CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

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Class Five: Appellate and Post-Conviction Review

WAIVER; ADEQUATE AND INDEPENDENT STATE GROUNDS

The Cases of Aubry Williams and James Avery

A person convicted of a crime in a state court may appeal to the state's appellate courts and, if unsuccessful there, may seek by petition for a writ of *certiorari* review by the United States Supreme Court. A convicted person may thereafter seek state post-conviction review by filing a motion or petition challenging the conviction and sentence, and a petition for a writ of habeas corpus in a federal district court seeking relief from confinement on the grounds that the conviction and/or sentence was obtained in violation of some provision of the United States Constitution.

However, an appellate or reviewing court may refuse to consider an issue on the merits. State courts frequently refuse to address issues because of a failure by the defendant's lawyer to follow a state procedural rule in raising the issue. For example, a state appellate court may refuse to address an issue if there was no objection in the trial court. A federal court may be barred from reviewing a state court's decision if the state court decided the case on grounds independent of the federal constitutional provision asserted and adequate to support the judgment. The cases of Aubry Williams and James Avery demonstrate the importance of defense counsel raising an issue at the proper time in order for the state supreme court and the U.S. Supreme Court to review it.

Aubrey Williams, an African American, was convicted of murder and sentenced to death by an all-white jury in Fulton County (Atlanta) Georgia in March 1953. Before his trial, the jury venire (the large group of potential jurors who are questioned and from whom the eventual jury is selected) was chosen by drawing cards containing the names of prospective jurors from a large number of cards. The names of prospective white jurors had been placed on white cards and those of blacks on yellow cards. Williams did not object to the use of the different colored cards before trial, at the time of jury selection or on appeal.

The following May, the United States Supreme Court reversed the conviction of James Avery, another African American, sentenced to death in Fulton County, finding that the use of the different colored cards to select the jury venire constituted racial discrimination in violation of his right to equal protection of the laws. *Avery v. Georgia*, 345 U.S. 559 (1953).

Six months after the *Avery* decision, Williams's attorney filed "an extraordinary motion for a new trial" challenging his conviction and sentence based on the *Avery* decision. The trial court and the Georgia Supreme Court refused to consider the issue, holding that Williams had waived the issue – that is, forfeited any right to review of it – because he failed to comply with a requirement of Georgia law that any challenge to the composition of a jury venire had to be made when the venire was "put upon" the defendant at the start of jury selection.

The United States Supreme Court granted *certiorari*. The case came before the Court as it

was facing growing resistance to its decisions requiring desegregation of public schools in *Brown v. Board of Education*, 347 U.S. 483 (1953), and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Aubry WILLIAMS, Petitioner,
v.
STATE of GEORGIA

United States Supreme Court
349 U.S. 375, 75 S. Ct. 814 (1955)

Frankfurter, J., delivered the opinion of the Court. Clark, J., filed a dissenting opinion in which Reed and Minton, JJ., concurred. Minton, J., filed a dissenting opinion in which Reed and Clark, JJ., joined.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Court has here under review the decision of a state court rejecting a claim of infirmity in a conviction for murder based on a constitutional ground raised for the first time in an extraordinary proceeding after the conviction had been affirmed on appeal. * * *

* * *

Avery was convicted of rape on September 20, 1951, in Fulton County, Georgia – the same county in which Williams was tried a year and a half later. Avery's petit jury was drawn with yellow and white tickets precisely in the manner used later in the case of Williams. * * * Avery, however, challenged the array when the jury was put upon him; Williams did not. Avery's challenge was overruled, and after trial he appealed on the ground of discrimination in the selection of the jury. The Georgia Supreme Court disapproved of the use of yellow and white tickets but affirmed the judgment on the ground that no discrimination was actually shown.

Certiorari in the *Avery* case was filed in this Court on July 28, 1952, nine weeks before the alleged murder in the Williams case. The ground, as here, was that the use of different-colored tickets for whites and Negroes deprived the defendant of equal protection of the laws. Avery's petition for certiorari was granted March 9, 1953, the day before the petit jury was put upon Williams. This Court reversed the *Avery* case on May 25, 1953, holding that Avery had made out a prima facie case of an unconstitutional discrimination by showing the use of different-colored tickets which the State had not rebutted.

While this Court's decision in the *Avery* case was thus rendered over two months after Williams' trial, it came a month before [Williams' attorney filed an amendment to his] motion for new trial. [The motion was denied and the conviction affirmed on appeal.] * * * Williams' counsel did not rely upon the ground raised by the *Avery* decision until some six months later in his extraordinary motion for new trial.

* * * [T]he extraordinary motion was dismissed by the trial court, and Williams again appealed to the Georgia Supreme Court. That court affirmed the dismissal of the extraordinary motion. The court concluded that Williams, having failed to challenge the array when put upon him, had waived any objections to the jury's selection. * * *

The court did not rest on this consideration. * * * The court said that its own decision in the *Avery* case, prior to the Williams trial, had fully set out the practice of using different-colored tickets in the selection of juries. "Due diligence would certainly have required the defendant and his attorney to make themselves familiar with the opinions of this court on the question now raised. It follows that, for this reason, the motion for new trial was not sufficient as an extraordinary motion for new trial."

In view of the entanglement of this case with our decision in *Avery*, we granted certiorari. * * *

* * *

* * * On oral argument here * * * the State, with commendable regard for its responsibility, agreed that the use of yellow and white tickets in this case was, in light of this Court's decision in *Avery*, a denial of equal protection, so that a new trial would be required but for the failure to challenge the array. We need only add that it was the system of selection and the resulting danger of abuse which was struck down in *Avery* and not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists. The question now before us, in view of the State's concession, is whether the ruling of the Georgia Supreme Court rests upon an adequate nonfederal ground, so that this Court is without jurisdiction to review the Georgia court.

A State procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough. But the unique aspects of the never-ending new cases that arise require its individual application to particular circumstances. Thus, we would have a different question from that before us if the trial court had no power to consider Williams's constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.

The Georgia courts have indicated many times that motions for new trial after verdict are not favored, and that extraordinary motions for new trial after final judgment are favored even less. But the Georgia statute provides for such motion, and it has been granted in "exceptional" or "extraordinary" cases. The general rule is that the granting or denying of an extraordinary motion for new trial rests primarily in the discretion of the trial court, and the appellate court will not reverse except for a clear abuse of discretion. In practice, however, the Georgia appellate courts have not hesitated to reverse and grant a new trial in exceptional cases. * * *

* * *

We conclude that the trial court and the State Supreme Court declined to grant Williams's motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us.

But the fact that we have jurisdiction does not compel us to exercise it. * * *

In the instant case, there is an important factor which has intervened since the affirmance by the Georgia Supreme Court which impels us to remand for that court's further consideration. This is the acknowledgment by the State before this Court that, as a matter of substantive law. Williams has been deprived of his constitutional rights. * * *

The facts of this case are extraordinary, particularly in view of the use of yellow and white tickets by a judge of the Fulton County Superior Court almost a year after the State's own Supreme Court had condemned the practice in the *Avery* case. That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and noncapital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant. We think that orderly procedure requires a remand to the State Supreme Court for reconsideration of the case. Fair regard for the principles which the Georgia courts have enforced in numerous cases and for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally

impaneled. * * *

MR. JUSTICE CLARK, with whom MR. JUSTICE REED and MR. JUSTICE MINTON join, dissenting.

To borrow a phrase from Mr. Justice Holmes, the opinion of the Court "just won't wash." While I, too, am not deaf to the pleas of the condemned, I cannot ignore the long-established precedents of this Court. The proper course, as has always been followed here, is to recognize and honor reasonable state procedures as valid exercises of sovereign power. We have done so in hundreds of capital cases since I have been on the Court, and I do not think that even the sympathetic facts of this case should make us lose sight of the limitations on this Court's powers.

* * *

* * * To me nothing could be clearer than that a state question arising in a case which is to be remanded to the state court should be left open for resolution by the State without the pressure of a decision by this Court.

* * *

It is elementary that this Court has no jurisdiction over a case here from a state court where there is an independent and adequate state ground supporting the conclusion reached below. * * *

* * *

A state court's decision cannot be overturned if any one of the grounds supporting it is independent and adequate. There is one ground here which appears so unassailable that the majority does not even attack it. Georgia law makes a showing of due diligence on the part of the movant a prerequisite to granting extraordinary motions for new trial. The state court in this case found that due diligence had not been properly pleaded, and that the facts of which the Georgia court could take notice conclusively demonstrated that diligence was indeed completely lacking.

* * *

Had the state court possessed the power, it might have been desirable to have permitted petitioner to adjudicate his substantial constitutional claim instead of sending him to his death because his attorney failed to take advantage of the usual opportunity afforded by the state law. On the other hand, had the jury acquitted petitioner, he would not have complained about any unconstitutionality in its selection. A State may be influenced by the unfairness of allowing the litigant who remains silent two chances for acquittal while giving the diligent litigant only one. And orderly administration of the laws often imposes hardships upon those who have not properly preserved their rights. In any event, the resolution of these conflicting interests should be a matter wholly for the Georgia courts

Mr. Justice MINTON, with whom Mr. Justice REED and Mr. Justice CLARK join, dissenting.

Georgia has a rule of law that the jury panel must be challenged at the threshold, that is, as Georgia expresses it, before the panel is "put upon the defendant." If the panel is not thus challenged, the issue cannot later be raised and is considered as waived "once and for all."

This is a reasonable rule. It gives the State an opportunity to meet the challenge and to justify the array, or, if it is improperly constituted, an opportunity to correct it.

In the instant case, the challenge to the array was not presented at the time the panel was put upon the petitioner-defendant. If the defendant thus fails to challenge the array before it is put upon him, he may not raise the question as to its legality for the first time in a motion for a new trial. * * *

Since petitioner did not and could not raise the question on a motion for new trial for the first time, it would seem that he could not raise it on an

extraordinary motion for a new trial. * * *

* * *

* * * [T]he Georgia Supreme Court held, first, that the challenge to the array must be made when the array is put upon the defendant and cannot be made later by motion for a new trial or extraordinary motion for new trial; and, second, that the grounds for the latter motion were insufficient.

This first holding is a well-established rule of law of Georgia and does not seem to have been applied discriminatorily so as to deny petitioner the equal protection of the law. He had the same right and opportunity to raise the question as anyone else.

The promulgation of such a rule of law is, as we have pointed out, fair and reasonable and cannot be said to deny due process of law. Georgia has provided a reasonable time and manner in which the question could be raised. Petitioner did not take advantage of it, probably because, as his attorney alleged in his affidavit, he "devoted his time and efforts to ascertaining the nature of the evidence to be presented by the State of Georgia upon the trial."

* * *

This Court now says that the Georgia Supreme Court has the power to grant the petitioner's motion. I suppose that it has, but I would not think that it had denied a federal constitutional right if it did not change its rule. * * *

We do not sit as a legal critic to indicate how we think courts should act. If a federal constitutional right is not presented, we have no duty to perform. There was no denial of equal protection of the law or of due process. This case was disposed of by the Georgia Supreme Court altogether on state grounds. In such circumstances our duty is clear. As we stated in *Edelman v. California*:

> It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Noncompliance with such local law can thus be an adequate state ground for a decision below. * * *

* * *

Without waiting for briefs or argument, the Georgia Supreme Court issued the following opinion:

Aubry WILLIAMS
v.
THE STATE

Supreme Court of Georgia,
211 Ga. 763, 88 S.E.2d 376 (1955).

DUCKWORTH, CHIEF JUSTICE [for a unanimous Court].

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Constitution of the United States, 10th Amendment. * * * Even though executives and legislators, not being constitutional lawyers, might often overstep the foregoing unambiguous constitutional prohibition of federal invasion of State jurisdiction, there can never be an acceptable excuse for judicial failure to strictly observe it. This court bows to the Supreme Court on all federal questions of law but we will not supinely surrender sovereign powers of this State. In this case the opinion of the majority of that court recognizes that this court decided the case according to established rules of law, and that no federal jurisdiction existed which would authorize that court to render a judgment either affirming or reversing the judgment of this court, which are the only judgments by that court that this court can constitutionally recognize.

The Supreme Court * * * undertakes to remand the case for further consideration, and in their opinion has pointed to Georgia law vesting in the trial judge discretion in ruling upon an

extraordinary motion for new trial and apparently concluded there from that this court should reverse the trial court because that discretion was not exercised in the way the Supreme Court would have exercised it. We know and respect the universally recognized rule that the exercise of discretion never authorizes a violation or defiance of law. In this case, as pointed out by us, that law is that the question sought to be raised must be raised before trial and not otherwise.

Not in recognition of any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court in a case that was decided by us in 1953, and to avoid further delay, we state that our opinion in *Williams v. State* * * * is supported by sound and unchallenged law, conforms with the State and federal constitutions, and stands as the judgment of all seven of the Justices of this Court.

The United States Supreme Court denied certiorari. 350 U.S. 950 (1956).

Aubrey Lee Williams was executed by the state of Georgia on March 31, 1956, in the electric chair.

Pressures on the Court

After a through review of how the United States and Georgia Supreme Courts dealt with Williams' case, one scholar concluded:

> Faced with growing Southern intransigence over the Court's school desegregation rulings, the Warren Court sought to protect its own authority and the integrity of *Brown* by attempting to avoid potentially damaging confrontations with Southern governments over ancillary racial issues, even when serious individual injustices resulted. The Court followed this strategy in its refusal to review Williams' conviction a second time.

Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L. J. 1423 (1994). Dickson's article is highly recommended for its account of the racial and political forces involved in the case.

Waiver and Arbitrariness

Justice Douglas noted the outcomes of *Avery* and *Williams* in footnote 21 of his concurring opinion in *Furman v. Georgia*:

> * * * If a James Avery can be saved from electrocution because his attorney made timely objection to the selection of a jury by the use of yellow and white tickets, while an Aubry Williams can be sent to his death by a jury selected in precisely the same manner, we are imposing our most extreme penalty in an uneven fashion.

However, courts refused to address an jury issue in the case of John Eldon Smith, the first person executed by Georgia after *Furman*, while granting review of that issue to his co-defendant. Smith was one of three people involved in two murders. The state had the strongest case against on of the other perpetrators, John Maree. He confessed, his hand prints were lifted from the victim's automobile, and a witness placed him at the crime scene. He was spared the death penalty in exchange for his testimony against Smith and the other co-defendant, Rebecca Machetti.

Smith and Machetti were sentenced to death within a few weeks of each other by juries drawn from jury pools in which women were substantially underrepresented. Machetti's lawyers challenged the jury composition in state court. Smith's lawyers did not. A federal court found the exclusion of women from jury service was unconstitutional and ordered a new trial for Machetti.[1] At that trial, a jury which fairly represented the community imposed a sentence of life imprisonment.

The federal courts refused to consider the identical issue in Smith's case because his lawyers

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1. *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

had not preserved it.[2] In dissenting from a decision upholding the denial of relief to Smith, Circuit Judge Joseph Hatchett observed:

> This case again illustrates the difficulty, if not the impossibility, of imposing the death penalty in a fair and impartial manner. It is a classic example of how arbitrarily this penalty is imposed. Maree, who bargained to receive $1,000 for the murder and on whom the evidence was the strongest, is eligible for parole in November 1983. He will live because the evidence against him was overwhelming and the prosecutor needed his testimony to convict Smith and Machetti. Thus, a deal was struck.
>
> Machetti, the mastermind in this murder, has had her conviction overturned, has had a new trial, and has received a life sentence. This court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. Her lawyers timely raised this constitutional objection. They won; she lives.
>
> John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue. * * * The fairness promised in *Furman v. Georgia* has long been forgotten.[3]

John Maree was released in 1987. Rebecca Machetti was paroled at age 71 in 2010. Georgia executed John Eldon Smith by electrocution on December 15, 1983.

2. *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *application denied*, 463 U.S. 1344, *cert. denied*, 464 U.S. 1003 (1983).

3. *Id*. at 1476 (Hatchett, J., dissenting).

THE ONCE GREAT WRIT OF HABEAS CORPUS

> Habeas corpus cuts though all forms and goes to the very tissue of structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.
>
> - Justice Oliver Wendell Holmes, dissenting in *Frank v. Mangum*, 237 U.S. 309, 346 (1915)

> Over the centuries [the Writ of Habeas Corpus] has been the common law world's "freedom writ" by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired," *Bowen v. Johnson*, 306 U.S. 19 26 (1939), and unsuspended, save only in the cases specified in our Constitution.
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> - *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961)

> This is a case about federalism.
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> - *Coleman v. Thompson*, 501 U.S. 722 (1991) (denying federal review of constitutional claims because lawyers missed the deadline for filing a notice of appeal in the state courts)

Decisions in the two cases which follow, *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), were handed down on the same day, March 18, 1963, and established the Warren Court's view of the scope of federal habeas corpus review. They have since been overruled by the Court and by legislation. However, some understanding of them is helpful in understanding what the writ once provided, the competing interests involved with regard to habeas review, and putting in context the limits of habeas corpus review later adopted by the Court and Congress.

Edward M. FAY, Warden, et al., Petitioners,
v.
Charles NOIA.

Supreme Court of the United States
372 U.S. 391, 83 S.Ct. 822 (1963)

Brennan, J., delivered the opinion of the Court in which Warren, C.J., Douglas, Black, White and Goldberg, JJ., joined. Clark, J., filed a dissenting opinion. Harlan, J., filed a dissenting opinion in which Clark and Stewart, JJ., joined.

Mr. Justice BRENNAN delivered the opinion of the Court.

* * *

Noia was convicted in 1942 with Santo Caminito and Frank Bonino in the County Court of Kings County, New York, of a felony murder in the shooting and killing of one Hammeroff during the commission of a robbery. The sole evidence against each defendant was his signed confession. Caminito and Bonino, but not Noia, appealed their convictions to the Appellate Division of the New York Supreme Court. These appeals were unsuccessful, but subsequent legal proceedings resulted in the releases of Caminito and Bonino on findings that their confessions had been coerced and their convictions therefore procured in violation of the Fourteenth Amendment. Although it has been stipulated that the coercive nature of Noia's confession was also established, the United States District Court for the Southern District of New York held in Noia's federal habeas corpus proceeding that because of his failure to appeal he must be denied relief under the provision of 28 U.S.C. §2254 whereby "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State * * *."[3] The Court of Appeals for the Second Circuit reversed, one judge dissenting, and ordered that Noia's conviction be set aside and that he be discharged from custody unless given a new trial forthwith.

* * *

* * * We affirm * * *.. We hold: (1) Federal courts have power under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; 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. (2) Noia's failure to appeal was not a failure to exhaust "the

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3. After Caminito and Bonino were released, Noia, unable to employ the procedure of a motion for reargument since he had not appealed from his conviction, made an application to the sentencing court in the nature of coram nobis. * * * The New York Court of Appeals * * * held that "[Noia's] failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize * * * coram nobis. * * * And this is so even though the asserted error or irregularity relates to a violation of constitutional right. * * *" Certiorari was denied. Noia then brought the instant federal habeas corpus proceeding in the District Court for the Southern District of New York. The District Court held a hearing limited to an inquiry into the facts surrounding Noia's failure to appeal but made no findings as to Noia's reasons. Noia and the lawyer who defended him at his trial testified. Noia said that while aware of his right to appeal, he did not appeal because he did not wish to saddle his family with an additional financial burden and had no funds of his own. The gist of the lawyer's testimony was that Noia was also motivated not to appeal by fear that if successful he might get the death sentence if convicted on a retrial. The trial judge, not bound to accept the jury's recommendation of a life sentence, had said when sentencing him, "I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance." Noia's confession included an admission that he was the one who had actually shot the victim.

remedies available in the courts of the State" as required by §2254; that requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court. (3) Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief.

I.

* * *

We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence: "the most celebrated writ in the English law." It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law * * *. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. * * * Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege." * * *

These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office. * * *

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* * * The principle that judicial as well as executive restraints may be intolerable received dramatic expression in Bushell's case. Bushell was one of the jurors in the trial, held before the Court of Oyer and Terminer at the Old Bailey, of William Penn and William Mead on charges of tumultuous assembly and other crimes. When the jury brought in a verdict of not guilty, the court ordered the jurors committed for contempt. Bushell sought habeas corpus, and the Court of Common Pleas, in a memorable opinion by Chief Justice Vaughan, ordered him discharged from custody. * * *

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* * * [R]estraints contrary to fundamental law, by whatever authority imposed, could be redressed by writ of habeas corpus. * * *

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The same principles have consistently been applied in cases of state prisoners seeking habeas corpus in the federal courts, although the development of the law in this area was at first delayed for several reasons. The first Judiciary Act did not extend federal habeas to prisoners in state custody, and shortly after Congress removed this limitation in 1867, it withdrew from this Court jurisdiction of appeals from habeas decisions by the lower federal courts and did not restore it for almost 20 years. Moreover, it was not until this century that the Fourteenth Amendment was deemed to apply some of the safeguards of criminal procedure contained in the Bill of Rights to the States. * * *

* * *

* * * Under the conditions of modern society, Noia's imprisonment, under a conviction procured by a confession held by the Court of Appeals in *Caminito v. Murphy* to have been coerced, and which the State here concedes was obtained in violation of the Fourteenth Amendment, is no less intolerable than was Bushell's under the conditions of a very different society; and habeas corpus is no less the appropriate remedy.

II.

But, it is argued, a different result is compelled by the exigencies of federalism, which played no role in Bushell's case.

We can appraise this argument only in light of the historical accommodation that has been worked out between the state and federal courts respecting the administration of federal habeas corpus. Our starting point is the Judiciary Act of February 5, 1867, which first extended federal habeas corpus to state prisoners generally, and which survives, except for some changes in wording, in the present statutory codification. * * * In 1867, Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments. Debated and enacted at the very peak of the Radical Republicans' power, the measure that became the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees. * * *

* * *

[The Court's initial] decisions [regarding the Act of 1867] fashioned a doctrine of abstention, whereby full play would be allowed the States in the administration of their criminal justice without prejudice to federal rights enwoven in the state proceedings. Thus the Court has frequently held that application for a writ of habeas corpus should have been denied "without prejudice to a renewal of the same after the accused had availed himself of such remedies as the laws of the state afforded * * *." With refinements, this doctrine requiring the exhaustion of state remedies is now codified in 28 U.S.C. §2254. But its rationale has not changed: "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation * * *. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." The rule of exhaustion "is not one defining power but one which relates to the appropriate exercise of power."

The reasoning of [the early cases] suggested that after the state courts had decided the federal question on the merits against the habeas petitioner, he could return to the federal court on habeas and there relitigate the question, else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent. And so this Court has consistently held, save only in *Frank v. Mangum*. In that case, the State Supreme Court had rejected on the merits petitioner's contention of mob domination at his trial, and this Court held that habeas would not lie because the State had afforded petitioner corrective process. However, the decision seems grounded not in any want of power, for the Court described the federal courts' habeas powers in the broadest terms, but rather in a narrow conception of due process in state criminal justice. The Court felt that so long as Frank had had an opportunity to challenge his conviction in some impartial tribunal, such as the State Supreme Court, he had been afforded the process he was constitutionally due.

The majority's position in *Frank*, however, was substantially repudiated in *Moore v. Dempsey*, a case almost identical in all pertinent respects to *Frank*. Mr. Justice Holmes, writing for the Court in *Moore* (he had written the dissenting opinion in *Frank*), said: "if in fact a trial is

dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; * * * [if] the State Courts failed to correct the wrong, * * * perfection in the machinery for correction * * * can [not] prevent this Court from securing to the petitioners their constitutional rights." It was settled in *Moore*, restoring what evidently had been the assumption until *Frank*, that the state courts' view of the merits was not entitled to conclusive weight. We have not deviated from that position. Thus, we have left the weight to be given a particular state court adjudication of a federal claim later pressed on habeas substantially in the discretion of the Federal District Court: "the state adjudication carries the weight that federal practice gives to the conclusion of a court * * * of last resort another jurisdiction on federal constitutional issues. It is not res judicata." "* * * [N]o binding weight is to be attached to the State determination. * * * The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." Even if the state court adjudication turns wholly on primary, historical facts, the Federal District Court has a broad power on habeas to hold an evidentiary hearing and determine the facts.

The breadth of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice. * * * It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that res judicata is inapplicable in habeas proceedings, is really but an instance of the larger principle that void judgments may be collaterally impeached. So also, the traditional characterization of the writ of habeas corpus as an original (save perhaps when issued by this Court) civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before. This is not to say that a state criminal judgment resting on a constitutional error is void for all purposes. But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Despite the Court's refusal to give binding weight to state court determinations of the merits in habeas, it has not infrequently suggested that where the state court declines to reach the merits because of a procedural default, the federal courts may be foreclosed from granting the relief sought on habeas corpus. But the Court's practice in this area has been far from uniform, and even greater divergency has characterized the practice of the lower federal courts.

For the present, however, it suffices to note that rarely, if ever, has the Court predicated its deference to state procedural rules on a want of power to entertain a habeas application where a procedural default was committed by the defendant in the state courts. Typically, the Court, like the District Court in the instant case, has approached the problem as an aspect of the rule requiring exhaustion of state remedies, which is not a rule distributing power as between the state and federal courts. * * * The same considerations of comity that led the Court to refuse relief to one who had not yet availed himself of his state remedies likewise prompted the refusal of relief to one who had inexcusably failed to tender the federal questions to the state courts. Either situation poses a threat to the orderly administration of criminal justice that ought if possible to be averted. * * * The point is that the Court, by relying upon a rule of discretion, avowedly flexible, yielding always to "exceptional circumstances," has refused to concede jurisdictional significance to the abortive state court proceeding.

III.

* * * Our survey discloses nothing to suggest that the Federal District Court lacked the power to order Noia discharged because of a procedural

forfeiture he may have incurred under state law. * * *

A number of arguments are advanced against this conclusion. One, which concedes the breadth of federal habeas power, is that a state prisoner who forfeits his opportunity to vindicate federal defenses in the state court has been given all the process that is constitutionally due him, and hence is not restrained contrary to the Constitution. But this wholly misconceives the scope of due process of law, which comprehends not only the right to be heard but also a number of explicit procedural rights – for example, the right not to be convicted upon evidence which includes one's coerced confession – drawn from the Bill of Rights. * * *

A variant of this argument is that if the state court declines to entertain a federal defense because of a procedural default, then the prisoner's custody is actually due to the default rather than to the underlying constitutional infringement, so that he is not in custody in violation of federal law. But this ignores the important difference between rights and particular remedies.

A defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds. But a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured. * * *

It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. * * *

* * *

Thus, a default such as Noia's, if deemed adequate and independent (a question on which we intimate no view), would cut off review by this Court of the state coram nobis proceeding in which the New York Court of Appeals refused him relief. It is contended that it follows from this that the remedy of federal habeas corpus is likewise cut off.

* * *

But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter. * * * Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

* * *

A practical appraisal of the state interest here involved plainly does not justify the federal courts' enforcing on habeas corpus a doctrine of forfeitures under the guise of applying the adequate state-ground rule. We fully grant that the exigencies of federalism warrant a limitation whereby the federal judge has the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts. Surely no stricter rule is a realistic necessity. A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. * * * [W]e reject * * * the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.

* * *

V.

Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require," 28 U.S.C. §2243; * * * Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst*, – "an intentional relinquishment or abandonment of a know right or privilege" – furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits – though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question.

The application of the standard we have adumbrated to the facts of the instant case is not difficult. Under no reasonable view can the State's version of Noia's reason for not appealing support an inference of deliberate by-passing of the state court system. For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. He declined to play Russian roulette in this fashion. This was a choice by Noia not to appeal, but under the circumstances it cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures. This is not to say that in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it cannot be found. Each case must stand on its facts. In the instant case, the language of the judge in sentencing Noia, made the risk that Noia, if reconvicted, would be sentenced to death, palpable and indeed unusually acute.

VI.

It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure. Our decision today swings open no prison gates. Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus. Those few who are ultimately successful

are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison. Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy. Affirmed.

Mr. Justice CLARK, dissenting.

* * * Beyond question the federal courts until today have had no power to release a prisoner in respondent Noia's predicament, there being no basis for such power in either the Constitution or the statute. * * * The short of it is that Noia's incarceration rests entirely on an adequate and independent state ground – namely, that he knowingly failed to perfect any appeal from his conviction of murder. * * * In view of this unfortunate turn of events, it appears important that we canvass the consequences of today's action on state law enforcement.

First, there can be no question but that a rash of new applications from state prisoners will pour into the federal courts, and 98% of them will be frivolous, if history is any guide. This influx will necessarily have an adverse effect upon the disposition of meritorious applications, for, as my Brother Jackson said, they will "be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." In fact, the courts are already swamped with applications which cannot, because of sheer numbers, be given more than cursory attention.

Second, the effective administration of criminal justice in state courts receives a staggering blow. Habeas corpus is in effect substituted for appeal, seriously disturbing the orderly disposition of state prosecutions and jeopardizing the finality of state convictions in disregard of the States' comprehensive procedural safeguards which, until today, have been respected by the federal courts. * * *

The rights of the States to develop and enforce their own judicial procedures, consistent with the Fourteenth Amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are today attenuated if not obliterated in the name of a victory for the "struggle for personal liberty." But the Constitution comprehends another struggle of equal importance and places upon our shoulders the burden of maintaining it – the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect. One is reminded of the exclamation of Pyrrhus: "One more such victory . . ., and we are utterly undone."

* * *

Mr. **Justice HARLAN**, whom Mr. Justice CLARK and Mr. Justice STEWART join, dissenting.

This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has rendered in a long time.

* * *

I dissent from the Court's opinion and judgment for the reason that the federal courts have no power, statutory or constitutional, to release the respondent Noia from state detention.

This is because his custody by New York does not violate any federal right, since it is pursuant to a conviction whose validity rests upon an adequate and independent state ground which the federal courts are required to respect.

A full exposition of the matter is necessary, and I believe it will justify the statement that in what it does today the Court has turned its back on history and struck a heavy blow at the foundations of our federal system.

* * *

I recognize that Noia's predicament may well be thought one that strongly calls for correction. But the proper course to that end lies with the New York Governor's powers of executive clemency, not with the federal courts. Since Noia is detained pursuant to a state judgment whose validity rests on an adequate and independent state ground, the judgment below should be reversed.

Charles TOWNSEND, Petitioner,
v.
Frank G. SAIN,
Sheriff of Cook County, et al.

United States Supreme Court
372 U.S. 293, 83 S.Ct. 745(1963).

Warren, C.J., delivered the opinion of the Court in which Douglas, Black, Brennan, and Goldberg, JJ., joined. Goldberg, J., filed a concurring opinion. Stewart, J., filed a dissenting opinion in which Clark, Harlan, and White, JJ., joined.

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case, in its present posture raising questions as to the right to a plenary hearing in federal habeas corpus * * * In 1955 the petitioner, Charles Townsend, was tried before a jury for murder in the Criminal Court of Cook County, Illinois. At his trial petitioner, through his court-appointed counsel, the public defender, objected to the introduction of his confession on the ground that it was the product of coercion. A hearing was held outside the presence of the jury, and the trial judge denied the motion to suppress. He later admitted the confession into evidence. Further evidence relating to the issue of voluntariness was introduced before the jury. The charge permitted them to disregard the confession if they found that it was involuntary. Under Illinois law the admissibility of the confession is determined solely by the trial judge, but the question of voluntariness, because it bears on the issue of credibility, may also be presented to the jury. The jury found petitioner guilty and affixed the death penalty to its verdict. The Supreme Court of Illinois affirmed the conviction, two justices dissenting. This Court denied a writ of certiorari.

Petitioner next sought post-conviction collateral relief in the Illinois State courts. The Cook County Criminal Court dismissed his petition without holding an evidentiary hearing. The Supreme Court of Illinois by order affirmed, holding that the issue of coercion was res judicata, and this Court again denied certiorari. The issue of coercion was pressed at all stages of these proceedings.

* * *

[Townsend sought to present evidence in the district court, not presented to the state court, that he had been on narcotics, was administered scopolamine or hyoscine, a "truth serum," and that it in combination with Phenobarbital "produce[d] a physiological and psychological condition adversely affecting the mind and will" and that the injection caused Townsend to confess.]

* * *

II.
* * *

* * * The whole history of the writ – its unique development – refutes a construction of the federal courts' habeas corpus powers that would

assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. * * * Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

III.

We turn now to the considerations which in certain cases may make exercise of that power mandatory. * * * Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

* * * We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

* * *

IV.

* * *

* * * The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. * * *

* * * Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. * * *

* * * A District Court sitting in habeas corpus clearly has the power to compel production of the complete state-court record. * * *

* * *

[Concurring opinion of **Justice Goldberg** omitted.]

Mr. Justice STEWART, whom Mr. Justice CLARK, Mr. Justice HARLAN, and Mr. Justice WHITE join, dissenting.

The basis for my disagreement with the Court can perhaps best be explained if I define at the outset the several areas in which I am entirely in accord with the Court's opinion. First, as to the underlying issue of constitutional law, I completely agree that a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial. Secondly, I agree that the Court of Appeals in this case stated an erroneous standard when it said that "(o)n habeas corpus, the district court's inquiry is limited to a study of the undisputed portions of the record." Thirdly, I agree that where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to

receive evidence and try the facts anew

* * *

* * * [T]he enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case before us, and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. * * *

* * *

Even accepting the Court's detailed hearing standards in toto, however, I cannot agree that any one of them requires the District Court to hold a new evidentiary hearing in the present case. * * *

* * * There is nothing whatever in the record to support an inference that the trial court did not scrupulously apply a completely correct constitutional standard in determining that the confession was admissible. * * *

Under our Constitution the State of Illinois has the power and duty to administer its own criminal justice. In carrying out that duty, Illinois must, as must each State, conform to the Due Process Clause of the Fourteenth Amendment. I think Illinois has clearly accorded the petitioner due process in this case. To require a federal court now to hold a new trial of factual claims which were long ago fully and fairly determined in the courts of Illinois is, I think, to frustrate the fair and prompt administration of criminal justice, to disrespect the fundamental structure of our federal system, and to debase the Great Writ of Habeas Corpus. * * *

Procedural Default – Waiver of Constitutional Rights

Clifford Davis, a federal prisoner, sought habeas corpus relief alleging unconstitutional discrimination in the composition of the grand jury that indicted him. However, his lawyer failed to make timely objection to the composition of the grand jury as required by federal criminal Rule 12(b)(2) The Supreme Court held that to obtain relief, Davis had to show cause – that is, a reason – for failing to make a timely objection and actual prejudice resulting from the constitutional violation. *Davis v. United States*, 411 U.S. 233 (1973). The Court held that the District Court had not abused its discretion in finding that Davis could show neither cause nor actual prejudice.

The Court later held that the rule of *Davis* "applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment." *Francis v. Henderson*, 425 U.S. 536 (1976). After being convicted of felony-murder in state court, Abraham Francis sought collateral relief on the ground that African Americans had been excluded from the grand jury that indicted him. In state post-conviction review, the Louisiana court held that Francis had waived the issue by failing to raise it before trial, as required by state law. Francis then sought relief in federal court. The U.S. Supreme Court held that the Louisiana waiver provisions were to be given effect unless the petitioner could show cause for failing to challenge the composition of the grand jury before trial and actual prejudice. Emphasizing the states' interests in finality, the Court stated that Louisiana could attach reasonable time limitations on the assertion of federal constitutional rights.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, Petitioner,
v.
John SYKES.

Supreme Court of the United States
433 U.S. 72, 97 S.Ct. 2497 (1977)

Rehnquist, J., delivered the opinion of the Court. Burger, C.J., filed a concurring opinion. Stevens, J., filed a concurring opinion. White, J., filed an opinion concurring in the judgment. Brennan, J., filed a dissenting opinion in which Marshall, J., joined.

Mr. Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas corpus to review a state convict's claim that testimony was admitted at his trial in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous-objection rule. Petitioner Wainwright, on behalf of the State of Florida, here challenges a decision of the Court of Appeals for the Fifth Circuit ordering a hearing in state court on the merits of respondent's contention.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he told his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and a few minutes later respondent's wife approached the police and told them the same thing. Sykes was immediately arrested and taken to the police station.

Once there, it is conceded that he was read his *Miranda* rights, and that he declined to seek the aid of counsel and indicated a desire to talk. He then made a statement, which was admitted into evidence at trial through the testimony of the two officers who heard it,[9] to the effect that he had shot Gilbert from the front porch of his trailer home. There were several references during the trial to respondent's consumption of alcohol during the preceding day and to his apparent state of intoxication, facts which were acknowledged by the officers who arrived at the scene. At no time during the trial, however, was the admissibility of any of respondent's statements challenged by his counsel on the ground that respondent had not understood the *Miranda* warnings. Nor did the trial judge question their admissibility on his own motion or hold a factfinding hearing bearing on that issue.

Respondent appealed his conviction, but apparently did not challenge the admissibility of the inculpatory statements. He later filed in the trial court a motion to vacate the conviction and, in the State District Court of Appeals and Supreme Court, petitions for habeas corpus. These filings, apparently for the first time, challenged the statements made to police on grounds of involuntariness. In all of these efforts respondent was unsuccessful.

Having failed in the Florida courts, respondent initiated the present action under 28 *U.S.C.* §2254, asserting the inadmissibility of his statements by reason of his lack of understanding of the *Miranda* warnings. * * *

* * *

We * * * conclude that Florida procedure did, consistently with the United States Constitution, require that respondents' confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground

9. No written statement was offered into evidence because Sykes refused to sign the statement once it was typed up.

which would have prevented direct review here. We thus come to the crux of this case. Shall the rule * * * barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? We answer that question in the affirmative.

* * * We leave open for resolution in future decisions the precise definition of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in *Fay v. Noia*, which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. * * *

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

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

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

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error

as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

We believe the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of §2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

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

* * *

Mr. Chief Justice BURGER, concurring.

I concur fully in the judgment and in the Court's opinion. I write separately to emphasize one point which, to me, seems of critical importance to this case. In my view, the "deliberate bypass" standard enunciated in *Fay v. Noia*, was never designed for, and is inapplicable to, errors even of constitutional dimension alleged to have been committed during trial.

* * *

Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.[1] The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.[2]

* * *

Mr. Justice STEVENS, concurring.

Although the Court's decision today may be read as a significant departure from the "deliberate bypass" standard announced in *Fay v. Noia*, I am persuaded that the holding is consistent with the way other federal courts have actually been applying *Fay*. 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 himself

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1. Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.

2. One is left to wonder what use there would have been to an objection to a confession corroborated by witnesses who heard Sykes freely admit the killing at the scene within minutes after the shooting.

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 entire proceeding, may be more significant than the language of the test the Court purports to apply. I therefore believe the Court has wisely refrained from attempting to give precise content to its "cause"-and-"prejudice" exception to the rule of *Francis v. Henderson*, 425 U.S. 536.

* * *

Mr. Justice WHITE, concurring in the judgment.

* * * The petition for habeas corpus of respondent Sykes alleging the violation of his constitutional rights by the admission of certain evidence should be denied if the alleged error is deemed harmless. This would be true even had there been proper objection to the evidence and no procedural default whatsoever by either respondent or his counsel.

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 * * * and is itself sufficient to foreclose the writ and to warrant reversal of the judgment.

* * *

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

* * *

I

I begin with the threshold question: What is the meaning and import of a procedural default? If it could be assumed that a procedural default more often than not is the product of a defendant's conscious refusal to abide by the duly constituted, legitimate processes of the state courts, then I might agree that a regime of collateral review weighted in favor of a State's procedural rules would be warranted. *Fay*, however, recognized that such rarely is the case; and therein lies *Fay*'s basic unwillingness to embrace a view of habeas jurisdiction that results in "an airtight system of (procedural) forfeitures."

* * * [T]he Court's assertion that it "think(s)" that the *Fay* rule encourages intentional "sandbagging" on the part of the defense lawyers is without basis, certainly the Court points to no cases or commentary arising during the past 15 years of actual use of the *Fay* test to support this criticism. Rather, a consistent reading of case law demonstrates that the bypass formula has provided a workable vehicle for protecting the integrity of state rules in those instances when such protection would be both meaningful and just.

* * *

In brief then, any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel.

* * *

Fay's answer thus is plain: the bypass test simply refuses to credit what is essentially a lawyer's mistake as a forfeiture of constitutional rights. * * *

II

What are the interests that Sykes can assert in preserving the availability of federal collateral relief in the face of his inadvertent state procedural default? Two are paramount.

As is true with any federal habeas applicant, Sykes seeks access to the federal court for the determination of the validity of his federal constitutional claim. * * *

* * * If the standard adopted today is later construed to require that the simple mistakes of attorneys are to be treated as binding forfeitures, it would serve to subordinate the fundamental

rights contained in our constitutional charter to inadvertent defaults of rules promulgated by state agencies, and would essentially leave it to the States, through the enactment of procedure and the certification of the competence of local attorneys, to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress.

* * * But federal review is not the full measure of Sykes' interest, for there is another of even greater immediacy: assuring that his constitutional claims can be addressed to some court. For the obvious consequence of barring Sykes from the federal courthouse is to insulate Florida's alleged constitutional violation from any and all judicial review because of a lawyer's mistake. From the standpoint of the habeas petitioner, it is a harsh rule indeed that denies him "any review at all where the state has granted none," particularly when he would have enjoyed both state and federal consideration had his attorney not erred.

* * *

III

A regime of federal habeas corpus jurisdiction that permits the reopening of state procedural defaults does not invalidate any state procedural rule as such; Florida's courts remain entirely free to enforce their own rules as they choose, and to deny any and all state rights and remedies to a defendant who fails to comply with applicable state procedure. The relevant inquiry is whether more is required specifically, whether the fulfillment of important interests of the State necessitates that federal courts be called upon to impose additional sanctions for inadvertent noncompliance with state procedural requirements such as the contemporaneous-objection rule involved here.

* * *

Punishing a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules. It is senseless because unplanned and unintentional action of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end. And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to his lawyer, hardly is the proper recipient of such a penalty. Especially with fundamental constitutional rights at stake, no fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney. This is especially true when so many indigent defendants are without any realistic choice in selecting who ultimately represents them at trial. Indeed, if responsibility for error must be apportioned between the parties, it is the State, through its attorney's admissions and certification policies, that is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably when faced with decisions governed by state procedural requirements.

* * *

Murray v. Carrier and Smith v. Murray

The Court decided two habeas corpus cases from Virginia on June 26, 1986, *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, and *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661. Both cases involved questions of whether issues that had not been raised on direct appeal could be considered by federal courts in habeas corpus proceedings.

In *Carrier*, defense counsel sought at trial to discover the victim's statements to the police describing her assailants. The trial court denied the motion. Counsel then filed a petition for appeal that failed to include any claim that the trial judge erred in not permitting counsel to

examine the victim's statements. Thereafter, Carrier filed a *pro se* state habeas corpus petition, claiming that he had been denied due process of law by the prosecution's withholding of the victim's statements. The state court denied the petition on the ground that the claim was barred because it had not been raised in the petition for appeal as required by a Virginia Supreme Court rule. In federal habeas corpus proceedings, Carrier argued that the federal courts should consider the claim because counsel's failure to include the claim was not deliberate, but inadvertent. The Court, in an opinion by Justice O'Connor, joined by Chief Justice Burger and Justices White, Powell, and Rehnquist, held that the fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause to excuse the procedural default.

The Court concluded that the State's interest in finality was the same regardless of whether counsel's failure to comply with a procedure rule resulted from ignorance or inadvertence rather than from a deliberate decision, tactical or not, to abstain from raising the claim. The failure to raise a claim on appeal reduces the finality of appellate proceedings and deprives the appellate court of an opportunity to review trial error. The Court defined "cause" as an external impediment that might have prevented counsel from raising the claim and, finding none, ruled that habeas review of the claim was barred.

Justice Brennan, joined by Justice Marshall, dissented. Among other things, Justice Brennan stated:

> * * * [T]o say that the petitioner should be bound to his lawyer's tactical decisions is one thing; to say that he must also bear the burden of his lawyer's inadvertent mistakes is quite another. Where counsel is unaware of a claim or of the duty to raise it at a particular time, the procedural default rule cannot operate as a specific deterrent to noncompliance with the State's procedural rules. Consequently, the State's interest in ensuring that the federal court help prevent circumvention of the State's procedural rules by imposing the same forfeiture sanction is much less compelling. To be sure, applying procedural default rules even to inadvertent defaults furthers the State's deterrent interests in a general sense by encouraging lawyers to be more conscientious on the whole. * * *
>
> I believe that this incremental state interest simply is not sufficient to overcome the heavy presumption against a federal court's refusing to exercise [habeas corpus] jurisdiction clearly granted by Congress. * * * [W]here a petitioner's constitutional rights have been violated and that violation may have affected the verdict, a federal court should not decline to entertain a habeas petition solely out of deference to the State's weak interest in punishing lawyers' inadvertent failures to comply with state procedures. * * *

Justice Brennan's dissent also applied to the other case, *Smith v. Murray*, decided the same day. In *Smith*, counsel objected at trial to the testimony of a psychiatrist who had interviewed Smith without warning him that he had a right to remain silent and to have counsel present during the interview. Smith's counsel did not raise the issue on appeal in 1978 because at that time it was foreclosed by decisions of the Virginia Supreme Court. However, three years later, the United States Supreme Court held in a case from Texas, *Estelle v. Smith*, 451 U.S. 454 (1981), that such warning were required by mental health experts and statements taken in the absence of such warnings were not admissible. Based on this new development, Michael Smith sought to present the issue in federal habeas corpus proceedings. The Court's opinion follows.

Michael Marnell SMITH, Petitioner
v.
Edward W. MURRAY, Director, Virginia Department of Corrections.

United States Supreme Court
477 U.S. 527, 106 S.Ct. 2661(1986).

O'Connor, J., delivered the opinion of the Court in which Burger, C.J., and White, Powell, and Rehnquist, JJ., joined. Stevens, J., filed a dissenting opinion in which Marshall and Blackmun, JJ., joined and in which Brennan, J., joined as to Parts II and III. Brennan, J., filed a dissenting opinion in *Murray v. Carrier* in which Marshall, J., joined, that applied to both cases.

Justice O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether and, if so, under what circumstances, a prosecutor may elicit testimony from a mental health professional concerning the content of an interview conducted to explore the possibility of presenting psychiatric defenses at trial. * * * On examination, however, we conclude that petitioner defaulted his underlying constitutional claim by failing to press it before the Supreme Court of Virginia on direct appeal. Accordingly, we decline to address the merits of petitioner's claims and affirm the judgment dismissing the petition for a writ of habeas corpus.

I

Following a jury trial, petitioner was convicted of the May 1977 murder of Audrey Weiler. * * *

Prior to the trial, petitioner's appointed counsel, David Pugh, had explored the possibility of presenting a number of psychiatric defenses. Towards that end, Mr. Pugh requested that the trial court appoint a private psychiatrist, Dr. Wendell Pile, to conduct an examination of petitioner. * * * During the course of the examination, [in response to questions by] * * * petitioner * * * stated that he had once torn the clothes off a girl on a school bus before deciding not to carry out his original plan to rape her. * * * At no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired.

At the sentencing phase of the trial, the Commonwealth called Dr. Pile to the stand. Over the defense's objection, Dr. Pile described the incident on the school bus. * * *

Petitioner appealed his conviction and sentence to the Supreme Court of Virginia. In his brief he raised 13 separate claims * * *. Petitioner did not, however, assign any error concerning the admission of Dr. Pile's testimony. At a subsequent state post-conviction hearing, [Smith's lawyer,]Mr. Pugh[,] explained that he had consciously decided not to pursue that claim after determining that "Virginia case law would [not] support our position at that particular time." Various objections to the Commonwealth's use of Dr. Pile's testimony were raised, however, in a brief filed by amicus curiae Post-Conviction Assistance Project of the University of Virginia Law School.

The Supreme Court of Virginia affirmed the conviction and sentence in all respects. In a footnote, it noted that, pursuant to a rule of the court, it had considered only those arguments advanced by *amicus* that concerned errors specifically assigned by the defendant himself. Accordingly, it did not address any issues concerning the prosecution's use of the psychiatric testimony. * * *

In 1979, petitioner sought a writ of habeas corpus [in the state courts and] argued that the admission of Dr. Pile's testimony violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Federal Constitution. The court ruled, however, that petitioner had forfeited the claim by failing to press it in earlier proceedings. At a subsequent evidentiary hearing, * * * the court heard testimony concerning the reasons underlying [the lawyer]'s decision not to pursue the Fifth Amendment claim on appeal. On the basis of that

testimony, the court found that [the lawyer] and his assistant had researched the question, but had determined that the claim was unlikely to succeed. Thus, the court found, "counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and . . . this decision resulted from informed, professional deliberation." * * *

II

* * *

Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding. In the present case, the Virginia courts have enforced that rule by declining to consider petitioner's objection to the admission of Dr. Pile's testimony, a claim concededly not included in his initial appeal from his conviction and sentence. [W]e held in *Murray v. Carrier*, 477 U.S. 478, that a federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial. * * * As we explained more fully in *Carrier*, this congruence between the standards for appellate and trial default reflects our judgment that concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure.

* * *

Notwithstanding the deliberate nature of the decision not to pursue his objection to Dr. Pile's testimony on appeal . . . petitioner contends that the default should be excused because [the lawyer]'s decision, though deliberate, was made in ignorance. Had he investigated the claim more fully, petitioner maintains, "it is inconceivable that he would have concluded that the claim was without merit or that he would have failed to raise it."

The argument is squarely foreclosed by our decision in *Carrier*, which holds that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." * * * After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. * * * Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Pile's testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution.

Nor can petitioner rely on the novelty of his legal claim as "cause" for noncompliance with Virginia's rules. Petitioner contends that this Court's decisions in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Ake v. Oklahoma*, 470 U.S. 68 (1985), which were decided well after the affirmance of his conviction and sentence on direct appeal, lend support to his position that Dr. Pile's testimony should have been excluded. But * * * the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was "available" at all. As petitioner has candidly conceded, various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal. * * * Under these circumstances, it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time of the direct appeal.

We conclude, therefore, that petitioner has not carried his burden of showing cause for noncompliance with Virginia's rules of procedure. That determination, however, does not end our inquiry. "'In appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Murray v. Carrier*, 477 U.S., at

495. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."

We acknowledge that the concept of "actual," as distinct from "legal," innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. Nonetheless, we think it clear on this record that application of the cause and prejudice test will not result in a "fundamental miscarriage of justice." There is no allegation that the testimony about the school bus incident was false or in any way misleading. Nor can it be argued that the prospect that Dr. Pile might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses. While that concern is a very real one in the abstract, here the record clearly shows that Dr. Pile did ask petitioner to discuss the crime he stood accused of committing as well as prior incidents of deviant sexual conduct. Although initially reluctant to do so, ultimately petitioner was forthcoming on both subjects. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether in fact petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice.

* * *

Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join and with whom Justice BRENNAN joins as to Parts II and III, dissenting.

The record in this case unquestionably demonstrates that petitioner's constitutional claim is meritorious, and that there is a significant risk that he will be put to death because his constitutional rights were violated.

The Court does not take issue with this conclusion. * * * Although the constitutional violations and issues were sufficiently serious that this Court decided to grant certiorari, and although the Court of Appeals for the Fourth Circuit decided the issue on the merits, this Court concludes that petitioner's presumably meritorious constitutional claim is procedurally barred and that petitioner must therefore be executed.

In my opinion, the Court should reach the merits of petitioner's argument. To the extent that there has been a procedural "default," it is exceedingly minor – perhaps a kind of "harmless" error. Petitioner's counsel raised a timely objection to the introduction of the evidence obtained in violation of the Fifth Amendment. A respected friend of the Court – the University of Virginia Law School's Post-Conviction Assistance Project – brought the issue to the attention of the Virginia Supreme Court in an extensive amicus curiae brief. Smith's counsel also raised the issue in state and federal habeas corpus proceedings, and, as noted, the Court of Appeals decided the case on the merits. Consistent with the well-established principle that appellate arguments should be carefully winnowed, however, Smith's counsel did not raise the Fifth Amendment issue in his original appeal to the Virginia Supreme Court – an unsurprising decision in view of the fact that a governing Virginia Supreme Court precedent, which was then entirely valid and only two years old, decisively barred the claim.

Nevertheless, the Court finds the lawyer's decision not to include the constitutional claim "virtually dispositive." The Court offers the remarkable explanation that "[u]nder these circumstances" – in which petitioner's death penalty will stand despite serious Fifth and Eighth Amendment violations that played a critical role in the determination that death is an appropriate penalty – "we do not believe that refusal to consider the defaulted claim on federal habeas

carries with it the risk of a manifest miscarriage of justice."

I fear that the Court has lost its way in a procedural maze of its own creation and that it has grossly misevaluated the requirements of "law and justice" that are the federal court's statutory mission under the federal habeas corpus statute. * * *

* * *

Virginia executed Michael Smith by electrocution by Virginia on July 31, 1986.

Roger Keith COLEMAN, Petitioner,
v.
Charles E. THOMPSON, Warden.

Supreme Court of the United States
501 U.S. 722, 111 S.Ct. 2546 (1991)

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Scalia, Kennedy, and Souter, JJ., joined. White, J., filed a concurring opinion. Blackmun, J., filed a dissenting opinion, in which Marshall and Stevens, JJ.

Justice O'CONNOR delivered the opinion of the Court.

This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.

I

A Buchanan County, Virginia, jury convicted Roger Keith Coleman of rape and capital murder and fixed the sentence at death for the murder. The trial court imposed the death sentence, and the Virginia Supreme Court affirmed both the convictions and the sentence. This Court denied certiorari.

Coleman then filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan County, raising numerous federal constitutional claims that he had not raised on direct appeal. After a 2-day evidentiary hearing, the Circuit Court ruled against Coleman on all claims. The court entered its final judgment on September 4, 1986.

Coleman filed his notice of appeal with the Circuit Court on October 7, 1986, 33 days after the entry of final judgment. Coleman subsequently filed a petition for appeal in the Virginia Supreme Court. The Commonwealth of Virginia, as appellee, filed a motion to dismiss the appeal. The sole ground for dismissal urged in the motion was that Coleman's notice of appeal had been filed late. Virginia Supreme Court Rule 5:9(a) provides that no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgment.

* * * On May 19, 1987, the Virginia Supreme Court issued an order, dismissing Coleman's appeal. * * * This Court again denied certiorari.

Coleman next filed a petition for writ of habeas corpus in the United States District Court for the Western District of Virginia. In his petition, Coleman presented four federal constitutional claims he had raised on direct appeal in the Virginia Supreme Court and seven claims he had raised for the first time in state habeas. The District Court concluded that, by virtue of the dismissal of his appeal by the Virginia Supreme Court in state habeas, Coleman had procedurally defaulted the seven claims. The District Court nonetheless went on to address the merits of all 11 of Coleman's claims. The court ruled against Coleman on all of the claims and denied the petition.

* * *

IV

In *Daniels v. Allen*, the companion case to *Brown v. Allen*, 344 U.S. 443 (1953), we confronted a situation nearly identical to that here. Petitioners were convicted in a North Carolina trial court and then were one day late in filing their appeal as of right in the North Carolina Supreme Court. That court rejected the appeals as

procedurally barred. We held that federal habeas was also barred unless petitioners could prove that they were "detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."

Fay v. Noia, 372 U.S. 391 (1963), overruled this holding. Noia failed to appeal at all in state court his state conviction, and then sought federal habeas review of his claim that his confession had been coerced. This Court held that such a procedural default in state court does not bar federal habeas review unless the petitioner has deliberately bypassed state procedures by intentionally forgoing an opportunity for state review. *Fay* thus created a presumption in favor of federal habeas review of claims procedurally defaulted in state court. * * *

Our cases after *Fay* that have considered the effect of state procedural default on federal habeas review have taken a markedly different view of the important interests served by state procedural rules. * * *

* * *

Recognizing that the writ of habeas corpus "is a bulwark against convictions that violate fundamental fairness," we also acknowledged that "the Great Writ entails significant costs." The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails. * * *

* * *

* * * By filing late, Coleman defaulted his entire state collateral appeal. This was no doubt an inadvertent error, and respondent concedes that Coleman did not "understandingly and knowingly" forgo the privilege of state collateral appeal. * * *

* * *

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

* * *

V

A

Coleman maintains that there was cause for his default. The late filing was, he contends, the result of attorney error of sufficient magnitude to excuse the default in federal habeas.

Murray v. Carrier considered the circumstances under which attorney error constitutes cause. *Carrier* argued that his attorney's inadvertence in failing to raise certain claims in his state appeal constituted cause for the default sufficient to allow federal habeas review. We rejected this claim, explaining that the costs associated with an ignorant or inadvertent procedural default are no less than where the failure to raise a claim is a deliberate strategy: It deprives the state courts of the opportunity to review trial errors. When a federal habeas court hears such a claim, it undercuts the State's ability to enforce its procedural rules just as surely as when the default was deliberate. * * *

Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. * * *

* * *

Attorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." * * *

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

* * *

Justice BLACKMUN, with whom Justice MARSHALL and Justice STEVENS join, dissenting.

Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests. * * * One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death. * * * Rather, displaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.

I

The Court cavalierly claims that "[t]his is a case about federalism," and proceeds without explanation to assume that the purposes of federalism are advanced whenever a federal court refrains from reviewing an ambiguous state-court judgment. Federalism, however, has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions." In this context, it cannot lightly be assumed that the interests of federalism are fostered by a rule that impedes federal review of federal constitutional claims.

Moreover, the form of federalism embraced by today's majority bears little resemblance to that adopted by the Framers of the Constitution and ratified by the original States. The majority proceeds as if the sovereign interests of the States and the Federal Government were coequal. Ours, however, is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not of sovereign States. The citizens expressly declared: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." James Madison felt that a constitution without this Clause "would have been evidently and radically defective." The ratification of the Fourteenth Amendment by the citizens of the several States expanded federal powers even further, with a corresponding diminution of state sovereignty. Thus, "the sovereignty of the States is limited by the Constitution itself."

Federal habeas review of state-court judgments, respectfully employed to safeguard federal rights, is no invasion of state sovereignty.

* * *

* * *

That the majority has lost sight of the animating principles of federalism is well illustrated by its discussion of the duty of a federal court to determine whether a state court judgment rests on an adequate and independent state ground. According to the majority's formulation, establishing this duty in the federal court serves to diminish the risk that a federal habeas court will review the federal claims of a prisoner in custody pursuant to a judgment that rests upon an adequate and independent state ground. In reality, however, this duty of a federal court to determine tis jurisdiction originally was articulated to ensure that federal rights were not improperly denied a federal forum. Thus, the quote artfully reconstituted by the majority, originally read: "It is incumbent upon this Court, when it is urged that the decision of thee state court rests upon a non-federal ground, to ascertain for itself, *in order that constitutional guarantees may appropriately be enforced*, whether the asserted non-federal gound independently and adequately supports the judgment." * * *

From these noble beginnings, the Court has managed to transform the duty to protect federal rights into a self-fashioned abdication. Defying the constitutional allocation of sovereign authority, the Court now requires a federal court to scrutinize the state-court judgment with an eye to denying a litigant review of his federal claims rather than enforcing those provisions of the Federal Bill of Rights that secure individual autonomy.

* * *

III

* * * In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors – even if the result of those errors is that the prisoner will be executed without having presented his federal claims to a federal court – because this attribution of risk represents the appropriate "allocation of costs." Whether unprofessional attorney conduct in a state postconviction proceeding should bar federal habeas review of a state prisoner's conviction and sentence of death is not a question of costs to be allocated most efficiently. It is, rather, another circumstance where this Court must determine whether federal rights should yield to state interests. In my view, the obligation of a federal habeas court to correct fundamental constitutional violations, particularly in capital cases, should not accede to the State's "discretion to develop and implement programs to aid prisoners seeking to secure postconviction review."

* * *

[F]ederal courts forgo the exercise of their habeas jurisprudence over claims that are procedurally barred out of respect for the state interests served by those rules. Recognition of state procedural forfeitures discourages petitioners from attempting to avoid state proceedings and accommodates the State's interest in finality. No rule, however, can deter gross incompetence. To permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner's federal claims in no way serves the State's interest in preserving the integrity of its rules and proceedings. The interest in finality, standing alone, cannot provide a sufficient reason for a federal habeas court to compromise its protection of constitutional rights.

* * *

Virginia executed Roger Keith Coleman by electrocution by Virginia on May 20, 1992. There were issues about his innocence at the time of his execution. However, DNA testing conducted on order of Gov. Mark Warner later confirmed that Coleman was guilty of the crimes for which he had been convicted.

Bowles v. Russell

Echoing the first sentence of Justice O'Connor's opinion in *Coleman* ("This is a case about federalism"), Chief Justice Boggs of the Sixth Circuit opened his opinion in *Bowles v. Russell*, "This is a case about missed deadlines." The Supreme Court's affirmance of that decision follows.

Keith BOWLES, Petitioner,
v.
Harry RUSSELL, Warden.

Supreme Court of the United States
551 U.S. 205, 127 S.Ct. 2360 (2007)

Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Alito, JJ., joined. Souter, J., filed a dissenting opinion, in which Stevens, Ginsburg, and Breyer, JJ., joined.

JUSTICE THOMAS delivered the opinion of the Court.

* * *

I

In 1999, an Ohio jury convicted petitioner Keith Bowles of murder for his involvement in the beating death of Ollie Gipson. The jury sentenced Bowles to 15 years to life imprisonment. Bowles unsuccessfully challenged his conviction and sentence on direct appeal.

Bowles then filed a federal habeas corpus application on September 5, 2002. On September 9, 2003, the District Court denied Bowles habeas relief. After the entry of final judgment, Bowles had 30 days to file a notice of appeal. Fed. Rule App. Proc. 4(a)(1)(A); 28 U.S.C. § 2107(a). He failed to do so. On December 12, 2003, Bowles moved to reopen the period during which he could file his notice of appeal pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. See § 2107(c).

On February 10, 2004, the District Court granted Bowles' motion. But rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the District Court inexplicably gave Bowles 17 days-until February 27-to file his notice of appeal. Bowles filed his notice on February 26 – within the 17 days allowed by the District Court's order, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c).

On appeal, respondent Russell argued that Bowles' notice was untimely and that the Court of Appeals therefore lacked jurisdiction to hear the case. The Court of Appeals agreed. * * *

II

According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30-day time period. Relevant to this case, if certain conditions are met, district courts have the statutory authority to grant motions to reopen the time for filing an appeal for 14 additional days. § 2107(c). Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days:

> (6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered,* * * *
> * * *

It is undisputed that the District Court's order in this case purported to reopen the filing period for more than 14 days. Thus, the question before us is whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by § 2107(c) but within the longer period granted by the District Court.

A

This Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." * * *

* * * Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. * * *

The resolution of this case follows naturally from this reasoning. Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute. * * * Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations.

B

Bowles contends that we should excuse his untimely filing because he satisfies the "unique circumstances" doctrine, which has its roots in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.* There, pursuant to then-Rule 73(a) of the Federal Rules of Civil Procedure, a District Court entertained a timely motion to extend the time for filing a notice of appeal. The District Court found the moving party had established a showing of "excusable neglect," as required by the Rule, and granted the motion. The Court of Appeals reversed the finding of excusable neglect * * *. This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.'"

Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the "unique circumstances" doctrine is illegitimate. * * * We see no compelling reason to resurrect the doctrine from its 40-year slumber. Accordingly, we reject Bowles' reliance on the doctrine, and we overrule *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule.

* * *

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I.

"'Jurisdiction,'" we have warned several times in the last decade, "'is a word of many, too many, meanings.'" This variety of meaning has insidiously tempted courts, this one included, to engage in "less than meticulous," sometimes even "profligate . . . use of the term."

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of time limit at issue here "mandatory and jurisdictional," we have recently and repeatedly corrected that designation as a misuse of the "jurisdiction" label.

But one would never guess this from reading the Court's opinion in this case, which suddenly restores [the Court's] indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of [its] error [in a previous case]. This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional

rulings to jurisdiction proper were obviously sound, and the majority makes no attempt to show they were not.

The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory. * * *

* * *

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, and is not jurisdictional, Statutes of limitations may thus be waived, *or excused by rules,* rules, such as equitable tolling, that alleviate hardship and unfairness.

* * * In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* and *Thompson v. INS,* we found that "unique circumstances" excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved district court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge's official word back in the days when we uncritically had a jurisdictional reason to be unfair, it is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14-day time limit of § 2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their "slumber," and inconsistency with a time-limit-as-jurisdictional rule. But eliminating those precedents underscores what has become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years * * *?

II.

We have the authority to recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge. * * *

* * * And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles's lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. According to Bowles's lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's lawyer had no obligation to go behind the terms of the order he received.

* * *

Plain Error, Cause and Prejudice, and Miscarriage of Justice

As the foregoing cases indicate, the failure of defense counsel to file a motion, make an objection, request a jury instruction, object to an instruction given by the court, or file within a deadline usually results in waiver of any review of that issue by the courts in appellate and post-conviction review. The federal courts will not consider a legal or factual basis for a claim that was not presented to the state courts. However, in some instances, courts will address issues even though they were not properly preserved.

Review of Plain Error on Direct Appeal

An appellate court may address an error even if the issue was not properly preserved by the defendant under various doctrines, usually referred to as "plain error." The Supreme Court has held that federal appellate courts may review an error not preserved if the appellate can "demonstrate that [the error] 'affected the outcome of the district court proceedings.'" *Puckett v. United States*, 556 U.S. 129, 135, 129 (2009) (quoting *United States v. Olano,* 507 U.S. 725, 734 (1993)). However, the Court has said it is to be done "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982)). Most states have a similar exception.

State appellate courts may also recognize errors not preserved at trial. For example, Alabama Rule of Appellate Procedure 45A requires the appellate courts to review the record for any plain error or defect in the process that has "adversely affected the substantial right of the appellant." The Alabama Supreme Court has said that "[p]lain error is 'error so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.'" *Ex parte Walker*, 972 So. 2d 737, 742 (Ala. 2007) (quoting *Ex parte Trawick*, 698 So. 2d 162, 167 (Ala. 1997)). "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations." *Hyde v. State*, 778 So. 2d 199, 209 (Ala. Crim. App. 1998), *aff'd*, 778 So. 2d 237 (Ala. 2000). "Although the failure to object will not preclude [plain-error] review, it will weigh against any claim of prejudice." *Sale v. State*, 8 So. 3d 330, 345 (Ala. Crim. App. 2008).

Federal Habeas Review

Federal courts apply the "cause and prejudice" standard in deciding whether to consider a claim that has not been properly preserved and held to be waived by the state courts. If the petitioner cannot show both cause and prejudice, the claim will not be considered unless the petitioner can show that failure to rule on the claim would result in a miscarriage of justice – denying relief to a person who is actually innocent.

Cause

The Court held that the failure to raise a claim in state court due to failure to anticipate changes in the law or because the state court is perceived as unsympathetic to the claim does not constitute "cause" for failure to raise the issue. *Engle v. Isaac*, 456 U.S. 107 (1982).

The Court found that Isaac could not establish cause for failing to comply with an Ohio rule mandating contemporaneous objections to jury instructions. The Court held that even if the state court has previously rejected a constitutional claim, it must be raised again because the state court might later decide that the claim is valid. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for procedural default.

As we saw, the Court applied this same rule in *Smith v. Murray*, 477 U.S. 527 (1986), where an issue was not raised on appeal because the state court had rejected it. And, as previously noted, the Court held that counsel's inadvertence in failing to raise an issue does not constitute cause. *Murray v. Carrier*, 477 U.S. 478 (1986),

However, the Court has found cause in several cases. In *Amadeo v. Zant*, 486 U.S. 214 (1988), the Court found that Amadeo established cause for failing to raise in the state trial court a constitutional challenge to the composition of the grand and trial jury pools from which were drawn the grand jury that indicted him, and the trial jury that convicted him and sentenced him to death, by showing that a memorandum by the state district attorney, directing the jury commissioners to underrepresent blacks and women in the master jury lists, had been concealed by county officials and therefore was not reasonably available to Amadeo's lawyers at the time they were required to challenge the jury. The concealment by the district attorney was found to be an "objective factor external to the defense" that excused the failure to raise an issue in a timely manner.

In *Strickler v. Greene*, 527 U.S. 263 (1999), Virginia prosecutors told the petitioner, prior to trial, that "the prosecutor's files were open to the petitioner's counsel," thus there was no need for a motion to reveal exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring prosecutors to disclose exculpatory evidence to the defense). *Strickler,* 527 U.S., at 276, n. 14. The prosecution file given to the Strickler petitioner, however, did not include several documents prepared by an important prosecution witness, recounting the witness' initial difficulty recalling the events to which she testified at the petitioner's trial. Those documents could have been used to impeach the witness. In state-court post-conviction proceedings, the petitioner in *Strickler* had unsuccessfully urged ineffective assistance of trial counsel based on counsel's failure to move, pretrial, for *Brady* material. Answering that plea, the State asserted that a *Brady* motion would have been superfluous, for the prosecution had maintained an open file policy pursuant to which it had disclosed all *Brady* material.

The Supreme Court determined that in the federal habeas proceedings, the petitioner had shown cause for his failure to raise a *Brady* claim in state court. 527 U.S., at 289. Three factors accounted for that determination:

> (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government.

The Court reached the same conclusion on similar facts in *Banks v. Dretke*, 540 U.S. 668, 693-98 (2004). There, it found an ever stronger showing of "cause" because a prosecution witness in the guilt and penalty phases of Banks's trial repeatedly misrepresented his dealings with police, but the prosecution allowed his testimony to stand uncorrected. 540 U.S. at 694. The Court held that Banks could "assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Id.*

Although the Court has treated a condemned inmate's lawyer was the agent of the client and refused to address issues where the lawyer missed a deadline or otherwise failed to preserve an issue, *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court held that the complete abandonment of Corey Maples by his lawyers at Sullivan & Cromwell constituted "cause" for his failure to file his federal habeas petition within the statute of limitations. *Maples v. Thomas*, 132 S.Ct. 912 (2012).

After filing a petition for post-conviction review on behalf of Maples in the state courts, the two lawyers responsible for his case left the firm without telling Maples or the court. No other Sullivan & Cromwell lawyer took responsibility for the case. The trial court eventually entered an order denying relief. The clerk of the court mailed copies of the order to Maples' two attorneys at the Sullivan & Cromwell's New York address and to an Alabama lawyer who had agreed to serve as local counsel. When the copies arrived at Sullivan & Cromwell, a mailroom employee sent the unopened envelopes back to the court with "Returned to Sender – Attempted, Unknown"

stamped on the envelopes and, on one, the handwritten notation "Return to Sender – Left Firm." The local lawyer received his copy of the order, but did not act on it based on his assumption that the firm's lawyers were responding to it.

The time for filing a notice of appeal expired. Maples' mother contacted Sullivan & Cromwell and lawyers at the firm sought to have the Alabama courts consider the issues raised, but they refused to do so, holding they had been waived because of the failure to file a timely notice of appeal. The federal district court and Eleventh Circuit Court of Appeals also held that the claims were defaulted.

While not disturbing the agency principle established in *Coleman*, the Supreme Court, in a decision by Justice Ginsburg, found there was no such relationship between Maples and his lawyers:

> A markedly different situation is presented * * * when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative.

The Court concluded that these "extraordinary circumstances beyond his control" constituted "cause" for the failure to file the notice of appeal and, therefore, the federal courts could consider the claims on habeas corpus review. The Court found that the local lawyer did not operate as Maples' agent in any meaningful sense of that word. Justice Alito concurred; Justices Scalia and Thomas dissented expressing the view that the claims were barred.

Nevertheless, the Court of Appeals for the Fifth Circuit refused to consider an appeal in the case of Louis Castro Perez, who was sentenced to death in Texas, because his lawyer did not file a notice of appeal within the time limit without telling Perez or other counsel on the case.[13] Judge Dennis dissented, pointing out that the lawyer's failure to file a notice of appeal was "an egregious breach of the duties an attorney owes her client" that constituted abandonment and that Perez had made a strong showing that he may have been sentenced to death in violation of the Constitution.[14]

The Court made another exception to *Coleman* in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that if at the first opportunity to raise a claim of ineffectiveness of trial counsel, a petitioner had no counsel or ineffective counsel, it would constitute cause that would allow the federal courts to consider the issue of trial counsel's ineffectiveness. Martinez was a prisoner from Arizona, where state procedural law required the he raise a claim of ineffectiveness during his first state post-conviction review proceeding. *See also Trevino v. Thaler*, 133 S.Ct. 1911 (2013) (applying *Martinez* where the state law allowed raising ineffective assistance of counsel on direct review but the structure and design of the system make it virtually impossible to raise the claim at that stage).

Prejudice

The Court has held that in order to show "prejudice," it must be established that the constitutional errors created not simply the possibility of prejudice, but that they worked to the actual and substantial disadvantage of the defendant, infecting the entire trial with error of constitutional dimensions. *United States v. Frady,* 456 U.S. 152 (1982). Frady sought review of a jury instruction that erroneously informed the jury of the meaning of malice. The Court said that in order to establish prejudice, Frady had to show that the "ailing instruction by itself so infected the entire trial that the resulting conviction violated due process and not merely that the instruction might have been undesirable, erroneous or even universally condemned."

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13. *Perez v. Stephens*, 745 F.3d 174 (5th Cir. 2014).

14. *Id*. at 187, 191-92 (Dennis, J., dissenting).

This standard is hard to meet and impossible with regard to some claims, such as underrepresentation of groups in the composition of juries or a prosecutor's intentional discrimination in using peremptory strikes to remove potential jurors on the basis of race, ethnicity or gender because it is impossible to prove that the defendant was *actually* prejudiced by the resulting prejudice**.** This is, there is no way to show that a jury that included members of the excluded race or gender would have decided the case differently.

Miscarriage of Justice

Even if a petitioner cannot show cause and prejudice with regard to an issue, it may be heard on the merits if failure to consider the claim would result in a miscarriage of justice. In *Murray v. Carrier*, 477 U.S. 478 (1986), the Court said that in order to establish a miscarriage of justice a petitioner must show that "a constitutional violation has *probably* resulted in the conviction of one who is actually innocent" (emphasis added). However, the Court found that Carrier had not met the standard.

In *Sawyer v. Whitley*, 505 U.S. 333 (1992), the Court said the miscarriage of justice exception also applies when a petitioner is "actually innocent" of the penalty imposed. The Court adopted a higher standard for establishing innocence of the penalty that it had expressed in *Murray v. Carrier* for innocence of the crime. It held that in order to establish "actual innocence" of the death penalty, a petitioner must show *by clear and convincing evidence*, that but for the constitutional error, no reasonable juror would have found him *eligible* for the death penalty under applicable state laws. The Court found that Robert Sawyer had not shown that he was not eligible for the death penalty.

In *Schlup v. Delo*, 513 U.S. 298 (1995), the petitioner, who had been convicted of the murder of another inmate at a prison, sought to present claims that the state had withheld exculpatory evidence and that he had been denied ineffective assistance of counsel. The claims had been defaulted and Schlup had already litigated other issues in federal habeas corpus proceedings which had been concluded. However, Schlup argued that because a statement in the possession of the state that had not been disclosed to him supported his assertion that he could not have committed the crime, it demonstrated that the "constitutional violation has probably resulted in the conviction of one who is actually innocent."

The Supreme Court, in a 5-4 decision, applied the *Carrier* standard, holding that Schlup was required to establish that, in light of the new evidence, it was more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Chief Justice Rehnquist, joined by Justices Kennedy and Thomas, dissented, expressing the view that the more stringent standard adopted in *Sawyer* should apply. Justice Scalia, joined by Justice Thomas, dissented, expressing the view that, based on the terms of the statute, the district court was not required to consider Schlup's petition at all because it was a second or "successive" petition.

Congress adopted a standard even more demanding than *Sawyer* in enacting the Anti-terrorism and Effective Death Penalty Act. It requires that in order to obtain an evidentiary hearing or file a second – or "successive" – habeas corpus petition, the petitioner must establish that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, *no reasonable factfinder would have found the applicant guilty of the underlying offense*." 28 U.S. Code §§ 2244(b)(2); 2254 (e) (emphasis added). The *Carrier* and *Sawyer* standards continue to govern whether a claim defaulted in state proceedings can be presented in an initial habeas petition.

Exhaustion of State Remedies

Charles E. ANDERSON, Warden
v.
Jack E. HARLESS

459 U.S. 4, 103 S.Ct. 276 (1982)

PER CURIAM.

Respondent was convicted of two counts of first degree murder and was sentenced to life imprisonment. The Michigan Court of Appeals affirmed respondent's conviction, and the Michigan Supreme Court, on review of the record, denied respondent's request for relief.

Respondent then filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of Michigan. He alleged, inter alia, that the trial court's instruction on "malice" – a crucial element in distinguishing between second degree murder and manslaughter under Michigan law – was unconstitutional. * * *

Relying primarily on *Sandstrom v. Montana*, 442 U.S. 510 (1979), the District Court held that this instruction unconstitutionally shifted the burden of proof to respondent and was inconsistent with the presumption of innocence. The court also held that respondent had exhausted available state-court remedies, as required by 28 U.S.C. §§ 2254(b) and (c), since his conviction had been reviewed by both the Michigan Court of Appeals and the Michigan Supreme Court. * * *

The United States Court of Appeals for the Sixth Circuit affirmed. The court held that respondent's claim had been properly exhausted in the state courts, because respondent had presented to the Michigan Court of Appeals the facts on which he based his federal claim and had argued that the malice instruction was "reversible error." The court also emphasized that respondent, in his brief to the Michigan Court of Appeals, had cited *People v. Martin*, 221 N.W.2d 336 (1974) – a decision predicated solely on state law in which no federal issues were decided, but in which the defendant had argued broadly that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments. In the view of the United States Court of Appeals, respondent's assertion before the Michigan Court of Appeals that the trial court's malice instruction was erroneous, coupled with his citation of *People v. Martin*, provided the Michigan courts with sufficient opportunity to consider the issue encompassed by respondent's subsequent federal habeas petition.

We reverse. In *Picard v. Connor*, 404 U.S. 270 (1971), we made clear that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made. * * * In addition, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim.

In this case respondent argued on appeal that the trial court's instruction on the element of malice was "erroneous." He offered no support for this conclusion other than a citation to, and three excerpts from, *People v. Martin*, – a case which held that, under Michigan law, malice should not be implied from the fact that a weapon is used. Not surprisingly, the Michigan Court of Appeals interpreted respondent's claim as being predicated on the state-law rule of *Martin*, and analyzed it accordingly.

The United States Court of Appeals concluded that "the due process ramifications" of respondent's argument to the Michigan court "were self-evident," and that respondent's "reliance on *Martin* was sufficient to present the state courts with the substance of his due process challenge to the malice instruction for habeas exhaustion purposes." We disagree. The District Court based its grant of habeas relief in this case on the doctrine that certain sorts of "mandatory presumptions" may undermine the prosecution's burden to prove guilt beyond a reasonable doubt

and thus deprive a criminal defendant of due process. * * * The Court of Appeals affirmed on the same rationale. However, it is plain from the record that this constitutional argument was never presented to, or considered by, the Michigan courts. Nor is this claim even the same as the constitutional claim advanced in *Martin* – the defendant there asserted a broad federal due process right to jury instructions that "properly explain" state law, and did not rely on the more particular analysis developed in cases such as *Sandstrom*.

* * *

Justice STEVENS, with whom Justice BRENNAN, and Justice MARSHALL join, dissenting.

* * *

[T]he question presented by this case is whether a somewhat garbled jury instruction contained a mandatory presumption that required a finding of malice or merely a permissive inference that allowed the jury to make such a finding. The parties seem to agree that if the instruction is considered mandatory, the respondent's conviction must be set aside under principles that are well settled in Michigan and in the federal courts.

* * *

I agree with the sensible approach to the exhaustion issue that was followed by the District Court and the Court of Appeals. I also believe that approach was entirely faithful to *Picard v. Connor*, which requires only that the "substance" of the federal claim (not the form) be "fairly presented" to the state courts. In this case the only arguable justification for dismissing the petition for failure to exhaust is a possibility that the state court might decide the instruction issue differently if phrased in terms of *Sandstrom v. Montana* rather than in terms of *People v. Martin*. That possibility is virtually nonexistent. The Court apparently perceives this case as a simple application of *Picard*; I think it can only be explained as an expansion of *Picard*. Such an expansion should be accompanied by a more careful analysis than the Court provides in this case, and it should not be undertaken without full briefing and argument.

* * *

Statutory Provisions Regarding Exhaustion

The exhaustion requirement is codified in 28 U.S.C. § 2254 (b), as amended by the Anti-terrorism and Effective Death Penalty Act. It requires that before a claim may be granted by a federal court, a petitioner must exhaust the remedies available under the law of the state to raise, by any available procedure, the question presented or show that there is an absence of any state corrective process or any process is ineffective to protect the rights of the petitioner. A petition may seek to present the claim to the state court, but the state courts may find it procedurally defaulted because not presented in earlier proceedings. At that point, the petition will have exhausted state remedies but be barred by procedural default from getting a merits ruling in federal court unless some exception to the exhaustion requirement applies.

The statute allows a federal court can *deny* a claim notwithstanding the failure of the petitioner to exhaust the remedies available in the courts of the State. The statute also provides that a state will not be deemed to have waived the exhaustion requirement unless it, through counsel, expressly waives it.

The Habeas Corpus Statutes as Amended by the Anti-terrorism and Effective Death Penalty Act (AEDPA)

In 1996, Congress passed and President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, which, among other things, imposed a statute of limitations on petitions for habeas corpus relief, 28 U.S.C. § 2244 (d); required deference to the ruling and decisions of state courts, limiting federal courts to granting relief only when the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d); provided that state court finding of fact are to be presumed correct unless the petitioner rebuts the presumption by clear and convincing evidence, 28 U.S.C. § 2254 (e)(1); restricted evidentiary hearings to claims involving (i) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," or (ii) "a factual predicate that could not have been previously discovered through the exercise of due diligence," *and* "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," 28 U.S.C. 2254 (e)(2); and required a petitioner seeking to file a second habeas corpus petition to make the same showing as in (e)(2) before a three-judge panel of a court of appeals, which then decides whether to allow the petition to be filed in district court. 28 U.S.C. § 2244 (b).

The Supreme Court addressed the deference provisions of 28 U.S.C. § 2254 (d) in the case that follows, *Williams v. Taylor*. The issue was whether the decision of the Virginia Supreme Court finding that Williams was not denied effective assistance of counsel was contrary to or involved an unreasonable application the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court set a two part standard of effectiveness in *Strickland*: whether counsel's performance was deficient under prevailing professional norms and whether there was a substantial probability that but for counsel's errors and omissions the outcome would have been different.

The Virginia trial court found ineffectiveness, but the Virginia Supreme Court reversed, holding that counsel had not been ineffective. A United States District Court found the Virginia Supreme Court's decision unreasonable and counsel ineffective. The Court of Appeals for the Fourth Circuit reversed and held Williams was not entitled to relief.

In the opinion that follows, Justice O'Connor delivered the Court's opinion with regard to how the deference provisions were to be applied. Justice Stevens delivered the opinion of the Court with regard to the issue of ineffective assistance of counsel. Justice Stevens' opinion is not included here, nor is the opinion of Chief Justice Rehnquist, concurring in part and dissenting in part, which was joined by Justices Scalia and Thomas. A majority of the Court concluded that Williams was denied his right to counsel and his death sentence was set aside.

Terry WILLIAMS, Petitioner,
v.
John TAYLOR, Warden.

United States Supreme Court
529 U.S. 362, 120 S.Ct. 1495 (2000)

O'Connor, J., delivered the opinion of the Court with respect to Part II (except as to the footnote), in which Rehnquist, C.J., and Kennedy and Thomas, JJ., joined, and in which Scalia, J. joined, except as to the footnote, and an opinion concurring in part and concurring in the judgment, in which Kennedy, J., joined.

Justice O'CONNOR delivered the opinion of the Court with respect to Part II concurred in part, and concurred in the judgment.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). In that Act, Congress placed a new restriction on the

power of federal courts to grant writs of habeas corpus to state prisoners. The relevant provision, 28 U.S.C. § 2254(d)(1), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Court holds today that the Virginia Supreme Court's adjudication of Terry Williams' application for state habeas corpus relief resulted in just such a decision. * * *

I

Before 1996, this Court held that a federal court entertaining a state prisoner's application for habeas relief must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (i.e., application of constitutional law to fact).

If today's case were governed by the federal habeas statute prior to Congress' enactment of AEDPA in 1996, * * * Williams' petition for habeas relief must be granted if we, in our independent judgment, were to conclude that his Sixth Amendment right to effective assistance of counsel was violated.

II

A

Williams' case is not governed by the pre-1996 version of the habeas statute. Because he filed his petition in December 1997, Williams' case is governed by the statute as amended by AEDPA. Section 2254 now provides:

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

Accordingly, for Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the role of federal habeas courts in reviewing petitions filed by state prisoners.

* * *

The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." Webster's Third New International Dictionary 495 (1976). The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court. * * * A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our

cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause. Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state-court decision as "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to *Strickland*, our clearly established precedent. Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not "mutually opposed" to *Strickland* itself.

* * *

The Fourth Circuit's interpretation of the "unreasonable application" clause of § 2254(d)(1) is generally correct. That court held * * * that a state-court decision can involve an "unreasonable application" of this Court's clearly established precedent in two ways. First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision "involv[ing] an unreasonable application of ... clearly established Federal law." * * *]

* * *

B

There remains the task of defining what exactly qualifies as an "unreasonable application" of law under § 2254(d)(1). * * *

* * * Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. * * *

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

* * *

Throughout this discussion the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. * * *

In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus

with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

III

* * * I agree with the [Justice Stevens' opinion for the] Court that the Virginia Supreme Court's adjudication of Williams' claim of ineffective assistance of counsel resulted in a decision that was both contrary to and involved an unreasonable application of this Court's clearly established precedent. * * *

First, I agree with the Court that our decision in *Strickland* undoubtedly qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of § 2254(d)(1). Second, I agree that the Virginia Supreme Court's decision was contrary to that clearly established federal law to the extent it held that [another] decision [of the Court] somehow modified or supplanted the rule set forth in *Strickland*. Specifically, the Virginia Supreme Court's decision was contrary to *Strickland* itself, where we held that a defendant demonstrates prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The Virginia Supreme Court held, in contrast, that such a focus on outcome determination was insufficient standing alone. * * *

Third, I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland*, its application was unreasonable. * * * Williams' trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation evidence. * * * The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life. * * * The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. * * * For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court's decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

* * *

Ricky BELL, Warden,
v.
Gary Bradford CONE.

Supreme Court of the United States
543 U.S. 447, 125 S.Ct. 847**(**2005).

The Court issued a per curiam order. Ginsburg, J., issued a concurring opinion in which Souter and Breyer, JJ., joined.

PER CURIAM.

The United States Court of Appeals for the Sixth Circuit granted a writ of habeas corpus to respondent Gary Bradford Cone after concluding that the "especially heinous, atrocious, or cruel" aggravating circumstance found by the jury at the sentencing phase of his trial was unconstitutionally vague, and that the Tennessee Supreme Court failed to cure any constitutional deficiencies on appeal. Because this result fails to

accord to the state court the deference required by 28 U.S.C. § 2254(d), we * * * reverse.

* * * A Tennessee jury convicted respondent of, *inter alia,* two counts of murder in the first degree and two counts of murder in the first degree in the perpetration of a burglary. At the conclusion of the penalty phase of respondent's trial, the jury unanimously found four aggravating circumstances and concluded that they outweighed the mitigating evidence. Respondent was sentenced to death.

The Tennessee Supreme Court affirmed respondent's convictions and sentence. As relevant here, the court held that three of the aggravating circumstances found by the jury "were clearly shown by the evidence." With respect to the jury's finding that the murder was "especially heinous, atrocious, or cruel," the court said:

> The jury also found that the murders in question were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind * * *. The evidence abundantly established that both of the elderly victims had been brutally beaten to death by multiple crushing blows to the skulls. Blood was spattered throughout the house, and both victims apparently had attempted to resist, because numerous defensive wounds were found on their persons. The only excuse offered in the entire record for this unspeakably brutal conduct by the accused was that these elderly victims had at some point ceased to "cooperate" with him in his ransacking of their home and in his effort to flee from arrest. As previously stated, it was stipulated by counsel for [respondent] that there was no issue of self-defense even remotely suggested. The deaths of the victims were not instantaneous, and obviously one had to be killed before the other. The terror, fright and horror that these elderly helpless citizens must have endured was certainly something that the jury could have taken into account in finding this aggravating circumstance.

* * *

* * * [T]he Sixth Circuit held that the state court's affirmance of respondent's sentence in light of the "especially heinous, atrocious, or cruel" aggravating circumstance was "contrary to" the clearly established principles set forth in our decision in *Godfrey v. Georgia*. The Court of Appeals allowed that "[n]o Supreme Court case has addressed the precise language at issue," and that no "Supreme Court decision is 'on all fours' with the instruction in Cone's case,"[4] but nevertheless concluded, in light of *Godfrey* and the series of cases that followed it, that federal law dictated the conclusion that the State's "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague. Lastly, the court rejected petitioner's argument that the Tennessee Supreme Court cured any deficiency in the aggravating circumstance on direct appeal by reviewing the jury's finding under the narrowed construction of the aggravator that it adopted in *State v. Dicks*, 615 S. W. 2d 126 (1981).

A federal court may grant a writ of habeas corpus based on a claim adjudicated by a state court if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." A state court's decision is "contrary to . . . clearly established Federal law" "if the state court applies a rule that contradicts the governing law set forth in our cases," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours."

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4. The jury was instructed with respect to this aggravated circumstance as follows:

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

The law governing vagueness challenges to statutory aggravating circumstances was summarized aptly in *Walton v. Arizona*:

> When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.,* whether they provide *some* guidance to the sentencer.
>
> * * *
>
> Indeed, in *Godfrey,* the case on which the Court of Appeals relied in declaring the aggravating circumstance to be unconstitutionally vague, the controlling plurality opinion followed precisely this procedure. Like the court below, the plurality looked first to the language of the aggravating circumstance found by the jury and concluded that there "was nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." But the plurality did not stop there: It next evaluated whether the Georgia Supreme Court "applied a constitutional construction" of the aggravating circumstance on appeal. Because the facts of the case did not resemble those in which the state court had previously applied a narrower construction of the aggravating circumstance and because the state court gave no explanation for its decision other than to say that the verdict was "factually substantiated," the plurality concluded that it did not. As we have subsequently explained, this conclusion was the linchpin of the Court's holding: "Had the Georgia Supreme Court applied a narrowing construction of the aggravator, we would have rejected the Eighth Amendment challenge to Godfrey's sentence, notwithstanding the failure to instruct the jury on that narrowing construction." * * *
>
> In this case, however, the Sixth Circuit rejected the possibility that the Tennessee Supreme Court cured any error in the jury instruction by applying a narrowing construction of the statutory "heinous, atrocious, or cruel" aggravator. The court asserted that the State Supreme Court "did not apply, or even mention, any narrowing interpretation or cite to [*State v.*] *Dicks,*" the case in which the State Supreme Court had adopted a narrowing construction of the aggravating circumstance. "Instead," the court said, "the [state] court simply, but explicitly, satisfied itself that the labels 'heinous, atrocious, or cruel,' without more, applied to [respondent's] crime."
>
> We do not think that a federal court can presume so lightly that a state court failed to apply its own law. As we have said before, § 2254(d) dictates a "'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt." To the extent that the Court of Appeals rested its decision on the state court's failure to cite *Dicks,* it was mistaken. Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.
>
> More importantly, however, we find no basis for the Court of Appeals' statement that the state court "simply, but explicitly, satisfied itself that the labels 'heinous, atrocious, or cruel,' without more, applied" to the murder. The state court's opinion does not disclaim application of that court's established construction of the aggravating circumstance; the only thing that it states "explicitly" is that the evidence in this case supported the jury's finding of the statutory aggravator. * * * [T]he State Supreme Court had construed the aggravating circumstance narrowly and had followed that precedent numerous times; absent an affirmative indication to the contrary, we must presume that it did the same thing here. That is especially true in a case such as this one, where the state court has recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case.

Even absent such a presumption in the state court's favor, however, we would still conclude in this case that the state court applied the narrower construction of the "heinous, atrocious, or cruel" aggravating circumstance. The State Supreme Court's reasoning in this case closely tracked its rationale for affirming the death sentences in other cases in which it expressly applied a narrowed construction of the same "heinous, atrocious, or cruel" aggravator. The facts the court relied on to affirm the jury's verdict – that the elderly victims attempted to resist, that their deaths were not instantaneous, that respondent's actions towards them were "unspeakably brutal" and that they endured "terror, fright and horror" before being killed – match, almost exactly, the reasons the state court gave when it held the evidence in *State v. Melson,* 638 S.W.2d 342, 367 (1982), to be sufficient to satisfy the torture prong of the narrowed "heinous, atrocious, or cruel" aggravating circumstance. * * *

The only remaining question is whether the narrowing construction that the Tennessee Supreme Court applied was itself unconstitutionally vague. It was not. In *State v. Dicks,* the state court adopted the exact construction of the aggravator that we approved in *Proffitt* [*v. Florida*]: that the aggravator was "directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" In light of *Proffitt,* we think this interpretation of the aggravator, standing alone, would be sufficient to overcome the claim that the aggravating circumstance applied by the state court was "contrary to" clearly established federal law under 28 U.S.C. § 2254(d)(1).

* * *

* * * The state court did apply such a narrowing construction, and that construction satisfied constitutional demands by ensuring that respondent was not sentenced to death in an arbitrary or capricious manner. The state court's affirmance of respondent's sentence on this ground was therefore not "contrary to . . . clearly established Federal law," and the Court of Appeals was without power to issue a writ of habeas corpus.

Justice GINSBURG, with whom Justice SOUTER and Justice BREYER join, concurring.

* * * I agree with the Court that, once the highest court of a State has dispositively decided a point of law, it is not incumbent on that court to cite its precedential decision in every case thereafter presenting the same issue in order to demonstrate its adherence to the pathmarking decision.

* * *

Law and Facts at the Time of the State Court Decision – *Cullen v. Pinholster* and *Greene v. Fisher*

The Supreme Court held that federal habeas review of a state court decision "is limited to the record that was before the state court that adjudicated the claim on the merits," *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), and the law the claim is based on must be clearly established at the time of the state court decision. *Greene v. Fisher*, 132 S.Ct. 38 (2011).

Justice Thomas, writing for the Court *Cullen v. Pinholster*, held that Section 2254(d)(1)'s "backward-looking language" – that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States – requires an examination of the state-court decision based on the record before the state court. It reversed a decision of the Ninth Circuit upholding a finding of ineffective assistance of counsel that was based in part on facts developed at an evidentiary hearing in federal court. A federal habeas court is not required to hold an evidentiary hearing when the state-court record precludes habeas relief under § 2254(d)'s limitations. The Court also reversed the lower court's holding of ineffective assistance of counsel.

Justice Alito, concurring in part and concurring in the judgement, expressed the view that while evidentiary hearings in federal court should be

rare, a petitioner may be entitled to one under if he made a diligent effort to produce the evidence that was not presented in state court and the evidence could not have been offered in the state-court proceeding. *See Williams (Michael) v. Taylor*, 529 U.S. 420, 433-434, (2000). Otherwise, petitioner is not entitled to a hearing unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254(e)(2)(B).

Justice Breyer concurred in part and dissented in part. He expressed the view that instead of deciding the ineffectiveness claim, the Court should have remanded the case for that determination in light of its holding. He also observed several situation where evidentiary hearings might be required in federal court. If the state-court rejection of a petitioner's claim was a decision that, even if the facts alleged were true, federal law was not violated and as a result no evidentiary hearing was held in state court, a federal court, upon finding that the state court determination was erroneous, may need to hold a hearing to determine whether the facts alleged were indeed true. A federal court could hold a hearing upon finding that a state court's rejection of a claim rested on a state ground, which did not constitute and adequate and independent basis for the decision. A hearing might also be necessary if the state court rejected a claim on one of several grounds and the federal court finds that ground contrary to or a unreasonable application of law clearly established by the Supreme Court. For example, a finding of ineffective assistance of counsel requires two findings: that counsel's performance was deficient and that there was a substantial probability that the deficient performance affected the outcome. A state court could reject the claim based on its conclusion that counsel's performance was not deficient without reaching the question of whether it affected the outcome. If the federal court decided that counsel's performance was deficient, it might be necessary to conduct a hearing to decide the question of whether it affected the outcome.

Justice Sotomayor issued a dissenting opinion which was joined in part by Justices Ginsburg and Kagan, expressing the view that petitioners are entitled to an evidentiary hearing if they can show "that could not have been previously discovered through the exercise of due diligence," § 2254 (e) (2) (A) (ii), and that the use of "backward-looking language" was not a sound basis for the majority's conclusion. She pointed out that a state court could reject a claim that the prosecutor withheld exculpatory evidence, but the petitioner might discover additional exculpatory evidence that was also withheld. She argued that such evidence should be received by the federal court.

Justice Sotomayor also expressed the view, joined by Justices Ginsburg and Kagan, that it was not even necessary to reach the issue of whether Pinholster was entitled to an evidentiary hearing because the state court record established that the California Supreme Court's decision that counsel was not ineffective was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), the case that established the standard for claims of ineffective assistance of counsel.

The Court unanimously held in *Greene v. Fisher* that "clearly established Federal law, as determined by the Supreme Court of the United States" includes only the Court's decisions as of the time of the state-court adjudication. Writing for the Court, Justice Scalia, relying on *Pinholster*, held the "backward-looking language [of § 2254(d)(1)] requires an examination of the state-court decision at the time it was made." The Court held that a decision it handed down only three months after Greene's case became final did not apply to his case.[1]

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1. The Court observed that Greene missed two opportunities to assert that the new decision governed his case. First, he could have petitioned the Supreme Court for *certiorari*, "which would almost certainly have produced a remand in light of the intervening * * * decision." Greene, 132 S.Ct at 45. Second, he did not reply on the new decision in state postconviction review. *Id*. Of course, it was Greene's lawyer who failed in this regard.

Statute of Limitations

Gary LAWRENCE, Petitioner,
v.
FLORIDA.

Supreme Court of the United States
549 U.S. 327, 127 S.Ct. 1079 (2007).

Justice Thomas delivered the opinion of the Court.

Congress established a 1-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment, 28 U.S.C. § 2244(d), and further provided that the limitations period is tolled while an "application for State post-conviction or other collateral review" "is pending," § 2244(d)(2). We must decide whether a state application is still "pending" when the state courts have entered a final judgment on the matter but a petition for certiorari has been filed in this Court. We hold that it is not.

* * *.

I

Petitioner Gary Lawrence and his wife used a pipe and baseball bat to kill Michael Finken. A Florida jury convicted Lawrence of first-degree murder, conspiracy to commit murder, auto theft, and petty theft. The trial court sentenced Lawrence to death. The Florida Supreme Court affirmed Lawrence's conviction and sentence on appeal, and this Court denied certiorari on January 20, 1998.

On January 19, 1999, 364 days later, Lawrence filed an application for state postconviction relief in a Florida trial court.[1] The court denied relief, and the Florida Supreme Court affirmed, issuing its mandate on November 18, 2002. Lawrence sought review of the denial of state postconviction relief in this Court. We denied certiorari on March 24, 2003.

While Lawrence's petition for certiorari was pending, he filed the present federal habeas application. The Federal District Court dismissed it as untimely under § 2244(d)'s 1-year limitations period. All but one day of the limitations period had lapsed during the 364 days between the time Lawrence's conviction became final and when he filed for state postconviction relief. The limitations period was then tolled while the Florida courts entertained his state application. After the Florida Supreme Court issued its mandate, Lawrence waited another 113 days – well beyond the one day that remained in the limitations period – to file his federal habeas application. As a consequence, his federal application could be considered timely only if the limitations period continued to be tolled during this Court's consideration of his petition for certiorari. * * * [T]he District Court concluded that Lawrence had only one day to file a federal habeas application after the Florida Supreme Court issued its mandate.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets a one-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment. This limitations period is tolled while a state prisoner seeks postconviction relief in state court.

* * *

Read naturally, the text of the statute must mean that the statute of limitations is tolled only while state courts review the application. * * * This Court is not a part of a "State's post-conviction

1. Lawrence contends that delays in Florida's program for appointing postconviction counsel and other issues outside of his control caused 298 days to pass before Florida appointed an attorney who took an active role in his postconviction case. These facts have little relevance to our analysis. Lawrence did not seek certiorari on the question whether these facts entitle him to equitable tolling. Indeed, Lawrence was able to file his state postconviction petition on time in spite of these delays. And before this Court, he argues that his attorney mistakenly missed the federal habeas deadline, not that he lacked adequate time to file a federal habeas application.

procedures." State review ends when the state courts have finally resolved an application for state postconviction relief. After the State's highest court has issued its mandate or denied review, no other state avenues for relief remain open. And an application for state postconviction review no longer exists. All that remains is a separate certiorari petition pending before a *federal* court. The application for state postconviction review is therefore not "pending" after the state court's postconviction review is complete, and § 2244(d)(2) does not toll the 1-year limitations period during the pendency of a petition for certiorari.

* * *

* * * [A]llowing the statute of limitations to be tolled by certiorari petitions would provide incentives for state prisoners to file certiorari petitions as a delay tactic. By filing a petition for certiorari, the prisoner would push back § 2254's deadline while we resolved the petition for certiorari. This tolling rule would provide an incentive for prisoners to file certiorari petitions-regardless of the merit of the claims asserted-so that they receive additional time to file their habeas applications.

III

Lawrence makes several arguments in support of his contention that equitable tolling applies to his case. First, he argues that legal confusion about whether AEDPA's limitations period is tolled by certiorari petitions justifies equitable tolling. But at the time the limitations period expired in Lawrence's case, the Eleventh Circuit and every other Circuit to address the issue agreed that the limitations period was not tolled by certiorari petitions. The settled state of the law at the relevant time belies any claim to legal confusion.

Second, Lawrence argues that his counsel's mistake in miscalculating the limitations period entitles him to equitable tolling. If credited, this argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline. Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel.

Third, Lawrence argues that his case presents special circumstances because the state courts appointed and supervised his counsel. But a State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay. Lawrence has not alleged that the State prevented him from hiring his own attorney or from representing himself. It would be perverse indeed if providing prisoners with postconviction counsel deprived States of the benefit of the AEDPA statute of limitations.

Fourth, Lawrence argues that his mental incapacity justifies his reliance upon counsel and entitles him to equitable tolling. Even assuming this argument could be legally credited, Lawrence has made no factual showing of mental incapacity. In sum, Lawrence has fallen far short of showing "extraordinary circumstances" necessary to support equitable tolling.

* * *

JUSTICE GINSBURG with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

* * * [P]etitions for certiorari do not exist in a vacuum; they arise from actions instituted in lower courts. When we are asked to review a state court's denial of habeas relief, we consider an application for that relief – not an application for federal habeas relief. Until we have disposed of the petition for certiorari, the application remains live as one for state postconviction relief; it is not transformed into a federal application simply because the state-court applicant petitions for this Court's review.

I would therefore hold that 28 U.S.C. § 2244(d)'s statute of limitations is tolled during the pendency of a petition for certiorari. Congress instructed that the one-year limitation period for filing a habeas petition in the appropriate federal

district court does not include "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending."§ 2244(d)(2). * * *

* * *

Not only is the majority's reading of § 2244(d)(2) unwarranted, it will also spark the simultaneous filing of two pleadings seeking essentially the same relief. A petitioner denied relief by a State's highest court will now have to file, contemporaneously, a petition for certiorari in this Court and a habeas petition in federal district court. Only by expeditiously filing for federal habeas relief will a prisoner ensure that the limitation period does not run before we have disposed of his or her petition for certiorari. Protective petitions will be essential, too, when we grant review of a state court's ruling on a state habeas petition, for many months can elapse between the date we agree to hear a case and the date we issue an opinion. Consequently, the same claims will be pending in two courts at once, and the duplication will occasion administrative problems; for example, no decision, law, or rule tells us in which court the record in the case should be lodged.

The anticipatory filing in a federal district court will be all the more anomalous when a habeas petitioner prevails in state court and the State petitions for certiorari. Under the majority's decision, it appears, the petitioner will be obliged to file a protective petition in federal court even though he gained relief from the state tribunal. Lawrence questions whether the federal courts would even have jurisdiction over such a bizarre petition. While I incline to the view that a prisoner in such a position would have standing, Lawrence's concerns are at least plausible and raise the specter of a habeas petitioner prevailing in state court, yet losing the right to pursue constitutional claims in federal court altogether: By the time we have ruled on the State's petition, the statute of limitations likely would have run.

* * *

Albert HOLLAND, Petitioner,
v.
FLORIDA.

Supreme Court of the United States.
130 S.Ct. 2549, 130 S.Ct. 2549 (2010).

Breyer, J., delivered the opinion of the Court, in which Roberts, C.J., and Stevens, Kennedy, Ginsburg, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in part and concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined as to all but Part I.

Justice BREYER delivered the opinion of the Court.

We here decide that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d). We also consider its application in this case. In the Court of Appeals' view, when a petitioner seeks to excuse a late filing on the basis of his attorney's unprofessional conduct, that conduct, even if it is "negligent" or "grossly negligent," cannot "rise to the level of egregious attorney misconduct" that would warrant equitable tolling unless the petitioner offers "proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth." In our view, this standard is too rigid. We therefore reverse the judgment of the Court of Appeals and remand for further proceedings.

I

AEDPA states that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." § 2244(d)(1). It also says that "[t]he time during which a properly filed application for State post-conviction . . . review" is "pending shall not be counted" against the 1-year period. § 2244(d)(2).

On January 19, 2006, Albert Holland filed a *pro se* habeas corpus petition in the Federal District

Court for the Southern District of Florida. Both Holland (the petitioner) and the State of Florida (the respondent) agree that, unless equitably tolled, the statutory limitations period applicable to Holland's petition expired approximately five weeks before the petition was filed. Holland asked the District Court to toll the limitations period for equitable reasons. We shall set forth in some detail the record facts that underlie Holland's claim.

A

In 1997, Holland was convicted of first-degree murder and sentenced to death. The Florida Supreme Court affirmed that judgment. On *October 1, 2001,* this Court denied Holland's petition for certiorari. And on that date – the date that our denial of the petition ended further direct review of Holland's conviction – the 1-year AEDPA limitations clock began to run.

Thirty-seven days later, on *November 7, 2001,* Florida appointed attorney Bradley Collins to represent Holland in all state and federal postconviction proceedings. By *September 19, 2002* – 316 days after his appointment and 12 days before the 1-year AEDPA limitations period expired – Collins, acting on Holland's behalf, filed a motion for postconviction relief in the state trial court. That filing automatically stopped the running of the AEDPA limitations period, § 2244(d)(2), with, as we have said, 12 days left on the clock.

For the next three years, Holland's petition remained pending in the state courts. During that time, Holland wrote Collins letters asking him to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review. Collins wrote back, stating, "I would like to reassure you that we are aware of state-time limitations and federal exhaustion requirements." He also said that he would "presen[t] . . . to the . . . federal courts" any of Holland's claims that the state courts denied. In a second letter Collins added, "should your Motion for Post-Conviction Relief be denied" by the state courts, "your state habeas corpus claims will then be ripe for presentation in a petition for writ of habeas corpus in federal court."

In mid-May 2003 the state trial court denied Holland relief, and Collins appealed that denial to the Florida Supreme Court. Almost two years later, in February 2005, the Florida Supreme Court heard oral argument in the case. But during that 2-year period, relations between Collins and Holland began to break down. Indeed, between April 2003 and January 2006, Collins communicated with Holland only three times – each time by letter.

Holland, unhappy with this lack of communication, twice wrote to the Florida Supreme Court, asking it to remove Collins from his case. In the second letter, filed on June 17, 2004, he said that he and Collins had experienced "a complete breakdown in communication." Holland informed the court that Collins had "not kept [him] updated on the status of [his] capital case" and that Holland had "not seen or spoken to" Collins "since April 2003." He wrote, "Mr. Collins has abandoned [me]" and said, "[I have] no idea what is going on with [my] capital case on appeal." He added that "Collins has never made any reasonable effort to establish any relationship of trust or confidence with [me]," and stated that he "does not trust" or have "any confidence in Mr. Collin's ability to represent [him]." Holland concluded by asking that Collins be "dismissed (removed) off his capital case" or that he be given a hearing in order to demonstrate Collins' deficiencies. The State responded that Holland could not file any *pro se* papers with the court while he was represented by counsel, including papers seeking new counsel. The Florida Supreme Court agreed and denied Holland's requests.

During this same period Holland wrote various letters to the Clerk of the Florida Supreme Court. In the last of these he wrote, "[I]f I had a competent, conflict-free, postconviction, appellate attorney representing me, I would not have to write you this letter. I'm not trying to get on your nerves. I just would like to know *exactly* what is happening with my case on appeal to the Supreme Court of Florida." During that same time period, Holland also filed a complaint against Collins

with the Florida Bar Association, but the complaint was denied.

Collins argued Holland's appeal before the Florida Supreme Court on February 10, 2005. Shortly thereafter, Holland wrote to Collins emphasizing the importance of filing a timely petition for habeas corpus in federal court once the Florida Supreme Court issued its ruling. Specifically, on March 3, 2005, Holland wrote:

> Dear Mr. Collins, P. A.:
>
> How are you? Fine I hope.
>
> I write this letter to ask that you please write me back, as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of Florida.
>
> If the Florida Supreme Court denies my [postconviction] and State Habeas Corpus appeals, *please file my 28 U.S.C. 2254 writ of Habeas Corpus petition, before my deadline to file it runs out (expires).*
>
> Thank you very much.
>
> Please have a nice day. (emphasis added).

Collins did not answer this letter.

On June 15, 2005, Holland wrote again:

> Dear Mr. Collins:
>
> How are you? Fine I hope.
>
> On March 3, 2005 I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.
>
> Also, *have you begun preparing my 28 U.S.C. § 2254 writ of Habeas Corpus petition? Please let me know, as soon as possible.*
>
> *"Thank you."* [emphasis added].

But again, Collins did not reply.

Five months later, in November 2005, the Florida Supreme Court affirmed the lower court decision denying Holland relief. Three weeks after that, on *December 1, 2005,* the court issued its mandate, making its decision final. At that point, the AEDPA federal habeas clock again began to tick-with 12 days left on the 1-year meter. * * * Twelve days later, on *December 13, 2005,* Holland's AEDPA time limit expired.

B

Four weeks after the AEDPA time limit expired, on January 9, 2006, Holland, still unaware of the Florida Supreme Court ruling issued in his case two months earlier, wrote Collins a third letter:

> Dear Mr. Bradley M. Collins:
>
> How are you? Fine I hope.
>
> I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet?
>
> Please send me the [necessary information] . . . so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable "Antiterrorism and Effective Death Penalty Act," if my appeals before the Supreme Court of Florida are denied.
>
> Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.
>
> Mr. Collins, would you please also inform me as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will have to be timely filed in and that court's address?
>
> Thank you very much.

Collins did not answer.

Nine days later, on January 18, 2006, Holland, working in the prison library, learned for the first time that the Florida Supreme Court had issued a final determination in his case and that its mandate had issued-five weeks prior. He immediately wrote out his own *pro se* federal habeas petition and mailed it to the Federal District Court for the Southern District of Florida

the next day. * * *

* * *

The same day that he mailed that petition, Holland received a letter from Collins telling him that Collins intended to file a petition for certiorari in this Court from the State Supreme Court's most recent ruling. Holland answered immediately:

> Dear Mr. Bradley M. Collins:
>
> * * * * * *
>
> Since recently, the Supreme Court of Florida has denied my [postconviction] and state writ of Habeas Corpus Petition. I am left to understand that you are planning to seek certiorari on these matters.
>
> It's my understanding that the AEDPA time limitations is not tolled during discretionary appellate reviews, such as certiorari applications resulting from denial of state post conviction proceedings.
>
> Therefore, I advise you *not* to file certiorari if doing so affects or jeopardizes my one year *grace* period as prescribed by the AEDPA.
>
> Thank you very much. [some emphasis deleted].

Holland was right about the law. See *Coates* [*v. Byrd*, 211 F.3d 1225] at 1226-1227 (C.A.11 2000) (AEDPA not tolled during pendency of petition for certiorari from judgment denying state postconviction review); accord, *Lawrence v. Florida,* 421 F.3d 1221, 1225 (C.A.11 2005), aff'd, 549 U.S. 327, at 331-336.

On January 26, 2006, Holland tried to call Collins from prison. But he called collect and Collins' office would not accept the call. App. 218. Five days later, Collins wrote to Holland and told him for the very first time that, as Collins understood AEDPA law, the limitations period applicable to Holland's federal habeas application had in fact expired in 2000-*before* Collins had begun to represent Holland. Specifically, Collins wrote:

> Dear Mr. Holland:
>
> I am in receipt of your letter dated January 20, 2006 concerning operation of AEDPA time limitations. One hurdle in our upcoming efforts at obtaining federal habeas corpus relief will be that the one-year statutory time frame for filing such a petition began to run after the case was affirmed on October 5, 2000 [when your] Judgment and Sentence . . . were affirmed by the Florida Supreme Court. However, it was not until November 7, 2001, that I received the Order appointing me to the case. As you can see, *I was appointed about a year after your case became final* . . . .
>
> [T]he AEDPA time period [thus] had run before my appointment and therefore before your [postconviction] motion was filed." (emphasis added).

Collins was wrong about the law. As we have said, Holland's 1-year limitations period did not begin to run until *this* Court denied Holland's petition for certiorari from the state courts' denial of relief on direct review, which occurred on October 1, 2001. And when Collins was appointed (on November 7, 2001) the AEDPA clock therefore had 328 days left to go.

Holland immediately wrote back to Collins, pointing this out.

> Dear Mr. Collins:
>
> I received your letter dated January 31, 2006. You are incorrect in stating that "the one-year statutory time frame for filing my 2254 petition began to run after my case was affirmed on October 5, 2000, by the Florida Supreme Court." As stated on page three of [the recently filed] Petition for a writ of certiorari, October 1, 2001 is when the United States Supreme Court denied my initial petition for writ of certiorari and that is when my case became final. That meant that the time would be tolled once I filed my [postconviction] motion in the trial court.
>
> Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U.S.C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.
>
> You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005

decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you would immediately inform me of the court's decision as soon as you heard anything.

Mr. Collins, I filed a motion on January 19, 2006 [in federal court] to preserve my rights, because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?

Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting anymore time. (valuable time).

Again, please file my 2254 Petition at once.

Your letter is the first time that you have ever mentioned anything to me about my time had run out, before you were appointed to represent me, and that my one-year started to run on October 5, 2000.

Please find out the status of my motion that I filed on January 19, 2006 and let me know.

Thank you very much.

Collins did not answer this letter. Nor did he file a federal habeas petition as Holland requested.

On March 1, 2006, Holland filed another complaint against Collins with the Florida Bar Association. This time the bar asked Collins to respond, which he did, through his own attorney, on March 21. And the very next day, over three months after Holland's AEDPA statute of limitations had expired, Collins mailed a proposed federal habeas petition to Holland, asking him to review it.

But by that point Holland had already filed a *pro se* motion in the District Court asking that Collins be dismissed as his attorney. The State responded to that request by arguing once again that Holland could not file a *pro se* motion seeking to have Collins removed while he was represented by counsel, *i.e.,* represented by Collins. But this time the court considered Holland's motion, permitted Collins to withdraw from the case, and appointed a new lawyer for Holland. And it also received briefing on whether the circumstances of the case justified the equitable tolling of the AEDPA limitations period for a sufficient period of time (approximately five weeks) to make Holland's petition timely.

C

After considering the briefs, the Federal District Court held that the facts did not warrant equitable tolling and that consequently Holland's petition was untimely. The court, noting that Collins had prepared numerous filings on Holland's behalf in the state courts, and suggesting that Holland was a difficult client, intimated, but did not hold, that Collins' professional conduct in the case was at worst merely "negligent." But the court rested its holding on an alternative rationale: It wrote that, even if Collins' "behavior could be characterized as an 'extraordinary circumstance,'" Holland "did not seek any help from the court system to find out the date [the] mandate issued denying his state habeas petition, nor did he seek aid from 'outside supporters.'" Hence, the court held, Holland did not "demonstrate" the "due diligence" necessary to invoke "equitable tolling."

On appeal, the Eleventh Circuit agreed * * *. The Court of Appeals first agreed with Holland that "'[e]quitable tolling can be applied to . . . AEDPA's statutory deadline.'" But it also held that equitable tolling could not be applied in a case, like Holland's, that involves no more than "[p]ure professional negligence" on the part of a petitioner's attorney because such behavior can never constitute an "extraordinary circumstance." * * *

Holland made "no allegation" that Collins had made a "knowing or reckless factual misrepresentation," or that he exhibited "dishonesty," "divided loyalty," or "mental impairment." Hence, the court held, equitable tolling was *per se* inapplicable to Holland's habeas petition. The court did not address the District Court's ruling with respect to Holland's diligence.

* * *

II

* * * Now, like all 11 Courts of Appeals that have considered the question, we hold that § 2244(d) is subject to equitable tolling in appropriate cases. * * *

We base our conclusion on the following considerations. First, the AEDPA "statute of limitations defense . . . is not 'jurisdictional.'" It does not set forth "an inflexible rule requiring dismissal whenever" its "clock has run." * * *

Second, the statute here differs significantly from the statutes at issue in *United States v. Brockamp,* 519 U.S. 347 (1997), and *United States v. Beggerly,* 524 U.S. 38 (1998) * * *. * * *

* * * AEDPA's statute of limitations, unlike the statute at issue in *Brockamp,* does not contain language that is "unusually emphatic," nor does it "reiterat[e]" its time limitation. * * * Moreover, in contrast to the 12-year limitations period at issue in *Beggerly,* AEDPA's limitations period is not particularly long. And unlike the subject matters at issue in both *Brockamp* and *Beggerly* – tax collection and land claims – AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home. * * *

* * *

Third, and finally, we disagree with respondent that equitable tolling undermines AEDPA's basic purposes. We recognize that AEDPA seeks to eliminate delays in the federal habeas review process. But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles. * * * When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the "writ of habeas corpus plays a vital role in protecting constitutional rights." It did not seek to end every possible delay at all costs. The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

* * *

III

We have previously made clear that a "petitioner" is "entitled to equitable tolling" only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. In this case, the "extraordinary circumstances" at issue involve an attorney's failure to satisfy professional standards of care. * * *

We have said that courts of equity "must be governed by rules and precedents no less than the courts of law." But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." In emphasizing the need for "flexibility," for avoiding "mechanical rules," we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity." The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

We recognize that, in the context of procedural default, we have previously stated, without qualification, that a petitioner "must 'bear the risk of attorney error.'" *Coleman v. Thompson,* 501

U.S. 722, 752-753 (1991). But *Coleman* was "a case about federalism," in that it asked whether *federal* courts may excuse a petitioner's failure to comply with a *state court's* procedural rules, notwithstanding the state court's determination that its own rules had been violated. Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules, an inquiry that does not implicate a state court's interpretation of state law. Holland does not argue that his attorney's misconduct provides a substantive ground for relief, nor is this a case that asks whether AEDPA's statute of limitations should be recognized at all. Rather, this case asks how equity should be applied once the statute is recognized. And given equity's resistance to rigid rules, we cannot read *Coleman* as requiring a *per se* approach in this context.

In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. * * * [G]iven the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments. Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove "egregious" and can be "extraordinary" even though the conduct in question may not satisfy the Eleventh Circuit's rule. * * *

We have previously held that "a garden variety claim of excusable neglect," such as a simple "miscalculation" that leads a lawyer to miss a filing deadline, does not warrant equitable tolling. * * * [T]he facts of this case present far more serious instances of attorney misconduct. * * *

IV

The record facts that we have set forth in Part I of this opinion suggest that this case may well be an "extraordinary" instance in which petitioner's attorney's conduct constituted far more than "garden variety" or "excusable neglect." To be sure, Collins failed to file Holland's petition on time and appears to have been unaware of the date on which the limitations period expired – two facts that, alone, might suggest simple negligence. But, in these circumstances, the record facts we have elucidated suggest that the failure amounted to more: Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

A group of teachers of legal ethics [as *Amici Curiae*] tells us that these various failures violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client. * * * And in this case, the failures seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence.

We do not state our conclusion in absolute form, however, because more proceedings may be necessary. The District Court rested its ruling not on a lack of extraordinary circumstances, but rather on a lack of diligence – a ruling that respondent does not defend. We think that the District Court's conclusion was incorrect. The diligence required for equitable tolling purposes is "'reasonable diligence,'" not """maximum feasible diligence,""" Here, Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins – the central impediment to the pursuit of his legal remedy – removed from his case. And, the *very day* that Holland discovered that his AEDPA clock had expired due to Collins'

failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Because the District Court erroneously relied on a lack of diligence, and because the Court of Appeals erroneously relied on an overly rigid *per se* approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief. We are "[m]indful that this is a court of final review and not first view." And we also recognize the prudence, when faced with an "equitable, often fact-intensive" inquiry, of allowing the lower courts "to undertake it in the first instance." Thus, because we conclude that the District Court's determination must be set aside, we leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.

* * *

Justice ALITO, concurring in part and concurring in the judgment.

* * * I agree with the Court's conclusion that equitable tolling is available under AEDPA. I also agree with much of the Court's discussion concerning whether equitable tolling is available on the facts of this particular case. In particular, I agree that the Court of Appeals erred by essentially limiting the relevant inquiry to the question whether "gross negligence" of counsel may be an extraordinary circumstance warranting equitable tolling. As the Court makes clear, petitioner in this case has alleged certain facts that go well beyond any form of attorney negligence, and the Court of Appeals does not appear to have asked whether those particular facts provide an independent basis for tolling. * * *

Although I agree that the Court of Appeals applied the *wrong* standard, I think that the majority does not do enough to explain the *right* standard. It is of course true that equitable tolling requires "extraordinary circumstances," but that conclusory formulation does not provide much guidance to lower courts charged with reviewing the many habeas petitions filed every year. I therefore write separately to set forth my understanding of the principles governing the availability of equitable tolling in cases involving attorney misconduct.

I

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." * * * * * * In my view * * * it is useful to note that several broad principles may be distilled from this Court's precedents.

First, our prior cases make it abundantly clear that attorney negligence is not an extraordinary circumstance warranting equitable tolling. In *Lawrence v. Florida,* 549 U.S. 327, 336 (2007), the Court expressly rejected the petitioner's contention that "his counsel's mistake in miscalculating the limitations period entitle[d] him to equitable tolling." * * *

* * *

While *Lawrence* addressed an allegation of attorney miscalculation, its rationale fully applies to other forms of attorney negligence. Instead of miscalculating the filing deadline, for example, an attorney could compute the deadline correctly but forget to file the habeas petition on time, mail the petition to the wrong address, or fail to do the requisite research to determine the applicable deadline. In any case, however, counsel's error would be constructively attributable to the client.

Second, the mere fact that a missed deadline involves "gross negligence" on the part of counsel does not by itself establish an extraordinary circumstance. As explained above, the principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control. * * * That rationale plainly

applies regardless whether the attorney error in question involves ordinary or gross negligence. * * *

Allowing equitable tolling in cases involving *gross* rather than *ordinary* attorney negligence would not only fail to make sense in light of our prior cases; it would also be impractical in the extreme. Missing the statute of limitations will generally, if not always, amount to negligence, and it has been aptly said that gross negligence is ordinary negligence with a vituperative epithet added. Therefore, if gross negligence may be enough for equitable tolling, there will be a basis for arguing that tolling is appropriate in almost every counseled case involving a missed deadline. * * * This would not just impose a severe burden on the district courts; it would also make the availability of tolling turn on the highly artificial distinction between gross and ordinary negligence. That line would be hard to administer, would needlessly consume scarce judicial resources, and would almost certainly yield inconsistent and often unsatisfying results. * * *

* * *

II

Although attorney negligence, however styled, does not provide a basis for equitable tolling, the AEDPA statute of limitations may be tolled if the missed deadline results from attorney misconduct that is not constructively attributable to the petitioner. In this case, petitioner alleges facts that amount to such misconduct. * * * In particular, he alleges that his attorney essentially "abandoned" him, as evidenced by counsel's near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years. Petitioner also appears to allege that he made reasonable efforts to terminate counsel due to his inadequate representation and to proceed *pro se,* and that such efforts were successfully opposed by the State on the perverse ground that petitioner failed to act through appointed counsel. * * *

If true, petitioner's allegations would suffice to establish extraordinary circumstances beyond his control. Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word. * * * That is particularly so if the litigant's reasonable efforts to terminate the attorney's representation have been thwarted by forces wholly beyond the petitioner's control. * * *

Justice SCALIA, with whom Justice THOMAS joins as to all but Part I, dissenting.

* * * In my view § 2244(d) leaves no room for equitable exceptions, and Holland could not qualify even if it did.

I

* * *

* * * It is fair enough to infer, when a statute of limitations says nothing about equitable tolling, that Congress did not displace the default rule. But when Congress has *codified* that default rule and specified the instances where it applies, we have no warrant to extend it to other cases.

II

A

Even if § 2244(d) left room for equitable tolling in some situations, tolling surely should not excuse the delay here. * * * Because the attorney is the litigant's agent, the attorney's acts (or failures to act) within the scope of the representation are treated as those of his client, and thus such acts (or failures to act) are necessarily not extraordinary circumstances.

* * * Where a State is constitutionally obliged to provide an attorney but fails to provide an effective one, the attorney's failures that fall below the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984), are chargeable to the State, not to the prisoner. But where the client has no right to counsel – which in habeas proceedings he does not – the rule holding him responsible for his attorney's acts applies with full force. Thus, when a state habeas petitioner's appeal is filed too late because of attorney error, the petitioner is out of luck – no less than if he

had proceeded *pro se* and neglected to file the appeal himself.

* * *

Faithful application of *Lawrence* should make short work of Holland's claim. * * * The relevant time period extends at most from November 10, 2005 – when the Florida Supreme Court affirmed the denial of Holland's state habeas petition – to December 15, 2005, the latest date on which § 2244(d)'s limitations period could have expired. Within that period, Collins could have alerted Holland to the Florida Supreme Court's decision, and either Collins or Holland himself could have filed a timely federal habeas application. Collins did not do so, but instead filed a petition for certiorari several months later.

Why Collins did not notify Holland or file a timely federal application for him is unclear, but none of the plausible explanations would support equitable tolling. By far the most likely explanation is that Collins made exactly the same mistake as the attorney in *Lawrence – i.e.*, he assumed incorrectly that the pendency of a petition for certiorari in this Court seeking review of the denial of Holland's state habeas petition would toll AEDPA's time bar under § 2244(d)(2). * * *

* * *

C

* * *

* * * [I]t is not even clear that Holland acted with the requisite diligence. * * * [T]here were other reasonable measures Holland could have pursued. For example, * * * Holland might have filed a "'protective'" federal habeas application and asked the District Court to stay the federal action until his state proceedings had concluded. He also presumably could have checked the court records in the prison's writ room – from which he eventually learned of the state court's decision – on a more regular basis. And he could have sought permission from the state courts to proceed *pro se* and thus remove Collins from the equation.[10] * * *

* * *

* * * [T]he Constitution does not empower federal courts to rewrite, in the name of equity, rules that Congress has made. Endowing unelected judges with that power is irreconcilable with our system, for it "would literally place the whole rights and property of the community under the arbitrary will of the judge," arming him with "a despotic and sovereign authority," 1 J. Story, Commentaries on Equity Jurisprudence § 19, p. 19 (14th ed.1918). The danger is doubled when we disregard our own precedent, leaving only our own consciences to constrain our discretion. Because both the statute and *stare decisis* foreclose Holland's claim, I respectfully dissent.

On remand, Judge Patricia Seitz of the United States District Court for the Southern District of Florida granted Holland habeas relief on March 30, 2012, in a lengthy opinion concluding that he was twice improperly denied the right to represent himself at trial.

10. Holland made many pro se filings in state court (which were stricken because Holland was still represented), and he sought to have new counsel appointed in Collins's place, but did not seek to proceed *pro se*. * * *

FLOW CHART OF PETITIONS FOR HABEAS CORPUS FILED BY STATE PRISONERS UNDER 28 U.S.C. § 2241 *et seq.* AS AMENDED BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

1. Is this a **capital case**?

   If **YES**, has the state established a mechanism for the appointment and compensation of counsel to indigent defendants for state collateral review? [The Department of Justice is proposing regulations with regard to what is required.]

   If **YES**, the special procedures in 28 U.S.C. Title 154, §§ 2261-2266 apply, including a 180-day statute of limitations and strict time limits for court processing of the case. (Not covered on this chart.)

   If **NO**, go to 2.

2. Has more than **one year elapsed** since conviction not counting time during which petition for certiorari on direct appeal and petition for state collateral review were pending? 28 U.S.C. § 2244(d).

   If **NO**, go to 3.

   If **YES**, – was there equitable tolling, was there a state-created impediment to filing, is the claim is based on a right newly recognized by the Supreme Court and made retroactive by the Supreme Court, or is the claim based on a factual predicate that could not have been previously discovered with due diligence? 28 U.S.C. § 2244(d).

   If **YES,** go to 3

   If **NO**, petition **DISMISSED**.

3. Is this petitioner's **first petition** or is this a second or successive petition?

   If a **FIRST PETITION**, go to 4.

   If a **SUCCESSIVE PETITION** –

   Was claim previously heard on federal habeas corpus?

   If **YES** –

   Claim **DISMISSED**. 28 U.S.C. § 2244(b)(1).

   If **NO** –

   Can petitioner establish to a three-judge panel of the Court of Appeals –

   (A) that the claim relies on a new retroactive rule of law that was previously unavailable; or

   (B) (i) the factual predicate for the claim could not have been discovered previously

through due diligence; *and*

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish ***by clear and convincing evidence*** that, ***but for the constitutional error***, ***no reasonable factfinder would have found the petitioner guilty***. 28 U.S.C. § 2244(b)(2).

If yes, go to 4.

If no, claim **DISMISSED**.

4. Is the claim based on the **Fourth Amendment**?

   If **NO**, go to 5.

   If **YES** –

   Did the state court provide an opportunity for a **full and fair hearing** on the claim?

   If **YES**, claim **DISMISSED**. *Stone v. Powell*, 428 U.S. 465 (1976).

   If **NO**, go to 5.

5. Have state remedies been **exhausted** for all claims (*i.e.* presented to every state court that was available to hear the claim under state law)?

   If **YES**, go to 6.

   If **NO**, court can **DENY** claims on merits, notwithstanding failure to exhaust. 28 U.S.C. § 2254(b), or **DISMISS** for failure to exhaust.

6. Was the claim properly presented and **addressed on the merits** in the state proceedings?

   If **YES**, go to 7.

   If **NO** (*i.e.*, the state court found waiver or procedural default)

   Can petitioner establish **cause and prejudice** for the procedural default or that failure to address the claim would result in a substantial miscarriage of justice? *Wainwright v. Sykes*, 433 U.S. 72 (1977).

   If **NO**, claim **DISMISSED**.

   If **YES**, go to 7.

7. Does petitioner seek the retroactive benefit of a "new rule" of law? *Teague v. Lane*, 489 U.S. 288 (1989).

   If **NO**, go to 8.

   If **YES** –

Is it a rule that may be applied retroactively under the exceptions set out in *Teague* (decriminalizes conduct, "watershed rule" of procedure)?

If **YES**, go to 8.

If **NO**, petition **DISMISSED**.

8. Have all the facts necessary for resolution of the claim been developed in the state court proceedings?

If **YES**, go to 9.

If **NO** –

(A) does the claim rely on –

(i) a new rule of law ***made retroactive*** to cases on collateral review ***by the Supreme Court***; or

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

(B) are the facts underlying the claim sufficient to establish ***by clear and convincing evidence*** that ***but for the constitutional error***, ***no reasonable factfinder would have found the applicant guilty***. 28 U.S.C. § 2254(e).

If **YES**, go to 9.

If **NO**, claim **DISMISSED.**

9. If the claim was adjudicated on the merits in the state court proceedings, was the state court decision ***contrary to***, or did it involve an ***unreasonable application*** of, clearly established federal law ***as determined by the United States Supreme Court***, or was the state court decision based on an unreasonable determination of facts? 28 U.S.C. § 2254(d)(1) ; *Williams v. Taylor*, 529 U.S. 362 (2000) (Opinion of O'Connor, J.). *See also* 2254(e)(2).

If **YES**, go to 10.

If **NO**, claim **DISMISSED**.

10. Did the constitutional violation have substantial or injurious effect or influence in determining the jury's verdict? *Brecht v. Abrahamson*, 507 U.S. 619 (1992).

If **YES**, relief granted (*i.e.*, conviction or sentence vacated; state may retry petitioner)

If **NO**, claim **DENIED**.

LEGAL STANDARDS AND BURDENS OF PRODUCTION AND PROOF

The following is provided as a reference to help in reading the materials and in keeping track of the various standards and ways of meeting them that are discussed in the cases.

With regard to any legal issue it is critical to discern which party has the responsibility for raising an issue, the applicable procedural rules, which party has the initial *burden of production* of evidence and whether that burden shifts to the other party at any time, what the governing legal standard is, and which party has the ultimate *burden of proof* with regard to meeting the standard. Another critical inquiry is the standard of review employed by appellate courts in reviewing issues.

As we have seen, in order to raise an issue on appeal, a party must comply with the applicable procedural rules, such as rules requiring that issues be raised at a certain time in the trial court. For example, a jurisdiction may require than any challenge to the composition of the jury venire be made at the time the jury is "put upon" the defendant (in other words, that challenge be raised before trial) as Georgia did in *Aubrey Williams v. Georgia*, 349 U.S. 375 (1955).

All jurisdictions require that any objection to the admission of evidence be made at the time the other party attempts to admit that evidence. This is the "contemporaneous objection" rule discussed in *Wainwright v. Sykes,* 433 U.S. 72 (1977), earlier in these materials. If a party anticipates that certain objectionable evidence is going to be presented by the other side, a motion *in limine* can be filed before trial asking the court to rule on the admissibly of the evidence before trial. Usually a party is required to submit proposed jury instructions or object to any instruction the court plans to give before the instructions are given in order to preserve the issue for appeal.

Failure to comply with a procedural rule may forfeit any review of the issue on appeal and in state and federal post-conviction review as demonstrated by *Wainwright v. Sykes*. As a general rule, issues must be presented to trial courts and ruled upon by the trial judge before they can be raised on appeal. Issues must be decided *on the merits* by state courts before they can be considered by federal courts in habeas corpus review.

The Governing Standard

What is a party required to establish in order to prevail on a claim? The prosecution is required to establish each element of a crime beyond a reasonable doubt in order to obtain a conviction. But with regard to other issues, a party may be required to establish certain facts by a preponderance of the evidence or by clear and convincing evidence. Often the standard will be a constitutional one that is set by the Supreme Court and can be changed by the Court. But with regard to habeas corpus and some issues, Congress may set the standard and has the power to change it.

The critical issue in a case may be what standard should apply. For example, in *Swain v. Alabama*, 380 U.S. 202 (1965), the Supreme Court established a very demanding – almost impossible – standard for establishing intentional racial discrimination in a party's exercise of peremptory strikes during jury selection. After the standard was widely criticized by commentators and even members of the Court and the practice of discriminatory use of strikes continued, the Court modified the standard in *Batson v. Kentucky*, 476 U.S. 79 (1986). We will examine those standards later in the course.

See also, e.g., the previous discussion of the standard adopted by the Court in *Schlup v. Delo*, 513 U.S. 298 (1995), with regard to the showing required by the Court to establish a miscarriage of justice to obtain habeas corpus review of a claim that has been procedurally defaulted and the modification of that standard by Congress in the Anti-terrorism and Effective Death Penalty Act.

As in *Swain*, the standard adopted may determine the outcome because the party which has the responsibility of meeting it will not be able to do so. Another example is the standard that

must be satisfied to show selective prosecution – that the prosecutor took a particular course of action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte v. United States*, 470 U.S. 598, 610 (1985). This is virtually impossible to prove, so no one prevails on a claim of selective prosecution. In other contexts, the Court has applied a less demanding standard of intentional discrimination, allowing inferences to be drawn from disparate impact and shifting the burden of production with regard to explanations for such impact. to resolve issues of intent.[1] An even less demanding standard would not require proof of intent, such as a showing of an impermissible *risk* of discrimination, which Justice Douglas put forward in *Furman v. Georgia*.

Allocation of Burdens of Production and Proof

Allocation of the burdens of production and proof are of critical importance, particularly the burden of proof. If a party is unable to meet its burden of proof, it will not prevail on the issue. As previously noted, allocation of the burden of proof – *i.e.,* which side is assigned by statute, rule or caselaw the burden of meeting the applicable standard – may determine the outcome, particularly if it is difficult or impossible to meet.

For example, if the prosecution strikes a disproportionate number of African Americans during jury selection, no legal issue is presented unless defense counsel objects. If such an objection is made based on the defense assertion that the prosecution has engaged in intentional racial discrimination in striking the jurors, the defense has the ultimate burden of proving intentional discrimination. But the defense first has the burden of producing evidence to establish a *prima facie* case, *i.e.*, to present evidence, which may include the prosecution's pattern of striking and any other evidence relevant to the intent of the prosecutor, which raises an inference of intentional racial discrimination.[2] If the defense fails to establish a *prima facie* case, the objection will be overruled. If the defense establishes a *prima facie* case, the burden *of production* shifts to the prosecution to give race neutral reasons for the strike.[3] The burden of *proof* remains on the defendant. Once the prosecution has given reasons, the judge then determines, based on all of the evidence, whether the defense has carried its burden of proving intentional racial discrimination.[4]

The Applicable Burden of Proof

The burden of proof is the degree of certainty a party must satisfy with its evidence to meet the applicable standard.

The standard of proof for most legal issues, including the one required to prevail in a civil case, is by a *preponderance of the evidence*, which means more likely than not. A plaintiff in a civil case must prove its case – *e.g.,* establish that the defendant was negligent and caused harm to the plaintiff – by a preponderance of the evidence. Most issues in criminal cases except for the guilt of the accused or the existence of aggravating circumstances, are resolved by proof by a preponderance of the evidence. If the factfinder – whether judge or jury – finds the evidence in equipoise – evenly balanced – it must decide the issue against the party with this burden of proof.[5]

A party may be required in some instances to establish by *clear and convincing evidence* that it meets the applicable standard. This is an intermediate standard lying between "preponderance of the evidence" and "proof beyond a reasonable doubt." While the standard is defined differently in different jurisdictions, the

1. *See*, *e.g.*, *Washington v. Davis*, 426 U. S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977); *Castaneda v. Partida*, 430 U.S. 482 (1977).

2. *Purkett v. Elem*, 514 U.S. 765 (1995).

3. *Id*. *See also Miller-El v. Dretke*, 545 U.S. 231 (2005).

4. *Purkett* at 767-68; *Miller-El* at 252.

5. *See, e.g., Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997); *Concrete Pipe v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993).

Supreme Court has defined the clear and convincing evidence standard to mean that the proposition must be based on "reasonable, substantial and probative" evidence.[6]

The highest standard of proof is *beyond a reasonable doubt*. If a jury or judge trying the guilt of one accused of a crime has a reasonable doubt with regard to any element of the crime, it must return a verdict of not guilty.[7]

The least demanding standard is *probable cause* – a showing that a certain thing is probably true. A law enforcement officer must show probable cause in order to obtain a warrant to arrest someone or search a business or home.[8] A person arrested for an offense may be detained or required to post bond upon a showing that there is probable cause to believe that he or she committed the offense.[9] A grand jury may return an indictment accusing someone of a crime only if it finds probable cause to believe that the person committed the crime.

A standard that is more demanding than probable cause but less demanding that preponderance of the evidence is *substantial probability*. The Supreme Court has adopted this standard with regard to establishing some claims. For example, a defendant who asserts that the prosecution failed to disclose exculpatory evidence as required by the due process clause must not only prove that the evidence was not disclosed, but also establish "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[10] With regard to claims of ineffective assistance of counsel, a defendant is required to show that there is a substantial probability that any deficiencies in the legal representation provided by counsel affected the verdict.[11] The Supreme Court has also held that for a defendant to prevail on a claim of prosecutorial misconduct in closing argument, he or she must establish a substantial probability that the improper argument affected the outcome.[12]

The states and the federal government have some leeway in allocating the burden of proof and deciding what burden of proof to place on parties. For example, with regard to a defendant's mental competence to stand trial, some jurisdictions require the prosecution to establish the defendant's competency beyond a reasonable doubt. Other jurisdictions require the prosecution to prove competency by clear and convincing evidence; others by a preponderance of the evidence. And some states require *the defendant* to prove incompetence by a preponderance of the evidence.[13]

However, there are constitutional limits on the allocation of proof and the burden of proof assigned to defendants. A jurisdiction may not shift the burden of proof to the defendant with

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6. *Woodby v. INS*, 385 U.S. 276, 281 (1966).

7. *In re Winship*, 397 U.S. 358 (1970). An early definition of the 'reasonable doubt' standard required jurors to be satisfied to a "moral certainty" that every element of a crime had been proven by the prosecution. *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850). However, in *Cage v. Louisiana*, 498 U.S. 39 (1990), the Supreme Court held that an instruction using "moral certainty" violated the Constitution in that the phrase could be interpreted by a reasonable juror as allowing a finding of guilt based on a degree of proof below reasonable doubt. But in *Victor v. Nebraska*, 511 U.S. 1 (1994), the Court held that a charge containing the words "moral certainty" did not necessarily violate the due process clause if it was not likely, based on the entire charge, that the jury understood the words to suggest a standard of proof lower than due process requires.

8. *Illinois v. Gates*, 462 U.S. 213 (1983).

9. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

10. *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley,* 473 U.S. 667, 682 (1985) (Blackmun, J., joined by O'Connor, J.); *id* at 685 (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

11. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

12. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

13. *Medina v. California*, 505 U.S. 437 (1992).

regard to any element of the crime at trial.[14] However, jurisdictions may get around this to some extent by the way they define crimes.[15] The Supreme Court has held that a state may not require the defendant to prove competence to stand trial by clear and convincing evidence because the trial of a person who more likely than not is incompetent (that is, one who has shown by a preponderance of the evidence – but not by clear and convincing evidence – that he is incompetent) would violate due process.[16]

Standards of Appellate Review

When an appellate court reviews issues raised on appeal, the parties and the reviewing court must determine the basis for the trial court's ruling and the standard of review is to be applied.

A trial court's ruling may be based upon interpretations of legal principles and conclusions of law, findings of fact or a mixed determination of law and fact. For example, the facts may not be in dispute and the trial court may be required to interpret the law and apply it to those facts. Or the governing law may be quite clear, but the trial court may be required to resolve disputed facts based upon the credibility of witnesses and its consideration of other evidence. For example, in the case of Ricky Rector, the trial judge resolved the issues of fact regarding Rector's ability to understand the proceedings and assist his counsel. Other rulings may be involve "mixed questions" of law and fact; that is, they are made based upon a combination of determinations of fact and interpretations of legal principles.

A trial court may set out in an order or opinion its findings of fact and conclusions of law that are the basis for its ruling. Often, however, busy trial judges rule on a complex issue involving both legal and factual issues with a single word. For example, a motion may be "granted" or "denied" after consideration of evidence and legal arguments. A motion to excuse a prospective juror based on the argument that the juror cannot be fair and impartial because of exposure to pretrial publicity, attitudes on the death penalty or for some other reason may be "granted" or "denied." And often objections during trial are "sustained" or "overruled" without further elaboration.

In these instances, it may be impossible to determine to what extent the trial court ruled based on its understanding of the law, its fact findings, or the way it applied the law to the facts. A reviewing court may presume that the judge understood the law and ruled based upon his or her findings with regard to the facts. Such a presumption is applied with regard to rulings dismissing prospective jurors during jury selection.

The determination of what kind of question – legal, factual or a mix of the two – the trial court decided often determines the standard applied by the reviewing court. A reviewing court is likely to decide legal conclusions *de novo*, meaning that it will make its own independent assessment of the legal conclusions of the trial judge. Reviewing courts are much more deferential to rulings of trial courts based in whole or part on findings of fact. After all, the trial court saw the witnesses and was in a better position to assess their credibility.

A reviewing court may employ a *clearly erroneous* standard, as did the Arkansas Supreme Court in the *Rector* case. The United States Supreme Court has said that under this standard, if a trial court's "account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[17] However, the reviewing court will reverse if, after review of the "entire evidence," it "is left with the definite and firm

14. *See Sandstrom v. Montana*, 442 U.S. 510 (1979).

15. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

16. *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

17. *United States v. Yellow Cab*, 338 U.S. 338, 342 (1949).

conviction that a mistake has been committed."[18]

Even more deferential is the *abuse of discretion* standard. For example, whether to grant a continuance of a trial is usually reviewed under an abuse of discretion standard. Such decisions are left primarily to the trial court and its exercise of discretion in those areas will be reversed only if the reviewing court finds that the trial court abused its discretion.

Courts may announce and apply other standards in various contexts. For example, the Supreme Court has held that a trial court's findings of impartiality of a potential juror despite the juror's exposure to pretrial publicity may "be overturned only for 'manifest error.'" *Patton v. Yount*, 467 U.S. 1025 (1984) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

Harmless Error

The harmless error rule authorizes appellate courts to affirm a conviction when the defendant's guilt is clear, even though he may have received an unfair trial. This was not always the case. Justice Frankfurter wrote for the Court in 1946 "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."[19] However, four decades later, a majority of the Supreme Court would observe: "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."[20] This is one of many areas in which the Court has substituted trial by judge for trial by jury.

The Supreme Court held in *Chapman v. California*, 386 U.S. 18 (1967), that even violations of the Constitution did not require reversal if the government convinced the reviewing court beyond a reasonable doubt "that the error complained of did not contribute to the verdict." However, some errors, like admission of a coerced confession, could never be treated as harmless error. *Id.* at 23 n. 8.

However, almost a quarter of a century later, five Justices concluded that the admission of a coerced confession could be harmless error after all. *Arizona v. Fulminante*, 499 U.S. 279, 307-310 (1991) (Opinion of Rehnquist, C.J., joined by O'Connor, Kennedy, Scalia and Souter, JJ.).[21] Chief Justice Rehnquist identified two types of constitutional error in *Fulminante*. The first is "'trial error' – error that occurs during presentation of the case to the jury." *Id.* at 307-08. The Court held that such errors may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.*

Chief Justice Rehnquist, writing for a majority of the Court, identified the second class of constitutional error as structural defects," which "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," are not "simply an error in the trial process itself," and involve speculative inquires into what "might have been." *Id.* at 309-310. Such errors include racial discrimination,[22] the denial of counsel at a critical stage of the proceedings,[23] interference with counsel's

18. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Hernandez v. New York*, 500 U.S. 352, 369 (1991) (applying the clearly erroneous standard in reviewing a trial court's conclusion that the prosecution did not intent to discriminate in striking Latino jurors); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); Fed. R. Civ. Pro. 52(a).

19. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

20. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

21. Another combination of justices concluded that the error was not harmless in Fulminante's case. 499 U.S. at 296-304 (Opinion of White, J., joined by Marshall, Blackmun, Kennedy and Stevens, JJ.).

22. *Vasquez v. Hillery*, 474 U.S. 254 (1986).

23. *See Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment); *Mempa v. Rhay*, 389 U.S. 128

representation at a critical stage,[24] the improper disqualification of privately retained counsel,[25] the denial of an impartial judge,[26] the denial of a public trial,[27] the absence of the defendant from trial,[28] and a defective reasonable-doubt instruction.[29] These errors require reversal without an inquiry into what impact they had on the outcome of the trial. Automatic reversal is also required in part because it is impossible to assess the harm to a defendant of these errors.[30]

In *Fulminante*, the majority observed that most constitutional error would fall into the first category and thus be subject to the harmless error analysis. Thus, a reviewing court is to hold an error "harmless" if believes, beyond a reasonable doubt, from its review of the record, that defendant would have been found guilty despite the error. Its inquiry is not whether the evidence was sufficient to convict the defendant, but whether the State has established beyond a reasonable doubt that the error did not contribute to the conviction. *Id.*, at 296 (Opinion of White, J., joined by Marshall, Blackmun, Kennedy and Stevens, JJ.).

Of course, judges cannot know what verdict a jury would have returned in the absence of the error. Reviewing courts do not observe the testimony of the witnesses and thus lack the accepted means of determining their credibility. They cannot know whether the error diverted the jury from a consideration of the properly admitted evidence or contributed in some other way to the jury's verdict. Judges may find the evidence of guilt "overwhelming" and, as a result, find any error "harmless" from a review of the record. The jury may not have found the case so easy to decide. While the reasonable doubt standard is a requirement of a high degree of certainty on the part of the judges in finding an error harmless, it allows judges to make the ultimate determination of guilt even where there was constitutional error.

With regard to errors that do not involve a violation of the Constitution – such as violation of statutes or rules of procedure – the Supreme Court has held that reversal is required only if the defendant establishes that the error had "substantial or injurious effect or influence in determining the jury's verdict."[31] The Court later held that this standard applies in federal habeas corpus proceedings.[32]

In certain instances, the Supreme Court has also

(1967) (sentencing).

24. *Geders v. United States*, 425 U.S. 80 (1976), (trial court prevented counsel from consulting with defendant during an overnight recess); *but see Perry v. Leeke*, 488 U.S. 272, 280 (1989) (order preventing a defendant from consulting with his lawyer during a brief recess immediately after defendant's direct testimony and before cross-examination upheld).

25. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)

26. *See, e.g., Neder v. United States*, 527 U.S. 1 (1999); *Edwards v. Balisok*, 520 U.S. 641 (1997). *But see Bracy v. Gramley*, 520 U.S. 899 (1997) (indicating a showing of prejudice is required in habeas corpus action to establish claim that trial judge was not impartial).

27. *Waller v. Georgia*, 467 U.S. 39 (1984).

28. *Snyder v. Massachussetes*, 291 U.S. 97 (1934).

29. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

30. *See*, *e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (finding that harmless error does not apply where racial discrimination is established because "when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance").

31. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). *See also* Federal Rule of Criminal Procedure 52(a), which instructs federal courts to "disregar[d]" "[a]ny error . . . which does not affect substantial rights."

32. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

made a harmless error analysis a part of the determination of whether there was a constitutional violation in the first place. Thus, in order to establish a violation of due process for a failure to disclose exculpatory evidence, a defendant must establish a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[33] In order to establish a violation of the Sixth Amendment right to counsel, a defendant must establish a substantial probability that but for counsel's errors the outcome of the trial would have been different.[34] To prevail on a claim of prosecutorial misconduct in closing argument, a defendant must establish a substantial probability that the improper argument affected the outcome.[35] And the Court has held that where a witness is unavailable because of deportation by the government, due process is violated "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."[36] Thus, in these critical areas, instead of first determining whether there was an error and then assessing its impact on the proceedings, the assessment of the impact is part of deciding whether a constitutional error occurred.

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33. *United States v. Bagley,* 473 U.S. 667, 682 (1985) (Blackmun, J., joined by O'Connor, J.); *id* at 685 (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

34. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). *See also* the discussion of the elements of an ineffectiveness claim in *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006).

35. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

36. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982).