DEFENSES TO THE PRECLUSIVE RULE OF WAINWRIGHT v. SYKES

Jon M. Kinnamon†

I. INTRODUCTION

It has long been established that before a petition for writ of habeas corpus will be reviewed by the federal courts, the habeas petitioner must first present his substantive claim to all tiers of the state court system. Included in this exhaustion requirement is the necessity of properly and timely objecting to any constitutional infirmities which occur during the state trial court proceeding. In fact, up until recently, the only instance where a failure to properly and timely assert the constitutional deficiency in the lower court was not fatal to the substantive constitutional claim was where such failure was deemed *not* to have been a "deliberate bypass" of the petitioner's available state remedies.[1] However, in *Wainwright v. Sykes,*[2] the United States Supreme Court implemented a new, more restrictive approach for federal habeas review of a constitutional claim not properly or timely asserted in the state trial proceedings. In *Sykes* the Court held that the failure of the defendant to raise a constitutional claim by *contemporaneous objection* at the state trial barred consideration of that claim in a subsequent federal habeas corpus proceedings. However, to prevent the defendant in the state trial from becoming a victim of a miscarriage of justice, the Supreme Court provided an exception to the *Sykes'* forfeiture policy. Upon a showing by the petitioner of: (1) *cause* for failing to make the objection, and (2) *prejudice* resulting from the alleged violation, a state procedural default will not bar consideration of the petitioner's claim.[3]

As the result of *Sykes,* whenever the state asserts a procedural defense to a state prisoner's petition,[4] alleging that petitioner failed to comply with a state procedural rule, counsel for the petitioner must initially ascertain whether the constitutional ground upon which he now seeks relief in the federal courts may be barred by a procedural defect which occurred in the state trial.[5] Depending upon the nature of the state proceeding, the subject

† B.A., University of Iowa (1963); M.A., University of Iowa (1971); J.D., University of Iowa (1966); Partner, Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, Iowa.

1. *See* Fay v. Noia, 372 U.S. 391 (1963).

2. 433 U.S. 72 (1977).

3. 433 U.S. at 87.

4. *See* 28 U.S.C. § 2254 (1976) which provides that the federal courts shall entertain an application for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

5. The Court in *Sykes* emphasized that it is only a failure to comply with state procedural rules that is reviewable in a federal habeas corpus proceeding, noting that "it is a well-

matter of the claim, and the policy underlying the procedural rule, counsel must ascertain which party or parties, severally or in combination, had the obligation to ensure that the defendant was afforded his substantive constitutional guarantees.[6] In some instances, the trial court and the state may be responsible under state procedure for preventing constitutional infirmities from occurring in the state trial proceedings.[7] Therefore, the state and the trial court must share or shoulder the responsibility for the constitutional deficiency, and review of the habeas petition in federal court may not be precluded.

Upon determining that the basis for petitioner's federal habeas corpus claim is a failure to comply with a state procedural rule, and that the burden for such compliance was on the habeas petitioner, counsel for the habeas applicant must determine whether the *Sykes* "cause-prejudice" test[8] or the *Fay v. Noia* "deliberate bypass" test[9] is controlling in evaluating the availability of federal habeas corpus relief. Thereafter, it will become necessary for counsel to consider the viability of any of the defenses which have been formulated for either test. This Article will limit its focus to a discussion of the "cause-prejudice" defense to the procedural default rule of *Sykes*.

II. The Holding and Rationale of Wainwright v. Sykes

In *Wainwright v. Sykes*,[10] a case involving a federal habeas corpus petition, a Florida prisoner first challeged the use of inculpatory statements, which he asserted were inadmissible due to his lack of understanding of his *Miranda* warnings. At the state trial, the petitioner failed to comply with a Florida procedural rule which required that a motion to suppress a confession be made before or during trial. The United States Supreme Court held that the petitioner's failure to make a timely objection precluded federal habeas corpus relief. Mr. Justice Rehnquist, writing for the majority, stated:

> We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that petitioner's 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 which would have prevented direct review here.[11]

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established principle of federalism that a state decision resting on an adequate foundation of state *substantive* law is immune from review in the federal courts." 433 U.S. at 81.

6. For example, in *Sykes*, respondent argued that the Florida "contemporaneous objection rule" (Fla. R. Crim. P. 3.190(i)) placed "the burden on the *trial judge* [in the absence of objection by the *accused*] to raise on his own motion the question of the admissibility of any inculpatory statement." 433 U.S. at 85. Even though the respondent's argument was rejected in *Sykes*, *id.* at 85-86, its consideration of the issue and its review of the Florida state court decisions interpreting the above rule, indicates that the Court is sensitive to such an argument.

7. *See, e.g.*, footnotes 75 and 77 *infra*.

8. 433 U.S. at 87.

9. 372 U.S. at 438.

10. 433 U.S. at 75.

11. *Id.* at 86-87. *See* Henry v. Mississippi, 379 U.S. 433 (1965).

The Supreme Court also observed that: "If a criminal defendant thinks that an action of the state court is about to deprive him of a federal constitutional right, there is every reason for his following state procedure in making known the objection."[12] The Court indicated that many interests are served by a contemporaneous objection rule,[13] noting that "[a]ny procedural rule which encourages the result that [a criminal] trial be free of error as possible is thoroughly desirable . . . ."[14] In arriving at its decision, the Court alluded to Mr. Justice Powell's concurring opinion in *Estelle v. Williams*,[15] wherein he viewed a failure to object "at a time when a substantial right could have been protected" as the same as a knowing waiver.[16] As such, *Sykes* seems to follow the trend of recent Supreme Court decisions which find default and waiver synonomous.[17]

The *Sykes* test limits the well-known dicta of *Fay v. Noia*.[18] *Fay* intimated that federal habeas corpus review of an alleged constitutional claim would be forfeited whenever the failure to make a constitutional challenge was attributable to a knowing waiver or deliberate bypass of available state procedures.[19] Prior to *Sykes*, the Eighth Circuit followed the less restrictive *Fay* test for determining whether a habeas corpus petitioner had waived a claim due to a deliberate bypass of a state procedure: the federal habeas claim was deemed waived only if "knowingly and understandingly" the peti-

12. 433 U.S. at 90.
13. *Id.* at 88-89.
14. *Id.* at 90.
15. 425 U.S. 501, 513 (1976).
16. 433 U.S. at 89 n.13.
17. In Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977), Judge Tuttle writes:

> As originally established by *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), waiver of constitutional rights was a consensual concept, depending on 'intentional relinquishment or abandonment of a known right,' 304 U.S. at 464, 58 S.Ct. at 1023. The person making the waiver had to know he had the right and had to deliberately forego its assertion. Later opinions transposed 'waiver' terminology to cases involving procedural default or forfeiture. In this type of case, the only known fact is that the defendant failed to claim his rights at the time when a procedural rule requires them to be asserted upon penalty of forfeiture; why he failed to act, or even whether he knew that he might claim the right in question, is immaterial to the operation of the forfeiture rule. A defendant who failed to claim constitutional protections at appropriate junctures in the trial process was often said to have 'waived' those rights. This would be high fiction, of course, under the *Johnson* standard because in a forfeiture case the 'waiver' is a penalty enforced by the court, unrelated to whether the failure was considered tactical choice or plea bargain made by the defendant and his lawyer.
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> The confusion was understandable because for a time the same standard was used in federal habeas corpus to govern both (1) the finding of a *Johnson v. Zerbst* waiver, and (2) the determination whether a procedural default grave enough to preclude habeas adjudication of the merits of a belatedly asserted claim had taken place.

557 F.2d at 508.

18. 372 U.S. 391 (1963).
19. 433 U.S. at 85.

tioner made a "considered choice" to waive his claim.[20] Under the *Fay* test, a calculated or tactical decision to bypass state procedure always precluded raising the substantive claim in a subsequent federal habeas corpus action. "It is the sweeping language of *Fay v. Noia,* going far beyond the facts of the case eliciting it . . ."[21] which the Supreme Court rejected in *Sykes*. Whatever validity remains of *Fay* will be considered in a subsequent section.[22]

III. The Sufficiency of Objections To Preserve Error

In *Sykes,* there was no timely objection to the admission of the defendant's confession on the constitutional grounds later advanced in the habeas corpus application.[23] As a prerequisite for filing a habeas corpus petition, a review of the state trial record is necessary in any given case to determine whether *Sykes* is applicable. When trial counsel has alerted the state trial court to the nature of the claim being pursued on federal review, *Sykes* is not controlling.[24] Though trial counsel may not have specifically used the talisman phrase "due process," or anchored his claim in a specific constitutional provision, counsel may have preserved error when the record discloses counsel urged to the trial court the underlying factual basis for the claim.

Numerous cases have been handed down which demonstrate the above concept. For example, it has been held that a state prisoner is required to present to the state courts only "the substance" of his federal claim; he need "not cit[e] 'book and verse on the federal constitution.' "[25] Whenever the record shows the state trial court was aware of the constitutional considerations involved in the claim, and the record shows that these considerations were later preserved by the defendant in the state appellate courts, a federal habeas court will decline to find a procedural default. The petitioner's constitutional claim must be fairly presented to the trial court and to the state appellate court:[26]

Under Iowa law, both the Iowa Rules of Criminal Procedure and Iowa case precedent provide that error ordinarily will not be noticed on appeal unless the ground for objection was stated at trial.[27] This established procedure is equivalent to the contemporaneous objection requirement considered in *Wainwright v. Sykes.* Frequently, an objection must not only be made at the trial court level, but asserted at a particular time in the trial proceedings

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20. Rinehart v. Brewer, 561 F.2d 126, 129 (8th Cir. 1977).

21. 433 U.S. at 87-88.

22. *See* notes 95-100 *supra* and accompanying text.

23. 433 U.S. at 75.

24. *See id.* at 87 (Court speaks in terms of the "cause-prejudice" test as being applicable only to a state procedural *waiver*).

25. Picard v. Connor, 404 U.S. 270, 278 (1971) (quoting Daugherty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)).

26. 404 U.S. at 275. *See also* United States *ex rel.* Johnson v. Vincent, 507 F.2d 1309 (2d Cir. 1974).

27. *See, e.g.,* State v. Holbrook, 261 N.W.2d 480, 483-84 (Iowa 1978).

before error will be deemed preserved.

In *Collins v. Auger,*[28] the Eighth Circuit considered the issue of whether an objection was sufficient to preserve constitutional error. The court ruled that defense counsel's objection at trial to the admission of petitioner's confession on the basis of the physician-patient privilege, the hearsay rule and self-incrimination was sufficient to warrant review in federal court of petitioner's claim that the admission of the confession violated his due process rights. The criteria used to determine the sufficiency of the objection was whether the state trial court, as well as the state appellate court, was alerted to the evidentiary and constitutional basis for excluding the confession.[29]

The State of Texas invoked a habeas corpus defense in the case of *Jiminez v. Estelle,*[30] relying upon the procedural rule that unless a defendant objects to the admissibility of evidence against him on the very ground on which he later seeks relief on appeal or habeas corpus, such ground is not later cognizable.[31] Jiminez' trial counsel objected to the state's introduction of former convictions on the unsupportable grounds that the introduction constituted hearsay and violated Jiminez' confrontation rights. In refusing to grant habeas relief, the Fifth Circuit, as well as the Texas Court of Appeals, required a *specific* objection that the use of prior uncounselled convictions for the purpose of enhancing punishment was a violation of due process.[32]

An objection at the state trial level must be sufficient to raise the constitutional claim that is to be pursued in the state appellate court and in the federal habeas court. The Fifth Circuit, in *Thomas v. Estelle,*[33] held that the state's "correct contemporaneous objection rule" was applicable to a federal habeas corpus petition.[34] In reviewing a Texas conviction, the court considered whether an objection made by defense counsel had alerted the trial court to the substantive claim. Testimony by a police officer concerning statements made to him at the scene by a non-testifying witness (one Minnie Patton) was objected to by defense counsel on the ground that trial counsel had questions to ask the non-testifying witness. Defense counsel articulated the objections as follows: "I will renew my objection to anything that was said by Minnie, because she can be brought down here."[35] In holding that the objection was sufficient, the Fifth Circuit did not require counsel to cite the specific constitutional amendment which was a proper basis for the objection, or to expressly refer to the confrontation clause.[36]

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28. 577 F.2d 1107 (8th Cir. 1978).
29. *Id.* at 1109.
30. 557 F.2d 506 (5th Cir. 1977).
31. *Id.* at 507. *See, e.g.,* Aldrighetti v. State, 507 S.W.2d 770 (Tex. Crim. App. 1974); Spead v. State, 500 S.W.2d 112 (Tex. Crim. App. 1973).
32. *Id. See* Ex Parte Gill, 509 S.W.2d 357 (Tex. Crim. App. 1973).
33. 582 F.2d 939 (5th Cir. 1978).
34. *Id.* at 940.
35. *Id.* at 941.
36. *Id.*

Even though the *Jiminez* case seems to mandate a specific objection at trial setting forth the precise constitutional basis, the vast majority of the cases addressing the sufficiency of the objection stress substance over form. That is, as long as the trial and appellate courts are alerted to the nature of the substantive claim. Subsequent habeas corpus review will be available in the federal courts; *Sykes* is not controlling because a procedural default is avoided by determining whether the substantive error was sufficiently preserved in a proper and timely manner.

IV. Assertions of Error Not Timely Made

Chapter 813 of the Iowa Code, which sets forth the Iowa Rules of Criminal Procedure, requires the assertion of constitutional claims at a specific time.[37] However, these procedural rules authorize certain exceptions.[38] The exceptions allow a defendant to assert an untimely claim upon a showing of good cause. Accordingly, a claim is not irretrievably lost at the trial court level until all procedural mechanisms for reviving an untimely claim have been exhausted and final judgment entered.

When a timely objection to evidence is not required by a specific statutory provision, it is well established by Iowa case law that failure to object to evidence or to move to strike evidence at the time the record is made, precludes a party from asserting on appeal that the admission of evidence was error.[39] An objection to a question must be timely made and precede the answer given by a witness.[40] In *State v. Jones*,[41] the Iowa Supreme Court held: "[W]here, as here, the objection is late and follows the answer, a motion to strike, coupled with an application to have the objection precede the answer, or an excuse for tardiness, must be made."[42]

Furthermore, Iowa follows a "correct objection" rule. Under that rule, an objector has the duty to indicate the specific grounds of inadmissibility so as to alert the trial court to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible, in the offer of evidence.[43] In *State v. Droste*,[44] the Iowa Supreme Court noted:

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37. Iowa Code § 813.2 (Iowa R. Crim. P. 2.4(c)) (1979) provides:
CONSTITUTIONAL OBJECTIONS. Rules excluding evidence on the ground that it was acquired by unlawful means are not applicable. Motions to suppress must be made to the trial court as provided in rule 10, subsection 2 of the rules of criminal procedure.
Iowa Code § 813.2 (Iowa R. Crim. P. 10.3) (1979) provides:
EFFECT OF FAILURE TO RAISE DEFENSES OR OBJECTIONS. Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial under this rule shall constitute waiver thereof, but the court for good cause shown, may grant relief from such waiver.

38. *See, e.g.* Iowa Code § 813.2 (Iowa R. Crim. P. 10.3) (1979).

39. *E.g.*, State v. King, 225 N.W.2d 337, 341 (Iowa 1975).

40. *See* State v. Cook, 261 Iowa 1341, 158 N.W.2d 26 (1968).

41. 271 N.W.2d 761 (Iowa 1978).

42. *Id.* at 167.

43. *See* State v. Williams, 207 N.W.2d 98 (Iowa 1973); State v. Johnson, 272 N.W.2d 480,

> The court in which the evidence is offered is entitled to know on what grounds it is challenged and should not be left to speculate as to whether the evidence is in fact subject to some infirmity which the objection does not point out. A specific objection, if overruled, cannot avail the objector except as to the ground specified since the court is not bound to look beyond the ground of the objection thus stated. Every ground of exception which is not particularly specified is to be considered as abandoned.[45]

In determining whether an alleged error can be considered in a habeas action, federal courts will consider whether defense counsel raised the alleged error at the state trial court level, even though the objection may have been untimely. For example, in *Di Paola v. Riddle,*[46] the defendant was tried for possession of marijuana in Virginia state court. During the trial, the defendant's attorney sought suppression of the marijuana on grounds that there was no warrant and no probable cause for the search at the time of the arrest. Notwithstanding the objections, the case went to the jury. Subsequently, the defendant's attorney learned that the defendant had a valid objection to the seizure of the evidence on the basis of the "no knock - forcible entry" rule. Even though defendant's counsel did file post-trial motions, he did not seek an order to set aside the verdict or to award a new trial upon the ground of after-discovered evidence, which, under Virginia law, provided the defendant with a factual basis to strike the fruits of the search from evidence. The Fourth Circuit concluded that the objection had been sufficiently raised, even though it was untimely: "considerations of timeliness do not require a recitation of facts which are unknown to lawyer and client and they are not chargeable by law with knowledge of them."[47]

Di Paola would have probably been decided the same had Iowa law been applied. Under Iowa law, this situation of newly-discovered evidence as a ground for an untimely motion to suppress would apparently qualify as an exception to a procedural forfeiture, based "upon good cause supported by affidavit."[48]

An assertion of a constitutional claim, though untimely, may render state forfeiture inapplicable. The raising of error, albeit late, eliminates many of the policy arguments that *Sykes* held were crucial in upholding a procedural bar. For example, an untimely assertion provides the trial judge with an opportunity to rule on the cause for delay as well as on the claim itself.

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484 (Iowa 1978) (wherein the court held that constitutional questions must be preserved in the same manner as any other issue).

44. State v. Droste, 232 N.W.2d 483 (Iowa 1975).

45. *Id.* at 487.

46. 581 P.2d 1111 (4th Cir. 1978).

47. *Id.* at 1113.

48. IOWA R. CRIM. P. 11.1, 23.2(a). Rule 11.1 requires a defendant to move for suppression of evidence obtained through unlawful search and seizure before trial unless the party was then aware of the factual grounds for the motion or the opportunity to do so did not arise. Similarly, rule 23.2 allows application for a new trial after judgment where newly discovered evidence is the basis for the motion.

Further, an assertion, although again untimely, demonstrates counsel is not standing silently by at the trial but is demonstrating a willingness to contest the admissibility of crucial evidence at the earliest available opportunity after the factual or legal grounds for the objection become known.

In *Salter v. Johnson*,[49] the Sixth Circuit upheld a state procedural default and strictly applied an Ohio Rule of Criminal Procedure similar to an Iowa provision regarding timely filing of a motion to suppress evidence.[50] The holding of *Salter* is quite similar to the holding in the *Di Paola* case. In *Salter*, the court acknowledged the failure of trial counsel to timely assert the claim, but mentioned the failure of counsel to utilize available corrective procedures subsequent to the default while the case was still pending at the trial court level. The motion which was eventually filed by defendant's trial counsel contained a conclusory allegation that "the affidavit used to procure the search warrant contains false and misleading statements."[51] The Sixth Circuit concluded: "No affidavit in support of this allegation was filed with the trial court, either prior to trial or at the conclusion of the state's case when the motion was renewed, or later, when in a motion for new trial this claim was raised again."[52] Since no evidentiary support had been offered in either the state trial court or in the federal district court for the allegation that the allegedly false statements in the search warrant were knowingly made with intent to deceive the court, or recklessly made to establish probable cause, the Sixth Circuit concluded that there existed no valid basis for the claim.[53]

V. The Procedural Context

A habeas corpus application may be based on an alleged constitutional deprivation which, pursuant to state law, the trial court, rather than the defendant, had the ultimate burden to recognize and avoid. For example, rule 8.2(b) of the Iowa Rules of Criminal Procedure requires a judge taking a guilty plea to address the defendant in open court and to comply with specific guidelines which codify prevailing federal standards. Furthermore, the trial court has the statutory obligation under rule 6(3) of the Iowa Rules of Criminal Procedure to instruct the jury on lesser included offenses deemed to be included in a public offense, "even though such instructions have not been requested."[54] Prior to the adoption of new revisions to the Code, failure of the

49. 579 F.2d 1007 (6th Cir. 1978).
50. *Compare* Ohio R. Crim. P. 12(c) *with* Iowa R. Crim. P. 10.4.
51. 579 F.2d at 1008.
52. *Id.*
53. *Id.* at 1009.
54. Iowa R. Crim. P. 6(3) provides:
In cases where the public offense charged may include some lesser offense, it is the duty of the trial court to instruct the jury not only as to the public offense charged but as to all lesser offenses of which the accused might be found guilty under the indictment and upon the evidence adduced, even though such instructions have not been requested.

trial court to instruct the jury on lesser included offenses had to be objected to by counsel in order to be preserved for review on appeal.[55]

Constitutional errors inhering in the final instructions must still be objected to by defense counsel or they will be deemed waived. However, error in an instruction may be raised for the first time in a motion for new trial, but the rule is subject to two exceptions: 1) a party may expressly waive the right to object for the first time in a motion for new trial, or 2) if the instruction was correct as given but not as explicit as the party may have desired, he must request an additional instruction before the jury is charged.[56] Further, rule 18.8(a) of the Iowa Rules of Criminal Procedure expressly allows the court, on its own motion as well as on motion by the defendant, to order the entry of judgment of acquittal if the evidence is insufficient to maintain a conviction of such offense or offenses.[57]

In further reviewing the procedural context of a default in the Iowa court system, rule 21 of the Iowa Rules of Criminal Procedure plays a critical role. According to this provision, the Iowa legislature grants the supreme court and the district courts authority to adopt rules governing procedures in the district court which are not inconsistent with the Iowa Rules of Criminal Procedure and the applicable statutes. *Wainwright v. Sykes* applies to a failure of *defense counsel* to raise a contemporaneous objection in accordance with state practice.[58] Under *Sykes,* a procedural default precludes the assertion of the invalidity of a conviction on the very ground which might have been asserted at trial, because there exists a valid procedural ground to uphold the validity of the conviction. However, in Iowa, under local rules or district court rules, the burden to avoid a constitutional deprivation may be placed on the *state,* vitiating the requirement of *Sykes* that defendant's counsel raise an objection.[59]

The Iowa District Court, Sixth Judicial District, has adopted local rules of practice and procedure which appear to complement the Iowa Rules of Criminal Procedure.[60] These rules regulate the supervision of a prisoner in open court and strictly prohibit a prisoner from being brought into open court in handcuffs or other physical restraints without the permission of the judge.[61]

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55. *See, e.g.,* State v. Veverka, 271 N.W.2d 744 (Iowa 1978).

56. State v. Brown, 172 N.W.2d 152, 157 (Iowa 1976). *See* State v. Veverka, 271 N.W.2d at 749.

57. IOWA R. CRIM. P. 18.8(a) provides in part:

> The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses changed in the indictment after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

58. 433 U.S. at 87-88.

59. IOWA R. CRIM. P. 29(1) provides: "[t]he Supreme Court and district court shall have authority to adopt rules governing procedure in the district court which are not inconsistent with these rules and applicable statutes."

60. IOWA CODE § 813 (1979).

61. *See* Iowa Sixth Judicial District, RULES OF PRACTICE and PROCEDURE 4.4 (1976).

Under its local rules, the Sixth District places an affirmative duty upon the prisoner's custodian to take reasonable measures to avoid exposing the defendant to the view of the jurors while he is in physical restraints.[62] The legal considerations behind this local rule are the presumption of innocence and the right of a defendant to be tried in a public forum free from partiality. Frequently, security measures and the use of physical restraints are a by-product of the inability of a prisoner to make bail, and not indicative of his guilt or innocence. Therefore, presenting the defendant in the courtroom in handcuffs or physical restraint may amount to prejudicial error. In Iowa, the burden rests on the state to see that such an error does not occur.

The approach of the Sixth Judicial District of Iowa must be compared, however, to a recent United States Supreme Court decision addressing a similar issue. In *Estelle v. Williams,*[63] the habeas petitioner did not object at trial to being tried in prison attire, and the Supreme Court held that because the petitioner had not been compelled to stand trial in prison garb, his petition should not be granted. The court refused to place the burden of ascertaining whether the respondent deliberately went to trial in jail clothes upon the trial judge. Once a defendant has had the assistance of counsel, under our adversary system the vast array of strategic and tactical trial decisions rests with the accused and his attorney.[64] To change this approach "would rewrite the duties of trial judges and counsel in our legal system."[65] The local rules of the Iowa district court discussed above[66] do not relieve that defendant of the burden of objecting to being tried in prison attire. It is only where local procedure rules impose a duty on state officers or the court itself to prevent constitutional irregularities that the *Wainwright v. Sykes* criteria may be inapplicable.

Though state procedural rules may place a duty upon the trial judge to ensure that a defendant is not deprived of fundamental rights, such rules can be judicially construed so to remove this responsibility from the trial judge. In *Sykes,* the United States Supreme Court viewed the Florida procedural rule and Florida case precedent in such a manner: "[r]espondent has advanced no explanation whatever for his failure to object at trial, and as the proceedings unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself."[67] Even though the Court refused to hold that the Florida rule placed the burden on the trial court of questioning the admissibility of any inculpatory statements, the fact that the Court took the time to consider the issue and to review the applicable Florida state court decisions interpreting the Florida rule indicates that the Court is sensitive to such an argument.

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62. *Id.*
63. 425 U.S. 501 (1976).
64. *Id.* at 512. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).
65. 425 U.S. at 512.
66. *See* note 61 *supra.*
67. 433 U.S. at 91 (footnote omitted).

A state trial court is not under a duty to recognize every error not raised by defense counsel during the trial proceedings. *Wainwright v. Sykes*[68] holds that the trial court is not under an obligation to examine *sua sponte* the voluntariness of a proffered self-incriminating statement of the accused, when the defendant fails to object. In *Sykes*, the burden of preserving error is instead placed on defense counsel. However, as the above cases demonstrate, under different facts, constitutional claims and procedural rules, a procedural default may exist where the ultimate burden of avoiding a constitutional deprivation is placed on the prosecution or on the trial court,[69] and defense counsel should be aware of such a possibility.

The possibility of having the burden of objecting to any constitutional deficiency being placed on the state is just one procedural peculiarity which defense counsel should be aware of when preparing a habeas petition. There may even be instances where habeas corpus relief is granted when neither the defendant nor the trial court judge recognized the constitutional defect.

For example, in *Bromwell v. Williams*,[70] federal habeas corpus relief was granted even though the defendant's counsel in the state court proceeding failed to object to the trial procedure that formed the basis of alleged constitutional error in the habeas petition. The rationale for granting the writ was that neither the defendant, nor his counsel, nor the prosecutor, nor even the trial judge conceived of a constitutional violation being committed when the non-consolidated charges, and the charges before the jury, were discussed in front of the entire voir dire panel on a consolidation motion by the prosecution. The *Bromwell* court held the *Sykes* requirement of "contemporaneous objection" to be inapplicable to the procedural context of a discussion before the jury panel and further held that the error committed may have impermissibly affected the jury's consideration of the charges severally.[71] Since defense counsel, as well as all other participants in the discussion, did not realize error was being committed, the court found justification for the fact that no challenge was made to the voir dire panel or to any individual panel members at trial. The failure to recognize the error in the first instance prevented defense counsel from taking advantage of other procedural remedies subsequent to the discussion. The court further found that the practice of arguing consolidated motions in front of the jury panel was a common one due to limitations of space inside the courthouse.[72] No party recognized the prejudicial implications of the discussion and the court refused to place the burden

68. *Id.* at 85-86.

69. As, for example, the defendant's sixth amendment right to a speedy trial. Under Barker v. Wingo, 407 U.S. 514 (1972), the burden of bringing the criminal defendant to trial in a reasonable time is not waived by the defendant's failure to demand his right to a speedy trial. *See also* IOWA R. CRIM. P. 27(2), which provides: "[a]pplications for dismissals . . . may be made by the county attorney or the defendant or the court on its own motion."

70. 445 F. Supp. 106 (D. Md. 1976).

71. *Id.* at 114, 120.

72. *Id.* at 114.

of realizing and objecting to this procedure solely on defendant's counsel. Additionally, the court concluded that the defendant would gain no advantage by informing the jury panel of other non-consolidated charges in a manner violative of his constitutional rights.[73] Finally, the court refused to find an absence of prejudice resulting from the alleged defect: "[n]o one can be certain that prejudice did in fact exist—but there is substantial likelihood that it did so exist. That substantial likelihood would seem to establish sufficient possibility of prejudice to meet the 'prejudice' prong of the 'cause' —'prejudice' exception . . . ."[74]

Another procedural argument which defense counsel has available relates to whether the procedural default in any way relates to the constitutional claim being asserted in the habeas petition. A procedural default should be examined to determine what claim or claims are forfeited as a consequence of that default, as well as to determine what party or parties were responsible for the default. In *Lockett v. Blackburn,*[75] the prosecutor willfully concealed named eyewitnesses whose testimony was material to the case. Neither the petitioner nor the state trial judge knew that the state had deliberately made key witnesses unavailable for defendant's trial. Both the lack of knowledge of the petitioner at time of trial regarding the availability of the eyewitnesses and the duty imposed on the prosecution to see justice done at trial were important considerations in examining the issue of whether there was a procedural default which would preclude federal habeas corpus review. In *Lockett,* the court held that, although defendant's trial counsel had committed a procedural default relative to properly filing a motion for continuance of the trial due to the unavailability of witnesses, that default was *unrelated* to the prosecution's failure to present witnesses' testimony which was material to the case in order to assure a just resolution at the time of trial.[76] As such, federal habeas corpus review was not precluded.

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73. The court stated:

> None of the participants in Brownwell's trial realized the constitutional implications of the practice of arguing a consolidated motion in the presence of a voir dire panel. That practice was a common one, attributable to the structural constraints of the Dorchester County Courthouse. As discussed above, there would seem to be no tactical advantage to a defendant in foregoing his objection to that practice . . . .

Id.

74. *Id.* at 120.

75. 571 F.2d 309 (5th Cir. 1978).

76. *Id.* at 312 n.2, *quoting from* Berger v. United States, 295 U.S. 78 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about

A habeas petition based on the accused's lack of competency at the state court level is another area which has produced results of which defense counsel should be aware. In *Suggs v. La Vallee,*[77] the Second Circuit considered the effect of the failure of a prisoner, at a sentencing proceeding in state court, to adequately assert an objection that he was incompetent at the time of his guilty plea. The court found that such a failure did not operate to preclude a prisoner from later asserting the claim in habeas corpus proceedings since, if the pleas were made while defendant was incompetent, the pleas were violative of due process and were void *ab initio.*[78] The trial judge has an affirmative duty to conduct, *sua sponte,* an on-the-record examination of the accused to ascertain whether he fully understands the consequences of a guilty plea.[79] The *Suggs* court ruled that "a defendant cannot waive his right to attack a conviction rendered without *Boykin* safeguards simply because he did not inform the trial judge of the judge's failure to discharge his duties at the time the error was committed. The accused does not have the burden of insuring that his plea is voluntary, that onus rests on the court."[80]

Because of peculiar factors present in *Suggs,* the Second Circuit held that the sentencing court was obligated to inquire into Suggs' competency at the time of his plea to determine the necessity of conducting a second *Boykin* colloquy.[81] Suggs told the sentencing court that he felt he had been incompetent at the time he entered the guilty pleas, and the record before the sentencing judge showed that the judge taking the guilty pleas had committed Suggs to a mental hospital because he felt something was wrong with the accused. The record further disclosed that another judge had made a determination of incompetency, based upon that ordered examination, and consequently the sentencing judge was alerted to the duty to determine the voluntariness of the pleas.[82] *Boykin v. Alabama* establishes that a trial judge may not accept a guilty plea "without an affirmative showing that it was intelligent and voluntary."[83] Applying this standard, the Second Circuit held that Suggs never pleaded guilty while he was both competent and informed of his *Boykin* rights,[84] and therefore it was proper for him to raise the competency question in his petition for habeas corpus relief.

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a just one.
295 U.S. at 88.

77. 570 F.2d 1092 (2d Cir. 1978), *cert. denied,* 99 S. Ct. 290 (1978).
78. *Id.* at 1116.
79. Boykin v. Alabama, 395 U.S. 238, 243 (1969).
80. 570 F.2d at 1116-17. *See* Boykin v. Alabama, 395 U.S. 238 (1969).
81. 570 F.2d at 1117.
82. Because the court in *Suggs* focused upon the failure of the sentencing judge to make *Boykin* inquiries, rather than upon Suggs' failure to object before the sentencing court to the previous invalid pleas, the court did not consider the question of whether a defendant's failure to timely raise a general incompetency claim in the state courts forecloses federal habeas review. *Id.* at 1117 n.62.
83. 395 U.S. at 242.
84. 570 F.2d at 1119.

As the cases discussed in this subsection clearly suggest, there are numerous procedural arguments which defense counsel can effectively assert to withdraw his particular habeas petitioner from the ambit of *Sykes* notwithstanding the existence of a procedural default. Generally speaking, the federal courts seem to be looking at the totality of circumstances and striving for fundamental fairness. A recent Eighth Circuit decision concisely summarizes the courts' major considerations in this area. In *Rhinehart v. Brewer,*[85] the Eighth Circuit analyzed the line of Supreme Court cases, culminating in *Sykes,* that imposed forfeiture of a substantive claim on a state procedural ground absent a showing of cause and prejudice. The court examined the procedural context of the default to make a determination of cause and prejudice. In its analysis, the court emphasized the following factors: (1) the ineffectiveness of counsel, (2) the fundamental character of constitutional rights at stake, and (3) the overall lack of fairness of the proceedings, including the judge's impropriety.[86] An emphasis on facts falling in any of these three categories may produce a sufficient rationale for finding the *Sykes* holding inapplicable.

VI. Fourth Amendment Habeas Review—"A Particular Category"

Failure to make any attempt to bar the introduction of evidence, either by objection or by a motion to suppress, constitutes a waiver of a fourth amendment claim.[87] If the state affords a procedural mechanism for suppressing evidence which the defendant fails to utilize, then the petitioner may not present a fourth amendment claim in a federal habeas corpus petition.[88]

When there is *no* procedural default, federal habeas corpus review of the fourth amendment claim of a state prisoner is limited to the issue of whether the prisoner was provided an opportunity for full and fair litigation of his or her claim in the state court system. In *Stone v. Powell,*[89] the United States Supreme Court precluded habeas corpus relief because the petitioner had a fair opportunity to urge the illegality of a search and seizure either before or during trial. In fact, petitioner had fully litigated that claim in the state forum.

In applying *Stone,* the federal courts have placed an emphasis on the word "opportunity." In *Hines v. Auger,*[90] the Eighth Circuit held that despite possible disagreement "as to the merits of the petitioner's claim were we sitting as an appellate court of first resort, we construe *Stone* to mandate that we not second-guess our state brethren, in cases such as this which present murky questions of fourth amendment probable cause."[91] *Stone* overrules the

85. 561 F.2d 126 (8th Cir. 1977).
86. *Id.* at 130 n.6.
87. *See* Wainwright v. Sykes, 433 U.S. 72 (1977).
88. *See* Shane v. Iowa, 581 F.2d 727 (8th Cir. 1978).
89. 428 U.S. 465 (1976).
90. 550 F.2d 1094 (8th Cir. 1977).
91. *Id.* at 1099.

federal policy of *Fay* which endorsed the fullest opportunity for plenary federal judicial review of constitutional rights involving personal liberty.[92] *Stone* only allows habeas review where the state provides no corrective procedures to redress fourth amendment violations, or where the defendant is precluded from utilizing the state process because of a breakdown in the state mechanism.[93]

In a state proceeding, it seems appropriate to place on the state as well as on the defense counsel the requirement to bring to the attention of the trial court evidentiary issues which may involve a constitutional controversy relating to fourth and fifth amendment claims. Certainly, the state is interested in having a court determine whether a fellow citizen has been unlawfully deprived of constitutional guarantees. Further, the prosecution can better assess its case against the accused by securing a pretrial ruling by the court on the admissibility of evidence. Because the state may have overwhelming evidence of guilt which is admissible, in addition to that evidence which is subject to constitutional challenge, the prosecutor may seek to avoid adducing merely cumulative evidence at trial which may later be the basis for overturning a conviction. Accordingly, to protect fellow citizens from constitutional infringements and to obtain a realistic assessment of the evidence against the accused, the prosecution, as well as defense counsel, should be obligated to alert the trial court to the need for a pretrial evidentiary hearing. Such a mutual obligation would better assure that the accused is apprised of the nature of the evidence to be adduced against him and such a procedure alerts defense counsel to the need of ascertaining whether such evidence was obtained illegally.

The Sixth Judicial District of Iowa has adopted a local rule which requires the prosecution to inform the court whether the state intends to use a statement of the accused or the fruit of a search or seizure at time of trial.[94] Because of the mandate in rule 21 of the Iowa Rules of Criminal Procedure that the local rules must complement the Rules promulgated in Iowa Code chapter 813, the failure of the state to follow local procedure and bring the issue of the admissibility of evidence to the attention of the court would not relieve defense counsel of his duty under Iowa Rule of Criminal Procedure 11 to file a motion to suppress. However, the local rule assists in preventing a procedural default, because defense counsel is alerted to potential constitutional infringements.

92. *See* 372 U.S. at 424.

93. *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915). *But cf.* Sallie v. State of North Carolina, 587 F.2d 636, 640-41 (4th Cir. 1978) (wherein the court interpreted *Stone v. Powell* as not barring the issuance of a writ of habeas corpus on sixth amendment grounds if the defense attorney fails to object to the admission of evidence obtained in a manner which clearly violated the fourth amendment).

94. Iowa Sixth Judicial District, RULES OF PRACTICE and PROCEDURE 4.2 (1976).

VII. Failure To Appeal and Failure To Raise a Claim When an Appeal Is Taken

In determining whether a federal petitioner may be granted habeas relief if he has bypassed direct appeal in state court, it is the *Fay* test, rather than the standards set forth in *Sykes*, which apparently governs the question of waiver of appeal. *Fay v. Noia* now appears limited to its facts.[95] A close reading of *Sykes* discloses that the deliberate bypass test of *Fay* was rejected only insofar as it had been declared applicable to a procedural default during the state trial. However, in his concurring opinion, Chief Justice Burger found merit in treating a waiver of appeal differently than trial claims.[96] The former entails a decision of the defendant himself, while the *Sykes* test pertains to defaults committed by trial counsel at the time of trial.

The Supreme Court declined to expressly state whether the new *Sykes* standard was applicable to a case in which the habeas corpus petitioner bypassed his right to appeal his conviction directly.[97] In his concurrence, Chief Justice Burger stated that the *Fay* test of deliberate bypass remained applicable to such matters as waiver of appeal, which implicated "the exercise of volition by the defendant himself with respect to his own federal constitutional rights."[98] The Chief Justice concluded that the cause and prejudice standard applied to matters requiring a contemporaneous objection at trial, where the "critical procedural decision" rested with the trial counsel rather than with his client.[99] Thus, it appears that the court is more apt to find a habeas petitioner bound by a bypass with respect to a strategic or tactical decision of the kind normally committed to counsel during a trial than with respect to decisions of the sort that ultimately rest with the defendant himself.[100]

In *Boyer v. Patton*,[101] the Third Circuit considered the effect of a petitioner's failure to file an appeal. The court adopted the standards and findings used by the district court magistrate, and stated that:

> due to [Boyer's] inexperience and confusion as to his right to appointed counsel even after conviction and sentencing, he refrained from requesting appointed counsel, and was left with no legal advisor whatsoever; and thus, it cannot be unequivocably stated that he deliberately failed to file an appeal to advance his case in another direction.[102]

At trial, Boyer's counsel had failed to object to a reference to Boyer's silence at the time of his arrest, and petitioner argued this omission deprived him of

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95. *See* 433 U.S. at 88 n.12.
96. *Id.* at 92 (Berger, C. J., concurring).
97. *Id.* at 88 n.12.
98. *Id.* at 92 (Berger, C. J., concurring).
99. *Id.* at 93.
100. *See id.* at 91 n.14.
101. 579 F.2d 284 (3rd Cir. 1978).
102. Boyer v. Patton, 436 F. Supp. 890 (E.D. Pa. 1977) (report of the Magistrate).

reasonable competent assistance of counsel. Petitioner further argued that the admission of prison guards' testimony at his trial constituted reversible error under state law, and was a constitutionally impermissible violation of the accused's fifth amendment right.[103] The *Boyer* court found that "[n]o issue of ineffectiveness of counsel was raised in *Wainwright*;" nor did the court discuss which waiver standard was applicable to a failure to take a direct appeal.[104]

Although the *Boyer* case failed to clarify the question of whether the *Fay* test or the *Sykes* test is applicable to the determination of whether the failure to pursue a state court appeal will preclude federal habeas relief, the court's discussion of the ineffective assistance of counsel issue may become significant. In *Boyer,* petitioner's trial counsel was questioned at a post-conviction hearing regarding his failure to object, and admitted that the prison guards' testimony "might well be objectionable" even though he proffered no explanation for his failure to object.[105] Since the failure to object to error of constitutional dimensions invites review of the trial attorney's competence, circuit courts will be faced with more habeas suits based on this claim of ineffective assistance of counsel.[106] It is unfortunate that the Third Circuit did not see fit to more thoroughly examine the issue of ineffective assistance of counsel in the habeas corpus setting so as to provide some guidance for future cases. Notwithstanding, it is doubtful that courts will be receptive to this argument, because such an approach undermines the impact of *Sykes.*[107]

Not only do questions arise as to the availability of federal habeas corpus relief where the petitioner has failed to perfect a state court appeal, but the same issue is presented where the petitioner has undertaken a state court appeal but the constitutional infirmity forming the basis of the habeas petition was not raised in that appeal. In *Evans v. Maggio,*[108] the Fifth Circuit considered the effect of a post-trial default of a challenge to the composition of the juries; this challenge was preserved at trial, but not urged on appeal. The Fifth Circuit determined that petitioners were never informed by counsel that the jury composition issue was not pursued on appeal, and could not therefore "understandingly and knowingly" have chosen to forego appeal on this constitutional claim. According to Louisiana jurisprudence, issues raised at trial which are not briefed and argued on appeal are considered "abandoned" or waived.[109] The *Evans* court considered the constitutional challenge waived unless the petitioners could satisfy the *Sykes* "cause and

103. 579 F.2d at 285.

104. *Id.* at 286.

105. *Id.* at 285.

106. For a discussion of the various minimum standards of attorney competency currently applied by the federal courts of appeal, *see* Maryland v. Marzulo, 98 S. Ct. 1885 (1978) (White, J., dissenting from the denial of a writ of certiorari).

107. For comments regarding the scope of the *Sykes* standard, *see* 433 U.S. at 88 n.12.

108. 557 F.2d 430 (5th Cir. 1977).

109. *Id.* at 433.

prejudice" test.[110] In the court's consideration of petitioners' claim, the fact the petitioners waited ten years after waiving the jury composition issue on appeal before seeking federal collateral relief worked to the petitioners' detriment.[111]

In the case of *Frazier v. Dzarnetsky,*[112] a similar issue was presented when the petitioner perfected an appeal but unjustifiably failed to raise a constitutional claim of the denial of a speedy trial. The *Frazier* court considered whether petitioner's failure to raise on appeal a sixth amendment speedy trial claim constituted a bypass of state procedures so as to bar habeas review. The *Frazier* court relied on Second Circuit authority which had concluded that while the decision to appeal is uniquely for the defendant himself, the decision of which legal issues will be urged on appeal is uniquely for the defendant's lawyer.[113] Finding that the petitioner had not made any showing of "cause" and "prejudice," the *Frazier* court held the habeas applicant was bound by his counsel's decision not to press the sixth amendment speedy trial issue on appeal.[114] The court suggested two ways in which petitioner could have circumvented counsel's failure to appeal the issue: either by vigorous objection to counsel's decision,[115] or by arguing that counsel was ineffective.[116]

Not only does the failure to present a properly and timely objected-to error on appeal raise questions as to the justification for such a default, it may also raise the question of whether the habeas petitioner has exhausted his state remedies. In *Shane v. State of Iowa,*[117] the Eighth Circuit recently returned a habeas corpus case to the state forum because it concluded the petitioner had not exhausted his state remedies. Though a petitioner is generally precluded from obtaining post-conviction relief because of a failure to urge a claim on appeal in the state court system, the Eighth Circuit pointed out that the Supreme Court of Iowa has allowed post-conviction relief for "substantial reasons" shown.[118] Accordingly, since the failure to raise a claim on appeal does not *absolutely* bar a state post-conviction remedy, the petitioner must pursue this remedy before pursuing a federal habeas action.[119] Because the Eighth Circuit appears to encourage the Iowa courts to follow a policy of reviewing constitutional claims not raised on direct appeal due to

110. *Id.* at 434.

111. *Id.*

112. 439 F. Supp. 735 (S.D.N.Y. 1977).

113. *See* Ennis v. Le Vre, 560 F.2d 1072, 1075 (2d Cir. 1977).

114. 439 F. Supp. at 738. *See* United States *ex rel.* Carlone v. Manson, 447 F. Supp. 611, n.4 (D. Conn. 1978).

115. 439 F. Supp. at 738 n.5. *See* Kaufman v. United States, 394 U.S. 211, 220 n.3 (1969); Plaine v. McCarthy, 527 F.2d 173, 175-76 (9th Cir. 1975).

116. 439 F. Supp. at 738 n.5.

117. 581 F.2d 727 (8th Cir. 1978).

118. 581 F.2d at 728. *See, e.g.*, State v. Boge, 252 N.W.2d 411 (Iowa 1977); Zacek v. Brewer, 241 N.W.2d 41 (Iowa 1976).

119. Of course, federal relief is not precluded if the state court decides that their review is procedurally barred by petitioner's failure to raise the procedural issue on direct appeal. Harris v. Brewer, 343 F.2d 166 (8th Cir. 1970).

"substantial reasons," the filing of a state post-conviction suit now appears to be a prerequisite to a federal habeas review.[120]

VIII. Failure to Appeal State Conviction to the United States Supreme Court Before Seeking Collateral Review

In *Lopez v. Curry*,[121] respondent raised the defense that where the state's highest court has upheld the constitutionality of a statute against petitioner's claim to the contrary, petitioner's failure to subsequently appeal that claim to the United States Supreme Court[122] constitutes a waiver of that constitutional claim which precludes collateral review of said claim in a federal habeas corpus action. In rejecting this defense, the *Lopez* court held that the effect of the retroactive application of a waiver doctrine such as respondent suggested would be to deny the petitioner a federal determination on his constitutional claims, a guarantee which Congress sought to provide by enacting the habeas corpus statute.[123] Under the circumstances of the case, the remedies of either a direct appeal or an appeal by writ of certiorari to the United States Supreme Court were no longer available because of the time that had elapsed.[124] As such, federal habeas corpus relief was deemed to be still available. The court refused to decide the issue of whether the pursuit of the above appeals might be required to satisfy the exhaustion requirement in other rare instances.

IX. Plain Error

In *Collins v. Auger*,[125] at the federal district court level, the petitioner sought review of a constitutional claim. The state asserted that the claim had not been raised during the state trial. Petitioner sought review under the "plain error" doctrine if the court found the objections urged at trial were insufficient to raise the constitutional claim asserted in the habeas petition.[126] The federal district court ruled that a state court conviction was not subject to review under the doctrine of "plain error," because the court viewed "plain error" as imposing a higher standard than a violation which is fundamentally unfair. However, on appeal, the applicability of this doctrine to a state habeas action was not considered by the Eighth Circuit, because the circuit court determined that the exceptions urged at trial by defense counsel were sufficient to raise the claim.[127]

The Sixth Circuit has indicated that it may be receptive to applying the

120. Shane v. State of Iowa, 581 F.2d 727, 728-29 (8th Cir. 1978).
121. 454 F. Supp. 1200 (S.D.N.Y. 1978).
122. Such an appeal would be made pursuant to 28 U.S.C. § 1257(2).
123. 454 F. Supp. at 1202.
124. *See* 454 F. Supp. at 1201-02 n.5, 6.
125. 451 F. Supp. 22 (S.D. Iowa 1977).
126. *See* Fed. R. Crim. P. 52(b).
127. Collins v. Auger, 527 F.2d 1107 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1057 (1979).

"plain error" doctrine to a state court conviction. In *Berrier v. Egeler,*[128] the Sixth Circuit granted habeas relief to a state prisoner who failed to contemporaneously object at his trial to an erroneous jury instruction which had omitted an essential element of the crime. The faulty self-defense instruction placed the burden of proof on the accused. Though state procedure supported the court's conclusion that lack of objection did not absolutely constitute a default, the court intimated that the "plain error" doctrine may be applicable to a state conviction: "[t]he magnitude of the error in this trial would make it cognizable in a habeas proceeding as plain error even when no objection has been made before the trial court."[129] Since federal due process requires the state to prove every element of the crime beyond a reasonable doubt, and Michigan law established that one element of murder was the negation of self-defense when such claim was made by the accused and evidence was offered to support it, the trial court's instruction impaired the fact-finding process. As such, the error was cognizable as "plain error" in a habeas action.

The United States Supreme Court, in *Francis v. Henderson,*[130] focused on the fairness of having equivalent standards for collateral review of state convictions and for review of federal convictions, when both convictions are challenged on the same grounds: grand jury composition.[131] In affirming the denial of a writ of habeas corpus based upon petitioner's failure to comply with state law,[132] the Court reaffirmed a policy of seeking to implement the provisions of Federal Rule of Criminal Procedure 12(b)(2)(f).[133] Rule 12(b)(2)(f) requires that challenges to the composition of the grand jury be raised before trial in federal court or be deemed waived. A claim of this type, which was not properly preserved at trial, could not be raised on collateral review without satisfying the *Sykes* "cause and prejudice" test.[134] Because the holding in *Francis* is designed to assure that both state and federal habeas corpus applicants are treated similarly, under this analysis it also seems fair to argue that applicants should have the same accessibility to collateral review of constitutional claims which reach the magnitude of plain error.

In *Hankerson v. North Carolina,*[135] the United States Supreme Court cited Federal Rule of Criminal Procedure 30 as the policy basis upon which the states may enforce "the sound and valid rule that failure to object to a jury instruction is a waiver of any claim of error."[136] If the design of recent habeas corpus decisions is to provide both federal and state actions with

128. 583 F.2d 515 (6th Cir. 1978), *cert. denied,* 99 S. Ct. 354 (1978).
129. *Id.* at 522. *See also* United States v. Buffa, 527 F.2d 1164 (6th Cir. 1975).
130. 425 U.S. 536 (1977).
131. *Id.* at 541-42.
132. *Id.* at 543.
133. *See* Davis v. United States, 411 U.S. 233 (1973).
134. *Id.* at 243-45.
135. 432 U.S. 233 (1977).
136. *Id.* at 244 n.8.

equivalent standards of review, the "plain error" doctrine may be available to overcome a due process violation, affecting the truth-finding process in a state proceeding even though no error was raised. Under this analysis, accessibility to habeas review of fundamental error should be accorded the same status as preclusion. As the Supreme Court has stated on the issue of preclusion: "[t]here is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations."[137]

X. Asserting a Retroactive Mullaney-Based Claim

In *Mullaney v. Wilber*,[138] the United States Supreme Court reviewed a requirement of Maine law which placed the burden of proof on a criminal defendant who seeks to prove heat of passion in order to reduce a homicide charge to manslaughter. The court held that the Maine rule failed to comply with fourteenth amendment due process. In a criminal case, the burden must be on the prosecution to prove beyond a reasonable doubt every element of the crime charged, including absence of heat of passion when such an issue is properly raised.[139] *Mullaney* established a new principle of law,[140] and was subsequently given retroactive application.[141]

An application of the *Mullaney* holding occurred in *Hankerson v. North Carolina*,[142] where the Supreme Court considered a North Carolina Supreme Court determination that, in a criminal case, the prosecution should have the burden of establishing that the defendant did not act in self-defense. In its instructons in a pre-*Mullaney* trial, the North Carolina trial court placed the burden of proving self-defense on the accused.[143] The United States Supreme Court upheld the retroactive application of the *Mullaney* principle by the North Carolina Supreme Court and reviewed the constitutonal issue. The Supreme Court noted that though there had been no objection to the instructions at the state trial level, since the North Carolina Supreme Court had considered the constitutional claim and did not decline review, it would do the same. However, a footnote in *Hankerson* creates a problem area in analyzing the effect of a procedural default on a constitutional claim which deflects the truth-finding process. The Court writes that:

> [W]e are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the

137. Kaufman v. United States, 394 U.S. 217, 228 (1969). *See also* Wainwright v. Sykes, 433 U.S. at 87.

138. 421 U.S. 684 (1975).

139. *Id.*

140. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

141. Hankerson v. North Carolina, 432 U.S. 233, 239 (1977).

142. *Id.*

143. *Id.* at 238.

> validity of such burden-shifting presumptions was as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.[144]

This view does not appear reconcilable with the Supreme Court's holding in *O'Connor v. Ohio.*[145] In *O'Connor,* the Court applied the *Griffin* rule[146] notwithstanding the defendant's failure to object in state court to the prosecutor's comments on the defendant's failure to testify. *O'Connor* was premised on the realization that, prior to the *Griffin* rule, such comments were allowed and defense counsel had no way of anticipating the change in the law involving this fifth amendment infringement.[147] The issue of what constitutes a valid waiver, where the right allegedly waived is a *federal* right, is a federal question, and a state court's finding does not bar an independent determination in federal habeas proceedings.[148] As such, the situation discussed above by the Supreme Court in *Hankerson,* where it was intimated that the State courts could insulate past *Mullaney* violations from federal habeas review by enforcing the rule that failure to object waives any subsequent review seems to be inconsistent and unfair. Since a violation of the *Mullaney* holding is a violation of a federal right, the federal courts should have the ultimate burden of deciding whether such a right has been waived in a later habeas corpus proceeding.

Courts have shown reluctance to impose a procedural bar to a *Mullaney*-based claim.

Support for such a view may be found in West Virginia, where the West Virginia Supreme Court, in *Jones v. Warden, West Virginia Penitentiary,*[149] determined that a procedural default was an inadequate basis upon which to bar review of constitutional error which rose to the magnitude of a *Mullaney*-based infringement.[150] The court wrote that: "safeguarding the integrity of the fact finding process must take priority over procedural concerns such as whether a trial lawyer could perceive future United States Supreme Court rulings and object to acts or instructions on the basis of constitutional

144. *Id.* at 244 n.8. *See, e.g.,* FED. R. CRIM. P. 30.

145. 385 U.S. 92 (1966) (per curiam).

146. The *Griffin* rule provides that comments by the trial court or by the prosecution in a criminal case concerning the defendant's failure to testify violate the defendant's fifth amendment right against self-incrimination. Griffin v. California, 380 U.S. 609 (1965).

147. *See* O'Connor v. Ohio, 385 U.S. at 93.

148. Hamilton v. Watkins, 436 F.2d 1323 (5th Cir. 1970); Alvarez v. Estelle, 531 F.2d 1319 (5th Cir. 1976).

149. ___ W. Va. ___, 241 S.E.2d 914 (1978).

150. *Id.* at ___, 241 S.E.2d at 916.

infirmities yet unborn."[151]

The distinction between the pre-*Mullaney* trial and the cases discussed in the preceding subsection is quite clear. In *Francis* and *Sykes*, the substantive claims were cognizable at the time of petitioner's trial, and state procedure required that an alleged error be timely asserted. In a pre-*Mullaney* trial, the substantive basis for the claim had not yet been recognized, and constitutional defects were undetected by all participants in the judicial system.

But even if the state's power to invoke a doctrine of procedural default to preclude review in *Mullaney* situations is upheld, a federal habeas corpus court may also entertain review under the cause and prejudice test of *Wainwright v. Sykes*. Under the *Sykes* standard, cause is easily established since defense counsel had no way of anticipating a new principle of law not legally cognizable before state trial. Prejudice is inherent in a case involving a *Mullaney* violation; the Supreme Court has ruled that there is no error more prejudicial than one which unfavorably shifts the burden of proof.[152] An example of where the cause and prejudice test was applied is *Wallace v. McKenzie*,[153] where the federal district court held that the Supreme Court's dictum in the *Hankerson* footnote[154] would not preclude review of a *Mullaney* issue because the petitioner in *Wallace* had shown cause and prejudice.[155] However, to support its conclusion, the district court emphasized the fact that West Virginia has a "plain error" doctrine which allows review of a jury instruction even when no objection is made at trial in order to avoid manifest injustice or clear prejudice to a party.[156] In addition, the district court noted that the Supreme Court of West Virginia, in a felony case, imposes a duty on the trial judge, if necessary, to assume the initiative of curing obvious error in order that the accused may receive a fair and impartial trial.[157]

Regardless of whether the cause-prejudice test is applied or whether the states are held to be without power to invoke procedural rules to preclude federal habeas review, federal courts should always have the power to review the retroactive application of the *Mullaney* holding. Without such review, the fundamental fairness for which our judicial system strives may be circumvented.

XI. Claims Treated as Open by State Appellate Courts

When the state appellate courts adjudicate a claim on its merits, the claim is therefore open to federal habeas review. The rule of *Wainwright v.*

151. *Id.*

152. *See* Bollenbach v. United States, 326 U.S. 607 (1946); Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973); Logan v. Auger, 428 F. Supp. 396 (S.D. Iowa 1977).

153. 449 F. Supp. 802 (S.D.W. Va. 1978).

154. *See* note 144 *supra*.

155. 449 F. Supp. at 806.

156. *Id.* at 806-07.

157. *Id.* at 807. *See also* Cole v. Stevenson, 447 F. Supp. 1268 (E.D.N.Y. 1978).

Sykes does not foreclose federal courts from reaching issues state appellate courts treat as open.[158]

XII. Fulfilling "Cause and Prejudice" Exception

The only guideline established by the Supreme Court in *Sykes* for defining the "cause" and "prejudice" test is that it should not be defined as broadly as the "knowing and deliberate waiver" test was in *Fay*.[159] The ambiguous concepts of "cause" and "prejudice" have created a judicial environment wherein the circuit courts have evolved their own meaning for these terms. The factors found determininative in *Wainwright* for precluding habeas review were (1) the petitioner's inability to offer a valid reason for not objecting to the inculpatory statements in compliance with Florida procedure and (2) the sufficiency of the evidence showing guilt, independent of the challenged statement which overwhelmingly supported a conviction.[160] In *Wainwright* the strength of the state's case at trial negated any allegation of actual prejudice because of the admission of petitioner's inculpatory statement.[161]

A. Cause

In *Wainwright*, the possibility that defense counsel failed to object to the admission of the confession as part of his trial strategy was the primary factor in the decision that there was no cause for failure to object.[162] The main factors which courts appear to use in assessing cause are: (1) whether defense counsel failed to object as a matter of neglect or mistake rather than as a matter of trial strategy[163] and (2) whether the defendant could gain a possible advantage from allowing the objectionable evidence to be admitted or from allowing an unlawful procedure to prevail without an attempt to terminate it.[164]

The meaning of an "inexcusable procedural default" as defined by Justice Powell places an emphasis on a bypass of a procedural rule being *deliberate* rather than *inadvertant* or *negligent*.[165] "Inexcusable procedural default" embodies an awareness by defense counsel of the factual and legal basis of the objection at the time the evidence was introduced without challenge and is a form of tactical choice by the defense counsel. Though a

158. *See, e.g.*, Francis v. Henderson, 425 U.S. at 542 n.5; State v. Ricketts, 451 F. Supp. 911 (D. Ga. 1978).

159. In *Sykes*, Mr. Justice Rehnquist wrote, "[w]e 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* . . . ." 433 U.S. at 87-88.

160. *Id.* at 88.

161. *Id.* at 91.

162. *Id.* at 88 n.12.

163. *See* Graham v. Maryland, 454 F. Supp. 643, 648 (D. Md. 1978).

164. *See* Watt v. Page, 452 F.2d 1174, 1175 (10th Cir.), *cert. denied*, 405 U.S. 1070 (1972).

165. Estelle v. Williams, 425 U.S. 501, 513-14 (1976) (Powell, J., concurring).

procedural default infers a waiver of constitutional rights, something which is not favored in the law, such a non-waiver doctrine "need not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought the objection would be futile."[166]

Lack of knowledge of facts or law would appear to be sufficient cause for failure to make proper objection, thus allowing later assertion of a constitutional claim. In addition, incompetency of counsel can be a sufficient cause for failure to make a proper objection, thereby allowing later assertion of a constitutional claim.

B. Prejudice

The Supreme Court in *Wainwright* held that it is the petitioner who bears the burden of pleading and proving "cause" and "prejudice."[167] To assess prejudice, the Supreme Court in *Wainwright* examined the other evidence offered against the accused, exclusive of the inculpatory statement, and found that such evidence "was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement."[168] To establish prejudice there must be more than the assertion that petitioner was prejudiced because he was convicted. The petitioner must set forth some actual way in which the claimed error resulted in prejudice.[169]

Some federal courts, despite the state's assertion of a procedural default, decide a habeas action on the merits where such a determination is adverse to the petitioner in order to forego a determination of whether the petitioner has satisfied the "cause and prejudice" test.[170] However, a decision on the merits may often be the most crucial factor in determining actual prejudice. If no merit to the substantive claim is found, a finding of prejudice under the *Sykes* test is precluded.[171]

The United States Supreme Court did not provide a specific definition for the term prejudice in *Sykes*.[172] Individual justices differed as to the proper

166. *Id.* at 515.
167. 433 U.S. at 87.
168. *Id.* at 91.
169. *See* Lumpkin v. Rickets, 551 F.2d 680, 682 (5th Cir. 1977).
170. *E.g.*, Spenkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).
171. As the Fifth Circuit indicated in *Spenkelink:*

> [w]hether Spenkelink's procedural default actually falls within the ambit of *Wainwright v. Sykes, supra*, and, concomitantly, whether sufficient cause or prejudice exists in this case so as not to bar federal habeas corpus review, are difficult questions on which we need not pass. Spekellink's contentions regarding the exclusion of the two veniremen must fail on their merits as a matter of law for reasons to be discussed; the petitioner thus is not entitled to relief on the basis of these contentions even if *Wainwright v. Sykes* does not prevent him from raising them. Therefore, we proceed to a consideration of the merits of the contentions themselves.

578 F.2d at 592.
172. *See* 433 U.S. at 90-91.

meaning of the term.[173] *Sykes* appears to endorse a review of the entire record to determine whether a guilty finding could have been sustained without the evidence which is the subject of a constitutional challenge.[174] Under the record of *Sykes,* the Supreme Court implied that if the constitutional claim had been decided on the merits, and found valid, the admission of the challenged evidence would have been harmless beyond a reasonable doubt. Such a finding in favor of the state would have satisfied the test handed down earlier in *Chapman v. California,*[175] where the Supreme Court established the test for assessing prejudice of a constitutional violation: constitutional error will not be considered harmless unless a court is satisfied that the error is harmless beyond a reasonable doubt.

In *Jiminez v. Estelle,*[176] the Fifth Circuit held the *Sykes* test controliing, and applied the "cause and prejudice" test to the facts of that case.[177] The court found "prejudice" because there was no doubt about the unconstitutionality of the state's use of Jiminez' prior convictions at his trial and because the state's proof of these two prior convictions was the only evidence which was introduced at the sentencing part of the trial for consideration by the jury.[178] However, the court remanded the case to the trial court to determine whether the incompetence of trial counsel in state court, by failing to object to the admission of uncounseled convictions under the Texas enhancement statute, constituted "cause" satisfying the exception to the rule and whether prejudice resulted from trial counsel's failure to object.[179]

In his opinion in *Jiminez,* Judge Tuttle noted that the petitioner had indicated to counsel at the enhancement hearing that his previous convictions were uncounseled.[180] Further, in *Jiminez* there was no tactical or strategic advantage to be gained by counsel's failure to make objection to this evidence.[181] Trial counsel attempted to have the evidence excluded but on unsupportable grounds; had the objection been proper, according to case precedent, the exclusion of the uncounseled convictions would have been compelled.[182] Examining the procedural context of the default, the Fifth Circuit stated that "[t]his set of circumstances makes it clear that counsel either ignored the grounds for objection or he did not comprehend their importance."[183]

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173. Two justices felt that prejudice should be determined under the harmless error test. *See id.* at 97-98 (White, J., concurring); *id.* at 117 (Brennan, J., dissenting).

174. *See* Collins v. Auger, 577 F.2d 1107, 1110-11 (8th Cir. 1978).

175. 386 U.S. 18 (1967).

176. 557 F.2d 506 (5th Cir. 1977).

177. *Id.* at 509-10.

178. *Id.* at 510.

179. *Id.* at 511.

180. *Id.*

181. *Id.*

182. *Id.* at 510.

183. *Id.* at 511.

In *Collins v. Auger,*[184] the Eighth Circuit concluded that the admission into evidence of incriminatory statements made by petitioner to a psychiatrist during a court-ordered psychiatric examination constituted prejudicial error. The court found that actual prejudice existed either under the harmless error standard or under the record when viewed as a whole.[185] The Eighth Circuit found it reasonable to assume the evidence wrongfully admitted influenced the trier of fact in determining the issues of the case: "the other evidence of petitioner's guilt presented at trial . . . was not so substantial as to negate any possibility of actual prejudice resulting . . . from the admission of petitioner's statements."[186] The Eighth Circuit sustained the finding that defense counsel's failure to specifically assert the due process objection to admission of petitioner's incriminatory statement was not a matter of trial strategy.[187]

XIII Waiver by State of Contemporaneous Objection Bar As Habeas Defense

In *Smith v. Estelle,*[188] the federal district court determined that in a federal habeas action pursuant to 28 U.S.C. § 2254, the state may waive a defense that the petitioner is precluded from review under *Sykes.* In *Estelle,* petitioner alleged a violation of his right to counsel and his right to remain silent with respect to a state-compelled psychiatric examination. The state responded to these challenges on the merits even though neither was the basis of an objection at the state trial court, nor was either issue presented to the Texas Court of Criminal Appeals.[189] Before applying the "cause" and "prejudice" test, the court initially considered whether, in a federal habeas corpus proceeding, the state may waive the contemporaneous objection defense. The court held that "the 'contemporaneous objection' defense may be waived and is so waived when the state decided to answer on the merits without relying solely or in the alternative on the contemporaneous objection rule."[190] Further, the Eighth Circuit has indicated that the issue of deliberate bypass by petitioner may be waived by the state in a habeas corpus action when the issue is not raised in the state's return of the habeas petition, but only in the brief.[191]

XIV. The State Procedural Rule Itself Must Not Be Unreasonable or be Inconsistently or Arbitrarily Applied

A federal habeas court is not bound by a state's rules of procedure which

184. 577 F.2d 1107 (8th Cir. 1978).
185. *Id.* at 1111.
186. *Id., quoting from* Wainwright v. Sykes, 433 U.S. at 91.
187. *See generally id.* at 1108-09.
188. 445 F. Supp. 647 (N.D. Tex. 1977).
189. *See id.*
190. *Id.* at 659.
191. Rinehart v. Brewer, 561 F.2d 126, 129 (8th Cir. 1977).

are unreasonable on their face or that are either arbitrarily or inconsistently applied.[192] If a state court's interpretation of its own law appears to be an obvious subterfuge to evade consideration of a federal issue, a federal court will re-examine the state court's determination.[193]

XV. Conclusion

The scope of this article focused upon cases of federal habeas review in a post-*Sykes* judicial environment. This examination of habeas cases is intended to alert defense counsel to recent procedural enactments and case holdings which will be of assistance in avoiding the commission of a procedural default at the different tiers of the state court system. Should a procedural default occur, various approaches have been presented which consider the applicability of the *Sykes* forfeiture rule and the effect of the rule on federal constitutional claims within the context of state proceedings. As illustrated by the habeas cases considered, the applicability of the *Sykes* rule does not absolutely invoke a procedural bar; in certain instances, the petitioner's fulfillment of the "cause and prejudice" test allows a federal habeas corpus court to consider a constitutional claim even though a state procedural default occurred.

Since any habeas case involving the state's assertion of a procedural bar must turn upon the nature of the claim, the record of the case, and the state interest advanced by the enforcement of the procedural rule involved, a premium is placed upon the skill of habeas counsel to present the federal court with those factors which excuse the failure of a timely assertion of a federal constitutional claim in the state forum. The *Sykes* decision sets forth criteria for determining this issue: "In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?"[194] Since fundamental constitutional claims of a habeas applicant are at stake, the *Sykes* principle which denies relief to an applicant whose state trial counsel did not object to constitutional error as required should be applied with great reservation and only when the "cause and prejudice" test is not fulfilled by the presentation of substantial considerations.

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192. Hallowell v. Keve, 555 F.2d 103, 107 (3d Cir. 1977).

193. *See* Wainwright v. Sykes, 433 U.S. 72, 107 n. 9 (Brennan, J.) (dissenting opinion) where it is stated:

> Of course, even under the Court's new standard, traditional principles continue to apply, and the federal judiciary is not bound by state rules of procedure that are unreasonable on their face, or that are either unreasonably or inconsistently applied. See, *e.g.*, *Henry v. Mississippi*, 379 U.S. 443 (1965); *NAACP v. Alabama*, 377 U.S. 288 (1964); *Staub v. Baxley*, 355 U.S. 313 (1958); *Williams v. Georgia*, 349 U.S. 375 (1955).

194. *Id.* at 79-80.