On the Threshold of *Wainwright v Sykes*: Federal Habeas Court Scrutiny of State Procedural Rules and Rulings

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NOTES


Every state prisoner who petitions for federal habeas corpus relief is entitled to an independent determination by the federal courts of the merits of his federal claim. When, however, the petitioner during his state trial failed to abide by a state procedural rule for preserving error, he may well find that he cannot raise his claim before a habeas court. In *Wainwright v. Sykes*, the United States Supreme Court barred habeas corpus review of a claim on which the petitioner “defaulted” in state court. Default on a state procedural rule was treated as an adequate and independent state ground for the state court decision, precluding review by the federal court of the federal claim. Under the rule announced in *Sykes*, habeas review is available only if

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1. Federal habeas corpus relief for state prisoners is codified at 28 U.S.C. § 2254 (1982). The statute provides, in relevant part, as follows:
   (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
   (b) 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, or that there either is an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
   Other subsections of the statute define the term “exhaustion” of state remedies, 28 U.S.C. § 2254(c) (1982), specify when the habeas court must presume that factual findings by the state courts are correct, 28 U.S.C. § 2254(d) (1982), and provide for the production and admission of a record of the state proceedings in the habeas court, 28 U.S.C. § 2254(e), (f) (1982).

2. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). This statement holds true even when the state courts that entered and affirmed the petitioner’s conviction have heard the identical claim on the merits. See *Brown v. Allen*, 344 U.S. 443, 459 (1953); 344 U.S. at 499-500 (Frankfurter, J., separate opinion). The power of habeas courts to review state court holdings on the merits of federal questions is one of the few certainties in the changeable law surrounding the writ. On the mercurial nature of habeas corpus law, see *Wainwright v. Sykes*, 433 U.S. at 81 (noting the “Court’s historic willingness to overturn or modify its earlier views of the scope of the writ”); Wright, *Habeas Corpus: Its History and Its Future* (Book Review), 81 MICH. L. REV. 802, 810 (1983) (“[T]he single most striking fact about habeas corpus over the years has been its ability to change.”).

3. Such rules commonly require that the appellant bring his claim to the attention of the trial court, as by a timely motion or objection. See, e.g., *Colo. R. Crim. P. 33, 51; Conn. R. Sup. Ct. 3063; Ill. Sup. Ct. R. [Ill. Rev. Stat. ch. 110A (1983)] 451(c)*. This Note does not distinguish between judicially and statutorily created state procedural rules. Nor have the courts distinguished the two. See, e.g., *Runnels v. Hess*, 653 F.2d 1359, 1363 n.4 (10th Cir. 1981).


5. A “defaulted” claim is one which was not properly raised and preserved according to state procedural laws or rules. This Note employs the terms “defaulted” or “forfeited” rather than the term “waived.” See *note 30 infra*.

1393
the petitioner can show both "cause" for failing to comply with the state procedural rule and "prejudice" resulting from the inability to raise the claim.6

In requiring a federal habeas court to determine whether it is faced with an adequate state procedural ground for decision that properly bars habeas review, Sykes, in effect, requires federal habeas courts to distinguish between state court decisions based on procedure and those based on the merits. If the source of the state court's affirmance of the petitioner's conviction is procedural, the Sykes test applies and review will be barred absent the requisite showing of cause and prejudice. If, on the other hand, the state court affirms on the merits of the constitutional claim (whether or not the petitioner in fact committed any procedural default),7 independent review by the habeas court is appropriate.

Subsequent practice has shown the Sykes cause-and-prejudice standard, from the point of view of the petitioner, to be very difficult to satisfy.8 In most cases, the same procedural default that barred direct review of a defendant's claim in state court will also bar federal collateral review. Because of this strict application and the broad scope9 of

6. 433 U.S. at 87. The Sykes Court expressly declined to explain how the cause-and-prejudice test would operate. 433 U.S. at 87.

7. When a state court has chosen to overlook a procedural default and has made a decision on the merits, all courts are agreed that there is "no warrant . . . for guarding state procedural rules more vigorously than the State itself does," and that the federal court may also examine the case on its merits. Phillips v. Smith, 552 F. Supp. 653, 655 (S.D.N.Y. 1982) (citation omitted), aff'd, 717 F.2d 44 (2d Cir. 1983), cert. denied, 104 S. Ct. 1287 (1984). See also Engle v. Isaac, 456 U.S. 107, 135 n.44 (no federal review in such cases unless state court exercises its right to waive state procedural rule); Sykes, 433 U.S. at 87 ("[W]e deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there . . . .") (emphasis added); Lockett v. Arn, 728 F.2d 266, 270 (6th Cir. 1984); Washington v. Harris, 650 F.2d 447, 451-52 (2d Cir. 1981), cert. denied, 455 U.S. 951 (1982); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981).

8. In Engle v. Isaac, 456 U.S. 107, 130 (1982), for example, the Court held that "the futility of presenting an objection to the state courts cannot alone constitute cause" for failing to object to a jury instruction. This was so even though the Ohio jury instruction on burdens of proof had stood substantially unchanged and unchallenged for over a century before it was struck down (after petitioner's trial) by the Ohio Supreme Court. 456 U.S. at 110-11. This holding prompted Justice Brennan to remark that "on the Court's present view it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause.'" 456 U.S. at 144 (Brennan, J., dissenting). See also Wright, supra note 2, at 809 (meanings which have been given to the terms "cause" and "prejudice" are "not comforting to prisoners.").

More recently, however, Justice Brennan (writing for a 5-4 majority of the Court) did manage to lead his "camel" through the needle's eye. In Reed v. Ross, 104 S. Ct. 2901 (1984), the Court found "cause" for petitioner's failure to raise his Mullaney claim (see Mullaney v. Wilbur, 421 U.S. 684 (1975)) at his trial in 1969. The Court held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." 104 S. Ct. at 2912. Engle, in which the Court reached the opposite conclusion with respect to the failure to raise a Mullaney claim in 1975, was distinguished on the ground that by that time the Court had decided In re Winship, 397 U.S. 358 (1970), that had been interpreted by "numerous courts" to require the prosecution to bear the burden of disproving certain affirmative defenses. 104 S. Ct. at 2912.

9. Attempts by petitioners to limit the scope of the Sykes test have for the most part proved
the Sykes test, petitioners often seek to avoid application of the test entirely. When the reason for the state court’s holding is even slightly ambiguous, a petitioner may attempt to circumvent the cause-and-prejudice test by claiming that the decision rested on the merits of the claim, and not on the procedural default. He may also claim that the state court’s ruling, although resting on a procedural default, is nonetheless not “adequate” to bar federal review.

Broadly speaking, the subject of the present Note is neither the scope of “cause” nor the meaning of “prejudice.” Rather, this Note examines specific problems which stand on the threshold of Wainwright v. Sykes. Resolution of these problems is necessary to deter-

unsuccessful. For example, the Court in Engle v. Isaac, 456 U.S. 107, 129 (1982), rejected petitioners’ contention that the Sykes test should be limited to claims in which the constitutional error does not affect the “truthfinding function” of trial courts. The factual context in which Sykes itself arose was a failure to object to the admission of a confession where the defendant allegedly had not understood his Miranda warning. The Sykes test has been applied, however, in cases presenting a broad range of procedural defaults. Defaults held to fall within the rule have included failures to make timely objections to the composition of a grand jury, Francis v. Henderson, 425 U.S. 536 (1976); see also note 23 infra (possible limitations of Francis), to the composition of a petit jury, Haggard v. Alabama, 550 F.2d 1019 (5th Cir. 1977), to the admission of illegally obtained evidence, United States ex rel. Maxey v. Morris, 591 F.2d 386, 391 (7th Cir.), cert. denied, 442 U.S. 912 (1979); Johnson v. Meacham, 570 F.2d 918 (10th Cir. 1978); Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978), or the testimony of an unconfessed witness, Zeigler v. Callahan, 659 F.2d 254, 271 (1st Cir. 1981), to the introduction of prior un counselled convictions, Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977), to the use of hearsay testimony, Fowler v. Parratt, 682 F.2d 746, 751 (8th Cir. 1982), to a prosecutor's comment on the defendant's failure to testify, Rummels v. Hess, 653 F.2d 1359 (10th Cir. 1981); Satterfield v. Zahradnick, 572 F.2d 443, 446 (4th Cir. 1978), or on the defendant's post-arrest silence, Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980), cert. denied, 461 U.S. 910 (1983); Lewis v. Cardwell, 609 F.2d 926 (9th Cir. 1979), to jury instructions, Engle v. Isaac, 456 U.S. 107 (1982); Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982); Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981), failure to move for a continuance in the event of a missing witness that the defendant claimed was deliberately concealed by the government, Ramirez v. Estelle, 678 F.2d 604 (5th Cir. 1982), failure to comply with state offer of proof rules, United States ex rel. Veal v. DeRobertis, 693 F.2d 642 (7th Cir. 1982), and failure to raise an issue in a state post-conviction proceeding, United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982); Matias v. Oshiro, 683 F.2d 318 (9th Cir. 1982).

While some courts have been cautious in discerning the possible boundaries of the Sykes test, others have been more precipitous. Compare United States ex rel. Caruso v. Zelinsky, 689 F.2d at 441-42 (Sykes test held to apply only after comparing the procedural default at issue with that presented in Sykes), with United States ex rel. Veal v. DeRobertis, 693 F.2d at 650 ("Any procedural default is covered by the 'cause and prejudice' standard . . . .") (emphasis added). See also Engle v. Isaac, 456 U.S. at 129 ("While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing.").

The standard which reigned before Sykes was much more permissive than the cause-and-prejudice test. It allowed the habeas court to hear the claim unless the procedural default resulted from a deliberate bypass of state procedures. See notes 18-21 infra and accompanying text. This deliberate-bypass standard may still apply to decisions of the sort entrusted to the defendant himself, such as how to plead, whether to forgo the assistance of counsel or to waive a jury, and whether to take an appeal. See Wainwright v. Sykes, 433 U.S. at 91-94 (Burger, C.J., concurring); Frazier v. Czarnetsky, 439 F. Supp. 735, 737-38 n.4 (S.D.N.Y. 1977); Goodman & Sallett, Wainwright v. Sykes: The Lower Federal Courts Respond, 30 Hastings L.J. 1683, 1689-90 (1979); Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum. L. Rev. 1050, 1067 (1978).
mine whether a state ruling is based upon an adequate state procedural ground, requiring application of the cause-and-prejudice test before habeas review will be permitted. Part I analyzes the rationale for the rule of *Wainwright v. Sykes* as well as its historical underpinnings. Part II examines the treatment of state court decisions that are based both on a defaulted claim and, in the alternative, on the merits of that claim. This Part concludes that decisions containing such alternative holdings should be governed by *Sykes*, because the concerns implicit in the *Sykes* standard apply with equal force when state courts have addressed the merits of a claim as well as procedural issues. Part III examines the proper treatment of state court decisions that affirm a petitioner's conviction without opinion. This Note argues for a presumption in favor of habeas review in such “silent affirmance” cases. Part IV explores the standard by which to determine if a given state ruling, even when unambiguously procedural, constitutes a state ground for decision that is “adequate” to preclude habeas review. This Part concludes that a state procedural ruling is adequate to bar habeas review if the forfeiture called for is reasonably calculated to promote a legitimate interest of the state.

I. UNDERPINNINGS OF THE CAUSE-AND-PREJUDICE TEST

The statutory form of the writ of habeas corpus for state prisoners affords relief from “custody in violation of the Constitution or laws or treaties of the United States.”10 Courts today use habeas corpus expansively as a means of independent review of decisions based on federal constitutional law.11 In its present expansive form, the proper scope of federal habeas corpus relief has become “[t]he most controversial and friction-producing issue in the relation between the federal


11. Although historical views of the writ differ, compare *Fay* v. *Noia*, 372 U.S. 391, 399-427 (1963) (vindication of due process historically the role of habeas corpus), with *Fay*, 372 U.S. at 449-63 (Harlan, J., dissenting) (scope of habeas corpus very limited throughout most of its history), it seems clear that habeas corpus did not always serve its present expansive function as an independent review of errors of federal constitutional law. At one time, federal collateral review was restricted to the narrow question of whether the sentencing tribunal had jurisdiction of the case. See, e.g., *Ex parte Harding*, 120 U.S. 782, 783-84 (1887); *Ex parte Wilson*, 114 U.S. 417, 420-21 (1885). That, at least, is the question courts purported to be addressing. The meaning of the term “jurisdiction” in this context may have been rather strained. See *Fay*, 372 U.S. at 450-51 (Harlan, J., dissenting).

The Court in recent years appears to have abandoned the historical approach to resolving habeas corpus issues which it employed in *Fay*. This is probably for the best, since few of the historical issues surrounding the writ have been resolved. Moreover, as Professor Charles Allan Wright observed, “[w]hat happened when the Normans conquered England, though very interesting in its own right, does not seem to be of much help in achieving” consensus on the proper function of the writ in a federal system in the late twentieth century. Wright, supra note 2, at 810. For a recent comprehensive study of the historical development of habeas corpus, see W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).
courts and the states."\textsuperscript{12} This controversy has been reflected in shifting alignments and in particularly acrimonious divisions within the Supreme Court over the last three decades.\textsuperscript{13}

In \textit{Brown v. Allen},\textsuperscript{14} the Supreme Court definitively expanded the scope of habeas corpus to include reconsideration of ordinary constitutional error. The habeas petitioner in \textit{Brown} alleged discrimination in the selection of grand jurors and the unconstitutional admission of certain evidence. Although the state appellate courts had heard these same claims, and although the petitioner did not claim that the appellate process had been inadequate to determine the issues, the Court held that the petitioner was entitled to have them redetermined by writ of habeas corpus.\textsuperscript{15}

But in the companion case of \textit{Daniels v. Allen},\textsuperscript{16} the Court limited the effect of its decision in \textit{Brown} by denying collateral review of a procedurally defaulted claim. The appeal in \textit{Daniels} was dismissed because the petitioner, purely from inadvertence, filed his appeal in state court one day late. The Court held that this default barred habeas review, stating that a contrary holding would allow habeas corpus to be used "in lieu of an appeal," and "would subvert the entire system of state criminal justice."\textsuperscript{17}

Ten years later, in 1963, the Court reversed itself. In \textit{Fay v. Noia}\textsuperscript{18} the Court allowed federal habeas review despite the petitioner's state procedural default, holding that the habeas court had discretion to

\textsuperscript{12} Wright, \textit{supra} note 2, at 802 (quoting 17 C. Wright, A. Miller, \& E. Cooper, \textit{Federal Practice and Procedure} \textsection 4261, at 588 (1978)). As long as the writ was confined to claims by state prisoners that the state court was without jurisdiction of the case, there was little occasion for conflict between legitimate state interests in the integrity of their procedures and substantive federal constitutional law. Presumably, when the state court was without jurisdiction, it could claim no legitimate interest in compliance with its procedures by the petitioner. \textit{See} \textit{Fay v. Noia}, 372 U.S. 391, 454 (1963) (Harlan, J., dissenting).

\textsuperscript{13} \textit{See}, e.g., the unusually acerbic see-saw exchanges between Justices O'Connor (writing for the Court) and Brennan (dissenting) in \textit{Engle v. Isaac}, 456 U.S. 107, 123-24 n.25, 137, 144, 148 (1982); \textit{see also} \textit{Wainwright v. Sykes}, 433 U.S. 72, 78 (1977) (noting the "sharp division" in the Court over the years on habeas issues).

\textsuperscript{14} 344 U.S. 443 (1953).

\textsuperscript{15} 344 U.S. at 459. The Court declared that these prior state determinations of federal issues could be reconsidered subject to "the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues." 344 U.S. at 458. \textit{See also Brown}, 344 U.S. at 499-500 (Frankfurter, J., separate opinion) (such reconsideration is authorized by the clear meaning of the federal law).

\textsuperscript{16} 344 U.S. 443 (1953).

\textsuperscript{17} 344 U.S. at 484-85. Although the rather harsh application of the procedural bar in \textit{Daniels} suggested an absolute rule that claims defaulted in state court would be foreclosed on habeas review, the \textit{Daniels} Court did observe that "some interference or incapacity" might excuse noncompliance with a state procedural rule. 344 U.S. at 487. The Court also noted that the North Carolina procedural rule at issue did not, of itself, violate the Constitution, 344 U.S. at 486, thereby suggesting that particular state rules or rulings might be held unconstitutional and therefore inadequate to bar habeas review.

\textsuperscript{18} 372 U.S. 391 (1963).
deny review only where the petitioner had deliberately bypassed\textsuperscript{19} or had exercised "an intelligent and understanding waiver"\textsuperscript{20} of state procedures for hearing the claim.\textsuperscript{21}

The Supreme Court largely repudiated \textit{Fay}\textsuperscript{22} fourteen years

\textsuperscript{19} 372 U.S. at 438.

\textsuperscript{20} 372 U.S. at 399.

\textsuperscript{21} 372 U.S. at 438. The petitioner in \textit{Fay}, like the petitioner in \textit{Daniels}, had filed his state appeal a day late. In contrast to the \textit{Daniels} Court's summary treatment of the default issue, however, Justice Brennan, writing for the Court in \textit{Fay}, undertook a lengthy historical analysis of the problem. In extending the coverage of the writ to state prisoners in 1867, Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386, Justice Brennan argued, Congress intended also to enhance the efficacy of the remedy. Indeed, "a remedy almost in the nature of removal . . . seems to have been envisaged." 372 U.S. at 415 (emphasis in original). Since the federal courts had been given such broad power by Congress, in Justice Brennan's view, the bar which the Court had raised to review of defaulted claims in \textit{Daniels} was purely prudential. Because the state's interest in "an airtight system of forfeitures," 372 U.S. at 432, was felt to be of a lesser order than that of alleviating substantively unconstitutional restraints, Justice Brennan and the majority held that the state interest should yield. \textit{See} 372 U.S. at 426-27, 431-32.

\textit{The Fay} deliberate-bypass standard was even more permissive than it appeared on its face. A close examination of the facts of \textit{Fay} reveals that the default which occurred there was not accidental, but the result of a "grisly choice." Noia had been tried for a capital offense and had received, not the death penalty, but a sentence of life imprisonment. Noia initially chose to "sit content" with this sentence rather than appeal and risk electrocution upon retrial, but he belatedly changed his mind. \textit{See} 372 U.S. at 439-40. There was also evidence in the record that Noia simply did not wish to incur the expense of an appeal. Michael, \textit{The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings}, 64 IOWA L. REV. 233, 245 n.90 (1979).

\textsuperscript{22} \textit{See} Wainwright v. Sykes, 433 U.S. 72, 87-88 (rejecting "the sweeping language of \textit{Fay} v. \textit{Noia} [as] going far beyond the facts of the case eliciting it!").

\textit{Fay} has been "virtually supplanted" by the holding in Sykes. Wright, \textit{ supra} note 2, at 809. \textit{But see} note 9 \textit{ supra}. The case continues to be relevant, however, for its salutary focusing of the issue. The habeas statute explicitly requires, as a jurisdictional prerequisite, that the petitioner have "exhausted" his state remedies. 28 U.S.C. § 2254(b), (c) (1982); \textit{see} note 1 \textit{ supra}. Before \textit{Fay}, the Court typically approached the problem of state procedural defaults as an aspect of this statutory requirement. \textit{See} \textit{Fay}, 372 U.S. at 425. In \textit{Fay}, the Court jettisoned this approach. \textit{See} 372 U.S. at 435; 372 U.S. at 462 n.19 (Harlan, J., dissenting); \textit{note} 21 \textit{ supra}. This has allowed subsequent debate on these issues to focus explicitly upon prudential and policy, rather than upon jurisdictional, concerns. \textit{See} Sykes, 433 U.S. at 96 n.4 (Stevens, J., concurring); 433 U.S. at 100-01 n.2 (Brennan, J., dissenting). \textit{Wright}, supra \textit{note} 2, at 809. This has allowed subsequent debate on these issues to focus explicitly upon prudential and policy, rather than upon jurisdictional, concerns. \textit{See} Sykes, 433 U.S. at 96 n.4 (Stevens, J., concurring); 433 U.S. at 100-01 n.2 (Brennan, J., dissenting). Were the problem of state procedural defaults still perceived as one of "exhaustion," the debate would necessarily center around the intent of Congress in enacting 28 U.S.C. § 2254(b), (c) (1982) (requiring exhaustion of state remedies as jurisdictional prerequisite). Because the issue of state procedural defaults and their effect on habeas review simply did not arise as the writ was understood in 1867, \textit{see} notes 11-12 \textit{ supra}, such "congressional intent" could not have existed. \textit{See} Hill, \textit{ supra} note 9, at 1058.

It continues to be important, therefore, to distinguish between cases dealing with \textit{exhaustion} issues and those dealing with defaults. This Note discusses problems of default only. The two types of cases superficially resemble one another, but the exhaustion requirement refers only to state remedies \textit{still open} to the applicant at the time he files for federal habeas relief. \textit{Fay}, 372 U.S. at 435. In an exhaustion case, just as in a default case, the habeas court will inquire whether the state court affirmation was "on the merits" or on "procedural" grounds. The purpose of the exhaustion inquiry, however, is to determine whether the petitioner may simply amend his state petition and continue to seek his remedy there.

Thus, in the exhaustion context, a state disposition on "procedural" grounds refers only to the most formalistic aspects of procedure, such as whether the petitioner named the correct party as respondent in his state post-conviction proceeding. A state disposition "on the merits," in an exhaustion case, means any denial of relief that is meant to be permanent, including a holding that the claim has been lost under state procedural rules. In the former case, the petitioner may
later, this time with Justice Rehnquist writing for the Court and Justice Brennan, who authored the *Fay* opinion, dissenting. In *Wainwright v. Sykes*, the Court barred habeas review of a claim based upon a defaulted objection to the admission of a confession. It said that a failure to comply with a state procedural rule could be excused on habeas review only if the petitioner could show both “cause” for failing to obey the rule and “prejudice” arising from the inability to raise the claim.

The Court rejected the *Fay* deliberate-bypass standard in favor of the stricter cause-and-prejudice test primarily to preserve “the many interests which [a contemporaneous-objection rule] . . . serves in its own right.” First, such rules facilitate the development of the record on a constitutional claim at trial “when the recollections of the witnesses are freshest . . . .” Second, a rule precluding review where error has not been preserved by objection ensures that the judge who observed the demeanor of witnesses will make the factual determinations essential to proper consideration of the merits of the claim. Finally, a system of forfeitures serves the interest in finality of judgments.
and jury verdicts by increasing the probability that evidence objected to will be excluded at trial, before any finding of guilt has been entered.\textsuperscript{29}

None of these observations on the wisdom of procedural rules requiring timely action is particularly new. What is novel\textsuperscript{30} is that these arguments are advanced in support of enforcing \textit{state} procedural rules in \textit{federal} courts.\textsuperscript{31} In its readiness to treat the state courts as exercising "a coordinate jurisdiction within the federal system,"\textsuperscript{32} the Court has signalled its concern that state systems of procedural forfeitures operate effectively, without being subverted on collateral review by a foreign (i.e., the federal) jurisdiction.

The \textit{Sykes} Court denounced the \textit{Fay} standard as subverting the enforcement of state procedural rules. The \textit{Fay} rule was said to encourage "sandbagging" on the part of defense lawyers, who might intentionally forgo a valid objection, betting on a verdict of not guilty. If the jury instead returned a guilty verdict, sandbagging lawyers could count on reversal in a habeas proceeding and a second chance at a jury on retrial.\textsuperscript{33}

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\textsuperscript{29}See 433 U.S. at 88-89.
\textsuperscript{30}There are other ways in which \textit{Sykes} may be viewed as "novel." The decision signalled the Court's heightened concern over the social "costs" of habeas corpus, a concern recently expanded in \textit{Engle v. Isaac}, 456 U.S. 107, 126-29 (1982). \textit{See also} Wright, \textit{supra} note 2, at 802 ("To many the 'Great Writ' . . . has lost its halo.") (footnote omitted).
\textit{Sykes} also represents a movement by the Court away from addressing procedural default issues in the language of "waiver" of constitutional rights. "Default," or "forfeiture," involves a penalty for failure, even inadvertent failure, to pursue required procedures for implementing a right. "Waiver" involves a conscious choice made by the person whose right is at issue. \textit{See generally} Westen, \textit{Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure}, 75 MICH. L. REV. 1214 (1977). \textit{Fay}, in requiring an intelligent and understanding waiver of state remedies before habeas review would be barred, 372 U.S. at 399, clearly adopted a waiver approach. Critics of this approach argue that the attempt to explain forfeiture rules for inadvertent defaults in terms of waiver only clouds the strict and unyieldingly participatory understanding of the term "waiver" in more appropriate contexts. \textit{Cf.} Jimenez \textit{v. Estelle}, 557 F.2d 506, 508 (5th Cir. 1977) (that a defendant who failed to claim constitutional protections at appropriate junctures at trial could be said to have "waived" those rights is "high fiction" under traditional waiver standard); Dix, \textit{Waiver in Criminal Procedure: A Brief for More Careful Analysis}, 55 Tex. L. REV. 193, 205, 209 (1977) ("rationalization" by the courts of preclusionary penalties in terms of waiver is "unfortunate"); Spritzer, \textit{Criminal Waiver, Procedural Default and the Burger Court}, 126 U. PA. L. REV. 473, 474-76, 513-14 (1978) (rights may be lost by waiver or by default; clarity of definition is important for analyzing which standard to apply).
\textsuperscript{31}Because federal courts are to enforce state procedural rules in much the same way as they do the federal rules, it is not surprising that the judicial standards for evaluating the effect of a procedural default on habeas review are today the same for both state and federal prisoners. \textit{See}, e.g., United States \textit{v. Frady}, 456 U.S. 152 (1982) (cause-and-prejudice test applied to federal prisoner).
\textsuperscript{33}433 U.S. at 89. The \textit{Sykes} Court's argument that, under \textit{Fay}, defense counsel would resort to intentional "sandbagging" maneuvers has been criticized as factually unsound. \textit{See}, e.g., Hill, \textit{supra} note 9, at 1074-75; Tague, \textit{Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do}, 31 STAN. L. REV. 1, 43-46 (1978); \textit{Note, Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims}, 130 U. PA. L. REV. 981, 994-98 (1982); \textit{see also} Sykes, 433 U.S. at 104 (Brennan, J., dissenting) ("[A]ny realis-
Moreover, the refusal of habeas courts to honor state forfeiture rules may discourage state court enforcement of the state’s own procedural rules.\textsuperscript{34} Under \textit{Fay}, the Court argued, the state reviewing courts knew that if they affirmed the defendant’s conviction on procedural grounds, the federal courts would hear the claim on the merits anyway. The federal courts would then decide the question without substantive guidance from the state courts. This situation provided the state courts with an incentive to ignore the procedural rule. By deciding the claim on its merits despite the default, state courts hoped to influence the decision of the case.\textsuperscript{35}

In view of these tactical considerations on the part of judges and lawyers, the Court concluded that the \textit{Fay} rule “tend[ed] to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event.”\textsuperscript{36} Yet even under \textit{Sykes}, as the remainder of this Note will illustrate, the ultimate disposition of a petitioner’s claim on appeal in the state courts will often be a most “portentous event” for determining the availability of federal habeas review.

\section{II. The Alternative Holdings Problem}

The \textit{Sykes} decision forces habeas courts to draw a crucial distinction between cases which a state court reviews on the merits and those that it refuses to review on procedural grounds. Where the state court has decided a case solely on the merits of the constitutional claim, habeas review is permitted. But where a case is decided upon procedural grounds, habeas review is precluded unless the petitioner can show cause and prejudice.\textsuperscript{37} Difficulty arises where a state court has...
arguably based its decision on both procedural and substantive grounds.\textsuperscript{38}

The circuits have split over whether habeas review is precluded where the state courts have affirmed a conviction on the basis of a procedural default and, in the alternative,\textsuperscript{39} on the merits. The Second, Third, and Seventh Circuits, along with one panel in the Fifth Circuit, have held that \textit{Sykes} bars federal habeas review when the state court relied expressly on a procedural rule as an alternative holding.\textsuperscript{40} The First and Ninth Circuits, and another panel of the Fifth Circuit, have taken the opposite view, holding that where the state courts have not relied \textit{exclusively} upon a procedural default, the \textit{Sykes} test does not apply.\textsuperscript{41} The positions of the Sixth and Eighth Circuits are less clear. Both Circuits, however, have applied the \textit{Sykes} test in cases


\textsuperscript{39} One may be tempted at this juncture to make the argument that alternative holdings are “impossible” in this context. If one of the holdings is that the claim is barred due to a procedural default, the argument proceeds, then the state court is powerless to render a holding on the merits. This argument is incorrect, that the procedural default ruling is jurisdictional in nature. The court is not \textit{powerless} to hear the defaulted claim, it simply \textit{refuses} to do so. See, e.g., ILL. REV. STAT. ch. 110A, § 301 (1983) (“[A]n appeal is initiated by filing a notice of appeal. No other step is jurisdictional.”). Nor is it convincing to say, as did the court in Dietz v. Solem, 640 F.2d 126, 131 n.1 (8th Cir. 1981), that any discussion of the merits of a claim not raised at trial must be dicta because it would necessarily be based on the purely hypothetical assumption that no procedural default was committed. This is at most a makeweight, since one cannot so argue if the state court opinion happens to reverse the order of its holdings so as to base the \textit{procedural default} holding on a hypothetical assumption, i.e., that the claim has merit.


\textsuperscript{41} See Jackson v. Amaral, 729 F.2d 41, 44-45 (1st Cir. 1984); Thompson v. Estelle, 642 F.2d 996 (5th Cir. Unit A 1981), \textit{cert. denied}, 459 U.S. 1110 (1983); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979); \textit{see also} Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982) (citing with approval Thompson v. Estelle, 642 F.2d at 998) (Petitioner Daniel Rodgers is also known as Daniel Rodgers, and the state court cases use this latter spelling of his name. 673 F.2d at 1186 n.1); Lussier v. Gunter, 552 F.2d 385, 388 (1st Cir.) (decided before \textit{Sykes} but after Francis v. Henderson, 425 U.S. 536 (1976), and declining to apply \textit{Francis’} cause-and-prejudice test in alternative holdings context), \textit{cert. denied}, 434 U.S. 854 (1977). Rodgers has been cited, incorrectly, as an alternative holdings case adhering to the position that review should be allowed. See Phillips v. Smith, 552 F. Supp. 653, 656 (S.D.N.Y. 1982), \textit{affd.}, 717 F.2d 44 (2d Cir. 1983), \textit{cert. denied}, 104 S. Ct. 1287 (1984). The state court opinions preceding Rodgers rested solely on the merits of the case; procedural issues played no part. See State v. Rodgers, 347 So. 2d 610 (Fla. 1977); Rodgers v. State, 338 So. 2d 1121 (Fla. Dist. Ct. App. 1976), \textit{quashed}, 347 So. 2d 610 (Fla. 1977); \textit{see also} State v. Rodgers, 347 So. 2d at 614 (Hatchett, J., dissenting) (dissenting justice would have grounded affirmance on procedural default).

The Eleventh Circuit has adopted as binding precedent Fifth Circuit decisions rendered on or before September 30, 1981 (the last day preceding the establishment of the Eleventh Circuit, formerly the Fifth Circuit Unit B). See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). Because separate panels of the Fifth Circuit have reached opposite results, compare Thompson v. Estelle, 642 F.2d at 998-99 (review possible), \textit{with} Ratcliff v. Estelle, 597 F.2d at 475-76 (review barred), neither the position of the Fifth Circuit nor that of the Eleventh can be
arguably presenting alternative holdings problems. This Note supports the position of the Second, Third, and Seventh Circuits; habeas review should be barred in alternative holdings cases.

As for the procedural half of an alternative holding, the policies cited by the Sykes court in justifying deference to valid state procedural rules are implicated whenever state courts actually rely upon a procedural default for their rulings, even if coupled with a ruling on the merits. Federal court intervention by way of habeas review of cases decided below by alternative holdings prevents state procedural defaults from resulting in forfeitures, as state procedural rules normally would require. Making the enforcement of the state rule less “airtight” in this way diminishes the incentives for making a record upon a claim when the recollection of witnesses is freshest, for allowing the trial judge to make the factual determinations that will form the backdrop of the claim as it works its way through the

stated with certainty. Oddly enough, the Fifth Circuit panel in Thompson made no mention of the Circuit’s earlier inconsistent holding in Ratcliff.

42. In Dietz v. Solem, 640 F.2d 126, 128, 132 n.1 (8th Cir. 1981), the court avoided the issue by dismissing as “casual observation” and “dicta” the state court’s comments on the merits of the petitioner’s claim. In Hockenbury v. Sowders, 620 F.2d 111, 115-16 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981), the court similarly observed that the state court had not made “a complete analysis” on the merits of the petitioner’s claim. The Sixth Circuit said in Hockenbury that it would apply the Sykes test in any case in which the procedural default was a “substantial basis” of the state court’s denial of the petitioner’s claim. 620 F.2d at 115. See also Jackson v. Amaral, 729 F.2d 41, 45 (1st Cir. 1984) (“The greater the reliance on federal doctrine, the more likely we are to find waiver [by the state court of the procedural rule].”).

43. A similar view was adopted in Note, Beyond Wainwright v. Sykes: Expanding the Role of the Cause-and-Prejudice Test in Federal Habeas Corpus Actions, 59 Notre Dame L. Rev. 1360 (1984). The author concluded that the cause-and-prejudice test should be applied in alternative holdings cases if the procedural ground was dispositive of the claim. Id. at 1385.

Of course, alternative holdings ought to bar federal habeas review only when the state court has actually rendered alternative holdings. Casual comments upon the petitioner’s procedural default do not constitute the adequate and independent state ground for affirmance envisaged by Sykes. See, e.g., Darden v. Wainwright, 699 F.2d 1031, 1034 n.4 (11th Cir. 1983) (properly refusing to apply Sykes test where state court only remarked briefly on procedural default without concluding that default had been committed or that review was precluded), vacated, 715 F.2d 502 (11th Cir.), vacated, 105 S. Ct. 1158 (1985).

The court in United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982), incorrectly treated a state court holding solely on the merits as an alternative holding. The state court said that “[d]espite the procedural bars to the bringing of this petition, we have nevertheless elected to consider this appeal on the merits” (emphasis added). 689 F.2d at 439. The state court seems to have chosen not to enforce the procedural rule, and in such a case it is well established that the habeas court need not enforce it either. See note 7 supra and accompanying text.

It is difficult to imagine that anything less than a holding would justify barring habeas review. Thus, the approach announced by the Sixth Circuit, whereby the Sykes test will apply whenever the procedural default formed a “substantial basis” of the state court’s opinion, see note 42 supra, does not appear helpful. By the same token, nothing more than an alternative holding should be required to implicate the Sykes test. Cf. Darden v. Wainwright, 699 F.2d at 1034 n.4 (because the state court’s determination on the merits was the “primary basis” of its decision, Sykes does not apply).


45. See note 27 supra and accompanying text.
courts, and for excluding improper evidence before it is ever admitted. Thus, substantially all of the reasons that the Sykes Court said justified the protection of state procedural rules exist in alternative holdings cases.

Alternative holdings cases differ from straightforward procedural default cases, however, in that the state court has rendered an additional holding on the merits. Despite this difference, the Sykes standard should apply to bar federal habeas review absent a showing of cause and prejudice.

Congress chose to give federal courts the final word on matters of federal constitutional law through the power of habeas review of state decisions. The power of federal habeas review does not, however, extend to decisions resting on adequate and independent nonfederal grounds, whether or not other valid federal claims are present. In the presence of an adequate state law ground for decision, any meritorious federal claim that may exist alongside it is rendered moot, for nothing can turn on its resolution.

Before Sykes, it was unclear whether a state procedural default ruling could constitute an adequate and independent state ground barring habeas review. Indeed, the Fay Court had declared that "the

46. See note 28 supra and accompanying text.
47. See note 29 supra and accompanying text.
48. This is not to say that all of the reasons supporting the Sykes standard apply with equal force to the alternative holdings case. The "sandbagging" problem, see note 33 supra and accompanying text, is attenuated in the alternative holdings context, since Sykes remains the general rule and the instant problem arises only where the state reviewing court has made an alternative holding on the merits. Only a very reckless lawyer indeed would intentionally hope to rely upon an alternative holding by the reviewing court as the basis for his sandbagging maneuver.

The Sykes Court's concern that allowing habeas review despite a state procedural default ruling renders state courts more lax in their enforcement of procedural rules, see notes 37-38 supra and accompanying text, is also weakened in the alternative holdings context. Habeas review of alternative holdings cases would only discourage state courts from making disquisitions on the merits of the claim when a holding could be rendered strictly on procedural grounds. The desirability of this result is discussed at notes 60-66 infra and accompanying text.

49. Because state courts are under the same duty as federal courts to uphold the federal Constitution, Congress could have left the enforcement of federal constitutional rights in criminal cases exclusively to the states. As was made clear in Brown v. Allen, however, Congress did not so choose. Brown v. Allen, 344 U.S. 443, 499-500 (1953) (Frankfurter, J., separate opinion); see notes 14-15 supra and accompanying text.

50. This is commonly referred to as the "adequate state ground doctrine." The doctrine holds that where the judgment of the state court rests on two grounds, one involving a federal question and the other not, the federal court will not take jurisdiction. See Ward v. Board of County Commrs., 253 U.S. 17, 22 (1920); Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

52. See Sykes, 433 U.S. at 81-82. Because of its origins in direct review, the adequate state ground doctrine could be viewed strictly as a function of the Supreme Court's appellate jurisdiction (and its traditional refusal to render advisory opinions) and not applicable to habeas review by the district courts. See Fay, 372 U.S. at 429. In Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874), a seminal case in the development of the doctrine, the Court held that the Judiciary Act of 1789 as amended, Act of Feb. 5, 1867, ch. 28, §2, 14 Stat. 385-86, did not require the Supreme Court to review an entire case as it came up from the state courts. Even if
adequate state ground rule is a function of the limitations of *appellate*
review,"53 and not of habeas review. It is significant, therefore, that in
adopting a cause-and-prejudice test, the *Sykes* Court did more than to
discard the *Fay* deliberate-bypass standard.54 *Sykes* in essence rejected
the *Fay* Court's limitation upon the scope of the adequate state
ground doctrine, and clearly held that a procedural default ruling that
would have constituted an adequate and independent state ground on
direct review will also presumptively bar habeas review.55 Thus,
where the habeas court discerns anywhere in the record a state court
ruling constituting an adequate state ground, it need not read any
further.56

In alternative holdings cases, the state court has made a procedural
default ruling and a ruling on the merits. Under *Sykes*, a state proce-
dural default ruling presumptively bars habeas review. Whether or
not the *Sykes* Court can be described as "applying" the "adequate
state ground rule" on habeas review57 is a semantic question. The
important point is that consideration of the holding on the merits would

the state court decided the federal question incorrectly in the Court's view, "to prevent a useless
and profitless reversal" the Court would look into the remainder of the record to see "whether
there exist other matters . . . which are sufficient to maintain the judgment of that court,
notwithstanding the error in deciding the Federal question." *Murdock*, 87 U.S. (20 Wall.) at
635. In other words, the Supreme Court, on appellate review, would not decide federal issues
when substantive state law was sufficient to sustain the judgment. Given the limited nature of the
holding, application of a similar limitation to habeas review by a district court plainly constitutes
an extension of *Murdock's* conception of the adequate state ground.

A still more basic difficulty in applying the adequate state ground rule to procedural default
rulings lay in the intuitive difference between procedural and substantive holdings. When a deci-
sion on the basis of substantive state law is dispositive of the case (as in *Murdock*), the federal
question is moot; nothing turns on its resolution. *Fay*, 372 U.S. at 429. But when the decision of
a state court purporting to be an adequate state ground is a ruling that the federal claim has itself
been forfeited, the very implementation of the federal right in state court is at issue. See *Runnels
v. Hess*, 653 F.2d 1359, 1365-66 (10th Cir. 1981) (Logan, J., concurring in part, dissenting in
part). However *adequate* the state procedural ruling might be to further the state's legitimate
interest in the integrity of its procedures, the *independence* (or power of such a ruling to render a
federal claim moot) was doubtful. But see *Sandalone, Henry v. Mississippi and the Adequate
State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 197-98 ("[T]he distinc-
tion between state substantive and procedural grounds has a surface plausibility that . . . fails to
withstand analysis.").

53. 372 U.S. at 429 (emphasis in original).

54. For a brief description of the deliberate-bypass standard, see text accompanying notes 18-
21 supra.

55. See *Sykes*, 433 U.S. at 87 (petitioner's failure to timely object to admission of evidence
"amounted to an independent and adequate state procedural ground which would have pre-
vented direct review here"); *McCown v. Callahan*, 726 F.2d 1, 3 (1st Cir.), *cert. denied*, 105 S.
Ct. 139 (1984). This Note argues that *Sykes* pays deference, in the form of a cause-and-prejudice
test, *only* to those state procedural rules that would constitute adequate state grounds for
decision on direct review. Under the *Sykes* regime, therefore, a determination of "adequacy" pre-
cedes any determination as to cause or prejudice. *See Part IV infra.*

56. Upon finding an adequate state ground, "no further examination is required." *Brown v.

57. *See Hill*, *supra* note 9, at 1051 & n.4.
therefore be "useless and profitless," because Sykes holds that the procedural ruling will stand alone to justify the state's custody of the petitioner. Habeas review, therefore, ought to be barred even where the state courts addressed an alternative holding to the merits.

The rule here advanced has the virtue of not interfering with the forms of state court decisionmaking. When habeas review is permitted in alternative holdings cases, state courts have a powerful incentive simply not to comment upon the merits of a claim — an unfortunate result. Disquisitions on the merits of constitutional claims should be encouraged, because such consideration may be more satisfying to the petitioner. More importantly, state appellate courts may often render alternative holdings in order to provide an alternate basis for affirmance in the event the procedural ruling is reversed. By discouraging state reviewing courts from rendering alternative rulings, the state's judicial resources may well be taxed to a greater extent than they normally would be, because reviewing courts would have to remand cases upon reversal for separate consideration of each possible ground for affirmance.

58. See note 52 supra.

59. The additional arguments that have been advanced for the opposite rule are singularly unpersuasive. One cannot logically argue, as did the petitioner in Phillips v. Smith, 717 F.2d 44, 48-49 (2d Cir. 1983), cert. denied, 104 S. Ct. 1287 (1984), that "when a state court invites federal intervention by ruling on the merits . . . , it manifests a judgment that the state's interest in resolving the constitutional question outweighs its interest in finality, accuracy and trial integrity" (emphasis in original). This argument only begs the question, that is whether or not state rulings on the merits invite federal habeas review.

It might also be argued that the very language of Sykes suggests that review should be allowed in the alternative holdings situation. The Court did say that in Sykes it was dealing "only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure." Sykes, 433 U.S. at 87 (emphasis added); see also United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 440-41 (3d Cir. 1982). To argue from this statement to a rule in the alternative holdings situation, however, is to take the Court's words out of context. All that the Court meant here is that when the state court has chosen to ignore a procedural default and has gone on to decide the case solely on its merits, the habeas court need not respect the state procedural rule to any greater extent than the state court itself. See notes 7 & 43 supra and accompanying text.


61. See United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982) ("Typically, decisions on procedural grounds are not as satisfying as decisions on the merits, and it is understandable that a court would want to show that it does not think its reliance on a procedural rule is causing any great injustice."); Wright, supra note 2, at 809 ("A rebuff to the prisoner on procedural grounds leaves a cloud, however frivolous, over the state conviction . . . .").


63. See Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983) ("Rather than encouraging adjudication of all issues in as few proceedings as possible, [petitioner's] position would prolong the full and final disposition of state criminal cases."); cert. denied, 104 S. Ct. 1287 (1984).

State appellate courts may render alternative holdings on the merits not only to provide alternate bases for affirmance in higher state courts, but also to gain input into the consideration of the merits in case "cause" and "prejudice" are found to excuse the default in federal court. The
Moreover, in some states the reviewing court must make a cursory review of the merits so that it may determine whether a "plain error" exception to the state's procedural rule is to be called into play.64 State courts operating under such a requirement, if their cursory examinations were taken to be alternative holdings,65 would find that their procedural rulings were almost constantly bypassed on federal collateral review.66

III. THE SILENT AFFIRMANCE PROBLEM

In many cases a habeas court is confronted with a state appellate court's summary affirmation, without opinion, of the petitioner's conviction. In such a case, it is unclear how the habeas court ought to determine under Sykes whether the state court rejected the petitioner's claim on its merits or barred it for noncompliance with a state procedural rule.67 One approach to the problem is for the district court, presumably familiar with state practice, to make its own inquiry into what the state court was "thinking" when it rejected the petitioner's claim without a word.68 Another common approach simply presumes

*Sykes* Court recognized this desire of state courts to channel the outcomes of cases that pass before them, even on habeas review. *See* note 35 *supra* and accompanying text. It would seem, therefore, that yet another consideration manifested in *Sykes* — the acknowledged role of state courts in channeling even the legal issues of a case — militates for the application of the *Sykes* test in alternative holdings situations.


65. Federal courts are often confused, and with good reason, as to what comments by a state court actually constitute an alternative holding. *See*, e.g., note 42 *supra* and note 67 *infra*.

66. The First Circuit's decision in Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984), illustrates that this danger is not merely an imagined one. There the court allowed federal habeas review where the Massachusetts Supreme Judicial Court's only discussion of the merits of the petitioner's claim arose in the context of applying the state's "misuse of justice" (a form of plain error) exception to its procedural rules. *See* Jackson, 729 F.2d at 44.

67. Only in the latter case will habeas review be barred absent a showing of "cause" for failing to comply with the procedural rule and "prejudice" resulting from a forfeiture. *See* notes 3-7 *supra* and accompanying text.

68. This approach was suggested in dicta as long ago as 1953. *See* Brown v. Allen, 344 U.S. 443, 458 (1953). A clear example of its application is Tweety v. Mitchell, 682 F.2d 461 (4th Cir. 1982), *cert. denied*, 460 U.S. 1013 (1983), in which the court stated: "[W]e are left to speculate whether the Virginia Supreme Court dismissed the case on state procedural grounds which would preclude federal habeas corpus review . . . or whether the court dismissed the opinion [sic] upon consideration of the merits, in which case a review of the merits by this court will be appropriate." 682 F.2d at 464 (footnote omitted). This approach was said to require an "inquiry into what the Virginia Supreme Court was thinking." 682 F.2d at 464. For a somewhat more sophisticated description of the same approach, see Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983): "In this circuit, the determination of whether state procedural bars were invoked by the state courts has been made on a case-by-case basis, upon a consideration of all the relevant indicia." One of the "indicis" said to point to a procedural default ruling below in *Maggio* was the very fact that relief was denied there, since petitioner's federal claim was so strong on the merits that it would presumably have "won" had it been considered. 705 F.2d at 117. Thus, under the Fifth Circuit's rulings, the greater the magnitude of the possible error in state court, the more likely it is that the federal court will presume a procedural default and decline to review the matter.
that silence by a state court evinces an intent to rely upon an adequate state procedural ground.\textsuperscript{69}

A third approach to the problem of affirmance without opinion involves a two-step analysis. This approach has been endorsed, at least in part, by the Supreme Court in \textit{County Court v. Allen}.\textsuperscript{70} The Court was confronted on habeas review with an opinion of the New York Court of Appeals that, though lengthy, was ambiguous as to the particular claim at issue. It was, in fact, unclear whether the state court had affirmed the petitioner's conviction on procedural or on substantive grounds.\textsuperscript{71} Justice Stevens, writing for the Court, attacked this threshold question by assuming for the sake of argument that the state court had been \textit{silent} on the merits of the issue.\textsuperscript{72} The opinion in \textit{County Court}, therefore, offers a pattern for habeas review of a simple affirmance without opinion.

Faced with its hypothetical affirmance without opinion, the Court in \textit{County Court} first inquired if it could rule out entirely the possibility that the state court based its denial of relief upon a procedural default. After examining the record and the state procedural law, the Court concluded that the petitioner could not have committed a pro-

\textsuperscript{69} See, e.g., Phillips v. Smith, 717 F.2d 44, 51 (2d Cir. 1983), \textit{cert. denied}, 104 S. Ct. 1287 (1984); Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir.), \textit{cert. denied}, 459 U.S. 849 (1982); Lewis v. Cardwell, 609 F.2d 926, 928 (9th Cir. 1979); see also Hearn v. Mintzes, 708 F.2d 1072, 1076 (6th Cir. 1983) (suggesting that it might apply the Martinez approach, but finding it unnecessary to do so under the facts of this particular case). This approach is generally invoked when a procedural default was briefed and argued before the court that affirmed without opinion. The briefs and arguments in state court are said to show that the court was "thinking in procedural terms." Brown v. Reid, 493 F. Supp. 101, 103 (S.D.N.Y. 1980). This argument ignores the fact that the substantive issues also were argued, and therefore the state court could just as easily have been "thinking in substantive terms." For the state court to exercise its discretion to excuse the default, the argument continues, is a rare and "extraordinary measure." 493 F. Supp. at 103. Apart from the obvious assumption made here about the frequency with which state courts will exercise their discretion to excuse defaults, this argument necessarily presumes that some clear procedural rule must have formed the basis of the arguments in state court. When the state of the law is unclear, however, or when the government's procedural default argument is novel or simply unfounded, the state court may have rejected it outright, without exercising any extraordinary discretion to excuse defaults.

\textsuperscript{70} 442 U.S. 140 (1979).

\textsuperscript{71} The case involved a complex tangle of closely related state and federal claims. See 442 U.S. at 146, 148, 153-54; see also People v. Lemmons, 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976) (opinion of the New York Court of Appeals upholding petitioner Allen's conviction). The petitioner claimed that a New York statutory presumption was unconstitutional as applied. The statute, N.Y. PENAL LAW § 265.15(3) (McKinney 1967), provided that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle. Petitioner moved for a directed verdict on the (state) ground that, despite the statutory presumption, he had not been proven guilty beyond a reasonable doubt of possessing a firearm. He did not, however, object on federal grounds to the giving of a jury instruction based on the statute. He raised his federal claim — that a conviction based upon this allegedly unreasonable legislative presumption deprived him of due process — only in a post-trial motion. 442 U.S. at 144-45.

\textsuperscript{72} See 442 U.S. at 148 n.6 (proceeding on the basis of the "alleged silence" of the New York court). However, the opinion does acknowledge that in any event the state court probably did reach the merits of the federal question. 442 U.S. at 153.
Procedural Bars to Habeas Corpus Review

This inquiry constitutes the first step of the two-step analysis. If the possibility of a procedural ruling can be excluded, then the state court must have ruled on the merits and federal habeas review may follow. If it is possible that the state holding was procedural, the court proceeds to the second step.

The Court in County Court suggested that if the first inquiry results in a finding that a state procedural rule does generally bar the type of claim which the petitioner raises, a habeas court should proceed to determine whether the state law of procedure contains any exceptions to the forfeiture rule that might have applied in the case. The Court found two exceptions that might have applied to the facts of County Court. The decision thus suggests a presumption in favor of state procedural default.

73. The Court began its first-step inquiry by noting that the state's forfeiture policy was a "cautious" one, 442 U.S. at 150 n.8, and that New York had "no clear contemporaneous-objection policy that applied in this case." 442 U.S. at 150 (footnote omitted). Keeping in mind that the petitioner had raised his claim before the judge in a post-trial motion, the Court observed that under New York law "protest" can be made at the time of the ruling "or at any subsequent time when the court had an opportunity of effectively changing the same." 442 U.S. at 150 n.8 (emphasis in original). Such protest can be made "expressly or impliedly," and need not be repeated at every stage in the disposition of the matter. 442 U.S. at 150 n.8. All of these factors, when combined with the fact that no New York court had ever expressly refused on contemporaneous-objection grounds to consider a post-trial claim like that of the petitioner, 442 U.S. at 150, rendered it highly unlikely that the petitioner had committed a procedural default under state law at all.

74. For example, if only the merits of the claim were briefed and argued before the state court, the conclusion is fairly impelled that its silence indicated that it held adversely to the petitioner on the merits of the claim. See Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981), cert. denied, 455 U.S. 951 (1982); also County Court, 442 U.S. at 152 ("This omission [to argue the procedural default in state court] surely suggests that the . . . courts were not thinking in procedural terms when they decided the issue."). This will not occur often, since it is usually considered wise for the prosecutor to argue in the alternative. See Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), cert. denied, 459 U.S. 849 (1982). Errors of judgment and oversights by prosecutors do, however, occur. See, e.g., Washington v. Harris, 650 F.2d at 452. The negative inference — that procedural issues were argued means that the holding was likely procedural — is illogical. See note 69 supra.

There may also be cases in which the decision to apply a new constitutional holding retroactively will override the possibility of a procedural default. In Hankerson v. North Carolina, 432 U.S. 233 (1977), the issue was the retroactivity of the holding in Mullaney v. Wilbur, 421 U.S. 684 (1975), that the state is constitutionally required to establish all elements of a criminal offense beyond a reasonable doubt. The Court suggested that states could choose to insulate past convictions from newer constitutional holdings "by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." 432 U.S. at 244 n.8. By implication, a state may choose not to insulate past convictions in this way. See, e.g., People v. Bailey, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d 943 (1968). This is a choice that a habeas court can respect by rejecting the possibility of a procedural default. See, e.g., Adkins v. Bordenkircher, 517 F. Supp. 390, 396 (S.D. W. Va. 1981).

Finally, state statutes may distinguish between the appellate court's power to "affirm" a conviction on its merits and to "dismiss" an appeal for procedural reasons. See, e.g., Mich. Ct. R. 7.211(o)(2)-(3) (West 1985). The state court's choice of words, even in an otherwise summary disposition of a case, may thus suggest the basis for its action. See, e.g., Hearn v. Mintzes, 708 F.2d 1072, 1075-76 (6th Cir. 1983).

75. See 442 U.S. at 151.

76. One exception allowed review of technically defaulted claims affecting "a fundamental
of habeas jurisdiction when a state procedural rule, by reason of a recognized exception, does not clearly constitute an independent state ground for decision. The structure of the Court's inquiry implies that if an exception to the relevant state procedural rule might have applied, the rule standing alone will not support the inference that the state court denied relief on a procedural ground. Rather than at-

constitutional right"; the other applied where a similar claim seeking similar relief was clearly raised. 442 U.S. at 151 n.10.

77. See County Court, 442 U.S. at 151 (Court examines state procedural law for exceptions which "might nonetheless apply"); 442 U.S. at 149 (fact of state court decision on procedural grounds constitutes an "inference" which must be "support[ed]"); Lockett v. Am, 728 F.2d 266, 269 (6th Cir. 1984); Kreck v. Spalding, 721 F.2d 1229, 1234-35 (9th Cir. 1983); Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir. Unit B 1982).

This understanding of County Court potentially affects a substantial number of silent affirmance cases. Although New York is one of the more permissive states procedurally, exceptions to a strict rule of contemporaneous objection are fairly common under state law. Speaking broadly, state courts have the power to review claims that were not raised at trial as a matter of discretion if an exception to the relevant state procedural rule might have applied, the rule standing alone will not support the inference that the state court denied relief on a procedural ground. Rather than at-
tempting to determine whether the state court actually applied the exception, 79 the habeas court would presume in favor of habeas jurisdiction. 79


An objection often need not conform to technical niceties where its meaning is clear. See, e.g., Freeman v. State, 486 P.2d 967, 980-81 (Alaska 1971); People v. Flynn, 8 Ill. 2d 133, 134, 133 N.E.2d 259, 260 (1956); N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 1983). When the trial court refuses a tendered jury instruction, the defendant may not have to object in order to preserve the issue for review. See, e.g., N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 1983). And when the defendant successfully sought a ruling to have certain charges dismissed, he need not object specifically to the court’s adding another count in their stead. People v. Davis, 82 Misc. 2d 41, 42, 370 N.Y.S.2d 328, 329 (App. Term 1975).

78. See note 68 supra and accompanying text.

79. The court in Henry v. Wainwright, 686 F.2d 311, 314 n.4 (5th Cir. Unit B 1982), vacated, 103 S. Ct. 3566 (1983), applied precisely this presumption, citing County Court. Because in Henry an established exception to the state’s procedural rule in capital cases, see note 77 supra, might well have applied, the federal court presumed that it was applied, and that the state court
If, however, no exception to an established procedural rule could even arguably have applied to the case at hand, the habeas court, having assured itself that it is possible that the state court holding was procedurally based and that it is not possible that the court excused the default, may confidently apply state law to bar review in the absence of cause or prejudice. This approach is similar to the de novo application of state procedural law that habeas courts undertake when a petitioner presents his claim for the first time before a habeas court, but with due allowances for the fact that a state court has rendered a decision in the case.

The two-step approach outlined here is designed to respect the likelihood that a petitioner's claim was in fact rejected on its merits, thereby entitling him to have the claim reviewed again by a federal court. The first step inquiry pinpoints those cases in which the inference that the state court decided the claim on the merits is strongest, and permits habeas review. Cases that do not pass the second step requirements for habeas review are those in which the opposite inference — that the state court barred the claim by reason of a default — is strongest. Here the habeas court may, with some degree of assurance, apply state law to bar habeas review. The cases which remain, those that may fall under an exception to a state procedural requirement, are those that truly are ambiguous. For these cases, a presumption applies that ensures federal courts the final word on the merits of federal questions, and that protects the petitioner's right to have federal review of a state court decision of his claim on the merits.

Thereby reached the merits. Were it to hold otherwise, the court noted, "Federal habeas review would unjustly be denied a prisoner who has no way of proving that the state courts did consider the merits of his claim." 686 F.2d at 314 n.4 (emphasis added). Because the petitioner's inability to prove the basis of the affirmance results entirely from the state court's silence, fairness would seem to dictate that the state, which seeks enforcement of its rule in the federal court, bear the burden of proof in the close cases falling under this second step. However, when the state court clearly rejected a claim on procedural grounds, and then merely denied reargument or leave to appeal without an opinion, the petitioner should not be entitled to any presumption in favor of habeas review. Here one can indeed feel certain that the state court has not truly adjudicated any issue, on its merits or otherwise. See Jones v. Henderson, 580 F. Supp. 273, 276-77 (E.D.N.Y. 1984).

80. Because the Court in County Court concluded that the petitioner had not committed a procedural default, or if he had, that it might have been excused, it did not suggest what action it might have taken had it concluded otherwise.

81. When a claim is raised for the first time before a habeas court, the state courts have not had an opportunity to review the claim and make a ruling which federal courts would be bound under Sykes to respect. In order to discourage petitioners from bypassing the state courts entirely in this way, habeas courts have applied the state law of procedure de novo, just as the state courts would have applied it given the opportunity. See, e.g., Adkins v. Bordenkircher, 517 F. Supp. 390, 395 (S.D. W. Va. 1981), aff'd, 674 F.2d 279 (4th Cir.), cert. denied, 459 U.S. 853 (1982). De novo review is desirable in this context because there is no possibility that a state court rendered a holding on the merits of the petitioner's claim.

82. See note 49 supra and accompanying text.

83. Cf. Edwards v. Jones, 720 F.2d 751, 756-57 (2d Cir. 1983) (Newman, J., concurring) (expressing concern that in case where no federal judge can be "even reasonably sure" that state
Moreover, "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."84

The two-step analysis provides distinct advantages over other approaches that habeas courts employ. Unlike the blanket presumption that the state court's holding was procedural, the technique outlined here avoids placing undue weight on the unilateral assertion by the government, on state appellate review, that the petitioner committed a default.85 In contrast to the approach in which the habeas court attempts to "speculate" on what the state court was "thinking," rulings under the County Court technique do not weigh the federal prerogative of having the final word on the merits of federal questions (and the petitioner's right to assert his claim) against what a state court "probably" did.86 Nor will the absurd situation be presented where, for example, a mere typographical error in one of the briefs filed in the state court can lead to confusion over what the state court was "thinking" when it decided the case, and therefore over whether the petitioner is

affirmance rested on procedural default, majority's presumption in favor of procedural default, see note 69 supra and accompanying text, will lead to mistaken conclusion that petitioner defaulted in state court when, in fact, affirmance below was on the merits), cert. denied, 105 S. Ct. 178 (1984).

84. County Court v. Allen, 442 U.S. 140, 154 (1979) (emphasis added) (footnote omitted). In sum, "respect" for state procedural rules does not mean that habeas courts must create procedural holdings where none may in fact exist. See note 7 supra. Indeed, the second step "respects" state procedural law by acknowledging, in the cases to which the step applies, that state courts may have exercised discretion to hear the claim.

85. One court employing the blanket presumption of default described the rule as follows: "Where the state does not raise the issue of procedural default and the state court holding is ambiguous, no presumption of preclusion inheres." Hall v. Wainwright, 565 F. Supp. 1222, 1234 n.15 (M.D. Fla. 1983) (emphasis added), affd. in part, revd. in part, 733 F.2d 766 (11th Cir. 1984). This way of stating that preclusion is to be presumed from the silence of the state court clearly illustrates that the petitioner's access to federal habeas review would often be determined by the prosecutor's unilateral decision whether or not to argue the alleged procedural default in state court.

Although the Second Circuit recently adopted this presumption of default in silent affirmance cases in Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir.), cert. denied, 459 U.S. 849 (1982), its decision has on occasion met with resistance. For example, based on "[his] own many years of personal experience with New York appellate courts," District Judge Knapp refused to apply the Martinez rule to a state prisoner's correctable procedural default in a pro se post-conviction petition. Gulliver v. Dalsheim, 574 F. Supp. 111, 113 (S.D.N.Y. 1983), revd., 739 F.2d 104 (2d Cir. 1984). No such state court, Judge Knapp reasoned, would dismiss without opinion a pro se petition on the basis of a correctable default without telling the petitioner how to correct it. 574 F. Supp. at 113. And in a concurring opinion in Edwards v. Jones, 720 F.2d 751 (2d Cir. 1983), Judge Newman suggested limiting the Martinez rule to cases in which the defendant in state court failed to observe a "well-known rule of trial practice." 720 F.2d at 755 (Newman, J., concurring) (quoting Taylor v. Harris, 640 F.2d 1, 2 n.3 (2d Cir.), cert. denied, 452 U.S. 942 (1981)).

86. In striking this balance, the state's interest in enforcing a system of preclusionary penalties is arguably attenuated when the state fails clearly to indicate the reason for its holding. A rule that goes unannounced presumably does little to promote the timely adjudication of constitutional claims.
entitled to habeas review. 87

Finally, a presumption in favor of federal jurisdiction is the only rule that encourages state courts unequivocally to state the bases for their decisions. The federal habeas court would face a far simpler inquiry if state courts regularly made explicit, if only summary, findings of procedural default. 88 When the state procedural law is unclear, either because legislation and court rules fail to make it clear, or because the state courts in the same or a similar case fail to enunciate an applicable rule, the federal courts will adopt a presumption in favor of review. And where the state court desires to rest its ruling on an adequate state ground, the mere indication of this fact by a "plain statement" 89 will insure that the intent of that ruling will be carried out.

87. In Martinez v. Harris, 675 F.2d 51, 55 n.6 (2d Cir.), cert. denied, 459 U.S. 849 (1982), a typographical error in the brief which the government filed in state court created some doubt as to whether the procedural default argument had been clearly presented, and therefore whether that issue was "on the mind" of the state court panel when it affirmed the conviction. The Second Circuit nevertheless applied a presumption that the state court holding had been procedurally based.

The utility of County Court for analysis of the problem of an affirmation without opinion has apparently been lost on the Second Circuit. In Martinez, 675 F.2d at 54-55, the court chose to apply a presumption that silence by a state court evinces an intent to rely upon an adequate state procedural ground. This is decidedly not the approach of County Court. Moreover, in Phillips v. Smith, 717 F.2d 44, 50-51 (2d Cir. 1983), cert. denied, 104 S. Ct. 1287 (1984), the court cited County Court in support of the view that habeas review is barred in the alternative holdings situation. See Part II supra. Because the Court in County Court searched New York law to find whether a procedural default had occurred — despite the existence in the state court opinion of a ruling on the merits — the Phillips court reasoned that when there are rulings on both substantive and procedural grounds, the procedural ground will still bar review. This argument ignores the fact that throughout most of the first part of the County Court opinion, Justice Stevens assumes, arguendo, that the New York Court of Appeals had been silent as to the merits of the claim at issue. See notes 71-72 supra and accompanying text.


89. The phrase "plain statement" derives from Michigan v. Long, 103 S. Ct. 3469, 3476 (1983). The Court was confronted with an analogous situation on appellate review; it was unclear whether the state high court had based its decision on state or federal constitutional law. Because an "ad hoc" method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved," 103 S. Ct. at 3475, the Court applied a jurisdictional presumption. In the absence of "a 'plain statement' that a decision rests upon adequate and independent state grounds," the Court will presume in favor of its own jurisdiction. 103 S. Ct. at 3476. Such a "plain statement" is clearly absent from the affirmation without opinion, and a presumption in favor of habeas review is therefore appropriate. The approach which probes the "thinking" of the state court in each case is just such an "ad hoc method" of dealing with cases involving possible independent state grounds, while the two-step approach which presumes in favor of habeas review will encourage plain statements by state courts of the reasons for their rulings.

A more strident approach to the problem of affirmances without opinion would require a "plain statement" that a decision rests upon a state procedural ground in order to implicate the Sykes test. The requirement of a "plain statement" to trigger Sykes' deference toward state procedural rulings would then parallel the statutory requirement of a "written finding, written opinion, or other reliable and adequate written indicia" of a fact-finding by a state court before the habeas court will be required to defer to that finding. 28 U.S.C. § 2254(d) (1982). See S. REP. No. 1797, 89th Cong., 2d Sess. 2, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 3663, 3664-65.

Short of a "plain statement" requirement, which would in essence eliminate the problem of
IV. THE ADEQUACY PROBLEM

Sykes held, in essence, that an unambiguous procedural default ruling by a state court that would have constituted an adequate and independent state ground on direct review will also presumptively bar consideration of otherwise cognizable federal issues on habeas review. Under this regime, the state court's decision of a procedural question often determines whether the claimant will be able to raise his substantive federal issue in any court, state or federal. If the state court, therefore, were to have the last word on the threshold procedural question, the constitutional guarantee represented by the precluded claim would have only as much force as the state courts were willing to allow it.

A system that allowed state courts to foreclose access to the vindication of federal constitutional rights by interposing unreviewable state grounds for decision would clearly be unacceptable. In its unwavering assertion that an adequate state procedural rule may properly bar the consideration of a federal claim, the Court has acknowledged that some form of federal review of state procedural affirmances without opinion, the steps advocated in the text will accomplish much the same results in a less intrusive way. The "plain statement" required by Long, moreover, may only reflect a pragmatic understanding of the infrequency with which the interpretation of state constitutions differs from the federal. See generally Sandalow, supra note 52, at 201-02 (decisions interpreting state constitutions often mirror Supreme Court's interpretation of similar clauses in the federal Constitution). State procedural rules, on the other hand, often conflict with the assertion of federal rights. Cf. Note, supra note 43, at 1385-86 (suggesting a requirement for a "plain statement" that the procedural ground in an alternative holdings case is dispositive before the Sykes cause-and-prejudice rule will apply).

90. The present Part of this Note deals with unambiguous default rulings which may nonetheless stand or fall as a bar to habeas review depending upon some federal determination as to their adequacy. This distinguishes Part IV from Parts II and III, in which the procedural rulings discussed were in some sense ambiguous. The procedural rulings examined in Part II were problematic because they were accompanied by holdings upon the merits of the claim. In Part III, the problem was to discern under which circumstances an affirmance without opinion could be considered a reasonably unambiguous procedural default ruling.


92. See text at note 8 supra. Thus, tying the federal court's enforcement obligations to the preclusionary rulings of state courts creates a "double or nothing" effect; either both courts are free to address a claim or neither is. Brilmayer, State Forfeiture Rules and Federal Review of State Criminal Convictions, 49 U. Chi. L. Rev. 741, 746 (1982).

93. Hill, supra note 9, at 1082. See also Staub v. City of Baxley, 355 U.S. 313, 319 (1958) (states cannot limit the guarantees of the federal Constitution).

94. Such a system would, de facto, give state courts the final word on matters of federal constitutional law. Yet Congress chose to vest this power in the federal courts. See note 49 supra and accompanying text; Francis v. Henderson, 425 U.S. 536, 550 (1976) (Brennan, J., dissenting) ("[T]he federal courts are the ultimate arbiters of federal constitutional rights . . . ."); Sandalow, supra note 52, at 189 ("If the Court did not . . . encroach upon the function of state courts to declare state law, vindication of federal rights would be subject to impermissible interference by a decision upon state grounds . . . .").

rulings is necessary before they can be accorded the deference manifested by a cause-and-prejudice test. The necessity of federal review is particularly acute where, as is usual, the state court is vested with discretion to forgive a default despite technical noncompliance with a procedural rule. This discretionary power to hear (or, conversely, not to hear) federal claims despite a default creates a special danger that those claims may be undervalued or even rejected in a discriminatory fashion.

It is clear, then, that the issue of when state procedural defaults can preclude consideration of a federal question in federal court is itself a federal question. Sykes holds, as a matter of federal law, that noncompliance with an adequate state procedural rule will only be excused by a showing of cause and prejudice. And because Sykes mandates such deference only to those rules which, because of the many interests they serve in their own right, would have constituted adequate state grounds for decision on direct review, the habeas court must also make a preliminary determination whether the state pro-

96. See note 119 infra and accompanying text.
97. Even when the court's exercise of discretion would constitute an act of grace, as when the legislature could bar discretion outright, the decision to preclude a federal claim may be "inadequate" to bar habeas review. If a state decides to grant discretion, it must be exercised in an "adequate" manner. The situation is analogous to the state's provision of channels of appellate review. While appellate review by the states is not required under the federal Constitution, Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983), "once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Rinaldi v. Yeager, 384 U.S. 305, 310 (1966). See also Hill, supra note 9, at 1084 n.182 (adequacy of state court's exercise of discretion over federal claims is subject to review by the Supreme Court).

98. Such grants of discretionary power to reviewing courts are commonly referred to as "plain error exceptions." These allow a reviewing court to notice errors appearing on the record even though they were not properly raised at trial. See note 77 supra.
99. The danger of discrimination against federal claims cannot be considered a thing of the past. In an era in which the vindication of federal rights is often perceived, by federal as well as state officers, as setting free "clearly guilty people... to continue to plunder the innocent citizenry," Letter from Edward C. Schmults, Deputy Attorney General of the United States, to the Editor (Dec. 6, 1982), N.Y. Times, Dec. 10, 1982, at A34, col. 3 (discussing the exclusionary rule), there exist strong pressures, in both state and federal courts, to undervalue those rights. The "redundancy" of habeas review of state court holdings is often thought to reduce the likelihood that the rights of any given petitioner will be undervalued. In order to make such a deprivation felt, courts in both coordinate, but nonetheless competitive, systems would have to concur in such a result.

100. Henry v. Mississippi, 379 U.S. 443, 447 (1965). See also Staub v. City of Baxley, 355 U.S. 313, 318 (1958) (sufficiency of pleadings based on this federal law is a federal question); Parker v. Illinois, 333 U.S. 571, 574 (1948) (same); Brilmayer, supra note 92, at 742 (same).
101. See note 26 supra and accompanying text.
102. As its title suggests, this Note takes the position that the adequacy inquiry stands on the threshold of (i.e., is preliminary to) the application of the cause-and-prejudice test. Most courts and observers confronting the issue have understood the inquiry in this way. See, e.g., Spencer v. Zant, 715 F.2d 1562, 1571 (11th Cir. 1983) ("[B]asic principles of due process and federal supremacy dictate that, before deferring to state interpretations of state procedural rules that result in forfeiture of a federal claim, the federal court should first determine that the state rule and its interpretation are 'independent and adequate.'") (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977)); Breest v. Perrin, 655 F.2d 1, 2 n.1 (1st Cir. 1981) (adequacy an issue "that must be considered before deciding the effect of Wainwright v. Sykes"); St. John v. Estelle, 563 F.2d
cedural ruling advanced would *prima facie* have been "adequate" to bar further review.

It remains unclear, however, how the federal habeas court is to determine adequacy. The few courts and commentators who have confronted the issue, both on direct and on habeas review, suggest several approaches. One method formerly used by some federal courts to determine adequacy applied federal plain error doctrine for the benefit of state prisoners. Another approach that found favor for a time was a *de novo* application of state standards. This approach viewed the adequacy inquiry as a form of original application of state standards of discretion. Both of these methods have since been re-

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168, 172 (5th Cir. 1977) (Tjoftlat, J., dissenting); Goodman & Sallet, *supra* note 9, at 1690. *But see* Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 1614 (5th ed. 1980); Hill, *supra* note 9, at 1059-88 (treating adequacy under the general rubric of "cause"). "Cause" and "adequacy" are indeed separate concepts. The adequate state ground doctrine has its origins in the Supreme Court's appellate jurisdiction, both civil and criminal, *see* note 52 *supra*, where it has long existed completely apart from the collateral review concept now known as "cause." The idea of "cause" derives from Fed. R. Crim. P. 12, which requires certain claims to be raised before trial absent "cause shown." *See* note 23 *supra*. In the rule 12 context, "cause" has meant, in accord with common usage, some form of *excuse* for noncompliance with the rule. *See, e.g.*, United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982) (claim that government failed to furnish trial counsel with copy of affidavit upon which allegedly unlawful search was based). In other words, cause exists under rule 12 under those exceptional circumstances in which a court refuses to penalize a criminal defendant for the ignorance or inadvertence of his attorney. *See* United States v. Hall, 565 F.2d 917, 920 (5th Cir. 1978); Buono v. United States, 126 F. Supp. 644, 645 (S.D.N.Y. 1954). Cause under Sykes, therefore, typically involves an assertion that trial counsel lacked knowledge or notice of the grounds for objection. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 130 (1982) (claim that trial counsel could not have known that jury instructions were defective); Graham v. Mabry, 645 F.2d 603, 607 (8th Cir. 1981) (if counsel had been unaware of defendant's previous connection with juror, cause might have been shown); *see also* Tyler v. Phelps, 643 F.2d 1095, 1101 (5th Cir. 1981) (in absence of explanation from trial counsel for failure to make objection, cause under *Sykes* will not be found), *cert. denied*, 456 U.S. 935 (1982). It is difficult to fathom, then, how an "adequacy" claim, *i.e.*, a claim that a state forfeiture rule unduly burdens federal rights, can be deemed "cause" for failing to comply with the rule.

103. Every federal court considering the claims of a federal prisoner has discretion to notice "[p]lain errors or defects affecting substantial rights . . . although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b).


106. State formulations of plain error doctrine are often narrower than that embodied in the federal rule. *See, e.g.*, State v. Morrill, 127 Vt. 506, 511, 253 A.2d 142, 145 (1969) (reviewing court has discretion to excuse a default only in "one of those rare and extraordinary cases where
jected by the Court on the ground that the states are entitled to apply and interpret their own plain error rules.\textsuperscript{108}

The remaining approaches to determining the adequacy of state procedural rulings draw, quite plausibly, on adequacy doctrine as it has developed in the context of direct review. The adequate state ground doctrine has its very origins in problems of direct review,\textsuperscript{109} and courts and commentators historically have drawn analogies between the treatment of defaulted claims in the habeas and direct review settings.\textsuperscript{110} Such analogies are particularly apposite at the present time because \textit{Sykes} restricted habeas review of defaulted claims, at least in part, precisely in order to parallel the treatment of such claims on direct review.\textsuperscript{111} Most significantly, the \textit{Sykes} Court

\textsuperscript{107} The Court, with Justice White in the majority, recently dismissed the federal plain error approach as flatly inconsistent with \textit{Sykes}. In the Court's view, the appropriate context for federal plain error inquiry is on direct review of federal convictions by federal courts. See \textit{Engle v. Isaac}, 456 U.S. 107, 134 (1982). The \textit{Sykes} test was itself established because review of state convictions “entail[s] greater finality problems and special comity concerns” which are not present on direct review of federal convictions. 456 U.S. at 134. The burden of justifying habeas review is, therefore, greater than that required to show plain error under the federal standard. 456 U.S. at 134-35. It consists of demonstrating cause and prejudice.


\textsuperscript{108} See note 52 supra.

\textsuperscript{109} In 1959, Professor Henry Hart suggested that state grounds adequate to prevent the Supreme Court from hearing a claim on direct review ought also to bar the claim on habeas review. Hart, \textit{Foreword: The Time Chart of the Justices}, 73 HARV. L. REV. 84, 118-19 (1959). Four years later, the \textit{Fay} Court rejected that suggestion, holding instead that the adequate state ground doctrine was applicable only on direct review. See note 53 \textit{supra} and accompanying text. Not long after \textit{Fay} was decided, Professor (now Dean) Sandalow observed that an anomaly had arisen in the availability of federal review of defaulted claims. Even when a given procedural ruling was adequate to bar review by the Supreme Court in its appellate capacity, review could be had collaterally in any of the dozens of federal district courts. Sandalow, \textit{supra} note 52, at 230-31. This led Sandalow to read \textit{Henry v. Mississippi}, 379 U.S. 443 (1965), \textit{see text at notes 132-36 infra}, as establishing parity between forfeiture standards at some “intermediate position” between the permissive approach of \textit{Fay v. Noia} and what he viewed as the unnecessarily strict approach embodied in traditional adequate state ground doctrine. See Sandalow, \textit{supra} note 52, at 235-38. For the suggestion that standards of direct and collateral review should be the same because review by federal habeas courts today serves as a de facto substitute for direct review by an overburdened Supreme Court, see Michael, \textit{supra} note 21, at 264 n.233, 269.

\textsuperscript{110} Professor Hill, \textit{supra} note 9, makes this observation most trenchantly. He begins with the example of a defaulted claim by a \textit{federal} prisoner. It is clear, in Hill's view, that because Congress intended the prisoner's default to be fatal (absent cause shown) on direct review, as provided in FED. R. CRIM. P. 12(b)(2), it could not have intended the rule to be circumvented by reviving the claim on collateral review. See \textit{id.} at 1060. The Court said as much in \textit{Davis v. United States}, 411 U.S. 233, 242 (1973). Because no orderly set of rules, state or federal, can exist without a system of sanctions, Hill, \textit{supra} note 9, at 1074, and because there is nothing to suggest that 28 U.S.C. § 2254 (1982), quoted at note 1 \textit{supra}, contemplates differential treatment
has in effect *directed* habeas courts to determine adequacy by inquiring whether the state ground for decision would have been upheld on direct review.\(^\text{112}\)

The most radical approach to the adequacy inquiry would hold that when the state court has discretion to excuse a default but does not exercise that discretion, the state court ruling that the claim is barred *cannot* constitute an adequate state ground to preclude habeas review.\(^\text{113}\) When a state court decides not to exercise its discretion to excuse a default, the proposition begins, it makes an implicit decision on the relative substantiality of the claim. Had the claim been considered substantial enough to rise to the level of "plain error," however the state defines that term, the state court would have exercised its discretion to hear the claim under the state's plain error exception.\(^\text{114}\)

Because this assessment of the substantiality of the claim is an implicit holding on the merits,\(^\text{115}\) the argument continues, it is proper to treat

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\(^{112}\) See Wainwright v. Sykes, 433 U.S. 72, 87 (1977); note 55 *supra*. It is rather curious that under *Sykes*, federal district courts are directed to conduct an inquiry that had been the exclusive province of the Supreme Court. However, the Court's decision to defend the result in *Sykes* by viewing the procedural default problem on habeas review as at least analogous to the adequate state ground doctrine on direct review made this circumstance inevitable.


\(^{114}\) A "plain error exception" is a broad grant of discretionary power to a reviewing court to notice errors appearing on the record which were not raised at trial. While the formulation of the exception varies among jurisdictions, see notes 103 & 106 *supra*, its application always involves an assessment of the substantiality of the claim. See the plain error exceptions listed at note 77 *supra* (discretion to notice errors which are "basic," "fundamental," or "affect substantial rights").

\(^{115}\) State court determinations that a claim constitutes *harmless* error have always been considered holdings on the merits. Fed. R. Crim. P. 52(a) defines "harmless error" as the obverse of plain error — that is, as an error or defect which does *not* affect substantial rights. *Cf.* note 103 *supra* ("plain error" defined). Because habeas courts commonly review harmless error determinations as holdings on the merits, see, e.g., Edwards v. Jones, 720 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring), *cert. denied*, 105 S. Ct. 178 (1984); Thompson v. Estelle, 642 F.2d 996 (5th Cir. Unit A 1981); Lussier v. Gunter, 552 F.2d 385, 388 (1st Cir.) ("[T]he [state court] decided the substance of [the petitioner's] constitutional claim. It characterized the [alleged error] as 'not so prejudicial as to justify reversal.' "), *cert. denied*, 434 U.S. 854 (1977), they ought also to review the plain error determinations implicit in state procedural default rulings. Federal review of state harmless error determinations reflects the intuition that what may appear insubstantial to a state court may be considered substantial by a federal court. *Cf.* Kotteakos v. United States, 328 U.S. 750, 761 (1946) (appellate review of harmless error determinations necessary because the error may indeed be serious). The same intuition can be said to apply to implicit plain error judgments. *But see* note 124 *infra*. 
it as such. Holdings on the merits of a claim are independently reviewable by the habeas court, whether or not a default has in fact been committed. Habeas review, therefore, is in order. It may be urged further that the very existence of discretionary power to forgive the default suggests that no vital interest is at stake. "If some deviations from regular procedure can be tolerated, a few more can hardly be seriously disruptive."117

Appealing as the simplicity and symmetry of this sweeping exception to the Sykes test may be, it surely could not have been contemplated by the Sykes Court. Such an "exception" would swallow the Sykes test entirely, since most, if not all, state procedural rules contain some provision for discretionary forgiveness of defaults. Under such an approach, nothing that a state court could do would insure the enforcement of a procedural rule on collateral review. Every decision seeking to enforce a procedural rule where discretion was theoretically permissible would be subject to unbridled habeas review.

The reasoning behind this approach, moreover, is not very convincing. The mere existence of discretion to excuse technical defaults in compliance with state procedural law does not indicate that no vital state interest is at stake. The habeas court must examine state procedural law to determine whether there has been a default; it should not matter, for purposes of determining the adequacy of a ruling to bar habeas review, whether that law comes from the legislature or through the discretion of state courts. Discretion, when it consists of "reasoned elaboration" according to known principles, "is nothing more than the judicial formulation of law."120 That state courts participate in the delineation of their own powers by the primary means available to them, namely discretion, cannot gainsay the fact that the lines thus drawn constitute the procedural law of the state. Even under the permissive Fay standard, state procedural law could not simply be ignored.121

116. See note 7 supra and accompanying text.
117. Sandalow, supra note 52, at 225.
120. Sandalow, supra note 52, at 226. Sandalow distinguishes this sort of exercise of discretion from "a power of continuing discretion," which connotes "ad hocness." Id. (citing H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 161, 168-79 (tent. ed. 1958)). This Note has argued previously that the discretion represented by state plain error exceptions manifests "reasoned elaboration" according to established patterns and principles. See note 77 supra.
121. Under Fay, state forfeiture rules were enforced only when the petitioner had deliberately bypassed state procedures for raising his claim. See notes 18-21 supra and accompanying text.
Moreover, all that has "implicitly" been determined by a state court that declines to hear a claim is that the facts of the claim do not warrant forgiveness under the applicable state standard, however that standard happens to be formulated. Thus, the fact that a claim is held not to rise to the level of a state law standard of discretion is simply irrelevant to whether such a ruling is adequate under a federal standard. Finally, a state court's refusal to hear a claim does not mean that it necessarily assessed the substantiality of the claim and found it wanting. A state court, under its plain error exception, may hear claims which constitute plain error. It is not required to do so.

Courts may also determine adequacy by reviewing a particular denial of a federal claim for consistency with prior state denials. Inconsistency with other decisions may indicate discriminatory application of a state procedural rule. No one disputes that if a state court were to make a ruling which actually discriminated against the assertion of federal claims, that ruling would be inadequate to bar those claims. But the habeas court must surely go beyond inquiring whether the state court actually acted with discriminatory intent. Proof that a state court acted with "bad" intent is both difficult to come by and unseemly to search for and proclaim. The adequacy inquiry may,

122. See notes 106 & 114 supra (formulations of discretionary power to excuse defaults vary among jurisdictions).

123. See Hill, supra note 9, at 1086 n.191.

124. The seductive argument that a plain error ruling, like a harmless error ruling, is an implicit holding on the merits, see note 115 supra, is also of questionable validity. There are distinctions between plain and harmless error. When a court decides that a claim does not constitute plain error, it generally poses itself a hypothetical question: if the allegations contained in the petition were true, would plain error exist under the applicable state standard? If not, the reviewing court will not assert jurisdiction. On the other hand, a court will more often assert jurisdiction and conclude that a claim does in fact have merit before it proceeds to find that the error is harmless. Only in the latter case has the state court asserted jurisdiction, considered the claim on its merits, found it to contain merit, and denied relief. Only in the latter case, therefore, is an independent federal determination on the merits clearly in order. See notes 2 & 7 supra and accompanying text. Moreover, despite its formal definition, see note 115 supra, harmless error involves a pragmatic inquiry as to whether the determination of guilt by the trier of fact would have resulted differently had the error not occurred. One would not expect the method of conducting this practical weighing of the effect of error upon the trier of fact to vary among jurisdictions. How the state weighs an error's likely effect on the outcome of a trial would thus seem a more reliable and relevant indicator of the importance accorded the right than its correspondence to variable state standards of plain error.

125. See notes 93-94 supra and accompanying text; Williams v. Georgia, 349 U.S. 375, 383 (1955); Fox River Paper Co. v. Railroad Commn., 274 U.S. 651, 657 (1927); Sandalow, supra note 52, at 196. Indeed, one strongly suspects that in those cases which suggested an "automatic" finding of inadequacy where discretion existed under state law, see note 113 supra and accompanying text, the Court in fact believed that the state ground in a civil rights case had been administered discriminatorily. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), for example, the Virginia state courts had precluded the petitioner's claims that the respondent's lease provision was racially discriminatory and constituted a violation of 42 U.S.C. § 1982 (1982).

126. See Hill, supra note 9, at 1085; Sandalow, supra note 52, at 219-20. Moreover, the state court may undervalue a federal claim inadvertently. See note 99 supra.

127. See generally Hill, supra note 9, at 1084 n.182 ("[W]hat has characterized Supreme
therefore, proceed on the basis of indicia of discriminatory application, particularly whether the nonfederal ground put forth by the state courts is inconsistent with earlier state court decisions. ¹²⁸

Reviewing a state ruling for consistency and correctness under state law might appear to be the proper approach for determining the adequacy of a state procedural ruling. The habeas court would act "as if it were the highest court of the state, considering the issue of state law," ¹²⁹ and strike down as a bar to habeas review only those rulings which were clearly erroneous under state law. However, neither state court review nor federal court review after the fashion of a state court will substitute for federal review of what remains a federal question. The very existence of the power to review state judgments illustrates that the highest state court's views will not always be motivated by the same considerations as those of the federal court. ¹³⁰ More significantly, consistency with past decisions says little about a ruling's adequacy. State procedural rulings may consistently have been "inadequate" to bar federal review. Further, "[a] federal right may be avoided by state grounds that lack a foundation in the record as well as by those that depart from earlier law." ¹³¹ Thus, the federal standard of review of the adequacy of state procedural rulings must scrutinize the state ruling more thoroughly than an inquiry that merely examines the consistency of that ruling with past state precedent.

The most appropriate standard for determining adequacy requires a demonstration that the forfeiture called for is reasonably calculated to promote a legitimate interest of the state. The adequate state ground case of Henry v. Mississippi ¹³² provides important guidance for the content of this more thoroughgoing standard for determining adequacy. In Henry, the defendant failed to object upon the introduction into evidence of the fruits of an allegedly unlawful search. Instead, defendant's counsel included the objection in a motion for directed verdict at the close of the state's case. The state supreme court held


¹²⁹. Hill, supra note 9, at 1083 (emphasis in original) (describing pre-1965 adequacy doctrine in the Supreme Court); see also Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harv. L. Rev. 1375, 1393 (1961) (federalism concerns exist whenever the Supreme Court reviews state court decisions).

¹³⁰. Professor Sandalow expressed this thought best when he observed that "[t]he Court's power to declare the state ground inadequate exploits the institutional differences between it and the state courts to assure that in the accommodation of state and federal interests appropriate recognition will be given to the latter." Sandalow, supra note 52, at 218.

¹³¹. Sandalow, supra note 52, at 227. See also Ward v. Board of County Commrs., 253 U.S. 17, 22-23 (1920) (Supreme Court review not precluded if the nonfederal grounds for the decision are without fair and substantial support).

the claim barred on procedural grounds. On direct review, in dicta, the Supreme Court suggested that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." The Court went on to suggest that the delay in presenting the objection until the close of the prosecution's case did not frustrate the state's legitimate "interest in avoiding delay and waste of time," presumably because the trial judge was still afforded ample opportunity to consider the alleged error. If this were so, the Court observed, and if upholding the forfeiture "would serve no substantial state interest," then the procedural ruling could not be treated as adequate to bar the assertion of "important" federal rights.

Although the continued vitality of Henry v. Mississippi has been questioned by commentators of late, the dicta for which it has be-

133. The Court remanded the case for a hearing as to whether the defendant had knowingly waived his right to raise his claim in a timely manner. This result clearly echoes with the Fay deliberate-bypass standard for habeas review, see text at notes 18-21 supra, and its application here on direct review renders the actual disposition of this case something of an historical curiosity.

134. 379 U.S. at 447.

135. 379 U.S. at 448-49.

136. 379 U.S. at 448-49.

137. See, e.g., Goodman & Sallett, supra note 9, at 1692 n.40; Hill, supra note 9, at 1051 ("Henry is ... dead, or nearly so." (footnote omitted)); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 558-62 (2d ed. 1973). One suspects that these misgivings arise partly from the intuition, born of experience, that an opinion authored two years after Fay v. Noia by Justice Brennan (who also wrote for the Court in Fay) cannot long remain viable under the Burger Court. More substantially, these commentators, notably Hill, view the dicta in Henry as an aberration, unsupported by precedent prior to Henry and not followed subsequently as authority. See Hill, supra note 9, at 1052, 1083-84.

While the Henry dicta probably went beyond mere synthesis of prior decisions, but see Recent Developments, Federal Jurisdiction: Adequate State Grounds and Supreme Court Review, 65 COLUM. L. REV. 710, 713 (1965) (Henry is "a fair synthesis of prior decisions" (footnote omitted)), it did have significant antecedents. Under the "inconsistency" approach to adequacy the Court held "inadequate" those state grounds that departed from prior state precedent. See note 128 supra and accompanying text. This approach reflected something more than a concern with mere notice to defense counsel of state procedures. There was also the belief that a state rule that is not consistently followed and is without adequate precedent likely does not serve a legitimate state purpose. See Barr v. City of Columbia, 378 U.S. 146, 149 (1964) ("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."). This is so for two reasons. First, in order for many procedural rules to serve any purpose at all, they must be known to the litigants whose behavior the state seeks to modify. Second, if a state has consistently tolerated certain behavior in the past, one is skeptical that some legitimate state interest has simply "sprung up" in the interim. The "inconsistency" approach, then, seeks to reveal more than mere evidence that the state court may be discriminating against federal claims. These cases also manifest the Court's disapproval of the arbitrariness and purposelessness of the "exaltation of form" to bar the assertion of federal claims. See Staub v. City of Baxley, 355 U.S. 313, 320 (1958). Professor Hill asserts that, prior to Henry:

a forfeiture for breach of state procedure was sustained by the Supreme Court on direct review, however technical and even burdensome the procedure might be, as long as a competent lawyer could have coped with it, and as long as the state court's disposition of the
come best known have recently been reaffirmed by the Supreme Court. And while the proposed application of the *Henry* dicta to the facts of that case may rightfully be criticized, the essence of the *Henry* approach is thoroughly consistent with the treatment of other claimed deprivations of fundamental rights.

The adequacy inquiry should thus be viewed as an inquiry into the constitutionality of a claimed deprivation of fundamental federal rights by state action. *Sykes* held that a state procedural ruling may constitute an adequate and independent state ground upon which a state court may rest its decision. Thus, the procedural ruling poten-

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138. In *James v. Kentucky*, 104 S. Ct. 1830 (1984), the Court on direct review held a procedural default ruling by the Kentucky Supreme Court inadequate to bar review on the merits. The state court had ruled that the trial judge was relieved of his obligation (when properly requested by counsel) to instruct the jury not to draw adverse inferences from the defendant's failure to testify, *see Carter v. Kentucky*, 450 U.S. 288 (1981), because of the petitioner's procedural default: he had requested only an "admonition," not an "instruction," to this effect. The Court held that the distinction drawn by the state court between instructions and admonitions could not prevent review on the merits for two reasons: first, such a distinction had not consistently been drawn under prior state precedent; and second, citing *Henry*, because "[t]o insist on a particular label" for defense counsel's action "would further no perceivable state interest." 104 S. Ct. at 1835.

139. The strident tone of the opinion is particularly troublesome when one considers that the state rule belaobored in *Henry* was more permissive than the corresponding federal rule. *Hill*, supra note 9, at 1052 n.13. In applying the *Henry* test, a habeas court should refrain from exercising a degree of scrutiny which would allow lesser scope for the operation of state rules than for federal rules. To intrude upon the effective functioning of state rules would undermine the primary rationale for the *Sykes* test. *See* notes 30-32 & 110 supra and accompanying text. *The Henry* Court did observe, however, that it did not contemplate "a plethora of attacks" on reasonable state procedural rules. 379 U.S. at 448 n.3.

140. *See* notes 145-49 infra and accompanying text.

141. *See* note 91 supra and accompanying text.
tially stands alone to justify the state's custody of the petitioner, even where his substantive claim if heard would mandate his release.\textsuperscript{142} Because the writ of habeas corpus for state prisoners affords relief from "custody in violation of the Constitution,"\textsuperscript{143} a state forfeiture ruling that is inadequate to bar review of a federal claim and yet that purports to justify custody of the petitioner is, in essence, a forfeiture in violation of the Constitution.\textsuperscript{144}

The Supreme Court today tests the constitutionality of governmental actions which limit the exercise of "fundamental" constitutional rights by applying stricter forms of review, or heightened "scrutiny" under the due process clause.\textsuperscript{145} The Court has also implicitly recognized that the right to fairness in criminal proceedings is one such fundamental right.\textsuperscript{146} The scrutiny represented by the \textit{Henry} formulation,\textsuperscript{147} which would at a minimum require that state forfeitures be justified by a legitimate state interest, can therefore be viewed as thoroughly consistent with traditional assessments of the constitutionality of state action when that action deprives individuals of federal rights.\textsuperscript{148} The vindication of the right to fairness in criminal proceedings by means of habeas corpus actions is of "‘fundamental importance . . . in our constitutional scheme' because [habeas petitions]

\textsuperscript{142} See text accompanying notes 58-59 supra.


\textsuperscript{144} "What is due from the federal courts . . . is a fresh look at the degree to which forfeitures are sustainable under the Constitution." Hill, \textit{supra} note 9, at 1059.

\textsuperscript{145} J. Nowak, R. Rotunda & J. Young, \textbf{Constitutional Law} 457 (2d ed. 1983).


\textsuperscript{147} The \textit{Henry} formulation of the adequacy inquiry clearly contemplates heightened constitutional scrutiny of state procedural rulings. It is unclear, however, and beyond the scope of this Note to determine, what level of scrutiny is intended or may be appropriate. At one point in the \textit{Henry} opinion, it is suggested that a "legitimate" state interest is all that is required to justify a deprivation of "important" federal rights. 379 U.S. at 448. In another place, the necessity of a "substantial" state interest is mentioned. 379 U.S. at 449. The wide array of rights that can conceivably be raised on habeas review vary in their importance, as does the substantiality of the state's interest in upholding a broad range of forfeitures. The state's interest in avoiding burdensome reprosecution may be greater in the context of guilty pleas, for example, than in the case of a retrial, because in the former case the state may not have marshalled evidence against a defendant soon after the offense was committed. By the time the plea is withdrawn and the case remanded, it may be too late for the state to rebuild its case. See Westen, \textit{supra} note 30, at 1247-49. This suggests that the appropriate level of scrutiny may vary depending upon the combination of right and forfeiture presented by a particular habeas claim.

\textsuperscript{148} Professor Hill observes that \textit{Henry} would force federal courts to undertake the task of imagining "hypothetical rules that would serve the interests of the state at least as well, or 'substantially' so." Hill, \textit{supra} note 9, at 1052. Hill fails to explain how the "task" set by \textit{Henry} is any more burdensome than that undertaken by federal courts faced with other allegedly unconstitutional deprivations of federal rights. \textit{Cf.} Trimble v. Gordon, 430 U.S. 762 (1977) (striking down classification based on illegitimacy in intestate succession statute as not substantially related to permissible state interests).
directly protect our most valued rights." Thus, treating alleged deprivations of those rights by applying stricter forms of review is as appropriate on habeas review as it is in other contexts.

It is too soon, in sum, to sound the death knell for *Henry v. Mississippi*. Discerning whether a state procedural ruling constitutes an adequate state ground for decision has today become an important issue that determines the applicability of the *Sykes* test, and the wisdom of the *Henry* formulation for determining the adequacy of state grounds to bar habeas review has now become apparent to a significant number of federal courts. The revitalization of *Henry* is a natural result of

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150. The petitioner in *Gulliver v. Dalsheim*, 574 F. Supp. 111 (S.D.N.Y. 1983), *revd.*, 739 F.2d 104 (2d Cir. 1984), for example, made the mistake of titling his motion to reargue in state court a "petition for habeas corpus." The state court then affirmed his conviction without opinion. District Judge Knapp held that even if the affirmation without opinion indicated that the state court declared petitioner's error a procedural default, which Judge Knapp doubted, such a default ruling would be inadequate to bar federal habeas review. He observed:

[I]napplicable to the case at bar is the "legitimate state interest" found by *Sykes* and its progeny in various state procedural rules... There is no comparable state interest in the insistence that a paper, making cognizable claims and filed with the correct court, bear one particular set of words at its head.

574 F. Supp. at 114.

In *Spencer v. Zant*, 715 F.2d 1562 (11th Cir. 1983), the petitioner while in state court had tried to challenge the minority composition of his petit jury. He raised the challenge during voir dire of that jury, but the state courts held that the challenge was not timely made under a state procedural rule requiring challenges to be made before the jury is "put upon" the defendant. 715 F.2d at 1568. Petitioner's application for habeas corpus was denied by the district court, but the Eleventh Circuit reversed, holding that Georgia's application of its procedural rule was inadequate to preclude review. The court noted that the procedural ruling was not well supported by prior state precedent, see notes 128-29 *supra* and accompanying text, but went on to say that even if it were, "Georgia's policy interests in enforcing its default rule in this case seem weak at best," because the trial court had been given "more than ample opportunity to correct the array without wasting judicial resources." 715 F.2d at 1573 & n.11 (citing *Henry v. Mississippi*).

In a thoughtful dissent in *St. John v. Estelle*, 563 F.2d 168 (5th Cir. 1977) (en banc), cert. denied, 436 U.S. 914 (1978), Judge Tnofflat, with whom Judges Goldberg and Godbold joined, asserted that *Sykes*:

[does] not stand for the proposition that the failure to comply with a state's contemporaneous objection rule necessarily bars full habeas review of the petitioner's constitutional claim.

Rather, it is the extent to which the state's rule is grounded on legitimate state interests and operates in a manner consistent with a defendant's right to a fair trial that determines whether a federal habeas court need defer to it.

563 F.2d at 172.

Dissenting in *Runnel v. Hess*, 653 F.2d 1359, 1366 (10th Cir. 1981), Judge Logan cited *Henry* for the proposition that the state procedural rule there involved was not adequate to bar habeas review because its enforcement would fail, under the circumstances, to promote a legitimate state interest. Since the prosecuting attorney's remarks that formed the basis of the federal claim were "irremediably prejudicial," the state's interest in correcting errors at the trial level was inapplicable. *See also* Miller v. North Carolina, 583 F.2d 701, 705-06 (4th Cir. 1978) (differing with the state's application of its own procedural rule when objection to an irremediably prejudicial closing statement appeared to serve no legitimate state purpose). Judge Murnaghan made a similar point in *Cole v. Stevenson*, 620 F.2d 1055, 1069-70 (4th Cir.), cert. denied, 449 U.S. 1004 (1980) (Murnaghan, J., dissenting), when he observed that "[t]he purposes of the rule favoring deference to a state procedural requirement [were] entirely absent" where the defendant's claim was one of "general constitutional law, applicable in every case." In that situation, the state's interest in encouraging factual exploration at the trial was said to be attenuated, and
the establishment of the *Sykes* test, since both cases are informed by a common understanding. *Sykes* seeks to uphold state procedural rules for the many interests that those rules serve in their own right; where those interests are not remotely being served, *Henry* would mandate, and *Sykes* would permit, federal review.

This partnership between *Sykes* and *Henry* can only be maintained, however, if the *Henry* approach outlined above is applied with restraint, so as not to undermine a state procedural rule where, in fact, some rule is needed. Rules by their very nature are only imperfectly tailored to individual cases, and *Henry* should not be employed as an intrusive, *post hoc* veto over state rules whose routine functioning will not allow them to apply with equal force to all petitioners. But if the very concept of "forfeiture" can rightly be viewed as "a theoretical model for weighing the defendant's interest in asserting defenses against the state's interest in foreclosing them," it would seem the height of good sense and fairness to require, as would *Henry*, that something be shown to weigh on the side of the state.

that interest was therefore inadequate to justify a forfeiture. Cf. Breest v. Perrin, 655 F.2d 1 (1st Cir.) (holding that state procedural rule served a legitimate state interest, and therefore was adequate to preclude review under *Sykes*), *cert. denied*, 454 U.S. 1059 (1981); Cheek v. Bates, 615 F.2d 559, 563 (1st Cir.) (observing, before applying *Sykes* test, that state procedural rule was reasonably well-tailored to state's substantial interest in truth-seeking function of the trial), *cert. denied*, 446 U.S. 944 (1980); O'Berry v. Wainwright, 546 F.2d 1204, 1217 (5th Cir.) (applying *Henry* formulation to default of fourth amendment claim before applying the *Stone v. Powell* "full and fair consideration" test), *cert. denied*, 433 U.S. 911 (1977); Holmes v. Israel, 453 F. Supp. 864, 867 (E.D. Wis. 1978) (questioning whether *Sykes* should apply where state's policy to prevent "sandbagging" by defense counsel was substantially vindicated by counsel's motion for mistrial), *aff'd*, 618 F.2d 111 (7th Cir. 1980).