PRESERVING JUSTICE IN CAPITAL CASES WHILE STREAMLINING THE PROCESS OF COLLATERAL REVIEW

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In this article, the author examines the process of collateral review in capital cases. While agreeing that the current procedure is inefficient and fraught with delays, the author argues against the proposals of the Bush Administration's crime bill and the Powell Committee. Rather, he urges that states provide better representation at trial for capital defendants and more aggressive appellate review. He contends that federal courts should no longer require that state procedures be exhausted before federal review can occur and that procedural defaults in state courts should not foreclose federal review if the defaulted claim implicates the reliability of the conviction or death sentence.

I.

The escalating controversy concerning collateral review of death sentences remains unresolved in the wake of the Powell Committee's report on habeas reform in capital cases,† the publication of the ABA's

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recommendations regarding habeas corpus in death penalty cases, and a series of recent decisions by the Supreme Court curtailing the availability of the "Great Writ." This article comments on the main issues before the Congress. Because my own views about those specific issues are firmly anchored in a broad conception of the writ, it will be helpful if I declare my perspective at the outset.

At least in capital cases, federal habeas jurisdiction should be designed to afford condemned prisoners meaningful and unimpeded access to the federal judiciary for the purpose of resolving all issues regarding the constitutional validity of the death sentence. The writ should not be recast as an extraordinary remedy solely applicable to claims of factual innocence. Nor should the availability of federal habeas review be regarded as contingent upon the failure of state judicial systems to provide adequate corrective processes for constitutional error. Instead, federal habeas jurisdiction should be understood as an ordinary and necessary stage of the process of post-conviction review of the constitutional validity of death sentences.

What is at stake in federal habeas review is the articulation and enforcement of federal rights. Although state judges share the constitutional responsibility for enforcing federal law, there are powerful structural reasons to insist on plenary federal review of alleged constitutional defects in state criminal convictions, an opportunity that is not realistically available on certiorari to the Supreme Court from direct review by state appellate courts. First, state courts may not be adequately sensitive to the

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3. See, e.g., McCleskey v. Zant, 111 S. Ct. 1454 (1991) (applying the cause and prejudice standard to determine if petitioner has abused the writ by including a claim that could have been brought in a prior federal habeas corpus petition); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (state court's granting of a motion to dismiss a state habeas claim based solely on procedural grounds is sufficient to deny petitioner review in federal habeas). These cases were decided after the Powell Committee and the ABA Task Force issued their reports. The "Great Writ" of habeas corpus, which provides a remedy for illegal restraint or confinement, has its roots in early English common law and has played a key role in American jurisprudence from the colonial period to the present. See Fay v. Noia, 372 U.S. 391, 399-426 (1963) (detailed discussion of the history of the writ). In the context of "collateral review" the Great Writ is used to challenge state court convictions in federal proceedings.

values embodied in federal constitutional safeguards. Given the ultimate and irreversible nature of the death penalty, this factor takes on special force when the prisoner challenges the constitutional validity of a death sentence. Second, an active role by the federal judiciary is essential to the coherent development of federal law.

The conception of federal habeas that I have outlined is admittedly more compatible with Brown v. Allen and Fay v. Noia, than with Wainwright v. Sykes, Smith v. Murray, Coleman v. Thompson and other recent cases that limit the availability of the writ. Federal habeas remains available as a method for obtaining a federal court's ruling on the meaning or application of an established principle of federal law when a state court has decided the issue adversely to the prisoner. But the Supreme Court's shift toward an increasingly narrow interpretation of the writ has severely compromised its usefulness for vindicating fact-bound claims decided adversely to the prisoner by the state courts, for rectifying constitutional errors that the state courts refuse to consider on their merits, or for announcing and applying correct constitutional principles if the applicable rule had not been clearly enunciated by the Supreme Court before the collateral proceedings began. Even if this state of affairs

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5. This second factor was much more important during the developmental period of capital-sentencing jurisprudence (roughly 1976-1986) than it is now. The Supreme Court has made it clear that current doctrines will not be extended any further, and much habeas litigation in death cases now tends to be highly fact-specific. However, important doctrines in constitutional criminal procedure continue to evolve, especially under the Sixth Amendment confrontation clause. See, e.g., Coy v. Iowa, 487 U.S. 1012, 1015-21 (1988) (place of screen between defendant and child sexual assault victims during testimony against defendant violated defendant's Sixth Amendment confrontation clause rights); Lee v. Illinois, 476 U.S. 530, 546 (1986) (co-defendant's confession implicating defendant is presumptively unreliable and must be subjected to cross-examination in order not to constitute a violation of the Sixth Amendment confrontation clause). New doctrines are also developing under a variety of due process doctrines concerning the development and presentation of a defense. See, e.g., Rock v. Arkansas, 483 U.S. 44, 62 (1987) (prohibits per se rule disallowing admission of hypnotically induced testimony).

6. 344 U.S. 443, 485-87 (1953) (petitioner entitled to have federal court make a determination on the merits of his claim without being bound by state court findings).

7. 372 U.S. 391, 438 (1963) (procedural default in state court bars federal review only if the prisoner deliberately decided not to raise the federal claim in state court).

8. 433 U.S. 72, 87 90-91 (1977) (establishes a "cause" and "prejudice" standard barring federal habeas review following a failure to raise a contemporaneous objection to the use of a confession at trial, absent a showing of cause of a failure to object and actual prejudice as a result).


10. 111 S. Ct. 2546, 2561-66 (1991) (federal habeas review is barred to state prisoner who defaulted federal claims in state court absent a showing of the cause for the default, and prejudice as a result).

11. The exception is, of course, fourth amendment claims. See, e.g., Stone v. Powell, 428 U.S. 465, 481-82 (1976) (federal habeas review not required where a state prisoner is afforded an opportunity for full litigation of a fourth amendment illegal search and seizure claim in the state court).
were acceptable in the ordinary run of criminal cases, it is clearly not acceptable in capital cases.

II.

I fear no contradiction when I say that no one is satisfied with the present system of collateral review of death sentences. However, what some critics regard as problems, others regard as virtues.

A. Inefficiency

The voices raised most loudly against the present state of affairs are those favoring more efficient administration of capital punishment. Their main concern is that the current review process entails too much delay. Ignoring, for the moment, the implausible argument that the current review process compromises the social purposes of capital punishment, the real objection to the present system is that the prolonged process of repeated collateral review in state and federal courts is inefficient, and that a less prolonged and repetitious process would be adequate to assure the legality of death sentences. Specifically, it is argued, the current system invites unnecessary relitigation of colorable claims and the filing of frivolous ones. The process is unnecessarily costly in judicial resources and encourages "delay and abuse."

These criticisms of the present system are well-founded. The repetition and delay are adequately documented. But sensible solutions can be formulated only if the causes of these problems are fully understood. Further, efforts to enhance efficiency must be carefully tailored to promote justice and thereby to preserve the primary purpose of the Great Writ.

The complexity and inefficiency of the current system arise in part from the structure of dual review in state and federal courts—which is often traversed more than once—and from the various procedural doctrines, such as exhaustion and procedural default, that add so many layers of complexity to each case. It is, therefore, reasonable to expect that some of these problems can be ameliorated by modifying the structure of the collateral review system. However, it would be a mistake to assume that the existing problems are attributable solely to the complexity of the collateral review process, and to the ease with which it can be "abused."

12. Although it is often said that the protracted nature of collateral review undermines the retributive and deterrent purposes of the death penalty, it is hard to credit the argument that deterrence or retributive justice can be significantly enhanced by reducing the period of judicial review from, say, ten years to five years. And, if the argument is taken to focus on the increased rate of reversals in the federal courts, rather than on the process itself, then the target of the argument is the substantive law not the procedure by which it is vindicated.
by lawyers seeking to delay executions. To the contrary, the protracted nature of post-conviction litigation in death cases during the past fifteen years has also been related to the indeterminacy of the governing constitutional norms and to the failure of state judicial systems to take effective measures to prevent constitutional errors.

Much of the responsibility for the protracted and repetitive process of collateral review rests at the door of the Supreme Court itself, not only because of its unfortunate rulings about federal habeas, which require much shadow boxing about procedural issues, but also because of the sometimes unpredictable and incoherent pattern of its capital-sentencing jurisprudence. If the federal constitutional dimensions of capital sentencing were relatively determinate and the law were more stable, attorneys, trial judges, and state appellate courts would be more likely to recognize and remedy constitutional errors, and collateral proceedings would be more orderly. However, between 1976 and 1984, a closely divided Supreme Court gradually enunciated several constitutional principles uniquely applicable to capital sentencing, principles which converted into federal questions many issues that would otherwise be controlled by state law.

The indeterminacy of capital-sentencing jurisprudence accounts both for the multiplicity of claims that have been raised in collateral proceedings and for the large proportion of cases in which successive petitions for collateral relief have been filed. Thus, the widespread assumption that most successive petitions include frivolous claims and are filed solely to delay execution is false, at least for the period of time relevant to the current assessment of federal habeas; in the vast majority of cases in which successor petitions have been filed, the initial collateral proceedings were filed before 1984. For the most part, the filing of successive petitions reflects legitimate and appropriate efforts by attorneys to vindicate the constitutional rights of their condemned clients in a rapidly changing and unpredictable legal environment.

In recent years, it appears that federal capital-sentencing jurisprudence has become more stable. The Supreme Court has not enunciated any new principles, has generally curtailed the broadest implications of its earlier jurisprudence, and has even begun to reverse earlier "death-is-different" rulings. Although some unanswered questions remain, the potential constitutional implications of various prosecutorial and judicial practices


are now readily recognizable.\textsuperscript{15} This was not true during the 1976-1984 period when many of the cases now being litigated in collateral proceedings were originally tried. To some extent then, the collateral review process is likely to become more orderly and less protracted than it has been during the past decade, even if no procedural changes are made to the current system.

The complexity and length of collateral litigation in capital cases is also largely attributable to the failure of many state judicial systems to take effective measures to prevent constitutional errors (or errors that are arguably of constitutional dimension). They have failed to assure that capital defendants are adequately represented at trial and they have failed to provide detailed guidance to trial judges and attorneys regarding practices and policies that should be followed or avoided in capital-sentencing proceedings.

Public attention is most often focused on the costs of the present system rather than its injustices. The debate would be comprehensible if the trade-off between these two factors were clear. The costs of the existing practices might be acceptable, for example, if they were demonstrably necessary to vindicate the rights of condemned prisoners. Unfortunately, the many layers of judicial proceedings which are routinely provided under the existing system do not assure that the condemned prisoners' constitutional claims will be heard on their merits, or that they will be resolved correctly when they are heard.

B. Injustice

Any system of collateral review of criminal convictions must rest on a predisposing preference for finality. Not every error that would warrant relief on direct review is significant enough to merit relief in a collateral proceeding. Some threshold of significance must be set, relating both to the nature of the error and its possible effect on the outcome of the trial. When combined with a natural judicial reluctance to undo criminal convictions, this predisposing tilt toward finality counterbalances the unsettling tendencies of a multi-tiered system of collateral review in which the res is never judicata.

Not surprisingly, the unique severity and irrevocability of the death penalty has led some state courts to lower the threshold of significance for reversible errors in capital cases. Unfortunately, however, many courts have not only declined to loosen the rules in capital cases, but also have

\textsuperscript{15} Although opponents of the death penalty may wish the Court had extended the reach of these constitutional safeguards, the stability of the Court's jurisprudence will at least have the salutary effect of reducing attorney error and of simplifying post-conviction proceedings.
shown a marked unwillingness, in practice, to undo death sentences. Perhaps this tendency is understandable. Capital trials and appeals are emotionally aversive, and consume enormous amounts of resources. Many, if not most, trial judges would prefer to avoid capital trials altogether, and are especially anxious to avoid retrials in these cases. Similar factors probably apply, albeit more faintly, at the appellate level, not only because state appellate judges tend to empathize with their colleagues on the trial bench, but also because retrials of capital cases, and re-reviews of reimposed death sentences, are so costly. These finality-enhancing tendencies are perhaps offset, in some states, by a shared judicial inclination to scrutinize death cases with special care; but my impression is that in many states, the predominant judicial inclination is to preserve death sentences, especially among judges who are not especially committed to the constitutional principles upon which the condemned prisoner is relying.

In theory, federal habeas review by judges who will not bear the burdens of re-litigation might be expected to compensate for the tendency toward underenforcement of federal rights by state courts. Yet, paradoxically, federal habeas law actually aggravates, and even reinforces, this tendency because it confers upon the most finality-conscious state courts the practical power to insulate their judgments from federal review. State judges who wish to minimize the risk of a reversal in federal court can do so by refusing to consider claims that were not raised at trial and preserved on direct appeal, and by resolving all disputed factual issues (and mixed questions of law and fact) against the prisoner.

Much is made of the so-called “abuses” of the process of collateral review by lawyers who file frivolous claims to delay the process. Frankly, however, I wonder why so little attention is paid to the litigation strategies of the states’ lawyers—strategies that clearly prolong and complicate the process of collateral review. For example, states anxious to expedite the execution of condemned prisoners could waive the exhaustion requirement. Yet the states’ attorneys virtually always insist that prisoners exhaust their claims in state courts. Why do they do this? Because collateral review by state courts protects death sentences from reversal by the federal courts, the state attorneys insist that condemned prisoners take their federal claims to state judges for the dual purposes of declaring some claims defaulted and of eliciting adverse findings on other claims from judges who are more strongly motivated than federal judges to preserve the finality of death sentences.

Admittedly, state courts must bear the heavy and unenviable burden of administering the system of capital punishment. But we should not be blind to the institutional realities that underlie the continued need for the Great Writ. In many, if not most, states there is a pronounced judicial tendency to overvalue finality and to undervalue the enforcement of constitutional norms in capital cases. Evidence in support of this assertion is readily available by comparing the processes of adjudication and review in states which tend to be more sensitive to constitutional norms to those of states which tend to emphasize finality.
Some states have established resource centers and legal service agencies to provide specialized representation for capital defendants and condemned prisoners; others continue routinely to appoint unqualified counsel at trial and to provide little or no representation on collateral review. Some state appellate courts have sought to operationalize the broad principles of legality, individualization, and reliability enunciated in the Supreme Court's eighth amendment jurisprudence by giving guidance to counsel and to trial courts, a practice that promotes fairness and avoids error. Others have taken a passive appellate role, leaving most aspects of capital-sentencing trials to the discretion of trial judges, as if the developing eighth amendment jurisprudence were relevant only if the holding of a particular Supreme Court decision were directly on point.

Some state appellate courts have recognized that the normal rules barring review of defaulted claims should be modified or abandoned in death cases; other state courts have insisted on uncompromising enforcement of procedural forfeiture rules. This variation in state practice is magnified by the Supreme Court's own uncompromising adherence to the position that, in most cases, a procedural default which forecloses state review also forecloses federal review.

By rule or by practice, some states designate a judge other than the sentencing judge to hear a collateral attack on the death sentence. In other states, the practice is for the sentencing judge to consider collateral challenges to the legality of the death sentence, a situation which is not well-calculated to elicit independent review. The effect of public opinion on judges who hold office at the pleasure of the electorate is also likely to be exaggerated in capital cases.

In sum, state courts are not uniformly likely to recognize and enforce federal constitutional safeguards. Unfortunately, because the Supreme Court has severely restricted the prerogative of federal judges to hear defaulted and successive claims, the existing arrangements do not provide sufficient assurance that capital-sentencing proceedings will be conducted in substantial compliance with constitutional norms or that constitutionally flawed death sentences will be set aside.

16. See, e.g., Smith v. Murray, 477 U.S. 527, 533-34 (1986) (failure on appeal to assign error to admission of testimony at state trial not reviewable in federal court unless defendant shows cause for failure to comply with state procedural rule and actual prejudice as a result); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (failure to object to admission of confession at trial amounts to a state procedural claim not directly reviewable by federal court); Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991) (state procedural default of federal claims bars federal habeas review absent a showing of cause and prejudice).

17. See, e.g., Wainwright, 433 U.S. at 86-87; Smith, 477 U.S. at 533-34; Coleman, 111 S. Ct. at 2565.

18. See McCleskey v. Zant, 111 S. Ct. 1454, 1467-75 (1991) (failure to raise all claims in first habeas petition bars raising the claims in a subsequent petition absent a showing of cause and prejudice).
The present system of collateral review, in short, is both inefficient and unjust. The question, of course, is what should be done to remedy these problems. In the following pages, I will first discuss two factors extrinsic to the structure and practice of habeas corpus review that account, in part, for the present difficulties and which, if modified, could ameliorate the situation. I will then focus on a few key aspects of the process of collateral review itself which should be modified in capital cases.

III.

State judicial systems can reduce the burdens of collateral review and assure the finality of adjudication by improving the quality of justice in capital cases and by taking special precautions to avoid constitutional error.

A. Adequacy of Representation

Attorneys representing defendants charged with capital crimes must perform a wide variety of functions uniquely applicable to capital cases. These obligations have become clear only as eighth amendment jurisprudence has evolved. During the developmental years of capital-sentencing law, it was predictable that even the most experienced lawyers would fail to appreciate these unique requirements. Even today, lawyers who do not have access to, or do not take advantage of, specialized training in capital defense are likely to provide deficient representation.

Until recently, one of the main areas of deficient representation has been the failure to recognize the constitutional objections to otherwise acceptable judicial and prosecutorial practices that may be raised in capital cases. When defense counsel fails to raise the claims, and thereby fails to give state courts an opportunity to avoid constitutional error, the stage is set for one of the most problematic features of the current process of collateral review. Most procedural defaults could be avoided if well-trained counsel, aware of the unique dimensions of capital cases, were appointed at trial.19

The risk of deficient representation can be significantly reduced, and the overall quality of justice significantly enhanced, by appointing as lead counsel in capital cases only those lawyers who are familiar with the specialized dimensions of capital cases and who have substantial trial experience.20 The defense must also be provided with adequate resources.

19. By targeting post-conviction proceedings for provision of adequate counsel rather than proceedings at the trial level, the Powell Committee completely ignored the principal source of inefficiency and injustice within the system—inadequate trial representation. Failure to address this problem is also a fatal flaw in the Bush Administration’s bill and in S. 1241, 102d Cong., 1st Sess. (1991).

20. The ABA recommends that attorneys in death cases meet the requirements of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which prescribe detailed procedures and qualifications to ensure effective represen-
including access to needed investigators and experts.21 Whenever feasible, state governments should fund capital defense resource centers that could provide appropriate information and support services for trial counsel. Further, compensation must be sufficient to encourage counsel to spend the time required for effective representation.22 Improved trial representation will promote just outcomes and will simplify collateral review 23

B. Adequacy of State Appellate Review

The burden of collateral review can be significantly reduced if state appellate courts exercise an active supervisory role on direct appeal. This is the subtext of the Supreme Court’s capital-sentencing jurisprudence. The Court could have decided to leave the administration of capital sentencing to state courts, refusing to constitutionalize the process at all. Short of that, it could have issued a few self-limiting rulings, such as barring the death penalty for rape and prohibiting mandatory death sentences. Instead, the Court chose to enunciate several broad principles, such as the enhanced need for reliability in the determination that death is the appropriate punishment in a particular case, which give constitutional magnitude to many features of capital sentencing that would otherwise be governed by state law.

By broadening the reach of federal law, and blurring the line between state and federal law, the Court has required a considerable range of interstitial law-making. Obviously this law-making must be accomplished either by state courts on direct review or by federal courts on collateral review. Quite clearly, the Court prefers for this function to be performed by state courts.

21. This requirement is critically important and should be specified by statute. One of the most distressing features of current collateral proceedings is that the habeas attorneys, often serving pro bono and supported by the resources of a major law firm, retain clinical experts and investigators who develop evidence that should have been developed at the time of the trial. The resources should be made available to do the job right the first time.

22. See generally Paduano & Smith, The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases, 43 Rutgers L. Rev. 281 (1991) (discussing the problem of inadequate remuneration for court-appointed counsel with a focus on capital cases).

23. Although better trial representation can be expected to simplify collateral review by reducing the need for evidentiary hearings, there is obviously no way to close the door to ineffective assistance claims without closing the door to federal habeas or collateral review altogether. The line between unsuccessful representation and constitutionally deficient representation is not clearly marked and, given the unique aspects of capital representation, very few claims of ineffective assistance can be regarded as frivolous.
Unfortunately, some state courts have not accepted this responsibility. They seem to view state appeals simply as off-Broadway performances on the way to the federal courts. Although I have not done a systematic empirical investigation, I suspect that federal habeas is most protracted and most cumbersome in jurisdictions where the state supreme courts have declined to exercise an aggressive supervisory role.

Improved trial representation and aggressive appellate review by state courts would reduce the burden of habeas litigation in capital cases by improving the quality of justice in capital-sentencing trials themselves. In cases where death sentences are imposed and affirmed, the federal issues would more likely be anticipated, preserved, and adjudicated on the merits by the state courts on direct review. Adverse rulings would then be well-positioned for expeditious federal review. In these cases, because the federal courts are functioning solely as interpreters of federal law, none of the unusual complexities of habeas review would arise.

IV

Clearly the two recommendations outlined above prescribe a plan for the future and are not a description of the current state of affairs. Most federal habeas petitions now present a lengthy list of alleged constitutional errors, many of which were not preserved at trial, or heard by the state courts, together with multiple allegations of ineffective assistance of counsel. The cases often bounce back and forth between the dual systems of collateral review in state and federal courts. It is therefore necessary to consider proposed changes to the structure and practice of habeas corpus review which could reduce inefficiency and injustice.24

A. Procedural Default

Having represented Michael Marnell Smith throughout the collateral

24. I am not addressing all of the changes that are being proposed. For example, all reform proposals specify time periods for filing federal habeas petitions. Informal time limits already exist, so this change will not have an impact on the pace of litigation in most jurisdictions. Also, I am not addressing the issue of retroactivity and the Supreme Court’s decisions in Teague v Lane, 489 U.S. 288, 310 (1989) (“new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced”), and its progeny Sawyer v Smith, 110 S. Ct. 2822 (1990); Saffle v Parks, 494 U.S. 484 (1990); Butler v McKellar 110 S. Ct. 1212 (1990); and Penry v Lynaugh, 492 U.S. 302 (1989). All of these cases discuss the application of Teague to cases where a new rule has been announced. Eighth amendment protections are no longer expanding, and the essential doctrinal contours had become evident by 1986. Thus, the most problematic application of Teague relates to trials which occurred before 1986. New Teague problems can be prevented altogether by improving the quality of counsel in state proceedings so that potentially valid claims are recognized and by modifying the doctrine of procedural default, so that valid claims that are not recognized can be protected. This is not to say that Teague should be left untouched by habeas reform.
review process culminating in *Smith v Murray*, my views on the issue of procedural default can be stated without equivocation: The present federal jurisprudence is profoundly incompatible with the purpose of federal habeas jurisdiction and with the spirit of the Court's eighth amendment jurisprudence. How can one defend the general proposition that a condemned prisoner is entitled to have a defaulted claim reviewed on the merits in federal court only if the state itself chooses to overlook the default? How can one defend the general proposition that the availability of federal relief for a constitutionally defective death sentence should depend on whether the defendant's trial counsel recognized the error? At the very least, federal courts should reach the merits of defaulted claims of constitutional error whenever there is a reasonable possibility that the error resulted in an unreliable adjudication, including an unreliable determination regarding the appropriateness of a death sentence. The proposition that the availability of a review of such a claim on its merits should depend on the willingness of the state court to review the claim or on the reasons for the attorney's failure to preserve it is impossible to defend.

Habeas review of defaulted constitutional errors that do not implicate the reliability of the outcome raises admittedly more difficult questions. Even in this context, though, it is difficult to ignore the fundamental inequity of the present rules, which permit highly selective application of constitutional norms. The problem is clearly presented by Michael Smith's own case. In that case, the prosecution was permitted, over the objection of the defense, to make affirmative use of incriminating testimony by a psychiatrist who had examined Smith at the request of the defense. A 1975 decision of the Virginia Supreme Court in *Gibson v Commonwealth*,

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25. 477 U.S. 527 (1986). Smith failed to raise a claim on his appeal from a murder conviction. Smith sought a writ of habeas corpus in state court, pressing the claim for the first time since trial, but he was denied on procedural grounds. *Id.* at 530-32. Smith then unsuccessfully sought a writ of habeas corpus in federal court. The Supreme Court affirmed the denial, finding that Smith's deliberate election not to pursue the claim on his state appeal cannot qualify as "cause" for noncompliance with the procedural rule, since the defendant must successfully show both "cause" and actual "prejudice." *Id.* at 533-34.

26. Neither the Powell Committee report, *supra* note 1, nor S. 1241, 102d Cong., 1st Sess. (1991), the Senate-passed version of the Administration's reform bill, address the issue of procedural default, thereby endorsing the current "cause and prejudice" standard, which denies federal relief to petitioners whose counsel have inadvertently waived petitioners' constitutional claims in state court. See Wainwright v Sykes, 433 U.S. 72, 90-91 (1977) (establishing the "cause and prejudice" standard).


28. 216 Va. 412, 414, 219 S.E.2d 845, 847 (1975) (self-incriminating statements vol-
which permitted the prosecution to do this, was an aberrant decision at odds with federal constitutional rulings and with the practice in most states. The Gibson case was before the Fourth Circuit on habeas when Smith was tried, and the Fourth Circuit invalidated the Virginia practice while Smith's case was on appeal. 29

It is clear that the psychiatrist's testimony was constitutionally inadmissible and that, if the claim had not been defaulted, Smith's death sentence would have been set aside. Yet, notwithstanding nine years of post-conviction litigation, the claim was never reviewed on its merits by any court. Smith was executed under a constitutionally defective death sentence because his attorney had failed to raise the issue on direct appeal and because the Virginia Supreme Court chose to ignore the error even though it was raised in an amicus brief. The perversity of the outcome in Michael Smith's case is amply demonstrated by noting the cumulative series of omissions that sealed his fate:

- Michael Smith's death sentence would have been set aside if the second-year law student who assisted in the appeal had researched federal law or had realized that Gibson v Commonwealth was an aberrant decision.
- Michael Smith's death sentence would have been set aside if his lawyer had been aware of the federal dimension of the claim or had assigned the error anyway, simply to preserve the issue for federal review.
- Michael Smith's death sentence would have been set aside if the attorney who filed the amicus brief in the Virginia Supreme Court, and who was aware of the federal law, had simply picked up the phone to suggest that Smith's lawyer amend his assignment of error. I was the amicus attorney.
- Michael Smith's death sentence would have been set aside if his lawyer had read the amicus brief, had realized that the claim should have been preserved, had tried to amend the assignments of error, and had been permitted to do so.
- Michael Smith's death sentence would have been set aside if the Virginia Supreme Court had taken note of the alleged error, sua sponte, as many state courts would have done.

Is it just for the enforcement of federal law in capital cases to turn on such contingencies? As a general proposition, death sentences should not be carried out unless the proceedings by which they were imposed conform to constitutionally required norms. 30 State judicial systems should have incentives to effectuate constitutional norms, not to evade them or to

untarily made to psychiatrist are admissible without violating constitutional privilege against self-incrimination), cert. denied, 425 U.S. 994 (1976).


30 This is one context in which the unique severity of the death penalty should require enhanced protections. Thus, even if habeas review of defaulted claims in non-capital cases were limited to errors that might have led to an unreliable outcome, all constitutional errors should be reviewable in capital cases.
allow them to go unenforced. Precisely the opposite incentives now exist.

Procedural default in state courts should not preclude federal review unless the defendant or counsel deliberately decided not to raise a recognized constitutional claim. *Fay v. Noia*,31 so understood, should be restored in capital cases.32 The "cause and prejudice" standard, which was first articulated in *Wainwright v. Sykes*33 and was later restrictively interpreted in cases such as *Carrier v. Murray*34 and *Smith v. Murray*,35 should be overturned.

In recommending that defaulted claims be addressed on their merits, at least in capital cases, I would not distinguish between claims that implicate the reliability of the conviction or sentence and those which do not. Setting to one side fourth amendment violations, which seem to weigh less on everyone's scale of constitutional values,36 all constitutional norms should be respected, and death sentences should not be affirmed unless the conviction and sentence are free of prejudicial constitutional error. Surely the highest ideals of our constitutional order should be respected and affirmed in capital prosecutions, even if practical accommodations are made in the ordinary run of criminal cases.

This proposal may be regarded as objectionable because it would too often undermine the finality of capital trials in cases in which the constitutional error does not implicate the substantive justice of the prisoner's execution. It should be emphasized, however, that state judicial systems have the power to facilitate consideration of all potential constitutional issues at trial through improved defense representation,

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32. The *en banc* decision of the Fourth Circuit in *Carrier v. Hutto*, 754 F.2d 520 (4th Cir. 1985), *rev'd sub nom.* *Carrier v. Murray*, 477 U.S. 478 (1986) found a middle ground between *Fay* and the rule adopted by the Supreme Court in *Carrier*. Under this approach, federal review would be precluded if the attorney’s decision not to raise the claim was based on informed professional deliberation and was not a product of ignorance or neglect. The ABA endorsed the approach. See ABA Task Force Report, *supra* note 2, at 2, 17-23. Although I would prefer this approach to that which now prevails in the Supreme Court—under which counsel’s deficient performance constitutes "cause" only if it amounts to an independent sixth amendment violation—I do not recommend it. Even this formulation would perpetuate the need to investigate counsel’s performance for the sole purpose of deciding whether claims should be addressed on their merits. The deliberate bypass rule of *Fay* would simplify and reduce the cost of collateral review.

36. See, e.g., *Stone v. Powell*, 442 U.S. 465, 494 (1976) (petitioner not entitled to federal habeas relief on ground that evidence introduced at trial was obtained through an unconstitutional search and seizure where state provided opportunity for full and fair litigation of fourth amendment claim); *United States v. Leon*, 468 U.S. 897 913-25 (1984) (fourth amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by detached and neutral magistrate which is ultimately found to be invalid).
through the use of checklists, and through active participation by the trial
dudge in monitoring compliance with constitutional requirements.

Even if a wholesale return to *Fay v. Noia* were rejected in favor of a
rrower approach, I would recommend a "second-best" rule along the
llowing lines: Federal courts should consider all constitutional claims
on their merits, notwithstanding procedural default in state court, whenever
the alleged constitutional error implicates the reliability of the capital
vention or of the determination that death is the appropriate sentence.37

B. Exhaustion of State Collateral Remedies

Exhaustion of available state remedies should not be required for state
prisoners under sentences of death.38 Proponents of expeditious collateral
review should have no objection to eliminating state post-conviction
proceedings and instituting immediate federal review, and the prospect of
a "clean" adjudication of the constitutional claim in federal courts should
be attractive to those who seek to vindicate the rights of condemned
prisoners. Abolition of the exhaustion requirement is likely to be opposed
by only one group—lawyers representing state attorneys general who would
prefer for fact-bound claims to be heard by state judges.39 This is ironic,
of course, because state officials should want to expedite collateral review
rather than perpetuate the most inefficient aspect of the process.

Although exhaustion should not be required, condemned prisoners
should nonetheless be entitled to seek whatever collateral relief is available
in state courts if they choose to do so, recognizing the impact that an
verse determination by the state court may eventually have in federal
court. Of course, a state may decide to close the door, as Arkansas has

37 I am referring here to the approach developed by Jeffries & Stuntz, *supra* note
7 at 719-21. A major weakness of the Powell Committee Report and the Administration's
crime bill is their exclusive focus on the reliability of the determination of guilt and their
failure to consider constitutional challenges to the imposition of death as the appropriate
penalty See Powell Committee Report, *supra* note 1, Comprehensive Violent Crime

38. 28 U.S.C. § 2254(b) (1988) should be amended by inserting, before the current language, "Except in cases in which the person is under a sentence of death,
    " The current language is:

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
is either an absence of available State corrective process or the existence of circum-
stances rendering such process ineffective to protect the rights of the prisoner.


39. This agenda was apparent in *Murray v. Giarratano*, 492 U.S. 1 (1989) (post-
conviction right to counsel for indigents in capital cases is not constitutionally mandated).
One way of disposing of Giarratano's argument for counsel on state habeas would be for the
Supreme Court to abolish the exhaustion requirement, or at least to entertain claims
that were defaulted in state habeas. The constitutional problem posed in *Giarratano* arises
only because Virginia and other states want to require condemned prisoners to seek state
habeas (because of the presumptive effect of state findings in federal court), but do not
want to provide counsel. See Official Transcript at 20-21, *Murray v. Giarratano*, 492 U.S.
recently done, but if the state chooses to afford the opportunity for such relief, this decision will presumably be predicated on a desire to protect the integrity of its own judicial process, rather than on a strategic effort to shape the outcome in federal court.

C. Representation in Collateral Proceedings

Federal habeas corpus now serves, and must continue to serve, an indispensable role in the administration of the death penalty. In light of the paramount importance of federal review, representation by adequately trained counsel is absolutely essential. A federal post-conviction representation system has now been established for capital cases. The important question concerns representation in state post-conviction proceedings.

I have proposed that collateral review in state courts no longer serve as a necessary way station on the track to federal review, not only because the exhaustion requirement engenders unnecessary delay and duplication, but also because it obscures and distorts what should be the paramount role of the federal courts—to assure that death sentences are not carried out unless they are free of constitutional defects. However, if the exhaustion requirement remains in force, and if the determinations made in state court continue to have presumptive force in federal court, adequate representation in state habeas is essential. Moreover, quality of representation in state habeas proceedings takes on even greater significance if the claims omitted from initial state petitions are regarded as defaulted for purposes of subsequent review. The acknowledged objective in the collateral review process, whether it occurs only in federal court or in both state and federal court, should be to litigate all claims in one proceeding. The prospect that this will occur will be enhanced if qualified counsel are appointed in these cases.

All reform proposals provide procedures for appointment of counsel in state habeas proceedings. Unfortunately, the Bush Administration’s crime bill, based on the Powell Committee proposal, provides very little incentive for states to provide adequate representation. Although the time limitations on the filing of habeas petitions and the tightened rules governing successive petitions would not apply unless the states establish a mechanism for appointing counsel, the states would have virtually no incentive to establish such a mechanism because the Supreme Court has already given the states


42. In Coleman v. Thompson, 111 S. Ct. 2546 (1991), the Court held that claims defaulted in state habeas are also barred from federal review in the absence of cause and prejudice, and also that attorney error cannot constitute "cause" for this purpose, no matter how egregious. Id. at 2565-66.
most of what they want. In contrast, the ABA recommended that the pro-state features of current federal habeas procedures—the exhaustion requirement, procedural default rules, and the presumption of correctness—be made contingent upon the provision of adequate representation in state habeas proceedings.

I favor the ABA approach, with the proviso that the exhaustion requirement be abolished outright. Under the approach I am recommending, the prisoner and the state can strike a bargain: the state promises to review the alleged constitutional errors and to provide adequate representation to enable the issues to be fully developed, and the prisoner, in turn, assumes the risk that any adverse state court determination will be given presumptive effect in subsequent federal proceedings. Whether collateral review in state courts is required or permitted, however, the outcome in state court should have no bearing on federal habeas review unless the state has provided qualified counsel to the condemned prisoner. 43

D The Problem of Successive Petitions

As I mentioned earlier, the filing of “successive” petitions44 is both inevitable and unobjectionable as long as the applicable constitutional norms are evolving and as long as new rulings would be given retroactive effect. No one pretends that the Supreme Court’s post-1976 death penalty decisions merely declared pre-existing law. Until 1984, virtually every decision setting aside a death sentence broke new ground or articulated a principle or rationale that implicated previously unquestioned practices.

Under these circumstances, complaints by Supreme Court Justices about the pace and multiplicity of habeas litigation in death penalty cases seem poorly aimed, to say the least, and perhaps even disingenuous. During the developmental period of capital-sentencing jurisprudence, it would have been grossly unfair to foreclose the application of the newly developing norms to condemned prisoners by subjecting their claims to the doctrine of procedural default, by declining to apply the law retroactively, or by cutting off the filing of successive petitions. And, for the most part, the federal courts were willing to entertain newly developing claims during this period.

43. The Powell Committee Report and S. 1271, 102d Cong., 1st Sess. (1991) do not specify criteria for appointment, thereby leaving the states free to specify the qualifications. In contrast, the ABA recommended codification of the ABA’s Guidelines for Appointment and Performance of Counsel in Death Penalty Cases, which require counsel to meet detailed qualifications and direct the states to establish a statewide appointment authority. See ABA Task Force Report, supra note 2, at 1. As noted above, this approach is too cumbersome for a legislative solution. The federal statute should prescribe only a designated level of experience in collateral litigation and the completion of a bar-approved course which provides specialized training in capital adjudication and collateral litigation in criminal cases. This is the approach taken in H.R. 3371, 102d Cong., 1st Sess. (1991), the House passed crime package.

44. I am using the term here to refer either to petitions raising claims not raised in the earlier petition or claims decided adversely to the petitioner in the earlier proceedings.
The governing principles of capital-sentencing jurisprudence have now stabilized, and the implications of these principles have come into relatively clear focus. As a result, the greater determinacy of constitutional law has significantly increased the likelihood that adequately trained trial counsel will recognize and object to constitutionally suspect practices, that trial courts will prevent constitutional error from occurring, that appellate courts will correct errors that do occur, that initial habeas petitions will include all available claims, and that fewer successive petitions will be filed.\textsuperscript{45} If this is a correct assessment, the tightened criteria for the filing of successive petitions announced by the Supreme Court and now being considered in Congress are less consequential than they seem. Nonetheless, in light of the continuing risk of imperfect adjudication, the door must be left open to review any constitutional claims that were previously hidden from view (due to no fault of the prisoner or counsel) or claims that implicate the reliability of the conviction or sentence.\textsuperscript{46}

V

In sum, I believe that many of the problems associated with federal habeas review in capital cases during the past fifteen years have been transitional ones attributable to the indeterminacy of eighth amendment jurisprudence. Because the law has become more stable, the process of collateral review is already becoming more orderly. By providing better trial representation by specialized counsel, and by providing aggressive appellate review, the states can further simplify the process of collateral review while improving the quality of justice in capital cases. However, there are two features of the system of collateral review which should be modified both to enhance efficiency and to promote justice: the exhaustion requirement should be repealed, and procedural defaults in state courts should foreclose federal review only in the unlikely event that the defendant or counsel intentionally bypassed the opportunity to raise a federal claim.

\textsuperscript{45} I emphasize, however, that the accuracy of this assertion depends upon the appointment of adequately trained counsel at trial and in state habeas.

\textsuperscript{46} The ABA approach to successive petitions provides just this sort of protection. ABA TASK FORCE REPORT, supra note 2, at 3, 35-36. Thus, it is preferable to the restrictive approach adopted by the Powell Committee, supra note 1, and by S. 1241, 102d Cong., 1st Sess. (1991).