Habeas Corpus

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation
Habeas Corpus, 68 J. Crim. L. & Criminology 571 (1977)
HABEAS CORPUS


In its 1963 decision Fay v. Noia, the United
States Supreme Court held that a defendant
could use the writ of habeas corpus for federal
review of a state conviction, regardless of his
failure to comply with state procedural rules,
as long as he had not deliberately bypassed the
state court procedures. This liberal decision
had the effect of providing federal review for
almost any constitutional claim, and hence, of
increasing federal court interference with state
judicial operations. In recent years, the Court
displayed a willingness to restore state court
deference to state procedure, analysis
cases clearly indicate the present Court's pref-
ersence to defer to state procedure, analysis
renews that this movement was not accom-
plished without some difficulty. The cases dis-
play a willingness to restrict Fay, but they also
show that the Court still feels uncertain in its
approach to the Fay doctrine.

To fully understand the three most recent
habeas corpus cases, a brief history of the
Court's treatment of habeas corpus problems is
helpful. The Fay decision represented the
benchmark of expanded federal habeas review
of state convictions. Previously, the Court, in
Brown v. Allen, had maintained that a federal
court on habeas appeal could evaluate both the
procedural and substantive constitutional
claims of a state defendant, with only those
convictions based upon an "adequate state
ground" being insulated from the review.

2 Id. at 438.
6 The Court did decide a fourth habeas case last
Term in which the defendant's habeas appeal was
accepted. In Blackledge v. Allison, 97 S. Ct. 1621
(1977), the Court permitted the habeas review but
did so on the most narrow of grounds. The narrow
holding in Blackledge remained consistent with the
Swain, Henderson and Wainwright restrictions of Fay
and of the availability of habeas corpus review. See
note 71 infra.

7 Article 1, section 9 of the United States Constitu-
tion protects the writ of habeas corpus from arbitrary
suspension; and, via the Judiciary Act of 1867, Con-
gress expanded the applicability of the privilege by
making the writ available to state prisoners. However.
in an effort to assure the states that federal interven-
tion with the state administration of criminal justice
would not run rampant, the Supreme Court origi-
nally held that only issues regarding trial court juris-
diction could be examined through the writ. See,
e.g., Ex Parte Spencer, 228 U.S. 652 (1913) (The
Court refused to pass upon legality of sentence,
claiming that habeas corpus was not meant to be
used as a writ of error). After nearly 50 years of
limiting habeas consideration to purely jurisdictional
issues, the Court began to consider issues that were
plainly not jurisdictional and to review substantive
claims of convicted state defendants. See Frank v.
Magnum, 237 U.S. 309 (1915), and Moore v. Demp-
sey, 261 U.S. 86 (1923) (In each, the Court considered
one habeas, the influence that a mob had on jury
decisions). Finally, by the time of Brown v. Allen,
344 U.S. 443 (1953), the Court no longer considered
the jurisdiction limitation as a problem and instead
just concerned itself with setting the extremes for
when habeas review could not be granted.
8 344 U.S. 443 (1953) (Petitioner applied to the
federal district court for habeas corpus after certio-
rari to review the state supreme court's affirmance
of his conviction was denied by the United States
Supreme Court).

9 Id. at 458.
However, the Fay Court abandoned the adequate state ground theory and replaced it with a new doctrine that permitted, almost without limit, the appeal of a state verdict through the writ. In Fay, a defendant relied on the writ to challenge the use of a confession at his state trial, despite the fact that he had failed to comply with a state rule requiring appeals to be raised at the state level first. The Supreme Court accepted the writ and claimed that the federal courts were empowered under the federal habeas statutes to grant relief from any conviction obtained in violation of the Constitution, notwithstanding the neglect of state procedure. While the defendant's failure to meet the state requirement, under Brown, would have created an adequate state ground to bar federal review, the Court in Fay deemed habeas as not so limited. Rather, the Fay Court believed that review of a state conviction could be denied only to the applicant “who has deliberately by-passed the orderly procedure of the state courts.”

As the Court became aware of the desirability of protecting state court procedures from federal intervention, it began to reduce both the scope and implications of Fay. For instance, in Davis v. United States, the Court ignored Fay and developed a new rule governing collateral review of pre-trial defendant errors. There, a defendant, convicted of a federal crime, attempted to achieve collateral review claiming an unconstitutional discrimination in the composition of the grand jury that indicted him. The Supreme Court refused the claim because the defendant had failed to attack the grand jury's composition at the pre-trial stage, as required by federal law. The Court referred to the Federal Rules of Criminal Procedure and concluded that a failure to comply with these rules would constitute a waiver of collateral review unless the defendant could show “cause” for his noncompliance or actual prejudice resulting from denial of review. Furthermore, in Francis v. Henderson, the Court extended the Davis doctrine to meet a state defendant's pre-trial failure to object to the composition of the grand jury. The Francis Court quoted at length from Davis, using that opinion to reject implicitly the federal interference with state procedures that was encouraged by Fay. According to the Francis Court, “considerations of comity and federalism” required that the Davis cause and prejudice standard be applied to habeas appeals of state criminal convictions.

Davis and Francis, then, stand for the proposition that, notwithstanding Fay, federal habeas review of an alleged pre-trial error could not be permitted unless the defendant showed cause for his failure to abide by the state rule or actual prejudice resulting from a court refusal to consider the claim. These opinions represented a limitation to Fay's all encompassing allowance of habeas review, but neither really purported to overrule the Fay doctrine. The Court in developing the cause and prejudice standards of Davis and Francis relied on statutory law and, in fact, made no effort to dispute the Fay deliberate bypass rule. Moreover, the Davis and Francis decisions were designed to meet pre-trial procedural defaults of the defendant, whereas the Fay defendant's failure to appeal as required was a post-trial default. These factual distinctions indicated that the Fay standard still had to be in existence for at least post-trial procedural default problems. Yet, the very fact that the Davis and Francis Courts both deliberately ignored Fay may have given the impression that Fay was resting on a very weak foundation.

---

11 372 U.S. at 498.
12 See Younger v. Harris, 401 U.S. 37 (1971). In Younger, the Court showed great deference to state court proceedings by holding that for reasons of “comity and federalism,” federal courts should abstain from enjoining pending state criminal prosecutions absent a finding of immediate harm to the defendant. Central to the Younger Court's concern was the belief that the overall government would perform more efficiently if the states and their institutions were left free to perform their separate functions. Id. at 44.
14 The Court specifically referred to Fed. R. Crim. P. 12(b)(2).
15 411 U.S. at 242.
17 Id. at 541.
18 Id. at 542.
19 To indicate further the weak foundation of Fay after Francis, consider the decision in Stone v. Powell, 428 U.S. 465 (1976). In Stone, the Court held that when “the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas relief.” Id. at 482. Although the Stone Court made no mention of the Fay doctrine, the Court's language seemed to be a direct repudiation of Fay. The Fay rule was developed to
The Court further eroded the foundation of Fay with its three main habeas corpus decisions of the last Term. In the Term's first habeas case, Swain v. Pressley, the Court considered the constitutionality of a federal law that denied habeas review of decisions by the Superior Court of the District of Columbia, if the Superior Court had already provided an adequate remedy. There, a defendant, convicted of grand larceny by the Superior Court, applied for a writ of habeas corpus in the United States District Court and asked for a review of the constitutionality of the Superior Court's trial proceeding. The district court dismissed the writ application, claiming to have no jurisdiction over the matter by virtue of federal law.

The Court noted that the defendant had not exhausted the remedies available at the superior court level, and hence refused to allow the writ as controlled by the section 110(g) exhaustion requirement. The district court did not discuss the constitutionality of the statute. The court of appeals reversed largely because it doubted the constitutionality of the section 110(g) restriction of federal habeas relief. In construing the statute, the court of appeals plainly ignored the section language that refuses habeas review if the superior court has adequately denied relief, and instead read the statute as requiring only the exhaustion of local remedies before a habeas petition could be filed. Unlike the district court, the appellate court believed that the defendant had exhausted all of his local remedies and thus remanded the case for consideration of the merits.

The Supreme Court reversed in a two-part opinion written by Mr. Justice Stevens. The Court ruled that section 110(g) did not unconstitutionally suspend federal habeas relief even though the section permitted a local court to decide the constitutional questions subject to review. In the first part of the opinion, Stevens attacked the appellate court's conclusion that section 110(g) merely required the exhaustion of state remedies before habeas could be allowed. Stevens noted that the statute plainly contradicted the appellate court's interpretation as its language clearly ordered federal courts not to grant habeas relief if such relief had been denied in the superior court. Additionally, Stevens contended that the statute could not be limited strictly to the exhaustion problem, because section 110(g) was deliberately patterned after 28 U.S.C. § 2255. Stevens implied that section 2255 gave deference to the local court proceedings by its creation of new post-conviction remedies in the sentencing court. Noticing the similarities between sections 110(g) and 2255, he concluded that the lan-

---

replace the adequate state ground theory of Brown v. Allen. Yet, when the Court in Stone discussed a full and fair opportunity at the state court level, it appeared to return to the Brown standard. To bar federal habeas review because an opportunity for a full and fair consideration was granted by the state court seems to indicate that such an opportunity represents an adequate state ground for denying the writ.

21 D.C. CODE § 110(g) (1973).
22 The defendant alleged that at trial the superior court had violated his constitutional right to due process of law because the court had denied him the effective assistance of counsel.
23 D.C. CODE § 110(g) (1973) provides: An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
25 As the court of appeals maintained: "[S]ection 110(g) does not affect the jurisdiction of the district court under 28 U.S.C. §§ 2241 et. seq. and operates only as an exhaustion of remedies provision... Thus, if the exhaustion requirement is met, Pressley has fulfilled all conditions to maintaining his petition." Id. at 1292-93.
26 According to Justice Stevens: This unequivocal statutory command to federal courts not to entertain an application for habeas corpus after the applicant has been denied collateral relief in the Superior Court, is squarely at odds with the Court of Appeals' view that the statute deals only with the procedure the applicant must follow before he may request relief in the District Court.
97 S. Ct. at 1228 (emphasis in original).
27 28 U.S.C. § 2255 (1970) reads, in part: An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
language of section 110(g) was sufficiently plain to denote the same local deference.

In the second part of the opinion, Stevens further attempted to give meaning to the statute's language. The defendant had argued that section 110(g) unconstitutionally suspended his right to habeas corpus because it permitted a superior court review not exactly commensurate with habeas relief in the district courts. Judges of the superior court did not enjoy the life tenure and salary protections afforded to district court judges, and hence the defendant believed that the superior court judges would be subject to local pressures not placed on the district court judges. Responding to the defendant's argument, Stevens referred to the final clause of section 110(g) and claimed that this clause avoided any serious question about the constitutionality of the statute. Stevens stated that the final clause permitted federal habeas review if the local remedy was inadequate, and therefore argued that the only constitutional question presented was whether the grant of an adequate local remedy would be a suspension of the writ. Stevens believed that such an adequate local remedy would not act to suspend the writ and noted that the Superior Court here could provide an adequate review. Although the superior court judges were not afforded the federal protections, they had to be presumed competent to decide constitutional issues.

Stevens gave no mention to Fay in his Swain opinion, but he may still have created a significant restriction on the Fay doctrine. In Fay, the Court eliminated the adequate state ground type of reasoning so that it could develop the much more liberal deliberate bypass theory. Yet, when Stevens referred to the adequate local remedy clause in Swain, he seemed to have ignored Fay and to have reverted to the doctrine of Brown v. Allen. The existence of Stevens' habeas discussion in terms of adequate local grounds, especially when that discussion was considered by Stevens as the important issue in the case, may indicate that the Court believed that Fay no longer had any value.

This conclusion becomes even more evident when the actual issues confronting the Swain court are considered. At the appellate level, the court believed that its task for the case was two-fold: First, to decide whether the statute was limited to the exhaustion of local remedies, and then, to determine whether the defendant had indeed satisfied the exhaustion requirement. However, the Stevens decision went much further than a mere review of the appellate court's action. Instead of simply limiting himself to a discussion of the appellate court's two issues, Stevens concentrated on the adequate remedy consideration.

Once he decided on the correct interpretation of the statute's language, though, Stevens should have looked at the case facts to resolve the difference between the district court and the court of appeals. The district court believed that the defendant had not exhausted his remedies, while the court of appeals maintained that he had. Only a Stevens determination that the defendant had exhausted his remedies would have justified his consideration of the statute's adequate remedy portion. In other words, if it were concluded that there was no exhaustion of remedies, then the defendant's appeal simply would have been rejected. However, Stevens failed even to consider this factual problem and rather went directly from the first statutory interpretation to the next. This obvious omission created one glaring problem for future applications of Fay. If the facts of Swain do support the district court's belief that local remedies were not exhausted, then it must be concluded that Stevens implicitly restricted Fay unnecessarily. In essence, Stevens seemed so anxious to discuss the adequate remedy section and hence to reinstate the adequate state ground theory rejected by Fay, that he may have forgotten his judicial duty to support every legal inference made in a court ruling.

In his concurring opinion, Mr. Chief Justice Burger appeared to agree with this criticism of the Stevens opinion. Although Burger opposed the Fay doctrine, he believed that Swain did not present the appropriate factual circumstances to restrict Fay in any manner. He noted that the Stevens opinion considered too much, and he contended that the adequate state ground problem should never have been discussed by the Court. Rather, he asserted that part one of the Court's opinion efficiently dis-

---

28 97 S. Ct. at 1229.

29 According to Justice Stevens: "We must, therefore, presume that the collateral relief available in the Superior Court is neither ineffective nor inadequate, simply because the judges of that court do not have life tenure." Id. at 1230-31.
posed of the defendant's claim and maintained that the language of section 110(g) clearly indicated that it was designed "to preclude access to the district court, not merely to assure exhaustion of local remedies."30

However, while criticizing the Swain opinion for its consideration of issues not presented, Burger fell prey to his own criticism. In attempting to dispute the majority's restriction of Fay, Burger inadvertently went too far and presented a subtle attack on the Fay decision. To support his notion that the majority should have ended its inquiry with part one, Burger presented an historical discussion of the availability of habeas review.31 According to Burger, habeas review was only permitted in order to consider whether the trial court had proper jurisdiction or whether the state had adhered to its own court procedures. The writ was "not considered a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority."32 The applicability of the Burger historical approach to Swain was simple. Since Burger did not believe that the habeas statute allowed a review of a conviction entered by a court of competent jurisdiction, he saw no issue of constitutional dimension raised by the Swain statute.33 This narrow Burger view of habeas would thus seem to indicate that, if presented with the proper factual circumstances to review Fay, Burger would reverse its all-encompassing grant of habeas and return habeas to only considerations of jurisdictional or state procedural issues.

In Henderson v. Kibbe,34 the Court continued its discussion of the habeas issue and, as it had done in Swain, narrowed the scope of Fay

30 Id. at 1232 (Burger, C.J., concurring).
31 Interestingly, in Fay, both the majority and dissenting opinions included detailed accounts of habeas corpus history. Mr. Justice Brennan, for the majority, argued that the history leading up through Brown v. Allen not only refuted the initial jurisdiction limitation to habeas appeals, but also supported the notion that any substantive constitutional question could be raised on habeas regardless of a state procedural default. 372 U.S. at 399. On the other hand, Mr. Justice Harlan, speaking in dissent, claimed this history proved that habeas was never meant to lie for a prisoner whose detention rested on a reasonable application of the state's own procedural requirements. 372 U.S. at 449 (Harlan, J., dissenting).
32 97 S. Ct. at 1231 (Burger, C.J., concurring).
33 Id. at 1232.
34 97 S. Ct. 1730 (1977).

without mention of that doctrine. There, a defendant robbed an intoxicated man and abandoned him at night in the middle of an unlighted rural road.35 Approximately thirty minutes after this occurred, a truck struck and killed the man who was still sitting on the road. The truck driver had been exceeding the posted speed limit by 10 m.p.h., and he neither swerved to avoid collision nor attempted to stop, even though he had been warned of a possible highway problem by the flashing lights of oncoming cars.

The defendant was prosecuted under a New York statute providing that a person is guilty of second degree murder when he recklessly causes the death of another person.36 The defendant's attorney argued that the death resulted not from the highway abandonment by the defendant, but rather from the intervening cause of the truck driver's negligence. However, when the trial judge failed to instruct the jury on the statutory elements of causation, the attorney did not object. The jury, responding to a court instruction that guilt must be proved beyond a reasonable doubt, subsequently reviewed the defendant's behavior and found him guilty of the murder charge. The defendant appealed on the intervening cause theory, but the state appellate court affirmed his conviction on the belief that the defendant could have foreseen that his acts would have led to the fatal accident.37 The court refused to consider the trial court's omission of the "cause" instruction, simply because it had not been objected to in the trial court.

The defendant applied for a writ of habeas corpus in the district court, arguing that the trial court's failure to define causation contaminated the proceedings.38 The district court rejected the writ, claiming that the defendant's attack on the trial court's instructions failed to raise a question of constitutional dimension and thus was not reviewable. The court of

35 Traffic vision was obscured on this road by darkness and by blowing snow. Id. at 1733.
36 N.Y. Penal Law § 125.25 (Consol. 1977) provides that: "A person is guilty of murder when under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."
38 He maintained that the omission of a cause definition denied him a full and fair hearing as required by 28 U.S.C. § 2254(d)(3) (1971).
appeals reversed and applied the Fay doctrine to this defendant’s mid-trial procedural default. The court maintained that, regardless of the defendant’s failure to object, the trial court’s incomplete jury instructions eliminated a necessary factor for guilt determination and thereby deprived the defendant of his rights to due process of law. According to the court, the failure to make any objection to the jury instructions was not a deliberate bypass of state procedure, but rather an obviously inadvertent omission. Consequently, the court believed that, via Fay, the defendant should have been entitled to federal habeas relief of his constitutional claim.

The Supreme Court reversed and, in effect, narrowed the scope of Fay once more. The Court neglected the Fay-based reasoning of the court of appeals and instead ruled against the defendant on mere factual grounds. The Court, per Mr. Justice Stevens, noted that the jury had been instructed on the definition of recklessness, equated that definition with one for cause, and held that the jury’s finding of reckless behavior by the defendant “necessarily included a determination that the harm was foreseeable to him.”

The manner in which the Court decided Henderson clearly indicated that Fay had been restricted. For one thing, the mere reversal of the appellate court’s opinion could be inferred as a dismissal of Fay. Had the Henderson Court felt bound by Fay, it certainly would have affirmed the appellate court’s careful application of that Fay standard. Moreover, the Stevens opinion failed even to mention Fay, hence creating the impression that Stevens wanted to restrict Fay only implicitly. As the basis for his reversal, Stevens chose to focus upon the New York criminal law at issue and to apply it to the case’s facts. His review led to the conclusion that the trial court’s omission did not infect the trial in such a way as to violate due process. Consequently, by failing to mention Fay and by utilizing a factual approach, Stevens was able to deny a writ application that the Fay Court probably would have accepted.

However, by rejecting Fay in such an implicit way, Stevens may have created problems for future Fay considerations. Clearly, in light of the appellate court’s reliance on Fay, the Henderson Court should have treated the defendant’s failure to object at trial as the central issue. The court of appeals had presented the Supreme Court with the right factual circumstances to reevaluate Fay. Yet, by misinterpreting the true impact of the lower court decision, the Henderson Court failed to take advantage of the opportunity to effect habeas evolution. During his entire Henderson discussion, Stevens only once mentioned the defendant’s failure to object, claiming that it is “the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.” Thus, Stevens’ refusal to expand on the question regarding the mid-trial error appeared particularly disturbing. He treated the factual questions relating to cause of main importance and effectually left the status of Fay unresolved.

In his concurring opinion, Mr. Chief Justice Burger expressed disagreement with the Stevens’ handling of Henderson. As he had done in Swain, Burger criticized Stevens for deciding the wrong issue and implied that he should have considered Fay in his treatment of the habeas problem. Burger first noted that the writ should have been dismissed simply because the defendant had failed to object to the instructions during trial, and then he discussed the Fay problem directly. Burger recognized that Fay concerned only a post-trial procedural error and contended that Fay was not meant to be applied to the mid-trial defaults. Thus, Burger seemed willing to maintain Fay at least for post-trial omissions because such omissions were unlikely to interfere unduly with state procedures. But, Burger restricted the Fay application and refused to accept the court of appeals’ extension of Fay.

Because Burger, in both Swain and Henderson, seemed to be the only justice willing to consider explicitly the procedural issue presented by Fay, a comparison of his opinions demonstrates further his desired treatment of Fay. In Swain, Burger presented his notion of habeas history and concluded that habeas was

40 It must be remembered that Fay, consistent with its factual circumstances, developed the deliberate bypass rule for habeas review of post-trial errors only.
41 534 F.2d at 497.
42 97 S. Ct. at 1737.
43 Id. at 1738.
44 Id. at 1736.
45 “By that failure he waived any claim of constitutional error.” 97 S. Ct. at 1738 (Burger, C.J., concurring).
never intended to be used for reviews of a state conviction. But, in *Henderson*, Burger appeared to ignore this *Swain* view by permitting *Fay* to continue for the post-trial error problems and by not denouncing *Fay* completely. These apparent divergent positions may be explained by considering Burger’s judicial philosophy. In these cases, Burger seemingly expressed the desire for the Court to progress in the habeas area one step at a time. He wanted the Court to consider the particular case at issue in the context of the overall court movement in the general area, and to make changes only when it was necessary to help clarify the law. In *Swain*, Burger may have wanted to present the historical review of habeas as a means of proving that the Court was going too far, too fast. His historical approach may be viewed as a method of forcing the Court to stop and reflect on its approach to the habeas question. Similarly, in *Henderson*, Burger wanted the Court to recognize the true issue involved, while assuring that he, himself, did not fall into the trap of deciding too much at once. Consequently, he could dispute the majority’s reasoning, while, at the same time, continue to develop his own habeas notions. In *Henderson*, Burger may still have thought that habeas should not be used for reviews of state convictions, but he found no need to consider that problem. Rather, with the *Henderson* facts, Burger could effectively maintain that habeas should not be used for review of mid-trial errors, and could reserve a full consideration of the *Fay* doctrine for when a post-trial situation arose.

In *Wainwright v. Sykes*, the rest of the Court finally began to follow the Burger lead and to reevaluate explicitly the *Fay* doctrine. There, the defendant’s Florida conviction of third-degree murder was aided by the introduction into evidence of a confession made to the police prior to trial. At no time during the trial did the defendant challenge the admission of the statement on the ground that he had not understood the *Miranda* warnings given by the police. But later, the defendant applied for habeas review claiming the inadmissibility of his statements because he had not knowingly and intelligently waived his constitutional right to remain silent. The district court accepted the defendant’s application when it read *Jackson v. Denno* as requiring a hearing in the state court to determine the admissibility of the inculpatory out-of-court statement. The court, relying upon *Fay*, held that the defendant had not lost his right to assert this *Jackson* privilege by failing to object at trial, since only strategic decisions at trial could create such a bar to habeas review.

The court of appeals affirmed and based its opinion on reasoning similar to that employed by the district court. The court first agreed that *Jackson* entitled the defendant to a hearing on the voluntary confession issue. Then, the court considered the effect that Florida’s contemporaneous objection rule would have on the *Jackson* guarantee of rights. As the district court had done, the appellate court relied on *Fay* and concluded that the nondeliberate failure of the defendant to comply with the state contemporaneous objection rule would not bar review. The court simply

and thus could not be said to have knowingly and intelligently waived his *Miranda* rights. 97 S. Ct. at 2500.

49 378 U.S. 368 (1964) Held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing.

50 *Wainwright v. Sykes*, 528 F.2d 522 (5th Cir. 1976).

51 The court of appeals looked at the traditional rules of the state’s criminal trial practice and noted that the burden is on the state to secure a prima facie determination of voluntariness, not upon the defendant to demand it. *Id.* at 525.

52 The contemporaneous objection rule considered here is contained in Rule 3.190(i), FLA. R. CRIM. P. (1975 Revision). It reads, in part:

Motion to Suppress a Confession or Admissions Illegally Obtained.

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

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

53 528 F.2d at 528. The court of appeals also considered the cause and prejudice test enunciated by the Supreme Court in *Davis v. United States*, 411 U.S. 233 (1973). The court claimed that “[a] major
remanded to the state level and required the state court to hold a hearing that would study the defendant's alleged non-waiver of his Miranda rights.

In reversing the appellate court's decision, the Supreme Court immediately gave notice that it was going to reevaluate the Fay doctrine. Writing for the Court, Mr. Justice Rehnquist introduced the habeas corpus provision of the federal code and asked when an adequate state ground could, under the code, bar consideration on habeas of an otherwise cognizable federal issue. The mere fact that Rehnquist reintroduced the adequate state ground theory previously rejected by the Fay court indicated strongly that the Fay rule was on its way out. This fact was illustrated even more clearly when Rehnquist answered his initial question with the contention that "it is a well established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts."

Next, Rehnquist gave a brief history of habeas review prior to and including Fay, and discussed the limitation of Fay created by the cause and prejudice rule of Francis v. Henderson. He applied Francis to the Wainwright

tenet of the Davis decision was that no prejudice was shown to petitioner through the loss, or waiver, of his rights to challenge jury composition. . . . [However, in Wainwright], involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent." Id. at 526–27.

In Wainwright, Justice Rehnquist wrote the opinion of the court; Chief Justice Burger, Justices White and Stevens each filed separate concurring opinions; and Justice Brennan, joined by Justice Marshall, dissented.

24 28 U.S.C. § 2254(a) (1970) provides that the federal courts shall entertain an application for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of the State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

55 97 S. Ct. at 2502.

56 Id. at 2503.

57 It is interesting to note that while Mr. Justice Rehnquist concurred in the Burger historical view in Swain, he seemed to have changed his position in Wainwright. The Burger view had been that habeas was limited only to jurisdictional questions. In Wainwright, Rehnquist seemed to accept the notion that habeas could include reviews of state convictions. 97 S. Ct. at 2503.

58 425 U.S. 536 (1976). Francis barred habeas review of a pre-trial failure to object unless cause or prejudice could be shown. See note 18 supra and accompanying text.

59 Rehnquist believed that the state's contemporaneous rule required the defendant to challenge the confession "at trial or not at all." 97 S. Ct. at 2506.

60 Id. at 2507.

61 Id. at 2508.
son, Stevens displayed the tendency of deciding a habeas case on substantive, not procedural, grounds. In each of these decisions, Stevens deliberately avoided the procedural issue involved in Fay, and developed his habeas limitation with the use of the case's facts. Similarly, in Wainwright, Stevens used the same substantive consideration to dispose of the habeas claim. He simply concluded that the Wainwright facts did not indicate that the defendant was prejudiced from the use at trial of the inculpatory statement. Although it appeared that Stevens did not approve of the continued existence of the Fay rule, he preferred to follow his own substantive limitation rather than accept the more direct procedural method employed by the majority.

Likewise, Mr. Justice White, in his concurring opinion, indicated that he too did not wish to adopt the Rehnquist approach. White believed that the Rehnquist denunciation of Fay was entirely unwarranted. Therefore, he utilized the Stevens manner of deciding the case and dismissed the defendant's claim upon substantive, rather than procedural, grounds. White looked at the facts of the case and asserted that the confession used at trial did not prejudice the defendant. However, instead of accepting the cause and prejudice rule promulgated by the majority, White believed that an entirely different theory, the harmless error rule of Harrington v. California, should have controlled. According to White, since the evidence of guilt in the case was sufficient to negate any possibility of actual prejudice, this appeared "to be tantamount to a finding of harmless error under the Harrington standard and [was] sufficient to foreclose the writ and to warrant reversal of the judgment." By utilizing Harrington to prove that Rehnquist had arbitrarily disposed of Fay, White was able to conclude that Fay still provided a good standard for habeas availability.

Mr. Justice Brennan, in his Wainwright dissent, expressed yet another disagreement with the Rehnquist position. Brennan disliked entirely the Rehnquist reasons for dismissing Fay and disputed at length the majority opinion. Brennan first disagreed with Rehnquist's almost complete deference to the state proceedings. According to Brennan, the Wainwright elimination of Fay insulated state court decisions so much from federal intervention, that federal habeas review would practically become a nullity. He noted that, under Wainwright, if a defendant could not show cause for his error and the state court refused to accept his habeas plea, the defendant would be unfairly left without any court in which he could address his constitutional claims. Moreover, Brennan also disagreed with the Rehnquist concern over defense attorney's practice of sandbagging. He recognized that any realistic system of federal habeas must be premised on the actuality that the ordinary procedural default is the result of the negligence, inadvertence or incompetence of the defendant's counsel. He believed that very few lawyers actually engaged in the sandbagging procedure feared by Rehnquist, especially since a failure of the attorney to deceive the federal court in the belief that there had been no deliberate bypass of state procedures, results in a forfeiture of all judicial review of his client's claim.

Additionally, Brennan maintained that if most of the procedural defaults are the result of attorney negligence, then the Rehnquist rule would force a defendant to suffer punishment from the error of his attorney. Disliking the ramifications of this, he claimed that it was senseless to punish a defendant for the careless acts of his counsel, especially since such punishment meant the loss of all court remedies. Finally, Brennan argued that the entire system of habeas review was left unorganized as a jurisdiction. Previously, he had defended the Fay decision against all adversaries. For instance, in Francis v. Henderson, 425 U.S. 536 (1976), Brennan responded to the Court's restriction of Fay with extreme vigor. As will be recalled, the Francis Court developed its cause and prejudice standard by relying on a federal statute. It neglected even to mention the Fay rule which it was purporting to replace. Brennan objected to this cavalier method of limiting a Supreme Court opinion and argued that if the Court believed Fay no longer to be good law, "it had the duty to face squarely our prior cases interpreting the federal habeas statutes and honestly state the reasons."
result of the Court's decision. The *Wainwright* majority opinion rejected the well-established deliberate bypass rule, and replaced it with a cause and prejudice theory which the Court did not even define. Leaving the terms undefined, according to Brennan, could only result in judicial chaos when lower courts attempted to apply the rule.

The final Court member to take issue with the Rehnquist opinion was Mr. Chief Justice Burger. In his concurrence, Burger initially remained consistent with Rehnquist by maintaining that the *Fay* deliberate bypass rule was never designed to cover errors alleged to have been committed during trial. However, almost immediately after making that predicted statement, Burger expanded the scope of his anti-*Fay* notion by introducing a new concept for *Fay* application. In *Henderson*, Burger had claimed that the *Fay* rule applied for any post-trial procedural default problem; but, in *Wainwright*, Burger suddenly changed his mind and noted that *Fay* should only be applied to those situations where the defendant had made the procedural error himself, unaided by his attorney. This restatement of the *Fay* rule could also be consistently applied to the facts of *Henderson*. As Burger correctly noted, *Fay* involved a circumstance where the defendant committed the default himself by failing to make the required appeal; while in *Henderson*, it was the attorney who had failed to object to the trial court's jury instructions. Yet, despite this factual difference, it still seemed strange for Burger to develop a new rule, in a Term where he had already proposed a different rule for the same issue.

Perhaps the explanation for the new Burger development stems from the fact that he did not really consider *Wainwright* the proper case to restrict the *Fay* doctrine so rigidly. It appeared that Burger was not convinced that *Wainwright* involved a mid-trial error and thus he refused to join an opinion that limited the *Fay* application without a solid base. Burger believed that *Henderson* had presented the Court with the right factual circumstances to limit *Fay* on the "trial stage" type of reasoning. Upset over the *Henderson* Court's failure to take advantage of the right factual circumstances at the right time, Burger wanted to make sure that the Court would not make a similar mistake in the future. Hence, he recommended a rule in *Wainwright* which could reasonably be inferred from the facts of *Fay* and which could easily be used in the future without concern over the factual circumstances and the trial stage involved. Staying ahead of the rest of the Court members in the habeas area, Burger used his new rule to avoid the problem of separating the cases and of falling into the procedural trap occupied by Rehnquist.

As the diverse opinions in *Wainwright* indicate, that case was the most important habeas decision rendered by the Court in the last session. The case has obvious far reaching ramifications. The Court explicitly returned to the pre-*Fay* ideals of deference to state courts and it held that the *Fay* doctrine should not be applied for review of errors at the mid-trial stage. Furthermore, the broad *Wainwright* language clearly indicated that the future use of the *Fay* standard for even post-trial procedural problems is uncertain. To understand the basic holding of *Wainwright* and its implications for the future, the case should be read in light of several important considerations.

First, the Court in *Wainwright* finally with-
drew from the Francis, Swain and Henderson tendencies to reduce Fay only implicitly. These three earlier decisions are deficient for their failure to meet the Fay issue directly. In these attempts to develop a new rule for replacing Fay, the Court should have discussed its understanding of Fay and presented a logical attack on Fay's federal intervention doctrine. The Court's constant refusal to consider Fay created confusion for both the conceptual analyses of the decisions and the predictions of the Court's habeas direction. Consequently, if it did nothing else, the Wainwright Court's direct consideration of the Fay issue helped to solve the existing confusion.

While the Wainwright Court may have solved some problems with its explicit rejection of Fay, it created other problems by replacing the deliberate bypass rule with a new cause and prejudice standard. In their Wainwright opinions, both White and Brennan had maintained that the Fay doctrine of deliberate bypass was well-established and uniformly applied throughout the country. Yet, the Court majority refused to give any indication as to what the new cause and prejudice rule actually meant. The majority simply left to the district courts the task of deciding for themselves what types of evidence constitute a determination of cause. Thus, the uniformity that the Fay doctrine had provided was dissipated. The Wainwright Court's insistence not to define its standard may still create the application problems and judicial chaos predicted by dissenting Justice Brennan.

Finally, the Wainwright majority may have repudiated Fay without legal basis and created a dangerously weak judicial precedent. Rehnquist based his opinion upon the Davis and Francis decisions. He used these cases to display a narrowing of Fay for pre-trial procedural defaults and he even discussed the statutory justification for those decisions. What he failed to understand, however, is that the statutory justification for Francis also applied to the Wainwright factual circumstances. Wainwright involved a pre-trial procedural error, and not a mid-trial error as maintained by Rehnquist. The same Federal Rule of Criminal Procedure 12 that governed the Davis decision and made applicable to habeas review for state prisoners via Francis, applied to the Wainwright situation as well. Rule 12(b)(3) required that motions to suppress evidence must be received prior to trial. If not so raised, via Rule 12(f), it would constitute a waiver from which relief can be granted only upon a showing of cause. Additionally, the Davis to Francis analogy can easily be applied to Wainwright, especially in light of the fact that the state involved there, had a rule of criminal procedure almost identical to Rule 12(b)(3). According to Rule 3.190

The Wainwright Court's insistence not to define its standard may still create the application problems and judicial chaos predicted by dissenting Justice Brennan.

Finally, the Wainwright majority may have repudiated Fay without legal basis and created a dangerously weak judicial precedent. Rehnquist based his opinion upon the Davis and Francis decisions. He used these cases to display a narrowing of Fay for pre-trial procedural defaults and he even discussed the statutory justification for those decisions. What he failed to understand, however, is that the statutory justification for Francis also applied to the Wainwright factual circumstances. Wainwright involved a pre-trial procedural error, and not a mid-trial error as maintained by Rehnquist. The same Federal Rule of Criminal Procedure 12 that governed the Davis decision and made applicable to habeas review for state prisoners via Francis, applied to the Wainwright situation as well. Rule 12(b)(3) required that motions to suppress evidence must be received prior to trial. If not so raised, via Rule 12(f), it would constitute a waiver from which relief can be granted only upon a showing of cause. Additionally, the Davis to Francis analogy can easily be applied to Wainwright, especially in light of the fact that the state involved there, had a rule of criminal procedure almost identical to Rule 12(b)(3). According to Rule 3.190

372 U.S. at 439.

77 Fed. R. Crim. P. 12(b) requires that "any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial." Subsection (2), which the Court in Davis v. United States, 411 U.S. 239 (1973), construed to include the composition of grand jury, mandates that objections based on defects in the indictment must be raised prior to trial. The Court in both Davis and Francis, used this provision in conjunction with Fed. R. Crim. P. 12(f) to hold that a failure to "timely" object would constitute waiver, but that a court "for cause shown" may grant relief from the waiver. 411 U.S. at 242.

78 Fed. R. Crim. P. 12(f) reads, in part: "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial... shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." 415 U.S. at 541. See note 17 supra.

79 In Francis, the Court maintained that: "If, as Davis held, the federal courts must give effect to these important and legitimate concerns in § 2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions." 425 U.S. at 541. See note 17 supra.
(i) of the Florida Rules of Criminal Procedure, the motion to suppress a confession "shall be made prior to trial."

Initially, Rehnquist seemed to recognize this, as he construed the rule "which in unmistakable terms and with specific exceptions requires that the motion to suppress be raised before trial." Yet, two paragraphs later, he concluded that Florida procedure required "petitioner's confession [to] be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground," preventing direct review by the court. Consequently, Rehnquist, without explanation, transferred a pretrial default into a mid-trial default, the net effect of which expanded the Francis rule unnecessarily. Misinterpreting the error involved in the case, he created a dangerously weak foundation for a case which purports to be a significant obstruction to the Fay doctrine. While Rehnquist took pride in pointing out the dangers of the "sweeping language of Fay v. Noia," and claimed that "[w]e do not choose to paint with a similarly broad brush here," he seems to have fallen prey to those same dangerous devices.

Conclusion

It is very difficult to summarize what the Court accomplished in this last Term or to predict the future of the habeas area. Clearly, the Court used the three cases reviewed here to advance its desire for state independence from federal intervention. One need only look at the reasoning utilized by Rehnquist in Wainwright and his constant reference to the dangers to state procedures created by Fay, to understand that at least this goal was accomplished. Additionally, the Court succeeded in imposing greater barriers to federal habeas review of state court decisions. The defendant failed to get his writ application accepted in each of the three principal cases, and only in the relatively minor case of Blackledge v. Allison, did the court grant habeas where cause was shown.

Regretfully however, what the Court did with these decisions was create further confusion in the habeas area. In Swain, by denying the writ on the adequate state ground theory, the Court simply did not realize that it could have accomplished the same net result by only considering the exhaustion of remedies issue presented by the lower courts. In Henderson, by refusing the writ on factual grounds, it failed to recognize the existence of the right circumstances for a proper and principled reevaluation of Fay. And in Wainwright, in its haste to eliminate Fay, the Court misinterpreted the factual issue involved and hence developed a rule with dubious precedential value. Although the Court dismissed the Fay doctrine in Wainwright with its claims of countless Fay weaknesses, it created further problems by not formally overturning the Fay decision. In the midst of all this confusion, only Burger seemed to have an idea as to the correct basis for overruling Fay. Burger consciously tried to get the rest of the Court headed in the right direction, but in each instance, the rest of the Court declined to follow his lead.

Consequently, at the end of the Term, the Court was caught in an interesting dilemma. Wainwright rejected the use of the Fay doctrine for mid-trial procedural defaults and undoubtedly the Court intends to overrule Fay entirely in the future. Yet, it still seemed unclear as to how the Court could effectively carry out this plan. Wainwright gave an indication as to the methodology, but the faulty basis upon which it rests may prove to be a hindrance. Moreover, Burger appeared to have promoted the most logical approach for eliminating Fay with his suggestion in the Wainwright concurrence, but his views have been ignored by the rest of the court. Thus, while the Court could have created a solid precedent with proper consideration of Henderson, the reader now will have to wait until the next session for the Court to develop more completely its direction in the habeas corpus area.

80 See note 51 supra.
81 97 S. Ct. at 2506.
82 Id.
83 Id. at 2507.
84 Id. at 2507 n.12.
85 See note 71 supra.