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HABEAS CORPUS

Swain v. Pressley, 97 S. Ct. 1224 (1977).
Henderson v. Kibbe, 97 S. Ct. 1730 (1977).
Wainwright v. Sykes, 97 S. Ct. 2497 (1977).

In its 1963 decision *Fay v. Noia*,[1] 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.[2] 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 has displayed a willingness to restore state court independence by narrowing the scope of *Fay*, and the Court has indicated that adherence to the *Fay* standard is no longer required. In two of the principal habeas corpus cases decided last Term, *Swain v. Pressley*[3] and *Henderson v. Kibbe*,[4] the Court implicitly rejected *Fay* by refusing habeas claims. In *Swain*, the Court maintained that an adequate local remedy could act as a bar to habeas review, and in *Henderson*, it ignored the *Fay* problem by simply basing its decision on the case facts. In a third case, *Wainwright v. Sykes*,[5] the Court explicitly denounced the *Fay* rule and relied upon a different habeas theory to deny a defendant's appeal.[6] The Court refused to apply the *Fay* deliberate bypass rule and instead developed a "cause and prejudice" standard for future habeas considerations. Despite the fact that these cases clearly indicate the present Court's preference to defer to state procedure, analysis reveals that this movement was not accomplished without some difficulty. The cases display 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.[7] Previously, the Court, in *Brown v. Allen*,[8] 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.[9]

[1] 372 U.S. 391 (1963).
[2] *Id.* at 438.
[3] 97 S. Ct. 1224 (1977).
[4] 97 S. Ct. 1730 (1977).
[5] 97 S. Ct. 2497 (1977).
[6] The Court did decide a fourth habeas case last Term in which the defendant's habeas appeal was accepted. In Blackledge v. Alison, 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 Constitution protects the writ of habeas corpus from arbitrary suspension; and, via the Judiciary Act of 1867, Congress expanded the applicability of the privilege by making the writ available to state prisoners. However, in an effort to assure the states that federal intervention with the state administration of criminal justice would not run rampant, the Supreme Court originally held that only issues regarding trial court jurisdiction 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. Dempsey, 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 certiorari 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[10] 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."[11]

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.*[12] For instance, in *Davis v. United States,*[13] 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[14] 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.[15] Furthermore, in *Francis v. Henderson,*[16] 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.[17]

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.[18] 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.[19]

[10] 28 U.S.C. §§ 2241–55 (1970).

[11] 372 U.S. at 438.

[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.

[13] 411 U.S. 233 (1973).

[14] The Court specifically referred to FED. R. CRIM. P. 12(b)(2).

[15] 411 U.S. at 242.

[16] 425 U.S. 536 (1976).

[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*,[20] the Court considered the constitutionality of a federal law[21] 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.[22] The district court dismissed the writ application, claiming to have no jurisdiction over the matter by virtue of federal law.[23] 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[24] 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.[25] 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.[26] 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.[27] 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-

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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.

[20] 97 S. Ct. 1224 (1977).

[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.

[24] Pressley v. Swain, 515 F.2d 1290 (D.C. Cir. 1975).

[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.

guage 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.[28] 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.[29]

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* 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

[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).

[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."

[37] People v. Kibbe, 35 N.Y.2d 407 (1974).

[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[39] and applied the *Fay* doctrine to this defendant's mid-trial procedural default.[40] 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.[41] 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."[42]

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.[43] 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."[44] 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,[45] 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

[39] Kibbe v. Henderson, 534 F.2d 493 (2d Cir. 1976).

[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,*[46] 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.[47] 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*[48] 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[49] 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.[50] Then, the court considered the effect that Florida's contemporaneous objection rule would have on the *Jackson* guarantee of rights.[51] 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.[52] The court simply

[46] 97 S. Ct. 2497 (1977).

[47] Miranda v. Arizona, 384 U.S. 436 (1966), requires that nothing said by the individual in custody be used against him at trial unless his right to remain silent has been knowingly and intelligently waived. In *Wainwright,* the defendant eventually alleged that his confession was inadmissible because he had been intoxicated at the time of his revelation to the police, and thus could not be said to have knowingly and intelligently waived his *Miranda* rights. 97 S. Ct. at 2500.

[48] 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.).

[49] Wainwright v. Sykes, 528 F.2d 522 (5th Cir. 1976).

[50] 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.

[51] 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.

[52] 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[53] introduced the habeas corpus provision of the federal code[54] and asked when an adequate state ground could, under the code, bar consideration on habeas of an otherwise cognizable federal issue.[55] 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."[56]

Next, Rehnquist gave a brief history of habeas review prior to and including *Fay*,[57] and discussed the limitation of *Fay* created by the cause and prejudice rule of *Francis v. Henderson*.[58] He applied *Francis* to the *Wainwright* circumstances to limit *Fay* even further. Treating the defendant's failure to object as a mid-trial error,[59] Rehnquist extended application of the cause and prejudice rule beyond the pre-trial stage. Rehnquist did not explain how or why *Francis*, and not *Fay*, should control the *Wainwright* factual circumstances. Apparently he implicitly accepted the interpretation of *Fay* given by Burger in his *Henderson* concurrence.

To solidify the notion that the *Fay* rule had definitely been held inapplicable for mid-trial procedural defaults and that it may have been dismissed for *all* purposes, Rehnquist continued with a stinging attack of the entire *Fay* decision. First, he noted that it was the "sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject."[60] Then, he pointed to the fact that a basis for the rejection of *Fay* was that it afforded too little respect for state court decisions. Rehnquist believed that *Fay* encouraged federal courts to refuse to honor state contemporaneous objection rules and that it eventually caused the state courts themselves to be less stringent in their rule enforcements. Finally, he claimed that the *Fay* doctrine led to sandbagging on the part of defense lawyers;[61] that is, it created a process by which the attorneys would use the state courts merely to try out their cases, with the knowledge that they could still get federal habeas review. To support his rejection of *Fay*, Rehnquist thought it necessary to speak in terms of "comity and federalism" and continue the Burger court protection of state proceedings from federal intervention.

As might have been expected, the very unequivocal language used by Rehnquist in *Wainwright*, elicited a number of diverse responses from the other members of the Court. For instance, Mr. Justice Stevens, in a concurring opinion, believed that the majority's decision should have been of no surprise, since he felt that the decision was consistent with the way in which *Fay* had been applied by the other federal courts. However, Stevens really used his concurrence to indicate that he still was not convinced that it was the Court's duty to discuss these habeas problems in procedural terms. It will be recalled that in both *Swain* and *Hender-*

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.

[53] 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.

[54] 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 16 *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 tendancy 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.[62] 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,*[63] 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."[64] By utilizing *Harrington* to prove that Rehnquist had arbitarily disposed of *Fay,* White was able to conclude that *Fay* still provided a good standard for habeas availability.[65]

Mr. Justice Brennan, in his *Wainwright* dissent, expressed yet another disagreement with the Rehnquist position.[66] 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.[67] 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.[68]

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.[69] Finally, Brennan argued that the entire system of habeas review was left unorganized as a

[62] *Id.* at 2511 (Stevens, J., concurring).

[63] 395 U.S. 250 (1969).

[64] 97 S. Ct. at 2512 (White, J., concurring).

[65] As White maintained "[t]he deliberate bypass rule of *Fay v. Noia* still affords adequate protection to the state's interest in insisting that defendants not flout the rules of evidence." *Id.* at 2512.

[66] Brennan was the author of *Fay* and particularly disliked the Rehnquist limitation of *Fay* and of federal 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." *Id.* at 547 (Brennan, J., dissenting).

[67] 97 S. Ct. at 2520 (Brennan, J., dissenting).

[68] *Id.* at 2515 n.5.

[69] *Id.* at 2520.

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.[70] Leaving the terms undefined, according to Brennan, could only result in judicial chaos when lower courts attempted to apply the rule.[71]

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.[72] 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"[73] 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-

[70] Rehnquist had stated in his majority opinion that he was leaving open "for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard." 97 S. Ct. at 2507.

[71] The Court in the same session provided a possible answer to this Brennan concern. In Blackledge v. Allison, 97 S. Ct. 1621 (1977), a habeas case decided just prior to *Wainwright,* the Court granted habeas relief from a state conviction. *Blackledge* could possibly be construed as a Court attempt to give meaning to the cause and prejudice standard. There, the Court accepted review of a defendant's habeas claim that his guilty plea had been induced by an unfulfilled promise of a lenient 10 year sentence, even though the defendant had not alleged such inducement at trial, as required by state law. The Court noted that the defendant had a witness who could attest to a defendant-counsel conversation where counsel urged acceptance of the plea. The Court also believed the defendant's assertion that he did not acknowledge his counsel's influence to the trial judge because his counsel had instructed him to deny the existence of any promise so that the Court would accept the plea. Apparently, the defendant had shown the Court sufficient "cause" for his actions, and hence this case might demonstrate the type of evidence that a defendant must present to indicate "cause" under the *Wainwright* standard.

[72] 97 S. Ct. at 2509 (Burger, C.J., concurring).

[73] That is, a reasoning based on the differentiation between the pre-trial, mid-trial and post-trial stages. *Id.*

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.[74] *Blackledge v. Allison*[75] may indicate the type of cause consideration required by the *Wainwright* Court. However, it must be noted that *Blackledge* was decided before *Wainwright* and that the *Wainwright* majority explicitly stated that it would not give meaning to its cause and prejudice standard.[76] Thus, 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.[77] 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),[78] it would constitute a waiver from which relief can be granted only upon a showing of cause. Additionally, the *Davis* to *Francis* analogy[79] 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

[74] The *Fay* Court had carefully defined what it meant by a deliberate bypass of state proceedings:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's defaults.

372 U.S. at 439.

[75] 97 S. Ct. 1621 (1977). See note 71 *supra.*

[76] 97 S. Ct. at 2507. See note 70 *supra.*

[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."

[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)[80] 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."[81] 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,"[82] 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*,"[83] and claimed that "[w]e do not choose to paint with a similarly broad brush here,"[84] 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*,[85] 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 re-evaluation 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 overruling 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*.