

Summer 1989

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### Recommended Citation

Diane Wells, Federal Habeas Corpus and the Death Penalty: A Need for a Return to the Principles of Furman, 80 J. Crim. L. & Criminology 427 (1989-1990)

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# FEDERAL HABEAS CORPUS AND THE DEATH PENALTY: A NEED FOR A RETURN TO THE PRINCIPLES OF FURMAN

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## I. INTRODUCTION

No one who has traced the Supreme Court's latest developments in the area of federal habeas corpus review can debate the fact that prisoners have more difficulty having federal courts review claims on the merits today than two decades ago. Nor could anyone debate that this new restrictive course for habeas review will suddenly discontinue. What is open for debate, however, is the legitimacy of placing the Court's newest target—the capital defendant—at the receiving end of this continuing course.

While the Supreme Court imposed the most severe restrictions to habeas review,<sup>1</sup> access to review for prisoners sentenced to death remained virtually intact. This is highly attributable to the Supreme Court's own rulings in the death penalty area. The Court's numerous holdings, beginning with *Furman v. Georgia*<sup>2</sup> and *Gregg v. Georgia*,<sup>3</sup> evolutionized the concept of heightening the procedural safeguards due the capital defendant because of the nature of the punishment involved. This concept, that "death is different," had for the most part remained sacrosanct until the Burger Court became concerned with the substantial increase in death sentence petitions entering the federal habeas process.<sup>4</sup> Two of the most severe blows to the death penalty habeas corpus jurisprudence, as it previ-

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<sup>1</sup> See Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307, n.6 (1983).

<sup>2</sup> 408 U.S. 238 (1972).

<sup>3</sup> 428 U.S. 153 (1976).

<sup>4</sup> *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983).

ously existed, were *Barefoot v. Estelle*<sup>5</sup> and *Smith v. Murray*.<sup>6</sup> As a result of the procedural obstacles created in these cases, as well as other actions taken by the Court to inhibit attainment of the writ for capital defendants, the *Furman* precept has in practice, if not in theory, begun to shrink to a mere formality.

## II. SUPREME COURT LIMITATIONS ON HABEAS CORPUS REVIEW

### A. *WAINWRIGHT V. SYKES* AND *MURRAY V. CARRIER*

The Court has indicated a general hostility toward allowance of federal habeas review for both state and federal prisoners by imposing procedural limitations on such review. One of these procedural limitations, the cause and prejudice rule, was established in *Wainwright v. Sykes*.<sup>7</sup> Sykes claimed in his habeas petition that certain statements he made to police were inadmissible.<sup>8</sup> He failed, however, to contemporaneously object to these admissions at trial, a requirement of the state rules of criminal procedure.<sup>9</sup> The Court of Appeals held that the trial judge's failure to consider the voluntariness of Sykes' statements did not automatically bar review, even if the petitioner failed to comply with state procedural rules.<sup>10</sup> In reaching this conclusion, the Fifth Circuit stressed the fact that there was a "total absence of any indication that his failure to object was attributable to trial tactics."<sup>11</sup> The Supreme Court nevertheless reversed, holding that if a state prisoner failed to properly raise a claim in state court then the claim is barred from federal review unless the petitioner can show both cause for failing to adhere to the state procedural rule and prejudice resulting from this violation.<sup>12</sup> The Court's application of a cause and prejudice rule to cases involving a contemporaneous objection rule was not premised on any requirement of the habeas statute itself, but rather on several policy considerations favoring imposition of restrictions on federal habeas review.

The Court first recognized that a contemporaneous objection rule "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest" and "may lead to the exclusion of the evidence objected to, thereby

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<sup>5</sup> *Id.*

<sup>6</sup> 477 U.S. 527 (1986).

<sup>7</sup> 433 U.S. 72 (1977).

<sup>8</sup> *Id.* at 75.

<sup>9</sup> *Id.*

<sup>10</sup> *Wainwright v. Sykes*, 528 F.2d 522, 527 (5th Cir. 1976), *rev'd*, 433 U.S. 72 (1977).

<sup>11</sup> *Id.* at 528.

<sup>12</sup> 433 U.S. at 87-90.

making a major contribution to finality in criminal litigation.”<sup>13</sup> The Court based its decision on concerns for federalism, comity, the prevention of “sandbagging,”<sup>14</sup> and finally the preservation of the trial as the “main event” in the criminal justice process.<sup>15</sup>

As a result of the narrow holding in *Sykes* and the Court’s decision to leave the “precise definition of the ‘cause-and-prejudice’ standard” to future decisions,<sup>16</sup> many lower federal courts exercised broad discretion in determining whether petitioners satisfied this test. “Typically, the courts balanced the defendant’s interest in securing relief, the state’s interest in finality and efficiency, and the needs of the adversarial process.”<sup>17</sup> In so doing, many of these lower courts distinguished between procedural defaults resulting from strategic decisions and those resulting from ignorance or inadvertence to conclude that *Sykes* does not preclude the possibility that inadvertent attorney conduct establishes cause.<sup>18</sup> However, the broad discretion that allowed federal courts to make such conclusions has been severely eroded due to subsequent cases extending and further defining the cause and prejudice test.

In *Murray v. Carrier*,<sup>19</sup> for example, the Court rejected the very notion expressed above. In *Carrier*, although counsel initially moved for discovery of the victim’s statements at trial, he failed to include this claim on appeal.<sup>20</sup> The Fourth Circuit held that “under certain circumstances error which is insufficient to make out a violation of the sixth amendment may nevertheless constitute cause under the [*Sykes*] exception to procedural bar.”<sup>21</sup> The Supreme Court reversed, holding that a “federal habeas petitioner cannot show cause for a procedural default by establishing that competent defense counsel’s failure to raise a substantive claim of error was inadvertent rather than tactical.”<sup>22</sup> The Court further ruled that ignorance or inadvertence does not constitute cause for a procedural default just because the claim was forfeited on appeal rather than at trial, as the State’s interests are not “significantly diminished” whether or not

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<sup>13</sup> *Id.* at 88.

<sup>14</sup> Counsel deliberately forgoes litigating constitutional claims at trial with the intent of safeguarding them for use in subsequent post-conviction challenges.

<sup>15</sup> *Id.* at 88-90.

<sup>16</sup> *Id.* at 87.

<sup>17</sup> Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177, 1184 (1985).

<sup>18</sup> Goodman & Sallet, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 HARVARD L.J. 1683, 1719 (1979).

<sup>19</sup> 477 U.S. 478 (1986).

<sup>20</sup> *Id.*

<sup>21</sup> *Carrier v. Hutto*, 724 F.2d 396, 398 (4th Cir. 1983).

<sup>22</sup> 477 U.S. at 478.

counsel's breach stems from ignorance or inadvertence as opposed to a deliberate decision.<sup>23</sup> However, the Court does attempt to relax this rigid rule by conceding that although "victims of a fundamental miscarriage of justice will meet the cause and prejudice standard,"<sup>24</sup> an extraordinary case may arise where a "constitutional violation has probably resulted in the conviction of one who is actually innocent, and in this case a federal habeas Court may grant the writ even in the absence of a showing of cause for the procedural default."<sup>25</sup> Thus, this exception permits an inquiry by lower federal courts into the innocent-relatedness of the petitioner's claim to act as a condition precedent to exercising the power of habeas review, at least in the procedural default area.

B. *SANDERS V. UNITED STATES AND KUHLMANN V. WILSON*

Although application of the doctrine of *res judicata* has been rejected with regard to habeas corpus proceedings because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,"<sup>26</sup> the Supreme Court has nevertheless deemed it necessary to create an alternative method of achieving some degree of finality in cases involving successive federal habeas applications by the same prisoner.<sup>27</sup> In *Sanders v. United States*,<sup>28</sup> the Court set the standard for "successive" or an "abuse of the writ" petitions. A federal court may refuse to consider a successive petition on the merits after first determining that: the same ground had been presented in a prior application; the prior determination adverse to the applicant was on the merits; and the "ends of justice" would not be served by reaching the merits of the new application.<sup>29</sup>

The opinion was purposely vague with regard to what would render redetermination of a claim for relief necessary under the "ends of justice" inquiry.<sup>30</sup> The Court indicated, however, that if the earlier habeas proceeding was not "full and fair" within the criteria established in *Townsend v. Sain*,<sup>31</sup> then an evidentiary hearing

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<sup>23</sup> *Id.* at 488-92.

<sup>24</sup> *Id.* at 495-96.

<sup>25</sup> *Id.* at 496.

<sup>26</sup> *Sanders v. United States*, 373 U.S. 1, 8 (1963).

<sup>27</sup> *Id.* at 24-26 (Harlan, J., dissenting).

<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.* at 15.

<sup>30</sup> Williamson, *Federal Habeas Corpus: Limitations on Successive Applications from the Same Prisoner*, 15 WM. & MARY L. REV. 265, 269 (1973).

<sup>31</sup> 372 U.S. 293 (1963).

should be granted.<sup>32</sup> Moreover, in a case in which the court discovers new facts or develops new law, subsequent review is warranted because the initial petition preceded the discovery or development.<sup>33</sup> The Court further stressed that the applicant has the burden of showing that the ends of justice would be served by reaching the merits of the new application.

The Court distinguished successive petitions involving claims not raised in an earlier habeas application.<sup>34</sup> The Court enunciated that an "abuse of the writ" may be found if a court concludes that the claim was deliberately withheld or abandoned, or the petitioner exhibited inexcusable neglect in failing to assert the claim earlier.<sup>35</sup> In other words, the petitioner can waive his right to assert the claim. As to what constitutes such a waiver, however, the Court merely stated that the principles established in *Fay v. Noia*<sup>36</sup> and *Townsend v. Sain*<sup>37</sup> should govern the decision.

The Court's current approach to successive petitions proves consistent with its curtailment of availability of habeas review for state prisoners in general. The Court's new policy calls for using brief per curiam opinions and summary dispositions to quickly dispose of most habeas petitions. It appears that the Court has adopted a presumption against considering the merits of claims raised in these successive petitions.<sup>38</sup>

In addition, the Court revisited the *Sanders* ends of justice test, established 23 years earlier, in the case of *Kuhlmann v. Wilson*.<sup>39</sup> *Kuhlmann* involved a sixth amendment claim of denial of right to counsel based on the Court's denial of a motion to suppress statements made to a jailhouse informant.<sup>40</sup> The prisoner, in a successive petition for a writ, claimed that the change in the law established by the Court's decision in *United States v. Henry*<sup>41</sup> warranted reconsideration of the sixth amendment claim. In order to provide federal courts with specific guidelines to use in resolving the "ends of justice" issue, four members of the Court concluded that "the 'ends of justice' require federal courts to entertain such peti-

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<sup>32</sup> 373 U.S. at 16-17.

<sup>33</sup> *Id.* at 17.

<sup>34</sup> *Id.* at 18.

<sup>35</sup> *Id.*

<sup>36</sup> 372 U.S. 391 (1963).

<sup>37</sup> 372 U.S. 293 (1963).

<sup>38</sup> Morris, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 373 (1985); see also *Daniels v. Blackburn*, 763 F.2d 705 (5th Cir. 1985).

<sup>39</sup> 477 U.S. 436 (1986).

<sup>40</sup> *Id.* at 439-41.

<sup>41</sup> 477 U.S. 264 (1980).

tions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."<sup>42</sup> Justice Stevens, in his dissenting opinion, did note that in determining "whether the 'ends of justice' would be served . . . one of the facts that may properly be considered is whether the petitioner advanced a 'colorable claim of innocence,'"<sup>43</sup> but he refused to join the plurality in requiring it.<sup>44</sup> The plurality justified its conclusion by weighing the competing interests of the prisoner with those of the state.<sup>45</sup> This attempt to link the ends of justice test to actual innocence clearly rejected the approach taken in *Sanders*, which left the decision to hear successive petitions to the "sound discretion of the federal trial judges."<sup>46</sup> However, since less than a majority of the Court took the position that the approach in *Sanders* had been modified, the impact of the *Kuhlmann* decision remains dubious.

C. *ROSE V. LUNDY* AND *GRANBERRY V. GREER*

The Court's decision in *Rose v. Lundy*<sup>47</sup> is a further indication of its desire to restrain liberal allowance of federal habeas review for both state and federal prisoners. In *Lundy*, the Court adopted a per se rule, termed by Justice Blackmun as the "total exhaustion rule,"<sup>48</sup> requiring federal district courts to dismiss all habeas petitions if state remedies have not been exhausted.<sup>49</sup> While the Court's decision is consistent with the previous understanding of the exhaustion doctrine, as codified in section 2254, in that it does not completely foreclose the power of federal courts to review the merits of federal claims in state courts, the Court's adoption of the total exhaustion rule, which establishes the proper timing of such review, goes beyond what is mandated by the code.<sup>50</sup> In so doing, the Court has nevertheless succeeded in transforming the exhaustion doctrine into "something approaching a jurisdictional barrier to federal review."<sup>51</sup>

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<sup>42</sup> 477 U.S. at 454.

<sup>43</sup> *Id.* at 476 (Stevens, J., dissenting).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 452.

<sup>46</sup> *Sanders v. United States*, 373 U.S. 1, 18 (1963).

<sup>47</sup> 455 U.S. 509 (1982).

<sup>48</sup> *Id.* at 522 (Blackmun, J., concurring).

<sup>49</sup> *Id.* (Blackmun, J., concurring).

<sup>50</sup> See Comment, *Lundy, Isaac and Frady: A Trilogy of Habeas Corpus Restraint*, 32 CATH U.L. REV. 169, n.120 (1982) [hereinafter *Habeas Corpus Restraint*]; see also 455 U.S. at 523 (Blackmun, J., concurring) (Justice Blackmun noted that "neither the language nor the legislative history of [these provisions] mandates dismissal" of mixed habeas petitions).

<sup>51</sup> Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 394 (1983).

Justice O'Connor appeared to acknowledge the fact that section 2254 does not militate a total exhaustion requirement, yet she worked around this recognition by claiming that Congress never specifically addressed the problem of mixed petitions.<sup>52</sup> Justice O'Connor further noted that no prior Supreme Court case dealt with the situation of a habeas petition containing both exhausted and unexhausted claims; therefore, the issue remained unresolved. Consequently, she considered the underlying policy considerations of the exhaustion doctrine, as established by precedent, and relied on these considerations, to "determine its proper scope."<sup>53</sup>

Justice O'Connor suggested that the plurality's opinion rests primarily on the recurring principle that the state courts should have the first opportunity to correct a constitutional violation alleged by state prisoners.<sup>54</sup> She claimed that states will not only benefit from "a rigorously enforced total exhaustion rule" because such a rule guarantees that petitioners will seek initial relief of their claims in state courts, but it will also increase the state courts' familiarity with federal constitutional issues.<sup>55</sup> The plurality further contended that full exhaustion of federal claims in state courts provides more efficient federal review because the courts will have the benefit of reviewing these claims with a complete factual record provided by the state.<sup>56</sup> Next, the plurality stated that the exhaustion requirement "reduces piecemeal litigation," therefore benefitting prisoners as well as the courts due to the increased likelihood that review of all the prisoners' claims will occur in a single proceeding, "thus providing for a more thorough and focused review."<sup>57</sup>

Finally, the plurality acknowledged the prisoner's interest in obtaining speedy review of his claims, and consequently stated that the total exhaustion rule will not necessarily impair this interest because the prisoner "can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims."<sup>58</sup> However, this assertion assumed new meaning when viewed in accordance with the plurality's further suggestion that while the petitioner does have the choice of deleting his unexhausted claims from the petition and later resubmitting these claims following state exhaustion, the federal courts may refuse to

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<sup>52</sup> 455 U.S. at 516.

<sup>53</sup> *Id.* at 517.

<sup>54</sup> *Id.* at 518.

<sup>55</sup> *Id.* at 518-19.

<sup>56</sup> *Id.* at 519.

<sup>57</sup> *Id.* at 520.

<sup>58</sup> *Id.*



treat them.<sup>59</sup> The Plurality based this conclusion on the principle governing the abuse of the writ doctrine set forth in *Sanders*.<sup>60</sup> In essence, the Plurality said that a prisoner who decided to proceed only with his exhausted claims was deliberately setting aside his unexhausted claims; therefore, the claims constituted an abuse of the writ and should be dismissed.

However, as Justice Brennan stated, the "plurality's conclusion simply distorts the meaning of the quote of [*Sanders*'] language."<sup>61</sup> Since the *Sanders* decision specifically established that dismissal for "abuse of the writ" is only appropriate when a prisoner "knowingly" and "deliberately" chooses not to assert a claim, or when the court is faced with "needless piecemeal litigation" or with collateral proceedings "whose only purpose is to vex, harass or delay" in order to get more than "one bite of the apple,"<sup>62</sup> it becomes clear that the term "deliberately" as used in *Sanders* cannot include abandoning unexhausted claims by a petitioner who is not permitted to proceed with them.<sup>63</sup> "Since the prisoner has no choice in the matter, it would be unrealistic and patently unfair to impose a penalty for a supposed abuse." <sup>64</sup> In essence, then, dismissing subsequent petitions on "abuse of the writ" grounds without further inquiry into "factual circumstances truly suggesting abuse" blatantly disregards the principles espoused in *Sanders*, and therefore diminishes this concept of abuse.<sup>65</sup>

In the more recent case of *Granberry v. Greer*,<sup>66</sup> the Court, to a certain degree, relaxed the rigidity for the *Lundy* total exhaustion rule. In *Granberry*, the Court held that when a state fails to raise an "arguably meritorious non-exhaustion defense," federal habeas review of petitioners claims will not be automatically barred. Rather, the Court "should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings" before permitting such review.<sup>67</sup> The Court further suggested certain instances in which it would prove beneficial for the federal court to address the merits initially.<sup>68</sup> For example, if the

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<sup>59</sup> *Id.* at 521.

<sup>60</sup> See *supra* note 28 and accompanying text.

<sup>61</sup> 455 U.S. at 535 (Brennan, J., concurring in part and dissenting in part).

<sup>62</sup> *Id.* at 535-36 (Brennan, J., concurring in part and dissenting in part).

<sup>63</sup> *Id.* (Brennan, J., concurring in part and dissenting in part).

<sup>64</sup> See Yackle, *supra* note 51, at 434.

<sup>65</sup> See *Habeas Corpus Restraint*, *supra* note 50, at 434.

<sup>66</sup> 481 U.S. 129 (1987).

<sup>67</sup> *Id.* at 134.

<sup>68</sup> *Id.* at 134-5.

petitioner fails to raise a "colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts and the federal courts," will all best be served, notwithstanding the state's failure to raise the exhaustion defense, if the district court outright denies the habeas petition.<sup>69</sup> This conclusion may be applicable as well to a case in which a miscarriage of justice has occurred after trial in district court because it would avoid prolonging the prisoner's confinement where relief is plainly warranted.<sup>70</sup> In contrast, however, the Court intimated that where an unresolved question of fact or state law having an important bearing is presented, it would be more appropriate in the interests of comity and judicial efficiency for the Court "to insist on complete exhaustion to make sure that it may ultimately review the issue on a fully informed basis."<sup>71</sup>

### III. RE-EVALUATING THE LEGITIMACY OF PROCEDURAL LIMITATIONS

#### A. *WAINWRIGHT V. SYKES* AND *MURRAY V. CARRIER*

The Court's formulation of the cause and prejudice test as set out in *Sykes* may create a situation in which juries might determine that a conviction violates due process, thereby rendering the conviction clearly unconstitutional. Yet because the prisoner cannot establish cause, the prisoner cannot obtain federal relief from this unconstitutional conviction.<sup>72</sup> If the procedural default by *Sykes*' attorney involved a claim of a confession forced out of *Sykes* by physical abuse, notwithstanding the existence of sufficient evidence to establish guilt, the Court arguably would not have imposed the forfeiture so readily.<sup>73</sup>

However, it is precisely in these cases, where a constitutional violation is particularly egregious, that the likelihood of a procedural default occurring even by a relatively ineffective attorney is minimal.<sup>74</sup> In contrast, where the constitutional right is not so egregious or well-established, the likelihood of a procedural default is

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<sup>69</sup> *Id.* at 135.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See Guttenburg, *Federal Habeas Corpus, Constitutional Rights and Procedural Forfeitures: The Delicate Balance* 12 HOFSTRA L. REV. 617, 677 (1984).

<sup>73</sup> See Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341, 441 (1978); see also *Payne v. Arkansas*, 356 U.S. 560 (1958); *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) (the Court stated that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error").

<sup>74</sup> *Id.*

greatly increased.<sup>75</sup> These assertions, then, reveal a disturbing aspect of the decision in *Sykes*: only the most blatant constitutional violations will be preserved for litigation in a federal habeas court.<sup>76</sup> In essence, *Sykes* not only dilutes federal remedies but federal constitutional rights as well.<sup>77</sup> The above analysis becomes more significant because it is highly improbable that such gross violations of the sort that occurred during the 1930s, 1940s, and 1950s are likely to occur today; rather, in today's more advanced society, the constitutional rights that must be confronted prove more subtle and complex.<sup>78</sup> This does not mean, however, that they are any less reprehensible. Furthermore, it is plausible to suggest that although the due process rights of criminal defendants will not expand to the comparable degree they did in previous decades, neither will they cease. The Court nevertheless advances various policy considerations in *Sykes* to justify the possible risk of diluting constitutional rights of prisoners by limiting federal review.

While many of the Court's policy considerations do have merit, some aspects of these policies prove problematic. The Court, in its desire to end litigation at some reasonably identifiable time, has used procedural forfeitures as a means to achieve this goal of finality in criminal judgments. The Court fails to explain why this goal should prevail over review of constitutional questions that affect a citizen's liberty and possibly his life.<sup>79</sup> Professor Bator, an advocate of greater finality in the criminal process, has admitted that, by accepting finality, one acknowledges that certain errors may go uncorrected.<sup>80</sup> Yet he also asserts that collateral review will not necessarily attain an error-free process.<sup>81</sup> Although this assertion may prove valid when state courts have previously considered the constitutional claims, the validity of this assertion is seriously undermined when those constitutional issues have never been presented or litigated in any court due to forfeiture.<sup>82</sup>

While the concept of finality is desirable, using procedural defaults to attain this goal permits the state to rely on its default rules

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<sup>75</sup> *Id.*

<sup>76</sup> *But see infra* note 376 and accompanying text. After *Smith v. Murray*, even blatant constitutional violations may not be vindicated if they are not related to the guilt-innocence determination.

<sup>77</sup> See Rosenberg, *supra* note 73, at 444-45.

<sup>78</sup> *Id.* at 439.

<sup>79</sup> See Guttenberg, *supra* note 72, at 681.

<sup>80</sup> *Id.* at 681-82.

<sup>81</sup> *Id.* at 682.

<sup>82</sup> *Id.*

to deny review of all improperly raised constitutional claims.<sup>83</sup> This enables the state to benefit from the commingling of its own constitutional wrongdoing and the defense counsel's failure to raise these issues,<sup>84</sup> which becomes highly problematic in view of the fact that the state sets the procedural forfeiture rules, decides when to excuse or enforce those rules, and licenses and appoints the defense bar.<sup>85</sup>

Furthermore, as Justice Brennan noted, finality issues bear no relevance to the question of whether a federal court should refuse to exercise its power of review based on a procedural default.<sup>86</sup> The state's finality interests are no more lessened by making habeas review available after the state court has reviewed a claim on the merits than after the state court has denied the claim on grounds of procedural default.<sup>87</sup> In any event, the state court has already deemed the litigation at an end. Justice Brennan concluded that because no one questions the availability of habeas relief when a state court denies the claim on the merits, the same should be true where the claim is denied due to procedural default, "unless the State's interest in enforcing its default rules requires a different result."<sup>88</sup> This suggestion applies as well to the Court's observation that allowing federal courts to review a petitioner's claim, notwithstanding the failure to comply with a state procedural rule, "detract[s] from the importance of the trial as the main event"<sup>89</sup> because this "cost" is present regardless of whether the state denies a claim on the merits or on procedural default grounds.<sup>90</sup> In fact, it would seem these "costs" exist to a greater extent when a "federal court reviews a constitutional claim that the state court has considered and rejected."<sup>91</sup> The trial will remain the "main event" regardless of liberal allowance of federal habeas review, if for no other reason than acquittal being the primary concern of the defendant in every criminal case.<sup>92</sup> In addition, whenever a federal court examines a state judgment, particularly in a case in which it excuses a failure to comply with a state procedural rule, the concerns of federalism and comity come into play; therefore, evaluation of these interests be-

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<sup>83</sup> *Id.* at 683.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Murray v. Carrier*, 477 U.S. 478, 520-21 n.2 (1986) (Brennan, J., dissenting).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

<sup>90</sup> *Carrier*, 477 U.S. at 521 n.2.

<sup>91</sup> *Id.*

<sup>92</sup> See Guttenberg, *supra* note 72, at 693.

comes necessary.<sup>93</sup>

Since the Supreme Court has recognized the value of state procedural rules,<sup>94</sup> the Court has strictly enforced them to avoid undermining their legitimacy. However, as Justice Brennan has noted, the legitimacy of such rules must be weighed against the "interests implicated by a prisoner's petition to a federal court to review the merits of a procedurally defaulted constitutional claim."<sup>95</sup> By enacting section 2254, Congress positioned the federal courts between the states and the people to protect people from unconstitutional action. These "interests" of the federal courts—to safeguard constitutional rights—are intensified when the state court has refused to review claims challenging constitutional violations, "for without habeas review no court will ever consider whether the petitioner's constitutional rights were violated."<sup>96</sup>

Even if the state's interests as discussed above are legitimate to justify the strict enforcement of state procedural rules, these interests are greatly diminished when considering a more substantial injustice which emanates from *Sykes*.<sup>97</sup> The Court in *Sykes* not only allowed for the possibility of a constitutional violation to go uncorrected but did so by binding the defendant to defense counsel's decision to by-pass a state procedure.<sup>98</sup> The Court's later decision in *Carrier*, underscores this injustice.<sup>99</sup> As Justice Brennan noted, it is one thing to bind the petitioner to his lawyer's tactical decisions, but it is quite another to bind him to his lawyer's inadvertent mistakes.<sup>100</sup>

The Court justified these decisions with its "sandbagging" concern. The sandbagging concept, however, rests on the assumption that counsel has considered the strategic and tactical advantage of not raising the "constitutional claim in a proper and timely manner at trial, the chances of eventually deceiving the federal court, and finally the possibilities of obtaining relief on the merits of the collateral proceeding."<sup>101</sup> This concept becomes clearly inapplicable to attorneys who commit defaults due to their negligence or ignorance. As Justice Brennan noted in his dissent in *Carrier*:

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<sup>93</sup> *Id.* at 685.

<sup>94</sup> See, e.g., *Henry v. Mississippi*, 379 U.S. 443 (1965); *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 88-89 (1977).

<sup>95</sup> *Carrier*, 477 U.S. at 519 (Brennan, J., dissenting).

<sup>96</sup> *Id.* at 520 (Brennan, J., dissenting).

<sup>97</sup> 433 U.S. at 72.

<sup>98</sup> *Id.*

<sup>99</sup> *Carrier*, 477 U.S. at 478.

<sup>100</sup> 477 U.S. at 524 (Brennan, J., dissenting).

<sup>101</sup> See Guttenberg, *supra* note 72, at 695.

Where counsel is unaware of a claim or of the duty to raise it at a particular time, the procedural default rule cannot operate as a specific deterrent to noncompliance with the State's procedural rules. Consequently, the State's interest in ensuring that the federal court help prevent circumvention of the State's procedural rules by imposing the same forfeiture sanction is much less compelling.<sup>102</sup>

Moreover, this view of defense strategy proves unrealistic. As Justice Brennan noted, good defense tactics would militate raising constitutional objections in accordance with state law because the defendant not only increases the possibility of acquittal at trial or reversal on appeal in the state courts, but also safeguards the availability of federal habeas remedies.<sup>103</sup> By choosing to sandbag, counsel inevitably runs the risk of possible forfeiture of all direct state and federal remedies.<sup>104</sup> It is irrational to assume that competent counsel would even undertake such a risk in the hopes that a subsequent federal habeas court would prove more sympathetic to the claim than the state court.<sup>105</sup>

In short, refusing to "continue the quest for justice, especially when the state has refused to consider the constitutional questions due to an attorney's failure to follow the proper rules of procedure,"<sup>106</sup> is not a legitimate proposition. Any acquiescence to the possibility of error should not be undertaken lightly nor should it occur before carefully analyzing the costs involved—an analysis which appears to be lacking from the Court's restriction of federal habeas review.<sup>107</sup> The Court's acquiescence to this possibility of error, enhanced by its limitation of what constitutes "cause" in *Carrier*, may be defended by the further provision allowing habeas corpus to remain available despite the absence of a "showing of cause" if the constitutional claim in question implicates "actual innocence." Although such an approach may be consistent with the Court's more recent limitations on federal habeas review in general, it signals a radical change in that review as it previously existed.<sup>108</sup>

B. *SANDERS V. UNITED STATES* AND *KUHLMANN V. WILSON*

In all probability the Supreme Court in *Sanders* not only wished to preserve an avenue by which federal courts can choose to enter-

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<sup>102</sup> 477 U.S. at 524 (Brennan, J., dissenting).

<sup>103</sup> *Wainright v. Sykes*, 433 U.S. 72, 103 n.5 (1977) (Brennan, J., dissenting).

<sup>104</sup> *Id.* (Brennan, J. dissenting).

<sup>105</sup> See Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1369-70 (1961).

<sup>106</sup> See Guttenberg, *supra* note 72, at 683.

<sup>107</sup> *Id.*

<sup>108</sup> See *infra* notes 378-83 and accompanying text.

tain new grounds for relief, but also attempted to reduce multiple petitions in an effort to achieve some degree of finality in prior judgments. However, while the *Sanders* decision remains for the most part intact, it has been severely criticized on numerous grounds. For example, concern has been expressed over the Court's act of equating the *Townsend* "full and fair" hearing criteria with its own requirement of finding that the "ends of justice" would be served by reviewing an additional application in *Sanders*.<sup>109</sup>

The difficulty arises as a result of the Court's placing on the applicant the burden of showing that the ends of justice would be served by a redetermination.<sup>110</sup> This act "introduces an element not present in *Townsend v. Sain*, since nothing in that decision indicates that the applicant must assume the burden of proving that the state hearing was not full and fair."<sup>111</sup> Moreover, equating what constitutes a waiver to justify implementation of the abuse of the writ remedy with the standards enunciated in *Noia*<sup>112</sup> presents problems as well.<sup>113</sup> Permitting prisoners to file successive petitions may be particularly susceptible to criticism for several reasons. If the prisoner adequately presents his first petition he will already have had the benefit of at least one federal hearing, "free from the momentum of the guilt-determining process."<sup>114</sup> Furthermore, "the procedures in such a hearing were presumptively adequate; the federal judge was presumptively willing to protect federal rights if they clashed with state or federal regulatory aims."<sup>115</sup> Moreover, since the petitioner will also have had an independent hearing providing an opportunity to discover constitutional error and inadequate process as well as to remedy inadequate development of a

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<sup>109</sup> See Williamson, *supra* note 30, at 278.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 278-79.

<sup>112</sup> *Fay v. Noia*, 372 U.S. 391, 438 (1963).

<sup>113</sup> See Williamson, *supra* note 30, at 282-83, arguing that the circumstances in which waiver was considered in *Noia* bears little relation to the context of successive habeas applications alleging new grounds for relief. *Noia* involved questions of trial strategy in which a benefit was anticipated and in which counsel participated. In successive federal habeas proceedings, the prisoner in most cases has no counsel and little is to be gained from consciously failing to raise all constitutional claims in the defendant's first application. *Id.* at 282. But see *Id.* at 284, arguing that when the second habeas petition is based on "new" evidence, holding the applicant to waiver because of inexcusable neglect is consistent with the writ because once the legal grounds for relief have been "formulated, if questions of fact are involved, counsel normally is appointed to represent the applicant." Since in this case counsel does make strategic decisions, he acts in the same capacity as the trial attorney.

<sup>114</sup> See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1149 (1970) [hereinafter *Developments*].

<sup>115</sup> *Id.*

claim, it is highly unlikely that petitioner's claim will be vindicated after another proceeding acting on the same information.<sup>116</sup> Nevertheless, adhering to strict denial of successive petitions on the grounds that there has been a previous opportunity to present constitutional claims in a federal forum fails to give proper weight to the fact that many first petitions do not adequately present all of a petitioner's claims.<sup>117</sup> Many of the reasons that a petitioner fails to present his claims adequately in his first petition seem valid,<sup>118</sup> especially in light of the Court's recognition in *Sanders* that most habeas petitions are prepared without assistance of counsel.<sup>119</sup>

If, in fact, the Court's action is premised on a desire to dissuade prisoners from engaging in piecemeal litigation, the possibility of which was acknowledged in *Sanders*,<sup>120</sup> there is little need for such action. The prisoner seems to derive little benefit from failing to set forth all the grounds that he thinks might have merit in his first application.<sup>121</sup>

It seems virtually inconceivable that a prisoner who seeks his liberty will not allege every *known* basis which might support his release. This is undoubtedly why so many frivolous grounds are alleged in post-conviction petitions since the prisoner, unschooled in the law, seeks his freedom on every ground he can imagine. It is in the prisoner's self-interest to allege constitutional infirmities, not because of procedural forfeiture, but because of continued imprisonment. Judicial anathema will never surpass a prisoner's unending quest for relief as an effective limitation on fragmented consideration of his claims.<sup>122</sup>

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<sup>116</sup> *Id.* (acknowledging that further proceedings would be justified by a change in the facts or applicable law).

<sup>117</sup> See Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740, 749 (1972).

<sup>118</sup> *Id.*

There are, of course, a number of reasons why a petitioner fails to present claims adequately in his first petition, even though his efforts are made in good faith. Some prisoners lack education; in such case petitioner's efforts may be nearly incomprehensible, sometimes written by pencil on tissue paper and so lacking in such specificity or relevant facts that the petitioner may learn of his claims piecemeal.

*Id.*

<sup>119</sup> *Sanders v. United States*, 373 U.S. 1, 11 (1963).

<sup>120</sup> *Id.* at 12.

<sup>121</sup> See Williamson, *supra* note 30, at 283; see also Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 354-55 (1973) (arguing that the problem of successive petitions may be mitigated in very large degree if the problem of exhaustion can be resolved because data indicates that once a petitioner has had his case heard and disposed of on the merits, he is not likely to return to the federal court on the same or a related claim).

<sup>122</sup> See Williamson, *supra* note 30, at 281-82; see also *Id.* at 283 (arguing that patently frivolous successive petitions or petitions clearly without merit can be summarily dismissed without significant cost to judicial resources); *Developments*, *supra* note 114, at 1153 (arguing that the problem of abuse of the writ is greatly overstated because "most prisoners of course are interested in being released as soon as possible; only rarely will



In addition, one of the essential functions of federal habeas corpus is to remedy error that becomes apparent only after prior habeas proceedings.<sup>123</sup> In the case of new fact or law, a significant gain in accuracy becomes possible. Moreover, the bar against second petitions is not warranted under the deterrent rationale of waiver in these "new law claim" situations. These views would seem to argue against the Supreme Court's new approach of placing "new law" claims in jeopardy of summary dismissal:<sup>124</sup> concerns for finality should not outweigh the concern for justice.

The Court's new approach to successive petitions only serves to amplify the plight of state prisoners in trying to raise constitutional claims in subsequent applications, regardless of whether they deserve further attention. This approach may be premised on the general trend throughout much of habeas corpus law emphasizing concerns of comity, federalism, and finality of judgment, or, more specifically, on the Court's dissatisfaction with the impact of the *Sanders* treatment of successive petitions in dealing with these recurring concerns.<sup>125</sup> No matter how valid the need to alter prior treatment of successive petitions, this particular approach may prove unnecessary.

Strict adherence to *Sanders* requires the district court to determine that "the ends of justice" would not be served by reaching the merits of a subsequent application.<sup>126</sup> In order to satisfy this requirement of *Sanders*, the judge must first partake in an elaborate inquiry into the allegations and facts and spend time evaluating the case. Furthermore, the *Sanders* Court specifically linked the meaning of the "ends of justice" clause to situations in which the first hearing on the merits of the claim was not "full and fair."<sup>127</sup> In so doing, the Court emphasizes that the underlying purpose of a federal habeas corpus proceeding "is not merely to provide an additional forum in which a prisoner may assert that his constitutional rights have been denied; rather it is to ensure a continuing mechanism for determinations that such rights have been afforded."<sup>128</sup> In light of the fact that the Court has not overruled *Sanders*, justifying the summary dismissal of successive petitions without reaching the merits

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one inexcusably neglect to raise all available issues in his first federal application"). *But see* Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 315 n.8 (1948) (in a five-year period, five prisoners filed 50, 27, 24, 22, and 20 petitions respectively).

<sup>123</sup> See *supra* note 34.

<sup>124</sup> See Morris, *supra* note 38, at 384.

<sup>125</sup> See *infra* notes 304, 308 & 311.

<sup>126</sup> See *supra* note 29.

<sup>127</sup> See Weick, *supra* note 117, at 749.

<sup>128</sup> See *supra* note 32.

becomes more problematic. This is especially true since "often very little extra effort short of an evidentiary hearing, would be required to deal with the application on its merits."<sup>129</sup>

It appears that certain members of the Court deemed the *Sanders* "ends of justice" standard especially inadequate in dealing with the need for finality because the standard leaves lower federal courts with too much discretion in choosing to review successive applications.<sup>130</sup> As the Court noted in *Kuhlmann*, "failure to provide clear guidance" leaves district judges "at large in disposing of applications for a writ of habeas corpus, creating the danger that they will engage in the exercise not of law but of arbitrariness."<sup>131</sup> Although only a plurality of the Court accepted the position, the decision may nevertheless have important implications for the future. It therefore becomes necessary to discuss why the underlying rationales for such a view may prove incorrect. As noted by Justice Brennan in his dissent, the plurality suggests that a prisoner is only "entitled to habeas relief if his interest in freedom from unconstitutional incarceration outweighs the State's interests in the administration of its criminal laws."<sup>132</sup> The plurality further suggests that under "federal review of state court convictions [pursuant to section 2254] is predicated solely on the need to prevent the incarceration of an innocent person."<sup>133</sup> By implying that factual innocence is "central to our habeas jurisprudence generally,"<sup>134</sup> the plurality is able to reach its position in *Kuhlmann*.

However, a problem arises in that the plurality's assertions are not supported by "statutory language, legislative history or our precedents."<sup>135</sup> As Justice Brennan points out in his dissent:

Contrary to the plurality's assertions, the Court has never delineated the general scope of the writ by weighing the competing interests of the prisoner and the State. Our cases addressing the propriety of federal collateral review of constitutional error made at trial or on appeal have balanced these interests solely with respect to claims that were

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<sup>129</sup> See *Williamson*, *supra* note 30, at 277.

<sup>130</sup> *Kuhlmann v. Wilson*, 477 U.S. 436, 444-47, 455 (1986).

<sup>131</sup> *Id.* at 445 (citing *Brown v. Allen*, 344 U.S. 443 (1953) (opinion of Frankfurter, J.)).

<sup>132</sup> *Id.* at 462 (Brennan, J., dissenting).

<sup>133</sup> *Id.* at 462 (Brennan, J., dissenting). The Court states:

Despite [the substantial] costs [federal habeas review imposes upon the States], Congress has continued to afford federal habeas relief in appropriate cases, "recognizing the need in a free society for an additional safeguard against compelling an innocent [person] to suffer an unconstitutional loss of liberty."

*Id.* (Brennan, J., dissenting) (quoting *Stone V. Powell*, 428 U.S. 465, 491-492 n.1 (1976)).

<sup>134</sup> *Id.* (Brennan, J., dissenting).

<sup>135</sup> *Id.* at 463 (Brennan, J., dissenting).

procedurally defaulted in state court.<sup>136</sup> Moreover, although *Stone v. Powell*,<sup>137</sup> a case upon which the Court heavily relies, limited those claims subject to habeas review, it did not do so by creating a new standard that must be met by all prisoners whereby their interests must not only outweigh those of the state but their claims must also make out a "colorable showing of factual innocence."<sup>138</sup> The cases following *Powell*<sup>139</sup> evidence this by consistently declining to extend the *Powell* limitations on federal habeas review to any other context.<sup>140</sup>

The plurality's assertion in *Sanders* that Congress created Rule 9(b)<sup>141</sup> or section 2244(b) to establish factual innocence as a predicate for review of successive habeas petitions seems to break down in light of the fact that in "adopting Rule 9(b) Congress expressly endorsed the existing case law governing subsequent petitions and cited *Sanders*."<sup>142</sup> Congress's concern, rather than being to correct the problem of a guilty prisoner seeking successive review, lies solely with the problem posed by successive applications presenting vexatious or meritless claims.<sup>143</sup> In this light then, even if the *Sanders* ends of justice test needs some degree of refinement for the policy reasons advanced by the plurality, defining the test in such a way as to require successive applicants to make a "colorable showing of factual innocence"<sup>144</sup> before relief is made available is at best unreasonable.

#### C. *ROSE V. LUNDY* AND *GRANBERRY V. GREER*

While it may be said that the exhaustion doctrine generally provides a feasible means for preserving the state court's role in enforcing federal laws, the same cannot be said of the total exhaustion rule. Some have criticized the *Lundy* decision on the basis that the total exhaustion rule does not necessarily vindicate the considerations discussed by the Court.<sup>145</sup> As Justice Blackmun pointed out in his concurrence, the comity considerations advanced by the Court are not defeated by allowing district courts to consider the ex-

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<sup>136</sup> *Id.* at 464 (Brennan, J., dissenting).

<sup>137</sup> 428 U.S. 465 (1976).

<sup>138</sup> *Kuhlmann*, 477 U.S. at 465 (1976) (Brennan, J., dissenting).

<sup>139</sup> 428 U.S. 465 (1976).

<sup>140</sup> 477 U.S. at 465-66 (Brennan, J., dissenting).

<sup>141</sup> Fed. R. Civ. P. 9(b).

<sup>142</sup> 477 U.S. at 469 (Brennan, J. dissenting).

<sup>143</sup> *Id.* at 469-70 (Brennan, J. dissenting).

<sup>144</sup> See *supra* note 138.

<sup>145</sup> See *Habeas Corpus Restraint*, *supra* note 50, at n.248.

hausted habeas claims of a mixed petition.<sup>146</sup> If this approach is taken, the state courts are not denied the first opportunity to rule on every constitutional challenge and to correct any such error before a federal court considers it on habeas.<sup>147</sup> Justice Blackmun further argued that in some respects the Court's ruling was "more destructive than solicitous of federal-state comity."<sup>148</sup> The Court also relied on federal interests to justify a total exhaustion rule; however, these interests are even more unsatisfactory than the state interests that support such a rule. The first of the Court's concerns—the "efficient administration of the federal courts"—is undermined rather than enhanced by the Court's current approach with regard to exhaustion.<sup>149</sup> In order to comport with the total exhaustion rule federal courts must now not only review the record initially to determine whether all claims have been exhausted, but in all likelihood must do so again when the prisoner returns to court for a review of the previously unexhausted claims.<sup>150</sup>

Furthermore, while it is inevitable that the state courts' presentation of complete factual records to the federal courts will make the subsequent review easier, efficiency of litigation is not a valid reason to postpone that litigation until after state courts have acted.<sup>151</sup>

Federal review is not deferred to allow the state courts to assist the federal courts in the exercise of their independent habeas jurisdiction, but rather to accord appropriate respect to state interests in orderly administration and to ensure state courts a proper role in the creation and development of federal law.<sup>152</sup>

It has been suggested that state courts might take offense to the requirement that calls for lower federal courts to delay federal review because they stand to benefit from prior state review "as though the state courts were stalking horses to be used by federal judges anxious to conserve their own efforts in habeas cases."<sup>153</sup> Furthermore, as pointed out by Justice Blackmun, the federal courts are already afforded satisfactory means by which they can perform their task within a complete factual record.<sup>154</sup> This argument, that it

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<sup>146</sup> *Rose v. Lundy*, 455 U.S. 509, 524-525 (1982) (Blackmun, J., concurring).

<sup>147</sup> *Id.* (Blackmun, J. concurring).

<sup>148</sup> *Id.* at 525 (Blackmun, J., concurring). For example, "[r]emitting a habeas petitioner to state court to exhaust a patently frivolous claim before the federal court may consider a serious, exhausted ground for relief hardly demonstrates respect for the state courts." *Id.*

<sup>149</sup> *Id.* at 527 (Blackmun, J., concurring).

<sup>150</sup> *Id.* at 526-27 (Blackmun, J., concurring).

<sup>151</sup> See Yackle, *supra* note 51, at 429-430.

<sup>152</sup> *Id.* at 430.

<sup>153</sup> *Id.*

<sup>154</sup> 455 U.S. at 526 n.3 (Blackmun, J., concurring). Justice Blackmun disagreed that

is not the state courts' function to assist in making federal habeas adjudication efficient, also diminishes the Court's assertion that the total exhaustion rule discourages piecemeal litigation. State courts should not be accorded with the responsibility of entertaining a whole range of issues for the purpose of providing federal courts with the benefit of reviewing all the petitioner's claims in one proceeding.<sup>155</sup>

Finally, the Court claims that its ruling, requiring dismissal of mixed petitions, furthers the interests of federal courts by relieving them of "the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims."<sup>156</sup> This argument is highly questionable as well because, as Justice Blackmun indicated in his dissent, the federal courts that have addressed interrelatedness have had no apparent problems distinguishing between "related" and "unrelated" claims.<sup>157</sup>

Others have criticized the plurality's total exhaustion rule because it is inflexible and it assumes that federal district courts cannot be trusted to apply a discretionary doctrine properly, and that, if left to themselves, "federal judges would lurch to the merit of federal claims without just cause."<sup>158</sup> Justice Stevens in his dissent in *Lundy* chastised the plurality's "inflexible, mechanical rule" because it acts to arbitrarily prevent district judges from administering their calendars effectively.<sup>159</sup> Justice Stevens argued that the availability of habeas relief should not depend upon the procedural history of the prisoner's claim, but upon the nature of the alleged constitutional violation.<sup>160</sup> He concluded that if the trial was fundamentally unfair, postponing relief is totally unwarranted because, if the prisoner were innocent, he would be required to "languish in jail" until the completion of another round of review in the state and federal courts.<sup>161</sup> On the other hand, if the prisoner were guilty, the delay is still unwarranted because it makes it more difficult for the prosecutor to obtain a conviction on retrial.<sup>162</sup> In light of this, Justice Stevens argued that district judges should be allowed to exercise

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the issue of interrelated claims must be restricted by a total exhaustion requirement, because federal courts have had no difficulty addressing the issue and can always dismiss the entire petition. *Id.* at 526 (Blackmun, J., concurring).

<sup>155</sup> See Yackle, *supra* note 51, at 430.

<sup>156</sup> *Rose*, 455 U.S. at 519.

<sup>157</sup> *Id.* at 526 (Blackmun, J., concurring).

<sup>158</sup> See Yackle, *supra* note 51, at 394-95.

<sup>159</sup> 455 U.S. at 546 (Stevens, J., dissenting).

<sup>160</sup> *Id.* at 547-48 (Stevens, J., dissenting).

<sup>161</sup> *Id.* at 545 (Stevens, J., dissenting).

<sup>162</sup> *Id.* (Stevens, J., dissenting).

their discretion in determining whether the existence of an unexhausted claim makes it inappropriate to consider the merits of a properly pleaded exhausted claim.<sup>163</sup>

Moreover, the Court in *Granberry*<sup>164</sup> acknowledged that when the states fail to raise the nonexhaustion defense in the district court, the court of appeals may in certain instances consider the merits regardless of the petitioner's failure to exhaust.<sup>165</sup> The Court suggested that if it failed to take this approach, states may be encouraged to postpone raising the nonexhaustion defense for use on appeal.<sup>166</sup> The Court seems to base its conclusion that "the State's omission [in certain instances] makes it appropriate for the court of appeals to take a fresh look at the issue" on the premise that in these cases the interests of comity and federalism are significantly lessened and therefore would be better served if the federal court "address[ed] the merits forthwith."<sup>167</sup> However, the Court failed to establish why in these certain instances the interests of comity and federalism would not be better served by allowing the federal court to review the merits forthwith, even if the state asserts the exhaustion doctrine initially. The state's interests in comity and federalism are virtually identical regardless of the time the state raises the defense. In reality, then, the total exhaustion requirement, established to promote federal-state comity, does so at the cost of limiting the discretion of the federal courts to entertain meritorious exhausted claims when paired with unexhausted claims and requires duplicative review of state habeas petitions.<sup>168</sup>

#### IV. DEVELOPMENT OF THE PRINCIPLE THAT "DEATH IS DIFFERENT"

The Supreme Court has stressed repeatedly in the decade since *Gregg*<sup>169</sup> that the eighth amendment requires a heightened degree of reliability in any case in which a state seeks to take the defendant's life.<sup>170</sup> This concern arises from the premise that the death penalty is qualitatively different from other forms of punishment.<sup>171</sup> Once the death penalty is imposed, because of its irrevocability, no constitutional wrong can ever be rectified. Therefore, it would seem that, before allowing the imposition of such a penalty, courts should be

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<sup>163</sup> *Id.* at 546 (Stevens, J., dissenting).

<sup>164</sup> 481 U.S. 129 (1987).

<sup>165</sup> See *supra* note 67.

<sup>166</sup> 481 U.S. at 134-35.

<sup>167</sup> *Id.* at 134.

<sup>168</sup> See *Habeas Corpus Restraint*, *supra* note 50, at 206.

<sup>169</sup> 428 U.S. 153 (1976).

<sup>170</sup> *Darden v. Wainwright*, 477 U.S. 168 (1986).

<sup>171</sup> *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977).

extremely certain of two factors: 1) that the accused is in fact guilty, and 2) that no constitutional rights would be denied by allowing for the execution of the accused. The Court apparently recognized this unique need to minimize the possibility of premature or unwarranted execution by frequently condemning procedures in capital cases that might be completely acceptable in noncapital cases.<sup>172</sup> Furthermore, many states require mandatory appellate review in death penalty cases, whereas no such requirement is applied to non-capital cases.<sup>173</sup>

This realization that "death is different" also applies to the theory that courts should exercise more flexibility in granting federal habeas review when a life is at stake. As codified by Congress, the federal writ serves as a form of collateral review of state judgments by federal courts whereby the federal judiciary can protect constitutional guarantees. These constitutional protections afforded by federal habeas corpus are most needed in death penalty cases.<sup>174</sup> The Court has even recognized that the threat of the death penalty may in certain circumstances exert a special pull in favor of the exercise of the federal court's undisputed statutory power to entertain a habeas corpus writ on a procedurally defaulted claim.<sup>175</sup>

Consequently, despite the presumption of finality attributed to a criminal conviction once the defendant has exhausted all avenues of appeal, federal courts reviewing post-conviction petitions for habeas corpus are "particularly sensitive to comprehensive and careful review of death penalty cases."<sup>176</sup> For example, in discussing the issuance of a certificate of probable cause, which permits appeal for a writ of habeas corpus, the Supreme Court acknowledged that "the nature of the penalty is a proper consideration in

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<sup>172</sup> *Lockett v. Ohio*, 480 U.S. 586 (1978) (capital sentencing scheme limiting range of mitigating circumstances that can be considered by the sentencer held unconstitutional); *Beck v. Alabama*, 447 U.S. 625 (1980) (death sentence unconstitutional as applied in capital offense where jury was not permitted to consider guilty verdict of a lesser included offense); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death sentence violates eighth and fourteenth amendments).

<sup>173</sup> See *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1137 (1984) [hereinafter *Capital Punishment*].

<sup>174</sup> *McGautha v. California*, 402 U.S. 183, 309 (1971) (Brennan, J., dissenting) (citing *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895-896 (1961)) ("For we have long recognized that the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake."); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) ("[The Supreme Court] has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake").

<sup>175</sup> *Fay v. Noia*, 372 U.S. 391, 440 (1963).

<sup>176</sup> See *Capital Punishment*, *supra* note 173, at 1137.

determining whether to issue a certificate of probable cause.”<sup>177</sup>

In light of Supreme Court decisions, the federal courts began to change their once prevalent view that procedural requirements were no more stringent in capital cases than in cases involving the imposition of less severe penalties.<sup>178</sup> State courts have also responded to the general principles laid out in *Furman* and *Gregg*. The procedural rules and precedents of the various states reflect the acceptance of the notion that appellate courts have a special duty to review the trial record for reversible error in death penalty cases.<sup>179</sup> It is apparent, then, that the precept lying at the core of *Furman* and *Gregg*,<sup>180</sup> which has been affirmed by the Supreme Court as well as by various federal and state courts, now plays a significant role in the determination of constitutionally administered capital punishment proceedings.

#### V. THE SUPREME COURT'S ABANDONMENT OF THE NOTION THAT “DEATH IS DIFFERENT”

Regardless of the Court's earlier assertions that death is a unique penalty, therefore entitling capital defendants greater procedural protections than noncapital defendants, the Court has recently indicated a willingness to abandon this concern. Recent judicial activity seems to reflect an attempt by Court opponents of habeas review to create procedural formulations in an effort to deny access to such federal review. Prior to such cases as *Barefoot v. Estelle*,<sup>181</sup> *Wainwright v. Witt*,<sup>182</sup> *Strickland v. Washington*,<sup>183</sup> and *Smith v. Murray*,<sup>184</sup> this Court would not have tolerated such formulations in the context of death penalty cases. These new formulations must

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<sup>177</sup> *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). But see *Barefoot*, 463 U.S. at 892 n.3 (where it is stated that Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal). See H.R. REP. NO. 23, 60th Cong., 1st Sess., at 1 (1908) (concern over the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process was also expressed) *Id.* at 2.

<sup>178</sup> See *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982) (“the view once prevalent that the procedural requirements applicable to capital sentencing are no more rigorous than those governing noncapital sentencing decisions . . . is no longer valid”); *Washington v. Watkins*, 655 F.2d at 1346, 1357, (5th Cir. 1981) (the seriousness of the sentence faced by the defendant is a factor that must be considered in determining counsel's adequacy of representation).

<sup>179</sup> See *Smith v. Murray*, 477 U.S. 527, 548 n.20 (1986) (Stevens, J., dissenting).

<sup>180</sup> The Court reaffirmed this precept in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and *Beck v. Alabama*, 447 U.S. 625 (1980).

<sup>181</sup> 463 U.S. 880 (1983).

<sup>182</sup> 469 U.S. 412 (1985).

<sup>183</sup> 466 U.S. 668 (1984).

<sup>184</sup> 477 U.S. 527 (1986).



therefore reflect the impatience, expressed by some members of the Court, with lengthy execution delays attributable to federal habeas corpus proceedings.

A. *BAREFOOT V. ESTELLE*

In order to fully understand the ramifications of *Barefoot*,<sup>185</sup> it is first necessary to discuss the workings of the certificate of probable cause. The habeas statute provides for review of a district judge's order denying an application for habeas corpus on appeal "by the court of appeals for the circuit where the proceeding is had."<sup>186</sup> However, "[a]n appeal may not be taken to the court of appeals . . . unless the justice or judge who rendered the order or circuit justice or judge issues a certificate of probable cause."<sup>187</sup> In order for a prisoner to obtain a certificate of probable cause, a petitioner must make a "substantial showing of the denial of [a] federal right."<sup>188</sup> Consequently, once the certificate has been issued, section 2253 as well as decisions of the Supreme Court indicate that a prisoner is entitled to a review and decision on the merits of his or her appeal.<sup>189</sup> Thus, although section 2253 removed the requirement of automatically staying proceedings against a prisoner, pending his appeal, Congress clearly left intact the requirement that upon obtaining the certificate, the court must grant a stay of execution to the capital defendant.<sup>190</sup> The decisions of the Supreme Court prior to 1983, emphasizing the significance of the issuance of a certificate of probable cause, give rise to this conclusion as well.<sup>191</sup> To hold otherwise serves only to diminish the stated significance of the certificate of probable cause.<sup>192</sup> If there is probable cause to appeal,

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<sup>185</sup> 463 U.S. at 880.

<sup>186</sup> 28 U.S.C. § 2253 (1982).

<sup>187</sup> *Id.*

<sup>188</sup> *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971) (quoting *Harris v. Ellis*, 204 F.2d 685 (5th Cir. 1953)).

<sup>189</sup> See Boaz, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 350 n.4 (1985); see also *Nowakowski v. Maroney*, 386 U.S. 542 (1967) (holding that summary denial of a habeas petition after issuance of certificate of probable cause); *Garrison v. Patterson*, 391 U.S. 464 (1968) (remanded for further consideration of appeal on merits after court of appeals summarily affirmed district court's denial of habeas corpus and continued the stay of execution pending the appeal); *Carafas v. LaVallee*, 391 U.S. 234 (1968) (vacated lower courts order because there was no indication that the appeal had been "duly considered on its merits" as required by *Nowakowski*, when a certificate of probable cause was granted); but see *Barefoot*, 463 U.S. at 890-91 (the Court reconciles with these prior cases the procedures followed by the court of appeals).

<sup>190</sup> See Boaz, *supra* note 189, at 358 n.52.

<sup>191</sup> *Id.* 2.

<sup>192</sup> *Brooks v. Estelle*, 459 U.S. 1061, 1063 (1982) (Brennan, J., dissenting).

carrying out a capital sentence before a decision on the merits is reached renders the certificate meaningless as applied to capital defendants because the appeal becomes moot.<sup>193</sup> The Court's decision in *Barefoot* not only "tampers with a question long settled by congressional action,"<sup>194</sup> but it also eviscerates its own prior holdings.

In *Barefoot*,<sup>195</sup> the Supreme Court approved the Fifth Circuit's treatment of stay applications in death penalty cases as equivalent to stay applications in civil litigation cases.<sup>196</sup> Instead of automatically granting a stay of execution, the Fifth Circuit required the petitioner to make an affirmative showing of success on the merits upon securing a certificate of probable cause.<sup>197</sup> The court arrived at this decision by relying on precedent involving stay applications in a prisoner's rights class action—a case that would not become moot regardless of the outcome of the applications.<sup>198</sup> What the Fifth Circuit and the Supreme Court both failed to consider is that even if such a denial of staying procedures was appropriate in that context, it is inapplicable to situations in which the denial results in execution before final determination of the appeal.

For many of those executed since the *Barefoot* decision, an order of the Supreme Court denying a stay of execution extinguished judicial review.<sup>199</sup> The Supreme Court seemed to justify this result by its further holding in *Barefoot* that federal circuit courts can properly decide the merits of a nonfrivolous federal habeas corpus appeal, brought by a state prisoner sentenced to death, while ruling on his motion for a stay of execution.<sup>200</sup> This proves questionable after examining how the court of appeals "fully considered the merits" of *Barefoot*'s appeal simultaneously with his application for a stay. As Justice Marshall pointed out in his dissent in *Barefoot*, it is simply not true to "say that the court of appeals ruled on the merits of the appeal."<sup>201</sup> If this assertion were true, it would seem an incredible feat considering the fact that the court had less than a day to review the voluminous record.<sup>202</sup> Moreover, the court had less than 24

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<sup>193</sup> See Boaz, *supra* note 189, at 350.

<sup>194</sup> *Id.* at 358 n.52.

<sup>195</sup> *Barefoot v. Estelle*, 463 U.S. 880 (1983).

<sup>196</sup> See Boaz, *supra* note 189, at 351 n.9.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 352.

<sup>200</sup> 463 U.S. at 889-90.

<sup>201</sup> *Id.* (Marshall, J., dissenting) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 891 (1983)).

<sup>202</sup> See Boaz, *supra* note 189, at 351 n.12.

hours to study the vast array of case law relevant to Barefoot's appeal—all this without the benefit of full briefing and argument by the parties.<sup>203</sup> The more plausible conclusion came from Justice Marshall who stated that what the court did conclude and was only capable of concluding, with the papers before it, was that the "likelihood of petitioner's prevailing on the merits was insufficient to justify the delay that would result from staying his execution pending the disposition of his appeal."<sup>204</sup> Yet the Supreme Court, in a death penalty case, condones the substitution of a hasty consideration of the merits of a "concededly substantial constitutional" claim for an actual ruling by the court of appeals in accord with its ordinary procedures.<sup>205</sup>

The Supreme Court has failed to advance any reasons for its approval of such expedited procedures in capital cases. Nevertheless, the Court probably relied on the various policy considerations underlying its previous procedural formulations restricting federal habeas review. As one commentator has suggested, three arguments are generally articulated when imposing restrictions to habeas review: 1) federal habeas corpus generates friction between federal and state courts, 2) it strains federal judicial resources, and 3) federal habeas corpus undermines the desire for finality in criminal proceedings.<sup>206</sup>

With regard to use of summary proceedings, many appellate courts have recognized that time constraints on a motion for a stay simply preclude the necessary time needed to inquire into the merits of an appeal. The Fourth Circuit noted in *Shaw v. Martin*,<sup>207</sup> that "[i]n the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constraints imposed by imminence of execution preclude any fine-tuned inquiry into the actual merits."<sup>208</sup> Similarly, the Eleventh Circuit in *Dobbett v. Strickland*<sup>209</sup> pointed out that "[b]ecause the brief period of time between the filing of this appeal and the scheduled execution is insufficient to consider properly the merits of the issues raised, this [c]ourt must stay the execution of the death sentence."<sup>210</sup>

Members of the Supreme Court have further commented on

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<sup>203</sup> *Id.*

<sup>204</sup> *Barefoot*, 463 U.S. at 909-10 (Marshall, J., dissenting).

<sup>205</sup> *Id.* at 911 (Marshall, J., dissenting).

<sup>206</sup> See *Capital Punishment*, *supra* note 173, at 1208.

<sup>207</sup> 613 F.2d 487 (4th Cir. 1980).

<sup>208</sup> *Id.* at 492.

<sup>209</sup> 670 F.2d 938 (11th Cir. 1982).

<sup>210</sup> *Id.* at 940.

the failure of expedited review to provide adequate review.<sup>211</sup> The principles underlying the approaches taken in such cases as *Shaw* and *Dobbert* provide "nothing more or less than the process necessary to assure that a death sentenced inmate has his or her properly preserved federal constitutional claims determined once on the merits by the federal judiciary."<sup>212</sup> The approach now taken to stay applications, as a result of the Supreme Court's *Barefoot* decision, presents a risk that some death-sentenced prisoners whose habeas corpus appeals would have succeeded will nonetheless be executed without an appeal. This approach is unacceptable in view of the fact that, while states suffer no irreparable harm in allowing a death-sentenced prisoner's first federal habeas corpus appeal to be heard on the merits, the prisoner's harm will be irreparable absent a hearing.<sup>213</sup>

The unacceptability of such irreparable harm resulting from these expedited procedures has led at least one circuit, which has a particularly strong interest in the proper handling of death penalty habeas corpus cases,<sup>214</sup> to attempt to circumvent the harshness of the *Barefoot* approach to stay applications. The Eleventh Circuit has made this attempt through its formulation of rules governing expedited procedures for habeas corpus death penalty cases. These rules provide strict guidelines delineating what will satisfy the *Barefoot* requirement of "considering the merits."<sup>215</sup> Furthermore, the rules establish that the delay avoided by expedited procedures will not automatically warrant departure from the normal, untruncated processes of appellate review when a case of first habeas corpus appeal is involved.<sup>216</sup>

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<sup>211</sup> *Wainwright v. Adams*, 466 U.S. 964, 965 (1984) (Marshall, J., dissenting from vacation of stay) ("[t]he haste and confusion surrounding this decision is degrading"); *Stephens v. Kemp*, 469 U.S. 1043, 1058 (1984) (Brennan, J., dissenting from denial of stay) (Court's denial of stay is "result orientation carried to its most cynical extreme").

As Justice Marshall has described, "The Supreme Court has authorized the reviewing courts to put [the habeas] proceedings on fast forward. . . . When the process speeds up, the opportunity for deliberation, consideration and rebuttal vanishes. The proceedings collapse into each other and the appellate process loses its vitality." *Boaz*, *supra* note 189, at 367 n.91 (quoting Justice Marshall, Remarks to the Second Circuit Conference in Hershey, Pa. (Sept. 6, 1985)).

<sup>212</sup> See Brief of Amicus Curiae NAACP Legal Defense and Educational Fund Inc. at 41, *Barefoot v. Estelle*, 463 U.S. 880 (1983).

<sup>213</sup> *Id.* at 17-18.

<sup>214</sup> See *Thompson v. Wainwright*, 714 F.2d 1495, 1505 n.6 (11th Cir. 1983) ("The number of prisoners under death sentence in the United States is approximately 1,100 to 1,200. Approximately one-third of these are in the three states of the Eleventh Circuit.")

<sup>215</sup> 11th Cir. R. 30.

<sup>216</sup> *Id.*

Another consequence of the *Barefoot* approach to staying applications that should render it unacceptable is its exacerbation of the risk that a meritorious claim of a condemned person will go undetected due to inadequate legal representation. It has already been established that capital inmates are often represented by unpaid volunteer sole practitioners with limited resources and facilities.<sup>217</sup> Such attorneys who often lack specialized competence in capital litigation may also lack the time needed to acquaint themselves with the relevant law.<sup>218</sup> This situation is not likely to improve since, as the numbers on death row rise, federal habeas corpus appeals will rise as well. These facts, coupled with the hurried nature of proceedings on stay applications, will cause even more experienced practitioners to overlook factual or legal authority which might save the life of a death-sentenced prisoner.<sup>219</sup> The added burdens placed on these practitioners by the expedited schedules involved in summary proceedings will make mistakes of this sort unavoidable.

Perhaps the irony of the Court's endorsement of the summary proceedings established in *Barefoot*, in light of its reiterated concern that condemned prisoners not be put to death without full consideration of the constitutionality of the proceedings, is best articulated by the question posed in an NAACP Brief:

Why should the circumstance that the state has unilaterally chosen to set an execution date which deprives a Federal Appellate Court of the time necessary for its usual measure of deliberate reflection be permitted to harry it into giving the most truncated consideration to cases with the most momentous consequences?<sup>220</sup>

The Court's evident willingness to disregard its earlier concerns is best demonstrated by the outright modification of acknowledged views by individual members of the Supreme Court. For instance, Justice Stevens once criticized a proposal to "grant certiorari and decide the merits of every capital case," which "would preclude federal district courts from granting writs of habeas corpus [in those cases] on any ground that had been presented to and rejected by [the Supreme Court]."<sup>221</sup> The obvious purpose of this proposal was to expedite the administration of the death penalty. Justice Stevens' reasoning for rejecting such a proposal was expressed in *Coleman v.*

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<sup>217</sup> See *Habeas Corpus—Expedited Appellate Review of Habeas Corpus Petitions Brought by Death-Sentenced State Prisoners*, 74 SUP. CT. REV. 1404, 1421 (1983) (citing Brief of Amicus Curiae American Bar Association at 21, *Barefoot v. Estelle*, 463 U.S. 880 (1983)).

<sup>218</sup> *Id.*

<sup>219</sup> See Brief of Amicus Curiae NAACP Legal Defense and Educational Fund Inc. at 17, *Barefoot v. Estelle*, 463 U.S. 880 (1983).

<sup>220</sup> *Id.*

<sup>221</sup> *Coleman v. Balkcom*, 451 U.S. 949, 950 (1981) (Stevens, J., concurring).

*Balkcom*,<sup>222</sup> where he stated: "[f]or after all, death cases are indeed different in kind from all other litigation. The penalty, once imposed, is irrevocable. In balance, therefore, I think the Court wisely declines to select this group of cases in which to experiment with accelerated procedures."<sup>223</sup> Yet this is precisely what the Court condoned in *Barefoot*.<sup>224</sup>

B. *WITHERSPOON V. ILLINOIS TO WAINWRIGHT V. WITT*

The sixth amendment entitles a criminal defendant to trial by an impartial jury.<sup>225</sup> However, what constitutes an adequate representation of an impartial jury differs depending on whether the jury will hear a capital or noncapital case.<sup>226</sup> In a noncapital case, where the responsibility for imposing a sentence does not rest with the jury, the mere existence of bias is usually sufficient to support the exclusion of a juror. In a capital case, it becomes necessary for judges to determine not only that the prospective juror opposes the death penalty but that his feelings are so intense toward it that they render him incapable of judging partially.<sup>227</sup> Therefore, the state has the latitude to exclude jurors for cause in a noncapital case,<sup>228</sup> even if it later could be shown that the individual is capable of setting aside his prejudices in order to judge impartially because it "disserves no interest of the defendant."<sup>229</sup> The same is not true when allowing such broad exclusions of jurors in capital cases. While "[n]o systemic skew in the nature of jury composition results from exclusion of individuals for random idiosyncratic traits likely to lead to bias[,] . . . [e]xclusion of those opposed to capital punishment, by contrast, keeps an identifiable class of people off the jury

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<sup>222</sup> *Id.*

<sup>223</sup> 451 U.S. 949, 953 (Stevens, J., concurring in denial of certiorari). This statement may be classified as mere dicta by some; however, it nevertheless indicates a willingness by Supreme Court members to modify earlier views, once thought worthy of noting, in later decisions. This is true even where the principles underlying such earlier views have remained unchanged. *But see supra* note 438.

<sup>224</sup> *Barefoot v. Estelle*, 463 U.S. 880 (1983).

<sup>225</sup> *See Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968) ("this jury fell woefully short of that impartiality to which the petitioner was entitled under the sixth and fourteenth amendments").

<sup>226</sup> A distinctive feature of capital trials in many states is that the jury determines the sentence. Therefore, the process of jury selection gives rise to special problems in a capital case because the views of prospective jurors concerning capital punishment become of paramount concern.

<sup>227</sup> Carr, *At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 STAN. L. R. 427, 456-57 (1987).

<sup>228</sup> *Wainwright v. Witt*, 469 U.S. 412, 441 (1985) (Brennan, J., dissenting).

<sup>229</sup> *Id.* (Brennan, J., dissenting).

and is likely to systemically bias juries.”<sup>230</sup>

The Supreme Court in *Witherspoon v. Illinois*<sup>231</sup> first recognized that constitutional rights were being denied capital defendants when prospective jurors with conscientious scruples against the death penalty were automatically eliminated. The Court realized that a jury vacant of all scrupled jurors did not create a representative jury drawn from a “fair cross section of the community” but rather a jury “uncommonly willing to condemn a man to die.”<sup>232</sup> The Court reasoned that an “impartial jury” in a capital case should not exclude those who oppose the death penalty as long as they could follow the law and consider imposing the death penalty in a particular case.<sup>233</sup> The *Witherspoon* Court, in an effort to aid the decision of when a scrupled juror could constitutionally be excluded from a capital jury, set forth a two-pronged standard. The Court stated that veniremen could be excluded for cause if they made it “unmistakeably clear” that: 1) they would automatically vote against the imposition of capital punishment notwithstanding the evidence that might be introduced at trial, or 2) their views concerning the death penalty would prevent them from rendering an impartial decision as to the defendant’s guilt.<sup>234</sup> The Court found that this standard adequately preserved the states’ interest in efficient law enforcement while safeguarding defendants from partial juries.<sup>235</sup> Thus, after *Witherspoon*, juries in capital trials began to reflect a more accurate representation of society.<sup>236</sup>

Sixteen years later, in response to the dissatisfaction with the *Witherspoon* rule, the Supreme Court in *Witt*<sup>237</sup> curtailed the rights of

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<sup>230</sup> *Id.* at 441-42 (Brennan, J. dissenting).

<sup>231</sup> 391 U.S. 510 (1968).

<sup>232</sup> *Id.* at 521.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 522-23 n.21.

<sup>235</sup> *Id.* The state could still exclude prospective jurors if it is shown that they could not vote for the death penalty; however, the state is held to a strict standard of proof.

<sup>236</sup> As the *Witherspoon* Court observed, “[I]n a nation less than half of whose people believe in the death penalty, a jury . . . [c]ulled of all those who harbor doubts about the wisdom of capital punishment . . . can speak only for a distinct and dwindling minority.” *Id.* at 519-20.

<sup>237</sup> *Wainwright v. Witt*, 469 U.S. 412 (1985). Proponents of the death penalty opposed the *Witherspoon* rule because it inhibited the states’ ability to implement the death penalty by placing them in a no win situation. If states were willing to risk allowing prospective jurors steadfastly opposed to the death penalty to sit on the jury, they might automatically lose the trial since most states require unanimity to impose a death sentence. See Carr, *supra* note 227, at 427 n.4. If the state did exclude these prospective jurors, it runs the equally serious risk that if the jury returned a death verdict, it would subsequently be overturned on appeal. *Id.* at 435. But see *Witherspoon*, 391 U.S. at 523 (Douglas, J., for the majority) (indicating that *Witherspoon* had not gone far enough to

capital defendants by "clarifying" this rule. Witt, who received a death sentence for murder, claimed in his habeas petition that the trial judge violated *Witherspoon* by excusing a venireman who, although indicating that she was afraid her views against capital punishment would "interfere" with her deliberations, never stated that she could not vote for the death penalty.<sup>238</sup> The Court reversed the granting of habeas corpus and in so doing fashioned a new standard significantly more lenient than the *Witherspoon* standard by which scrupled venireman could be excluded from capital juries.<sup>239</sup> Presently, in order to exclude a juror based on his views about capital punishment, the views must "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."<sup>240</sup> Justice Rehnquist has stated that this is the proper standard for juror exclusion in capital cases "because it is in accord with traditional reasons for excluding jurors."<sup>241</sup>

If the Court's decision in *Witt* is premised on this position taken by Justice Rehnquist, then at the very least the Court misconceives the entire thrust of *Witherspoon*.<sup>242</sup> In essence, the *Witt* Court, by equating exclusion for bias in capital cases with exclusion for the "innumerable other reasons which result in bias," permits death-qualification to be evaluated under the same lenient standards.<sup>243</sup> The *Witherspoon* Court recognized that allowing for broad exclusions of prospective capital jurors based on their views about capital punishment "infringes the rights of a capital defendant in a way that

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ensure a capital defendant a trial by an impartial jury drawn from a fair cross section of the community).

<sup>238</sup> *Witt*, 469 U.S. at 412.

<sup>239</sup> *Id.* The *Witt* Court justified retreating from the *Witherspoon* Court's strict burden of proof by finding that juries are no longer empowered with unlimited discretion when determining sentences as in the days of *Witherspoon*; rather, after decisions such as *Furman* and *Gregg*, their role has been reduced to answering specific factual questions posed by the judge. Therefore, the Court concluded that a broader standard for excluding jurors was required to ensure the exclusion of not only jurors who would "automatically" vote against a death verdict but jurors who were not likely to answer factual questions truthfully as well. *Id.* at 421-22. But see Carr, *supra* note 227, at 454-55 (arguing that the role of capital sentencing juries has not changed substantially: the sentencers' decision hinges on a moral judgment based on a weighing of a wide range of circumstances, not on objective factfinding).

<sup>240</sup> *Witt*, 469 U.S. at 424. The Court relies on the language in *Adams v. Texas*, 448 U.S. 38 (1980), allegedly broadening *Witherspoon*, to justify a retreat from the *Witherspoon* Court's restrictions. But see *Witt*, 469 U.S. at 450-51 (Brennan, J., dissenting) (observes that appellate courts reviewing *Witherspoon* claims, after *Adams* was decided, found it to be a "clear endorsement of the *Witherspoon* approach").

<sup>241</sup> *Id.* at 423.

<sup>242</sup> *Id.* at 456 (Brennan, J., dissenting).

<sup>243</sup> *Id.* at 456 (Brennan, J., dissenting).



broad exclusion for indicia of other kinds of bias does not.”<sup>244</sup> The *Witherspoon* Court, in realizing that a significant degree of uncertainty will exist as to whether prospective jurors with scruples about capital punishment should be excluded, concluded that the cost of this uncertainty must be allocated to the state.<sup>245</sup> The necessity for such a conclusion seems apparent, for as Justice Brennan noted:

“[T]he risks to a defendant’s Sixth Amendment rights from a jury from which those who oppose capital punishment have been excluded [are] far more serious than the risk to the state from inclusion of particular jurors whose views about the death penalty might turn out to predispose them toward the defendant.”<sup>246</sup>

This, coupled with the overriding interests of a defendant whose life is at stake, certainly justifies placing the burden on the other party. Nevertheless, the Court has chosen to debase the capital defendant’s sixth amendment guarantees by shifting the risk of biased and unrepresentative juries.<sup>247</sup>

*Witt* proves significant to capital defendants as well due to its holding that a trial court’s determination of scrupled juror bias is a finding of fact that deserves a presumption of correctness in accordance with section 2254(d).<sup>248</sup> The Court found *Patton v. Yount*,<sup>249</sup> a noncapital case which expanded the scope of section 2254(d) to include a trial court’s determination of juror bias, to be controlling.<sup>250</sup> In so doing, the *Witt* Court placed particular emphasis on the fact that only the trial court has the advantage of taking demeanor evidence into account.<sup>251</sup> However, the Court, while recognizing that a trial court still must apply a legal standard to an historical fact in determining juror bias, nevertheless rejected the conclusion that logically follows—the question becomes one of mixed law and fact and consequently the presumption should not apply.<sup>252</sup> The net result, then, of the Court’s decision in *Witt* is to promote the state’s ability to compile death-qualified juries in capital trials at the ex-

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<sup>244</sup> *Id.* at 441.

<sup>245</sup> *Id.* at 444.

<sup>246</sup> *Id.* at 445.

<sup>247</sup> *Id.* at 453.

<sup>248</sup> *Wainwright v. Witt*, 469 U.S. 421, 429 (1985).

<sup>249</sup> *Patton v. Yount*, 467 U.S. 1025 (1984).

<sup>250</sup> See *supra* note 242 and accompanying text.

<sup>251</sup> *Witt*, 469 U.S. at 428.

<sup>252</sup> See *Id.* at 429 (Justice Rehnquist stated, “[T]he trial judge is of course applying some kind of legal standard to what he sees and hears”); see also *Patton*, 461 U.S. at 1052 (Stevens, J., dissenting) (stating that “the question whether a juror has an opinion that disqualifies is a mixed one of law and fact”). Many lower courts have characterized a judge’s decision to disqualify a juror based on bias as a mixed question of law and fact. See, e.g., *Darden v. Wainwright*, 725 F.2d 1526 (11th Cir.), *cert. denied*, 467 U.S. 1230 (1984); *Hance v. Zant*, 696 F.2d 40 (11th Cir.), *cert. denied*, 463 U.S. 1210 (1983).

pense of curtailing capital defendants' sixth and fourteenth amendment rights. Moreover, the *Witt* Court's "equivocating of all juror bias," allowing for a mixed question of law and fact, even in a capital case, to lie within the parameters of section 2254(d), further indicates the Court's willingness to retreat from its proclamation that special precautions be taken in capital trials to ensure that the death penalty is accurately administered.<sup>253</sup>

### C. *STRICKLAND V. WASHINGTON*

The determination of which attorney failures fall within the parameters of a sixth amendment claim of ineffective assistance of counsel has special significance for the capital defendant. In *Strickland*,<sup>254</sup> the Supreme Court attempted to enunciate what sort of attorney behavior would rise to the level of a sixth amendment violation. The Court held that in order to succeed on a claim of ineffective assistance of counsel, a defendant must first show that her attorney's performance "fell below an objective standard of reasonableness" and then must show that "but for this deficiency, a reasonable probability exists that the result of the proceeding would have been different."<sup>255</sup> This latter requirement is known as the *Strickland* prejudice requirement. The Court ruled that this standard is applicable to both noncapital trials and to the guilt and sentencing phases of capital trials.<sup>256</sup>

The Court's insistence on equating capital sentencing proceedings with ordinary trials is one of the most critical deficiencies of the *Strickland* decision as applied to capital defendants. The role of defense counsel in criminal cases is unquestionably a vital component of the adversary system of justice.<sup>257</sup> However, due to the constitutionally required special procedures in capital trials and the uniqueness of the penalty itself, defense counsel must bear additional responsibilities in capital trials unlike those found in other criminal

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<sup>253</sup> The *Witt* Court's "retreat" in regard to the application of § 2254(d) may not prove as effective in limiting federal habeas review of these claims as first thought. Federal reviewing courts are not bound by the presumption of correctness if they conclude that the factual determination (in this case, the judge's decision to exclude a juror based on bias) was not fairly supported by the record. 28 U.S.C. § 2254(d) (1982). It seems probable that since the record will often contain testimony that conflicts with the trial judge's decision to exclude, federal reviewing courts will persist in overturning death sentences due to improper handling of jury selection procedures. See Carr, *supra* note 227, at 444.

<sup>254</sup> *Strickland v. Washington*, 466 U.S. 688 (1984).

<sup>255</sup> *Id.* at 688-89.

<sup>256</sup> *Id.* at 687.

<sup>257</sup> Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983).

trials.<sup>258</sup> The existence of a penalty phase in capital trials alone drastically differentiates them from ordinary criminal trials.<sup>259</sup> By having two trials in a capital case, one to determine guilt or innocence and one to determine penalty, a capital attorney must try each phase of the trial differently since trials focusing on whether a convicted defendant should live or die radically differ in both form and issues addressed from those focusing on the commission of a crime.<sup>260</sup> Moreover, it has been indicated that due to the complexity of death penalty defenses, the field has become specialized.<sup>261</sup> The cumulative effect of these factors may serve as justification for holding capital attorneys to a higher standard of performance.<sup>262</sup> The necessity for such a conclusion is evidenced by the fact that experienced criminal trial counsel, while completely competent to try an intricate criminal case, is not equally competent in handling a penalty trial in a capital case.<sup>263</sup> The specialized nature of the death penalty defense should also serve to justify a retreat from the *Strickland* Court's "strong presumption" of attorney competence in capital cases.<sup>264</sup> This presumption, in effect, requires reviewing courts to find that, irrespective of what an attorney does or does not do, the attorney's actions or omissions result from strategically reasonable decisions; therefore, they are rendered competent.<sup>265</sup> Particularly in capital cases, this is simply not always true.<sup>266</sup>

At the penalty phase of trial, an indispensable function of defense counsel is to portray the defendant as a human being by

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 303.

<sup>260</sup> *Id.*

<sup>261</sup> See Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 491 (1987).

<sup>262</sup> *Id.* at nn. 181-82.

<sup>263</sup> See Goodpaster, *supra* note 257.

<sup>264</sup> Goodpaster, *The Adversary System, Advocacy and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 72-78 (1986); see also *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (arguing that in order to prevent second guessing of counsel's actions, a reviewing court must indulge a strong presumption that the challenged action was based on "sound trial strategy").

<sup>265</sup> See Goodpaster, *supra* note 264, at 78; see, e.g., *Darden v. Wainwright*, 477 U.S. 168, 186 (1986) ("there are several reasons why counsel reasonably would have chosen to rely on a simple plea for mercy from petitioner himself" after learning that trial counsel afforded only a half hour preparing mitigating evidence); *Woratzek v. Ricketts*, 799 F.2d 1365 (9th Cir. 1986) (attorney's decision not to call potential witnesses at penalty phase of trial was deemed a strategic judgment and not unreasonable); see also *Solomon v. Kemp*, 735 F.2d 395, 404 (11th Cir. 1984); *Thomas v. Wainwright*, 767 F.2d 738, 746-47 (11th Cir. 1985).

<sup>266</sup> See Goodpaster, *supra* note 257, at 303-304 n.22, 337 n.151; see also Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1,2 (1986).

presenting favorable mitigating evidence to the jury.<sup>267</sup> By presenting such evidence, counsel attempts to convince the jury that, although guilty, the defendant is nonetheless worthy of living.<sup>268</sup> As indicated in one death penalty defense manual, "It is extremely easy for a jury to vote to kill a sack of cement. It is much more difficult for them to kill a human being."<sup>269</sup> If this evidence is not introduced, the penalty phase becomes essentially meaningless. The Court in *Strickland*, a capital case specifically dealing with the issue of an attorney's failure to present such evidence, stated that the key in judging a claim of ineffectiveness is to decide "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>270</sup> A sentencing hearing in which the sentencer must reach a decision based solely on the aggravating circumstances offered by the state gives the sentencer "one-sided and incomplete information" and no basis for exercising mercy.<sup>271</sup> Such a sentencing hearing eviscerates the function of the adversarial system and undermines the established standards requiring reliability in capital sentencing.<sup>272</sup> In *Strickland*, the Court did indicate that failure to present mitigating evidence may result from an attorney's reasonable strategic decision.<sup>273</sup> However, several courts have refused to characterize as ineffective the conduct of attorneys who completely fail to investigate and present this evidence at the penalty phase.<sup>274</sup>

Moreover, the *Strickland* prejudice requirement appears inconsistent with the Supreme Court's death penalty law. While a reviewing court's determination as to whether a "fair and accurate" result was produced at trial may prove relevant to a trial at which the central issue is a "factual inquiry into whether the defendant committed any crimes," it proves irrelevant at the capital sentencing trial where no factual determination is involved.<sup>275</sup> Rather than focusing on a factual inquiry, the penalty phase of a capital trial focuses on the highly moralistic issue of whether the defendant should live or die.<sup>276</sup> As one commentator observed:

The capital sentencing decision primarily involves a weighing of val-

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<sup>267</sup> Goodpaster, *supra* note 257, at 317-18.

<sup>268</sup> *Id.*

<sup>269</sup> SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE (1981).

<sup>270</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>271</sup> See Fong, *supra* note 261, at 480.

<sup>272</sup> *Id.*

<sup>273</sup> 466 U.S. at 699.

<sup>274</sup> See Fong, *supra* note 261, at 479 n.123.

<sup>275</sup> *Id.* at 486.

<sup>276</sup> See Goodpaster, *supra* note 264.

ues; it is not a fact determination. It makes little sense to speak of an "accurate" or "correct" death sentence. A death sentence may only be "appropriate" or "just", in the sense that anyone hearing the evidence and argument on the issue might feel such a sentence warranted.<sup>277</sup>

In accordance with *Lockett*, experienced counsel, by presenting mitigating evidence that may at first seem insignificant—such as the defendant's being abused as a child or evidence of the defendant's compassion for others—has often succeeded in returning a life verdict.<sup>278</sup> In this light, if a defendant challenges a sentencing hearing where no mitigating evidence was introduced, a court concluding that "no reasonable jury would have been influenced by this evidence" seems to misunderstand the Court's requirement that the penalty stage provide for an individualized sentencing hearing.<sup>279</sup> Appellate courts deemed "wholly ill-suited to evaluate the appropriateness of death in the first instance due to their inability to confront and examine the individuality of the defendant" are now, in reviewing habeas claims, substituting their judgment for that of the sentencer who would have decided the issue in the "first instance."<sup>280</sup>

The *Strickland* standard is also deficient in aiding courts' determination of ineffective assistance claims raised by capital defendants in this context because upon deciding these claims they remain unarmed not only of the mitigating evidence a diligent attorney would have uncovered but also of the effect such evidence would have had on the jury.<sup>281</sup> Nevertheless, *Strickland* requires reviewing courts to do this.<sup>282</sup> In essence, courts predicting the impact of unrepresented evidence are merely reassessing the evidence of the capital defendant's often substantial guilt.<sup>283</sup> Thus, as the vast majority of cases following the *Strickland* Court's lead indicate, the outcome—that counsel's failure to investigate and present mitigating evidence will nonetheless constitute effective assistance of counsel—becomes

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<sup>277</sup> *Id.* at 83.

<sup>278</sup> See Fong, *supra* note 261, at 487.

<sup>279</sup> *Id.*

<sup>280</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

<sup>281</sup> See Fong, *supra* note 261, at 488.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 489. The *Strickland* Court seemed to do just this. Although calling the attorney's failure to present mitigating evidence a reasonable strategic choice, the Court also noted counsel's sense of hopelessness as to the possibility of saving the defendant's life because of the strong evidence against him. It therefore appears that the prejudice test allows trial counsel to be less diligent in the very cases which seem to call for a greater degree of effort on behalf of the defendant. See Goodpaster, *supra* note 264.

predictable.<sup>284</sup>

Assuming the *Strickland* standard for effective assistance of counsel arose in response to an apparent need to balance the state's interest in finality against society's interest in providing fair trials to those accused of crimes, it may prove to be a valid method for satisfying this need when applied to noncapital trials.<sup>285</sup> However, in the context of capital cases, courts conducting direct and post-conviction review proceedings must contend with a mass of seemingly irreconcilable standards. The Supreme Court has established that, due to the uniqueness of the death penalty, the Constitution requires that a capital defendant be afforded certain procedural protections.<sup>286</sup> Among these procedural protections are reliability and individualization in a capital sentencing hearing in which the defendant has the right to present any mitigating evidence to the jury that may save his life. These specialized procedures impose upon defense counsel functions "definably different from counsel in ordinary criminal cases."<sup>287</sup> Yet the Supreme Court, through its *Strickland* decision, requires these lower courts to neutrally apply a uniform standard in determining ineffective assistance of counsel claims which, due to the unlikelihood of attaining habeas relief by satisfying this standard, may cause irreparable harm to capital defendants.

The way to reconcile this confusion is not by closing the door to collateral review, a necessary means by which capital defendants can vindicate their right to effective assistance of counsel; rather, the answer lies in recognizing that, because attorneys are required to perform different functions in capital cases, defining what constitutes "reasonably competent counsel" must also differ in these cases.<sup>288</sup>

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<sup>284</sup> Fong, *supra* note 261, at 489. However, a sympathetic court can easily manipulate such an open-ended standard if it wants to grant relief. See, e.g., *Johnson v. Kemp*, 615 F. Supp. 355 (S.D. Ga. 1985), *aff'd*, 781 F.2d 1482 (1986) (granting habeas relief where defense counsel failed to present mitigating testimony at sentencing); *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983) (habeas relief granted when counsel indicated a lack of understanding on how to present mitigating evidence and failed to do so).

<sup>285</sup> *Strickland v. Washington*, 466 U.S. 668, 693-4 (1984). The Court stated, "The standard also reflects the profound importance of finality in criminal proceedings." See also Fong, *supra* note 261, at 485. The standard if set too low will result in sentence reversals for minute errors by defense counsel, yet if the standard is set too high, defendants may be deprived of a fair trial.

<sup>286</sup> See *supra* note 172.

<sup>287</sup> See Goodpaster, *supra* note 257, at 360.

<sup>288</sup> See Fong, *supra* note 261, at 490 (proposes that capital defense counsel be held to a standard of performance comporting with experienced counsel in death penalty trials and that failure to investigate or present mitigating evidence is presumed unreasonable and prejudicial). There may be certain cases where it is a reasonable judgment not to present mitigating evidence. However, it still must be determined if counsel engaged in

It is not enough to conclude that counsel acted effectively during the guilt phase of the trial;<sup>289</sup> counsel's representation must also be measured at the penalty phase. More specifically, the Court must assess counsel's conduct in regard to the particular investigative and trial practices necessary to protect the defendant's rights.<sup>290</sup> Otherwise, capital defendants are being denied a fair and adversarial sentencing hearing as well as their sixth amendment right to effective counsel. In this light, the *Strickland* decision becomes just as difficult to reconcile with the Court's prior pronouncements guaranteeing heightened procedural safeguards to capital defendants.

#### D. SYNTHESIZING *BAREFOOT*, *WITT*, AND *STRICKLAND*

Some troubling implications in regard to the direction of capital punishment jurisprudence emerge from these decisions. *Barefoot* seems to stand for the proposition that less process is due capital defendants because death is different and it is time to rectify the problem of overcrowding on death rows.<sup>291</sup> In the alternative, *Witt* and *Strickland*, by their failure to differentiate capital cases from non-capital cases, where clearly distinct procedural issues come into play, suggest that there is to be no more process afforded to capital defendants than that of noncapital litigants.<sup>292</sup> These propositions would not prove so disturbing perhaps if it were not for the fact that not too long ago, the Court, in monitoring death sentences, primarily focused on the procedures by which death sentences were imposed.<sup>293</sup> The Court in *Barefoot*, by creating expedient procedures for the sake of accommodating capital punishment, drastically undermines the aura of reliability surrounding sentences imposed under such procedures. The Court in *Witt* and *Strickland*, by applying open ended standards to determine the effectiveness of counsel and the propriety of excluding certain death penalty opponents from sitting on juries, rather than those specifically structured to accommodate the specialized procedures involved in capital cases,

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an investigation to discover this evidence in order to serve as a basis for making the decision. See Goodpaster, *supra* note 264, at 84 n.116.

<sup>289</sup> See Goodpaster, *supra* note 257, at 360-61.

<sup>290</sup> *Id.*

<sup>291</sup> Geimer, *Death at any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737, 762 (1985).

<sup>292</sup> *Id.*

<sup>293</sup> See, e.g., *California v. Ramos*, 463 U.S. 992 (1983); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion). The Court indicates that in light of the procedural rights involved, claims of capital defendants should be process-oriented and not result-oriented. See Fong, *supra* note 261, at 490.

opens the door to arbitrary application of the death penalty.<sup>294</sup> In earlier days, death sentences inflicted as a result of arbitrary and unreliable procedures led the Court to conclude that capital punishment was unconstitutional when imposed under such procedures.<sup>295</sup> Although the risk of arbitrariness and unreliability created by *Barefoot*, *Witt*, and *Strickland* is not identical to that found in *Furman* and its progeny, the result of imposing death sentences in accordance with today's procedures may nevertheless push capital punishment "toward the precipice of unconstitutionality."<sup>296</sup>

## VI. PROCEDURAL LIMITATIONS AND DEATH PENALTY CASES

The arguments indicating disapproval of the recent limitations restricting liberal allowance of federal habeas review take on special significance in criminal cases that involve the death penalty. This is especially true since many of the Court's concerns in establishing these limitations are not relevant to death penalty cases. Additionally, death penalty cases often pose certain problems that are absent from noncapital cases.

For example, the Supreme Court has previously indicated the importance of the state's right to convict and sentence its criminals without federal interference, thereby promoting judicial comity. The importance of this right was emphasized in *Rose v. Lundy*,<sup>297</sup> a noncapital case.<sup>298</sup> "State interests, however, cannot always prevail over the defendant's interest in meaningful enforcement of constitutional rights."<sup>299</sup> In capital cases, federal and state courts should be particularly willing to allow this concern for comity to succumb to the overriding interest of state and federal governments in preserving the lives of their citizens.<sup>300</sup> Although it may be appropriate to restrict federal habeas review in the interest of limiting undue federal interference in state affairs when the petitioner only faces a prison term, it would seem inappropriate when the petitioner faces execution.<sup>301</sup> Moreover, even if, as Justice Stevens noted, "the interest in imposing the death sentence is essentially a state interest,"<sup>302</sup> federal courts still "have a compelling interest in ensuring that states impose the death penalty in a constitutionally permissible

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<sup>294</sup> See Carr, *supra* note 227, at 448-49.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 448.

<sup>297</sup> 455 U.S. 509 (1982).

<sup>298</sup> See *supra* notes 55 & 147-48 and accompanying text.

<sup>299</sup> See *Capital Punishment*, *supra* note 173, at 1210.

<sup>300</sup> *Id.* at 1209.

<sup>301</sup> *Id.* at 1210.

<sup>302</sup> *Coleman v. Balkcom*, 451 U.S. 949, 950 (1981) (order denying certiorari).



fashion."<sup>303</sup>

Liberal allowance of federal habeas review has also been attacked on the grounds that the federal court has an interest in relieving itself from the drain on judicial resources resulting from the filing of habeas corpus petitions with the Supreme Court.<sup>304</sup> This interest may be justified by the fact that many of the claims in habeas corpus cases have been previously considered by various courts.<sup>305</sup> The use of expedited review, as approved by the Supreme Court in *Barefoot*, may be a particularly valuable way to remedy this concern. However, while it is true that these summary proceedings will inevitably result in the Court's ability to handle a larger number of cases, such a quantitative increase may prove unjustifiable if it reduces the reliability of the review by requiring federal courts to give less consideration to the merits of these cases.<sup>306</sup> In death penalty cases this risk may violate the principles espoused in *Furman* and its progeny. One final note is that basing justification of summary proceedings on notions of judicial expense simply ignores the evidence indicating that many of these death penalty habeas corpus cases are meritorious.<sup>307</sup>

The Court has consistently stressed its concern over the need for finality in criminal proceedings to justify dispensing with the procedural protections afforded by federal habeas corpus.<sup>308</sup> The

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<sup>303</sup> See *Capital Punishment*, *supra* note 173, at 1210.

<sup>304</sup> See *Weick*, *supra* note 117, at 747-748; see also *Kuhlmann v. Wilson*, 477 U.S. 436, 453 n.16 (1986) (citing *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982) ("unlimited availability of federal collateral attack burdens our criminal justice system as successive petitions divert the time of judges, prosecutors, and lawyers' from the important task of trying criminal cases")).

<sup>305</sup> Justice Powell observed:

When raised on federal habeas, a claim generally has been considered by two or more tiers of state courts. It is the solemn duty of these courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law. The task which federal courts are asked to perform on habeas is thus most often one that has or should have been done before. The presumption that "if a job can be well done once, it should not be done twice" is sound and one calculated to utilize best "the intellectual, moral and political resources involved in the legal system."

*Habeas Corpus - Expedited Appellate Review of Habeas Corpus Petitions Brought by Death-Sentenced State Prisoners*, 74 SUPR. CT. REV. 1404, 1423 (1983) (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 259 (1973)).

<sup>306</sup> See *supra* notes 207-211 and accompanying text. This has been the very concern raised by some commentators and Supreme Court Justices.

<sup>307</sup> See *supra* note 396 and accompanying text.

<sup>308</sup> See, e.g., *Rose v. Lundy*, 455 U.S. 509, 528 (1982) (Blackmun, J., concurring); *Kuhlmann v. Wilson*, 477 U.S. 436, 453-4 n.16 (1986) (quoting *Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148-49 (1970)); *Engle v. Isaac*, 456 U.S. 107, 127-28 n.32 (quoting *Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963)).

*Barefoot* decision seemed to reveal a specific concern that capital defendants will use federal habeas corpus "to delay an execution indefinitely."<sup>309</sup> This may be attributable to the fact that, unlike noncapital defendants, capital defendants gain little benefit from expediting the process.<sup>310</sup> However, if the Court's concern for delay is particularly accented in capital cases due to a special incentive on the part of capital defendants to engage in piecemeal litigation,<sup>311</sup> requiring a petitioner to exhaust state remedies is even less workable in achieving this goal than it is in noncapital cases. Perhaps the better approach, in furtherance of this goal, would be to permit the states to waive exhaustion.<sup>312</sup> Regardless of the validity of the Court's concern for such delays in capital cases, it is significantly minimized in light of the fact that these cases present a unique need for delay.<sup>313</sup> This is evident because noncapital defendants can begin to serve their sentence before appeals are reviewed, while capital defendants obviously cannot do the same.<sup>314</sup> Additionally, some members of the Supreme Court and some commentators have noted that the delays that occur between imposition of the death sentence and execution are unavoidable.<sup>315</sup>

While it may be conceded that the state's interest in finality is sufficient to justify limiting federal habeas corpus for noncapital de-

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<sup>309</sup> *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

<sup>310</sup> See *Morris*, *supra* note 38, at 377 nn.45-46 and accompanying text ("Capital defendants, on the other hand gain little advantage from expediting the process. Since most capital defendants do not contest their convictions, but only their sentence, a victory on appeal usually means a life sentence.").

<sup>311</sup> See *Barefoot*, 463 U.S. at 895 ("To the extent that these [successive petitions] involve the danger that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic, the State has quite a legitimate interest in preventing such abuses of the writ.").

<sup>312</sup> See *Thomas V. Wainwright*, 714 F.2d 1495, 1506 n.10 (11th Cir. 1983) (suggested that while permitting waiver of exhaustion furthers the interest in finality and the avoidance of piecemeal litigation, an alternative approach "which takes into account the fact that death is involved" would be to allow a continuance while petitioner exhausts his own claims). But see *Morris*, *supra* note 38, at n.59.

<sup>313</sup> See *Morris*, *supra* note 38, at 378.

<sup>314</sup> *Id.* at 378 n.47.

<sup>315</sup> Justice Stevens explains that given bifurcated punishment hearings, "post-trial proceedings in trial court, direct and collateral review in the state judicial system, collateral review in the federal system, and clemency review . . . it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution." *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens J., concurring) (order denying certiorari). See Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 927 (1982), which states:

Whatever view one takes of the deterrent capacity of the death penalty when it is the swift and certain result of criminal activity, the current, roller coaster system—though absolutely necessary to protect the innocent from execution, to safeguard basic constitutional rights, and to avoid racially motivated executions—makes swift and certain executions impossible.

fendants, this interest is not sufficient to override the capital petitioner's interest in having his claims considered on the merits. This insufficiency becomes evident when viewing the various states' actions in the death penalty area. It is first shown by the prevailing practice in many states that courts have special obligations that attend the review of death penalties.<sup>316</sup> More importantly, it must be stressed that the state courts themselves have generated the largest number of reversals on a wide range of state law grounds.<sup>317</sup> It has been recognized that all states cannot possibly have the same interest in accelerating the execution rate.<sup>318</sup> Moreover, this notion of the need for finality in judgment is hardly a novel concern. In essence, then, the states' interest in finality argument merely acts as a scapegoat to justify the Court's primary mission—to bar federal habeas review for capital defendants.

Moreover, this unique need for delay in capital cases has led to the misconceived view that death-sentenced defendants intentionally withhold claims and raise them successively.<sup>319</sup> However, Justice Brennan has previously criticized this fear of intentional delay.<sup>320</sup> The argument that lawyers would not risk forfeiting claims by intentionally withholding them is particularly applicable to death penalty cases because a lawyer is even less apt to take such a risk when a life is at stake. Furthermore, the Supreme Court's more recent indication of its desire to restrict successive petitions<sup>321</sup> provides even less incentive to intentionally withhold claims.

In addition, the Court, by allowing for summarily dismissing successive petitions in capital cases, ignores that in the area of capital successive petitions there exists an especially critical need for a relaxation of the standards applied to successive habeas petitions in

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<sup>316</sup> See *supra* note 179.

<sup>317</sup> State law grounds include the following: conviction of a crime different from that charged in the indictment, failure to charge concerning the availability of witnesses, admission of hearsay evidence, refusal to sever the trial of two defendants when counsel has a conflict of interest, failure to sequester the jury, misunderstanding about plea bargain agreements, and prosecutorial vindictiveness for refusal to plea bargain. See Greenberg, *supra* note 315, at 921-22.

<sup>318</sup> Justice Stevens stated in *Coleman v. Balkcom*, 451 U.S. 949, 950 (1981):

Because the persons on death row are concentrated in only a few States, because some States have no capital punishment at all, and because the range of capital offenses differs in different States, it is quite clear that all States do not share the same interest in accelerating the execution rate.

<sup>319</sup> See *Morris*, *supra* note 38, at 378.

<sup>320</sup> See *supra* notes 100-105 and accompanying text.

<sup>321</sup> See *Morris*, *supra* note 38, at 388 & n.84 and accompanying text (where it is argued that because courts are no longer lenient towards successive petitions, withholding claims is not sound judgment).

the noncapital case.<sup>322</sup> This is due to the unique procedural situation which arises for capital defendants, sometimes forcing them to use successive habeas petitions.<sup>323</sup> As a result of the Court's decision in *Lundy*,<sup>324</sup> all claims presented in a federal habeas petition must first be presented and ruled upon in the state courts.<sup>325</sup> The frequent result from the interaction of state and federal rules is the state courts' refusal to stay an execution date, which forces the defendant to request a stay from the federal courts by filing a habeas petition.<sup>326</sup> However, the requirement of exhaustion prevents the defendant from bringing all valid claims into federal court in the first petition if the state courts have not completed their review simultaneously.<sup>327</sup>

The capital defendant is therefore faced with two choices: 1) request a stay, resulting in execution, or 2) request a stay on some but not all claims or raise them successively.<sup>328</sup> The federal court's new approach to successive petitions, however, following the lead set by the Supreme Court,<sup>329</sup> provides for the possible dismissal of any issue raised on successive petitions. The capital defendant must therefore involuntarily forego constitutional claims whether meritorious or not; if he chooses to exhaust all of his claims, he runs the substantial risk that he will not be alive to pursue them. In this light, the capital defendant is provided with less protection than the noncapital defendant.<sup>330</sup> While the noncapital defendant can wait for the exhaustion of claims before entering federal court, the capital defendant is forced into federal court early to avoid execution. As Justice Frankfurter noted, "The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules, which by avoiding some abuses, generate others."<sup>331</sup>

The Court's new approach to successive petitions creates fur-

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<sup>322</sup> *Id.* at 379-80 & nn.50-53.

<sup>323</sup> *Id.*

<sup>324</sup> *Rose v. Lundy*, 455 U.S. 509 (1982).

<sup>325</sup> *Id.* at 522.

<sup>326</sup> See *Morris*, *supra* note 38, at 379.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 380.

<sup>329</sup> See *Spenkelink v. Wainwright*, 442 U.S. 906 (1979) (denying stay of execution).

<sup>330</sup> It should be noted that the severity of the *Sanders* limitations proves less detrimental to the noncapital petitioner. He or she has the opportunity to return to court years after the conviction and successfully raise new or unadjudicated challenges to incarceration. See *Hobbs v. Peppersack*, 206 F. Supp. 301 (D. Md. 1962) (granting relief on eight federal habeas petitions). This is not so for the capital defendant.

<sup>331</sup> *Brown v. Allen*, 344 U.S. 443, 498 (1953) (Frankfurter, J., concurring).

ther problems that are especially detrimental to capital defendants because the new approach does away with the "ends of justice" test for relitigated claims. This may not be such a high price to pay for noncapital defendants since it is arguable that unless the initial proceeding was somehow lacking, the questions of justice should have been resolved in the first petition. However, for capital defendants the "ends of justice" exception, allowing for reconsideration of a claim, acts as a safeguard against mistake in the imposition of a death sentence.<sup>332</sup>

The Court's application of summary dismissals to capital cases is particularly shocking in the area of "new law" and "new fact" claims. This is evidenced when viewing the Court's treatment of the *Stephens v. Kemp* case.<sup>333</sup> Stephens, in his second petition for federal habeas relief, contended that a new study demonstrating the "arbitrary and unequal imposition of capital punishment based upon the race of the defendant and the race of the victim,"<sup>334</sup> constituted "newly discovered evidence" as articulated in *Townsend*.<sup>335</sup> At the time Stephens filed his second petition, the Eleventh Circuit was considering in several other cases the identical evidence that Stephens presented in his petition. Nevertheless, the district court summarily dismissed Stephens' petition as an "abuse of the writ," holding that although the new studies constituted "newly discovered evidence" for purposes of permitting relief on a first petition for habeas review, the identical studies did not constitute "newly discovered evidence" for purposes of securing relief on a second petition.<sup>336</sup> The Supreme Court denied certiorari and vacated the stay of execution "notwithstanding the continued pendency of the discrimination issue before the Eleventh Circuit."<sup>337</sup>

It has been settled that "newly discovered evidence" is "evidence which could not reasonably have been presented by the petitioner in the earlier proceeding."<sup>338</sup> Therefore, the lower court's rejection of Stephens' statistical evidence, premised on the ground that "[n]othing prevented the compilation of this information prior

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<sup>332</sup> See *Morris*, *supra* note 38, at 384.

<sup>333</sup> *Stephens v. Kemp*, 469 U.S. 1043 (1984).

<sup>334</sup> *Stephens v. Kemp*, 578 F. Supp. 103 (M.D. Ga. 1983).

<sup>335</sup> 372 U.S. 391 (1980).

<sup>336</sup> *Stephens*, 578 F. Supp. at 108.

<sup>337</sup> *Stephens*, 469 U.S. at 1044 (Brennan, J., dissenting). But see *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), where it was held that statistics on Georgia death penalty statute did not demonstrate prima facie case in support of contention that death penalty was imposed upon petitioner because of his race or because of the race of the victim.

<sup>338</sup> *Stephens*, 469 U.S. at 1051 (Brennan, J., dissenting) (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)); see also *id.* at n.10 (*Townsend* test for "newly discovered evidence" is the same whether first or second petition).

to this late date,"<sup>339</sup> renders Congress's instruction, that newly discovered evidence be given fair consideration, meaningless. As Justice Brennan notes "'newly discovered evidence' by definition always existed at an earlier time; the inquiry, rather, is whether the petitioner *reasonably* either did not know about it or could not have presented it at an earlier proceeding."<sup>340</sup> Since in the instant case it is clearly apparent that the statistical studies were unavailable at the time Stephens filed his first habeas petition,<sup>341</sup> we are left with an irrational situation. The possibility of preventing an execution due to "newly discovered evidence" should not depend on whether the defendant has filed a first habeas petition at the time this new evidence became available.<sup>342</sup>

This case raises a further question as to the propriety of the Court's treatment of successive petitions claimed to be an "abuse of the writ," "particularly where a human life hangs in the balance."<sup>343</sup> It has long since been established under *Sanders* that if a petitioner, in response to a State's allegation of abuse of the writ, pleads facts that, if true, would entitle the petitioner to relief, he must receive an evidentiary hearing.<sup>344</sup> The district court held that Stephens did in fact receive this evidentiary hearing at which time he failed to adequately "proffer" the new studies.<sup>345</sup> However, the purpose of this alleged "evidentiary hearing" was to "clarify whether (1) Stephens' execution should be stayed and (2) whether and to what extent an evidentiary hearing was necessary to resolve the underlying merits of Stephens' petition."<sup>346</sup> Moreover, counsel insisted that Judge Owen's law clerk informed them that they were not expected to bring witnesses to the oral argument.<sup>347</sup> Finally, it is worthy of note that five of the dissenters had no problem reaching the conclusion that "the hearing held by the district court on November 15, 1983 was not an evidentiary hearing."<sup>348</sup> Until this decision, it seemed to be a long-standing principle that "[d]ue process of law . . . does not allow a hearing to be held . . . without giving [petitioners] timely notice, in advance of the hearing, of the specific issues that they

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<sup>339</sup> *Stephens*, 578 F. Supp. at 107.

<sup>340</sup> *Stephens*, 469 U.S. at 1051.

<sup>341</sup> *Id.*

<sup>342</sup> See *Morris*, *supra* note 38, at 385.

<sup>343</sup> *Stephens*, 469 U.S. at 1054 (Brennan, J., dissenting).

<sup>344</sup> *Sanders v. United States*, 373 U.S. 1, 21-22 (1962).

<sup>345</sup> *Stephens*, 469 U.S. at 1044 (Brennan, J., dissenting).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 1045-46.

<sup>348</sup> *Stephens v. Kemp*, 722 F.2d 627, 628 n.3 (M.D. Ga. 1983).

must meet.”<sup>349</sup> In fact, even though it has been established that expedited briefings and hearings are permissible in capital cases,<sup>350</sup> they are permissible only under the condition that counsel has “adequate opportunity to address the merits and knows that he is expected to do so.”<sup>351</sup> This principle seems to apply with greater force in a case like the one at hand, where there exists “uncontradicted record evidence that counsel in fact were affirmatively advised not to bring their witnesses to the argument” and where petitioner “unknowingly had and lost his only chance to avoid execution.”<sup>352</sup>

Moreover, the impact of the *Kuhlmann* decision as well as the criticisms resulting therefrom take on enhanced significance when viewing the lower federal courts’ application of this decision in death penalty cases. In *Jones v. Henderson*,<sup>353</sup> the court concluded that since a common ground existed between the plurality and the Steven’s dissent, courts may consider whether there are “colorable claims of innocence” when presented with successive habeas petitions. The court then instructed the district court that on remand, in determining whether to review the petition on the merits, “it is free to consider whether the petitioner has supplemented his claim with a colorable showing of innocence just as it may consider whether an intervening change in the law has taken place.”<sup>354</sup> This position was criticized by the dissent as being an unreasonable application of the *Sanders* “ends of justice” test:

Since less than a majority of the Court has taken the position that the *Sanders* test is so modified, I would not suggest to the district court, especially in a case involving a constitutional right having value reaching beyond the trial court’s truth-seeking function, that it need not entertain a repetitive writ that is based on intervening developments in the law regarding that right simply because no colorable showing of innocence has been made.<sup>355</sup>

Moreover, in *Messer v. Kemp*,<sup>356</sup> a case that involved the filing of a successive petition on the grounds that the *Ake*<sup>357</sup> decision constituted an intervening change in the law, the court, while acknowledging that *Kuhlmann* has not substantially changed the *Sanders* “ends of

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<sup>349</sup> 469 U.S. at 1055 (Brennan, J., dissenting) (citing *In re Gault*, 387 U.S. 1, 33-34 (1967)).

<sup>350</sup> *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983).

<sup>351</sup> *Id.*

<sup>352</sup> 469 U.S. at 1056.

<sup>353</sup> 809 F.2d 946 (2d Cir. 1987).

<sup>354</sup> *Id.* at 952.

<sup>355</sup> *Id.* at 954 (Kearse, J., concurring).

<sup>356</sup> 647 F. Supp. 1035 (N.D. Ga. 1986).

<sup>357</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

justice" test, goes on to conclude that since *Kuhlmann* indicates the importance of the "colorable showing of factual innocence" factor, it would be inappropriate to give the change in intervening law alone controlling weight and is therefore insufficient to require consideration.<sup>358</sup> The significance of this stance becomes apparent due to the fact that before the *Kuhlmann* decision, an intervening change in law "seemed to guarantee reconsideration in the Eleventh Circuit."<sup>359</sup> This, coupled with the fact that the court acknowledged that a man's life being at stake is a "weighty factor" that "the Court fully appreciates"<sup>360</sup> "in the ends of justice determination, indicates that the impact of the *Kuhlmann* decision is not as trivial as previously implied."<sup>361</sup>

Moreover, although every defendant, whether capital or not, should be guaranteed an opportunity to present new evidence that casts a doubt on the reliability of the conviction, this right becomes particularly crucial to capital defendants.<sup>362</sup> Because capital sentencing procedures have the potential to lead to unwarranted death-sentences, there exists a "far more subtle type of 'new' evidence [in these cases]: evidence which should have been introduced in mitigation during the sentencing phase of a capital trial."<sup>363</sup> "Because many of the attorneys who handle capital cases are inexperienced in death penalty proceedings . . ."<sup>364</sup> and also because capital cases require additional "insight and effort beyond that required in most non-capital cases,"<sup>365</sup> it is not a rare occurrence that lawyers fail to introduce evidence which should have been asserted to dissuade the jury from imposing death.<sup>366</sup> Thus, the risk posed by summarily dismissing successive petitions involving "new facts" becomes especially egregious in capital cases since, given the severity of the sentence, it is particularly arguable that these defendants not be penalized for lack of due diligence on the part of trial counsel in fully investigating the case.

Much of the criticisms resulting from the Court's decision in *Smith*<sup>367</sup> lie within these parameters. In *Smith*, the Court extended

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<sup>358</sup> *Id.* at 1043.

<sup>359</sup> *Id.* at 1043 n.9.

<sup>360</sup> *Id.* at 1043.

<sup>361</sup> See *supra* notes 355-60 and accompanying text. But see *Moore v. Kemp*, 824 F.2d 847 (11th Cir. 1987).

<sup>362</sup> See *Morris*, *supra* note 38, at 385.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 386.

<sup>365</sup> *Id.* at 386 n.74; see also *supra* notes 217-18 and accompanying text.

<sup>366</sup> See *Morris*, *supra* note 38, at 386.

<sup>367</sup> *Smith v. Murray*, 477 U.S. 527 (1986).



its decision in *Carrier*<sup>368</sup> to hold that the petitioner forfeited his constitutional claim as to admission of psychiatric testimony, at the sentencing phase of a capital proceeding, by failing to raise it on direct appeal.<sup>369</sup> The Court, by stating that "we reject the suggestion that principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a state imposes for the violation of its criminal laws,"<sup>370</sup> indicates its refusal to allow the defendant's interests in vindicating constitutional rights to prevail over state concerns of comity, federalism, and finality, even in a capital case. In light of the fact that the Court recently reiterated "that execution is the most irremediable and unfathomable of penalties; that death is different,"<sup>371</sup> Justice Brennan noted in his dissent in *Carrier*:

Even if I did not believe that this difference in the State's interests was sufficient to require holding that counsel's inadvertence constitutes cause, there is an additional difference in the defendant's interests that compels this conclusion in *Smith v. Murray*: the fact that it is a capital case. To the extent that . . . the definition of cause requires consideration of the interests of the defendant as well as of the State, it strikes me as cruelly unfair to bind a defendant to his lawyer's inadvertent failure to prevent prejudicial constitutional error thus barring access to federal review—where the consequence to the defendant is death.<sup>372</sup>

Justice Brennan further suggests that "against this background of special concern, 'comity' and 'federalism' concerns simply do not require such an exercise of this Court's discretion in capital cases."<sup>373</sup>

A further concern emanating from *Smith*<sup>374</sup> involves the fact that the Court allowed a constitutional violation, one recognized as of great importance in a capital sentencing proceeding,<sup>375</sup> to go unexamined when a life is at stake due to a procedural bar. The implication of the Court's holding, that only a claim involving "actual innocence" rises to the level of a miscarriage of justice,<sup>376</sup> is

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<sup>368</sup> 477 U.S. 478 (1986).

<sup>369</sup> *Smith*, 477 U.S. at 539.

<sup>370</sup> *Id.* at 538.

<sup>371</sup> *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

<sup>372</sup> *Murray v. Carrier*, 477 U.S. 478, 525-26 (1986) (Brennan, J., dissenting).

<sup>373</sup> *Id.*

<sup>374</sup> 477 U.S. at 527.

<sup>375</sup> Chief Justice Burger's opinion for the Court in *Estelle v. Smith*, 451 U.S. 454 (1981), makes it clear that the introduction by the prosecution, at the sentencing phase, of petitioner's comments to the court-appointed psychiatrist violated the fifth amendment. The Court stated that fifth amendment rights apply to capital sentencing proceedings: "Just as the fifth amendment prevents a criminal defendant from being made the deluded instrument of his own conviction; it protects him as well." *Id.* at 461.

<sup>376</sup> *Smith*, 477 U.S. at 542-43 (Stevens, J., dissenting).

unreasonable at best. As Justice Stevens pointed out in his dissent in *Smith*, this position is apposite to the Court's previous understanding of habeas corpus.<sup>377</sup> The Court itself has specifically rejected the view that the presence of a serious constitutional violation was actually an inquiry into the guilt or innocence of the petitioners. In *Moore v. Dempsey*,<sup>378</sup> the Court stated that "what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."<sup>379</sup> Along these lines, Justice Brennan more recently stated, "The constitutional rights of criminal defendants are granted to the innocent and guilty alike."<sup>380</sup>

Thus, Justice Stevens noted that if accuracy in guilt or innocence were the only value of our criminal justice system, then many of our constitutional protections, such as the fifth amendment right against self-incrimination and the eighth amendment right against cruel and unusual punishment, would become irrelevant.<sup>381</sup> Justice Stevens continued by recognizing the significance of our constitutional framework and our decision to adopt an accusatorial system of justice:

Our Constitution, however, and our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice, reflect a different choice. That choice is to afford the individual certain protections—the right against compelled self-incrimination and the right against cruel and unusual punishment among them—even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty and individual dignity that our society affords to all, even those charged with heinous crimes. . . . Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination and the statutory duty to serve "law and justice" should simply reflect those values.<sup>382</sup>

The Court's failure to adhere to this choice may unfortunately render Justice Brennan's fear, that "we have lost our sense of the transcendent importance of the Bill of Rights to our society,"<sup>383</sup> a truth.

The injustice of the Court's extension of *Carrier* to capital cases

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<sup>377</sup> *Id.* at 543.

<sup>378</sup> 261 U.S. 86 (1923).

<sup>379</sup> *Id.* at 87-88.

<sup>380</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986); *see also* *Walberg v. Israel*, 766 F.2d 1071, 1077-78 (7th Cir. 1985) (Posner, J.). *But see* *Kuhlmann v. Wilson* 477 U.S. 436, 452-54 (1986) (Powell, J., plurality opinion).

<sup>381</sup> *Smith*, 477 U.S. at 544 (Stevens, J., dissenting).

<sup>382</sup> *Id.* at 544-45.

<sup>383</sup> *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting).

is further evidenced when considering that many of the policy concerns underlying the *Sykes* and *Carrier* decisions are irrelevant in the context of death penalty cases. For example, the Court in *Sykes* espoused the notion that liberal excusal of procedural forfeitures detracts from the prominence of the trial as the "main event."<sup>384</sup> Moreover, the Court recognized that procedural forfeitures promote the state's ability quickly to resolve any constitutional issues that may arise.<sup>385</sup> However sound these concerns, they conflict with the realities of death penalty trial proceedings. Regardless of whether it is a capital or noncapital case, it proves highly unreasonable to expect counsel to raise all possible constitutional issues at the trial stage.<sup>386</sup> In fact, requiring counsel to raise all conceivable but undeveloped issues "might actually disrupt state court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, someday, gain recognition."<sup>387</sup>

This requirement would be particularly unrealistic in death penalty cases because the range of issues with which counsel must deal and have knowledge substantially increases from those involved in noncapital cases.<sup>388</sup> In addition, unlike for a noncapital defendant, "the focus and attention of the state is never removed from the capital inmate [and] the state is on notice to retain evidence and preserve important testimony in preparation for the inevitable capital appeals."<sup>389</sup> Thus, the Court's assertion that the trial is the "main event" breaks down when applied to death penalty law because it fails to take into account the complexity and character of the issues involved.<sup>390</sup>

Another policy consideration underlying *Sykes* as well as many of the Court's other habeas corpus opinions involves another aspect of the notion of finality, that is, the concern for the convict's need "to get on with the process of rehabilitation." As Justice Harlan once observed:

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not

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<sup>384</sup> See *supra* note 89.

<sup>385</sup> See *supra* note 13.

<sup>386</sup> See Catz, *supra* note 17, at 1212.

<sup>387</sup> *Reed v. Ross*, 468 U.S. 1, 15-16 (1984).

<sup>388</sup> See Catz, *supra* note 17, at 1212 ("[T]he attorney in these cases also must be concerned with developing evidence of mitigating circumstances, the heightened public attention given to the trial, [and] jury qualification under *Witherspoon*.").

<sup>389</sup> See *Morris*, *supra* note 38.

<sup>390</sup> Catz, *supra* note 17, at 1212.

on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.<sup>391</sup>

This concern is of extreme importance to the defendant who faces a death sentence because the only finality of interest involved is the finality of death.<sup>392</sup> As Justice O'Connor stated, the question of whether the prisoner is in fact capable of rehabilitation is answerable only after a "careful and comprehensive review of society's decision to kill one of its members."<sup>393</sup> In this light then, denying habeas review prematurely for capital defendants is counterproductive to the concept of rehabilitation.<sup>394</sup>

Another criticism of the Court's application of the *Sykes* cause and prejudice test in *Smith* involves the Court's concern with the guilt-innocence determination rather than with constitutional errors not reflecting on that inquiry. The problem arises because the Court seems to interject its "colorable showing of factual innocence" test, apparently created to focus on the need for this guilt-innocence determination, where it does not logically apply. As Justice Brennan noted in his dissent in *Kuhlmann*:

[I]t is unclear what relevance the plurality's standard would have in a case in which a prisoner alleges constitutional error in the sentencing phase of a capital case. Guilt or innocence is irrelevant in that context; rather there is only a decision made by representatives of the community whether the prisoner shall live or die.<sup>395</sup>

Along these lines, I submit that while attorney error may be justifiable in denying a petitioner federal court review in an ordinary case, it should at least entitle the habeas petitioner in a capital case to such review.

#### VII. THE ADOPTION OF PROCEDURES AFFORDING A LESSER CHANCE FOR FEDERAL REVIEW ON THE MERITS OF A CAPITAL CASE IS NOT WARRANTED

The Supreme Court, in formulating obstacles to habeas review, has lost sight of the fact that

between 1976, when the Supreme Court restored the death penalty in *Gregg v. Georgia*, and 1983, the federal courts of appeals—when they reached the merits of the petition on habeas review—had decided more than 73% of the capital cases in favor of the death-sentenced prisoner. This number stands out starkly against the rate of success

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<sup>391</sup> *Id.* (quoting from *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).

<sup>392</sup> *Id.* at 1212-13.

<sup>393</sup> *Id.* at 1213.

<sup>394</sup> *Id.*

<sup>395</sup> *Kuhlmann v. Wilson*, 477 U.S. 436, 471-72 n.7 (1986) (Brennan, J., dissenting).

for appeals in non-capital habeas cases—typically less than 7%.<sup>396</sup> This high reversal rate in habeas death cases strongly supports the view that the Court's adoption of limitations, restricting such review for condemned persons, is unwarranted.<sup>397</sup> The Court should endeavor to conclude that numerous errors in capital cases are likely to occur in the future as well.<sup>398</sup> "This becomes evident when viewing the various grounds that Courts have found in the past for requiring these reversals."<sup>399</sup> For example, "[t]here have been at least six recent cases where defendants sentenced to death were [subsequently found innocent]."<sup>400</sup> Others were either retried and convicted of noncapital offenses after having their convictions reversed or were resentenced to less than a life sentence after having their sentences vacated.<sup>401</sup> An even larger number of cases have held that the capital defendant was convicted in violation of the Federal Constitution.<sup>402</sup> The Supreme Court itself has continued to reverse capital sentences for various reasons.<sup>403</sup>

Perhaps the severe impact of the Court's recent attempts to foreclose habeas review for capital defendants is best illustrated by the events leading up to the release of the defendants in the *Pitts* case. In this case, the defendants' convictions were set aside on the grounds of newly discovered evidence.<sup>404</sup> A new trial was commenced and the defendants were convicted a second time.<sup>405</sup> Curtis Adams later confessed to murders for which the defendants had been sentenced, and the defendants were pardoned. This situation, where a defendant is released after another person's confession to the crime was corroborated, is not as rare an occurrence as one may think.<sup>406</sup> Although in these cases the defendants' lives were spared, they bring to surface one of the most disturbing aspects of the Supreme Court's present willingness to abandon full review of

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<sup>396</sup> See Robbins, *Wither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 285 (1986) (citing Brief of Amicus Curiae NAACP Legal Defense and Education Fund, Inc. at app. E 1b-1b, *Barefoot v. Estelle*, 463 U.S. 880 (1983)).

<sup>397</sup> See Greenberg, *supra* note 315, at 919.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 920.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* at 921 ("The Supreme Court has [reversed] capital sentences based upon *Witherspoon*, the vagueness of the sentencing statute, ex parte consultation of probation reports to the judge, double jeopardy, and admission of impermissible psychiatric testimony.")

<sup>404</sup> See *Pitts v. State*, 166 So. 2d 131 (Fla. 1964).

<sup>405</sup> See *Pitts v. State*, 307 So. 2d 473 (Fla. Dist. Ct. App. 1975).

<sup>406</sup> See Greenberg, *supra* note 315, at 920 & n.68.

death penalty cases: the exacerbated risk that will inevitably result in the taking of innocent lives due to uncorrected errors. Does such an approach have any place in a civilized and sensibly administered system of justice?

Before one can answer such a question, perhaps it is necessary to determine why the Court might adopt procedures that dispense with this particular need for reliability in capital cases. Justice Marshall's suggestion in *Barefoot*<sup>407</sup> provides some guidance by pointing out that "the only hint of a possible rationale," for adopting special summary procedures solely for capital cases is the Court's quotation of a statement in *Lambert v. Barrett*.<sup>408</sup> The quotation suggests that the Court's approval of summary procedures rests on an assumption that appeals by prisoners under sentence of death are generally frivolous.<sup>409</sup> However, it is apparent from the historical evidence that this assumption is totally without merit.<sup>410</sup> Furthermore, even if frivolous claims did present a recurring problem in capital habeas cases, it can easily be managed. The requirement of obtaining a certificate of probable cause before appeal was inserted in the Federal Rules to thwart such claims.<sup>411</sup> Perhaps the strongest repudiation of the Court's willingness to tolerate such limitations on habeas review in death penalty cases was written by Justice Blackmun in his dissent in *Darden v. Wainwright*:

Although the Constitution guarantees a criminal defendant only a fair trial and not a perfect one . . . this Court has stressed repeatedly in the decade since *Gregg* . . . that the Eighth Amendment requires a heightened degree of reliability in any case where a state seeks to take the defendants' life. Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.<sup>412</sup>

This statement could have as easily been written in response to other Supreme Court decisions previously mentioned in this note, specifically those that have created procedural formulations allowing for habeas review to be severely limited for capital defendants.<sup>413</sup>

However, it is the Court itself that provides the ammunition needed to make the job of establishing the illegitimacy of the Court's new procedures one of relative ease. The Court recently

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<sup>407</sup> *Barefoot v. Estelle*, 463 U.S. 880, 914 (1983).

<sup>408</sup> *Id.* at 914 (citing *Lambert v. Barrett*, 159 U.S. 660, 662 (1895)).

<sup>409</sup> *Id.* at 914-15 (Marshall, J., dissenting).

<sup>410</sup> See *supra* notes 396-99 and accompanying text.

<sup>411</sup> See *supra* note 177.

<sup>412</sup> 477 U.S. 168, 188-9 (1986) (Blackmun, J., dissenting).

<sup>413</sup> See *supra* notes 181-4.

advanced in *Ford v. Wainwright*<sup>414</sup> the notion that "the minimum assurance that the life and death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely an opportunity to be allowed to substantiate a claim before it is rejected."'<sup>415</sup> The Court further announced that "the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims . . . ."<sup>416</sup> The Court, by setting forth these pronouncements, intimates precisely the problem with its new procedures. By both applying lenient standards, whether to determine either effective assistance of counsel or when to exclude a juror for bias, and allowing for summarily dismissing successive petitions, summary proceedings, and denial of review due to procedural defaults, the Court sanctions the very result feared: the inability to provide redress for those with substantial claims. This becomes evident because, as in the case of procedural defaults, the merits of the petitioner's claim will never have been reached.<sup>417</sup> Furthermore, even assuming that these new procedures are in response to a justifiable concern with increasing frivolous capital appeals and that the merits are at least considered, the procedures still fail because they provide no meaningful way to ferret out those claims which are worthy of review from those that are not.<sup>418</sup> Admittedly then, these new procedures can only be viewed as illegitimate actions of the Court.

In this light, then, the principle that "death is different" carries just as much weight today as it had in the days following *Furman* because nothing has intervened to detract from the purposes that underlie the doctrine that called it into existence.

#### VIII. AN ARGUMENT FOR A RETURN TO THE PRINCIPLES OF *FURMAN*

The Supreme Court, in numerous and various holdings, has reaffirmed the principles underlying *Furman* and its progeny. Today the Court strays from that principle. Even more troubling, however, the Court strikes down that tenet while offering little empirical basis for why it purports to do so. There is no justification for such action; therefore the Court should return to the previously well-established principles of *Furman*. Furthermore, because this "heightened standard" can only be achieved by allowing effective access to fed-

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<sup>414</sup> 477 U.S. 399 (1986).

<sup>415</sup> *Id.* at 414 (quoting *Sollesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J. dissenting)).

<sup>416</sup> *Id.* at 417.

<sup>417</sup> See *supra* note 94 and accompanying text.

<sup>418</sup> See *Boaz*, *supra* note 189, at 358.

eral habeas review, the Court should cease to deprive capital litigants of such review.

It appears that these recent limitations on review stem from a desire to curtail the long lags between imposing the death sentence and actual execution.<sup>419</sup> Apparently, the Court feels that the only way to do this is to prevent federal courts from reaching the merits of the constitutional challenges of these condemned persons. This is evidenced by Chief Justice Burger's dissent from the Court's grant of certiorari in *Darden*.

In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times . . . and have been passed upon no fewer than 95 times by federal and state court judges. Upon review of the petition and history of this case, I conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent.<sup>420</sup>

As Justice Blackmun, dissenting in *Darden*, explains, this statement "suggests that he [Chief Justice Burger] irrevocably had committed himself to rejecting those claims before he had received the benefit of the full briefing, oral argument, access to the record and discussion of the issues by other Members of the Court, that followed the grant of certiorari."<sup>421</sup> Justice Blackmun further observed that "the fact that this Court has granted certiorari three times is hardly a reason for concluding Darden's claims are meritless, or that the undoubted interest in finality should outweigh our duty to ensure that Darden receive due process."<sup>422</sup> Chief Justice Burger's willingness to allow the right of an individual to considered treatment of his claims to succumb to concerns such as finality, comity, and efficiency clearly undermines the Court's longstanding commitment to vindi-

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<sup>419</sup> See *supra* notes 309-11 and accompanying text; see also *Gray v. Lucas*, 463 U.S. 1237, 1240 (1983) ("This case illustrates a recent pattern of calculated efforts to frustrate valid judgments after painstaking judicial review over a number of years; at some point there must be finality.") (Burger, C.J., concurring in denial of certiorari and denial of application for stay); *Brooks v. Estelle*, 459 U.S. 1061, 1067 (1982) (Court rejected Brook's contention that Fifth Circuit had not fully considered the merits of his appeal, agreeing with the court of appeals' refusal to reconsider claims "so often considered and of such little merit.").

<sup>420</sup> *Darden v. Wainwright*, 473 U.S. 928, 929 (1985) (Burger, C.J., dissenting from the grant of certiorari).

<sup>421</sup> 477 U.S. 168, 205 n.9 (1986) (Blackmun, J. dissenting).

<sup>422</sup> *Id.* This statement is further supported by cases such as *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984), where Jack House's conviction was finally reversed after spending 11 years on death row pursuing his appeals. See also *Hobbs v. Peppersack*, 206 F. Supp. 301 (D. Md. 1962) (granting relief of eight federal habeas petitions). Admittedly, the issues involved in these cases have been litigated before numerous courts, yet the claims presented were eventually found to have merit.



cate the constitutional rights of capital defendants. This commitment, which provides for heightened constitutional standards for condemned prisoners, is further undermined by the Court's new trend in death penalty law.<sup>423</sup> The Court has now begun to lower these standards in an effort to make execution possible, just when the higher standards were beginning to yield results.<sup>424</sup> In this light, the legitimacy of this new approach becomes particularly questionable.

The unfairness of the Court's efforts to restrict federal post-conviction review is further explicated by the unlikelihood that there will be a notable reduction in the number of errors found in capital convictions or sentences.<sup>425</sup> In the past, states have flagrantly disregarded clear legal standards.<sup>426</sup> Other states' death penalty sentencing procedures have resulted in interpretational errors.<sup>427</sup> Furthermore, it is apparent from the extraordinary range of errors found in capital cases in the past<sup>428</sup> that many errors will likely occur in the future.<sup>429</sup>

In light of the frequent occurrence of errors requiring later reversals of capital convictions and sentences, Justice Powell's presumption that the job that federal courts perform on habeas review has adequately been done by state courts is hardly fathomable.<sup>430</sup>

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<sup>423</sup> See *State v. Ramseur*, 524 A.2d 188 (N.J. 1987).

<sup>424</sup> See Boaz, *supra* note 189, at 352. Approximately 90% of all executions since the end, in 1977, of the decade-long moratorium on capital punishments have occurred since *Barefoot* was decided. Many of these executions resulted from the Supreme Court's denying a stay of execution. *Id.*

<sup>425</sup> See Greenberg, *supra* note 315, at 923.

<sup>426</sup> See Greenberg, *supra* note 315, at 923 (Texas courts applied statute for 12 years which was in obvious violation of *Witherspoon*).

<sup>427</sup> See *Songer v. Wainwright*, 769 F.2d 1488 (11th Cir. 1985); *Lucas v. State*, 490 So. 2d 943 (Fla. 1986); *Harvard v. State*, 486 So. 2d 537 (Fla. 1986), where all three death sentences were overturned because judges conducting sentencing proceedings believed that Florida law precluded consideration of non-statutory mitigating circumstances. The Florida legislature has since removed the phrase "as enumerated in the statutory list" from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances. *Fla. Stat.* § 921.141(2)(b), (3)(b) (1987).

<sup>428</sup> See *supra* notes 400-403.

<sup>429</sup> See Greenberg, *supra* note 315, at 923; see also *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985) (held that death qualified juries to determine a criminal defendant's guilt constituted a per se violation of the sixth and fourteenth amendments); *Ritter v. Smith*, 726 F.2d 1505 (11th Cir. 1984) (state death penalty statute's sentencing procedures were facially unconstitutional); *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983) (reversed sentence because trial court failed to explain what function consideration of circumstances in extenuation or mitigation would play in sentencing deliberations); *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984) (reversed conviction of Jack House because evidence revealed that victims were alive two hours after the state claimed House killed them).

<sup>430</sup> See *supra* note 305.

Justice Powell attempts to justify imposing limitations on habeas review in his concurrence in *Ford*.<sup>431</sup>

Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review. . . . It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.<sup>432</sup>

However, if Justice Powell is suggesting that this assumption justifies limiting access to habeas review, his reasoning is severely flawed. The very evidence Justice Powell sets forth to conclude that errors in conviction are not likely to result in unwarranted executions due to more extensive review<sup>433</sup> strongly argues against imposing limitations that would allow for such executions. If the petitioner in *Ford* was denied full access to his post-conviction remedies due to procedural obstacles, the execution of an insane person may well have resulted. A majority of the Court has recognized that such an execution offends humanity and undermines the dignity of society.<sup>434</sup>

Moreover, while it may be conceded that the Constitution does not require a perfect trial for a capital defendant,<sup>435</sup> clearly a system that places the utmost value on individual life must afford him the best procedural protections that can be provided. This standard of protection is obviously not being met when the Court allows imposition of potentially unjust death sentences due to procedural formulations.<sup>436</sup> Possibly no better illustration than the dissent in the case of John Eldon Smith exists to remind us that procedural bars to habeas review have no place in death penalty jurisprudence.

Machetti, the mastermind in this murder, has had her conviction over-

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<sup>431</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>432</sup> *Id.* at 420 (Powell, J., concurring).

<sup>433</sup> Justice Powell presents the history of petitioner Ford's attempts to obtain relief from his conviction or execution in the various courts. *Id.* at 420 n.1.

<sup>434</sup> *Id.* at 408-10.

<sup>435</sup> *Darden v. Wainwright*, 477 U.S. 168, 188 (1986) (Blackmun, J., dissenting) (citing *Lutwak v. United States*, 344 U.S. 604, 619 (1953)).

<sup>436</sup> In one recent Florida case, the son of the man condemned to death for the killing of his daughter recanted testimony he gave at his father's trial years before that provided the sole evidence for the finding of premeditation. The father raised this newly discovered evidence in his habeas petition, but his case was rushed through the lower federal courts in less than three days, with a circuit judge pleading that "there has not been enough time in which justiciably to decide this case." *Dobbert v. Wainwright*, 742 F.2d 1231, 1274 (11th Cir. 1984) (Clark, J., dissenting). Speeding to the Supreme Court, Dobbert asked the Court to pause just long enough to allow him to brief his appeal. Less than a day later, he was executed. No court had actually addressed the issue of whether the recantation testimony was credible evidence. *Dobbert v. Wainwright*, 468 U.S. 1231 (1984). See Boaz, *supra* note 189, at 365 n.86.

turned, has had a new trial, and has received a life sentence. This Court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. Her lawyers timely raised this constitutional objection. They won; she lives.

John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool he faces electrocution. His lawyers waived the jury issue. Judicial economy, as required by recent decisions of the Supreme Court, dictate that we not reach the underrepresentation of women issue even under principles of "manifest injustice."<sup>437</sup>

The recent procedures by which the Supreme Court allows a condemned person to be executed inevitably result in "arbitrariness and capriciousness," the very concerns which gave rise to the doctrine of *Furman*. The Supreme Court could not rightly hold that it is any less abhorrent today to allow "similar cases" to be treated differently than it was in the pre-*Furman* days.

Moreover, if the concern certain members of the Court have with not carrying out death sentences imposed by the state<sup>438</sup> were to be allayed, it would inevitably require the execution rate to rise significantly because it would be necessary to execute 200 death row prisoners per year just to offset the new arrivals.<sup>439</sup> If the further goal of reducing the death row population were to be achieved, even more executions would be necessary.<sup>440</sup> This, coupled with the fact that public support for capital punishment decreases in periods in which the U.S. carries out executions,<sup>441</sup> suggests that these increased numbers of executions would only serve to diminish pub-

<sup>437</sup> *Smith v. Kemp*, 715 F.2d 1459, 1476 (11th Cir. 1983), *cert. denied*, 464 U.S. 1003 (1983) (Hatchett, J., concurring in part, dissenting in part).

<sup>438</sup> See *supra* note 419; see also Sherill, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6, at 80 (Justice Powell observed that such delays [from habeas corpus petitions] "undermine public confidence in our system of justice").

In *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979), Justice Rehnquist asserted:

[J]ust as the rule of law entitled a criminal defendant to be surrounded with all the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that when the State has taken all the steps required by that rule of law, its will, as represented by the legislature which authorized the imposition of the death sentence, and the state courts which imposed and upheld it, should be carried out.

Members of the Court have also expressed the concern that if death sentences are not carried out promptly the deterrent effect of the punishment will be lessened. "When society promises to punish by death certain criminal conduct and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system." *Coleman v. Balkcom*, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting).

<sup>439</sup> See Greenberg, *supra* note 315, at 924.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

lic acceptance for further implementation of the death penalty.<sup>442</sup> As a result, the Court should endeavor to conclude that it would "undermine public confidence in our system" by imposing restrictions on habeas review when a life is at stake more than it would to allow for the delays attending adjudication of federal habeas corpus petitions.

Some federal courts have attempted to bring a measure of order to the procedural limitations created by the Court to reduce delays in executions. These lower courts appear to have taken the view that a state's right to a speedy execution should not be allowed to prevail at the expense of denying an individual his right to fair review of his federal constitutional challenges. Evidently, these courts are prepared to live up to their obligations to safeguard the liberties of capital defendants even if the Supreme Court is not. This is indicated by the many actions taken by lower federal courts, to circumvent the harsh results rendered by the Supreme Court's new policies toward capital habeas review. For example, many courts have held that a procedural default will not automatically serve to bar federal habeas review if the state fails to preserve this issue on appeal or if the state court decides to raise and answer a constitutional question.<sup>443</sup> A federal court may also reach the merits of a habeas claim if the state has not clearly announced or strictly adhered to the procedural bar.<sup>444</sup> Other courts have refrained from allowing state imposed execution dates to interfere with ordinary appellate procedures, even in light of the summary review procedures sanctioned in *Barefoot*.<sup>445</sup>

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<sup>442</sup> *Id.*

<sup>443</sup> See Catz, *supra* note 390, at 1206-07; see also Cooper v. Wainwright, 807 F.2d 881, 887 (11th Cir. 1986) ("if state chooses to ignore a defendant's failure to abide by a contemporaneous objection rule, the federal courts may reach the merits of the substantive claim"). In Magill v. Dugger, 824 F.2d 879, 891 (11th Cir. 1987), the court stated, "Magill should not be allowed to elevate a simple evidentiary complaint into a claim that evidence relevant to non-statutory mitigating circumstances was restricted—to catapult the claim beyond the barriers of procedural default." The federal court rejected this contention: "While the brief does not cite to federal cases in support of its claim, it 'at least provided the Court with some of the elements of a constitutional argument.'" *Id.* at 891 (citing Cooper v. Wainwright, 807 F.2d 881, 887 (11th Cir. 1986)). As a result of finding no procedural default, the Court's review was not precluded by the procedural default rule of Smith v. Murray, 477 U.S. 527 (1986). *Id.* at 892.

<sup>444</sup> See, e.g., Wheat v. Thigpen, 793 F.2d 621, 627 (5th Cir. 1986) (because the Mississippi Supreme Court had not clearly announced, or strictly or regularly followed, the procedural bar at the time of Wheat's direct appeal, there is no prevention of federal review); see also Spencer v. Kemp, 781 F.2d 1458, 1470 (11th Cir. 1986) (novel or sporadically applied procedural bar not adequate and independent state ground precluding federal habeas review); Mann v. Dugger, 817 F.2d 1471, 1483 (11th Cir. 1987) (arbitrary and unannounced procedural bar cannot preclude federal habeas review).

<sup>445</sup> See Blair v. Armontrout, 604 F. Supp. 723, 724-25 (W.D. Mo. 1985), in which the

Still other courts are construing these new procedural formulations very narrowly, thereby abstaining from rigidly applying them.<sup>446</sup> Moreover, many federal courts have resisted the departure from the principle that "death is different." The courts seem to be giving special effect to death penalty cases by affording the capital petitioner every chance to review, even where it would not be afforded to the noncapital petitioner.<sup>447</sup> Federal courts are also criti-

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court held that "there is no valid reason justifying the Missouri Supreme Court's failure to grant a stay of execution. To the limited extent that the granting of a stay may depend on the probability of success on the merits," see *Barefoot v. Estelle*, 463 U.S. 880 (1983) (petitioner advised the Missouri Supreme Court that federal habeas review was being sought, pursuant to a recent decision of the Court, yet the petitioner's request was denied by the same Court). The court further indicated that the right of review is rendered utterly meaningless if the execution is set on a date within the time specified for review. *Blair*, 604 F. Supp. at 725. See also *Chaney v. Brown*, 712 F.2d 441 (10th Cir. 1983), where the Court relies on *Barefoot* and other Supreme Court decisions citing *Barefoot* to stay an execution:

In view of the issuance of the certificate of probable cause for an appeal; the substantial lengthy opinion of the District Court discussing seven issues raised by the federal habeas suit; this court's obligation to give the parties the opportunity to fully address the underlying merits; this Court's duty to give due consideration to the merits of the appeal; the obvious restrictions of time in the circumstances of this case and the irreversible nature of the death penalty, we are constrained to grant [a stay] . . . ."

*Id.* at 443; see also *Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987) (reversed denial of stay of execution, where the Court, through dicta, suggests that although Bundy may not be entitled to succeed on the merits of any of his claims, the petition demonstrates a likelihood of success in at least some respects sufficient to justify a stay).

<sup>446</sup> *Bundy*, 808 F. 2d at 1421. In deciding whether it would grant a stay, the district court wrongly applied *Barefoot*. The federal court of appeals held that "*Barefoot* addressed the handling of requests for stays in death sentence habeas corpus cases in the courts of appeal and in the Supreme Court of the United States. . . . Nothing in *Barefoot* suggests that the Supreme Court intended to, if indeed it could, after the pleading obligations set out for habeas cases in the Federal District Courts by § 2254 Rules." *Id.* at 1420-21.

See also *Richmond v. Rickett*, 774 F.2d 957 (9th Cir. 1985), where the court overturned a holding that Richmond's second petition constituted "abuse of writ." The relief obtained by Richmond on his first petition went only to the sentence. However, Richmond was resentenced to death pursuant to a new statute that cured the deficiency at issue in his first habeas petition. The court held that it was not an abuse of writ to seek appeal for the adverse determinations of his other grounds challenging the death sentence in his first petition that he may have been unable to raise due to mootness grounds. If he were to prevail on appeal of these claims, he could not be resentenced.

See also *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986), where the court reiterated that "previous decisions of this and our predecessor Circuit acknowledged that the abuse of writ doctrine is of rare and extraordinary application; a doctrine that should not be rigidly applied."

<sup>447</sup> See *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985), where the court reversed defendant's judgment of conviction due to prosecution's failure to disclose police report, in which one of the eyewitnesses initially indicated that he did not see the killer's face and could not identify him. The court stated:

Whether it is reasonably probable that a different result might have been obtained had the evidence been disclosed is a question of agonizing closeness. This is a

cally evaluating and reversing, if not the conviction, the sentence.<sup>448</sup> It seems feasible to conclude that these federal courts are using sentence reversals as a last resort to atone for the injustices they are bound to inflict on capital defendants due to recent Supreme Court decisions.

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capital case, however, and one moreover in which our reading of the evidence shows there is a possibility that the wrong man is to be executed. In such a case, if ever, petitioner should receive the benefit of the doubt.

*Id.* at 1043.

See also *Songer v. Wainwright*, 605 F. Supp. 686, 692 (M.D. Fla. 1985), where the court issued a certificate of probable cause stating that although the court found no basis to apply an intervening law to the present case, it may be debatable among jurists. "Since this is a capital case, petitioner shouldn't be foreclosed from urging such contention on appeal." *Id.*

See also *Wilson v. Butler*, 825 F.2d 879 (5th Cir. 1987), where the court reversed its decision to remand the case for a hearing only on Wilson's claim that counsel was ineffective at the sentencing phase of the trial, while dismissing Wilson's claim of ineffective assistance at the guilt phase. The court in reaching this decision observed:

Although our original action was appropriate for the usual habeas case, several factors compel the conclusion that we erred in remanding the case for a hearing solely on Wilson's claim of ineffective assistance at sentencing. . . . The essential purpose of federal habeas corpus is to insure that no petitioner is punished in violation of the Constitution. When, as here, the punishment involved is death, a punishment qualitatively different from all others, fundamental justice demands heightened vigilance in evaluating a petitioner's constitutional claims.

*Id.* at 882. The Court further relies on *Autry v. Estelle*, 719 F.2d 125 (5th Cir. 1983), a case involving a similar issue, to support its decision. In *Autry*, the court remanded the case to the district court for a more complete evidentiary hearing. In doing so, "we [the Court] explained that our action was not required by any found deficiency in the most recent evidentiary hearing but was to afford a death-sentenced prisoner every opportunity to present his claims consistent with the interest of the state." *Id.* at 883 (citing *Autry v. McKackle*, 727 F.2d 358, 360 (5th Cir. 1984), *cert. denied*, 465 U.S. 1090 (1984). In *Autry*, the court recognized "as a basic principle of justice that, if death is involved, the petitioner should be presented every opportunity possible to present facts relevant to his constitutional claims." *Id.* at 883 (citing *Autry v. Estelle*, 719 F.2d at 1252).

<sup>448</sup> See *Adams v. Dugger*, 816 F.2d 1501 (11th Cir. 1987), where the court held that the judge's statement to Adams' jury clearly violated the principles enunciated in *Caldwell* that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere, thereby creating an impermissible danger that the jury's recommended sentence was unreliable and consequently, that Adams' death sentence was unreliable." See also *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986) (court reversed district court's denial of Adams' habeas petition because jury instructions—that their role was advisory—left jury with false impression of significance of their role in the sentencing process and created a danger of bias in favor of death penalty); *Cooper v. Wainwright*, 807 F.2d 881, 889 (11th Cir. 1986) (court remanded case for evidentiary hearing on petitioner's *Lockett* claim and held that "the mitigating evidence petitioner proffered at trial, and cites in his habeas petition may entitle him to a new sentencing trial"); *Mann v. Dugger*, 817 F.2d 1471 (11th Cir. 1987) (prosecutor's comments made prior to sentencing can establish a *Caldwell* violation, especially where court exacerbated the error in the instructions at sentencing phase); *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987), (court indicated that counsel's failure in the guilt-innocence phase of the trial may affect the outcome of the penalty phase of the trial).

It has become increasingly clear that the efforts exhibited by many lower federal courts to retain the availability of post-conviction review for capital defendants indicate a reluctance to employ a streamlined approach to federal habeas corpus law.<sup>449</sup> This reluctance stems from a recognition that such an approach is unsound because it departs from the principles espoused in *Furman*. If left to their own authority, these courts would remain loyal to the more sound approach previously articulated and applicable to all procedural limitations inhibiting federal habeas review:

[W]hen a capital defendant raises a non-frivolous constitutional question, neither the state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should expressly provide that in matters of procedural default, as in other matters, death is different.<sup>450</sup>

The Court's recent departure from the principles of *Furman* should be recognized as an attempt to strip the federal courts of any meaningful way to enforce the constitutional rights of capital petitioners through habeas review—the bulk of this enforcement long-residing in those courts.<sup>451</sup> In essence, then, the Supreme Court has reduced these lower federal courts to administrative arms of a Supreme Court dedicated to clearing the path for speedy execution,<sup>452</sup> no matter what the cost. In light of the fact that the Supreme Court's recent approach to habeas review for capital defendants has proven unsound, the misguided concerns of individual members of the Court cannot act as a base to justify denying the federal courts the opportunity to fully perform the duties they are deemed best apt to exercise.<sup>453</sup> Rather, the Supreme Court should defer to the preferred approach intimated by these lower federal courts and return to the principles of *Furman*.

## IX. CONCLUSION

The Supreme Court has recently created a veritable storm of procedural obstacles to bar access to federal habeas corpus review for prisoners. Through its decision in *Barefoot*<sup>454</sup> and *Smith*,<sup>455</sup> the Court has unjustifiably placed the capital defendant in the "eye" of

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<sup>449</sup> See *supra* notes 444-448. But see Catz, *supra* note 390, at 1205 n.175.

<sup>450</sup> *Smith v. Murray*, 477 U.S. 527, 546 n.11 (1986) (Stevens, J., dissenting) (citing Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1222 (1986)).

<sup>451</sup> See Boaz, *supra* note 189, at 349 n.1.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *Barefoot v. Estelle*, 463 U.S. 880 (1983).

<sup>455</sup> *Smith v. Murray*, 477 U.S. 527 (1986).

this storm. It becomes difficult to see how one can reconcile this Court with the one that evolutionized a precept that the eighth amendment requires a heightened degree of reliability in any case in which a state seeks to take the defendant's life.<sup>456</sup>

While the Court's adoption of procedural formulations to limit habeas review for capital defendants may have been deemed necessary to achieve some useful or important purpose at the outset, it becomes highly unworkable viewed in light of the aftermath. The Court's new procedures sanction the dissolution of the directives of *Furman*. The problem this dissolution presents concerns the constitutional requirements society deems necessary to justify the state's taking of an individual's life. It has already been established that the *Furman* precept has won a vital place in our constitutional law.<sup>457</sup> In essence, this precept acts as the leveler between two separable but intertwined areas of law: death penalty law and constitutional law. In order to apply one, the state must meet the requirements of the other. By abandoning *Furman*, the Supreme Court is denying the Constitution. The Court, as guardians of the Constitution, should not persist on this course. A contrary view runs afoul of society's traditional sense of fairness and justice<sup>458</sup> and would espouse the notion that a society committed to the sanctity of individual life is willing to sacrifice constitutional values in order to clear the way for death.

Moreover, the view that the innocent and guilty alike deserve equal justice under the law, if accepted, must be given substance. Capital defendants may, it is true, serve as the perfect models to justify the temptation to resist claims of denial of constitutional rights due to the particularly heinous nature of the crimes many of these individuals have undoubtedly committed. However, it is in these very instances, where notions of justice may easily fall prey to notions of just deserts, that judicial prudence must reach its peak. In the words of one judge, "[I]f we could but abstract ourselves, as a people, from our reaction to the shocking heinous acts that have shattered innocent lives, I believe we would still choose a system that does not put a price upon the quality of justice."<sup>459</sup> The Court needs to be reminded that the unpleasant consequences often ren-

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<sup>456</sup> See *supra* note 170 and accompanying text.

<sup>457</sup> See *supra* note 180.

<sup>458</sup> See *Carter v. Rafferty*, 621 F. Supp. 533, 560 (D. N.J. 1985) ("The need to combat crime should never be utilized to justify an erosion of our fundamental guarantees. Indeed, the growing volume of criminal cases should make us even more vigilant; the greater the quantity—the greater the risk to the quality of justice.")

<sup>459</sup> *State v. Ramseur*, 524 A.2d 188, 300 (N.J. 1987) (O'Hern, J., concurring).



dered by strict enforcement of constitutional guarantees is merely the necessary price to be paid for constitutional freedom.<sup>460</sup>

If the Court had been faithful to the *Furman* precept, it would have accounted for the extremely high reversal rate for habeas corpus death penalty cases as well as recognized the significance of acts taken by lower federal courts to conclude that it has been led astray in the area of death penalty habeas corpus law and needs to find its way back to a workable system. In the words of Justice Stevens, "[T]he Court has lost its way in a procedural maze of its own creation."<sup>461</sup> The only path leading out of this maze is by way of a return to the principles of *Furman*.

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<sup>460</sup> See *supra* note 174.

<sup>461</sup> *Smith v. Murray*, 477 U.S. 527, 540 (1986) (Stevens, J., dissenting).