Washington and Lee Law Review

Volume 41 | Issue 2 Article 16

Spring 3-1-1984

XI. Prisoners' Rights

only disregarded the court's limited role on appeal but rested its holding on the mistaken conclusion that the Board's findings concerning Mitchell and Patillo's supervisory status were inconsistent.[99] While inconsistent Board findings regarding the supervisory authority of two individuals in the same case might constitute a valid reason to overturn a Board determination, the Board's findings in *St. Mary's Home* concerning whether Mitchell and Patillo were supervisors were consistent and thus provided the Fourth Circuit with little ground upon which to overturn the Board's holding.[100]

SETH CALVEN PRAGER

XI. PRISONERS' RIGHTS

A. *Federal Habeas Corpus: Novelty of Constitutional Claim as Satisfying the Cause Prong of the Cause and Prejudice Test*

A writ of habeas corpus allows a prisoner to obtain immediate relief from illegal deprivation of the prisoner's liberty by a state.[1] Section 2254 of Title 28 of the United States Code provides that state prisoners may petition federal courts for habeas corpus relief as a means of compelling legal justification for the prisoner's confinement.[2] A federal court will issue a writ of habeas corpus when a prisoner demonstrates that the state adjudication did not protect the defendant's interests under either the Constitution or the laws of the United States.[3] Historically, a defendant's failure to comply with a state's con-

---

Circuit's review of Board's findings and analysis of Mitchell's supervisory status in *St. Mary's Home*); *St. Mary's Home*, 690 F.2d at 1072 (Murnaghan, J., concurring in part and dissenting in part) (majority "pays lip service to" but disregards court's limited role on appeal); *see also supra* notes 34-41 and accompanying text (discussing dissent's findings in *St. Mary's Home*).

99. *See supra* notes 53-58 and accompanying text (discussing Fourth Circuit's misinterpretation of Board's findings regarding supervisory status of Mitchell and Patillo).

100. *See id.* The *Res-Care* court acknowledged as prior case law the *St. Mary's Home* court's reversal of the Board's determination that Mitchell was not a supervisor on the ground that Mitchell exercised exactly the same authority as Patillo, whom the Board classified as a supervisor. *See* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1468 (7th Cir. 1983).

---

1. *See* 28 U.S.C. § 2241 (1976). Section 2241 of Title 28 of the United States Code authorizes the Supreme Court, federal district courts, Supreme Court justices, and federal circuit judges to grant writs of habeas corpus to prisoners whom the state government or federal government illegally has incarcerated. *Id.* § 2241(a).

2. *Id.* § 2254. Section 2254 of Title 28 of the United States Code allows the Supreme Court, federal district courts, Supreme Court justices, and federal circuit judges to consider petitions from state prisoners for federal habeas corpus review. *Id.* § 2254(a).

3. *See id.* § 2254(d)(7) (to obtain federal habeas corpus review petitioner must allege denial of due process in state proceeding); *id.* § 2241(c)(3) (habeas corpus relief not available unless

temporaneous objection rule barred federal habeas review.[4] A contemporaneous objection rule typically requires a defendant to object promptly to the introduction of evidence or the issuance of jury instructions at trial.[5] In the past thirty years, however, the Warren Court promoted the judicial goal of fairness toward defendants by expanding the availability of habeas corpus relief while the Burger Court advanced the ideal of finality of adjudication in restricting the availability of the writ.[6]

The Warren Court, believing that a forfeiture of a defendant's constitutional rights is intolerable, expanded the rights of criminal defendants.[7] Emphasizing that the courts must protect the constitutional rights of criminal defendants, the Warren Court increased a state prisoner's chances of obtaining habeas corpus review in federal court.[8] In *Fay v. Noia*,[9] the Warren Court held that a state prisoner who has failed to comply with state procedural rules requiring the exhaustion of state remedies nevertheless may file a petition for federal habeas corpus review if the prisoner did not by-pass deliberately state appellate remedies.[10] The Warren Court formulated the "deliberate by-pass"

---

prisoner is in custody in violation of Constitution or laws of United States). To obtain federal habeas corpus relief, a petitioner must show that he is in custody, that he is presenting a federal question, that he has exhausted his state remedies, and that he has not waived his rights to habeas corpus relief. *See* Johnson & Davenport, *A Federal Habeas Corpus Primer*, 4 AM. J. TRIAL ADVOC. 51, 54 (1980). The Constitution of the United States inspired the enactment of the original habeas corpus statute. *See* U.S. CONST. art. I, § 9, cl. 2; Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789) (current version at 28 U.S.C. § 2241 (1976)). Federal courts have had the power to issue writs of habeas corpus to state prisoners since 1867. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386 (1867) (current version at 28 U.S.C. § 2254 (1976)).

4. *See* Ex Parte Spencer, 228 U.S. 652, 660-61 (1913) (Court denied petitioner habeas corpus review for failure to object to constitutionality of statute at trial).

5. *See, e.g.*, United States v. Frady, 456 U.S. 152, 162 (1982) (defendant must object to jury instructions before jury retires); Engle v. Isaac, 456 U.S. 107, 115 & n.15 (1982) (same); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (requiring defendant to make motion to suppress evidence prior to trial).

6. *See* Note, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 217 & n.1 (1982) [hereinafter cited as *1981 Term*] (referring to differences in attitude between Warren Court and Burger Court); *infra* text accompanying notes 7-34 (tracing history of judicial application of habeas corpus relief).

7. *See* Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1096 (1978) (commenting on general goal of Warren Court).

8. *See infra* text accompanying notes 9-11 (discussing Warren Court's expansion of federal habeas corpus through *Fay* decision); *see also* Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233, 239 (1969) (discussion of habeas corpus decisions of Warren Court); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, U. PA. L. REV. 473, 473 (1978) (same).

9. 372 U.S. 391 (1963).

10. *Id.* at 438. In *Fay v. Noia* the defendant failed to appeal his murder conviction by the County Court of Kings County, New York, and therefore could not petition for state collateral relief. *Id.* at 394-96. The defendant petitioned for federal habeas corpus review claiming that his conviction resulted from the admission into evidence of a coerced confession. *Id.* at 396 & n.2. The Supreme Court in *Fay* held that a state procedural default does not limit a federal court's power of review under the federal habeas corpus statute. *Id.* at 398-99, 438; *see* 28 U.S.C. § 2241(a) (1976); *see also* Spritzer, *supra* note 8, at 497-98 (discussion of *Fay*).

test in *Fay* to protect a defendant's constitutional rights from forfeiture because of inadvertence or negligence of the defendant's attorney.[11]

In contrast to the Warren Court's expansion of habeas corpus rights, the Burger Court established a trend of restricting the availability of federal habeas corpus relief.[12] More specifically, to promote the finality of judgments and judicial efficiency, the Burger Court expected the state courts to protect the constitutional rights of citizens.[13] For example, in *Wainwright v. Sykes*,[14] the Burger Court created a new, prohibitive standard to replace the *Fay* "deliberate by-pass" test.[15] The *Fay* test created problems for courts that had to determine whether a prisoner had intended to by-pass state procedural remedies by applying for a federal writ of habeas corpus.[16] As a remedy for the problems the "deliberate by-pass" test created, the *Sykes* Court devised a two-part "cause and prejudice" test that allows prisoners to petition federal courts for habeas corpus relief despite a state procedural bar to appellate review.[17]

---

11. 372 U.S. 398-99. *See* Comment, *"Fundamental Miscarriage of Justice": The Supreme Court's Version of the "Truly Needy" in Section 2254 Habeas Corpus Proceedings*, 20 SAN DIEGO L. REV. 371, 384 (1983) [hereinafter cited as *Miscarriage of Justice*] (court will deny habeas corpus review if defendant deliberately by-passed state procedural remedies for tactical reasons but can grant review if defendant's by-pass of state remedies was through oversight).

12. See Rose v. Lundy, 455 U.S. 509, 522 (1982) (court must dismiss habeas corpus petition if petition contains unexhausted claim); Stone v. Powell, 428 U.S. 465, 481-82 (1976) (federal habeas corpus review not available on Fourth Amendment claim when defendant had full and fair opportunity to litigate in state court); *see also 1981 Term, supra* note 6, at 22 (contrasting the Warren Court and Burger Court policies on federal habeas corpus); *Miscarriage of Justice, supra* note 11, at 375-76 (same).

13. *See* Michael, *supra* note 8, at 273 (habeas corpus decisions of Burger Court exhibit increased deference to states' judicial competency); *Miscarriage of Justice, supra* note 11, at 375-76 (Burger Court decisions on habeas corpus promote federalism by relying on state courts to protect constitutional rights of citizens). In addition to promoting federalism and finality, the restrictive writ of habeas corpus advanced by the Burger Court promotes comity between state and federal courts, furthers the intent of the framers of the Constitution, and lightens the overburdened federal dockett. *See id.*

14. 433 U.S. 72 (1977).

15. *See id.* at 87-88; *see also* Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 384 (1983) (discussion of *Sykes*).

16. *See* Townsend v. Sain, 372 U.S. 293, 313 (1963) (listing requirements for determining when evidentiary hearing is necessary as response to habeas corpus petition); *see also* Comment, *Habeas Corpus: The Sixth Circuit Interprets the Cause and Prejudice Test of* Wainwright v. Sykes, 48 U. CINN. L. REV. 862, 864 n.11 (1979) [hereinafter cited as *The Sixth Circuit*]. The *Fay* "deliberate by-pass" test, which allows a habeas corpus petition despite a petitioner's noncompliance with a state's contemporaneous objection rule, not only increased the potential number of habeas corpus petitioners but also required the courts to investigate petitioners' trial tactics. *Id.*

17. *See* 433 U.S. at 87 (setting forth two-part "cause and prejudice" test). The *Wainwright v. Sykes* "cause and prejudice" test for permitting habeas corpus review despite petitioners' failure to comply with state contemporaneous objection rules results from incorporating the holdings of *Davis v. United States* and *Francis v. Henderson*. *See* Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973).

In *Davis*, a federal prisoner petitioned the Fifth Circuit for federal habeas corpus relief alleging a faulty grand jury indictment in the district court. 411 U.S. at 235. The Fifth Circuit found that rule 12(b)(2) of the Federal Rules of Criminal Procedure barred the petitioner's motion since the rule requires a criminal defendant to object to defective grand jury indictments before trial.

The cause prong of the *Sykes* test prohibits a defendant who has failed to make timely objection to alleged error at trial from filing a petition for habeas corpus review unless the defendant can demonstrate sufficient cause for non-compliance with the state's contemporaneous objection rule.[18] To satisfy the prejudice prong of the *Sykes* test, a petitioner must demonstrate actual prejudice resulting from the trial court errors of which the defendant complains.[19] Subsequent to the *Sykes* decision, federal courts have attempted to define the cause[20] and prejudice[21] elements of the *Sykes* test.

In *United States v. Frady*,[22] the Supreme Court clarified the meaning of the prejudice prong of the *Sykes* test.[23] In *Frady*, a convicted defendant sought federal habeas corpus relief from his murder conviction by alleging prejudicial jury instructions at his trial in the United States District Court for the District of Columbia.[24] Although the defendant petitioner did not object to the jury instructions at trial before the federal district court as federal procedure required, the petitioner claimed in his habeas petition that the jury instruction concerning the meaning of malice violated due process of law.[25] The Supreme

---

Id.; see FED. R. CRIM. P. 12(b)(2) (petitioner must object to faulty indictment by motion prior to trial). The Supreme Court in *Davis* held that a court could grant habeas corpus relief following the petitioners' failure to object to the faulty indictment only if the prisoner demonstrated sufficient cause for failing to comply with the federal procedural rule. 411 U.S. at 242; *see* FED. R. CRIM. P. 12(b)(2) (petitioner must object to faulty indictment by motion prior to trial).

In *Francis*, a state prisoner failed to make a timely objection to the composition of his grand jury. 425 U.S. at 537-38. Louisiana law existing at the time of *Francis* required the defendant to make objections concerning grand jury composition before the expiration of the third day following the termination of the grand jury's term. *Id.* Upon habeas corpus review, the Supreme Court held that an appellate court's power to grant collateral relief depends upon a petitioner's demonstration of cause for failure to comply with the state's contemporaneous objection rule and of actual prejudice resulting from failure to comply with the rule. *Id.* at 542.

To clarify any confusion resulting from the fact that both the *Francis* and *Davis* Court's interpretations of the cause and prejudice elements of the *Sykes* test applied to grand jury proceedings, the Warren Court stated in *Sykes* that the "cause and prejudice" exception to the state procedural bar rule also is applicable to cases other than those pertaining to grand jury errors. *See* 433 U.S. at 87; *The Sixth Circuit, supra* note 16, at 865.

18. *See Sykes*, 433 U.S. at 87; *see also* Michael, *supra* note 8, at 266-67 (discussion of *Sykes*).

19. *See Sykes*, 433 U.S. at 87; *see also* Michael, *supra* note 8, at 266-67 (discussion of *Sykes*).

20. *See* Ford v. Strickland, 696 F.2d 804, 817 (11th Cir. 1983) (petitioner's belief that objection at trial would be futile because of unsympathetic court not sufficient cause for failure to object); Hicks v. Scurr, 671 F.2d 255, 259 (8th Cir. 1982) (failure to object to unanticipated and incorrect statistical evidence constituted sufficient cause for failure to object).

21. *See, e.g.*, Thompson v. White, 661 F.2d 103, 106-07 (8th Cir. 1981) (town sheriff's choosing of entire jury constituted prejudice); Hines v Enomoto, 658 F.2d 667, 674 (9th Cir. 1981) (improper denial of peremptory challenge constituted prejudice); Baldwin v. Blackburn, 653 F.2d 942, 949-52 (5th Cir. 1981) (jury instruction referring to heinous nature of murder committed during perpetration of armed robbery does not constitute prejudice).

22. 456 U.S. 152 (1982).

23. *See id.* at 168-70.

24. *Id.* at 157-58.

25. *Id.* at 158. In *United States v. Frady*, petitioner Frady sought federal habeas corpus relief on the basis of prejudicial jury instructions at his district court trial. *Id.* at 157-58. The judge at petitioner Frady's district court trial had instructed the jury that an intentional, wrongful act is committed by a defendant with malice aforethought. *Id.* In addition, the judge instructed

Court found that the petitioner in *Frady* failed to demonstrate that the alleged improper jury instruction prejudiced the jury.[26] The *Frady* Court held that in order for the court to grant relief, the petitioner had to show actual prejudice and not merely the possibility of prejudice.[27]

Additionally, the Supreme Court in *Engle v. Isaac*[28] refined the cause prong of the *Sykes* test.[29] In *Isaac*, three state prisoners challenged the constitutionality of a jury instruction requiring the prisoners to bear the burden of proof on a claim of self-defense.[30] In dismissing the application for habeas corpus relief, the *Isaac* Court held that the prisoners' lack of awareness of a constitutional basis for challenging the jury instructions did not satisfy the cause prong of the "cause and prejudice" test.[31] The *Isaac* Court noted that the petitioner should have objected at trial since a precedential basis for the at-trial objection to self-defense jury instructions had existed since the Supreme Court case of *In re Winship*,[32] which preceded the first petitioner's state trial by four and one-half years.[33] The Supreme Court in *Isaac* added that numerous state court decisions challenging the constitutionality of requiring a defendant to bear the burden of proof in a criminal trial would have permitted the peti-

---

the jury that the law presumes the malice essential to homicide if the defendant uses a deadly weapon and if mitigating circumstances are absent. *Id.* Petitioner Frady alleged that the judge's instructions coerced the jury into presuming malice and therefore precluded the possibility of a manslaughter verdict. *Id.*

At the time of Frady's original trial, the United States District Court for the District of Columbia had jurisdiction over all local felonies. *Id.* at 160. Petitioner Frady violated the District of Columbia's contemporaneous objection rule by not complying with the Federal Rule of Criminal Procedure that requires a defendant to object to erroneous jury instructions before the jury retires. *Id.* at 162; *see* FED. R. CRIM. P. 30 (no error assignable to jury instructions unless defendant objects before jury retires).

26. 456 U.S. at 172. The Supreme Court in *Frady* found overwhelming evidence of the defendant's malice in the trial court record. *Id.* In addition, Frady never asserted at trial that he acted without malice. *Id.* The Supreme Court held that the facts indicating malice disposed of the contention that Frady suffered actual prejudice from the use of the questioned jury instructions. *Id.*

27. *Id.* at 170. The *Frady* Court concluded that the petitioner had to show that the alleged improper jury instructions actually and substantially disadvantaged the defendant and infected the trial with constitutional error. *Id.*

28. 456 U.S. 107 (1982).

29. *Id.* at 135; *see also* text accompanying note 18 (explaining cause prong of *Sykes* test).

30. 456 U.S. at 119-23. The Ohio state courts convicted the three habeas corpus petitioners in *Engle v. Isaac* at different points in time. *Id.* at 113-14. An Ohio grand jury convicted petitioner Hughes of voluntary manslaughter in January 1975. *Id.* at 113. The State of Ohio convicted petitioner Bell of murder in April 1975. *Id.* at 113-14. The State of Ohio convicted petitioner Isaac in September 1975 of aggravated assault. *Id.* at 114. The three petitioners did not object to the impropriety of the jury instructions at their respective trials. *Id.* at 124-25. Ohio's contemporaneous objection rule requiring contemporaneous objection to jury instructions barred the petitioners from raising an unconstitutional jury instruction claim on direct appeal. *Id.*

31. *Id.* at 130-31.

32. 397 U.S. at 358 (1970).

33. *See* 456 U.S. at 131; *infra* notes 46-47 and accompanying text (discussion of *In re Winship*).

tioners to construct and present a valid constitutional claim at trial.[34] The *Isaac* Court, however, would not decide whether the novelty of a constitutional claim establishes sufficient cause for failure to object contemporaneously to alleged impropriety at trial.[35] The Supreme Court's lack of guidance forced the federal circuits to adjudicate novelty claims without the benefit of a universal standard.[36] In *Ross v. Reed*,[37] the Fourth Circuit recently considered whether the novelty of a constitutional claim satisfies the cause prong of the *Sykes* "cause and prejudice" test.[38]

The Superior Court of Wake County, North Carolina, convicted the defendant Ross in 1969 for the first degree murder of his wife.[39] At trial, Ross presented the partial defense of lack of malice[40] and sought acquittal on a claim of self-defense.[41] In accordance with applicable North Carolina law existing at the time of Ross' trial, the trial judge instructed the jury that Ross had the burden of proving both defenses.[42] Thereafter, the jury convicted Ross

---

34. 456 U.S. at 131-32; *see, e.g.*, Henderson v. State, 234 Ga. 827, 832-33, 218 S.E.2d 612, 616-17 (1975) (jury instructions improperly shifted burden of proof to defendant on claim of self-defense); State v. Cuevas, 53 Haw. 110, 113, 488 P.2d 322, 325 (1971) (placing burden of proof on defendant with regard to malice aforethought is unconstitutional); State v. Robinson, 48 Ohio App. 2d 197, 201, 356 N.E.2d 725, 730 (1975) (defendant not required to prove self-defense claim), *aff'g*, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976); *see also* Engle v. Isaac, 456 U.S. 107, 132 n.40 (1981) (listing additional state court decisions that should have alerted petitioners in *Isaac* to possibility of constitutional claim).

35. *See* 456 U.S. at 131. In refusing to decide whether novelty satisfies the cause prong of the *Sykes* test, the *Isaac* court declined to adopt a rule that would require either extraordinary foresight by counsel in objecting on currently nonexistent conditional grounds or continual objection at trial in the hope of a latent constitutional claim. *Id.; see supra* text accompanying note 18 (discussion of cause prong of *Sykes* test). The Supreme Court in *Isaac* noted that discovery of a constitutional claim that counsel could not have known about at trial does not invalidate automatically the trial court proceedings. 456 U.S. at 131.

36. *See The Sixth Circuit, supra* note 16, at 866 (stating that lower federal courts were left without guidelines for habeas corpus petitions).

37. 704 F.2d 705 (4th Cir.), *cert. granted*, 104 S.Ct. 523 (1983).

38. *Id.* at 708; *see* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (setting forth two-pronged "cause and prejudice" test); *supra* note 35 (discussion of failure to decide novelty issue in *Isaac*).

39. 704 F.2d at 706. In *Ross v. Reed*, the defendant and his wife were living separately at the time of the wife's murder. State v. Ross, 275 N.C. 550, 551, 169 S.E.2d 875, 876 (1969), *cert. denied*, 397 U.S. 1050 (1970). Ross and his sister arrived at the home of Ross' wife to take the children and Mrs. Ross to a shopping mall. *Id.* Upon return to the wife's home, defendant Ross and his wife entered the house. *Id.* After a discussion concerning Ross' former girlfriend, witnesses stated that Ross shot his wife four times. *Id.* at 876-77. Defendant Ross testified that his wife had approached him with a knife and he shot his wife in self-defense. *Id.* at 877. Witness testimony corroborated that Ross had a wound on his neck. *Id.*

40. 704 F.2d at 706. In presenting the partial defense of lack of malice, Ross attempted to reduce his conviction from murder to manslaughter. *Id.; see* United States v. Alexander, 471 F.2d 923, 942 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 844 (1972) (manslaughter is killing without malice); United States v. Wharton, 433 F.2d 451, 454 (D.C. Cir. 1970) (malice is only element that differentiates murder from manslaughter); Beardslee v. United States, 387 F.2d 280, 291 (8th Cir. 1967) (malice distinguishes murder from manslaughter).

41. 704 F.2d at 706; *see supra* note 39 (explaining origins of Ross' self-defense claim).

42. 704 F.2d at 706.

and sentenced him to life imprisonment.[43] The North Carolina Supreme Court affirmed Ross' conviction in October 1969.[44]

Soon after the North Carolina Supreme Court had affirmed Ross' conviction, however, the Burger Court revised the previously settled area of constitutional law concerning the burden of proof in criminal cases.[45] In early 1970, the United States Supreme Court decided *In re Winship*.[46] The *Winship* Court held that to satisfy due process requirements, the prosecution must prove beyond a reasonable doubt all elements of the offense charged.[47] Five years after deciding *In re Winship*, the Supreme Court held in *Mullaney v. Wilbur*[48] that jury instructions which shift the burden of proof to a defendant on a heat of passion claim are unconstitutional.[49] The Supreme Court subsequently held in *Hankerson v. North Carolina*[50] that the *Mullaney* holding applied retroactively.[51]

---

43. *See* State v. Ross, 275 N.C. 550, 551, 169 S.E.2d 875, 876 (1969).

44. 704 F.2d at 706.

45. *See In re Winship*, 397 U.S. 358, 364 (1970) (holding that prosecution must prove all elements of charged crime); *Miscarriage of Justice, supra* note 11, at 385 (referring to shift in goals between Warren Court and Burger Court on subject of habeas corpus review).

46. 397 U.S. 358 (1970). In *In re Winship*, the New York Family Court tried a juvenile for stealing money from a woman's pocketbook. *Id.* at 360. The trial judge acknowledged that the proof that the prosecution elicited at trial may not have proven the defendant's guilt beyond a reasonable doubt. *Id.* The judge rejected the defendant's claim that the fourteenth amendment required the prosecution to prove guilt beyond a reasonable doubt and asserted that § 744(b) of the New York Family Court Act required proof by the preponderance of the evidence. *Id.*

47. 397 U.S. at 364.

48. 421 U.S. 684 (1972). The State of Maine found the defendant in *Mullaney v. Wilbur* guilty of murder. *Id.* at 685; *see* State v. Wilbur, 278 A.2d 139 (Me. 1971). Wilbur claimed that he attacked the deceased as a result of the deceased's homosexual advance and sought acquittal because of lack of intent. 421 U.S. at 685. In the alternative, Wilbur attempted to reduce a possible murder conviction to a manslaughter conviction since the homicide occurred in the heat of passion. *Id.* The judge instructed the jury that a defendant must prove that he acted in the heat of passion to reduce a murder charge to manslaughter. *Id.* at 686-87.

49. 421 U.S. at 703-04. The *Mullaney* Court held that the due process clause of the fourteenth amendment requires the prosecution to prove beyond a reasonable doubt in homicide cases that heat of passion did not exist. *Id.* at 704.

50. 432 U.S. 233 (1977). In *Hankerson v. North Carolina,* the deceased asked the defendant Hankerson for a light for a cigarette while the defendant was sitting in an automobile. *Id.* at 235. The defendant subsequently shot the deceased. *Id.* Hankerson claimed that the deceased and the deceased's friends had attacked the defendant. *Id.* The defendant asserted that he acted in self-defense. *Id.* The trial court instructed the jury that if the state proved beyond a reasonable doubt that the defendant intentionally killed the deceased, the law presumes malice and the defendant then must prove that he acted in self-defense. *Id.* at 236. The trial court found Hankerson guilty of second-degree murder. *Id.* at 238. On Hankerson's appeal, the Supreme Court of North Carolina failed to apply the *Mullaney* holding retroactively because the court foresaw the release of large numbers of murderers into society. *Id.* at 239-40; *see supra* text accompanying notes 48-49 (discussion of *Mullaney*).

51. 432 U.S. 240, 244. In deciding whether the *Mullaney* decision would apply retroactively the Supreme Court in *Hankerson* considered the potential impact of numerous habeas petitions on the judicial system. *Id.* at 242-43. Foreseeing a potential flood of habeas petitions inundating the federal courts, the Supreme Court found that states could insulate past convictions from habeas corpus review by enforcing state contemporaneous objection rules. *Id.* at 244 n.8.

Although Ross' conviction was final, Ross petitioned the North Carolina courts for postconviction relief by relying on *Mullaney* and *Hankerson* to show that the state court jury instruction unconstitutionally shifted the burden of proof to Ross on the issues of lack of malice and self-defense.[52] After the North Carolina courts refused to grant Ross postconviction relief, Ross filed a petition for a federal writ of habeas corpus in the United States District Court for the Eastern District of North Carolina.[53] The district court delayed consideration on the petition pending the outcome of the Fourth Circuit's decision in *Cole v. Stevenson*.[54] In *Cole*, the defendant failed to allege upon direct appeal that a trial court jury instruction which shifted the burden of proof on a claim of self-defense to the defendant violated due process.[55] Since North Carolina procedural rules required an immediate exception to jury instructions to preserve the claim for appellate review, the *Cole* court barred the defendant from litigating a due process claim on federal habeas corpus review.[56] After the *Cole* decision, the district court dismissed Ross' petition on the basis of failure to object contemporaneously to trial court jury instructions.[57] The Fourth Circuit later denied Ross' petition for habeas corpus relief by relying on the *Cole* court's holding that a failure to preserve a claim for appellate review according to applicable state law bars federal habeas corpus review of the claims.[58] In April of 1982, the Supreme Court granted Ross' writ of certiorari and vacated the Fourth Circuit's judgment that had denied Ross habeas corpus relief.[59] Accordingly, the Supreme Court ordered the Fourth Circuit to reconsider Ross' petition[60] in light of *Isaac*[61] and *Frady*.[62]

Upon re-evaluation, the *Ross* court examined the factual elements of the case in conjunction with the restrictive *Sykes* "cause and prejudice" test.[63]

---

52. 704 F.2d at 706.

53. *Id.*

54. 620 F.2d 1055 (4th Cir.) (en banc), *cert. denied*, 449 U. S. 1004 (1980).

55. *Id.* at 1056.

56. *Id.* at 1057. The *Cole v. Stevenson* court based its decision to deny petitioner Cole habeas corpus review on the *Hankerson* finding that despite the *Mullaney* decision, states could ensure the validity of past convictions by enforcing state contemporaneous objection rules. *Id.* at 1056, 1061; *see* United States v. Hankerson, 432 U.S. 233, 244 n.8 (1977); *see also supra* notes 48-51 (discussion of *Mullaney* and *Hankerson*).

57. 704 F.2d at 707.

58. *Id.* at 706-07; *see supra* text accompanying notes 54-56 (discussion of *Cole*).

59. 704 F.2d at 706; *see* Ross v. Reed, 456 U.S. 921 (1981) (Supreme Court's remanding of *Ross* to Fourth Circuit).

60. 704 F.2d at 707; *see* Ross v. Reed, 456 U.S. 921 (1981) (Supreme Court's remanding of *Ross* to Fourth Circuit).

61. 456 U.S. 107 (1982); *see also supra* text accompanying notes 28-35 (discussion of *Isaac*).

62. 456 U.S. 152 (1982); *see also supra* text accompanying notes 22-27 (discussion of *Frady*).

63. 704 F.2d at 707; *see also supra* text accompanying notes 17-19 (discussion of *Sykes* "cause and prejudice" test). In addition to the "cause and prejudice" argument, Ross also advanced two unsuccessfully alternative arguments in support of his habeas petition. 704 F.2d at 707. First, Ross asked the Fourth Circuit to overrule the holding in *Cole v. Stevenson* that failure to comply with a state's contemporaneous objection rule barred habeas corpus review. *Id.; see* Cole v. Stevenson, 620 F.2d 1055 (4th Cir.) (en banc), *cert. denied*, 449 U.S. 1004 (1980); *see also supra* text accompanying notes 54-56 (discussion of *Cole*). The *Ross* court announced that

The Fourth Circuit concluded that the trial court's jury instructions that shifted the burden of proof to Ross on the issues of lack of malice and self-defense may have encouraged the jury to render a verdict of guilty.[64] The Fourth Circuit reasoned that since Ross' constitutional claim that the jury instructions violated due process of law related to the guilt determination process, Ross suffered actual prejudice.[65] The *Ross* court found therefore that Ross' claim satisfied the prejudice prong of the *Sykes* test.[66] Furthermore, the Fourth Circuit concluded that Ross had sufficient cause for failing to present his federal claim concerning unconstitutional jury instructions to the Supreme Court of North Carolina.[67] In determining whether Ross' claim satisfied the cause prong of the "cause and prejudice" test, the *Ross* court compared the facts of *Isaac* with the facts in *Ross*.[68] In *Isaac*, the first habeas corpus petitioner's trial occurred four and one-half years after the *Winship* decision.[69] The *Isaac* Court held that the *Winship* holding, requiring the prosecution to prove every element of a criminal offense, provided the petitioner's attorney with precedent sufficient to permit a valid constitutional objection to a jury instruction that had shifted the burden of proof to a criminal defendant on the issue of self-defense.[70] The Supreme Court stated in *Isaac* that counsel's unawareness

---

the Fourth Circuit would follow the *Cole* decision unless the Fourth Circuit reversed itself in an *en banc* decision or the Supreme Court specifically overruled *Cole*. 704 F.2d at 707. Second, Ross claimed that the North Carolina Supreme Court waived the rule barring review of any impropriety to which the defendant failed to object at trial when the North Carolina Supreme Court heard on direct appeal the trial judge's instructions concerning the burden of proof. *Id.* The Fourth Circuit declined to rule on Ross' second argument. *Id.*

64. 704 F.2d at 707. The Fourth Circuit in *Ross* would not speculate on whether Ross' guilty verdict resulted from the jury instruction that shifted the burden of proof or from persuasive prosecution work. *Id.*

65. *Id.; see also* United States v. Frady, 456 U.S. 152, 169 (1981). In *Frady*, the Supreme Court stated that to demonstrate prejudice for the purposes of satisfying the *Sykes* test, the petitioner not only must show the erroneous nature of the jury instruction but also must show that the instruction worked to the petitioner's actual disadvantage. 456 U.S. at 169; *see supra* text accompanying notes 23-27 (discussion of *Frady*). In *Isaac*, the Supreme Court stated that the type of constitutional claim the petitioner raised may affect the court's conclusion of the degree of prejudice involved and that a claim concerning the truth finding function of the trial magnifies the degree of prejudice that the appellate court is calculating. Engle v. Isaac, 456 U.S. 107, 129 (1981); *see supra* text accompanying notes 28-34 (discussion of *Isaac*).

66. 704 F.2d at 707. In *Ross* the prosecution conceded that the facts of the case satisfied the prejudice prong of the *Sykes* test. *Id.; see supra* text accompanying notes 18-20 (discussion of *Sykes* "cause and prejudice" test).

67. 704 F.2d at 709. The Fourth Circuit apparently has joined the Fifth and Seventh Circuits in extending the *Sykes* test from trial defaults to appellate defaults since Ross also failed to raise upon direct appeal to the Supreme Court of North Carolina the claim of unconstitutional jury instructions in his original trial. *Id.* at 707; *see* Norris v. United States, 687 F.2d 899, 903-04 (7th Cir. 1982) (failure to object to impropriety occurring at state trial in course of direct appeal bars litigation of issue on federal habeas corpus review); Evans v. Maggio, 557 F.2d 430, 433-34 (5th Cir. 1977) (same).

68. 704 F.2d at 707-08; *see also supra* text accompanying notes 28-34 (discussion of *Isaac*).

69. 704 F.2d at 708; *see also supra* text accompanying notes 28-34 (discussion of *Isaac*); *supra* text accompanying notes 46-47 (discussion of *Winship*).

70. 704 F.2d at 708. *See Isaac*, 456 U.S. at 132 n.40 (listing other state court decisions that should have alerted Isaac to possibility of constitutional claim).

of an accepted constitutional development did not satisfy the cause requirement necessary for allowing habeas corpus review.[71] In contrast to *Isaac*, however, the North Carolina Supreme Court decided the *Ross* direct appeal five months prior to the *Winship* decision.[72] The Fourth Circuit reasoned that although indications of a major constitutional revision concerning the burden of proof in self-defense claims may have preceded the *Winship* holding, no documented constitutional claim existed upon which Ross could have based an objection to the jury instructions at the time of trial.[73]

After distinguishing *Isaac* to allow Ross habeas corpus review, the Fourth Circuit supported its conclusion by discussing various policies underlying the "cause and prejudice" test.[74] In particular, the Fourth Circuit explained that attorneys and appellate courts would have difficulty in planning trial strategy if novelty never satisfied the cause prong of the *Sykes* test.[75] The *Ross* court reasoned that if novelty never satisfied the cause prong, attorneys would have to argue all possible constitutional claims on appeal to ensure the right of post-conviction relief if a favorable development in the law later arose.[76] Moreover, the *Ross* court found that requiring defendants to argue all possible claims on relief would strain the overburdened federal docket with meritless claims.[77] The *Ross* court concluded that the Supreme Court intended the *Sykes* "cause and prejudice" test to remedy situations that produce injustice.[78] The Fourth Circuit did not speculate whether the state court's jury instruction that shifted the burden of proof to Ross on the issues of lack of malice and self-defense actually affected the jurors' decision-making processes.[79] The *Ross* court stated only that shifting the burden of proof to Ross on the issues of lack of malice and self-defense was unfair and therefore Ross' trial was a miscarriage of justice.[80] Accordingly, the Fourth Circuit remanded the case to the district court and ordered the lower court to issue a writ of habeas corpus.[81]

The *Ross* decision illustrates the Fourth Circuit's desire to promote fairness and to avoid the harsh results that potentially can accompany a denial of habeas corpus review because of a strict application of the *Sykes* test.[82] Since the

---

71. 704 F.2d at 707.

72. *Id.* at 706; *see also supra* text accompanying notes 46-47 (discussion of *Winship*).

73. 704 F.2d at 708.

74. *Id.* at 708-09; *see supra* text accompanying notes 17-19 (explanation of *Sykes* "cause and prejudice" test).

75. 704 F.2d at 708.

76. *Id.*

77. *Id.*

78. *Id.; see* Wainwright v. Sykes, 433 U.S. 72, 91 (1977); *supra* text accompanying notes 14-19 (discussion of *Sykes*).

79. 704 F.2d at 709.

80. *Id.*

81. *Id.*

82. *See* Wainwright v. Sykes, 433 U.S. 72, 94-95 & n.1 (1977) (Stevens, J., concurring) (federal courts occasionally avoid Supreme Court mandated tests and look to totality of cir-

Supreme Court has never determined what a prisoner must demonstrate to satisfy either the cause or prejudice prong of the test, lower federal courts have formulated their own standards for applying the *Sykes* test.[83] Federal circuit courts are in general agreement that failure to observe state contemporaneous objection rules will bar federal habeas corpus review unless a prisoner can show cause and prejudice in the prisoner's habeas corpus petition.[84]

In addition to the Fourth Circuit, only the Ninth Circuit has recognized that the novelty of a constitutional claim satisfies the cause prong of the *Sykes* test.[85] In *Myers v. Washington*,[86] the petitioner applied to the Washington Supreme Court for habeas corpus relief alleging that the trial court jury instructions unconstitutionally shifted the burden of proof to the petitioner on the intent element of the petitioner's murder charge.[87] Myers had failed to

---

cumstances to decide cases in interest of fairness); *see also The Sixth Circuit, supra* note 16, 874 (stating that some federal courts avoid applying *Sykes* strictly).

83. *See* Wainwright v. Sykes, 433 U.S. 72, 87, 91 (1977). In *Sykes*, the Supreme Court placed the burden on lower federal courts to form the precise definition of the cause and prejudice elements of the *Sykes* test. *Id; see The Sixth Circuit, supra* note 16, at 866 (federal courts left without guidelines in defining cause or prejudice). The Supreme Court subsequently has attempted to lend courts some guidance on defining cause and prejudice but such efforts have been nebulous. *See* United States v. Frady, 456 U.S. 152, 168-69 (1982) (clarifying prejudice prong of *Sykes*); Engle v. Isaac, 456 U.S. 107, 130-34 (1982) (refining cause prong of *Sykes*); *supra* text accompanying notes 22-35 (discussion of *Frady* and *Isaac*).

84. *See, e.g.*, Ford v. Strickland, 696 F.2d 804, 812-13 (11th Cir. 1983) (procedural default bars habeas relief unless petitioner shows cause and prejudice); Nieb v. Jago, 695 F.2d 228, 230 (6th Cir. 1982) (failure to observe contemporaneous objection rule results in procedural default unless petitioner demonstrates cause and prejudice); Sales v. Harris, 675 F.2d 532, 542 (2d Cir.) (failure to object during state appeal creates bar to habeas review on issue unless petitioner shows cause and prejudice), *cert. denied*, ____ U.S. ____, 103 S. Ct. 170 (1982); Hicks v. Scurr, 671 F.2d 255, 259 (8th Cir.) (same), *cert. denied*, ____ U.S. ____, 103 S. Ct. 295 (1982); Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (same); Tyler v. Phelps, 643 F.2d 1095, 1100-02 (5th Cir. 1981) (failure to observe contemporaneous objection rules bars habeas corpus relief unless petitioner demonstrates cause and prejudice), *cert. denied*, 456 U.S. 935 (1982).

85. *See* Myers v. Washington, 646 F.2d 355, 360 (9th Cir. 1981), *vacated*, 456 U.S. 921 (1982), *aff'd on rehearing*, 702 F.2d 766 (9th Cir. 1983) (reaffirming original Ninth Circuit decision after Supreme Court ordered reconsideration in light of *Isaac* and *Frady*). In addition to the Fourth and Ninth Circuits, three other circuits have entertained novelty claims that the circuits subsequently dismissed because the individual facts failed to satisfy the cause prong of the *Sykes* test. *See* United States *ex rel* Hudson v. Brierton, 699 F.2d 917, 921-22 (7th Cir. 1983) (fruit of poisonous tree doctrine not novel at time of trial); Bass v. Estelle, 696 F.2d 1154, 1157 (5th Cir. 1983) (issue not novel since constitutional claim recognizable before trial); Dietz v. Solem, 677 F.2d 672, 675 (8th Cir. 1982) (counsel had basis for constitutional claim, therefore no novelty existed).

86. 646 F.2d 355 (9th Cir. 1981), *vacated*, 456 U.S. 921 (1982), *aff'd on rehearing*, 702 F.2d 766 (9th Cir. 1983).

87. *Id.* at 359. The petitioner in *Myers v. Washington* filed a writ of habeas corpus with the Washington Supreme Court in 1979 on the basis of five issues he did not raise on direct appeal of a murder conviction. *Id.* at 356-57. Myers' original trial occurred in 1957 and his direct appeal occurred in 1959. *Id.* In a habeas corpus petition to the Washington Supreme Court, Myers relied on the *Mullaney* and *Hankerson* holdings to challenge the original jury instructions that shifted the burden of proof to Myers on the intent element of the murder charge. *Id.* at 359; *see supra* text accompanying notes 48-51 (discussion of *Mullaney* and *Hankerson*). The Washington Supreme Court denied Myers' habeas corpus petition in the interest of achieving finality of state court judgments. 646 F.2d at 357.

raise the issue at trial or upon direct appeal.[88] The Washington Superior Court and the Washington Supreme Court decided Myers' trial and subsequent appeal several years before the *Mullaney* and *Hankerson* decisions.[89] The Ninth Circuit granted Myers' writ of habeas corpus despite Myers' failure to raise the constitutional due process claim on direct appeal to the Washington Supreme Court.[90] The *Myers* court reasoned that the petitioner could not have known at the time of direct appeal to the Washington Supreme Court that the jury instructions improperly shifted the burden of proof to the petitioner.[91] The *Myers* court held, therefore, that the claim satisfied the cause prong of the *Sykes* test.[92]

The *Ross* and *Myers* holdings are correct despite the Supreme Court's hesitancy in *Isaac* to certify novelty as sufficient cause to satisfy the "cause and prejudice" test.[93] Because the *Winship* decision preceded the original petitioner's trial in *Isaac* by four and one-half years, the Supreme Court did not certify the *Isaac* petitioner's claims as novel.[94] In contrast, at the time of the *Ross* appeal no precedent existed upon which Ross could formulate a valid constitutional objection.[95] Realistically, defendant's counsel could not object at trial or on appeal when no accepted constitutional basis existed upon which to voice an objection.[96] In keeping with the *Sykes* principle of avoiding miscarriages of justice, the Fourth Circuit justifiably recognized novelty of the constitutional claim as demonstrating sufficient cause to satisfy the first prong of the *Sykes* test.[97]

The Fourth Circuit's decision in *Ross* departs from the Burger Court's goal of restricting federal habeas corpus availability to promote judicial economy and finality.[98] The *Ross* court impliedly reasserts the Warren Court's intent to protect a defendant's constitutional rights.[99] Apparently, the Fourth Circuit recognized the harshness of its ruling in *Cole* which seemingly valued

---

88. 646 F.2d at 356-57.

89. *Id.; see supra* note 87 (discussion of *Myers*).

90. 646 F.2d at 359-60.

91. *Id.* at 360.

92. *Id.* In holding that Myers satisfied the cause prong of the *Sykes* test, the *Myers* court concluded that the courts should not expect counsel to foresee changes in a settled area of constitutional law. *Id.*

93. *See* 704 F.2d at 709 (novelty satisfies cause prong of "cause and prejudice" test and petitioner therefore granted habeas corpus review); Myers v. Washington, 646 F.2d 355, 360-61 (9th Cir. 1981) (same); *see also* Engle v. Isaac, 456 U.S. 107, 131 (1982) (Supreme Court declined to recognize novelty as sufficient cause under "cause and prejudice" test); *supra* text accompanying notes 28-35 (discussion of *Isaac*).

94. *See Isaac*, 456 U.S. at 130-34; *supra* text accompanying notes 46-47 (discussion of *Winship*).

95. *See* 704 F.2d at 708; *supra* text accompanying notes 46-47 (discussion of *Winship*).

96. *See* 704 F.2d at 708. Like the *Ross* decision, the Supreme Court in *Isaac* stated that courts cannot expect counsel to possess extraordinary vision to anticipate new constitutional grounds for objection. *See Isaac*, 456 U.S. at 131.

97. *See* 704 F.2d at 709; *supra* text accompanying notes 14-19 (discussion of *Sykes*).

98. *See supra* text accompanying notes 12-13 (Burger Court's goal of restricting habeas corpus availability).

99. *See supra* text accompanying notes 7-8 (Warren Court's expansion of habeas corpus availability).

judicial economy ahead of a prisoner's constitutional rights.[100] Moreover, the *Ross* court recognized that the vindication of a prisoner's valid constitutional claim is of primary consideration.[101]

The Fourth Circuit effectively recognized the fallacious reasoning of the Burger Court's promotion of judicial efficiency and finality through a restrictive writ.[102] Under the "cause and prejudice" test, a federal court's determination of whether both elements of the *Sykes* test exist will be subject to appeal by either the state or the petitioner.[103] Prisoners who do not satisfy the "cause and prejudice" test of *Sykes* will file claims of ineffective assistance of counsel at trial.[104] If, however, a court validates a "cause and prejudice" petition, further appeals by the petitioner or the prosecution will follow contesting any ruling on the merits.[105] In comparison with the *Fay* "deliberate by-pass" standard, the "cause and prejudice" test is nebulous and produces extraneous litigation.[106]

In *Ross*, the Fourth Circuit correctly applied the "cause and prejudice" exception to a state procedural bar by granting the petitioner habeas corpus relief.[107] Although the *Ross* decision contradicts the Burger Court's philosophy by expanding the availability of the writ, the Fourth Circuit reacted appropriately to the Supreme Court's decision in *Isaac* not to determine whether the novelty of a constitutional claim satisfies the cause prong of the *Sykes* "cause and prejudice" test.[108] In identifying novelty as a sufficient cause under the *Sykes* test, the *Ross* holding reflects the Fourth Circuit's willingness to protect the

---

100. *See supra* text accompanying notes 54-56 (discussion of *Cole*). The Fourth Circuit in *Cole* decided the case based on the *Hankerson* determination that states could ensure the validity of past convictions, despite the *Mullaney* decision, by enforcing state contemporaneous objection rules. *See* Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977); Mullaney v. Wilbur, 421 U.S. 684, 704 (1972); Cole v. Stevenson, 620 F.2d 1055, 1057 (4th Cir.) (*en banc*), *cert. denied*, 449 U.S. 1004 (1981); *supra* notes 50-51 (discussion of *Hankerson*); *supra* notes 48-49 (discussion of *Mullaney*); *see also* Comment, *The Availability of Federal Habeas Corpus Review to State Prisoners: The Effect of the Cause and Prejudice Test*, 38 WASH. & LEE L. REV. 532, 534-42 (1981) (discussion and analysis of *Cole*).

101. *See* 704 F.2d at 709.

102. *See Miscarriage of Justice, supra* note 11, at 393-94 (discussion of judicial inefficiency of "cause and prejudice" test). The *Sykes* "cause and prejudice" test produces hearings on the issues of cause and prejudice, on the merits of the substantive claim, and on whether a fundamental miscarriage of justice occurred. *Id.; see supra* text accompanying notes 14-19 (discussion of *Sykes* "cause and prejudice" test).

103. *See Miscarriage of Justice, supra* note 11, at 394 (discussion of inefficiency of "cause and prejudice" test).

104. *Id.*

105. *Id.*

106. *Id.* To clarify some of the conceptual confusion surrounding the "cause and prejudice" test, the Supreme Court in *Sykes* should have stated what is necessary to satisfy the cause and prejudice prongs of the *Sykes* test. *Id.* at 394 n.132.

107. *See supra* text accompanying notes 14-35 (policies and origins of "cause and prejudice" test).

108. *See supra* text accompanying notes 12-13 & 35-38 (discussion of Burger Court philosophy and *Isaac* Court's inability to decide whether novelty satisfies cause prong of "cause and prejudice" test).

constitutional rights of habeas petitioners to whom the the courts would have denied relief because of a procedural default during state appellate review.[109] Until the Supreme Court specifically addresses whether novelty satisfies the cause prong of the *Sykes* test, practitioners in the Fourth Circuit should be cognizant of the Fourth Circuit's desire to rectify a miscarriage of justice on habeas corpus review by certifying novelty as sufficient cause under the *Sykes* "cause and prejudice" test.

JEFFREY J. GIGUERE

B. *Prisoner's Right to Change Name Under First Amendment Free Exercise Clause*

Before 1964, the United States Supreme Court refused to recognize a prisoner's claim for alleged violations of the free exercise of religion clause of the first amendment.[1] Although a prisoner does not forfeit all of his first amendment civil rights while incarcerated,[2] a prisoner is subject to the necessary constraints inherent in a prison environment.[3] A prisoner does not enjoy to the same extent as a nonprisoner the right to exercise his religion to the limits

---

109. *See supra* text accompanying notes 63-81 (discussion of *Ross* court's decision to certify novelty as sufficient cause under "cause and prejudice" test).

---

1. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (first amendment free exercise clause applicable to states through fourteenth amendment); U.S. CONST. amend. I (Congress prohibited from establishing religion or prohibiting free exercise of religion); U.S. CONST amend. XIV, § 1 (states prohibited from abridging fundamental rights of United States citizens without due process of law); *see also* Cooper v. Pate, 378 U.S. 546, 546 (1964) (reversing district court's dismissal of prisoner's complaint based upon civil rights statutes for alleged violations of prisoner's first and fourteenth amendment right to free religious expression). The Civil Rights Act of 1871 provides subject matter jurisdiction for federal courts to consider civil causes of action from United States citizens who claim that the government has deprived them of rights, privileges, or immunities that the Constitution protects under the due process clause of the fourteenth amendment. 42 U.S.C. § 1983 (1976 & Supp. V 1981); *see* Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961) (prisoners have the right to invoke provisions of 42 U.S.C. § 1983 when alleging deprivation of certain rights and privileges of citizenship), *rev'd on other grounds*, 409 U.S. 421 (1973). *Compare* Ruffin v. Commonwealth, 62 Va. 790, 796 (1871) (state once regarded prisoners as slaves of state and in forfeiture of all civil rights) *with* Palmigiano v. Travisono, 317 F. Supp. 776, 785 (D.R.I. 1970) (courts have moved beyond *Ruffin* toward heightened concern for prisoners' human rights). *See generally* Paulsen, *Prison Reform in the Future—the Trend Toward Expansion of Prisoners' Rights*, 16 VILL. L. REV. 1082 (1971).

2. *See* U.S. CONST. amend. I; *see also* Cruz v. Beto, 405 U.S. 319, 321 (1972) (prisoners have first amendment rights); Johnson v. Avery, 393 U.S. 483, 485 (1969) (prisoners, like other citizens, have right to petition government for redress of grievances); *infra* note 6 (discussion of *Johnson v. Avery*).

3. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) (recognizing that prisoners are subject to appropriate prison rules and regulations).

of the first amendment.[4] Courts generally permit prison officials to make and enforce regulations free from judicial interference for the safe and orderly conduct of penal institutions.[5] Prison regulations, however, are subject to constitutional scrutiny by the judiciary.[6] Since 1974, the Supreme Court has sought to enable prisoners to pursue first amendment rights freely to the extent that the exercise of those rights is not inconsistent with the prison's interest in security, order, or other reasonable objectives of the prison system.[7] Thus, while federal courts traditionally have adopted a "hands-off"[8] attitude toward problems of prison administration, federal courts have been concerned with the constitutionality of prison regulations that interfere with a prisoner's freedom of religion.[9] The Fourth Circuit in *Barrett v. Virginia*[10] recently considered the reasonable objectives of the penal system as weighed against a Muslim inmate's right to change his name for religious reasons.[11]

In *Barrett*, a state prisoner, Thomas Eldridge Barrett, who had converted to Islam applied twice to the Arlington County circuit court for legal recognition of his adopted Muslim name.[12] The county court denied Barrett's requests pursuant to a Virginia change-of-name statute[13] that expressly prevents circuit

4. *See* Price v. Johnson, 334 U.S. 266, 285 (1948). In *Price v. Johnson*, the Supreme Court held that prison officials may withdraw or limit many privileges and rights of prisoners because of the underlying interests of the penal system. *Id.* The Supreme Court subsequently has identified four functions of the corrections system, including deterrence of crime by isolating prisoners from society, protection of society by quarantining criminals, rehabilitation of offenders so that they may become productive citizens, and preservation of internal security of the prison. *See* Pell v. Procunier, 417 U.S. 817, 822-23 (1974).

5. *See* Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 863 (4th Cir. 1975) (first amendment requires prison officials to provide only reasonable opportunities for inmates to exercise religion); *see also infra* notes 55-57 and accompanying text (discussion of *Sweet*).

6. *See* Johnson v. Avery, 393 U.S. 483, 486 (1969). In invalidating a prison regulation that prohibited inmates from giving legal advice, the Supreme Court in *Johnson v. Avery* held that federal courts will protect the constitutional rights of inmates when prison regulations offend the fundamental guarantees of the first amendment. *Id.*

7. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974). In *Pell v. Procunier*, the Supreme Court held that courts must analyze prisoners' first amendment claims in terms of society's basic right to protect itself from criminals. *Id.* at 822-23.

8. *See* Procunier v. Martinez, 416 U.S. 396, 404 (1974). The operation of correctional facilities is the primary responsibility of the executive and legislative branches, not the judicial. Bell v. Wolfish, 441 U.S. 520, 548 (1979). Furthermore, federal courts are hesitant to interfere with state penal institutions because of limitations on the scope of federal review of the state's police power. 416 U.S. at 404-405. *See generally* Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

9. *See* Procunier v. Martinez, 416 U.S. 396, 405-406 (1974) (policy of judicial restraint does not imply unwillingness of federal courts to hear valid constitutional claims).

10. 689 F.2d 498 (4th Cir. 1982).

11. *Id.* at 501.

12. *Id.* at 499.

13. VA. CODE ANN. § 8.01-217 (Cum. Supp. 1983). In Virginia, it is illegal to assume a name unlawfully. *See id.* § 18.2-504.1. The Virginia change-of-name statute provides the only legal means by which a person may change his name. *See id.* § 8.01-217; *see also* 689 F.2d at 500 n.1. The statute instructs the applicant to apply to the county or city circuit court in which the applicant resides. VA. CODE ANN. § 8.01-217 (Cum. Supp. 1983). The statute prohibits Virginia circuit courts from considering applications of prisoners although the statute permits the circuit

courts from considering applications from prisoners.[14] The prisoner brought suit in the United States District Court for the Eastern District of Virginia against the Commonwealth of Virginia for alleged violations of his constitutional right under the first and fourteenth amendments to exercise his religion freely.[15] The district court referred the cause of action to a magistrate for an evidentiary hearing[16] on the merits of Barrett's due process claim with respect to the constitutionality of the Virginia change-of-name statute.[17] The Commonwealth of Virginia presented evidence claiming that legal recognition of the plaintiff's newly adopted name would lead many other prisoners to change their names and thus unduly would burden prison administration and would place identification records in disarray.[18] In claiming that the Virginia change-of-name statute was unconstitutional, Barrett argued that the statute prevented him from fully complying with the teachings of Islam[19] since Muslims consider their names to be of religious significance.[20]

At the evidentiary hearing, the magistrate held that the plaintiff's first amendment rights outweighed the state's interest in efficient prison administration and therefore concluded that the change-of-name statute was unconstitutional as applied to the plaintiff.[21] Furthermore, the magistrate found the Virginia statute overly rigid because the statute gives the county circuit court discretion to consider change-of-name applications from probationers who show "good cause" but does not contain a corresponding provision for prison inmates.[22]

---

courts to consider "good cause" applications from probationers. *Id.* The statute instructs the county circuit court to grant name changes to applicants in the absence of a fraudulent purpose. *Id.* Probationers must show "good cause" in addition to the absence of a fraudulent purpose. *See id.*

14. 689 F.2d at 499-500; *see* VA. CODE ANN. § 8.01-217 (Cum. Supp. 1983).

15. 689 F.2d at 500. The plaintiff in *Barrett v. Virginia* challenged the constitutionality of the Virginia change-of-name statute under 42 U.S.C. § 1983 (1976 & Supp. V 1981). 689 F.2d at 500; *see supra* note 1 (explaining § 1983).

16. 689 F.2d at 500. Section 636 of 28 U.S.C. provides that a federal judge may designate a United States magistrate to conduct evidentiary hearings of prisoner petitions challenging conditions of confinement. 28 U.S.C. § 636(b)(1)(B)(1976). At the conclusion of the hearing, the magistrate will submit to the trial court the proposed findings of fact and recommendations for disposition. *Id.*

17. 689 F.2d at 500.

18. *Id.; see* Joint Appendix to Briefs for Appellant and Appellee at 60-108, Barrett v. Virginia, 689 F.2d 498 (4th Cir. 1982) [hereinafter cited as Joint Appendix].

19. *See* Joint Appendix, *supra* note 18, at 32. According to Chief Minister Muhammad's interpretation of the Muslim *Holy Quran* or holy book, Muslims should choose divine names. *Id.*

20. *See id.* In *Barrett*, the plaintiff testified at the evidentiary hearing that the Commonwealth's refusal to allow a prisoner to change his name prevented Barrett both from freeing himself of a name that had no religious significance and from pursuing the dictates of his conscience in accordance with his firm belief that his new name was of religious significance. *Id.* at 45-46. Muslims consider their birth names to be a spiritually unenlightened vestige of slave society in which white masters gave blacks their names. *See* Joint Appendix, *supra* note 18, at 22.

21. 689 F.2d at 500.

22. *See id.* at 502. The magistrate in *Barrett* was concerned with the lack of a "good cause" provision for a prisoner's petition for change of name. Joint Appendix, *supra* note 18, at 14. Unlike prisoners, probationers may change their names when they persuade the circuit court that

The district court agreed with the magistrate that the statute was unconstitutional as applied to Barrett and ordered the county circuit court to consider the plaintiff's application for a change of name.[23] The Commonwealth moved to clarify the district court's order and asked permission to record Barrett's new name as an alias.[24] Subsequently, the district court ordered the Commonwealth to change the prison records to reflect the plaintiff's legal religious name but allowed the defendant to list the plaintiff's given name as an alias.[25] The Commonwealth appealed the district court's ruling with respect to the constitutionality of the Virginia change-of-name statute and the subsequent order requiring the defendant to alter the plaintiff's prison records.[26]

On appeal, the Fourth Circuit in *Barrett* considered the constitutionality of the Virginia change-of-name statute in light of United States Supreme Court precedent[27] and prior Fourth Circuit decisions.[28] The *Barrett* court cited the Supreme Court's decision in *Pell v. Procunier*[29] as controlling authority in the area of prisoners' first amendment rights.[30] Specifically, the Fourth Circuit relied on language in *Pell* that an inmate forfeits only those rights that

---

"good cause" exists. VA. CODE ANN. § 8.01-217 (Cum. Supp. 1983). A religiously motivated application for change of name presumably would constitute "good cause." *See* 689 F.2d at 500 (district court ordered county circuit court to consider Barrett's application for change of name).

23. 689 F.2d at 500.

24. *Id.* The Commonwealth in *Barrett* argued in favor of keeping a prisoner's name the same from the time of arrest until the date of release from the prison facility. Joint Appendix, *supra* note 18, at 66-67. In addition to prisons, other facilities such as hospitals and dental clinics, as well as the F.B.I. and the National Criminal Records Exchange, use a prisoner's name of record. *Id.* at 61-68. The Commonwealth argued that changing a prisoner's name of record would cause the state undue burdens. 689 F.2d at 500.

25. 689 F.2d at 500. Prison officials apparently identify prisoners by many different names throughout incarceration, and consequently the prison adds aliases as "a/k/a's" following a prisoner's name of record. *See id.* (district court required defendant to change all prison records of plaintiff to reflect religious name as Barrett's name of record).

26. 689 F.2d at 499.

27. *See id.* at 501-503. In considering the constitutionality of the Virginia change-of-name statute, the Fourth Circuit in *Barrett* relied on four Supreme Court cases to determine the applicable standard for judging prisoner first amendment claims. *Id.* at 501; *see* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Cruz v. Beto, 405 U.S. 319 (1972); *see also infra* notes 30 & 37 and accompanying text (discussion of *Pell* and *Jones*).

28. *See* 689 F.2d at 501-503. The Fourth Circuit in *Barrett* relied on three precedents within the circuit to determine whether the prisoner's claimed first amendment interests should override the limitations on prisoners' free exercise rights that the Virginia change-of-name statute imposes. *Id.; see* Gallahan v. Hollyfield, 670 F.2d 1345 (4th Cir. 1982) (upholding Cherokee Indian prisoner's first amendment religious right to have long hair); Pittman v. Hutto, 594 F.2d 407 (4th Cir. 1979) (upholding censorship of prison magazine); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975) (upholding denial of prisoner's request to attend regular chapel service with general prison population); *see also infra* notes 57, 67 & 81 and accompanying text (discussion of *Sweet, Gallahan, Pittman*).

29. 417 U.S. 817 (1974).

30. 689 F.2d at 501; *see also* Pell v. Procunier, 417 U.S. 817, 822 (1974) (analyzing prisoner first amendment claims in terms of legitimate policies and goals of corrections system). The *Pell* Court considered the proper scope of journalists' access to prison inmates. *Id.* at 821-22. The Supreme Court in *Pell* held that the prison's refusal to allow the press access to specific inmates

conflict with his status as a prisoner or with the state's interest in deterrence of crime, protection of society from criminals, rehabilitation of prisoners, and the maintenance of internal prison security.[31] In interpreting this language from *Pell*, the Fourth Circuit admitted that restrictions on a prisoner's freedom are not unconstitutional when such restrictions are necessary to preserve the legitimate interests of penal institutions.[32] The *Barrett* court recognized that the judiciary ordinarily accords substantial deference to determinations by correctional officials in enforcing prison discipline and order.[33] The Fourth Circuit reasoned, however, that the Commonwealth's determination of the constitutionality of prison strictures is not immune from judicial review.[34]

In evaluating the constitutionality of the Virginia change-of-name statute, the *Barrett* court analyzed the reasonableness of the fears of prison officials concerning prison discipline and order.[35] During oral argument before the *Barrett* court, the Commonwealth relied principally on *Jones v. North Carolina Prisoners' Labor Union*[36] in which the United States Supreme Court held that courts must defer to the informed discretion of penal officials regarding the reasonableness of restrictions on inmate freedom unless the prison officials clearly exaggerate the seriousness of threats to prison order and security.[37] The *Barrett* court, however, determined that the Commonwealth's analysis of *Jones* was overly broad, and thus the Fourth Circuit concluded that *Jones* did not prohibit judicial review of restrictions on prisoners' first amendment freedoms.[38] In explaining the willingness of the judiciary to hear valid first amendment claims, the *Barrett* court cited language in *Jones* to the effect that prison regulations may restrain prisoners' civil liberties only to the extent that is necessary to prevent serious risks to prison security.[39] In *Jones*, the Supreme Court upheld the refusal of prison officials to allow the activities of a prisoners' union by reasoning that the threat of an organized prisoner union warranted the restrictions on the first amendment freedom to associate.[40] Although recognizing a prison's interest in maintaining order and security, the *Barrett* court concluded that the Supreme Court in *Jones* did not abdicate the

---

did not infringe unconstitutionally upon the prisoners' right of free speech since the prisoners could receive other visitors. *Id.* at 821, 825.

31. 417 U.S. at 822-23, *quoted in* 689 F.2d at 501.

32. 689 F.2d at 501.

33. *Id.*

34. *Id.*

35. *Id.* at 502-503.

36. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977).

37. 689 F.2d at 501; *see Jones*, 433 U.S. at 128-30 (upholding prison ban on inmate union). In *Jones v. North Carolina Prisoners' Labor Union*, the Supreme Court emphasized the difficulties of running a penal institution and asserted the judiciary's wide-ranging deference for the decisions of prison officials because courts are ill-equipped to deal with the urgent problems of prison administration. *Id.* at 126.

38. 689 F.2d at 502.

39. *Id.; see Jones*, 433 U.S. at 133 (upholding constitutionality of prison regulation since prison drafted regulation no more restrictively than necessary to counter perceived threat to prison security).

40. 433 U.S. at 133.

judiciary's constitutional authority to protect the individual liberties of prisoners.[41] Accordingly, the Fourth Circuit affirmed the district court and held the Virginia change-of-name statute unconstitutional.[42] Furthermore, the *Barrett* court reiterated the lower court's view that the statute's lack of a "good cause" exception for prisoners as well as for probationers was fatal to the statute's constitutionality.[43] To the extent that the Virginia change-of-name statute infringed upon the plaintiff's first amendment religious expression, the Fourth Circuit considered the absence of a good cause exception to be unreasonable and thus unconstitutional.[44] Implicit in the balancing approach in *Jones*, according to the *Barrett* court, is the recognition that restrictions on prisoners' first amendment rights must be no broader than necessary to protect the prison's interests in order and security.[45] The Fourth Circuit agreed with the district court that the plaintiff's rights to practice his religion required the circuit court to consider Barrett's good cause application for a change of name.[46] The Fourth Circuit held, therefore, that the change-of-name statute unreasonably restricted the plaintiff's first amendment religious expression because permitting prisoners to change their names on religious grounds would present no undue hardship to prison administration.[47]

Although the *Barrett* court declared the Virginia change-of-name statute unconstitutional, the Fourth Circuit found error in the district court's subsequent order requiring the Commonwealth to reorganize its files to reflect a prisoner's current legal name.[48] The Fourth Circuit preferred instead to conform to the general principle that the first amendment only prohibits government action and does not require affirmative acts.[49] By preserving the latitude

41. 689 F.2d at 502.

42. *Id.* at 503.

43. *Id.; see* Joint Appendix, *supra* note 18, at 25. The *Barrett* court agreed with the district court that the Virginia change-of-name statute was overly rigid in not allowing even the consideration of a request from a prisoner for a change of name. 689 F.2d at 502. In declaring the Virginia statute unconstitutional, the Fourth Circuit characterized its decision as consistent with the principle that prisons should choose the least restrictive alternative available when encroaching upon prisoners' first amendment freedoms. *Id.*

44. 689 F.2d at 503.

45. *Id.* at 502.

46. *Id.*

47. *Id.* at 503.

48. *Id.*

49. *Id.; see, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 878-79 (1982) (Blackmun, J., concurring) (first amendment freedom of speech does not require government to provide public school students with specific books in school library although state may not remove specific books from library for purpose of restricting access to ideas that school officials find offensive); Smith v. Arkansas State Highway Employees, 441 U.S. 463, 465 (1979) (state highway commission's procedure to accept grievances only from employees directly and not from union on behalf of employees does not violate freedom of association rights of union members since first amendment does not impose on government affirmative obligation to recognize union); Silvette v. Art Comm'n of Va., 413 F. Supp. 1342, 1346 (E.D. Va. 1976) (notwithstanding artist's right to free artistic expression, artist does not have first amendment right to compel government to display his paintings); U.S. CONST. amend. I (prohibiting government actions infringing fundamental rights); *see also infra* note 51 (analyzing *Barrett* court's discussion of general rule that first amendment does not require affirmative government acts).

of prison officials with regard to prison records, the Fourth Circuit emphasized that courts must defer to prison officials whenever administrative decisions do not implicate constitutional rights.[50] In the *Barrett* court's view, the free exercise clause of the first amendment requires only that the Commonwealth comply with the plaintiff's request for a religiously motivated change of name.[51]

Prior to the *Barrett* decision, the leading case in the Fourth Circuit on first amendment religious issues pertaining to inmates was *Sweet v. South Carolina Department of Corrections*.[52] In *Sweet*, the Fourth Circuit upheld a prison's decision denying a prisoner the right to attend chapel services along with the general prison population.[53] The prisoner's reputation among other prisoners as an informer in connection with a riot prompted the prisoner in *Sweet* to request segregated confinement for his own safety.[54] The *Sweet* court refused to disturb the reasonable judgment of prison officials that the prison could not guarantee an inmate's safety at prison-wide chapel services.[55] The *Barrett* court cited with approval language from *Sweet* that prison regulations unconstitutionally infringe upon first amendment freedoms only when prison officials are unable to justify the regulation in the interests of discipline and

---

50. 689 F.2d at 503.

51. *Id.* In reversing the district court's order directing the Commonwealth to record the plaintiff's legal name as the name of record, the *Barrett* court cited several precedents which indicated that the free exercise clause of the first amendment does not require a prison to alter prison files. *See, e.g.*, Akbar v. Canney, 634 F.2d 339, 340 (6th Cir. 1980) (inmate does not have constitutional right to dictate how prison keeps records), *cert. denied*, 450 U.S. 1002 (1981); Smalley v. Bell, 484 F. Supp. 16, 17 (W.D. Okla. 1979) (changing all records of prisoner to reflect new name is insurmountable task); Muhammad v. Keve, 479 F. Supp. 1311, 1324 (D. Del. 1979) (state may identify citizens by any name, number, or symbol state chooses even though means of identification is personally offensive to person identified); United States v. Duke, 458 F. Supp. 1188, 1189 (S.D.N.Y. 1978) (alteration of records creates confusion and substantial record-keeping problems).

52. 529 F.2d 854 (4th Cir. 1975). Since 1961, the Fourth Circuit has recognized causes of action by prisoners seeking injunctive relief and damages against prison officials for alleged denials of religious freedom. *See* Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961) (prisoners do not relinquish all civil rights). In *Sewell v. Pegelow*, the Fourth Circuit ignored criticism that, by granting a hearing to a prisoner who accused prison officials of placing him in solitary confinement because of his religion, similar petitions would inundate federal courts in the future. *Id.* The *Sewell* court held that a prisoner's basic constitutional rights far outweighed the prison's interest in administrative efficiency. *Id.* The Fourth Circuit has placed first amendment religious freedom in a "preferred" position among other first amendment rights. *See* Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971) (criminals and prison communities may benefit from rehabilitative effects of religious devotion). In *Brown v. Peyton*, the Fourth Circuit noted that judges, not prison officials, must secure constitutional freedoms of prisoners. *Id.* at 1232. Thus, the Fourth Circuit from the early 1960's to the present has been at the forefront of a trend throughout the federal appellate circuits toward the increased recognition of prisoners' first amendment rights. *See generally* Flaherty, *Inside the Invisible Courts*, N.L.J., May 2, 1983, 1; Note, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812 (1977) [hereinafter cited as *Religious Rights*].

53. 529 F.2d at 864.

54. *Id.* at 857.

55. *Id.* at 863. Prison officials in *Sweet v. South Carolina Dep't of Corrections* offered individual religious ministration to prisoners in segregated confinement in lieu of attendance at regular prison services. *Id.* at 864.

order.[56] To determine the reasonableness of prison regulations, the *Sweet* court balanced the legitimate civil rights of prisoners against the concern of prison authorities for security and order and concluded that the prison's denial of the inmate's request to attend prison-wide chapel services was permissible under the first amendment.[57]

In addition to the Fourth Circuit, several United States circuit courts of appeals have considered the first amendment rights of prisoners in light of the responsibilities of prison officials in maintaining security and order.[58] The Second Circuit's decision in *LaReau v. MacDougall*[59] is consistent with the Supreme Court's decision in *Procunier v. Martinez*.[60] In attempting to formulate a standard of review for prisoner first amendment claims, the *Martinez* Court established a two-part test to invalidate a prison regulation authorizing mail censorship.[61] The *Martinez* Court explained that a prison regulation must advance an important government interest and must be no broader than necessary to protect prison order, security, and the rehabilitation of inmates.[62] In *MacDougall*, the Second Circuit emphasized that restraints on religious liberty are unconstitutional if less restrictive alternatives are available.[63] Similarly, the Eighth Circuit in *Teterud v. Burns*[64] invalidated a prison regulation that required an Indian prisoner to cut his hair, which the prisoner wore long for religious reasons, since the prison could pursue other alternatives without threatening prison security.[65] On essentially the same facts as in *Teterud*, the

---

56. 689 F.2d at 503; *see* Pell v. Procunier, 417 U.S. 817, 827 (1974) (federal courts must evaluate validity of prison regulations according to whether officials have overemphasized security to detriment of prisoners' fundamental liberties); *Sweet*, 529 F.2d at 860 (balancing of competing interests of prisoners and prison authorities is inevitable).

57. 529 F.2d at 864. The *Sweet* court held that a prisoner may exercise first amendment rights free from prison interference subject to the reasonable requirements of prison discipline and security. *Id.* at 859. The Fourth Circuit in *Barrett* merely interpreted the reasonableness of prison regulations in light of *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), which the Supreme Court decided after the Fourth Circuit's decision in *Sweet*, and held that *Jones* was consistent with the principle of judicial review of the reasonableness of prison regulations. *See* 689 F.2d at 502. Relying on both *Jones* and *Sweet* as precedent, the *Barrett* court decided that the Virginia change-of-name statute was invalid because the statute unreasonably restricted the plaintiff's religious expression by not allowing Barrett to change his name. *See id.* at 502-503.

58. *See Religious Rights, supra* note 52, at 839-51 (discussing federal appellate courts' disposition of prisoner first amendment claims).

59. 473 F.2d 974 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973).

60. 416 U.S. 396 (1974).

61. *See id.* at 412-13; *MacDougall*, 473 F.2d at 979 (applying a balancing test to determine whether prison regulation infringes upon free exercise clause). In *LaReau v. MacDougall*, the Second Circuit considered whether a prison regulation denying unruly prisoners access to Sunday mass furthered an important prison objective and whether the restraint on religious liberty reasonably achieved the objective. *Id.* The *MacDougall* court upheld the trial court's dismissal of the prisoner's complaint and noted the substantial interest of prison officials in preventing a major incident between the unruly prisoners and the general inmate population. *Id.*

62. *Martinez*, 416 U.S. at 413.

63. *MacDougall*, 473 F.2d at 979.

64. 522 F.2d 357 (8th Cir. 1975).

65. *Id.* at 362. In invalidating a prison regulation requiring a prisoner to cut his hair, the

Fourth Circuit in *Gallahan v. Hollyfield*[66] similarly held that a prison haircut regulation as applied to an Indian inmate was unconstitutional because the prison could preserve order and discipline without forcing the plaintiff to cut his hair.[67]

Not all federal circuit courts, however, have required prisons to utilize less restrictive alternatives when a prisoner's first amendment freedoms are at stake.[68] For example, the Third Circuit in *St. Claire v. Cuyler*[69] held that the *Martinez* Court's least restrictive means test concerning the reasonableness of prison regulations no longer was valid after *Jones*.[70] In determining that *Jones* invalidated the *Martinez* least restrictive means test, the Third Circuit cited language from *Jones* to the effect that a prison regulation protecting order and discipline is constitutional unless the prisoner can prove convincingly that prison officials have exaggerated their response to security threats.[71]

Eighth Circuit in *Teterud v. Burns* cited evidence that Indians consider their bodies as gifts from nature and thus sacred. *Id.* at 360 nn.5-6. The first amendment, according to the Eighth Circuit, protects an Indian's desire to wear his hair uncut for religious reasons. *Id.* at 360 & n.5. The *Teterud* court suggested that instead of requiring a prisoner to cut his hair, the prison could require the inmate to keep his hair clean, to submit to searches of his hair for contraband, to wear a hair net when preparing food, and to sit for a new identification photograph. *Id.* at 361. The prison officials in *Teterud* could not justify their regulation as constituting the least restrictive means of preserving the interests of prison administration when the prisoner's first amendment right was at stake. *Id.* Therefore, the Eighth Circuit found the regulation invalid. *Id.*

66. 670 F.2d 1345 (4th Cir. 1982).

67. *See id.* at 1346-47 (least restrictive means test). The prison in *Gallahan v. Hollyfield* argued that inmates with long hair are harder to identify than prisoners with short hair because long hair will enable prisoners to conceal their features. *Id.* at 1346. Furthermore, the prison noted that long hair is not only unsanitary but also provides a hiding place for contraband. *Id.* Notwithstanding the prison's arguments for restricting the length of prisoners' hair, the *Gallahan* court recognized other alternatives to requiring short hair in order to protect the prison's legitimate interests. *Id.* For example, the court commented that rather than cutting an inmate's hair, prisons could require an inmate to keep his hair tied back in a ponytail. *Id.* at 1347.

68. *See* St. Claire v. Cuyler, 634 F.2d 109, 114 (3d Cir. 1980) (extreme deference to decisions of prison officials).

69. *Id* at 109.

70. *Id.* at 114. In *St. Claire v. Cuyler*, the Third Circuit upheld a prison regulation that prevented Muslim prisoners from wearing religious head coverings. *Id.* at 112-15. The *Cuyler* court argued that Supreme Court pronouncements of the least restrictive means standard should not control over the wide-ranging deference that courts must accord prison officials. *Id.* at 114. The *Jones* Court specifically mentioned that prison officials must draft regulations no more broadly than necessary to preserve prison security. 433 U.S. at 133. While the Third Circuit seems to have overlooked this language from *Jones*, the Third Circuit did recognize that judicial deference toward prison officials might not be applicable in situations in which prison officials could not justify their actions with regard to institutional security. 634 F.2d at 114. *Cuyler* perhaps is distinguishable from the Fourth Circuit's holding in *Barrett* to the extent that less restrictive alternatives were not feasible in the *Cuyler* case. *Id.* at 115. In *Cuyler*, the prison produced convincing evidence that the facility simply did not have the resources and guards available to search each inmate who wore headgear for contraband. *Id.* Moreover, a prison official in *Cuyler* testified that prisoners used hats for purposes other than religious expression. *Id.* Gangs within the prison apparently identified themselves by wearing certain types of head coverings. *Id.* The Third Circuit, therefore, probably could have reached the same result in upholding the prison regulation under a least restrictive means analysis. *Id.*

71. 634 F.2d at 114. The *Cuyler* court's reluctance to second-guess the decisions of prison

In interpreting the reasonableness of prison regulations, other federal circuit courts in addition to the *Barrett* court have balanced the prison's interests in order and security against the first amendment rights of prisoners.[72] The outcome, however, depends largely on how much deference courts are willing to accord prison officials.[73] The Tenth Circuit in *Kennedy v. Meachum*[74] required prison officials to justify a prison regulation by a compelling state interest which is the same standard courts use in determining the validity of first amendment free exercise claims of nonprisoners.[75] In *Madyun v. Franzen*,[76] the Seventh Circuit attempted to find a middle ground between the reasonableness standard in *Jones* and the compelling state interest standard.[77] Consequently, the *Madyun* court cited with approval the Second Circuit's deci-

---

officials is consistent with the view that courts will avoid interfering with prisons in matters of internal security. *Id.; see* Phillips v. Bureau of Prisons, 591 F.2d 966, 972 (D.C. Cir. 1979) (threats to institutional security endanger order and safety of prisons and thus courts should defer to informed discretion of prison officials).

72. *See, e.g.*, Green v. White, 545 F.2d 1099, 1100 (8th Cir. 1976) (prisoner not allowed special privileges in name of religion); O'Brien v. Blackwell, 421 F.2d 844, 845 (5th Cir. 1970) (extreme deference for prison officials); Brown v. Wainwright, 419 F.2d 1376, 1377 (5th Cir. 1970) (prison regulations must not be arbitrary). *See generally Religious Rights, supra* note 52, at 839-51 (at least seven different standards exist for analyzing prisoner free exercise claims).

73. *See Religious Rights, supra* note 52, at 863-65 (courts defer to prison officials when absence of challenged regulation would threaten compelling interests such as security and order). Courts seldom find administrative economy and convenience compelling reasons for restricting prisoners' first amendment rights. *Id.* at 865.

74. 540 F.2d 1057 (10th Cir. 1976).

75. *Id.* at 1061. In determining the constitutionality of nonprisoner first amendment claims, the Supreme Court has required the government to show that compelling state interests justify the burdens placed on a person's first amendment rights. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (state interest in mandatory school attendance not so compelling to overcome religious practices of Amish); Sherbert v. Verner, 374 U.S. 398, 403-406 (1963) (establishing balancing test in which court weighs state interests against deprivation of first amendment rights).

76. 704 F.2d 954 (7th Cir. 1983).

77. *Id.* at 959. In *Madyun v. Franzen*, the Seventh Circuit considered the first amendment right of a male prisoner to refuse to submit to a "frisk search" by a female prison guard. *Id.* at 955. The plaintiff in *Madyun* claimed that his Islamic faith forbade physical contact with a woman other than his wife or mother and that to force the plaintiff to submit to a frisk search under such circumstances constituted a violation of the plaintiff's first amendment rights. *Id.* In upholding the constitutionality under the first amendment of a frisk search of the prisoner by a female prison guard, the Tenth Circuit rejected both the compelling state interest and the reasonableness standards of review of first amendment claims. *Id.* at 958; *see supra* text accompanying note 36 & note 75 and accompanying text (explaining reasonableness and compelling state interest standards). The reasonableness standard requires a prison to show that a prison regulation does not unreasonably restrict a prisoner's first amendment rights while the compelling state interest standard requires the state to provide a compelling justification for interfering with the first amendment rights of citizens. *See* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977) (reasonableness standard); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (compelling state interest standard). The *Madyun* court held that a compelling state interest test was applicable only in nonprisoner first amendment actions. 704 F.2d at 958. The Tenth Circuit also considered the reasonableness standard to be inappropriate since such a broad standard would force courts to defer almost completely to prison officials in matters of prison administration. *Id.* at 959. In *Madyun*, the Tenth Circuit adopted instead the Second Circuit's least restrictive alternative standard in *LaReau v. MacDougall* and held that the state had an important objective in providing equal opportunity for women to serve as prison guards and that frisk searches of

sion in *MacDougall* applying the least restrictive alternative test and held that a prison had an important interest in allowing a female prison guard to search a male inmate notwithstanding a tenet of the prisoner's religion that forbade physical contact with a woman other than the prisoner's wife or mother.[78]

No matter what standard courts use in determining the constitutionality of restrictions of prisoners' first amendment rights, courts generally are in agreement that mere administrative inconvenience rarely, if ever, outweighs the prisoner's interest in freedom of religious expression.[79] The Fourth Circuit in *Barrett* correctly refused to uphold the constitutionality of Virginia's change-of-name statute when convenience of record-keeping was the only justification that the Commonwealth could offer in support of the statute's validity.[80] Name changes should weigh less heavily with courts than, for example, control of inflammatory publications,[81] prison-wide unions,[82] and potential riots[83] since administrative inconvenience does not endanger prison

---

male prisoners reasonably allowed the state fully to utilize female prison guards. *Id.* at 960; *see* LaReau v. MacDougall, 473 F.2d 974, 979 (2d Cir. 1972); *supra* note 61 (discussion of *MacDougall*). The Fourth Circuit in *Barrett* recognized that an overly broad interpretation of the reasonableness standard in *Jones* inevitably would lead courts to defer to the judgment of prison officials irrespective of the legitimate first amendment claims of prisoners. *See* 689 F.2d at 502; *see also Jones*, 433 U.S. at 127-28. Nevertheless, the *Barrett* court adopted the reasonableness standard but rejected the Commonwealth of Virginia's contention that courts should defer to the reasonable judgment of prison officials. 689 F.2d at 502. The *Barrett* court held that courts and not prison officials ultimately must determine the reasonableness of prison regulations that infringe upon first amendment rights of prisoners. *Id.; see* text accompanying note 38 (judicial review of prison restrictions still valid after *Jones*).

78. *Madyun*, 704 F.2d at 960; *see* LaReau v. MacDougall, 473 F.2d 974, 979 (2d Cir. 1972).

79. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267 (1974) (administrative convenience is not compelling state interest); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646-47 (1974) (Bill of Rights protects citizens against government's inevitable concern for administrative efficiency); Muhammad v. Keve, 479 F. Supp. 1311, 1323 n.15 (D. Del. 1979) (administrative convenience does not rise to level of legitimate interest of prison in security and order). In *Muhammad v. Keve*, the U.S. District Court for the District of Delaware held that the failure of state prison officials to recognize plaintiffs' Muslim names in the interests of administrative efficiency did not outweigh the prisoners' interests in free expression of their religion. *Id.* at 1322.

80. *Barrett*, 689 F.2d at 500.

81. Pittman v. Hutto, 594 F.2d 407, 410 (4th Cir. 1979). In *Pittman v. Hutto*, the Fourth Circuit cited language from *Jones* that courts must defer to the reasonable decisions of prison officials. *Id.* at 412; *see Jones*, 433 U.S. at 129-32. The *Pittman* court upheld the prison's censorship of a prisoner magazine because of inflammatory articles and reasoned that language in *Martinez* that prison regulations must be no broader than necessary to achieve penal objectives was inapplicable in cases in which the possibility of disruptions of prison security justified the prison stricture. *Id.* at 411; Comment, *Prisons and the First Amendment*, 66 VA. L. REV. 232, 232-33 (1980) (in view of seriousness of threat to prison security, *Pittman* arguably was correct in citing *Jones* as controlling authority).

82. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129 (1977); *see supra* text accompanying notes 36-41 (discussion of *Jones*).

83. *Jones*, 433 U.S. at 132-33. Prison officials in *Jones* were concerned with violence, especially full-scale riots. *Id.* Indeed, in the wake of the Attica prison riot in September, 1971, a crisis mentality has pervaded the outlook of courts toward the problems of prisons. *See id.* at 133 (courts must allow prison officials to act before "eve of a riot"); Procunier v. Martinez, 416 U.S. 396, 404-405 (1974) (judicial deference toward prison officials reflects no more than