10-1985

Murray v. Carrier

Lewis F. Powell Jr.

R. with views to a Grant (CA4's decision undercuts Wainwright v. Sykes)

5/13

Grant

CA4 en banc split 5-4

Preliminary Memo

May 16, 1985 Conference
List 1, Sheet 4

No. 84-1554

SIELAFF (Director, VA DOC)	Cert to CA4 (Winter, Phillips, Murnaghan, Sprouse, Ervin; Russell, Widener, Hall, Chapman diss) (PC) (en banc)	5/4
v.		
CARRIER (prisoner)	Federal/Habeas	Timely

1. SUMMARY: The question is whether inadvertant attorney error falling short of unconstitutionally ineffective assistance can itself satisfy the "cause" prong of Wainwright v. Sykes.

2. FACTS AND DECISION BELOW: Resp was charged with rape and abduction. Prior to trial, his counsel sought discovery of any statements the victim may have made. After an in camera inspection, the TC found that they were not exculpatory and did

CFR. This case is a clear hold or grant. CA4's view of cause will decimate Sykes. Anx

not have to be turned over. A renewed defense request was also denied. Resp was convicted.

In his notice of appeal to the Va. S. Ct., resp's counsel included among the assigned errors a claim that the TC should have allowed him access to the victim's statements. In his actual brief, however, he did not pursue this issue. The S. Ct. denied review. Resp then pursued state habeas remedies, arguing that withholding the victim's statements denied him due process. The TC dismissed because the claim had not been raised on direct appeal, and the Va. S. Ct. again denied review.

Resp then filed this federal habeas action. His underlying claim is that the TC should have ordered the prosecution to disclose the victim's statements, even if they were not exculpatory, as long as they were "material to guilt." Compare United States v. Agurs, 427 U.S. 97, 106 (1976), with Brady v. Maryland, 373 U.S. 83 (1963). The DC (Clarke, ED Va) denied both the writ and a certificate of probable cause because resp had failed to raise the claim in state court. It refused to entertain resp's claim that the default was the result of ineffective assistance, stating that that issue must also be raised first in the state courts.

CA4 (Ervin, Wyzanski (dj); Hall, diss) reversed. It set out the question as: "Can a single act or omission by counsel, insufficient by itself to contravene the 6th Am, satisfy the 'cause' prong" of Wainwright v. Sykes. The answer was that it could, as long as it was not the result of deliberate strategy. If a failure to object or raise a claim was deliberate, it could

be cause only if it amounted to constitutionally ineffective assistance of counsel. But if it was just the result of ignorance or oversight, the defendant should not be penalized for counsel's momentary lapse, and the default would be excused. Furthermore, since a claim of attorney error as cause is not itself a ground for habeas relief, it need not be exhausted in the state court (though a claim of ineffective assistance must be). The CA remanded for a determination whether there was a strategic explanation for counsel's error, and whether the prejudice prong was satisfied.

In dissent, Judge Hall first argued that resp's request for materials at trial was based on Jencks, not Brady, and therefore his claim was waived entirely apart from his failure to pursue it on appeal. Second, he found no indication of prejudice resulting from the procedural bar. Third, he criticised resp's failure to offer any evidence to dispute the great likelihood that the failure to pursue the issue on appeal was tactical. The majority's exception to Wainwright will ultimately swallow the rule. Finally, even if the failure to brief the issue on appeal did constitute both cause and prejudice, it should still have been presented to the state courts to rule on in the first instance.

Upon rehearing en banc, the CA agreed with the panel, 5-4, relying on the opinions already written.

3. CONTENTIONS: Petr -- If counsel's performance satisfies constitutional minima, procedural bars should be allowed to operate as expected. The decision below renders Wainwright

virtually meaningless. Other CAs have rejected an "inadvertance" excuse and held that errors falling short of ineffective assistance cannot constitute "cause." Long v. McKeen, 722 F.2d 286 (CA6 1983), cert. denied, No. 83-6135 (1984); Tsirizotakis v. LaFevre, 736 F.2d 57 (CA2), cert. denied, No. 84-5305 (1984).

In any event, the cause and prejudice issue must be exhausted in the state courts. See Alcorn v. Smith, cert. granted, No. 84-5636.

Amicus (AGs of 39 States) -- The CA's decision is a return to pre-Wainwright days and is contrary to Engle v. Isaac, in which this Court noted that an apparently valid claim could be forfeited if "counsel might have overlooked it." 459 U.S., at 133-134.

4. DISCUSSION: The question whether attorney incompetence falling short of constitutionally inadequate assistance can constitute cause has divided the lower courts. As long as there is to be an exhaustion requirement, this is a dubious exception. It pokes a big hole in Wainwright. In addition, the CA's compromise distinction between deliberate and inadvertent errors is suspect, for there is no more reason that the defendant should pay the price for the first than the second. From his point of view, it is small solace to know that his lawyer's choice was tactical rather than inadvertent.

The petn should at least be held for Alcorn v. Smith, No. 84-5636, which directly raises the second question, viz., whether the cause question itself must be exhausted, and implicitly raises the first, since if such error cannot be cause, there is

no need to worry about exhaustion. A similar petn has been held for Alcorn. Lockett v. Arn, No. 84-5878. Depending on the outcome and rationale in Alcorn, the Court may wish to grant this petn or Lockett.

5. RECOMMENDATION: CFR, with a view toward a hold for No. 84-5636.

There is nor response.

May 8, 1985 Herz Opinion in petn

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 84-1554

Submitted ....., *19*... *Announced* ....., *19*...

SIELAFF, DIR., VA DOC

vs.

CARRIER

Also motion for IFP.

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.					JPM	3							
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

lfp/ss 01/03/86 SIELAFF SALLY-POW

84-1554 Sielaff v. Carrier (CA4 en banc)

(Argued January 21)

MEMO TO ANNE:

The question in this case is:

> "Whether attorney error, based on ignorance or inadvertence that does not constitute ineffective assistance of counsel, nevertheless constitutes 'cause' under the 'cause and prejudice' standard for excusing a procedural default?"

Respondent was convicted in Virginia state court of rape and abduction. His attorney sought to obtain copies of all statements the victim may have made to the police relevant to the case. The state trial court reviewed the statements in camera, and concluded that they contained "no evidence of an exculpatory nature". When a second request was made by defendant immediately before trial, the trial court again inspected the statements and declined to release them as they contained nothing exculpatory. Respondent was relying on Brady and Jencks v. U.S. that requires the prosecution to make available to a defendant any evidence in its possession that not only is "material" but also is "favorable to the accused".

Following his conviction, respondent appealed to the Supreme Court of Virginia and included in his notice of appeal - as one of seven errors assigned - that the trial judge had erred by not permitting defense counsel to examine any statements given the police by one defendant. Counsel, however, did not include this claim in the brief he filed with the Virginia Supreme Court. Under the Rules of that court, only "errors assigned in the petition for appeal (that is in brief form) will be noticed by this court and no error not so assigned will be admitted as a ground for reversal of a decision below." Accordingly, in view of this procedural default, the Virginia Supreme Court denied certiorari.

The "procedural default" ("cause")

Respondent thereafter unsuccessfully sought state habeas corpus relief relying on his Brady claim, and then filed this habeas corpus petition in the U.S. District Court. That court dismissed respondent's petition because of his procedural default in failing to preserve the issue on direct appeal (Judge Clarke). On appeal to CA4, a panel composed of Circuit Judges Hall and Ervin, and District Judge Wyzanski reversed, with Judge Hall dissenting. The case then was considered en banc, and the decision and opinion of the panel were approved by a 5-4

CA 4 Rev.

vote. The four dissenting judges were: Hall, Widener, Russell and Chapman.

It was conceded by counsel for respondent in his argument before CA4 that the negligent or inadvertent failure to have included the alleged error on the appeal to the Virginia Supreme Court did not constitute "ineffectiveness assistance of counsel". Indeed, CA4 acknowledged that a single error due to "inadvertence or ignorance" would not be viewed as ineffective assistance of counsel, and it was noted that trial counsel in this case had performed well. Nevertheless, relying primarily on Jurek v. Estelle, 593 F.2d 672, 683 n. 19 (CA5), CA4 concluded:

> "We conclude that attorney error short of wholesale ineffective assistance of counsel can constitute Wainwright cause provided that the act or omission resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy. * * * Procedural default is excused not when counsel reasonably but incorrectly exercises her judgment, but when, through ignorance or oversight, she fails to exercise it at all, in dereliction of the duty to represent her client. This is what we mean by attorney error, and in such a case, the defendant should not be penalized under Wainwright for a momentary lapse by counsel." App. 12

Respondent's brief prepared by lawyers at Georgetown University Law Center makes some rather interesting and novel arguments. It is first argued that there is no need to exhaust the "cause and prejudice" issue before a state court. But if there is such a requirement, respondent says it does not apply in this case. The Virginia Supreme Court Rules provide no remedy for a procedural default that occurred on appeal as distinguished from one that occurred at trial. I note here that neither of these points was relied upon by CA4 in its decision, and I know of no authority that supports them.

Respondent does emphasize that the reasoning of Sykes, and the "values" it serves, relates solely to trial defaults. Sykes did not consider defaults that occurred on appeal, and this question - according to respondent was left open in Jones v. Barnes, 463 U.S. 745. (I have not checked that decision).

Respondent distinguishes Engle by arguing that it decided nothing beyond what Sykes decided. As to "exhaustion", respondent argues that in fact he fulfilled the exhaustion requirement of §2254(b)-(c) because his

constitutional claim was presented in the state habeas corpus proceeding.

Although I give counsel for respondent high marks for rather ingenious but subtle arguments, I am inclined to think that Engle comes close to controlling this case. Nor do I see a sound reason for making a distinction between a procedural default that occurred on appeal rather than at trial. I therefore am inclined to reverse.

* * *

Unless you have a different view, Anne, a very brief memo - two or three pages will suffice.

L.F.P., Jr.

ss

Prelim. Notes

84-1554 Sielaff v. Correll (CA4 en banc 5 to 4)

Inclined to Reverse (1/20)

1. CA4's decision. Where the procedural default of counsel (here failure to include the Q at issue in his petition for appeal to Va S/Ct) was due only to inadvertence or negligence - rather than a deliberate tactic - the "cause" component of Wainwright v Sykes is absent. Thus, no procedural default.

2. Result. Would substantially limit Wainwright v. Sykes.

Also, if inadvertent error is not "the "cause" of a procedural default, there would be no requirement for a Δ to exhaust state remedies before going to Fed H/C.

3. Makes little difference to Δ whether error was negligent or intentional.

Of course, the procedural "default" must constitute a default under state law. Va S/Ct rules - inclusion of a claim in petition for appeal

amc 01/21/86

BENCH MEMORANDUM

To: Mr. Justice Powell January 21, 1986

From: Anne

No. 84-1554, Murray v. Carrier

(cert. to CA4) (argument January 21, 1985)

Questions Presented

(1) Is attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of the Sixth Amendment, sufficient to establish the "cause" required to excuse a procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977)?

(2) May the exhaustion requirement of 28 U.S.C. §2254 be circumvented merely because a claim of attorney error is asserted to establish "cause" under Wainwright v. Sykes rather than as an independent ground for habeas corpus relief?

Background

Resp was convicted of rape and abduction in Virginia state court. Prior to trial, resp's lawyer moved to discover statements made by the victim to the police. Following in camera inspection of the statements, the trial judge informed counsel that the statements contained no exculpatory evidence and would not be released. Immediately before trial, defense counsel again moved to discover statements made by the victim and by an identification witness. The judge denied this motion as well, and counsel excepted on the record.

Counsel filed a notice of appeal, which listed an argument concerning the judge's refusal to release the statements. But when counsel filed his appellate brief, he omitted that argument. After the conviction was affirmed on appeal, resp filed a state habeas petition alleging that the judge's refusal to release the statements denied him due process. The state court dismissed the petition on the ground that the claim was procedurally barred because resp had failed to raise the claim on direct appeal.

Resp then filed a habeas petition in federal DC, renewing his argument that the trial judge's refusal to turn over the witnesses' statements denied him due process. The DC denied the writ, reasoning that resp's procedural default barred him from pressing the claim in federal court. The DC also noted that resp had not exhausted his ineffective assistance claim based on counsel's failure to press the due process argument on appeal.

A panel of CA4 reversed, holding that "attorney error short of wholesale ineffectiveness of counsel can constitute Wainwright cause, provided that the act or omission resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy." CA4 then remanded for the DC to determine if the failure to raise the due process claim on direct appeal was the result of attorney error or strategic choice and to determine if resp was prejudiced by the alleged error. Judge Hall dissented, in part because he disagreed with the panel's conclusion that attorney error that falls short of ineffective assistance can amount to "cause." Judge Hall pointed out that the panel's interpretation of cause would mean that every time a lawyer failed to abide by a state procedural rule, the defendant could avoid Wainwright by asserting that such failure was due to his lawyer's ignorance of procedure. In Judge Hall's view, such interpretation of "cause" would ultimately allow the exception to swallow the rule.

On rehearing en banc, CA4 affirmed the panel decision for the reasons stated in that opinion. Four judges dissented, stating that they agreed with the views expressed in Judge Hall's opinion.

Discussion

CA4 clearly erred in deciding that "cause" can be found on attorney ignorance or inadvertence. In my view, ignorance or inadvertence can never constitute cause. This portion of CA4's decision is not difficult to dispose of for, in Engle v. Isaac, 456 U.S. 107, the Court essentially recognized that errors caused

by counsel's ignorance or inadvertence will not amount to cause. The more difficult question to be resolved in this case is whether attorney error can ever amount to "cause" under Wainwright v. Sykes. That is, the Court could hold that, though mere ignorant or inadvertent error does not amount to cause, serious attorney error (sufficient to establish the first prong of the Strickland v. Washington test for ineffective assistance or some intermediate standard) can constitute cause. I would argue that attorney error, no matter how serious, should never constitute cause. I fear that this position may sound extreme, but I think that it is doctrinally the most sensible. My reasons for taking this view are the following.

My reading of Engle v. Isaac and of Reed v. Ross, 104 S.Ct 2901 (cause for failure to raise claim may be found where claim was so "novel" that counsel reasonably failed to recognize and raise it), suggests that "cause" is some external factor that was beyond counsel's control at the time of trial, such as where the trial court prevented counsel from raising his objection, where it was impracticable for counsel to object, or where the state did not require an objection in a particular form. Simple attorney error obviously would not amount to "cause" under this standard. Moreover, serious attorney error would not satisfy this standard either because counsel's failure properly to perform his duties is not something beyond counsel's control.

I wish to emphasize that, by adopting such an approach, the Court would not be denying relief to prisoners who allege serious attorney error. Such a claim properly should be raised

as an ineffective assistance of counsel claim. That is, where the prisoner believes that his lawyer's procedural default was so egregious as to deny him a fair trial, the prisoner should allege an ineffective assistance claim, listing the procedural default as the example of attorney error. The prisoner would be required to present that claim to the state courts for exhaustion before raising it on federal habeas corpus.

I think that this approach is most sensible and is consistent with the case law. It would create enormous confusion for the lower courts to hold that there are different categories of attorney error, some constituting cause and others constituting ineffective assistance. Nor does it make sense to allow a prisoner to raise ineffective assistance as "cause" and also as a Sixth Amendment violation. The Sixth Amendment guarantees a prisoner a certain level of assistance. If the defendant believes that he has been denied such assistance, whether through procedural default or some other failure of counsel, then he should be required to raise the claim under the rubric of ineffective assistance.

This memo states my views very briefly because at this late moment I still wished to give them to you prior to conference. Of course, I will be happy to do a follow-up memo with more extensive analysis and support.

Murray

84-1554 SIELAFF v. CARRIER Argued 1/21/86

Slonaker (Asst AG of Va) (not an effective oral advocate)

The error was noted in the Notice of Appeal but not mentioned in the Petition for Appeals. This was denied & is equivalent to a decision on the merits.

Thinker one must decide whether there was ineffective assistance

Frey (SG)

They must be "ineffective assistance" for "cause" to exist as to the "procedural default".

CA 4 was seeking an "intermediate position". That can't be squared with Engle - overlooking a claim is a procedural default; it is not "cause"

To justify "cause", as Engle noted there must be some external reason - e.g. state law not clearly settled.

In Strickland, D said lawyer failed to put on evidence. Here lawyer failed to include claim in notice of appeal. Result should not be different.

Cohn (Resp)

CA4 found a narrow middle ground.

SO'C noted CA4's holding would require a hearing in every case to determine whether there was negligence on a tactical decision.

Cohn agree that a tactical decision (e.g. not to object) can never form the "cause" for the default

Murray Rev 6-3

No. 84-1554, [redacted] v. Carrier Conf. 1/24/86

The Chief Justice Rev.

Controlled by Syker & Engle

J. Hall's desient is "right on the nose".

Justice Brennan Aff in

The State & SG's briefs do not present right Q

Correct Q is whether State interest is same when fault results from negligence as when & there was a tactical decision.

The default here was on appeal & this does not deprive a Δ of right to H/C

Justice White Rev.

Agree with C.J.

Justice Marshall Aff in

Agree with WJB

Const doesn't require showing of prejudice.

Justice Blackmun Rev.

Bound by Engle & Ross as to appellate issue.

Also our cases do not ~~justify~~ justify a distinction

Justice Powell Rev.

CA 4 erred in bifurcating "cause" (legitimate excuse for a procedural default) by holding that "cause" may be established where the default was occasioned by negligence or inadvertence. - ~~It~~ as distinguished from a factual decision.

Here counsel omitted ~~his~~ to include his clients claim from Petition of Appeal to Va S/C.

× ×× ×

A sensible resolution of this general problem would be to Hold that counsel error - whether ~~careless~~ negligent or ~~&~~ deliberate, can never be viewed as cause. The Q should be only whether there was ~~ineffective~~ assistance of counsel.

cf BRW + HAB opps

Justice Rehnquist Rev.

Agree with C.J., BRW, & LFP

Justice Stevens Affirm

We should not be writing rules for H/C.

Here the error did not affect the outcome.

But would be different case if outcome were in doubt.

Would not apply Sykes to appellate error ~~cases where error~~

Justice O'Connor Rev

Governed by Engle & Ross

~~Can~~ "cause" is some external, verifiable excuse. Not an error counsel could have avoided.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

L. F. P.

From: **Justice O'Connor**

FEB 18 1986

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Join

No. 84–1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February ——, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certoriari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

I

Respondent Clifford Carrier was convicted of rape and abduction by a Virginia jury in 1977. Before trial, respondent's court-appointed counsel moved for discovery of the victim's statements to police describing "her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place." Record II, at 11. The presiding judge denied the motion by letter to counsel after examining the statements *in camera* and determining that they contained no exculpatory evidence. Record II, at 31. Respondent's counsel made a second motion to discover the victim's statements immediately prior to trial, which the trial judge denied for the same reason after conducting his own *in camera* examination. Tr. 151–152.

After respondent was convicted, his counsel filed a notice of appeal to the Virginia Supreme Court assigning seven errors, of which the fifth was:

> "Did the trial judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial, and during the course of the trial?" Record II, at 83.

Without consulting respondent, counsel subsequently submitted the requiredpetition for appeal but failed to include this claim, notwithstanding that Virginia Supreme Court Rule 5:21 provides that "[o]nly errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below." The Virginia Supreme Court refused the appeal and this Court denied certiorari. *Carrier* v. *Virginia*, 439 U. S. 1076 (1979).

A year later respondent, by this time proceeding pro se, filed a state habeas corpus petition claiming that he had been denied due process of law by the prosecution's withholding of the victim's statements. The State sought dismissal of his petition on the ground that respondent was barred from presenting his due process discovery claim on collateral review because he failed to raise that claim on appeal. The state habeas court dismissed the petition "for the reasons stated in the Motion to Dismiss," Record I, at Tab 12, and the Virginia Supreme Court denied certiorari.

Respondent next filed a pro se habeas petition in the District Court for the Eastern District of Virginia, renewing his due process discovery claim as grounds for relief. The State filed a motion to dismiss asserting that respondent's failure to raise the issue on direct appeal was a procedural default barring federal habeas review under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), and that respondent had not exhausted his state remedies because he could bring an ineffective assistance of counsel claim in the state courts to establish that his procedural default should be excused. Record I, at tab 3. The United States magistrate to whom the case was referred recommended dismissal by virtue of the procedural default and also ruled that respondent had not exhausted his state

remedies. In reply to the magistrate's report, respondent alleged that his procedural default was "due to ineffective assistance of counsel during the filing of his appeal." App. 11. The District Court approved the magistrate's report, holding the discovery claim barred by the procedural default and indicating that respondent should establish cause for that default in the state courts.

At oral argument on appeal to the Court of Appeals for the Fourth Circuit, respondent abandoned any claim of ineffective assistance of counsel but asserted that counsel had mistakenly omitted his discovery claim from the petition for appeal and that this error was cause for his default. A divided panel of the Court of Appeals reversed and remanded. *Carrier* v. *Hutto*, 724 F. 2d 396 (CA4 1983). The court construed respondent's objection to the denial of discovery as having rested throughout on a contention that *Brady* v. *Maryland*, 373 U. S. 83 (1963), requires the prosecution to disclose any evidence that might be material to guilt whether or not it is exculpatory, and concluded that when respondent's counsel omitted this discovery claim from the petition for review "the issue was lost for purposes of direct and collateral review." *Carrier* v. *Hutto*, *supra*, at 399. The court framed the issue before it as whether "a single act or omission by counsel, insufficient by itself to contravene the sixth amendment, [can] satisfy the 'cause' prong of the exception to preclusive procedural default discussed in *Wainwright*?" *Id.*, at 400. In answering this question, the court drew a dispositive distinction between procedural defaults resulting from deliberate tactical decisions and those resulting from ignorance or inadvertence. *Id.*, at 401. The court determined that only in the latter category does an attorney's error constitute cause because, whereas a tactical decision implies that counsel has, at worst, "reasonably but incorrectly exercise[d] her judgment," ignorance or oversight implies that counsel "fail[ed] to exercise it at all, in dereliction of the duty to represent her client." *Ibid.* Thus, in order to

establish cause a federal habeas petitioner need only satisfy the district court "that the failure to object or to appeal his claim was the product of his attorney's ignorance or oversight, not a deliberate tactic." *Ibid.* Accordingly, the Court of Appeals remanded to the District Court:

> "[A]lthough the likelihood of attorney error appears very great in this case, we lack testimony from Carrier's counsel which might disclose a strategic reason for failing to appeal the *Brady* issue. The question of counsel's motivation is one of fact for the district court to resolve upon taking further evidence." *Id.*, at 402.

The court also ruled that the District Court erred in suggesting that respondent should establish cause for the default in the state courts. "The exhaustion requirement of 28 U. S. C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." *Ibid.* Since respondent did not allege ineffective assistance of counsel as an independent basis for habeas relief, the case presented no exhaustion question.

The dissenting judge believed that the petition should have been dismissed for failure to exhaust state remedies because respondent had never presented his discovery claim as a denial of due process in the state courts, *id.*, at 403–404 (Hall, J., dissenting), and differed with the majority's interpretation of the cause standard because "[it] will ultimately allow the exception to swallow the rule." *Id.*, at 405. The State sought rehearing, and the *en banc* Court of Appeals adopted the panel majority's decision, with four judges dissenting. *Carrier* v. *Hutto*, 754 F. 2d 521 (CA4 1985). We now reverse.

II

Wainwright v. *Sykes* held that a federal habeas petitioner who has failed to comply with a State's contemporaneous-objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain re-

view of his defaulted constitutional claim. 433 U. S., at 87. See also *Francis* v. *Henderson*, 425 U. S. 536 (1976). In so holding, the Court explicitly rejected the standard described in *Fay* v. *Noia*, 372 U. S. 391 (1963), under which a federal habeas court could refuse to review a defaulted claim only if "an applicant ha[d] deliberately bypassed the orderly procedure of the state courts," *id.*, at 438, by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.*, at 439 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). See *Wainwright* v. *Sykes*, *supra*, at 87–88. At a minimum, then, *Wainwright* v. *Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim. See *id.*, at 91, n. 14; *Reed* v. *Ross*, —— U. S. ——, —— (1984). Beyond that, the Court left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." *Id.*, at 87.

We revisited the cause and prejudice test in *Engle* v. *Isaac*, 456 U. S. 107 (1982). Like *Wainwright* v. *Sykes*, *Engle* involved claims that were procedurally defaulted at trial. In seeking to establish cause for their defaults, the prisoners argued that "they could not have known at the time of their trials" of the substantive basis for their constitutional claims, which were premised on *In re Winship*, 397 U. S. 358 (1970). *Engle*, *supra*, at 130. Without deciding "whether the novelty of a constitutional claim ever establishes cause for a failure to object," *id.*, at 131, we rejected this contention because we could not conclude that the legal basis for framing the prisoners' constitutional claims was unavailable at the time. *Id.*, at 133. In language that bears directly on the present case, we said:

> "We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the bur-

> den of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis for a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for a procedural default." *Id.*, at 133–134 (footnote omitted).

The thrust of this part of our decision in *Engle* is unmistakable: the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. At least with respect to defaults that occur at trial, the Court of Appeals' holding that ignorant or inadvertent attorney error is cause for any resulting procedural default is plainly inconsistent with *Engle*. It is no less inconsistent with the purposes served by the cause and prejudice standard. That standard rests not only on the need to deter intentional defaults but on a judgment that the costs of federal habeas review "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." *Engle*, *supra*, at 128. Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *ibid.*, are heightened in several respects when a trial default occurs: the default deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and

"exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.*, at 129. Clearly, these considerable costs do not disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision, for whatever reason, to withhold a claim.

Indeed, the rule applied by the Court of Appeals would significantly increase the costs associated with a procedural default in many cases. In order to determine whether there was cause for a procedural default, federal habeas courts would routinely be required to hold evidentiary hearings to determine what prompted counsel's failure to raise the claim in question. While the federal habeas courts would no doubt strive to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures, we are not prepared to assume that these costs would be negligible, particularly since, as we observed in *Strickland* v. *Washington*, —— U. S. ——, —— (1984), "[i]ntensive scrutiny of counsel . . . could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." Nor will it always be easy to classify counsel's behavior in accordance with the deceptively simple categories propounded by the Court of Appeals. Does counsel act out of "ignorance," for example, by failing to raise a claim for tactical reasons after mistakenly assessing its strength on the basis of an incomplete acquaintance with the relevant precedent? The uncertain dimensions of any exception for "inadvertence" or "ignorance" furnish an additional reason for rejecting it.

We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, —— U. S. ——, (1984), we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think

that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed* v. *Ross*, *supra*, at ——, or that "some interference by officials," *Brown* v. *Allen*, 344 U. S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard.

Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduct[] trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default. However, we think that the exhaustion doctrine, which is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982), generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause—a question of federal law—without deciding an independent and unexhausted constitutional claim on the merits. But if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of

comity that underlies the exhaustion doctrine would be ill-served by a rule that allowed a federal district court "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," *Darr* v. *Burford*, 339 U. S. 200, 204 (1950), and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

It is clear that respondent failed to show or even allege cause for his procedural default under this standard for cause, which *Engle* squarely supports. Respondent argues nevertheless that his case is not controlled by *Engle* because it involves a procedural default on appeal rather than at trial. Respondent does not dispute, however, that the cause and prejudice test applies to procedural defaults on appeal, as we plainly indicated in *Reed* v. *Ross*, *supra*, at ——. *Reed*, which involved a claim that was defaulted *on appeal*, held that a habeas petitioner could establish cause for a procedural default if his claim is "so novel that its legal basis is not reasonably available to counsel," *id.*, at ——. That holding would have been entirely unnecessary to the disposition of the prisoner's claim if the cause and prejudice test were inapplicable to procedural defaults on appeal.

The distinction respondent would have us draw must therefore be made, if at all, in terms of the content of the cause requirement as applied to procedural defaults on appeal. Accordingly, respondent asks us to affirm the Court of Appeals' judgment on the narrow ground that even if counsel's ignorance or inadvertence does not constitute cause for a procedural default at trial, it does constitute cause for a procedural default on appeal. In support of this distinction, respondent asserts that the concerns that underlie the cause and prejudice test are not present in the case of defaults on appeal. A default on appeal, he maintains, does not detract from the significance of the trial or from the development of a full trial record, or deprive the trial court of an opportunity to

correct error without the need for retrial. Moreover, unlike the rapid pace of trial, in which it is a matter of necessity that counsel's decisions bind the defendant, "the appellate process affords the attorney time for reflection, research, and full consultation with his client." Brief for Respondent 19. Finally, respondent suggests that there is no likelihood that an attorney will preserve an objection at trial yet choose to withhold it on appeal in order to "sandbag" the prosecution by raising the claim on federal habeas if relief is denied by the state courts.

These arguments are unpersuasive. A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. The important role of appellate procedural rules is aptly captured by the Court's description in *Reed* v. *Ross* of the purposes served by the procedural rule at issue there, which required the defendant initially to raise his legal claims on appeal rather than on postconviction review:

> "It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 147 (1970). This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the litigant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." —— U. S., at ——.

These legitimate state interests, which are manifestly furthered by the comparable procedural rule at issue in this case, warrant our adherence to the conclusion to which they led the Court in *Reed* v. *Ross*—that the cause and prejudice test applies to defaults on appeal as to those at trial.

We likewise believe that the standard for cause should not vary depending on the timing of a procedural default or on

the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process. "Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Id.*, at ——. It is apparent that the frustration of the State's interests that occurs when an appellate procedural rule is broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than a deliberate decision, tactical or not, to abstain from raising the claim. Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and "undercut[s] the State's ability to enforce its procedural rules." *Engle*, 456 U. S., at 129. As with procedural defaults at trial, these costs are imposed on the State regardless of the kind of attorney error that led to the procedural default. Nor do we agree that the possibility of "sandbagging" vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful. Moreover, we see little reason why counsel's failure to detect a colorable constitutional claim should be treated differently from a deliberate but equally prejudicial failure by counsel to raise such a claim. The fact that the latter error can be characterized as a misjudgment, while the former is more easily described as an oversight, is much too tenuous a distinction to justify a regime of evidentiary hearings into counsel's state of mind in failing to raise a claim on appeal.

The real thrust of respondent's arguments appears to be that on appeal it is inappropriate to hold defendants to the errors of their attorneys. Were we to accept that proposition, defaults on appeal would presumably be governed by a

rule equivalent to *Fay* v. *Noia*'s "deliberate bypass" standard, under which only personal waiver by the defendant would require enforcement of a procedural default. We express no opinion as to whether counsel's decision not to take an appeal at all might require treatment under such a standard, see *Wainwright* v. *Sykes*, 433 U. S., at 88, n. 12, but, for the reasons already given, we hold that counsel's failure to raise a *particular* claim or claims on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim. Respondent has never alleged any external impediment that might have prevented counsel from raising his discovery claim in his petition for review, and has disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim. See generally *Evitts* v. *Lucey*, —— U. S. —— (1985) (right to effective assistance of counsel applies on an appeal as of right). Respondent's petition for federal habeas review of his procedurally defaulted discovery claim must therefore be dismissed for failure to establish cause for the default.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 19, 1986

84-1554 - Murray v. Carrier

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 20, 1986

84-1554 - Murray v. Carrier

Dear Sandra,

Please join me.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1986

Re: 84-1554 - Murray v. Carrier

Dear Sandra:

I shall be writing in dissent in this case.

Respectfully,

JPS

Justice O'Connor

Copies to the Conference

February 25, 1986

84-1554 Murray v. Carrier

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 27, 1986

Re: No. 84-1554-Murray v. Carrier

Dear Sandra:

I await the dissent.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 20, 1986

Re: No. 84-1554-Murray v. Carrier

Dear John:

Please join me in your dissent.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 21, 1986

Re: 84-1554 Murray v. Carrier

Dear John,

I plan to make some responses to your dissent in this case but it will take me a few days.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 25, 1986

Sallie—
Draft letter as stated below.
CL to BRW + BW & R.

No. 84-1554 Murray v. Carrier

Dear Byron, Lewis and Bill,

John's dissent in this case is quite powerful and deserves an adequate response. I hope I have accomplished that in the attached 2nd Draft opinion for the Court. It now expressly concedes, as we did in Engle, that in an extraordinary case, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." (p.15) I think this much of a concession is appropriate and consistent with our precedents. Agree

Please let me know if the additions cause any of you undue concern.

Sincerely,

Sandra

Justice White
Justice Powell
Justice Rehnquist

Dear Sandra,
I think your additions are helpful and appropriate.
They are consistent with what I am saying in my opinion for the Court in Kuhlmann v. Wilson No 84—.

The historic purpose of habeas corpus is to afford relief for an unconstitutional conviction of an innocent person — a purpose often overlooked.

amc 03/26/86

March 26, 1986

To: Mr. Justice Powell

From: Anne

Re: No. 84-1554, Murray v. Carrier

I have read Justice Stevens' dissent in this case and the changes that Justice O'Connor has made in response. This case illustrates for me why the Court should adopt the standard in your draft in Kuhlmann v. Wilson to govern habeas corpus generally, or at least to govern cases where the State argues that the petitioner's claim is procedurally barred. The changes Justice O'Connor has made demonstrate that we are concerned that a prisoner will not be able to satisfy the "cause and prejudice" standard notwithstanding the fact that he can make a colorable showing of innocence. I will refrain from saying more on this point now, because this case did not present the question of whether the cause and prejudice standard should be abandoned in favor of your standard in Wilson and because I doubt that the Court would accept that standard for first federal habeas. I agree

Apart from those thoughts, I think that the changes that Justice O'Connor has made are basically fine. She has added about five pages of text, responding to the dissent. The criti-

cal change is the first full paragraph on page 15, where she says that, even in the absence of cause for a procedural default, federal habeas relief should be available to afford relief from an unconstitutional conviction of an "innocent person". Similarly, the final paragraph of the opinion states that respondent's petition must be dismissed unless he demonstrates on remand that "the victim's statements contain material that would establish respondent's actual innocence." Those changes are consistent with the purpose of habeas corpus to provide relief from unjust incarceration and are consistent with your approach in Wilson.

March 27, 1986

84-1554 Murray v. Carrier

Dear Sandra:

I think your additions are helpful and appropriate.

They are consistent with what I am saying in my opinion for the Court in Kuhlmann v. Wilson, No. 84-1479. The historic purpose of habeas corpus is to afford relief from an unconstitutional conviction of an innocent person - a purpose often overlooked.

Sincerely,

Justice O'Connor

lfp/ss

cc: Justice White
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 28, 1986

Murray v. Carrier

No. 84-1554

Dear Sandra,

I will be writing a separate dissent in this case. I shall try my best not to hold you up too long.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

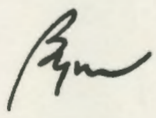
April 7, 1986

84-1554 - Murray v. Carrier

Dear Sandra,

I am still with you.

Sincerely yours,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 9, 1986

Re: No. 84-1554, Murray v. Carrier

Dear Sandra:

For now, I shall await the further writing in this case.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 24, 1986

84-1554 - Murray v. Carrier

Dear Sandra:

I join.

Regards,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1986

Re: Nos. 84-1554-Murray v. Carrier and
85-5487-Smith v. Murray

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1986

Re: No. 84-1554, Murray v. Carrier

Dear John:

Please join me in your opinion concurring in the judgment.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1986

No. 84-1554 Murray v. Carrier
No. 84-5487 Smith v. Murray

Dear Chief,

There is a cross citation to Ford v. Wainwright in Bill Brennan's opinion in these two cases which he prefers to retain. Accordingly, the announcement of these cases should await the announcement of Ford.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

84-1554 Murray v. Carrier (Anne)

SOC for the Court 1/25/86
1st draft 2/18/86
2nd draft 3/25/86
3rd draft 4/7/86
4th draft 6/23/86
Joined by WHR 2/19/86
BRW 2/20/86
LFP 2/25/86
CJ 4/24/86

JPS dissenting
1st draft 3/20/86
2nd draft 4/4/86
3rd draft 6/20/86
Joined by TM 3/20/86
HAB 6/19/86

WJB dissenting
1st draft 6/18/86
2nd draft 6/20/86
Joined by TM 6/19/86

WJB will dissent 3/28/86
JPS will dissent 2/21/86
TM awaiting dissent 2/27/86
HAB awaiting further writing 4/9/86