10-1981

Engle v. Isaac

Lewis F. Powell Jr.

Whether Wainwright v Sykes procedural default rule applies where Ds failed to object to instructions that Ds bore full burden of proof on issue of self-defense. There is conflict.

Preliminary Memo

April 17, 1981 Conference
List 1, Sheet 4

No. 80-1430

ENGLE, Superintendent v. ISAAC	Cert to CA 6 (Brown; Edwards [CJ], concurring; Jones, concurring; Lively, dissenting; Merritt, dissenting; Kennedy, dissenting) Federal/Civil (Habeas)	Timely
PERINI, Superintendent v. BELL	Cert to CA 6 (Merritt, Brown & Martin) Federal/Civil (Habeas)	Timely
ENGLE v. HUGHES	Cert to CA 6 (Kennedy, Martin & Phillips; order) Federal/Civil (Habeas)	Timely

Out of prison
Consolidated cases
Still in prison
Served sentence

1. SUMMARY: Whether resps were barred from federal habeas relief under Wainwright v. Sykes by Ohio's contemporaneous objection rule, when they failed to object to jury instructions placing on them the burden of proof on the issue of self-defense.

(over)

2. BACKGROUND: These are three consolidated cases. Each resp was indicted for a criminal offense in Ohio and each was found guilty of a lesser included offense after a jury trial. In each case, the resp relied upon the affirmative defense of self-defense. In each case no objection was entered to the trial court's jury instruction that the defendant bore the burden of proof on self-defense by a preponderance of the evidence. Sentencing for each occurred in 1975 and each was sentenced to a prison term.

Subsequent to their convictions, the Ohio Supreme Court concluded that solely as a matter of state law, O.R.C. §2901.05(a) (effective January 1, 1974) changed the traditional common-law rule that a defendant has the burden of proof by a preponderance of the evidence on affirmative defenses. Under the new law, the defendant has only the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense. The State then has the burden of proving beyond a reasonable doubt the nonexistence of the affirmative defense. State v. Robinson, 47 Ohio St.2d 103 (1976). In a subsequent decision, State v. Humphries, 51 Ohio St.2d 95 (1977), the Ohio Supreme Court held that although the interpretation of O.R.C. §2901.05(a) reached in Robinson was fully applicable to all trials conducted after January 1, 1974, a defendant who did not object to the charge on that basis would be precluded from relief.

Ohio law — only burden of coming forward

Resp Isaac appealed his conviction, relying upon Robinson. The appellate court affirmed because he had failed to object to

the instruction. The Ohio Sup. Ct. denied Isaac relief on the same day that it decided Humphries. Resps Bell and Hughes appealed their convictions, but did not raise the issue of the adequacy of the jury instructions on self-defense. Subsequently all three resps filed habeas petitions in Federal District Court and in all three instances the courts denied relief. A panel of the CA 6 subsequently voted to reverse Isaacs. The majority of the panel (Beck & Phillips) found that the Ohio Sup. Ct.'s selective denial of the benefit of the Robinson decision was itself arbitary and capricious and thus a denial of Due Process. It did not consider the question of whether the instruction itself violated Due Process. Because the major thrust of petr's claim was not directed at the constitutionality of the jury instruction itself, but rather at the constitutionality of the selective application of Robinson, Wainwright v. Sykes was held not to be applicable. A rehearing en banc was granted.

Sometime during the proceedings in the courts below, Hughes and Isaac were granted final releases as a matter of parole and thus have served their sentences. Bell is still in prison.

3. DECISION BELOW:

Isaac: Judge Brown, joined by Judges Weick, Keefe & Martin, wrote the plurality opinion. Judge Brown rejected the approach of the CA 6 panel, which has focused on the arbitrary and capricious nature of selective retroactivity: "We believe that the more appropriate focus is on the underlying claim, in this case the constitutional validity of the jury instructions . . . as considered in light of Robinson and Humphries." On this

point, the threshold issue was whether or not the state procedural rule effectively precludes federal habeas review. Noting that the "cause" and "prejudice" standards of Wainwright still remain "somewhat undefined," Judge Brown concluded that the circumstances of this case satisfied both standards. "Cause" was found in the fact that there was no indication at the time of trial that the jury instructions were contrary to state law; the instructions were in accordance with well-established state law. Because the burden of proof is a critical element of the fact-finding process, prejudice was established by an error in the allocation of that burden. Having found that Isaac met the criteria set forth in Wainwright, the plurality went on to consider the substantive constitutional claim under Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977). The court read these cases to have held that while a state is largely free to define crimes as it chooses, Due Process requires that it prove beyond a reasonable doubt the elements of the crime as defined. Although self-defense does not negate an element of the crime involved here as defined by the Ohio statute, the plurality found "no practical difference between requiring a state to prove the elements of crimes beyond a reasonable doubt and requiring it to meet its assumed burden of proving absence of affirmative defenses beyond a reasonable doubt." In effect, the plurality held that despite the language of the statute, the absence of self-defense is an element of the crime for constitutional, Due Process purposes.

Chief Judge Edwards concurred in the result, but argued that under In re Winship, 397 U.S. 358 (1970), and Mullaney the Due Process Clause requires that the burden of proof of criminal intent be placed on the prosecution. In his view, criminal intent of aggravated assault and self-defense are completely irreconcilable. Therefore, to require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent. He joined the plurality opinion on the Wainwright issue. Judge Jones concurred separately and seems to rely primarily on the reasoning of the original panel decision.

Judge Lively dissented. In his view Robinson did not place the burden on the state of disproving affirmative defenses beyond a reasonable doubt. Judge Kennedy dissented, arguing that the cause and prejudice exception of Wainwright does not apply in this case. He relied primarily on a footnote in Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8 (1977), which stated that:

> "The states if they wish may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is waiver of any claim of error."

In Hankerson, the Court held Mullaney to be retroactive; it made the above remark in the context of a discussion of the impact of its decision on the administration of justice. In Judge Kennedy's view, if a change in interpretation of the law provides "cause" for a defendant's failure to object at trial sufficient to satisfy Wainwright, then the impact on the administration of justice of making that interpretation retroactive can never be mitigated by application of the state's contemporaneous objection rules. This would be contrary to the suggestion in Hankerson.

Moreover, the trial in this case was held three months after Mullaney was decided and, therefore, the rule of that case was not new or unanticipated. Judge Merritt dissented separately, but agreed with the reasoning of Judge Kennedy on the Wainwright issue.

On the same day that the Isaac decision came out, a panel of the CA 6 (Merritt, Brown & Martin) decided the Bell case. Judge Brown wrote the opinion and specifically adopted his opinion for the plurality in Isaac. Judge Merritt dissented, citing his dissent in Isaac.

A panel of the CA 6 (Kennedy, Martin & Phillips) decided the Hughes case several days later. The panel issued a brief order, relying on Isaac.

4. CONTENTIONS: Petr contends that the decision of the CA 6 is in direct conflict with Hankerson, supra, and with the en banc decision of the CA 4 in Cole v. Stevenson, 620 F.2d 1055 (1980). Petr argues that resps did not satisfy the cause requirement of Wainwright because the result reached by the Ohio court in Robinson was not "unanticipatable" at the time of trial, and notes that counsel in Robinson did make the objection that counsel failed to make here. Petr further argues that the prejudice requirement of Wainwright was not met here because assigning the defendant the burden of proof on the issue of self-defense is not in itself unconstitutional. (The Ohio law prior to its change in 1974 was not unconstitutional.) The CA 6 avoided this problem by effectively rewriting the Ohio statute: it held that the enactment of § 2901.05 in 1974 created a

functional element of the crime of "absence of the affirmative defense." Under Ohio law, however, the existence or nonexistence of the affirmative defense is collateral to the elements of the crime. See State v. Poole, 33 Ohio St.2d 18 (1973). Thus, the CA 6 found prejudice in the failure of the state courts to apply a state statutory benefit and this reflects a misperception of the role of the federal courts upon habeas review.

Resp Bell argues that the en banc decision was not as fragmented as it seems at first. No member of the court denied that the state had erred in making defendants prove their innocence by establishing that they acted in self-defense; seven judges found that the misallocation of the burden of proof was an error of constitutional magnitude; and six judges found that the standard set forth in Wainwright was met. Furthermore, Ohio law on the issue of the burden of proof with respect to affirmative defenses has been so confused and inconsistent that the present case is particularly unsuited for review by this Court. This case is distinguishable from the CA 4 decision in Cole on two grounds. First, the benefit claimed in Cole derived directly from this Court's prior pronouncements on the constitutional requirement of proving guilt beyond a reasonable doubt; it was not tainted by any inconsistent or contradictory actions by the state legislature and courts. Second, to the extent that there was confusion on the meaning of the federal constitutional standard, the state here, unlike in Cole, was itself the cause of that confusion. Finally, the decision below is of limited

precedential value because it relies heavily upon the unique circumstances of Ohio law, and applies to only a narrow category of cases tried between 1974 and 1978.

Resp Hughes has filed a separate response, which adopts the substantive reasoning presented in that of Bell. Hughes points out that both he and Isaac have received a final release (termination) of their parole from the State of Ohio. This means, that as far as the State of Ohio is concerned, both have fully served their entire sentences. The petr here is the superintendent of the correctional facility where Isaac and Hughes had been held. He was named as the party defendant by virtue of the fact that he was the individual who held custody of Hughes and Isaac when the habeas corpus petition was filed. Since his sole interest in this proceeding stemmed from the fact that he was the custodian and since his custodial interest has terminated independently of these proceedings, he no longer has a concrete interest in the cases against Isaac and Hughes.

Resp Isaac has filed a separate response, which is not very clear. He appears to take the approach accepted by the CA 6 panel, concentrating on the Due Process implications of limited retroactivity.

5. DISCUSSION: Resp Hughes seems correct in pointing out an initial problem as to whether or not there is still a live controversy between petr and resps Hughes and Isaac. The petition is not altogether clear, but it does state that "Hughes and Isaac were granted final releases as a matter of parole and thus have served their sentences." Although the collateral

consequences of a conviction would keep the matter alive had resps lost below, it is not at all clear that petr, superintendent of the correctional institute, is any longer the proper party to represent the state's continuing interest or that a habeas proceeding is the proper forum for this. However, because the petition refers to parole, it is not clear that parole could not still be revoked. (Although the reference to "final releases" indicates that it could not.) Because of this confusion as to the status of the case with respect to Isaac and Hughes, I recommend that if the Court grants this case it take one of two approaches. First, it could grant the petition limited to the Bell case and hold the other two. Second, it could ask for further briefing on the potential mootness point prior to granting. I would recommend the first approach as the simplest.

Two issues

Both of the issues raised by the cert petition are important. There is a conflict with the en banc decision of the CA 4 on the question of whether a change in the law can satisfy the "cause" requirement of Wainwright. The CA 4 seems to have believed it was bound by the footnote in Hankerson:

> "If change of law is cause for failing to object, then no state procedural bar could prevent federal habeas corpus in the context of cases held to be retroactive, and the Supreme Court's reliance on procedural bar as a reason for extending Mullaney retroactively would be circumvented. Footnote 8 clearly implies that the Court feels that change of law is not cause under Wainwright."
> 620 F.2d at 1063.

I don't read the language of the Hankerson footnote to have definitively settled the issue. It says only that "the states .

. . may be able to insulate past convictions by forcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim." Since a conflict has developed in the circuits over this issue, it may be appropriate for the Court to decide the point left open in Hankerson.

The second question raised by the petition, whether there was prejudice, also raises an interesting question. I read the plurality opinion below, which is the majority opinion in Bell, to hold that by assuming the burden of proof beyond a reasonable doubt with respect to the absence of self-defense, the state has effectively defined the absence of self-defense as as element of crime. At least there is no constitutional distinction between a statute which laid out the elements of the offense to include the absence of self-defense and a separate statute which although speaking of self-defense as an "affirmative defense" puts the burden on the state to prove its absence. This combination of the reasonable doubt standard with what appears to be an affirmative defense puts the case somewhere between Mullaney and Patterson. It may, therfore, be a good vehicle by which the Court could clarify the tension between those two cases that has troubled the lower courts.

My recommendation then is that the Court consider a grant on both issues, but consider limiting the grant to the Bell case alone.

There are three responses.

4/1/81 Kahn Opinion in Petition

ME

This is the issue that the Ct. almost granted last fall. I agree with the memo-writer that Bell be granted and the other cases held. There is a big conflict; CADC and CA6 on one side; CA4 en banc on the other.

However, there may be a mootness problem. When the case is granted, resp may file a suggestion of mootness.

Paul C.

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

Argued ....., 19... Assigned ....., 19... No. 80-1430

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

ENGLE

vs.

ISAAC

Grant

Only one case, & no need to limit to Bell (only Resp still in prison)

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

or to Bell

Reviewed 12/7/81 - Difficult case.

Until 1974 Ohio followed common rule with respect to plea of self-defense: Both burden of going forward & of proving defense were on the Δ.

dfl 12/07/81

In 1974, Ohio - by statute as construed in 1976 (State v Robinson) - changed rule so that only burden of going forward (raising the defense) rests on Δ. The State then has burden of proving "no self defense" by ev. beyond reasonable doubt.

Resp Bell, when tried for aggravated assault prior to change in Ohio law, did not object to the then standard instruction placing both burdens on Δ.

In this fed H/C case there are two Qs:

(1.) Does Syker "cause & prejudice" rule apply to a change in law made by State & also made retroactively. State & SG say no, but CA6 held "yes". David thinks a strict application of Syker to both "cause" & "effect" to the "change/retroactive" situation is unreasonable

BENCH MEMORANDUM

To: Mr. Justice Powell David voting December 7, 1981 like HLR note suggesting that the Q should be

From: David Levi whether a competent lawyer would have objected anyway. (This rule - too hard to apply)

NO

No. 80-1430: Engle v. Isaac; Perini v. Bell; Engle v. Hughes

(Isn't Bell only live case? I thought other two were mooted)

Question Presented

Whether in the circumstances of this case there was "cause and prejudice" permitting federal habeas review despite the defendant's failure to obey a state contemporaneous objection rule?

I am inclined simply to start with my Hankerson view of non-retroactivity in fed habeas review of state cases

I. Facts and Decisions Below

(2) Even if we find "cause & prejudice, does the jury instruction following common law violate Const.?

Will address only Bell's case

In 1975 Isaac was convicted in Ohio state court of one count of aggravated assault. At trial, Isaac relied on a defense of self-defense, and the trial judge instructed the jury that the defendant bore the burden of proving his affirmative defense by a preponderance of the evidence. This was the standard jury charge on self-defense at that time, and Isaac made no objection.

no objection

Prior to 1974, Ohio followed the traditional common law rule that both the burden of going forward and of proving affirmative defenses rested on the defendant. In that year, however, the Ohio legislature undertook to codify the burden of proving affirmative defenses as follows:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused. § 2901.05(A).

Initially, this codification was not thought to have worked any change in the law. However, after Isaac was convicted but before he had taken an appeal, the State Supreme Court held that the codification had in fact changed the burden of proof effective January 1, 1974. The court held that it was now the state's burden to prove, beyond a reasonable doubt, the absence of an affirmative defense, once properly raised. State v. Robinson, 47 Ohio St.2d 103 (1976).

Ohio S/Ct held burden had been shifted to State — once D properly raised issue

In his appeal, Isaac relied upon Robinson to attack the jury instructions. Citing Isaac's failure to object at trial, the intermediate court of appeals affirmed his conviction. The State Supreme Court dismissed his appeal in 1977 for lack of a substantial question. On the same day that it dismissed Isaac's appeal, the state Supreme Court held that its decision in Robinson was applicable retroactively to all trials held after January 1, 1974, but only if the defendant objected to the instructions at the time of trial. Isaac then applied for federal habeas relief, arguing that the State's refusal to grant him the benefit of the Robinson decision violated due process. The district court held that Isaac had waived his constitutional claim by failing to present it at trial. Ohio Criminal Rule 30 requires a defendant to object to jury instructions before the jury retires. As such, the State court's rejection of his appeal rested on an independent state procedural ground, and Isaac had shown neither cause nor actual prejudice necessary to permit the court to hear his federal claim despite his procedural default.

must object to jury instructions

A panel of the CA6 reversed (Celebreeze, Phillips and Peck). As a preliminary matter, Judge Peck noted that the CA did not need to decide whether the State court's decision to apply Robinson retroactively as a matter of state law would have been required under Mullaney v. Wilbur, 421 U.S. 684 (1975) and Hankerson v. North Carolina, 432 U.S. 233 (1977).

Turning to the merits, the CA 6 held that the cause and prejudice standard was simply irrelevant to Isaac's attack on the selective retroactive application of Robinson. To the extent that Isaac challenged the jury instructions at trial the cause and prejudice standard might block his claim. But Isaac's major claim was not that the jury instructions were unconstitutional but that a selective retroactive application of Robinson itself violated due process. The purposes of the contemporaneous objection rule were not served in this case--Isaac had no reason to suspect that the instructions were not valid. To bar Isaac from benefit of Robinson on the basis that he failed to lodge an objection was an arbitrary and capricious exercise of state procedural law. Judge Celebrezze filed a concurring opinion in which he argued that it was irrelevant whether Isaac should have objected or not: Having agreed to assume the burden of proof after January 1, 1974, and considering the fundamental nature of the burden of proof to the truth finding process, the State must adhere to its own procedures.

The CA en banc affirmed but on a different ground. CA6 en banc The CA was no longer content to argue that the selective application of a retroactive rule of state law was arbitrary and capricious. Footnote 8 in Hankerson, casts doubt on such a holding and requires more deference to state procedural rules. Rather, "the more appropriate focus is on the underlying claim, in this case the constitutional validity of

en banc
CA 6 reversed

the jury instructions given at Isaac's trial ... In this context, the threshold question, then, is not whether the state's limiting of the retroactive benefits of a new statutory interpretation through the use of a procedural rule is constitutional but whether that state procedural rule effectively precludes federal habeas corpus review of the underlying constitutional claim."

To measure the effect of the procedural rule, the CA applied the "cause and prejudice" rule stated in Wainwright v. Sykes, 433 U.S. 72 (1977). Because there was no indication at the time of Isaac's trial that the jury instruction given by the trial court was contrary to state law, it would have been futile for Isaac to object. A defendant should not be required to anticipate changes in the law, and Isaac's failure to object was supported by "cause." Moreover, the prejudice to Isaac was clear since he was forced to bear the burden of proving self defense. The prejudice in such a case might be presumed.

CA 6 applied "cause & prejudice" rule — finding both. There was "cause" not to object & there was prejudice

Confident that it could reach Isaac's attack on the jury instructions, the CA then considered whether that attack raised a question of federal law. In In re Winship, 397 U.S. 358 (1970), and Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court held that the state could not place the burden of proving an element of the crime on the defendant. Although the Court had limited Mullaney somewhat in Patterson v. New York, 432 U.S. 197 (1977), "due process requires that a state

prove all elements of the crime as the state has defined the crime."

Isaac was convicted of aggravated assault. The affirmative defense of self-defense did not negate an element of this crime. Even so, the question arises under Mullaney and Patterson: "Can Ohio, having by statute assumed the burden of proof with respect to absence of self-defense, consistently with due process convict a defendant by applying a different and lesser standard of proof"? The CA answered the question in the negative: Once the State chose to assume the burden of proof, fundamental fairness required that it be bound by that decision. "From the point of view of fairness and due process, there is no practical difference between requiring a state to prove the elements of crimes beyond a reasonable doubt and requiring it to meet its assumed burden of proving absence of affirmative defenses beyond a reasonable doubt." The habeas petition was granted.

There were several concurring and dissenting opinions. Chief Judge Edwards argued that under Mullaney and Hankerson the burden of proving self defense could not rest on the defendant, regardless of state law. He joined the majority's treatment of the cause and prejudice question.

Judge Jones concurred in the result only.

In a rather opaque dissent, Judge Lively argued that there was no federal constitutional violation in Isaac's conviction. All that the State had done in the new statute as

interpreted by the State court was to reduce the quantum of proof needed to permit an acquittal on the ground of self-defense. Quite simply, the defendant no longer need prove self-defense by a preponderance of the evidence, but must simply put in enough evidence to raise the defense; the statute said no more than that. The State had not made "a determination that absence of the facts necessary to sustain a plea of self-defense 'must be either proved or presumed.'" There had been no change in the elements of the offense. Nor was there any constitutional requirement that the State make its rule retroactive in all instances. Judge Engel joined in this dissent.

Judge Kennedy argued that there had been no showing of "cause and prejudice." In Hankerson, 432 U.S., at 244 n.8, the Court expressly noted that by holding Mullaney to be retroactive the Court was not subjecting the States to the burden of re-trying every defendant: "The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." The clear implication of this statement is that a mere change in law is not "cause." Moreover, it was not impossible for Isaac to have anticipated the change in law: Mullaney was decided three months before his trial and In re Winship five years prior. He might well have objected to the instructions on the basis of these cases.

After noting his belief that due process requires the State to bear the burden of negating self defense as an element of the offense, Judge Merritt dissented for the reasons given by Judge Kennedy.

Hughes and Bell were decided on the authority of Isaac.

Note that Hughes and Isaac have been granted final releases as a matter of parole. Bell is still in prison. The parties do not address the question of mootness in the case of Hughes and Isaac.

Two Qs:

II. Discussion 1. Effect of procedural "default" when a subsequent change in law is made retroactive?

There are two questions in this case. The first question is whether these defendants are barred from making a collateral attack on the jury instructions by their failure to comply with Ohio's contemporaneous objection rule. These cases provide the Court with an opportunity to explain the meaning of the "cause and prejudice" test stated but not defined in Wainwright v. Sykes. In particular, these cases permit the Court to decide whether the assumed futility of an objection--or the fact that a legal basis for an objection does not yet exist--is "cause" for failing to object. Second, there is considerable uncertainty in these cases as to whether any federal constitutional violation ever existed. It is unclear that the change in state law and the State's decision to limit

2. Even not barred by default, was there a fed. Const. error?

argues that the CA6 has virtually destroyed the "cause" requirement as stated by the Court in Wainwright v. Sykes. Although the Sykes Court did not attempt to give precise definition to the terms "cause and prejudiced," it made clear that the "deliberate bypass" or "knowing waiver" tests stated in Fay v. Noia no longer governed. If a belief that an objection will be futile or if failure to anticipate a change in the law are sufficient to show cause, then there is little difference between "cause" and "deliberate bypass."

Our system guarantees all defendants competent counsel. But it does not guarantee all defendants

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the retroactive effect of the change implicated any federal constitutional rights. Thus, even if cause and prejudice could be shown, it is unclear that any basis for habeas relief exists. To make matters more confusing, the State has framed this substantive constitutional question--going to the merits of the habeas petition--as if it were part of the initial "cause and prejudice" analysis: Whether "prejudice" has been shown, when the habeas petitioner has failed to allege a violation of his federal constitutional rights.

A. Cause

Both the State and the SG argue with some force that the CA has misconstrued the "cause" requirement. The State argues that the CA6 has virtually destroyed the "cause" requirement as stated by the Court in Wainwright v. Sykes. Although the Sykes Court did not attempt to give precise definition to the terms "cause and prejudiced," it made clear that the "deliberate bypass" or "knowing waiver" tests stated in Fay v. Noia no longer governed. If a belief that an objection will be futile or if failure to anticipate a change in the law are sufficient to show cause, then there is little difference between "cause" and "deliberate bypass."

Our system guarantees all defendants competent counsel. But it does not guarantee all defendants counsel of equal competence. Some lawyers will have greater foresight

and will anticipate changes in the law. Indeed, by their objections they will often cause changes in the law to be made, to the benefit of the system. Attorneys should have an incentive to change the law and anticipate developments. In the circumstances of this case, and particularly in view of the fact that Mullaney was decided before trial while all counsel realized that the Ohio criminal law had been recodified, there was no reason why Isaac's attorney should not have objected to the jury instructions. These circumstances distinguish O'Connor v. Ohio, 385 U.S. 92 (1966), in which the Court held that a contemporaneous objection rule could not bar relief for an antecedent violation of Griffin v. California, 380 U.S. 609 (1965).

Moreover, if the notion of finality is to have any place in the criminal system, the states must be permitted to insist upon their contemporaneous objection rules. The Hankerson Court recognized this in footnote 8 in which it noted that although Mullaney would be applied retroactively, failure to object at trial would bar retrial if the state had a contemporaneous objection rule.

The SG, as amicus, agrees with the State that the CA6 has left little to the cause requirement. The SG re-emphasizes the important policies served by contemporaneous objection rules: such rules promote finality and the avoidance of error while they discourage sandbagging by defense attorneys. Only for "cause" ought these important

policies be overborne. Yet the CA did not explain why the apparent futility of an objection ought to amount to cause. If "cause" exists when an attorney simply inadvertently fails to make an objection, then "cause" and "deliberate bypass" are identical. Nor should "cause" exist when an attorney deliberately decides not to object because the objection will probably be futile. Such a decision is a tactical decision--to make some claims, but not others--no different than any other tactical decision. If the tactic does not pay off, that is the price of an adversary system. But the defendant cannot have it both ways. He cannot withhold his objection because he believes that to be the more effective way to present his case, and then complain when he loses. Only when a defendant "has been denied a fair opportunity to raise his claim in accordance with the governing procedural rules" should there be a finding of "cause" sufficient to excuse a procedural default.

The SG emphasizes that his view of the cause requirement is in no sense unfair. A defendant has no right to have his claims at trial considered in light of subsequent legal developments. The system aims at fairness not perfection. The system simply could not operate if every change in the law would require retrial of those convicted under the old law. Were "futility" sufficient to show cause, there would be little incentive for lawyers to anticipate

Not unfair

changes or make new claims, and sandbagging would be encouraged.

Finally, the SG agrees with the State that even if futility is sufficient "cause," there was no such futility in the circumstances of this case. The result in Robinson was fully to be anticipated given the amendment to Ohio law. Indeed, the result in Robinson suggests that objection would not have been futile.

The SG notes in a footnote that he is unsure whether the "prejudice" component of the "cause and prejudice" test is before the Court given the manner in which the State framed the prejudice question. If the proper definition of the "prejudice" prong is before the Court, then the SG wishes it to be known that it was not properly applied in these cases. The CA presumed prejudice. But the test of prejudice is actual prejudice, and having found cause the CA should have remanded to the trial court to assess whether a different jury instruction would have made any difference in the circumstances of these cases.

Although I find these arguments to be somewhat persuasive, I remains unconvinced that a demanding "cause" requirement would promote the purposes of the contemporaneous objection rule. This is a point which is often made in the secondary literature. One frequently encounters Justice Brennan's argument that most violations of states' contemporaneous objection rules will occur due to attorney

David

inadvertence not to "sandbagging." See 91 Harv. L. Rev. 70, 217-218:

> "There is good reason to believe that sandbagging is not often a useful tactic, and that in any event federal courts are sufficiently able to deter it. The most likely explanation for procedural defaults, then, is attorney error. If a lawyer's default results from inadvertence, the Sykes rule will not increase the chance that the objection will be raised in the state trial. Thus, the choice between Fay and Sykes is neutral with respect to the goals of promoting determinations based on 'fresh evidence' and deciding all issues in one proceeding. Finally, it seems unwarranted to presume that state judges will ignore their own contemporaneous objection rules."

I don't buy all of this

The Harvard article suggests that a "reasonable attorney" standard be adopted: "the court can examine the trial record to see whether there was in fact a deliberate bypass and, if not, whether it is more likely than not that a reasonable defense attorney would have considered the constitutional objection and decided not to raise it."

Will produce additional litigation, with subjective judgs being made

See also, Tague, Federal Habeas Corpus and Ineffective Assistance of Counsel, 31 Stan.L.Rev. 1 (1978):

> "If Estelle and Sykes illustrate the defendant's burden, few defendants will be able to establish cause. If the attorney exercises professional judgment, perhaps simply if the attorney consciously decides not to object, the defendant will be barred from habeas relief. It is not enough for the defendant to show that counsel failed to research or to understand the law, or objected on the wrong ground, or failed to get a ruling on the objection from the trial court, or failed to discover the information upon which the objection was based in time to comply with the procedural rule. It is not enough for the defendant to show that counsel wrongly decided that the motion

would be denied, or that counsel was not motivated by either the hope of gaining some tactical advantage or of avoiding some possible harm, or that the defendant disagreed with counsel's decision. And there is no suggestion ... that the habeas court must review the reasonableness of the attorney's decision. Finally, it is not enough to show that counsel did not know of the information that would have supported an objection, at least if this infomration was reasonably discoverable.

There are, however, several ways the defendant might establish cause. First, if counsel did object, albeit out-of-time, the defendant could show that counsel's failure to strictly comply with the procedural rule was inadvertentand not deliberate. Second, the defendant could show that the attorney did not actually decide to refrain from objecting: Counsel might have lacked the competence to recognize the issue; the practice challenged on post-conviction appeal may have been so customary in the jurisdiction that a reasonable trial attorney might not have objected; the government may have failed to reveal information that would have alerted counsel to the issue; or the legal basis for the objection may have been discovered or even created only after the time for objection had passed but before the conviction became final. Third, the defendant might show cause if the attorney decided not to object because objecting might have had 'grisly'results for the defendant, or because counsel reasonably feared that the trial court or jury might retaliate against the defendant in response to the objection. Finally, the defendant might also show that no attorney would ever have made a tactical decision to refrain from objecting--that any attorney who had recognized the possiblity of an objection would have made one." (emphasis added)

I think the argument is fairly convincing that an exacting cause standard does not serve the purposes of contemporaneous objection rules. It is scarcely believable that any of the defendants in these cases were sandbagging. The jury instructions were standard and the State court had

Δs have followed their existing state law

not yet altered its position. However else one would apply the cause requirement in another case, it is difficult to characterize a decision not to object in these cases as a tactical decision. No a tactical decision here

I think you have found two more sensible ways of limiting the burden of federal habeas. In your Hankerson concurrence you argue that new federal constitutional rules should not be applied retroactively in habeas proceedings. Presumably that would knock out quite a few habeas cases. And in Stone v. Powell, you succeeded in ending the collateral review of search and seizure decisions where there had been a full and fair consideration of the question in state court. Unfortunately, you were less successful in Rose v. Mitchell. I think that these approaches are more analytically satisfying than an artificially high "cause" standard. The question for you, and I think it is difficult, is whether you should go along with a higher "cause" standard in light of the Court's apparent unwillingness to place further substantive limits on the availability of habeas or to place a flat limit on the retroactive application of new constitutional rules in collateral proceedings. The difficulty with an "insurmountable cause" approach is illustrated in these cases. If there has been a violation of constitutional rights in this case, it is the right to be tried under the state prescribed burden of proof. Such a right appears to go to the basic fairness of the trial and to guilt or innocence. A high standard of cause

My preferred views

(1)

(2)

Yes

me

Yes

My Hankerson view

will keep these defendants from habeas relief, but if their constitutional claims are valid, I question whether they should not be able to present their claims upon habeas. Yes

This is not to say that procedural defaults will be forgiven in any instance. Perhaps one might adopt the "reasonable attorney" approach--would a reasonable attorney have been aware of the objection and decided not to make it for tactical reasons? There may be cases in which the failure to object is inexcusable and where the objection deals with a "trial type" right rather than a right whose infringement questions the basic fairness of the proceedings. Thus, in Estelle v. Williams, 425 U.S. 501 (1976), the defendant was tried for assault with intent to commit murder in Texas state court. He was tried in prison garb; his attorney did not object. However, Texas has no contemporaneous objection rule. The USDC rejected Williams' §2254 petition; the CA reversed. Although there was no violation of a contemporaneous objection rule, the Chief reasoned that only if Williams was compelled to wear prison garb was there a constitutional violation. Having framed the issue in this way, the Chief's analysis of the indicia of compulsion ~~is~~ was strikingly similar to a "cause and prejudice" sort of analysis. Because Williams had not objected, because the record indicated that such an objection would not have been futile, and because the record did not indicate that Willaims' counsel had anything to fear from any objection, it could not be said that Willaims had been

"compelled" to stand trial in jail garb or "that there was sufficient reason to excuse the failure to raise the issue before trial."

In concurring in Estelle v Williams ~~you~~ noted that there were two situations in which a conviction should be left standing despite an infringement of a constitutional right: (1) knowing waiver of the right and (2) "inexcusable procedural default." This was a case of inexcusable default: "It is my view that a tactical choice or procedural default of the nature of that involved here ordinarily should operate, as a matter of federal law, to preclude the later raising of the substantive right." You emphasized that this was "a curable trial defect" and that the right at stake was "a trial-type right" such that the attorney's error ought to bind the client (citing Henry v. Mississippi, 379 U.S. 443, 451-452 (1965)). There was evidence in the record that the defendant had deliberately decided not to object because of an erroneous belief that the objection would be futile.

I may be giving the lawyers in this case too much of the benefit of the doubt. Certainly, given the decision in Mullaney and the amendment to Ohio law, a good lawyer might have thought to make an objection in these cases. And habeas ought not to be the corrective for the inherent problems of an adversary system. But, on the whole, I would not support the rigid cause standard urged by the government.

David

I will consider the constitutional question in the next section, but I am afraid you will have to wait until the morning to read it. I do apologize.

dfl 12/08/81

Engle v. Isaac--No. 80-1430 (continued)

B. Prejudice

The State argues that no prejudice was shown in these cases because there was no constitutional violation. By framing the argument in this way, the State has collapsed the prejudice inquiry with the merits of the habeas petition. This is analytical error. The showing of prejudice required to overcome a procedural default need not be the same as the prejudice required to show a constitutional violation.

The CA6 found a federal constitutional violation in these cases upon an analogy to Mullaney and Patterson:

> As we read Mullaney and Patterson, while the sttes are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes, as the states have chosen to define them, beyond a reasonable doubt. We further conclude that, once a state assumed the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume. From the point of view of fairness and due process, there is no practical difference between requiring a state to prove the elements of crimes beyond a reasonable doubt and requiring it to meet its assumed burden of proving absence of

> affirmative defenses beyond a reasonable doubt. Thus we conclude that, in Isaac's trial, placing the burden on him to prove self-defense by a preponderance of the evidence constituted a denial of federal due process."

It is important to note just what the CA6 is not holding. First, it is not holding that the State must assume the burden of defeating affirmative offenses. Such a holding would not be justified in light of Patterson, although two of the concurring judges apparently felt that the change in Ohio law was required by Mullaney and Patterson. Rather, it holds only that if and as a matter of state law, Ohio chooses to assume that burden, then it must bear it as a matter of federal due process. One can draw a rather strong analogy to Mullaney: Due process did not require Maine to include an absence of provocation and passion in its definition of the crime of murder; once the State did so, however, due process requires the state to bear the burden of disproving provocation and passion.

Second, the CA did not hold that the State court's decision in Robinson had to be applied retroactively in all cases as a matter of federal constitutional law. That was the approach taken by the panel in the first decision. Judge Peck argued that it was arbitrary and capricious to insist upon the contemporaneous objection rule and that Robinson must apply to all tried after January 1, 1974. But the CA en banc opinion

relied solely on the fact that the statute changed the law as of January 1, 1974. Robinson was of value to the CA because it interpreted the statute. But the source of the constitutional violation was not the ~~CA's~~ State court's decision to apply Robinson retroactively in some cases but not others; rather, the source of the constitutional violation was the State's decision to assume the burden of disproving affirmative defenses as of January 1, 1974. Had the CA based its finding of a constitutional violation on the state court's decision to apply Robinson retroactively in only some cases, then I think we would have a problem with the CA's decision. That is, if the State only assumed the burden of disproving affirmative defenses by its decision in Robinson, then surely the State could limit the retroactive application of that decision. Your concurrence in Hankerson suggests the propriety of such limitations.

Judge Lively argues in dissent that in fact the State did not assume the burden of disproving affirmative defenses. The State simply removed the burden from the defendant. It did not reassign the burden to the State. This is a clever argument, but I doubt it makes much difference. I would think that Mullaney would govern a case in which a defendant was forced to bear the burden of proving a defense when State law did not in fact allocate the burden to the defendant.

Finally, it makes one's head spin to consider precisely how your Hankerson concurrence would apply if the Court affirms the CA6. The Court will hold that once a State has assumed the burden of disproving affirmative defenses, or once Ohio has removed the burden of proof from the defendant, it must adhere to that allocation of the burden or violate due process. Such a holding would be something of an extension of Mullaney, and I think you could take the position that the rule should only be available to defendants on direct appeal. Would that mean that other defendants tried under the old instructions in Ohio, after 1974, could not raise the claim upon habeas? That would seem to be a strange result given that these cases come to the Court in a collateral posture themselves. Now that Ohio has returned--as of 11/1/78--to its old rule, and now clearly places the burden on the defendant once again, the retroactivity question will only be important to a band of defendants tried between 1974 and 1978.

Dissent

III. Conclusion

Much to my surprise, I would affirm the CA6. I think that there are more careful ways of limiting habeas than by insisting on a standard of cause that is virtually impossible for any defendant to meet. Your approach in Hankerson and Stone v. Powell points the way. As to the constitutional violation, I think that the CA makes a

convincing argument, on an analogy to Mullaney, that once the State altered the burden of proof it was bound to adhere to its own rules and not simply as a matter of state procedural law.

80-1430 ENGLE & Bell v. ISAAC Argued 12/8/81

a "cause & prejudice" Q under Sykes
Ohio changed its law w/r to ~~to~~ burden of proof on self-defense issue

1. Mr. W. position: a retroactive change applies only to cases on appeal.

2. In '78 Ohio law was again changed ~~so as that~~ restoring cm. law rule to effect that self-def. must be proved by Δ.

retroactive - what happens to cases bet '74 & '78? & Mir '78 change is

Poole

Karas (Ass't AG - Ohio)

Does not concede a const. violation (Ohio Ct has held "self defense" is to be an aff. defense - not an element of the crime. See State v. Poole 33 Ohio St 2d 18)

Kingsley (Resp). (Represented Engle throughout this case)

Aymer (Resps Bell & Hughes)

In Syker the factual basis for the error was not in record.

Moreover, Syker applies only where default does not relate to the fairness of guilt or innocence of error.

Test should be whether the default - i.e. impairs integrity of fact finding process.

BRW noted Ohio S/Ct has not said the "changed rule" (burden of state) is an "element of crime."

State is free to determine elements of crime but once determined fed D/P requires they be proved.

~~Compel (cont.)~~

Kansas (Rehearing)

Ohio S/Ct in Robinson applied new Rule retroactively as matter of state law.

Relies on State v. Abner

dfl 12/10/81

To: Justice Powell

From: David

Re: Engle v. Isaac--No. 80-1430

I. These are the relevant, underlying state law events:

1. Prior to 1974, Ohio followed the traditional common law rule placing the burden of proof as to affirmative defenses on the defendant.

2. Effective January 1, 1974, Ohio passed a new criminal code that included the following provision:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Note that the statute says nothing as to the burden of proof.

3. In a 1975 decision, State v. Rogers, 43 Ohio St.2d 28 (1975), the Ohio S.C. stated in dictum that the defendant must still bear the burden of proving affirmative defenses under the new statutory section.

Δ still has burden

4. But in a 1976 decision, State v. Robinson, 47 Ohio St.2d 103 (1976), the Ohio SC changed course and held that the new statute had changed the burden of proof as to affirmative defenses, placing that burden on the prosecution. The defendant bears only the burden of going forward. The court held that a jury instruction placing the burden of proof on the defendant was prejudicial error.

5. In State v. Humphries, 51 Ohio St.2d 95 (1977), the Ohio S.C. made clear that its ruling in Robinson would only apply retroactively to those defendants who objected at trial in accord with Ohio's contemporaneous objection rule pertaining to jury instructions. (Rule 30). At the same time, the S.C. held that a defendant tried to a judge, could claim benefit of the Robinson decision since there was no comparable contemporaneous objection rule in the context of bench trials--the judge does not instruct himself.

6. The Ohio legislature took ~~has now taken~~ matters back into its hands. Effective January 1, 1978, defendants must again bear the burden of proving affirmative defenses:

> "The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

II. The decisions below

Because Isaac did not object to the jury instruction he was barred from all state court relief under Humphries.

The federal district court held that Isaac's failure to object constituted a waiver of his claim upon Mullaney that the erroneous jury instructions violated due process. Without reaching the validity of Isaac's constitutional theory, the court dismissed because of Isaac's failure to show "cause and prejudice."

A panel of the CA6 reversed. The panel held that the district court had properly barred Isaac from attacking the jury instructions on the basis of cause and prejudice. However, Isaac also argued that Ohio's selective application of State v. Robinson was itself a constitutional violation and as to this allegation there was no requirement of contemporaneous objection.:

> "The major thrust of petitioner's claim was, and is, not directed to the constitutionality of the jury instruction itself; but rather, it centers upon and challenges the constitutionality of the Ohio Supreme Court's selective application of its State v. Robinson decision while petitioner's conviction was still pending on review in the state courts. Wainwright v. Sykes, supra, is not applicable to this second prong of appellant's petition."

Under the panel's holding, Isaac did not have a claim because of Mullaney. Any such claim had been forfeited by his failure to object. Rather he had a claim because the State's

insistence upon its contemporaneous objection rule itself amounted to an independent constitutional violation. By permitting some defendants to be retried because they had lodged an objection, while defendants such as Isaac were not permitted retrial, was arbitrary and capricious. The panel never considered whether or not the jury instructions were themselves constitutionally permissible.

The CA6 en banc drew back from the panel's attack on the contemporaneous objection rule. Recognizing that these rules are entitled to some deference and that the Court indicated as much in footnote 8 of Hankerson, the en banc court stated: "We are ... hesitant to hold, as did the panel opinion, that this use of a contemporaneous objection rule to limit the retroactive benefits of a new statutory interpretation is, ipso facto, violative of due process." Rather, the panel framed the issue as follows:

> "We beleive that the more appropriate focus is on the underlying claim, in this case the constitutional validity of the jury instructions given at Isaac's trial as considered in light of Robinson Humphries. In this context, the threshold question, then, is not whether the state's limiting of the retroactive benefits of a new statutory interpretation through the use of a procedural rule is constitutional but whether that state procedural rule effectively precludes federal habeas corpus review of the underlying constitutional claim."

The en banc court found that there was cause and prejudice and proceeded to determine the validity of the jury

instructions. The CA noted that absence of self-defense was not an element of the crime of aggravated assault as defined by the state. Even so a Mullaney type question arose:

> "Can Ohio, having by statute assumed the burden of proof with respect to absence of self-defense, consistently with due process convict a defendant by applying a different and lesser standard of proof. .... As we read Mullaney and Patterson, while the state are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes, as the states have chosen to define them, beyond a reasonable doubt. We further conclude tht, once a state assumed the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume. From the poin to view of fairness and due process, there is no practical difference between requiring a state to prove the elements of crimes beyond a reasonable doubt and requiring it to meet its assumed burden of proving absence of affirmative defenses beyond a reasonable doubt."

In short, as I understand it, there are two ways of thinking about what happened here. The panel considered that the Robinson decision itslef created the new right in defendants to have the state bear the burden of disproving affirmative defenses. But that right was only made available, retrospectively, to those defendants who had the good fortune to object to the old instructions. The panel viewed this selective, retrospective provision of the right as arbitrary and a violation of equal protection and due process. The en banc court, on the other hand, considered that the new right was created by the statute. The only limit on asserting the right was the state's contemporaneous objection rule, and, if "cause and prejudice"

could be shown, the failure to object would not bar habeas relief. Thus, I do not think that the state's ability to make a law only partially retrospective is at all implicated in the way that the CA en banc approached the question. But I may be wrong.

Rev 7-2

No. 80-1430, Engle v. Isaac Conf. 12/11/81

The Chief Justice Reverse

Different from Frady, as here challenge is that there was a const. violation by misplacing burden of proof. In Frady only ~~[illegible]~~ instructions were involved

The State statute was there in 1974 ~~[illegible]~~ - before trial. Thus is contributory - should have objected

Justice Brennan Aff'm.

The change in statute created no const. Q. But there is an E/P clause issue, by the difference bet. ~~[illegible]~~ result in bench & jury trial. Humphrey's Rule is not reasonable under Wainwright. As late as ~~[illegible]~~ 1975 S/Ct Ohio (after statute was changed) reaffirmed old rule. Thus no "cause".

Justice White Reverse

Failure to follow a state procedural rule is the problem.

Agree there was cause - lawyer followed law. Not clear as to prejudice element. Could find harmless error in no const ~~[illegible]~~ violation. Here, ~~[illegible]~~ Ohio violated no const. right. Ohio did not make its rule an element of the crime. Ohio was free as to how far to ~~[illegible]~~ go in elements of crime. CA 6's opinion makes no sense.

CA6 did not address E/P. Not ~~[illegible]~~ discussed in Briefs. We don't need to address this.

Justice Marshall Aff'm

No reasons given

Justice Blackmun

Apply Syker & let it go at this
Agree with Byron.

Justice Powell Reverse

Adhere to my Hankerson view. Reserve it.
On merits, Ohio statute was changed in '74.
Ds were convicted in '75. Subsequently, the
Ohio S/Ct construed new statute to place
burden on State. This is H/C review.

I'm not ~~so~~ sure it is reasonable to
fault counsel for not objecting, as Ohio
had followed different Rule & new statute
was ambiguous.

But there must be a showing of actual
prejudice. I think I could go with BRW that the
error - if any - was not ~~auto~~ of Const. dimension under Ohio law.

Justice Rehnquist *Reverse*

There was no valid cause. Sykes will be undercut if courts have to ask in every case whether the lawyer reasonably should have known law might change.

Not reading "cause" out altogether - e.g. when prosecutor had withheld evidence (Brady)

If E/P is reached, there is a rational distinction bet. bench & jury trials. But because this issue not having been exhausted as a remedy, & not properly raised, issue is not here.

Justice Stevens *Reverse* - but not on "cause/prejudice" analysis.

Agree with WHR as to E/P claim.

If we reach merits of E/P claim, agree with WHR that there is rational basis for dif. bet. jury & bench memo.

As to "cause & prejudice", ~~[illegible]~~ has doubts as to soundness of this rule.

The "merits" & "prejudice" end up being the same. Here there is no Const. violation.

If a trial lawyer fails to object, it will be rare case in which a Const violation will have occurred.

These type of claim should not be entertained on collateral attack.

Justice O'Connor *Reverse*

~~[illegible]~~ The error here does affect the ~~[illegible]~~ truth finding process, ~~but~~ & this is ~~[illegible]~~ different from Sykes. Nevertheless, would extend ~~extend~~ Sykes to cover all cases unless there is a "mis-carriage of justice."

E/P issue suggest it is raised ~~to~~ in H/C for first time - i.e. no exhaustion

See p 17 Point I made in Bustamonte & Stone v Powell

Ask David to read.

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

File Copy

From: Justice O'Connor

Circulated: FEB 9 1982

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, PETITIONER, *v.* LINCOLN ISAAC ~~&~~ Hughes T. Bell

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

[February ——, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), we held that a state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, could not litigate that claim in a § 2254 habeas corpus[1] proceeding without showing cause for and actual prejudice from the default. Applying the principle of *Sykes* to this case, we conclude that respondents, who failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions, may not challenge the constitutionality of those instructions in a federal habeas proceeding.

Reviewed LFP 2/9

Fine opinion. Join

I

Respondents' claims rest in part on recent changes in Ohio criminal law. For over a century, the Ohio courts required criminal defendants to carry the burden of proving self-de-

[1] Title 28 U. S. C. § 2254(a) empowers "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." This statutory remedy may not be identical in all respects to the common-law writ of habeas corpus. See *Wainwright* v. *Sykes*, 433 U. S. 72, 78 (1977).

fense by a preponderance of the evidence. See *State* v. *Seliskar*, 35 Ohio St. 2d 95, 298 N. E. 2d 582 (1973); *Szalkai* v. *State*, 96 Ohio St. 36, 117 N. E. 12 (1917); *Silvus* v. *State*, 22 Ohio St. 90 (1871). A new criminal code, effective January 1, 1974, subjected all affirmative defenses to the following rule:

> "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." Ohio Rev. Code Ann. § 2901.05(A) (1975).

For more than two years after its enactment, most Ohio courts assumed that this section worked no change in Ohio's traditional burden-of-proof rules.[2] In 1976, however, the Ohio Supreme Court construed the statute to place only the burden of production, not the burden of persuasion, on the defendant. Once the defendant produces some evidence of self-defense, the state court ruled, the prosecutor must disprove self-defense beyond a reasonable doubt. *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976) (syllabus by the court).[3] The present actions arose because Ohio tried

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[2] See, *e. g.*, *State* v. *Rogers*, 43 Ohio St. 2d 28, 30, 330 N. E. 2d 674, 676 (1975) (noting that "self-defense is an affirmative defense, which must be established by a preponderance of the evidence"), cert. denied, 423 U. S. 1061 (1976). But see *State* v. *Matthews*, No. 74AP-428, p. 9 (Ct. App. Franklin County, Ohio, Dec. 24, 1974) (§ 2901.05(A) "evinces a legislative intent to change the burden of the defendant with respect to affirmative defenses"); 1 O. Schroeder & L. Katz, Ohio Criminal Law and Practice § 2901.05, p. 14 (1974 ed.) ("The provisions of 2901.05(A) follow the modern statutory trend in this area, requiring the accused to raise the affirmative defense, but leaving the burden of persuasion upon the prosecution."); Student Symposium: The Proposed Ohio Criminal Code—Reform and Regression, 33 Ohio St. L. J. 351, 420 (1972) (suggesting that legislators intended to change traditional rule).

[3] In Ohio, the court's syllabus contains the controlling law. See *Haas*

and convicted respondents after the effective date of § 2901.05(A), but before the Ohio Supreme Court's interpretation of that statute in *Robinson.*[4]

Who?

On December 16, 1974, an Ohio grand jury indicted respondent Hughes for aggravated murder.[5] At trial the State showed that, in the presence of seven witnesses, Hughes shot and killed a man who was keeping company with his former girlfriend. Prosecution witnesses testified that the victim was unarmed and had just attempted to shake hands with Hughes. Hughes, however, claimed that he acted in self-defense. His testimony suggested that he feared the victim, a larger man, because he had touched his pocket while approaching Hughes. The trial court instructed the jury that Hughes bore the burden of proving this defense by a prepon-

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v. *State*, 103 Ohio St. 1, 7–8, 132 N. E. 158, 159–160 (1921).

[4] Two years after *Robinson*, the Ohio legislature once again amended Ohio's burden of proof law. The new § 2901.05(A), effective November 1, 1978, provides:

"Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, *and the burden of proof, by a preponderance of the evidence*, for an affirmative defense, is upon the accused." Ohio Rev. Code Ann. § 2901.05(A) (Supp. 1980) (emphasis added).

This amendment has no effect on the litigation before us. Thoughout this opinion, citations to § 2901.05(A) refer to the statute in effect between January 1, 1974, and October 31, 1978.

[5] See Ohio Rev. Code Ann. § 2903.01 (1975):

"(A) No person shall purposely, and with prior calculation and design, cause the death of another.

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

"(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code."

derance of the evidence. Counsel for Hughes did not specifically object to this instruction.[6]

On January 24, 1975, the jury convicted Hughes of voluntary manslaughter, a lesser included offense of aggravated murder.[7] On September 24, 1975, the Summit County Court of Appeals affirmed the conviction, and on March 19, 1976, the Supreme Court of Ohio dismissed Hughes' appeal, finding no substantial constitutional question.[8] Neither of these appeals challenged the jury instruction on self-defense.

Who?

Ohio tried respondent Bell for aggravated murder in April 1975. Evidence at trial showed that Bell was one of a group of bartenders who had agreed to help one another if trouble developed at any of their bars. On the evening of the murder, one of the bartenders called Bell and told him that he feared trouble from five men who had entered his bar. When Bell arrived at the bar, the bartender informed him that the men had left. Bell pursued them and gunned one of the men down in the street.

Bell defended on the ground that he had acted in self-de-

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[6] Hughes' counsel did register a general objection "to the entire Charge in its entirety" because "[w]e are operating now under a new code in which many things are uncertain." App. 48. Counsel's subsequent remarks, however, demonstrated that his objection concerned only the proposed definitions of "Aggravated Murder, Murder and Voluntary Manslaughter." App. 48, 50.

[7] Voluntary manslaughter is "knowingly caus[ing] the death of another" while under "extreme emotional stress brought on by serious provocation reasonably sufficient to incite [the Defendant] into using deadly force." Ohio Rev. Code Ann. § 2903.03 (A) (1975).

Hughes was sentenced to 6-25 years in prison. The State's petition for certiorari indicated that Hughes has been "granted final releas[e] as a matter of parole." Pet. for Cert. 6. This release does not moot the controversy between Hughes and the State. See *Humphrey* v. *Cady*, 405 U. S. 504, 506–507 n. 2 (1972); *Carafas* v. *LaVallee*, 391 U. S. 234, 237–240 (1968).

[8] See *State* v. *Hughes*, C. A. No. 7717 (Ct. App. Summit County, Ohio, Sept. 24, 1975); *State* v. *Hughes*, No. 75–1026 (Ohio, March 19, 1976).

fense. He testified that as he approached two of the men, the bartender shouted: "He's got a gun" or "Watch out, he's got a gun." At this warning, Bell started shooting. As in Hughes' case, the trial court instructed the jury that Bell had the burden of proving self-defense by a preponderance of the evidence. Bell did not object to this instruction and the jury convicted him of murder, a lesser included offense of the charged crime.[9]

Bell appealed to the Cuyahoga County Court of Appeals, but failed to challenge the instruction assigning him the burden of proving self-defense. The Court of Appeals affirmed Bell's conviction on April 8, 1976.[10] Bell appealed further to the Ohio Supreme Court, again neglecting to challenge the self-defense instruction. That court overruled his motion for leave to appeal on September 17, 1976,[11] two months after it construed § 2901.05(A) to place the burden of proving absence of self-defense on the prosecution. See *State* v. *Robinson*, *supra*.

Respondent Isaac was tried in September 1975 for felonious assault.[12] The State showed that Isaac had severely beaten his former wife's boyfriend. Isaac claimed that the boyfriend punched him first and that he acted solely in self-defense. Without objection from Isaac, the court instructed

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[9] Ohio defines murder as "purposely caus[ing] the death of another." Ohio Rev. Code Ann. § 2903.02(A) (1975). Bell received a sentence of 15 years to life imprisonment.

[10] *State* v. *Bell*, No. 34727 (Ct. App. Cuyahoga County, Ohio, April 8, 1976).

[11] *State* v. *Bell*, No. 76–573 (Ohio, Sept. 17, 1976).

[12] See Ohio Rev. Code Ann. § 2903.11 (1975):

"(A) No person shall knowingly:

"(1) Cause serious physical harm to another;

"(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

"(B) Whoever violates this section is guilty of felonious assault, a felony of the second degree."

the jury that Isaac carried the burden of proving this defense by a preponderance of the evidence. The jury acquitted Isaac of felonious assault, but convicted him of the lesser included offense of aggravated assault.[13]

Ten months after Isaac's trial, the Ohio Supreme Court decided *State* v. *Robinson*, *supra*. In his appeal to the Pickaway County Court of Appeals,[14] Isaac relied upon *Robinson* to challenge the burden of proof instructions given at his trial. The court rejected this challenge because Isaac had failed to object to the jury instructions during trial, as required by Ohio Rule Crim. Proc. 30.[15] This default waived

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[13] Ohio Rev. Code Ann. § 2903.12 (1975) describes aggravated assault:

"(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force shall knowingly:

"(1) Cause serious physical harm to another;

"(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

"(B) Whoever violates this section is guilty of aggravated assault, a felony of the fourth degree."

The judge sentenced Isaac to a term of six months to five years imprisonment. According to the State's petition for certiorari, Isaac has been released from jail. This controversy is not moot, however. See n. 7, *supra*.

[14] *State* v. *Isaac*, No. 346 (Ct. App. Pickaway County, Ohio, Feb. 11, 1977).

[15] At the time Hughes and Bell were tried, this rule stated in relevant part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Shortly before Isaac's trial, Ohio amended the language of the rule in minor respects:

"A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds

Isaac's claim. *State* v. *Glaros*, 170 Ohio St. 471, 166 N. E. 2d 379 (1960); *State* v. *Slone*, 45 Ohio App. 2d 24, 340 N. E. 2d 413 (1975).

The Supreme Court of Ohio dismissed Isaac's appeal for lack of a substantial constitutional question.[16] On the same day, that court decided *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977), and *State* v. *Williams*, 51 Ohio St. 2d 112, 364 N. E. 2d 1364 (1977), vacated in part and remanded, 438 U. S. 911 (1978). In *Humphries* the court ruled that every criminal trial held on or after January 1, 1974, "is required to be conducted in accordance with the provisions of [Ohio Rev. Code Ann. § 2901.05]." *Id.*, at 95, 364 N. E. 2d, at 1355 (syllabus by the court). The court, however, refused to extend this ruling to a defendant who failed to comply with Ohio Rule Crim. Proc. 30. *Id.*, at 102–103, 364 N. E. 2d, at 1359. In *Williams*, the court declined to consider a constitutional challenge to Ohio's traditional self-defense instruction, again because the defendant had not properly objected to the instruction at trial.

All three respondents unsuccessfully sought writs of habeas corpus from federal district courts. Hughes' petition alleged that the State had violated the Fifth and Fourteenth Amendments by failing to prove guilt "as to each and every essential element of the offense charged" and by failing to "so instruct" the jury. The District Judge rejected this claim, finding that Ohio law does not consider absence of self-defense an element of aggravated murder or voluntary manslaughter. Although the self-defense instructions at Hughes' trial might have violated § 2901.05(A), they did not violate the federal Constitution. Alternatively, the District

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of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Both versions of the Ohio rule closely parallel Rule 30 of the Federal Rules of Criminal Procedure.

[16] *State* v. *Isaac*, No. 77–412 (Ohio, July 20, 1977).

Judge held that Hughes had waived his constitutional claim by failing to comply with Ohio's contemporaneous objection rule. Since Hughes offered no explanation for his failure to object, and showed no actual prejudice, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), barred him from asserting the claim. *Hughes* v. *Engle*, Civ. Action No. C77–156A (N. D. Ohio, June 26, 1979).

Bell's petition for habeas relief similarly alleged that the trial judge had violated due process by instructing "the jury that the accused must prove an affirmative defense by a preponderance of the evidence." The District Court acknowledged that Bell had never raised this claim in the state courts. Observing, however, that the State addressed Bell's argument on the merits, the District Court ruled that Bell's default was not a "deliberate bypass." See *Fay* v. *Noia*, 372 U. S. 391 (1963). Although the court cited our opinion in *Wainwright* v. *Sykes*, *supra*, it did not inquire whether Bell had shown cause for or prejudice from his procedural waiver. The court then ruled that Ohio could constitutionally burden Bell with proving self-defense since it had not defined absence of self-defense as an element of murder. *Bell* v. *Perini*, No. C 78–343 (N.D. Ohio, Dec. 26, 1978).

Bell moved for reconsideration, urging that § 2901.05(A) had in fact defined absence of self-defense as an element of murder. The District Court rejected this argument and then declared that the "real issue" was whether Bell was entitled to retroactive application of *State* v. *Robinson*, *supra*. Bell failed on this claim as well since Ohio's decision to limit retroactive application of *Robinson* "substantially further[ed] the State's legitimate interest in the finality of its decisions." App. to Pet. for Cert. A59. Indeed, the District Court noted that this Court had sanctioned just this sort of limit on retroactivity. See *Hankerson* v. *North Carolina*, 432 U. S. 233, 244 n. 8 (1977). *Bell* v. *Perini*, No. C 78–343 (N.D. Ohio, Jan. 23, 1979).

Isaac's habeas petition was more complex than those submitted by Hughes and Bell. He urged that the Ohio Supreme Court had "failed to give relief [to him], despite its own pronouncement" that *State* v. *Robinson* would apply retroactively. In addition, he declared broadly that the Ohio court's ruling was "contrary to the Supreme Court of the United States in regard to proving self-defense." The District Court determined that Isaac had waived any constitutional claims by failing to present them to the Ohio trial court. Since he further failed to show either cause for or actual prejudice from the waiver, see *Wainwright* v. *Sykes*, *supra*, he could not present his claim in a federal habeas proceeding. *Isaac* v. *Engle*, Civ. Action No. C-2-78-278 (S.D. Ohio, June 26, 1978).

The Court of Appeals for the Sixth Circuit reversed all three District Court orders. In *Isaac* v. *Engle*, 646 F. 2d 1129 (CA6 1980), a majority of the en banc court ruled that *Wainwright* v. *Sykes* did not preclude consideration of Isaac's constitutional claims. At the time of Isaac's trial, the court noted, Ohio had consistently required defendants to prove affirmative defenses by a preponderance of the evidence. The futility of objecting to this established practice supplied adequate cause for Isaac's waiver. Prejudice, the second prerequisite for excusing a procedural default, was "clear" since the burden of proof is a critical element of factfinding, and since Isaac had made a substantial issue of self-defense. *Id.*, at 1134.

A majority of the court also believed that the instructions given at Isaac's trial violated due process. Four judges thought that § 2901.05(A) defined the absence of self-defense as an element of felonious and aggravated assault. While the State did not have to define its crimes in this manner, "due process require[d] it to meet the burden that it chose to assume." 646 F. 2d, at 1135. A fifth judge believed that, even absent § 2901.05(A), the Due Process Clause would com-

pel the prosecution to prove absence of self-defense because that defense negates criminal intent, an essential element of aggravated and felonious assault. A sixth judge agreed that Ohio had violated Isaac's due process rights, but would have concentrated on the State's arbitrary refusal to extend the retroactive benefits of *State* v. *Robinson*, *supra*, to Isaac.[17]

Relying on the en banc decision in *Isaac*, two Sixth Circuit panels ordered the District Court to release Bell and Hughes unless the State chose to retry them within a reasonable time. *Bell* v. *Perini*, 635 F. 2d 575 (CA6 1980);[18] *Hughes* v. *Engle*, judgment order reported at 642 F. 2d 451 (CA6 1980). We granted certiorari to review all three Sixth Circuit opinions. 451 U. S. 906 (1981).

II

A state prisoner is entitled to relief under 28 U. S. C. § 2254 only if he is held "in custody in violation of the Constitution or laws or treaties of the United States." Insofar as respondents simply challenge the "correctness" of the self-defense instructions under Ohio law, they allege no deprivation of federal rights and may not obtain habeas relief. The lower courts, however, read respondents' habeas petitions to state at least two constitutional claims. Respondents repeat both of those claims here.

But Here were Const. claims

A

First, respondents argue that § 2901.05, which governs the burden of proof in all criminal trials, implicitly designated absence of self-defense an element of the crimes charged

[17] The latter analysis paralleled the reasoning of the panel that originally decided the case. See *Isaac* v. *Engle*, 646 F. 2d 1122 (CA6 1980).

Four members of the court dissented from the en banc opinion. Two judges would have found no constitutional violation and two would have barred consideration of Isaac's claims under *Wainwright* v. *Sykes*, *supra*.

[18] One judge dissented from this decision, indicating that *Wainwright* v. *Sykes*, *supra*, barred Bell's claims.

against them. Since Ohio defined its crimes in this manner, respondents contend, our opinions in *In re Winship*, 397 U. S. 358 (1970); *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and *Patterson* v. *New York*, 432 U. S. 197 (1977), require the prosecution to prove absence of self-defense beyond a reasonable doubt. A plurality of the en banc Sixth Circuit seemed to accept this argument in Isaac's appeal, finding that due process required the State "to meet the burden that it chose to assume." 646 F. 2d, at 1135.

We find this claim patently without merit.[19] Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare *Mullaney* v. *Wilbur*, *supra*, with *Patterson* v. *New York*, *supra*. These decisions, however, do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime.[20] The Due Process Clause

[19] The State suggests that the ineffectiveness of this claim demonstrates that respondents suffered no actual prejudice from their procedural default. We agree that the claim is insufficient to support habeas relief, but do not categorize this insufficiency as a lack of prejudice. If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable. It is unnecessary in such a situation to inquire whether the prisoner preserved his claim before the state courts.

[20] Definition of a crime's elements may have consequences under state law other than allocation of the burden of persuasion. For example, the Ohio Supreme Court interpreted § 2901.05(A) to require defendants to come forward with some evidence of affirmative defenses. *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976). Defendants do not bear the same burden with respect to the elements of a crime; the State must prove those elements beyond a reasonable doubt even when the defendant introduces no evidence. See, *e. g.*, *State* v. *Isaac*, 44 Ohio Misc. 87, 337 N. E. 2d 818 (Munic. Ct. 1975). Moreover, while Ohio requires the trial court

does not mandate that when a State treats absence of an "affirmative defense" as an "element" of the crime for one purpose, it must do so for all purposes. The structure of Ohio's Code suggests simply that the State decided to assist defendants by requiring the prosecution to disprove certain affirmative defenses. Absent concrete evidence that the Ohio legislature or courts understood § 2901.05(A) to go further than this, we decline to accept respondents' construction of state law. While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law.[21]

B

Respondents also allege that, even without considering § 2901.05, Ohio could not constitutionally shift the burden of proving self-defense to them. All of the crimes charged against them require a showing of purposeful or knowing behavior. These terms, according to respondents, imply a degree of culpability that is absent when a person acts in self-defense. See Committee Comment to Ohio Rev. Code Ann. § 2901.21 (1975) ("generally, an offense is not committed unless a person . . . has a certain guilty state of mind at the time of his act or failure [to act]"); *State* v. *Clifton*, 32 Ohio

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to charge the jury on all elements of a crime, *e. g.*, *State* v. *Bridgeman*, 51 Ohio App. 2d 105, 366 N. E. 2d 1378 (1977), vacated in part, 55 Ohio St. 2d 261, 381 N. E. 2d 184 (1978), it does not require explicit instructions on the prosecution's duty to negate self-defense beyond a reasonable doubt. *State* v. *Abner*, 55 Ohio St. 2d 251, 379 N. E. 2d 228 (1978).

[21] We have long recognized that a "mere error of state law" is not a denial of due process. *Gryger* v. *Burke*, 334 U. S. 728, 731 (1948). If the contrary were true, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Ibid.* See also *Beck* v. *Washington*, 369 U. S. 541, 554–555 (1962); *Bishop* v. *Mazurkiewicz*, 634 F. 2d 724, 726 (CA3 1980); *United States ex rel. Burnett* v. *Illinois*, 619 F. 2d 668, 670–671 (CA7 1980).

App. 2d 284, 286–287, 290 N. E. 2d 921, 923 (1972) ("one who kills in self-defense does so without the *mens rea* that otherwise would render him culpable of the homicide"). In addition, Ohio punishes only actions that are voluntary, Ohio Rev. Code Ann. § 2901.21(A)(1) (1975), and unlawful, *State* v. *Simon*, No. 6262, p. 13 (Ct. App. Montgomery County, Ohio, Jan. 16, 1980), modified on reconsideration (Jan. 22, 1980). Self-defense, respondents urge, negates these elements of criminal behavior. Therefore, once the defendant raises the possibility of self-defense, respondents contend that the State must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness. The Due Process Clause, according to respondents' interpretation of *Winship*, *Mullaney*, and *Patterson*, forbids the States from disavowing any portion of this burden.[22]

This argument states a colorable constitutional claim. Several courts have applied our *Mullaney* and *Patterson* opinions to charge the prosecution with the constitutional duty of proving absence of self-defense.[23] Most of these deci-

[22] In further support of the claim that, § 2901.05 aside, due process requires the prosecution to prove absence of self-defense, respondent Bell maintains that the States may not constitutionally punish actions taken in self-defense. If fundamental notions of due process prohibit criminalization of actions taken in self-defense, Bell suggests, then absence of self-defense is a vital element of every crime. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1366–1379 (1979); Comment, Shifting the Burden of Proving Self-Defense—With Analysis of Related Ohio Law, 11 Akron L. Rev. 717, 758–759 (1978); Note, The Constitutionality of Affirmative Defenses After *Patterson* v. *New York*, 78 Colum. L. Rev. 655, 672–673 (1978); Note, Burdens of Persuasion in Criminal Proceedings: The Reasonable Doubt Standard After *Patterson* v. *New York*, 31 U. Fla. L. Rev. 385, 415–416 (1979).

[23] *E. g.*, *Tennon* v. *Ricketts*, 642 F. 2d 161 (CA5 1981); *Holloway* v. *McElroy*, 632 F. 2d 605 (CA5 1980), cert. denied, 451 U. S. 1028 (1981); *Wynn* v. *Mahoney*, 600 F. 2d 448 (CA4), cert. denied, 444 U. S. 950 (1979); *Commonwealth* v. *Hilbert*, 476 Pa. 288, 382 A. 2d 724 (1978). See also Comment, 11 Akron L. Rev., *supra* n. 22; Note, 78 Colum. L. Rev., *supra* n. 22.

sions adopt respondents' reasoning that due process commands the prosecution to prove absence of self-defense if that defense negates an element, such as purposeful conduct, of the charged crime. While other courts have rejected this type of claim,[24] the controversy suggests that respondents' second argument states at least a plausible constitutional claim. We proceed, therefore, to determine whether respondents preserved this claim before the state courts and, if not, to inquire whether the principles articulated in *Wainwright* v. *Sykes*, *supra*, bar consideration of the claim in a federal habeas proceeding.[25]

at least a plausible constitutional claim

[24] *E. g.*, *Carter* v. *Jago*, 637 F. 2d 449 (CA6 1980); *Baker* v. *Muncy*, 619 F. 2d 327 (CA4 1980).

[25] As we recognized in *Sykes*, 433 U. S., at 78–79, the problem of waiver is separate from the question whether a state prisoner has exhausted state remedies. Section 2254(b) requires habeas applicants to exhaust those remedies "available in the courts of the State." This requirement, however, refers only to remedies still available at the time of the federal petition. See *Humphrey* v. *Cady*, 405 U. S. 504, 516 (1972); *Fay* v. *Noia*, 372 U. S. 391, 435 (1963). Respondents, of course, long ago completed their direct appeals. Ohio, moreover, provides only limited collateral review of convictions; prisoners may not raise claims that could have been litigated before judgment or on direct appeal. See Ohio Rev. Code Ann. § 2953.21(A) (1975); *Collins* v. *Perini*, 594 F. 2d 592 (CA6 1979); *Keener* v. *Ridenour*, 594 F. 2d 581 (CA6 1979). Since respondents could have challenged the constitutionality of Ohio's traditional self-defense instruction at trial or on direct appeal, we agree with the lower courts that state collateral relief is unavailable to respondents and, therefore, that they have exhausted their state remedies with respect to this claim.

In addition to the claims discussed in text, respondents contend that Ohio's failure to apply *State* v. *Robinson* retroactively to them violates the Due Process and Equal Protection Clauses. Respondents' due process claim asserts that Ohio has no rational reason for refusing to apply *Robinson* to all defendants tried after the effective date of § 2901.05(A). Their equal protection claim rests on the fact that the Ohio Supreme Court has applied *Robinson* retroactively to defendants convicted in nonjury trials, even when those defendants raised no burden-of-proof objection at trial. See *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977).

We do not believe respondents' habeas petitions fairly raise either of

III

None of the respondents challenged the constitutionality of the self-defense instruction at trial.[26] They thus violated Ohio Rule Crim. Proc. 30, which requires contemporaneous objections to jury instructions. Failure to comply with Rule 30 is adequate, under Ohio law, to bar appellate consideration of an objection. See, *e. g.*, *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977); *State* v. *Gordon*, 28 Ohio St. 2d 45, 276 N. E. 2d 243 (1971). The Ohio Supreme Court has enforced this bar against the very due process argument raised here. *State* v. *Williams*, 51 Ohio St. 2d 112, 364 N. E. 2d 1364 (1977), vacated in part and remanded, 438 U. S. 911 (1978).[27] We must determine, therefore, whether re-

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these claims. In particular, we find no trace of the equal protection argument in any of the proceedings below. We doubt, moreover, that respondents have properly exhausted available state remedies for these claims. Respondents could not have known the type of retroactivity Ohio would accord *State* v. *Robinson* until the Ohio Supreme Court decided *Humphries*, *supra*. The latter decision was rendered on the same day that the court refused to review Isaac's direct appeal and long after the convictions of Bell and Hughes became final. Accordingly, respondents did not have the opportunity on direct appeal to confront the Ohio courts with the equal protection and due process problems *Humphries* allegedly creates. Nor did the Ohio Supreme Court consider those problems in *Humphries*. Under these circumstances, Ohio might allow respondents to raise their equal protection and due process claims in a collateral proceeding. We decline, therefore, to address those claims at this time. See *Picard* v. *Connor*, 404 U. S. 270 (1971).

[26] While respondent Bell does not deny his procedural default, he argues that we should overlook it because the State did not raise the issue in its initial filings with the District Court. In some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim. *E. g.*, *Estelle* v. *Smith*, 451 U. S. 454, 468 n. 12 (1981); *Jenkins* v. *Anderson*, 447 U. S. 231, 234 n. 1 (1980). In this case, however, both the District Court and Court of Appeals evaluated Bell's default. Prudential considerations, therefore, do not deter us from also reaching the issue. See *Jenkins*, *supra*, at 234 n. 1.

[27] In Isaac's own case, the Ohio Court of Appeals refused to entertain his

spondents may litigate, in a federal habeas proceeding, a constitutional claim that they forfeited before the state courts.

A

The writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law,[28] it claims a place in Article I of our Constitution.[29] Today, as in prior centuries, the writ is a bulwark against convictions that violate "fundamental fairness." *Wainwright* v. *Sykes*, *supra*, at 97 (STEVENS, J., concurring).

We have always recognized, however, that the Great Writ entails significant costs.[30] Collateral review of a conviction

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challenge to the self-defense instruction because of his failure to comply with Rule 30. The Ohio Supreme Court subsequently dismissed Isaac's appeal for lack of a substantial constitutional question. It is unclear whether these appeals raised a constitutional, or merely statutory, attack on the self-defense instruction used at Isaac's trial. If Isaac presented his constitutional argument to the state courts, then they determined, on the very facts before us, that the claim was waived.

Relying upon *State* v. *Long*, 53 Ohio St. 2d 91, 372 N. E. 2d 804 (1978), respondents argue that the Ohio Supreme Court has recognized its power, under Ohio's plain-error rule, to excuse Rule 30 defaults. *Long*, however, does not persuade us that the Ohio courts would have excused respondents' defaults. First, the *Long* court stressed that the plain-error rule applies only in "exceptional circumstances," such as where, "but for the error, the outcome of the trial clearly would have been otherwise." *Id.*, at 96, 97, 372 N. E. 2d, at 807, 808. Second, the *Long* decision itself refused to invoke the plain-error rule for a defendant who presented a constitutional claim identical to the one pressed by respondents.

[28] See 3 W. Blackstone, Commentaries *129–*138; *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603 (H. L.).

[29] Art. I, § 9, cl. 2.

[30] Judge Henry J. Friendly put the matter well when he wrote that "[t]he proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142,

extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S. 1, 24–25 (Harlan, J., dissenting). See also *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (POWELL, J., concurring in the judgment). By frustrating these interests, the writ undermines the usual principles of finality of litigation.[31]

Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Wainwright* v. *Sykes*, *supra*, at 90. Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.

We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a

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145 (1970).

[31] Judge Friendly and Professor Bator suggest that this absence of finality also frustrates deterrence and rehabilitation. Deterrence depends upon the expectation that "one violating the law will swiftly and certainly become subject to punishment, just punishment." Rehabilitation demands that the convicted defendant realize "that he is justly subject to sanction, that he stands in need of rehabilitation." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *supra* n. 30, at 146.

habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.[32]

In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum.[33] The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules. These considerations supported our *Sykes* ruling that, when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.

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[32] During the last two decades, our constitutional jurisprudence has recognized numerous new rights for criminal defendants. Although some habeas writs correct violations of long-established constitutional rights, others vindicate more novel claims. State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands.

[33] Counsel's default may stem from simple ignorance or the pressures of trial. We noted in *Sykes*, however, that a defendant's counsel may deliberately choose to withhold a claim in order to "sandbag"—to gamble on acquittal while saving a dispositive claim in case the gamble doesn't pay off. See 433 U. S., at 89–90.

Respondents urge that we should limit *Sykes* to cases in which the constitutional error did not affect the truthfinding function of the trial. In *Sykes* itself, for example, the prisoner alleged that the State had violated the rights guaranteed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). While this defect was serious, it did not affect the determination of guilt at trial.

We do not believe, however, that the principles of *Sykes* lend themselves to this limitation. The costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing. We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.

yes

B

Respondents seek cause for their defaults in two circumstances. First, they urge that they could not have known at the time of their trials that the Due Process Clause addresses the burden of proving affirmative defenses. Second, they contend that any objection to Ohio's self-defense instruction would have been futile since Ohio had long required criminal defendants to bear the burden of proving this affirmative defense.

We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a viable constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.[34]

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[34] See *Estelle* v. *Williams*, 425 U. S. 501, 515 (1976) (POWELL, J., concurring) (the policy disfavoring inferred waivers of constitutional rights "need not be carried to the length of allowing counsel for a defendant deliberately to forgo objection to a curable trial defect, even though he is aware

Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.[35]

Respondents' claim, however, is not simply one of futility. They further allege that, at the time they were tried, they could not know that Ohio's self-defense instructions raised constitutional questions. A criminal defendant, they urge, may not waive constitutional objections unknown at the time of trial.

We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object.[36] We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair.[37] These concerns, however, need not detain

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of the factual and legal basis for an objection, simply because he thought objection would be futile"); *Myers* v. *Washington*, 646 F. 2d 355, 364 (CA9 1981) (Poole, J., dissenting) (futility cannot constitute cause if it means simply that a claim was "unacceptable to that particular court at that particular time"), cert. pending, No. 81-1056.

[35] In fact, the decision to withhold a known constitutional claim resembles the type of deliberate bypass condemned in *Fay* v. *Noia*, 372 U. S. 391 (1963). Since the cause and prejudice standard is more demanding than *Fay*'s deliberate bypass requirement, see *Sykes*, *supra*, at 87, we are confident that perceived futility alone cannot constitute cause.

[36] The State stressed at oral argument before this Court that it does not seek such a ruling. Instead, Ohio urges merely that "when the tools are available to construct the argument, . . . you can charge counsel with the obligation of raising that argument." Transcript at 8–9.

[37] See *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (separate opinion of Harlan, J.); *Williams* v. *United States*, 401 U. S. 646, 665–666 (1971) (MARSHALL, J., concurring in part and dissenting in part);

us here since respondents' claims were far from unknown at the time of their trials.

In re Winship, 397 U. S. 358 (1970), decided four-and-one-half years before the first of respondents' trials, laid the basis for their constitutional claim. In *Winship* we held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. During the five years following this decision,[38] dozens of defendants relied upon this language to challenge the constitutionality of rules requiring them to bear a burden of proof.[39] In most of these cases, the defendants' claims

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Hankerson v. *North Carolina*, 432 U. S. 233, 246–248 (1977) (POWELL, J., concurring in the judgment).

[38] Even before *Winship*, criminal defendants and courts perceived that placing a burden of proof on the defendant may violate due process. For example, in *Stump* v. *Bennett*, 398 F. 2d 111 (CA8 1968), cert. denied, 393 U. S. 1001 (1968), the Eighth Circuit ruled en banc that an Iowa rule requiring defendants to prove alibis by a preponderance of the evidence violated due process. The court, moreover, observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law." *Id.*, at 122. See also *Johnson* v. *Bennett*, 393 U. S. 253 (1968) (vacating and remanding lower court decision for reconsideration in light of *Stump*); *State* v. *Nales*, 28 Conn. Supp. 28, 248 A. 2d 242 (1968) (holding that due process forbids requiring defendant to prove "lawful excuse" for possession of housebreaking tools).

[39] See, *e. g.*, *State* v. *Commenos*, 461 S. W. 2d 9 (Mo. 1970) (en banc) (intent to return allegedly stolen item); *Phillips* v. *State*, 86 Nev. 720, 475 P. 2d 671 (1970) (insanity), cert. denied, 403 U. S. 940 (1971); *Commonwealth* v. *O'Neal*, 441 Pa. 17, 271 A. 2d 497 (1970) (absence of malice); *Commonwealth* v. *Vogel*, 440 Pa. 1, 268 A. 2d 89 (1970) (insanity), overruled, *Commonwealth* v. *Rose*, 457 Pa. 380, 321 A. 2d 880 (1974); *Smith* v. *Smith*, 454 F. 2d 572 (CA5 1971) (alibi), cert. denied, 409 U. S. 885 (1972); *United States* v. *Braver*, 450 F. 2d 799 (CA2 1971) (inducement), cert. denied, 405 U. S. 1064 (1972); *Wilbur* v. *Robbins*, 349 F. Supp. 149 (Me. 1972) (heat of passion), aff'd sub nom. *Wilbur* v. *Mullaney*, 473 F. 2d 943 (CA1 1973), vacated, 414 U. S. 1139 (1974), on remand, 496 F. 2d 1303 (CA1 1974), aff'd, 421 U. S. 684 (1975); *State* v. *Cuevas*, 53 Haw. 110, 488

countered well-established principles of law. Nevertheless, numerous courts agreed that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses.[40] In light of this activity, we cannot say that respondents lacked the tools to construct their constitutional claim.[41]

P. 2d 322 (1971) (lack of malice aforethought or presence of legal justification); *State* v. *Brown*, 163 Conn. 52, 301 A. 2d 547 (1972) (possession of license to deal in drugs), overruled on other grounds, *State* v. *Whistnant*, 179 Conn. 576, 427 A. 2d 414 (1980); *In re Foss*, 10 Cal. 3d 910, 519 P. 2d 1073, 112 Cal. Rptr. 649 (1974) (en banc) (entrapment); *Woods* v. *State*, 233 Ga. 347, 211 S. E. 2d 300 (1974) (authority to sell narcotic drugs), appeal dismissed, 422 U. S. 1002 (1975); *State* v. *Buzynski*, 330 A. 2d 422 (Me. 1974) (mental disease); *People* v. *Jordan*, 51 Mich. App. 710, 216 N. W. 2d 71 (1974) (absence of intent), disapproved on other grounds, *People* v. *Johnson*, 407 Mich. 196, 284 N. W. 2d 718 (1979); *Commonwealth* v. *Rose*, 457 Pa. 380, 321 A. 2d 880 (1974) (intoxication); *Retail Credit Co.* v. *Dade County*, 393 F. Supp. 577 (SD Fla. 1975) (maintenance of reasonable procedures); *Fuentes* v. *State*, 349 A. 2d 1 (Del. 1975) (extreme emotional distress), overruled, *State* v. *Moyer*, 387 A. 2d 194 (Del. 1978); *Henderson* v. *State*, 234 Ga. 827, 218 S. E. 2d 612 (1975) (self-defense); *State* v. *Grady*, 276 Md. 178, 345 A. 2d 436 (1975) (alibi); *Evans* v. *State*, 28 Md. App. 640, 349 A. 2d 300 (1975) (absence of malice; further describing in detail that due process requires prosecution to negate most affirmative defenses, including self-defense), aff'd, 278 Md. 197, 362 A. 2d 629 (1976); *State* v. *Robinson*, 48 Ohio App. 2d 197, 356 N. E. 2d 725 (1975) (self-defense), aff'd, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976). See also *Trimble* v. *State*, 229 Ga. 399, 191 S. E. 2d 857 (1972) (alibi), overruled, *Patterson* v. *State*, 233 Ga. 724, 213 S. E. 2d 612 (1975); *Grace* v. *State*, 231 Ga. 113, 118, 125–128, 200 S. E. 2d 248, 252, 256–258 (1973) (dissenting opinions) (insanity).

Several commentators also perceived that *Winship* might alter traditional burdens of proof for affirmative defenses. *E. g.*, W. LaFave & A. Scott, Handbook on Criminal Law § 8, pp. 46–51 (1972); The Supreme Court 1969 Term, 84 Harv. L. Rev. 1, 159 (1970); Student Symposium, 33 Ohio St. L. J., *supra* n. 2, at 421; Comment, Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism After *Wilbur* v. *Mullaney*, 26 U. Me. L. Rev. 37 (1974).

[40] Even those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time.

[41] Respondent Isaac even had the benefit of our opinion in *Mullaney* v.

We do not suggest that every competent counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. A competent counsel might have overlooked 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 of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.[42]

Wilbur, supra, decided three months before his trial. In *Mullaney* we invalidated a Maine practice requiring criminal defendants to negate malice by proving that they acted in the heat of passion. We thus explicitly acknowledged the link between *Winship* and constitutional limits on assignment of the burden of proof. Cf. *Lee* v. *Missouri,* 439 U. S. 461, 462 (1979) (per curiam) (suggesting that defendants who failed, after *Taylor* v. *Louisiana,* 419 U. S. 522 (1975), to object to the exclusion of women from juries must show cause for the failure).

Respondents argue at length that, before the Ohio Supreme Court's decision in *State* v. *Robinson, supra,* they did not know that Ohio Rev. Code Ann. § 2901.05(A) changed the traditional burden of proof. Ohio's interpretation of § 2901.05(A), however, is relevant only to claims that we reject independently of respondents' procedural default. See *supra,* at 10–12; n. 25, *supra.*

[42] Respondents resist this conclusion by noting that *Hankerson* v. *North Carolina,* 432 U. S. 233, 243 (1977), gave *Mullaney* v. *Wilbur,* the opinion explicitly recognizing *Winship*'s effect on affirmative defenses, "complete retroactive effect." *Hankerson* itself, however, acknowledged the distinction between the retroactive availability of a constitutional decision and the right to claim that availability after a procedural default. JUSTICE WHITE's majority opinion forthrightly suggested that the States "may be able to insulate past convictions [from the effect of *Mullaney*] by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." 432 U. S., at 244 n. 8. In this case we accept the

C

Respondents, finally, urge that we should replace or supplement the cause-and-prejudice standard with a plain-error inquiry. We rejected this argument when pressed by a federal prisoner, see *United States* v. *Frady*, No. 80–1595, and find it no more compelling here. The federal courts apply a plain-error rule for direct review of federal convictions. Fed. Rule Crim. Proc. 52(b). Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners is "greater than the showing required to establish plain error on direct appeal." *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977); *United States* v. *Frady*, *supra*, at ——.[43]

Contrary to respondents' assertion, moreover, a plain-error standard is unnecessary to correct miscarriages of justice. The terms "cause" and "actual prejudice" are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate cases those

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force of that language as applied to defendants tried after *Winship*.

Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice. Respondents urge that their prejudice was so great that it should permit relief even in the absence of cause. *Sykes*, however, stated these criteria in the conjunctive and the facts of this case do not persuade us to depart from that approach.

[43] Respondents bolster their plain-error contention by observing that Ohio will overlook a procedural default if the trial defect constituted plain error. Ohio, however, has declined to exercise this discretion to review the type of claim pressed here. See n. 27, *supra*. If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review. See *Mullaney* v. *Wilbur*, *supra*, at 688 n. 7; *County Court of Ulster County* v. *Allen*, 442 U. S. 140, 147–154 (1979). Our opinions, however, make clear that the States have the primary responsibility to interpret and apply their plain error-rules. Certainly we should not rely upon a state plain-error rule when the State has refused to apply that rule to the very sort of claim at issue.

principles must yield to the imperative of a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard, see *Wainwright* v. *Sykes*, *supra*, at 91; *id.*, at 94–97 (STEVENS, J., concurring), we decline to adopt the more vague inquiry suggested by the words "plain error."

IV

Close analysis of respondents' habeas petitions reveals only one colorable constitutional claim. Because respondents failed to comply with Ohio's procedures for raising that contention, and because they have not demonstrated cause for the default, they are barred from asserting that claim under 28 U. S. C. § 2254. The judgments of the Court of Appeals are reversed and remanded for proceedings consistent with this opinion.

So ordered.

File

dfl 02/10/82

To: Justice Powell

From: David

Re: Engle v. Isaac---No. 80-1430

I recommend you join Jusitce O'Connor's opinion. This is really a masterful and canny opinion. (I agree)

The key to the opinion is in Part IIA. I was a bit troubled by this section on first reading. In that Part, Justice O'Connor finds the reasoning of the CA6 to be "patently without merit." The CA had found on an analogy to Mullaney, that once the state had assigned itself the burden of proving absence of self-defense, due process required that it in fact bear that burden. Just as the Court in Mullaney required the state to bear the burden of proving the elements of the crime the state defined, so, too, due process requires the state to bear the burden if it chooses to assign that burden to itself: "From the point of view of fairness and due process, there is no practical difference between requiring a state to prove the elements of crimes beyond a reasonable doubt and requiring it to meet its assumed burden of proving absence of affirmative defenses beyond a reasonable doubt"

I do not think I would have characterized the CA6's position as patently wrong. I think that the claim was colorable, and that Justice O'Connor could either have gone on to reach the merits of the claim--as in effect she does--or could have reached the cause and prejudice question as to this claim as well. Of course I can well understand why Justice O'Connor wished to get rid of the claim without reaching cause and prejudice--this was the one claim as to which Isaac might have had "cause." Still I am puzzled why she felt to treat the claim quite so lightly. Perhaps she thought it would make the succeeding section look somewhat inconsistent if she treated this first claim as colorable but went on to decide its ultimate merits rather than deciding the cause and prejudice question. That is, in the succeeding section she might also have undertaken to decide the constitutional claim without reaching the "cause and prejudice" formulation. I do not think that this inconsistency would have been genuine; I think that the Court is free to kick these claims out either on cause and prejudice or for failure to raise a winning constitutional claim. But I do not think any of this matters enough to hold off joining--unless you feel some urge to protect your position in Mullaney (although the CA was really extending Mullaney). You might suggest that it is a bit harsh to characterize the claim as colorless or patently wrong.

February 10, 1982

80-1430 - Engle v. Isaac, et al

Dear Sandra:

This is a personal supplement to my formal join note. I like very much your opinions in both this case and Frady.

Engle is a difficult case in view of the peculiar Ohio situation. I think you wrote a deft and masterful opinion.

no H

I make two comments, one simply as a matter of information and the other a suggestion for your consideration.

As the author of Mullaney, I was particularly interested in the way you dealt with it. Although I would not have said - perhaps understandably - that the Mullaney claim in Isaac was "patently without merit", I do agree that

there may be a difference - as you suggest - between an "element of a crime" and "an affirmative defense", even though the state has chosen to assume the burden of disproving the latter. I may write briefly in concurrence if other Justices in dissent challenge your position on Mullaney.

I particularly liked Part III A in which you discussed habeas corpus. Its abuse has been a subject of special interest to me. Our views are entirely congruent. If you have not done so, you might take a look at my concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218 250, and particularly pp. 262, 264. ~~264.~~

~~No ¶~~ ~~Where~~ 97 s

~~P. 263, would~~ support strongly your views ~~including a~~ as does the quotation from Justice Paul Reardon.

No ¶ → What I wrote in Bustamonte became the "law of the land" in Stone v. Powell, 428 U.S. 465 (1976). Although "~~proud~~ pride of authorship" may be motivating me, I do think a citation to

You may wish to cite these cases as

~~these two cases would be appropriate and~~ as they are strongly supportive of your views.

With or without ~~such an~~ these addition, your opinions in Isaac and Frady will add a significant measure of needed rationality to this area of our criminal justice system.

Sincerely,

February 10, 1982

80-1430 - Engle v. Isaac, et al

Dear Sandra:

This is a personal supplement to my formal join note. I like very much your opinions in both this case and Frady.

Engle is a difficult case in view of the peculiar Ohio situation. I think you wrote a deft and masterful opinion. I make two comments, one simply as a matter of information and the other a suggestion for your consideration.

As the author of Mullaney, I was particularly interested in the way you dealt with it. Although I would not have said - perhaps understandably - that the Mullaney claim in Isaac was "patently without merit", I do agree that there may be a difference - as you suggest - between an "element of a crime" and "an affirmative defense", even though the state has chosen to assume the burden of disproving the latter. I may write briefly in concurrence if other Justices in dissent challenge your position on Mullaney.

I particularly liked Part III A in which you discussed habeas corpus. Its abuse has been a subject of special interest to me. Our views are entirely congruent. If you have not done so, you might take a look at my concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218 250, and particularly pp. 262, 264. What I wrote in Bustamonte became the "law of the land" in Stone v. Powell, 428 U.S. 465 (1976). You may wish to cite these cases as they are strongly supportive of your views.

With or without these additions, your opinions in Isaac and Frady will add a significant measure of needed rationality to this area of our criminal justice system.

Sincerely,

Justice O'Connor

LFP/vde

February 10, 1982

80-1430 Engle v. Isaac, et al

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

Copies to the Conference

LFP/vde

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 10, 1972

Re: Engle v. Isaac (No. 80-1430)

Dear Sandra:

I will circulate a dissent in due course.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 10, 1982

Re: No. 80-1430 Engle v. Isaac

Dear Sandra:

Please join me.

Sincerely,

WHR

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 10, 1982

Re: No. 80-1430 - Engle v. Isaac

Dear Sandra:

I await the dissent.

Sincerely,

TM

T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

file

February 11, 1982

No. 80-1430 Engle v. Isaac

Dear Lewis,

Thank you for your letter concerning the referenced case. I am delighted you have seen fit to join the opinion.

Your suggestions are excellent. When I circulate the next printed draft, I will add the changes noted in the attached copy of pp. 11, 17 and 18.

Sincerely,

Sandra

Justice Powell

Enclosure

against them. Since Ohio defined its crimes in this manner, respondents contend, our opinions in *In re Winship*, 397 U. S. 358 (1970); *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and *Patterson* v. *New York*, 432 U. S. 197 (1977), require the prosecution to prove absence of self-defense beyond a reasonable doubt. A plurality of the en banc Sixth Circuit seemed to accept this argument in Isaac's appeal, finding that due process required the State "to meet the burden that it chose to assume." 646 F. 2d, at 1135.

a careful review of our prior decisions reveals that this claim is

~~We find this claim patently~~ without merit.[19] Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare *Mullaney* v. *Wilbur*, *supra*, with *Patterson* v. *New York*, *supra*. These decisions, however, do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime.[20] The Due Process Clause

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[19] The State suggests that the ineffectiveness of this claim demonstrates that respondents suffered no actual prejudice from their procedural default. We agree that the claim is insufficient to support habeas relief, but do not categorize this insufficiency as a lack of prejudice. If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable. It is unnecessary in such a situation to inquire whether the prisoner preserved his claim before the state courts.

[20] Definition of a crime's elements may have consequences under state law other than allocation of the burden of persuasion. For example, the Ohio Supreme Court interpreted § 2901.05(A) to require defendants to come forward with some evidence of affirmative defenses. *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976). Defendants do not bear the same burden with respect to the elements of a crime; the State must prove those elements beyond a reasonable doubt even when the defendant introduces no evidence. See, *e. g.*, *State* v. *Isaac*, 44 Ohio Misc. 87, 337 N. E. 2d 818 (Munic. Ct. 1975). Moreover, while Ohio requires the trial court

citizen." Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (POWELL, J., concurring). See also Stone v. Powell, 428 U.S. 465 (1976).

extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S. 1, 24–25 (Harlan, J., dissenting). See also *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (POWELL, J., concurring in the judgment). By frustrating these interests, the writ undermines the usual principles of finality of litigation.[31]

Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Wainwright* v. *Sykes*, *supra*, at 90. Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.

We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a

[addition to n. 30. Start on new line, no indent]

145 (1970).

[31] Judge Friendly and Professor Bator suggest that this absence of finality also frustrates deterrence and rehabilitation. Deterrence depends upon the expectation that "one violating the law will swiftly and certainly become subject to punishment, just punishment." Rehabilitation demands that the convicted defendant realize "that he is justly subject to sanction, that he stands in need of rehabilitation." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *supra* n. 30, at 146.

Justice POWELL, elucidating a position that ultimately commanded a majority of the Court, similarly suggested: ←

¶ indent] "No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further

See Schneckloth v. Bustamonte, 412 U.S. 218, 263-265 (1973) (POWELL, J., concurring).

habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.[32]

In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum.[33] The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules. These considerations supported our *Sykes* ruling that, when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.

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[32] During the last two decades, our constitutional jurisprudence has recognized numerous new rights for criminal defendants. Although some habeas writs correct violations of long-established constitutional rights, others vindicate more novel claims. State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands.

[33] Counsel's default may stem from simple ignorance or the pressures of trial. We noted in *Sykes*, however, that a defendant's counsel may deliberately choose to withhold a claim in order to "sandbag"—to gamble on acquittal while saving a dispositive claim in case the gamble doesn't pay off. See 433 U. S., at 89–90.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 16, 1982

Re: 80-1430 - Engle v. Isaac

Dear Sandra,

I had been inclined to reach the merits of the colorable constitutional issue you identify and to reverse on that question. I am now content with your resolution and join your opinion.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

cpm

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

CHAMBERS OF
THE CHIEF JUSTICE

February 16, 1982

Re: No. 80-1430 - Engle v. Isaac

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 HARRY A. BLACKMUN

March 11, 1982

Re: No. 80-1430 - Engle v. Isaac

Dear Sandra:

You already have a Court for your opinion. You have my vote, too, if you could make the following changes. Most of them, I believe, are minor.

1. Eliminate the word "initial" in the third line of footnote 26 on page 15. The presence of this word seems to me to suggest that the Sykes issue was raised sometime before the District Court. I believe that, in fact, the State did not present the issue until the case reached the Court of Appeals.

2. In the same footnote you reject Bell's contention that the State waived its Sykes claim by presenting it for the first time before the Court of Appeals. According to the petitioner, however, Bell raises the State's waiver for the first time in this Court. Should not respondent's argument be answered on that ground rather for "prudential considerations"? It seems somewhat anomalous to permit the State to prevail on the argument that Bell failed to object at trial when the State itself is guilty of a similar default.

3. Eliminate footnote 32 on page 18.

4. Eliminate all of the text on page 23 except the last sentence. I believe that none of the respondents raises a Sixth Amendment claim. The material I suggest for deletion is therefore dictum.

5. Eliminate the second sentence of the first paragraph on page 24.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

PP. 11, 14, 15, 17, 18, 2, 23

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

File

From: Justice O'Connor

Circulated: _____

Recirculated: MAR 12 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, PETITIONER, *v.* LINCOLN ISAAC

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

[February ——, 1982]

Changes received. They look OK to me. SOC has added cites to Bustamonte & Stone — 17, 18

LFP

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), we held that a state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, could not litigate that claim in a § 2254 habeas corpus[1] proceeding without showing cause for and actual prejudice from the default. Applying the principle of *Sykes* to this case, we conclude that respondents, who failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions, may not challenge the constitutionality of those instructions in a federal habeas proceeding.

I

Respondents' claims rest in part on recent changes in Ohio criminal law. For over a century, the Ohio courts required criminal defendants to carry the burden of proving self-de-

[1] Title 28 U. S. C. § 2254(a) empowers "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." This statutory remedy may not be identical in all respects to the common-law writ of habeas corpus. See *Wainwright* v. *Sykes*, 433 U. S. 72, 78 (1977).

fense by a preponderance of the evidence. See *State* v. *Seliskar*, 35 Ohio St. 2d 95, 298 N. E. 2d 582 (1973); *Szalkai* v. *State*, 96 Ohio St. 36, 117 N. E. 12 (1917); *Silvus* v. *State*, 22 Ohio St. 90 (1871). A new criminal code, effective January 1, 1974, subjected all affirmative defenses to the following rule:

> "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." Ohio Rev. Code Ann. § 2901.05(A) (1975).

For more than two years after its enactment, most Ohio courts assumed that this section worked no change in Ohio's traditional burden-of-proof rules.[2] In 1976, however, the Ohio Supreme Court construed the statute to place only the burden of production, not the burden of persuasion, on the defendant. Once the defendant produces some evidence of self-defense, the state court ruled, the prosecutor must disprove self-defense beyond a reasonable doubt. *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976) (syllabus by the court).[3] The present actions arose because Ohio tried

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[2] See, *e. g.*, *State* v. *Rogers*, 43 Ohio St. 2d 28, 30, 330 N. E. 2d 674, 676 (1975) (noting that "self-defense is an affirmative defense, which must be established by a preponderance of the evidence"), cert. denied, 423 U. S. 1061 (1976). But see *State* v. *Matthews*, No. 74AP-428, p. 9 (Ct. App. Franklin County, Ohio, Dec. 24, 1974) (§ 2901.05(A) "evinces a legislative intent to change the burden of the defendant with respect to affirmative defenses"); 1 O. Schroeder & L. Katz, Ohio Criminal Law and Practice § 2901.05, p. 14 (1974 ed.) ("The provisions of 2901.05(A) follow the modern statutory trend in this area, requiring the accused to raise the affirmative defense, but leaving the burden of persuasion upon the prosecution."); Student Symposium: The Proposed Ohio Criminal Code—Reform and Regression, 33 Ohio St. L. J. 351, 420 (1972) (suggesting that legislators intended to change traditional rule).

[3] In Ohio, the court's syllabus contains the controlling law. See *Haas*

and convicted respondents after the effective date of § 2901.05(A), but before the Ohio Supreme Court's interpretation of that statute in *Robinson.*[4]

On December 16, 1974, an Ohio grand jury indicted respondent Hughes for aggravated murder.[5] At trial the State showed that, in the presence of seven witnesses, Hughes shot and killed a man who was keeping company with his former girlfriend. Prosecution witnesses testified that the victim was unarmed and had just attempted to shake hands with Hughes. Hughes, however, claimed that he acted in self-defense. His testimony suggested that he feared the victim, a larger man, because he had touched his pocket while approaching Hughes. The trial court instructed the jury that Hughes bore the burden of proving this defense by a prepon-

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v. *State*, 103 Ohio St. 1, 7–8, 132 N. E. 158, 159–160 (1921).

[4] Two years after *Robinson*, the Ohio legislature once again amended Ohio's burden of proof law. The new § 2901.05(A), effective November 1, 1978, provides:

"Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, *and the burden of proof, by a preponderance of the evidence*, for an affirmative defense, is upon the accused." Ohio Rev. Code Ann. § 2901.05(A) (Supp. 1980) (emphasis added).

This amendment has no effect on the litigation before us. Thoughout this opinion, citations to § 2901.05(A) refer to the statute in effect between January 1, 1974, and October 31, 1978.

[5] See Ohio Rev. Code Ann. § 2903.01 (1975):

"(A) No person shall purposely, and with prior calculation and design, cause the death of another.

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

"(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code."

derance of the evidence. Counsel for Hughes did not specifically object to this instruction.[6]

On January 24, 1975, the jury convicted Hughes of voluntary manslaughter, a lesser included offense of aggravated murder.[7] On September 24, 1975, the Summit County Court of Appeals affirmed the conviction, and on March 19, 1976, the Supreme Court of Ohio dismissed Hughes' appeal, finding no substantial constitutional question.[8] Neither of these appeals challenged the jury instruction on self-defense.

Ohio tried respondent Bell for aggravated murder in April 1975. Evidence at trial showed that Bell was one of a group of bartenders who had agreed to help one another if trouble developed at any of their bars. On the evening of the murder, one of the bartenders called Bell and told him that he feared trouble from five men who had entered his bar. When Bell arrived at the bar, the bartender informed him that the men had left. Bell pursued them and gunned one of the men down in the street.

Bell defended on the ground that he had acted in self-de-

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[6] Hughes' counsel did register a general objection "to the entire Charge in its entirety" because "[w]e are operating now under a new code in which many things are uncertain." App. 48. Counsel's subsequent remarks, however, demonstrated that his objection concerned only the proposed definitions of "Aggravated Murder, Murder and Voluntary Manslaughter." App. 48, 50.

[7] Voluntary manslaughter is "knowingly caus[ing] the death of another" while under "extreme emotional stress brought on by serious provocation reasonably sufficient to incite [the Defendant] into using deadly force." Ohio Rev. Code Ann. § 2903.03 (A) (1975).

Hughes was sentenced to 6-25 years in prison. The State's petition for certiorari indicated that Hughes has been "granted final releas[e] as a matter of parole." Pet. for Cert. 6. This release does not moot the controversy between Hughes and the State. See *Humphrey* v. *Cady*, 405 U. S. 504, 506–507 n. 2 (1972); *Carafas* v. *LaVallee*, 391 U. S. 234, 237–240 (1968).

[8] See *State* v. *Hughes*, C. A. No. 7717 (Ct. App. Summit County, Ohio, Sept. 24, 1975); *State* v. *Hughes*, No. 75–1026 (Ohio, March 19, 1976).

fense. He testified that as he approached two of the men, the bartender shouted: "He's got a gun" or "Watch out, he's got a gun." At this warning, Bell started shooting. As in Hughes' case, the trial court instructed the jury that Bell had the burden of proving self-defense by a preponderance of the evidence. Bell did not object to this instruction and the jury convicted him of murder, a lesser included offense of the charged crime.[9]

Bell appealed to the Cuyahoga County Court of Appeals, but failed to challenge the instruction assigning him the burden of proving self-defense. The Court of Appeals affirmed Bell's conviction on April 8, 1976.[10] Bell appealed further to the Ohio Supreme Court, again neglecting to challenge the self-defense instruction. That court overruled his motion for leave to appeal on September 17, 1976,[11] two months after it construed § 2901.05(A) to place the burden of proving absence of self-defense on the prosecution. See *State* v. *Robinson, supra.*

Respondent Isaac was tried in September 1975 for felonious assault.[12] The State showed that Isaac had severely beaten his former wife's boyfriend. Isaac claimed that the boyfriend punched him first and that he acted solely in self-defense. Without objection from Isaac, the court instructed

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[9] Ohio defines murder as "purposely caus[ing] the death of another." Ohio Rev. Code Ann. § 2903.02(A) (1975). Bell received a sentence of 15 years to life imprisonment.

[10] *State* v. *Bell*, No. 34727 (Ct. App. Cuyahoga County, Ohio, April 8, 1976).

[11] *State* v. *Bell*, No. 76–573 (Ohio, Sept. 17, 1976).

[12] See Ohio Rev. Code Ann. § 2903.11 (1975):

"(A) No person shall knowingly:

"(1) Cause serious physical harm to another;

"(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

"(B) Whoever violates this section is guilty of felonious assault, a felony of the second degree."

the jury that Isaac carried the burden of proving this defense by a preponderance of the evidence. The jury acquitted Isaac of felonious assault, but convicted him of the lesser included offense of aggravated assault.[13]

Ten months after Isaac's trial, the Ohio Supreme Court decided *State* v. *Robinson*, *supra*. In his appeal to the Pickaway County Court of Appeals,[14] Isaac relied upon *Robinson* to challenge the burden of proof instructions given at his trial. The court rejected this challenge because Isaac had failed to object to the jury instructions during trial, as required by Ohio Rule Crim. Proc. 30.[15] This default waived

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[13] Ohio Rev. Code Ann. § 2903.12 (1975) describes aggravated assault:

"(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force shall knowingly:

"(1) Cause serious physical harm to another;

"(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

"(B) Whoever violates this section is guilty of aggravated assault, a felony of the fourth degree."

The judge sentenced Isaac to a term of six months to five years imprisonment. According to the State's petition for certiorari, Isaac has been released from jail. This controversy is not moot, however. See n. 7, *supra*.

[14] *State* v. *Isaac*, No. 346 (Ct. App. Pickaway County, Ohio, Feb. 11, 1977).

[15] At the time Hughes and Bell were tried, this rule stated in relevant part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Shortly before Isaac's trial, Ohio amended the language of the rule in minor respects:

"A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds

Isaac's claim. *State* v. *Glaros*, 170 Ohio St. 471, 166 N. E. 2d 379 (1960); *State* v. *Slone*, 45 Ohio App. 2d 24, 340 N. E. 2d 413 (1975).

The Supreme Court of Ohio dismissed Isaac's appeal for lack of a substantial constitutional question.[16] On the same day, that court decided *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977), and *State* v. *Williams*, 51 Ohio St. 2d 112, 364 N. E. 2d 1364 (1977), vacated in part and remanded, 438 U. S. 911 (1978). In *Humphries* the court ruled that every criminal trial held on or after January 1, 1974, "is required to be conducted in accordance with the provisions of [Ohio Rev. Code Ann. § 2901.05]." *Id.*, at 95, 364 N. E. 2d, at 1355 (syllabus by the court). The court, however, refused to extend this ruling to a defendant who failed to comply with Ohio Rule Crim. Proc. 30. *Id.*, at 102–103, 364 N. E. 2d, at 1359. In *Williams*, the court declined to consider a constitutional challenge to Ohio's traditional self-defense instruction, again because the defendant had not properly objected to the instruction at trial.

All three respondents unsuccessfully sought writs of habeas corpus from federal district courts. Hughes' petition alleged that the State had violated the Fifth and Fourteenth Amendments by failing to prove guilt "as to each and every essential element of the offense charged" and by failing to "so instruct" the jury. The District Judge rejected this claim, finding that Ohio law does not consider absence of self-defense an element of aggravated murder or voluntary manslaughter. Although the self-defense instructions at Hughes' trial might have violated § 2901.05(A), they did not violate the federal Constitution. Alternatively, the District

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of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Both versions of the Ohio rule closely parallel Rule 30 of the Federal Rules of Criminal Procedure.

[16] *State* v. *Isaac*, No. 77–412 (Ohio, July 20, 1977).

Judge held that Hughes had waived his constitutional claim by failing to comply with Ohio's contemporaneous objection rule. Since Hughes offered no explanation for his failure to object, and showed no actual prejudice, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), barred him from asserting the claim. *Hughes* v. *Engle*, Civ. Action No. C77-156A (N. D. Ohio, June 26, 1979).

Bell's petition for habeas relief similarly alleged that the trial judge had violated due process by instructing "the jury that the accused must prove an affirmative defense by a preponderance of the evidence." The District Court acknowledged that Bell had never raised this claim in the state courts. Observing, however, that the State addressed Bell's argument on the merits, the District Court ruled that Bell's default was not a "deliberate bypass." See *Fay* v. *Noia*, 372 U. S. 391 (1963). Although the court cited our opinion in *Wainwright* v. *Sykes*, *supra*, it did not inquire whether Bell had shown cause for or prejudice from his procedural waiver. The court then ruled that Ohio could constitutionally burden Bell with proving self-defense since it had not defined absence of self-defense as an element of murder. *Bell* v. *Perini*, No. C 78-343 (N.D. Ohio, Dec. 26, 1978).

Bell moved for reconsideration, urging that § 2901.05(A) had in fact defined absence of self-defense as an element of murder. The District Court rejected this argument and then declared that the "real issue" was whether Bell was entitled to retroactive application of *State* v. *Robinson*, *supra*. Bell failed on this claim as well since Ohio's decision to limit retroactive application of *Robinson* "substantially further[ed] the State's legitimate interest in the finality of its decisions." App. to Pet. for Cert. A59. Indeed, the District Court noted that this Court had sanctioned just this sort of limit on retroactivity. See *Hankerson* v. *North Carolina*, 432 U. S. 233, 244 n. 8 (1977). *Bell* v. *Perini*, No. C 78-343 (N.D. Ohio, Jan. 23, 1979).

Isaac's habeas petition was more complex than those submitted by Hughes and Bell. He urged that the Ohio Supreme Court had "failed to give relief [to him], despite its own pronouncement" that *State* v. *Robinson* would apply retroactively. In addition, he declared broadly that the Ohio court's ruling was "contrary to the Supreme Court of the United States in regard to proving self-defense." The District Court determined that Isaac had waived any constitutional claims by failing to present them to the Ohio trial court. Since he further failed to show either cause for or actual prejudice from the waiver, see *Wainwright* v. *Sykes*, *supra*, he could not present his claim in a federal habeas proceeding. *Isaac* v. *Engle*, Civ. Action No. C–2–78–278 (S.D. Ohio, June 26, 1978).

The Court of Appeals for the Sixth Circuit reversed all three District Court orders. In *Isaac* v. *Engle*, 646 F. 2d 1129 (CA6 1980), a majority of the en banc court ruled that *Wainwright* v. *Sykes* did not preclude consideration of Isaac's constitutional claims. At the time of Isaac's trial, the court noted, Ohio had consistently required defendants to prove affirmative defenses by a preponderance of the evidence. The futility of objecting to this established practice supplied adequate cause for Isaac's waiver. Prejudice, the second prerequisite for excusing a procedural default, was "clear" since the burden of proof is a critical element of factfinding, and since Isaac had made a substantial issue of self-defense. *Id.*, at 1134.

A majority of the court also believed that the instructions given at Isaac's trial violated due process. Four judges thought that § 2901.05(A) defined the absence of self-defense as an element of felonious and aggravated assault. While the State did not have to define its crimes in this manner, "due process require[d] it to meet the burden that it chose to assume." 646 F. 2d, at 1135. A fifth judge believed that, even absent § 2901.05(A), the Due Process Clause would com-

pel the prosecution to prove absence of self-defense because that defense negates criminal intent, an essential element of aggravated and felonious assault. A sixth judge agreed that Ohio had violated Isaac's due process rights, but would have concentrated on the State's arbitrary refusal to extend the retroactive benefits of *State* v. *Robinson, supra,* to Isaac.[17]

Relying on the en banc decision in *Isaac,* two Sixth Circuit panels ordered the District Court to release Bell and Hughes unless the State chose to retry them within a reasonable time. *Bell* v. *Perini,* 635 F. 2d 575 (CA6 1980);[18] *Hughes* v. *Engle,* judgment order reported at 642 F. 2d 451 (CA6 1980). We granted certiorari to review all three Sixth Circuit opinions. 451 U. S. 906 (1981).

II

A state prisoner is entitled to relief under 28 U. S. C. § 2254 only if he is held "in custody in violation of the Constitution or laws or treaties of the United States." Insofar as respondents simply challenge the correctness of the self-defense instructions under Ohio law, they allege no deprivation of federal rights and may not obtain habeas relief. The lower courts, however, read respondents' habeas petitions to state at least two constitutional claims. Respondents repeat both of those claims here.

A

First, respondents argue that § 2901.05, which governs the burden of proof in all criminal trials, implicitly designated absence of self-defense an element of the crimes charged

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[17] The latter analysis paralleled the reasoning of the panel that originally decided the case. See *Isaac* v. *Engle,* 646 F. 2d 1122 (CA6 1980).

Four members of the court dissented from the en banc opinion. Two judges would have found no constitutional violation and two would have barred consideration of Isaac's claims under *Wainwright* v. *Sykes, supra.*

[18] One judge dissented from this decision, indicating that *Wainwright* v. *Sykes, supra,* barred Bell's claims.

against them. Since Ohio defined its crimes in this manner, respondents contend, our opinions in *In re Winship*, 397 U. S. 358 (1970); *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and *Patterson* v. *New York*, 432 U. S. 197 (1977), require the prosecution to prove absence of self-defense beyond a reasonable doubt. A plurality of the en banc Sixth Circuit seemed to accept this argument in Isaac's appeal, finding that due process required the State "to meet the burden that it chose to assume." 646 F. 2d, at 1135.

A careful review of our prior decisions reveals that this claim is without merit.[19] Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare *Mullaney* v. *Wilbur*, *supra*, with *Patterson* v. *New York*, *supra*. These decisions, however, do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime.[20] The Due Process Clause does not mandate that

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[19] The State suggests that the ineffectiveness of this claim demonstrates that respondents suffered no actual prejudice from their procedural default. We agree that the claim is insufficient to support habeas relief, but do not categorize this insufficiency as a lack of prejudice. If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable. It is unnecessary in such a situation to inquire whether the prisoner preserved his claim before the state courts.

[20] Definition of a crime's elements may have consequences under state law other than allocation of the burden of persuasion. For example, the Ohio Supreme Court interpreted § 2901.05(A) to require defendants to come forward with some evidence of affirmative defenses. *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976). Defendants do not bear the same burden with respect to the elements of a crime; the State must prove those elements beyond a reasonable doubt even when the defendant introduces no evidence. See, *e. g.*, *State* v. *Isaac*, 44 Ohio Misc. 87, 337 N.

when a State treats absence of an "affirmative defense" as an "element" of the crime for one purpose, it must do so for all purposes. The structure of Ohio's Code suggests simply that the State decided to assist defendants by requiring the prosecution to disprove certain affirmative defenses. Absent concrete evidence that the Ohio legislature or courts understood § 2901.05(A) to go further than this, we decline to accept respondents' construction of state law. While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law.[21]

B

Respondents also allege that, even without considering § 2901.05, Ohio could not constitutionally shift the burden of proving self-defense to them. All of the crimes charged against them require a showing of purposeful or knowing behavior. These terms, according to respondents, imply a degree of culpability that is absent when a person acts in self-defense. See Committee Comment to Ohio Rev. Code Ann. § 2901.21 (1975) ("generally, an offense is not committed unless a person . . . has a certain guilty state of mind at the

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E. 2d 818 (Munic. Ct. 1975). Moreover, while Ohio requires the trial court to charge the jury on all elements of a crime, *e. g.*, *State* v. *Bridgeman*, 51 Ohio App. 2d 105, 366 N. E. 2d 1378 (1977), vacated in part, 55 Ohio St. 2d 261, 381 N. E. 2d 184 (1978), it does not require explicit instructions on the prosecution's duty to negate self-defense beyond a reasonable doubt. *State* v. *Abner*, 55 Ohio St. 2d 251, 379 N. E. 2d 228 (1978).

[21] We have long recognized that a "mere error of state law" is not a denial of due process. *Gryger* v. *Burke*, 334 U. S. 728, 731 (1948). If the contrary were true, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Ibid.* See also *Beck* v. *Washington*, 369 U. S. 541, 554–555 (1962); *Bishop* v. *Mazurkiewicz*, 634 F. 2d 724, 726 (CA3 1980); *United States ex rel. Burnett* v. *Illinois*, 619 F. 2d 668, 670–671 (CA7 1980).

time of his act or failure [to act]"); *State* v. *Clifton*, 32 Ohio App. 2d 284, 286–287, 290 N. E. 2d 921, 923 (1972) ("one who kills in self-defense does so without the *mens rea* that otherwise would render him culpable of the homicide"). In addition, Ohio punishes only actions that are voluntary, Ohio Rev. Code Ann. § 2901.21(A)(1) (1975), and unlawful, *State* v. *Simon*, No. 6262, p. 13 (Ct. App. Montgomery County, Ohio, Jan. 16, 1980), modified on reconsideration (Jan. 22, 1980). Self-defense, respondents urge, negates these elements of criminal behavior. Therefore, once the defendant raises the possibility of self-defense, respondents contend that the State must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness. The Due Process Clause, according to respondents' interpretation of *Winship*, *Mullaney*, and *Patterson*, forbids the States from disavowing any portion of this burden.[22]

This argument states a colorable constitutional claim. Several courts have applied our *Mullaney* and *Patterson* opinions to charge the prosecution with the constitutional duty of proving absence of self-defense.[23] Most of these deci-

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[22] In further support of the claim that, § 2901.05 aside, due process requires the prosecution to prove absence of self-defense, respondent Bell maintains that the States may not constitutionally punish actions taken in self-defense. If fundamental notions of due process prohibit criminalization of actions taken in self-defense, Bell suggests, then absence of self-defense is a vital element of every crime. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1366–1379 (1979); Comment, Shifting the Burden of Proving Self-Defense—With Analysis of Related Ohio Law, 11 Akron L. Rev. 717, 758–759 (1978); Note, The Constitutionality of Affirmative Defenses After *Patterson* v. *New York*, 78 Colum. L. Rev. 655, 672–673 (1978); Note, Burdens of Persuasion in Criminal Proceedings: The Reasonable Doubt Standard After *Patterson* v. *New York*, 31 U. Fla. L. Rev. 385, 415–416 (1979).

[23] *E. g.*, *Tennon* v. *Ricketts*, 642 F. 2d 161 (CA5 1981); *Holloway* v. *McElroy*, 632 F. 2d 605 (CA5 1980), cert. denied, 451 U. S. 1028 (1981); *Wynn* v. *Mahoney*, 600 F. 2d 448 (CA4), cert. denied, 444 U. S. 950 (1979); *Commonwealth* v. *Hilbert*, 476 Pa. 288, 382 A. 2d 724 (1978). See also Comment, 11 Akron L. Rev., *supra* n. 22; Note, 78 Colum. L. Rev., *supra*

sions adopt respondents' reasoning that due process commands the prosecution to prove absence of self-defense if that defense negates an element, such as purposeful conduct, of the charged crime. While other courts have rejected this type of claim,[24] the controversy suggests that respondents' second argument states at least a plausible constitutional claim. We proceed, therefore, to determine whether respondents preserved this claim before the state courts and, if not, to inquire whether the principles articulated in *Wainwright* v. *Sykes*, *supra*, bar consideration of the claim in a federal habeas proceeding.[25]

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n. 22.

[24] *E. g.*, *Carter* v. *Jago*, 637 F. 2d 449 (CA6 1980); *Baker* v. *Muncy*, 619 F. 2d 327 (CA4 1980). See also *Leland* v. *Oregon*, 343 U. S. 790 (1952) (rule requiring accused to prove insanity beyond a reasonable doubt does not violate due process).

[25] As we recognized in *Sykes*, 433 U. S., at 78–79, the problem of waiver is separate from the question whether a state prisoner has exhausted state remedies. Section 2254(b) requires habeas applicants to exhaust those remedies "available in the courts of the State." This requirement, however, refers only to remedies still available at the time of the federal petition. See *Humphrey* v. *Cady*, 405 U. S. 504, 516 (1972); *Fay* v. *Noia*, 372 U. S. 391, 435 (1963). Respondents, of course, long ago completed their direct appeals. Ohio, moreover, provides only limited collateral review of convictions; prisoners may not raise claims that could have been litigated before judgment or on direct appeal. See Ohio Rev. Code Ann. § 2953.21(A) (1975); *Collins* v. *Perini*, 594 F. 2d 592 (CA6 1979); *Keener* v. *Ridenour*, 594 F. 2d 581 (CA6 1979). Since respondents could have challenged the constitutionality of Ohio's traditional self-defense instruction at trial or on direct appeal, we agree with the lower courts that state collateral relief is unavailable to respondents and, therefore, that they have exhausted their state remedies with respect to this claim.

In addition to the claims discussed in text, respondents contend that Ohio's failure to apply *State* v. *Robinson* retroactively to them violates the Due Process and Equal Protection Clauses. Respondents' due process claim asserts that Ohio has no rational reason for refusing to apply *Robinson* to all defendants tried after the effective date of § 2901.05(A). Their equal protection claim rests on the fact that the Ohio Supreme Court has applied *Robinson* retroactively to defendants convicted in nonjury trials, even when those defendants raised no burden-of-proof objection at trial.

III

None of the respondents challenged the constitutionality of the self-defense instruction at trial.[26] They thus violated Ohio Rule Crim. Proc. 30, which requires contemporaneous objections to jury instructions. Failure to comply with Rule 30 is adequate, under Ohio law, to bar appellate consideration of an objection. See, *e. g.*, *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977); *State* v. *Gordon*, 28 Ohio St. 2d 45, 276 N. E. 2d 243 (1971). The Ohio Supreme Court has enforced this bar against the very due process argument raised here. *State* v. *Williams*, 51 Ohio St. 2d 112, 364 N. E. 2d 1364 (1977), vacated in part and remanded, 438 U. S.

See *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977).

We do not believe respondents' habeas petitions fairly raise either of these claims. In particular, we find no trace of the equal protection argument in any of the proceedings below. We note, moreover, that respondents may not have properly exhausted available state remedies for these claims. Respondents could not have known the type of retroactivity Ohio would accord *State* v. *Robinson* until the Ohio Supreme Court decided *Humphries*, *supra*. The latter decision was rendered on the same day that the court refused to review Isaac's direct appeal and long after the convictions of Bell and Hughes became final. Accordingly, respondents did not have the opportunity on direct appeal to confront the Ohio courts with the equal protection and due process problems *Humphries* allegedly creates. Nor did the Ohio Supreme Court consider those problems in *Humphries*. Under these circumstances, Ohio might allow respondents to raise their equal protection and due process claims in a collateral proceeding. Because respondents' petitions do not clearly raise either of these issues, and because respondents may not have exhausted available state remedies for those claims, we decline to address them at this time.

[26] While respondent Bell does not deny his procedural default, he argues that we should overlook it because the State did not raise the issue in its filings with the District Court. In some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim. *E. g.*, *Estelle* v. *Smith*, 451 U. S. 454, 468 n. 12 (1981); *Jenkins* v. *Anderson*, 447 U. S. 231, 234 n. 1 (1980). In this case, however, both the District Court and Court of Appeals evaluated Bell's default. Bell, moreover, did not make his "waiver" claim until he submitted his brief on the merits to this Court. Accordingly, we decline to consider his argument.

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911 (1978).[27] We must determine, therefore, whether respondents may litigate, in a federal habeas proceeding, a constitutional claim that they forfeited before the state courts.

A

The writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law,[28] it claims a place in Article I of our Constitution.[29] Today, as in prior centuries, the writ is a bulwark against convictions that violate "fundamental fairness." *Wainwright* v. *Sykes*, *supra*, at 97 (STEVENS, J., concurring).

We have always recognized, however, that the Great Writ entails significant costs.[30] Collateral review of a conviction

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[27] In Isaac's own case, the Ohio Court of Appeals refused to entertain his challenge to the self-defense instruction because of his failure to comply with Rule 30. The Ohio Supreme Court subsequently dismissed Isaac's appeal for lack of a substantial constitutional question. It is unclear whether these appeals raised a constitutional, or merely statutory, attack on the self-defense instruction used at Isaac's trial. If Isaac presented his constitutional argument to the state courts, then they determined, on the very facts before us, that the claim was waived.

Relying upon *State* v. *Long*, 53 Ohio St. 2d 91, 372 N. E. 2d 804 (1978), respondents argue that the Ohio Supreme Court has recognized its power, under Ohio's plain-error rule, to excuse Rule 30 defaults. *Long*, however, does not persuade us that the Ohio courts would have excused respondents' defaults. First, the *Long* court stressed that the plain-error rule applies only in "exceptional circumstances," such as where, "but for the error, the outcome of the trial clearly would have been otherwise." *Id.*, at 96, 97, 372 N. E. 2d, at 807, 808. Second, the *Long* decision itself refused to invoke the plain-error rule for a defendant who presented a constitutional claim identical to the one pressed by respondents.

[28] See 3 W. Blackstone, Commentaries *129–*138; *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603 (H. L.).

[29] Art. I, § 9, cl. 2.

[30] Judge Henry J. Friendly put the matter well when he wrote that "[t]he proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such ef-

extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S. 1, 24–25 (Harlan, J., dissenting). See also *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (POWELL, J., concurring in the judgment). By frustrating these interests, the writ undermines the usual principles of finality of litigation.[31]

Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or

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forts at undoing judgments of conviction." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 145 (1970).

JUSTICE POWELL, elucidating a position that ultimately commanded a majority of the Court, similarly suggested:

"No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 262 (1973) (POWELL, J., concurring) (footnote omitted). See also *Stone* v. *Powell*, 428 U. S. 465 (1976).

[31] Judge Friendly and Professor Bator suggest that this absence of finality also frustrates deterrence and rehabilitation. Deterrence depends upon the expectation that "one violating the law will swiftly and certainly become subject to punishment, just punishment." Rehabilitation demands that the convicted defendant realize "that he is justly subject to sanction, that he stands in need of rehabilitation." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *supra* n. 30, at 146.

innocence." *Wainwright* v. *Sykes*, *supra*, at 90. Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.

We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 263–265 (1973) (POWELL, J., concurring).[32]

In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has de-

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[32] During the last two decades, our constitutional jurisprudence has recognized numerous new rights for criminal defendants. Although some habeas writs correct violations of long-established constitutional rights, others vindicate more novel claims. State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands.

tracted from the trial's significance by neglecting to raise a claim in that forum.[33] The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules. These considerations supported our *Sykes* ruling that, when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.

Respondents urge that we should limit *Sykes* to cases in which the constitutional error did not affect the truthfinding function of the trial. In *Sykes* itself, for example, the prisoner alleged that the State had violated the rights guaranteed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). While this defect was serious, it did not affect the determination of guilt at trial.

We do not believe, however, that the principles of *Sykes* lend themselves to this limitation. The costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing. We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.

B

Respondents seek cause for their defaults in two circumstances. First, they urge that they could not have known at the time of their trials that the Due Process Clause addresses

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[33] Counsel's default may stem from simple ignorance or the pressures of trial. We noted in *Sykes*, however, that a defendant's counsel may deliberately choose to withhold a claim in order to "sandbag"—to gamble on acquittal while saving a dispositive claim in case the gamble doesn't pay off. See 433 U. S., at 89–90.

the burden of proving affirmative defenses. Second, they contend that any objection to Ohio's self-defense instruction would have been futile since Ohio had long required criminal defendants to bear the burden of proving this affirmative defense.

We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.[34] Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.[35]

Respondents' claim, however, is not simply one of futility. They further allege that, at the time they were tried, they could not know that Ohio's self-defense instructions raised constitutional questions. A criminal defendant, they urge, may not waive constitutional objections unknown at the time of trial.

We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object.[36] We

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[34] See *Estelle* v. *Williams*, 425 U. S. 501, 515 (1976) (POWELL, J., concurring) (the policy disfavoring inferred waivers of constitutional rights "need not be carried to the length of allowing counsel for a defendant deliberately to forgo objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile"); *Myers* v. *Washington*, 646 F. 2d 355, 364 (CA9 1981) (Poole, J., dissenting) (futility cannot constitute cause if it means simply that a claim was "unacceptable to that particular court at that particular time"), cert. pending, No. 81–1056.

[35] In fact, the decision to withhold a known constitutional claim resembles the type of deliberate bypass condemned in *Fay* v. *Noia*, 372 U. S. 391 (1963). Since the cause and prejudice standard is more demanding than *Fay*'s deliberate bypass requirement, see *Sykes*, *supra*, at 87, we are confident that perceived futility alone cannot constitute cause.

[36] The State stressed at oral argument before this Court that it does not

might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair.[37] These concerns, however, need not detain us here since respondents' claims were far from unknown at the time of their trials.

In re Winship, 397 U. S. 358 (1970), decided four-and-one-half years before the first of respondents' trials, laid the basis for their constitutional claim. In *Winship* we held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. During the five years following this decision,[38] dozens of defendants relied upon this language to challenge the constitutionality of rules requiring them to bear a burden

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seek such a ruling. Instead, Ohio urges merely that "when the tools are available to construct the argument, . . . you can charge counsel with the obligation of raising that argument." Transcript at 8–9.

[37] See *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (separate opinion of Harlan, J.); *Williams* v. *United States*, 401 U. S. 646, 665–666 (1971) (MARSHALL, J., concurring in part and dissenting in part); *Hankerson* v. *North Carolina*, 432 U. S. 233, 246–248 (1977) (POWELL, J., concurring in the judgment).

[38] Even before *Winship*, criminal defendants and courts perceived that placing a burden of proof on the defendant may violate due process. For example, in *Stump* v. *Bennett*, 398 F. 2d 111 (CA8 1968), cert. denied, 393 U. S. 1001 (1968), the Eighth Circuit ruled en banc that an Iowa rule requiring defendants to prove alibis by a preponderance of the evidence violated due process. The court, moreover, observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law." *Id.*, at 122. See also *Johnson* v. *Bennett*, 393 U. S. 253 (1968) (vacating and remanding lower court decision for reconsideration in light of *Stump*); *State* v. *Nales*, 28 Conn. Supp. 28, 248 A. 2d 242 (1968) (holding that due process forbids requiring defendant to prove "lawful excuse" for possession of housebreaking tools).

of proof.[39] In most of these cases, the defendants' claims countered well-established principles of law. Nevertheless, numerous courts agreed that the Due Process Clause requires the prosecution to bear the burden of disproving cer-

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[39] See, *e. g.*, *State* v. *Commenos*, 461 S. W. 2d 9 (Mo. 1970) (en banc) (intent to return allegedly stolen item); *Phillips* v. *State*, 86 Nev. 720, 475 P. 2d 671 (1970) (insanity), cert. denied, 403 U. S. 940 (1971); *Commonwealth* v. *O'Neal*, 441 Pa. 17, 271 A. 2d 497 (1970) (absence of malice); *Commonwealth* v. *Vogel*, 440 Pa. 1, 268 A. 2d 89 (1970) (insanity), overruled, *Commonwealth* v. *Rose*, 457 Pa. 380, 321 A. 2d 880 (1974); *Smith* v. *Smith*, 454 F. 2d 572 (CA5 1971) (alibi), cert. denied, 409 U. S. 885 (1972); *United States* v. *Braver*, 450 F. 2d 799 (CA2 1971) (inducement), cert. denied, 405 U. S. 1064 (1972); *Wilbur* v. *Robbins*, 349 F. Supp. 149 (Me. 1972) (heat of passion), aff'd sub nom. *Wilbur* v. *Mullaney*, 473 F. 2d 943 (CA1 1973), vacated, 414 U. S. 1139 (1974), on remand, 496 F. 2d 1303 (CA1 1974), aff'd, 421 U. S. 684 (1975); *State* v. *Cuevas*, 53 Haw. 110, 488 P. 2d 322 (1971) (lack of malice aforethought or presence of legal justification); *State* v. *Brown*, 163 Conn. 52, 301 A. 2d 547 (1972) (possession of license to deal in drugs), overruled on other grounds, *State* v. *Whistnant*, 179 Conn. 576, 427 A. 2d 414 (1980); *In re Foss*, 10 Cal. 3d 910, 519 P. 2d 1073, 112 Cal. Rptr. 649 (1974) (en banc) (entrapment); *Woods* v. *State*, 233 Ga. 347, 211 S. E. 2d 300 (1974) (authority to sell narcotic drugs), appeal dismissed, 422 U. S. 1002 (1975); *State* v. *Buzynski*, 330 A. 2d 422 (Me. 1974) (mental disease); *People* v. *Jordan*, 51 Mich. App. 710, 216 N. W. 2d 71 (1974) (absence of intent), disapproved on other grounds, *People* v. *Johnson*, 407 Mich. 196, 284 N. W. 2d 718 (1979); *Commonwealth* v. *Rose*, 457 Pa. 380, 321 A. 2d 880 (1974) (intoxication); *Retail Credit Co.* v. *Dade County*, 393 F. Supp. 577 (SD Fla. 1975) (maintenance of reasonable procedures); *Fuentes* v. *State*, 349 A. 2d 1 (Del. 1975) (extreme emotional distress), overruled, *State* v. *Moyer*, 387 A. 2d 194 (Del. 1978); *Henderson* v. *State*, 234 Ga. 827, 218 S. E. 2d 612 (1975) (self-defense); *State* v. *Grady*, 276 Md. 178, 345 A. 2d 436 (1975) (alibi); *Evans* v. *State*, 28 Md. App. 640, 349 A. 2d 300 (1975) (absence of malice; further describing in detail that due process requires prosecution to negate most affirmative defenses, including self-defense), aff'd, 278 Md. 197, 362 A. 2d 629 (1976); *State* v. *Robinson*, 48 Ohio App. 2d 197, 356 N. E. 2d 725 (1975) (self-defense), aff'd, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976). See also *Trimble* v. *State*, 229 Ga. 399, 191 S. E. 2d 857 (1972) (alibi), overruled, *Patterson* v. *State*, 233 Ga. 724, 213 S. E. 2d 612 (1975); *Grace* v. *State*, 231 Ga. 113, 118, 125–128, 200 S. E. 2d 248, 252, 256–258 (1973) (dissenting opinions) (insanity).

tain affirmative defenses.[40] In light of this activity, we cannot say that respondents lacked the tools to construct their constitutional claim.[41]

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 burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have chosen to omit or overlooked 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 conceiv-

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Several commentators also perceived that *Winship* might alter traditional burdens of proof for affirmative defenses. *E. g.*, W. LaFave & A. Scott, Handbook on Criminal Law § 8, pp. 46–51 (1972); The Supreme Court 1969 Term, 84 Harv. L. Rev. 1, 159 (1970); Student Symposium, 33 Ohio St. L. J., *supra* n. 2, at 421; Comment, Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism After *Wilbur* v. *Mullaney*, 26 U. Me. L. Rev. 37 (1974).

[40] Even those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time.

[41] Respondent Isaac even had the benefit of our opinion in *Mullaney* v. *Wilbur*, *supra*, decided three months before his trial. In *Mullaney* we invalidated a Maine practice requiring criminal defendants to negate malice by proving that they acted in the heat of passion. We thus explicitly acknowledged the link between *Winship* and constitutional limits on assignment of the burden of proof. Cf. *Lee* v. *Missouri*, 439 U. S. 461, 462 (1979) (per curiam) (suggesting that defendants who failed, after *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), to object to the exclusion of women from juries must show cause for the failure).

Respondents argue at length that, before the Ohio Supreme Court's decision in *State* v. *Robinson*, *supra*, they did not know that Ohio Rev. Code Ann. § 2901.05(A) changed the traditional burden of proof. Ohio's interpretation of § 2901.05(A), however, is relevant only to claims that we reject independently of respondents' procedural default. See *supra*, at 10–12; n. 25, *supra*.

able constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.[42]

C

Respondents, finally, urge that we should replace or supplement the cause-and-prejudice standard with a plain-error inquiry. We rejected this argument when pressed by a federal prisoner, see *United States* v. *Frady*, No. 80–1595, and find it no more compelling here. The federal courts apply a plain-error rule for direct review of federal convictions. Fed. Rule Crim. Proc. 52(b). Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners is "greater than the showing required to establish plain error on direct appeal." *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977); *United States* v. *Frady*, *supra*, at ——.[43]

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[42] Respondents resist this conclusion by noting that *Hankerson* v. *North Carolina*, 432 U. S. 233, 243 (1977), gave *Mullaney* v. *Wilbur*, the opinion explicitly recognizing *Winship*'s effect on affirmative defenses, "complete retroactive effect." *Hankerson* itself, however, acknowledged the distinction between the retroactive availability of a constitutional decision and the right to claim that availability after a procedural default. JUSTICE WHITE's majority opinion forthrightly suggested that the States "may be able to insulate past convictions [from the effect of *Mullaney*] by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." 432 U. S., at 244 n. 8. In this case we accept the force of that language as applied to defendants tried after *Winship*.

Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice. Respondents urge that their prejudice was so great that it should permit relief even in the absence of cause. *Sykes*, however, stated these criteria in the conjunctive and the facts of this case do not persuade us to depart from that approach.

[43] Respondents bolster their plain-error contention by observing that

Contrary to respondents' assertion, moreover, a plain-error standard is unnecessary to correct miscarriages of justice. The terms "cause" and "actual prejudice" are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate cases those principles must yield to the imperative of a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard, see *Wainwright* v. *Sykes*, *supra*, at 91; *id.*, at 94–97 (STEVENS, J., concurring), we decline to adopt the more vague inquiry suggested by the words "plain error."

IV

Close analysis of respondents' habeas petitions reveals only one colorable constitutional claim. Because respondents failed to comply with Ohio's procedures for raising that contention, and because they have not demonstrated cause for the default, they are barred from asserting that claim under 28 U. S. C. § 2254. The judgments of the Court of Appeals are reversed and remanded for proceedings consistent with this opinion.

So ordered.

Ohio will overlook a procedural default if the trial defect constituted plain error. Ohio, however, has declined to exercise this discretion to review the type of claim pressed here. See n. 27, *supra*. If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review. See *Mullaney* v. *Wilbur*, *supra*, at 688 n. 7; *County Court of Ulster County* v. *Allen*, 442 U. S. 140, 147–154 (1979). Our opinions, however, make clear that the States have the primary responsibility to interpret and apply their plain error-rules. Certainly we should not rely upon a state plain-error rule when the State has refused to apply that rule to the very sort of claim at issue.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 12, 1982

Re: No. 80-1430 - Engle v. Isaac

Dear Sandra:

My primary difficulty with your opinion is footnote 32.

I therefore shall not join your opinion. At the end of the next draft, please show the following:

"JUSTICE BLACKMUN concurs in the result."

Sincerely,

Harry

Justice O'Connor

cc: The Conference

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[80-1430; MARCH 24, 1982]

David -
Your characterization is apt. No one is kinder or more generous than WJB until he takes up his pen in dissent.
My marginal notes were made last night

o: The Chief Justice
Justice White
Justice Marshall
✓Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

om: Justice Brennan

rculated: 24 March 1982

irculated: _____

No. 80–1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, PETITIONER *v.* LINCOLN ISAAC

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

[March ——, 1982]

JUSTICE BRENNAN, dissenting.

Who's calling who what!?

Today's decision is a conspicuous exercise in judicial activism. In its eagerness to expatiate upon the "significant costs" of the Great Writ, *ante*, at 16–18, and to apply "the principles articulated in *Wainwright* v. *Sykes*," 433 U. S. 72 (1977), *ante*, at 14, to the cases before us, the Court demonstrably misreads and reshapes the habeas claim of at least one of the state prisoners involved in this action. Respondent Isaac presented exactly one claim in his habeas petition. That claim *did not even exist* until after Isaac was denied relief on his last direct appeal. As a result, Isaac could not have "preserved" his claim in the state courts: He simply committed no "procedural default," and the Court is thus clearly wrong to apply *Sykes* to his claim in order to relegate it to the dustbin. The Court then compounds its error when it attempts to articulate the "principles" of *Sykes*: In purporting to give content to the "cause" standard announced in that case, the Court defines "cause" in a way supported neither by *Sykes* nor by common sense. I dissent from both of these errors, which are discussed in turn below.

I

Respondent Isaac was indicted in May 1975; he was con-

To: The Chief Justice
Justice White
Justice Marshall
✓Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: 24 March 1982

Recirculated: _____

1st DRAFT

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Respondent Isaac was indicted in May 1975; he was con-

victed after a jury trial and sentenced during the following September.[1] While his conviction was on appeal in the Ohio Court of Appeals, the Ohio Supreme Court decided *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (July 1976), which construed Ohio Rev. Code Ann. § 2901.05(A) (effective January 1, 1974) to require the prosecution to bear the burden of persuasion, beyond a reasonable doubt, with respect to an affirmative defense of self-defense raised by the defendant. The Ohio Court of Appeals affirmed Isaac's conviction in February 1977.[2] The Ohio Supreme Court dismissed Isaac's appeal in July 1977.[3] On the same day, the Ohio Supreme Court decided *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354. That case declared *Robinson* retroactive to the effective date of § 2901.05(A), but only *partially*: It held that in order to gain the retroactive benefits of the *Robinson* decision, a defendant tried before a jury must have preserved his claim by objection *at trial* to the allocation of the affirmative-defense burden of proof, while a bench-trial defendant could have made the same objection as late as in the *court of appeals*, and the objection would still have been preserved. 51 Ohio St. 2d, at 102–103, 364 N. E. 2d, at 1359.

Isaac filed his habeas petition in the United States District Court for the Southern District of Ohio in March 1978.[4] The asserted ground for relief was "denial of due process of law," in that

> "The trial court charged petitioner had the burden of proving self-defense. After conviction and during the first appeal the Ohio Supreme Court declared the instructions to be prejudicial error under *Robinson*. This

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[1] App. 2; Appendix to Brief in No. 78–3488, *Isaac* v. *Engle* (CA6), pp. 2, 3–4.

[2] App. 6.

[3] App. 13.

[4] Appendix to Brief in No. 78–3488, *Isaac* v. *Engle* (CA6), p. 18.

> case was immediately raised to the Appellate Court. They held any error was waived. The Ohio Supreme Court then held *Robinson* retroactive. Petitioner had raised retroactivity in its leave to appeal and was denied leave to appeal the same day *Humphries* was decided declaring retroactivity. The Ohio Supreme Court refuses to give relief despite its own pronouncement. The holding of the court is contrary to the Supreme Court of the United States in regard to proving self-defense."[5]

Isaac's memorandum in support of his habeas petition made it plain that his claim was that *Humphries'* selective retroactive application of the *Robinson* rule denied him due process of law.[6] It is obvious, of course, that it was simply impossible to make this claim before *Humphries* was decided, in July 1977, on the same day that Isaac's direct appeals in the state court system were finally rejected.

Ohio Rev. Code Ann. § 2953.21(A) provides for postconviction relief under certain circumstances:

> "Any person convicted of a criminal offense . . . claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds of relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

By applying the doctrine of *res judicata* to postconviction petitions, the Ohio Supreme Court has allowed relief under this procedure only under limited circumstances: Constitutional issues can be raised under § 2953.21(A) only when they could not have been raised at trial or on appeal. *State* v. *Perry*, 10

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[5] *Id.*, at p. 21 (emphasis added).

[6] *Id.*, at p. 25.

Ohio St. 2d 175, 180–181, 226 N. E. 2d 104, 108 (1967); see *Keener* v. *Ridenour*, 594 F. 2d 581, 589–591 (CA6 1979) (construing scope of Ohio postconviction remedy); *Riley* v. *Havener*, 391 F. Supp. 1177, 1179–1180 (ND Ohio 1974) (same). But Isaac's claim is manifestly of the sort that *could not have been raised at trial or on appeal*, for the claim only came into existence on the day that Isaac's last appeal was rejected. Consequently, state postconviction remedies are available to Isaac and have *not* been exhausted.

I draw three conclusions from the foregoing account, all of which to my mind follow ineluctably from the undisputed facts of this case. First, Isaac's habeas petition should have been dismissed for his failure to exhaust available state remedies. See *Picard* v. *Connor*, 404 U. S. 270 (1971), where we emphasized that

> "the federal claim must be fairly presented to the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." 404 U. S., at 275–276.

In the present case, petitioner Engle responded to Isaac's petition by raising the issue of Isaac's failure to exhaust.[7] Therefore the Court of Appeals clearly erred, under *Picard* and our whole line of exhaustion precedents, in granting habeas relief to Isaac instead of requiring exhaustion. The proper disposition of Isaac's case is thus to reverse and remand with instructions to dismiss on exhaustion grounds. The Court's failure to order such a disposition is incomprehensible: Less than a month ago this Court emphatically reaffirmed the exhaustion doctrine, and indeed extended it, announcing a requirement of "total exhaustion" for habeas petitions. *Rose* v. *Lundy*, —— U. S. —— (March 3, 1982).[8]

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[7] *Id.*, at pp. 35–36.

[8] "A rigorously enforced total exhaustion rule will encourage state pris-

But today it finds the nostrum of "cause and prejudice" more attractive, and so *Rose* v. *Lundy* is not applied. *Sic transit gloria*! In less than a month the bloom is off the *Rose*.

My second conclusion is that Isaac simply committed no "procedural default" in failing to raise at trial or on direct appeal the claim that appears in his habeas petition. That claim *did not exist* at any time during Isaac's trial or direct appeal. Thus the essential factual predicate for an application of *Wainwright* v. *Sykes, supra*, is completely absent in Isaac's case. *Sykes* involved a habeas petitioner who had failed to object in a timely manner to the admission of his confession at trial. 433 U. S., at 86–87. Given that factual predicate, *Sykes* addressed the question of whether federal habeas review should be barred absent a showing of "cause" for the procedural default of failing to object, and a further showing of "prejudice" resulting from the admission of the confession. *Id.*, at 87, 90–91. But in the case before us, respondent Isaac could not have made any objection, timely or otherwise, at trial or on appeal. Thus the application of *Sykes* is completely and manifestly erroneous in this case.[9]

My last conclusion is that the Court is so intent upon applying *Sykes* to Isaac's case that it plays Procrustes with his claim. In order to bring Isaac's claim within the ambit of

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oners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasing familiar with and hospitable toward federal constitutional issues." Slip op., at 10.

[9] The panel opinion of the United States Court of Appeals for the Sixth Circuit in Isaac's case reached this same conclusion. The panel correctly read Isaac's petition as presenting the question of "whether the decision of the Supreme Court of Ohio to withhold from petitioner the benefits of Section 2901.05(A), as established in *State* v. *Robinson*, for failure to comply with Ohio's contemporaneous objection rule was a deprivation of due process." 646 F. 2d 1122, 1124 (1980). As to this question, the panel accurately concluded that "*Wainwright* v. *Sykes, supra*, is not applicable to . . . [Isaac's] petition." *Id.*, at 1127.

Sykes, the Court first characterizes his petition as "complex." *Ante*, at 9.[10] Then, without quoting the claim as it actually appeared in Isaac's petition, the Court delineates a "colorable constitutional claim" nowhere to be found in the petition. As the Court recasts it, Isaac's claim is as follows:

> [T]he crime[] charged against [Isaac] require[s] a showing of purposeful or knowing behavior. These terms, according to [Isaac], imply a degree of culpability that is absent when a person acts in self-defense. . . . Self-defense, [Isaac] urge[s], negates . . . [essential] elements of criminal behavior. Therefore, once the defendant raises the possibility of self-defense, [Isaac] contend[s] that the State must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness. The Due Process Clause, according to [Isaac's] interpretation of *Winship*, *Mullaney*, and *Patterson*, forbids the States from disavowing any portion of this burden." *Ante*, at 12–13.

This new-modeled claim bears no resemblance to the claim actually made by Isaac in his habeas petition. See *supra*, at 2–3.[11] But by virtue of this exercise in juristic revisionism, the Court puts itself in position to find that "Isaac's" claim was "forfeited before the state courts," *ante*, at 16—no difficult task, since the claim is wholly imagined by the Court itself—thus enabling the Court to reach its clearly sought goal of deciding "whether the principles articulated in *Wainwright* v. *Sykes*, *supra*, bar consideration of the claim in a federal habeas proceeding." *Ante*, at 14. Unsurprisingly, the

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[10] The full text of Isaac's claim appears *supra*, at pp. 2–3. It is plain that the Court's claim of "complexity" is merely a smokescreen, behind which the Court feels free to reshape Isaac's claim.

[11] It does bear some resemblance to Isaac's claim as construed by the plurality opinion of the Court of Appeals *en banc* below. 646 F. 2d 1129, 1133–1136 (1980). But the plurality's construction was simply incorrect, and this Court should correct such errors, not perpetuate them.

Court's bottom line is that Isaac's fictive claim is indeed barred by *Sykes*. In short, the Court reshapes respondent Isaac's actual claim into a form that enables it to foreclose all federal review, when as plainly pleaded the claim was unexhausted, thus calling for the dismissal of Isaac's petition for habeas relief. The Court's analysis is completely result-oriented, and represents a noteworthy exercise in the very judicial activism that the Court so deprecates in other contexts.

"result-oriented" from W & B!

II

For the reasons stated above, I conclude that in its unseemly rush to reach the merits of Isaac's case, the Court has ignored settled law respecting the exhaustion of state remedies. But lest it be thought that my disagreement with today's decision is confined to that point alone, I turn to the Court's treatment of the merits of the cases before us. I continue to believe that the "deliberate bypass" standard announced in *Fay* v. *Noia*, 372 U. S. 391 (1963), is the only sensible rule to apply in habeas cases such as respondents'. I adhere to my dissent in *Wainwright* v. *Sykes*, *supra*, in which I termed the "cause-and-prejudice" standard adopted in that case "a mere house of cards whose foundation has escaped any systematic inspection." 433 U. S., at 99–100, n. 1. The Court has now begun to furnish its house of cards—and the furniture is as jerry-built as the house itself.

Stare decisis?!

A

Sykes did not give the terms "cause" and "prejudice" any "precise content," but promised that "later cases" would provide such content. 433 U. S., at 91. Today the nature of that content becomes distressingly apparent. The Court still refuses to say what "cause" *is*: And I predict that on the Court's present view it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show "cause." But on the other hand, the Court is more than eager to say what "cause" is *not*: And in doing so, the Court is

supported neither by common sense nor by the very reasons offered in *Sykes* for adoption of the "cause and prejudice" standard in the first place.

According to the Court, "cause" is *not* demonstrated when the Court "cannot say that [habeas petitioners] lacked the tools to construct their constitutional claim," *ante*, at 23, however primitive those tools were and thus however inchoate the claim was when petitioners were in the state courts. The Court concludes, after several pages of tortuous reasoning, *ante*, at 21–23, that respondents in the present cases did indeed have "the tools" to make their constitutional claims. This conclusion is reached by the sheerest inference: It is based on citations to other cases in other jurisdictions, where other defendants raised other claims assertedly similar to those that respondents "could" have raised. *Ante*, at 21–22 & n. 39. To hold the present respondents to such a high standard of foresight is tantamount to a complete rejection of the notion that there is a point before which a claim is so inchoate that there is adequate "cause" for the failure to raise it. In thus rejecting inchoateness as "cause," the Court overlooks the fact that none of the rationales used in *Sykes* to justify adoption of the cause-and-prejudice standard can justify today's definition of "cause."

Sykes adopted the cause-and-prejudice standard in order to accord "greater respect" to state contemporaneous-objection rules than was assertedly given by *Fay* v. *Noia*, *supra*. 433 U. S., at 88. The Court then offered a number of reasons why contemporaneous-objection rules should be given such greater respect:

> (1) "A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not a year later in a federal habeas proceeding." 433 U. S., at 88.
>
> (2) A contemporaneous objection "enables the judge who observed the demeanor of those witnesses to make

the factual determinations necessary for properly deciding the federal constitutional question." *Ibid.*

(3) "A contemporaneous-objection rule may lead to the exclusion of evidence objected to, thereby making a major contribution to finality in criminal litigation." *Ibid.*

(4) The *Fay* v. *Noia* rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.*, at 89.

(5) A contemporaneous objection rule "encourages the result that [criminal trials] be as free of error as possible." *Id.*, at 90.

None of these rationales has any force in the present case. The first three reasons are valid, if at all, only in the particular context of objections to the admission of evidence such as were at issue in *Sykes*. As for the "sandbagging" rationale, dutifully repeated by today's Court, *ante*, at 19, n. 33, that was fully answered in my *Sykes* dissent:[12] That argument still

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[12] 433 U. S., at 103–104 & n. 5:

"Under the regime of collateral review recognized since the days of *Brown* v. *Allen* [344 U. S. 443 (1953)], and enforced by the *Fay* bypass test, no rational lawyer would risk the 'sandbagging' feared by the Court. . . . In brief, the defense lawyer would face two options: (1) He could elect to present his constitutional claims to the state courts in a proper fashion. If the state trial court is persuaded that a constitutional breach has occurred, the remedies dictated by the Constitution would be imposed, the defense would be bolstered, and the prosecution accordingly weakened, perhaps precluded altogether. If the state court rejects the properly tendered claims, the defense has lost nothing: Appellate review before the state courts and federal habeas consideration are preserved. (2) He could elect to 'sandbag.' This presumably means, first, that he would hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of a conviction since the prosecution would be able to

"offends common sense," and does not become less offensive by sententious repetition. And the final reason—relied on again today, *ante*, at 17–18—is plainly irrelevant to a case involving inchoate constitutional claims. Such claims are *ex hypothesis* so embryonic that only the extraordinarily foresighted criminal defendant will raise them. It is completely implausible to expect that the raising of such claims will predictably—or even occasionally—make trials more "free of error."

B

The Court justifies its result today with several additional reasons—or, rather, "sentiments" in reasons' clothing. We are told, *ante*, at 16–17, that "the Great Writ entails significant costs. Collateral review of a conviction extends the ordeal of trial for both society and the accused." But we are not told why the accused would consider it an "ordeal" to go to federal court in order to attempt to vindicate his constitutional rights. Nor are we told why society should be eager to ensure the finality of a conviction arguably tainted by unreviewed constitutional error directly affecting the truthfinding function of the trial. I simply fail to understand how allowance of a habeas hearing "entails significant costs" to *anyone* under the circumstances of the cases before us.

"sentiments in reasons clothings"

In a similar vein, we are told, *ante*, at 18, that "We must also acknowledge that writs of habeas corpus frequently cost

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present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims (subject to whatever 'plain error' rule is available). Third, to carry out his scheme, he would now be compelled to deceive the federal habeas court and to convince the judge that he did not 'deliberately bypass' the state procedures. If he loses on this gamble, all federal review would be barred, and his 'sandbagging' would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into option 2 by *Fay*. I do not. That belief simply offends common sense."

society the right to punish admitted offenders." I for one will acknowledge nothing of the sort. Respondents were all convicted after trials in which they allege that the burden of proof respecting their affirmative defenses was imposed upon them in an unconstitutional manner. Thus they are not "admitted" offenders at all: If they had been tried with the assertedly proper allocation of the burden of proof, then they might very well have been acquitted. Further, it is sheer demagoguery to blame the "offender" for the logistical and temporal difficulties arising from retrial: If the writ of habeas corpus has been granted, then it is at least as reasonable to blame the State for having prosecuted the first trial "in violation of the Constitution or laws . . . of the United States," 28 U. S. C. § 2254(a).

Finally, we are told, *ante*, at 18 & n. 32, that

> "the Great Writ imposes special costs on our federal system. . . . Federal intrusions into state criminal trials frustrate the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights. . . . State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands."

Once again, the Court drags a red herring across its path. I hope that the Court forgets only momentarily that "the States' sovereign power" is limited by the Constitution of the United States: that the "intrusion" complained of is that of the supreme law of the land. But it must be reason for deep concern when this Court forgets, as it certainly does today, that "it is a *constitution* we are expounding,"[13] and that it is inimical to the principle of federal constitutional supremacy to accede to state courts' "frustration" at the requirements of federal constitutional law as it is interpreted in an evolving

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[13] *M'Culloch* v. *Maryland*, 4 Wheat. 316, 407 (1819).

society. *Sykes* promised that its cause-and-prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." 433 U. S., at 91. Today's decision, with its unvarnished hostility to the assertion of federal constitutional claims, starkly reveals the emptiness of that promise.

C

Finally, there is the issue of the Court's extension of the *Sykes* standard "to cases in which the constitutional error . . . affect[s] the truthfinding function of the trial." *Ante*, at 19. The Court concedes, *ibid.*, that *Sykes* itself involved the violation of the habeas petitioner's *Miranda* rights, and that although "this defect was serious, it did not affect the determination of guilt at trial." But despite the fact that the present cases admittedly do involve a defect affecting the determination of guilt, the Court refuses to limit *Sykes* and thus bars federal review: "We do not believe . . . that the principles of *Sykes* lend themselves to this limitation." *Ibid.* In so holding, the Court ignores the manifest differences between claims that affect the truthfinding function of the trial and claims that do not.

The Court proclaimed in *Stone* v. *Powell*, 428 U. S. 465, 490 (1976), "the ultimate question of guilt or innocence . . . should be the central concern in a criminal proceeding." A defendant's Fourth Amendment rights, see *Stone*, or his *Miranda* rights, see *Sykes*, may arguably be characterized as "crucially different from many other constitutional rights," *Kaufman* v. *United States*, 394 U. S. 217, 237 (1969) (Black, J., dissenting), in that evidence procured in violation of those rights has not ordinarily been rendered untrustworthy by the means of its procurement. But a defendant's right to a trial at which the burden of proof has been constitutionally allo-

cated can *never* be violated without rendering the *entire* trial result untrustworthy. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome," *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), and petitioners in the present cases concede as much, Brief of Petitioners 22. As Justice Harlan noted in *In re Winship*, 397 U. S. 358 (1970),

> "If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent." 397 U. S., at 371 (concurring opinion).

Where, as here, the burden was placed on *respondents*, rather than on the prosecution, to prove their affirmative defenses by a preponderance of the evidence, the risk of convicting the innocent is even greater than in Justice Harlan's example. And if this allocation of the burden of proof was erroneous, then that error constitutes a denial of due process of intolerable proportions. We have recognized the truth of this proposition in numerous precedents. In *Ivan V.* v. *City of New York*, 407 U. S. 203 (1972), we held our earlier decision in *Winship* to be fully retroactive, stating that

> "'Where the major purpose of a new constitutional doctrine is to overcome an aspect of a criminal trial *that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials*, the new rule has been given complete retroactive effect. *Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application*

> *in these circumstances.'* *Williams* v. *United States*, 401 U. S. 646, 653 (1971). See *Adams* v. *Illinois*, 405 U. S. 278, 280 (1972); *Roberts* v. *Russell*, 392 U. S. 293, 295 (1968)." 407 U. S., at 204 (emphasis added).[14]

In sum, this Court has heretofore adhered to the principle that, "In the administration of criminal justice, our society imposes almost the entire risk of error upon itself," because "the interests of the defendant are of such magnitude." *Addington* v. *Texas*, 441 U. S. 418, 423–424 (1979). In the context of the cases before us today, this principle means that a habeas claim that a mistake was made in assigning the risk of error cannot be cavalierly dismissed as just another "type of claim raised by the prisoner," *ante*, at 19. In my view, the *Sykes* standard is misguided and insupportable in any context. But if it is to be suffered to exist at all, it should be limited to the arguable peripheries of the trial process: It should not be allowed to insulate from all judicial review all violations of the most fundamental rights of the accused.

I dissent.

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[14] We later relied on *Ivan V.* in holding that our decision in *Mullaney* must be applied retroactively. *Hankerson* v. *North Carolina*, 432 U. S. 233, 242–244 (1977).

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 25, 1982

Re: No. 80-1430 - Engle v. Isaac

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

SOC

THE C. J.	W. J. B.	[redacted]	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
		12/12/81						
join + SOC 2/16/82	will dissent 2/10/82	1st draft 2/9/82	Join SOC 2/16/82	await dissent 2/10/82	Concur in result 3/12/82	Join SOC 2/10/82	Join SOC 2/16/82	1st draft Conc. in part + dis. in part 2/18/82
	1st draft 3/24/82	2nd draft 3/12/82 4th draft		Join WJB 3/25/82				2nd draft 3/26/82
	2nd draft 4/1/82	4/2/82						

80-1430 Engle v. Isaac