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State Prisoners' Access to Federal Habeas Corpus: Restrictions Increase

By Richard A. Powers III*

The Supreme Court continues to restrict the availability of habeas corpus to state prisoners. The author considers four recent cases in which access to the writ has been limited. Those cases (1) held that a federal habeas petitioner's fair cross-section claim was barred, since a new constitutional rule in this area would not be applied retroactively; (2) explicitly applied the plain statement rule in a federal habeas corpus case; and (3) more narrowly defined the exhaustion requirement and cause in habeas corpus petitions.

If any doubt existed that the United States Supreme Court was curtailing the unlimited right of access by state prisoners to federal habeas corpus relief, such uncertainty was put to rest by four opinions issued by the Court in late February 1989 denying relief for procedural defaults and failure to exhaust available remedies in the state courts. Those cases are *Harris v. Reed*,[1] *Teague v. Lane*,[2] *Castille v. Peoples*,[3] and *Dugger v. Adams*.[4]

Three years ago, the Supreme Court, for the first time in twenty-five years, gave notice that it intended to curtail the flood of federal habeas corpus petitions from state prisoners. It issued a quartet of opinions holding that an attorney's failure to raise a claim of trial error on appeal regardless of the reason for the default (short of ineffective assistance of counsel) would not constitute the "cause" required under a cause and prejudice standard to excuse counsel's failure in the state court.[5] A claim of ineffective assistance of counsel must first be presented to the state court as an independent ground before it may be pre-

* United States Magistrate, Philadelphia.

[1] 109 S. Ct. 1038 (1989).

[2] 109 S. Ct. 1060 (1989).

[3] 109 S. Ct. 1056 (1989).

[4] 109 S. Ct. 1211 (1989).

[5] Murray v. Carrier, 477 U.S. 478 (1986); see also Ledewitz, "Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence," 24 Crim. L. Bull. 379 (1988).

sented to the federal court and only after state remedies have been exhausted. In *Smith v. Murray*,[6] the Court found that the petitioner had not carried his burden of showing cause and prejudice for the noncompliance by his counsel with the Virginia appellate rules that require that all errors must be raised on direct appeal. In addition to these two procedural default decisions, the Court held in *Kuhlmann v. Wilson*[7] and *Darden v. Wainwright*[8] that a colorable claim of factual innocence must be asserted to cause the federal court to find that the ends of justice require it to consider the petitioner's state petition when state remedies have not been exhausted.

Improper Use of Peremptory Challenges

Of the four recent decisions, *Teague v. Lane*[9] is probably the most startling and far-reaching curtailment of the state prisoner's access to the "Great Writ." In *Teague*, the prosecutor used all ten of his peremptory challenges to exclude blacks from the petit jury. The defendant's attorney had objected and moved unsuccessfully for a mistrial on two occasions arguing that the defendant was " 'entitled to a jury of his peers.' "[10] The prosecutor argued that his challenges were an attempt to achieve a balance of men and women on the jury. The defendant was convicted of attempted murder and other offenses by an all-white jury. Thereafter, he filed an unsuccessful state court appeal in which he argued that the prosecutor's use of peremptory challenges denied him the right to be tried by a jury that was representative of the community.

The appeal was denied, and the petitioner sought federal habeas corpus relief and repeated his fair-cross-section-of-the-community claim. The defendant also argued for the first time that under *Swain v. Alabama*,[11] a prosecutor could be questioned about his use of peremptory challenges once he volunteered an explanation. The district court denied relief and held

[6] 477 U.S. 527 (1986).

[7] 477 U.S. 436 (1986).

[8] 477 U.S. 168 (1986).

[9] 109 S. Ct. 1060 (1989).

[10] *Id.* at 1062.

[11] 380 U.S. 202 (1965).

that it was bound by *Swain* and other Seventh Circuit precedent. On appeal, a panel of the court of appeals agreed with the defendant-petitioner that the Sixth Amendment fair cross-section requirement, applicable to a jury venire, also applied to a petit jury and held that the petitioner had made out a prima facie case of discrimination. The court of appeals, however, voted to rehear the case en banc and postponed the hearing until after the Supreme Court decision was rendered in *Batson v. Kentucky*.[12] Thereafter, a decision was handed down in *Batson,* which overruled a portion of *Swain* and held that a defendant can establish a prima facie case by simply showing he is "a member of a cognizable racial group" and the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race. These "facts" and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race.[13]

Relief was denied as a result of the court of appeals' determination that the *Batson* rule was not to be applied retroactively because, in the interim, the Supreme Court decided *Allen v. Hardy,*[14] which held that *Batson* could not be applied retroactively to cases on *collateral review.* In addition, the court of appeals held that the petitioner's *Swain* claim was procedurally barred and was without merit, since the fair cross-section requirement was restricted to the jury venire.

The Supreme Court in *Teague v. Lane,* in Parts I and II of an opinion authored by Justice O'Connor, held that *Allen v. Hardy* prevented the petitioner from benefiting from the rule announced in *Batson,* since his conviction became final before *Batson* was decided. Furthermore, in Part III, the Court held that the petitioner was procedurally barred from raising the *Swain* claim that he had established a violation of the equal protection clause, since he did not raise the *Swain* claim at trial or on direct appeal and forfeited review of the claim in collateral proceedings in the state court. Therefore, under *Wainwright v.*

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[12] 476 U.S. 79 (1986); see Acker, "Exercising Peremptory Challenges After *Batson,*" 24 Crim L. Bull. 187 (1988).

[13] Batson, 476 U.S. at 96.

[14] 478 U.S. 255 (1986).

Sykes,[15] he was barred from raising the claim in a federal habeas corpus proceeding, since he made no attempt to show cause for his default and the Illinois appellate court did not address the *Swain* claim.

In Parts IV and V of the plurality opinion, Justice O'Connor was joined by the Chief Justice and Justices Scalia and Kennedy in holding that retroactivity is a *threshold question* in determining when a new constitutional rule of criminal procedure will be applied to the defendant in the case announcing the rule and that evenhanded justice requires that it be applied retroactively to all who are similarly situated. In so holding, the Court reasoned that the retroactivity of a new constitutional rule of criminal procedure would not be applied on collateral review with habeas corpus as the vehicle, unless the rule would be applied retroactively *to all defendants* on collateral review through one of two articulated exceptions set forth by Justice Harlan in *Mackey v. United States*.[16] The Court held further that a rule requiring petit juries to be composed of a fair cross-section of the community would not be a "bedrock procedural element" that would be retroactively applied under the second *Mackey* exception.[17]

Justice White agreed to the nonretroactivity of the fair cross-section rule in collateral proceedings and to the holding that retroactivity of new constitutional rules of criminal procedure will be restricted to all cases pending on direct review.[18] Justice Stevens, joined by Justice Blackmun, determined that the petitioner had alleged a Sixth Amendment violation and the Court should decide the question in his favor, but that the conviction should not be set aside as a matter of *stare decisis*, since the Court's opinion in *Allen v. Hardy* controlled the disposition of the retroactivity question.[19] Justice Stevens also concluded

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[15] 433 U.S. 72 (1977).

[16] 401 U.S. 667, 692-693 (1971). Two suggested exceptions to the general rule that constitutional rules of criminal procedure should not be applied retroactively to cases on collateral review were (1) if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe" or (2) if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' "

[17] Teague, 109 S. Ct. at 1077.

[18] *Id.* at 1078-1079.

[19] 478 U.S. 255 (1986).

that because the petitioner's *Swain* claim had not been exhausted in the state court, it was not ripe for review on federal habeas corpus.

Justices Brennan and Marshall, the dissenters in *Teague,* were considerably disturbed by the new condition to the determination of a constitutional claim, which would require that it meet one of the two exceptions set forth by Justice Harlan in *Mackey.*[20] Furthermore, the dissent was surprised that the retroactivity issue was raised only in an amicus brief and the Court had not given an opportunity for full briefing and argument.

In reaching its conclusion, the Court acknowledged that "our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review."[21] The result is a cart-before-the-horse analysis: A new constitutional rule of criminal procedure will not be found until it is determined to be applicable to all defendants on collateral review. This approach serves to limit the availability of such new procedures to those "so central to an accurate determination of innocence or guilt."[22]

"Plain Statement" Rule

The Supreme Court approached the procedural default analysis in a less neoteric fashion in *Harris v. Reed.*[23] In that case, the petitioner's state court murder conviction was affirmed by the Appellate Court of Illinois on direct appeal after the petitioner challenged only the sufficiency of the evidence. Following direct appeal, the petitioner's postconviction application, in which he alleged the ineffective assistance of trial counsel in several respects (including the failure to call alibi witnesses), was dismissed. The denial of relief was affirmed by the appel-

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[20] 109 S. Ct. at 1086.

[21] *Id.* at 1076; see, e.g., Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (a successive habeas petition may be entertained only if a defendant makes a "colorable claim of factual innocence"); Murray v. Carrier, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

[22] 109 S. Ct. at 1077.

[23] 109 S. Ct. 1038 (1989).

late court once again. Although the appellate court referred to the "well settled" Illinois principle that claims not presented on direct appeal were considered waived, the state court nevertheless went on to consider and reject the claim of ineffective assistance of counsel on the merits.

Turning to the federal court, the petitioner filed a habeas corpus petition and pressed his claim of ineffective assistance of counsel. The district court determined that *Wainwright v. Sykes* would have barred federal consideration of the claim had the state appellate court found waiver under state law. The district court, however, held that there had been no waiver decision, whereupon the court considered the claim on its merits and dismissed it. Thereafter, the U.S. Court of Appeals held that it was precluded from reviewing the merits of the claim because it believed the claim to be procedurally barred. The court of appeals found that the Illinois appellate court's order was ambiguous on the waiver question, but the court of appeals nevertheless concluded that it was bound by the order's " 'suggest[ed]' . . . intention 'to find all grounds waived except that pertaining to the alibi witnesses.' "[24]

In an opinion rendered by Justice Blackmun, the Supreme Court concluded that the *Sykes* procedural default rule "has its historical and theoretical basis in the 'adequate and independent state ground' doctrine."[25] Whether a state court's reference to state law constitutes an adequate and independent state ground for its judgment requires that the last state court rendering a judgment " 'clearly and expressly' "[26] state that its judgment rests on a state procedural bar. The federal courts may reach the federal question on review unless the state court's opinion contains a *plain statement* that its decision rests on adequate and independent state grounds.[27]

The Court further explained its holding by stating that the rule applies "only when a state court has been presented with the federal claim, as will usually be true given the requirement that a federal claimant exhaust state court remedies before raising a claim in the federal habeas petition."[28] The Court contin-

[24] Harris, 109 S. Ct. at 1041.

[25] *Id.* at 1042.

[26] *Id.* at 1043 (citing Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)).

[27] *Id.*

[28] *Id.* at 1060. See 28 U.S.C. § 2254(b).

ued: "Of course, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred."[29] By citing *Castille* and *Teague* in footnotes, the Court intertwined two of its contemporaneous opinions in support of this state procedural bar rule.

"Fair Presentation" Requirement Not Met

In *Castille v. Peoples*,[30] the petitioner, who had been convicted of arson after he robbed a man and set him afire, submitted a pro se petition for allocatur to the Supreme Court of Pennsylvania and requested appointment of counsel. Under Pennsylvania procedure, the appeal would "be allowed only when there are special and important reasons therefor."[31] The Pennsylvania supreme court granted the request for counsel without reaching the merits of the claim presented. Peoples, then represented by counsel, submitted a second petition for allocatur in which he raised some, but not all, of the claims he had raised pro se. Thereafter, the Pennsylvania supreme court denied the second petition without an opinion.

The petitioner then submitted a federal petition for a writ of habeas corpus, which was denied for failure to exhaust state remedies. On appeal, the U.S. Court of Appeals held that the exhaustion rule was satisfied, since the state courts had an opportunity to pass upon and correct the alleged violations of the federal constitutional rights.

In an opinion by Justice Scalia, the United States Supreme Court held that the claim had been presented for the first and only time in a procedural context in which its merits were not considered under Pennsylvania law unless " 'there are special and important reasons therefor,' Pa. Rule App. Proc. 1114. Raising the claim in such a fashion does not, for the relevant purpose, constitute 'fair presentation.' "[32]

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[29] Harris, 109 S. Ct. at 1043 n.9 (citing Castille v. Peoples, 109 S. Ct. 1056, 1060 (1989) (slip op. 5); Teague v. Lane, 109 S. Ct. 1060, 1067-1068 (1989) (plurality opinion).

[30] 109 S. Ct. 1056 (1989).

[31] Pa. R.A.P. 1114.

[32] Castille, 109 S. Ct. at 1060 (referring to *Ex Parte* Hawk, 321 U.S. 114 (1944), and Pitchess v. Davis, 421 U.S. 482 (1975)).

In reversing the court of appeals, the opinion concludes:

> It follows from what we have said that it was error for the Court of Appeals to rest a conclusion of exhaustion upon respondent's presentation of his claims in petitions for allocatur. The requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pensylvania law.[33]

Prior Existence of Basis of State Relief

In the last of the four cases discussed here, *Dugger v. Adams,*[34] the petitioner was convicted of first-degree murder after the trial judge erroneously instructed all prospective jurors on their responsibility for the sentence. He told the jurors that their recommendations would only be advisory and that he had the final responsibility for imposition of sentence. This was incorrect under the law of Florida, since the Supreme Court of Florida held that a "trial judge could only override the jury's verdict if the facts were 'so clear and convincing that virtually no reasonable person could differ.' "[35] Defense counsel did not object to the instructions at trial, and he did not allege on direct appeal or on postconviction review that the foregoing instructions were improper. He also failed to allege in an unsuccessful federal petition for habeas corpus that this claim was constitutionally based.

Thereafter, the United States Supreme Court decided *Caldwell v. Mississippi*[36] and held that a prosecutor's remarks that misinform a jury in a capital case violated the Eighth Amendment. Thereafter, based on *Caldwell,* Adams filed another postconviction motion in the state court challenging, for the first time, the instructions in question and urging that they violated the Eighth Amendment by misinforming the jury of their sentencing role under Florida law. The Florida supreme court refused to address the argument because the defendant had failed to raise it on direct appeal. Adams then returned to the federal court and filed a second federal habeas petition,

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[33] *Id.*

[34] 109 S. Ct. 1211 (1989).

[35] Tedder v. State, 322 So. 2d 908, 910 (1975) (per curiam).

[36] 472 U.S. 320 (1985).

which the district court held to be procedurally barred. The court of appeals reversed and determined that the claim was so novel at the time of Adams's trial, sentencing, and appeal that its legal basis was not reasonably available at that time and that Adams had therefore established cause for his procedural default.

The Supreme Court, through Justice White, reasoned that the *Caldwell* decision did not provide cause for the respondent's procedural default. Adams had available to him a state claim that the instructions in question violated state law and did not object to them at trial or challenge them on appeal. As a result, Florida law barred Adams from raising the issue in the state proceedings. Since the respondent offered no excuse for his failure to challenge the instructions on state law grounds, there was none that would amount to good cause in a federal habeas corpus proceeding. In effect, the Court determined that the prior existence of the basis for state relief rendered the novelty of the constitutional basis for the later *Caldwell* claim to be nonexistent and unavailable to provide federal relief when the claim was not presented initially to the state court.

Conclusion

These decisions demonstrate the decreasing flexibility of the federal petition for a writ of habeas corpus, which has lately been strictly limited to those constitutional violations that have been fully and fairly presented for review to the state courts on the same factual and legal basis on which they are later submitted to the federal courts. Undoubtedly, there will be a marked increase in denials of relief for state procedural defaults in addition to the usual denials for failure to exhaust state remedies that presently prevail in the disposition of state prisoners' habeas corpus applications.

It is apparent that these decisions presage the streamlining of the habeas corpus procedure sought by the Chief Justice in his address to the American Bar Association concerning the unending number of death penalty appeals that are presented to the Court for review.[37] Perhaps the Court is also sending a mes-

[37] On February 7, 1989, Chief Justice Rehnquist addressed the midyear meeting of the American Bar Association and discussed the topic of habeas reform. The Chief Justice stated the following:

sage to the Federal Courts Study Committee to develop new threshold review procedures that will stem the tide of state prisoner petitions containing procedural defaults before they reach judicial consideration of the merits. A cooperative approach with the National Center for State Courts could also result in a uniform petition proposed for use in state collateral review proceedings that would require petitioners to set forth the basis for *federal* as well as state relief in all state postconviction proceedings. This would go a long way toward reducing the work load of federal judges in searching the entire state court record to determine whether the federal grounds have been fairly presented to the state courts for review.

> The flaw in the present system is not that capital sentences are set aside by federal courts, but that litigation ultimately resolved in favor of the state takes literally years. . . . [T]he time elapsed between the commission of the crime and the date of execution in capital murder cases averages 8 years nationally, and more than 13 years in some states. . . . I am sure that committees studying this question will come up with useful suggestions as to how this problem may be solved. I think if we give the states an incentive to provide counsel for habeas petitioners, and require that all federal claims be consolidated in one petition and filed within a reasonable time after the conclusion of direct review, the system will be considerably improved.

21 Third Branch 6 (Feb. 1989).