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A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys

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ARTICLES

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Recent United States Supreme Court decisions have dramatically restricted the power of the United States District Courts to review state court criminal convictions. The trend in the Court's decisions is to elevate technical performance above substance in the evaluation of claims of federal rights violations. This trend has resulted in an increased demand upon state trial and appellate counsel to properly preserve and develop both legal and factual grounds supporting claims of constitutional error. The purpose of this article is to provide practitioners with an overview of recent developments in federal habeas corpus law and their impact on the conduct of state court criminal litigation and subsequent federal habeas litigation.

Federal habeas corpus is, of course, a statutorily created remedy[1] that may be expanded or restricted by legislative action.[2] However, while Congress has disputed habeas corpus "reform" this past year within debate over a comprehensive crime package,[3] the Supreme Court

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1. 28 U.S.C. § 2254 (1988).

2. See, for example, Justice O'Connor's discussion of legislative action applicable to interpretation of congressional intent with respect to a significant component (i.e., deference to state fact-finding) of federal habeas review of state court judgments in part III of her dissenting opinion in Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1725-27 (1992) (O'Connor, J., dissenting).

3. The last congressional session included legislation approved by the House, H.R. 3371, 102d Cong., 1st Sess. (1991), and by the Senate, S. 2305, 102d Cong., 2d Sess. (1991), which sought to limit state inmate access to federal review through the application for federal writ of habeas corpus. The House version contained a provision particularly troubling to defense counsel

has moved to implement its own set of "reforms," streamlining and, in some sense, rationalizing the habeas corpus remedy.[4] State trial, appellate, and post-conviction counsel, as well as counsel representing federal habeas petitioners, must be aware of the Court's approach to federal relief to properly represent their clients in criminal matters.

Today, the federal habeas corpus remedy continues to allow many defendants the option of seeking federal review of state court disposition of their federal constitutional complaints.[5] However, it contains numerous pitfalls for unwary attorneys and their clients that serve principally to frustrate litigation of meritorious claims. The focus of this article is simply to alert counsel to the requirements that recent decisions impose upon them and to suggest further dangers the writ may face in cases on the docket for the October 1992 term.

The framework for discussion flows from a general characterization of the remedy as it now exists: Generally, a state inmate may assert claims of federal constitutional rights violations occurring during the state court trial in a single petition in which all claims asserted have previously been litigated in state proceedings.[6] The state court's application of the bar of procedural default based on state procedural grounds generally will serve to bar federal review of these federal claims.[7] The federal habeas court will dismiss successor petitions upon assertion of the defense of abuse of the writ unless the petitioner can demonstrate one of three things: (1) that failure to raise the claim resulted from some cause external to or beyond his control, such as prosecutorial misconduct;[8] (2) that he is actually innocent of the crime for which he has been convicted;[9] or (3) that he is innocent of an

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which would have required federal habeas courts to defer to state disposition of federal constitutional claims rendered after full and fair adjudication. The Conference Committee report, H.R. CONF. REP. No. 405, 102d Cong., 1st Sess. 18 (1992), reflected the Senate version which omitted the requirement of deference to state court determinations of federal constitutional claims rendered after full and fair adjudication. The Congressional debate ended when the Senate failed to pass the compromise bill, prompting the New York Times to decry a perceived lobbying effort by Chief Justice Rehnquist in support of the Senate version. *The High Court v. Habeas Corpus*, N.Y. TIMES, Jan. 4, 1992, at A18.

4. *See* Marcia Coyle, *Back to the Future: The Justices Re-Examine the Habeas Corpus Writ*, 14 NAT'L L.J., Feb. 17, 1992, at 1, 52-53.

5. *See* Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (Federal habeas corpus is available to review claims based on "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.").

6. *See* Rose v. Lundy, 455 U.S. 509, 520 (1982) (holding state defendant's petition containing exhausted and unexhausted claims must be dismissed by federal habeas court).

7. Coleman v. Thompson, 111 S. Ct. 2546, 2553-54 (1991); Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

8. McCleskey v. Zant, 111 S. Ct. 1454, 1470-71 (1991).

9. Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

aggravating circumstance supporting imposition of the death sentence.[10] Finally, once state court litigation has resulted in creation of a factual record on the claim, the federal habeas court will be bound by that record unless the petitioner can demonstrate cause for the failure.[11] This virtually requires a showing that state officials have deprived the petitioner of a fair opportunity to develop the evidentiary record necessary to support the claim because default by the petitioner or his counsel will not suffice to establish "cause" in these circumstances.[12]

To properly preserve the criminal defendant's ultimate option of filing for federal review, defense counsel must be cognizant of the procedural context in which claims of federal violations must be presented at each stage in the litigation.

A. Preservation of Federal Constitutional Error in State Trials

The provision of effective assistance of counsel includes the duty placed upon the defense lawyer to preserve claims of error for appellate review.[13] Counsel discharges this duty by asserting a claim of violation of constitutional guarantees, statutory rights, or directives of procedural rules.[14] Typically, these claims may be asserted in the pre-trial process by written motion;[15] by interposing a timely objection during the course of trial to the admission[16] or exclusion of evidence or to restriction of examination;[17] or by objecting to improper argument.[18]

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10. Sawyer v. Whitley, 112 S. Ct. 2514, 2518-19 (1992) (noting that inmate sentenced to death may raise claims in successor petition only if inmate can meet cause and prejudice test or can demonstrate that he is "innocent" of factor used to impose death penalty).

11. *Id.* at 2518-19 (holding that inmate sentenced to death may raise claims in successor petition only if inmate can meet cause and prejudice test or can demonstrate that he is "innocent" of factor used to impose death penalty).

12. Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1721 (1992).

13. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 379-80 (1986) (holding ineffective assistance claim may be predicated on counsel's failure to seek exclusion of illegally seized evidence).

14. For example, in State v. Roper, the court held that a trial court must grant severance of counts in the indictment upon timely motion when severance is required by procedural rule. 682 P.2d 464, 466-68 (Ariz. Ct. App. 1984).

15. The defendant's failure to move to quash or dismiss a defective indictment pursuant to Arizona Rule of Criminal Procedure 13.5 results in a waiver of any attack on the sufficiency of the charging instrument on appeal. State v. Rupp, 586 P.2d 1302, 1308-09 (Ariz. Ct. App. 1978).

16. *See, e.g.*, State v. Williams, 533 P.2d 1146, 1150 (Ariz. 1975) (holding trial court erred in admitting statements relating to collateral matters for use in impeaching defense witness).

17. *See, e.g.*, State v. Melendez, 588 P.2d 294, 296-97 (Ariz. 1978) (holding trial court improperly restricted cross-examination as to witness's motive to testify to avoid death penalty prosecution).

18. *See, e.g.*, State v. Ikirt, 770 P.2d 1159, 1164-65 (Ariz. 1987), *cert. denied*, 493 U.S. 872 (1989) (holding prosecutor's remarks concerning defendant's statements to his mother improperly

Preservation of certain claims may require the filing of post-judgment motions. Examples include motions for new trial based on jury misconduct during deliberations,[19] or prosecutorial misconduct such as suppression of favorable evidence or reliance on perjured testimony.[20] Often, facts supporting this type of claim are disclosed to defense counsel only after conviction, despite exercise of due diligence.[21] Regardless of the nature of the claim, or the basis upon which the right is asserted, the most general rule of preservation of error is that claims not timely submitted for ruling by the trial court are deemed waived—subject to an exception for fundamental or plain error recognized in some jurisdictions.[22]

The same general rules apply to preservation of federal constitutional claims and claims arising under federal laws or treaties, the only class of claims subject to litigation by application for the federal writ of habeas corpus by state criminal defendants.[23] Because such claims are almost inextricably interwoven in the state investigative and trial process,

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commented on defendant's decision not to testify); State v. Van Den Berg, 791 P.2d 1075, 1079-80 (Ariz. Ct. App.), *review denied* (1990) (holding that prosecutor erred in arguing personal opinion of guilt, but error waived because of lack of objection).

19. *See* State v. Hansen, 751 P.2d 951, 955-56 (Ariz. 1988) (holding brief discussion of defendant's prior trial during deliberations inconsequential because verdict not mentioned); State v. Aguilar, 818 P.2d 165, 165-67 (Ariz. Ct. App.), *review denied* (1991) (motion for new trial proper vehicle for asserting claim of jury misconduct based on reception of information or evidence from outside sources during trial or deliberations).

20. *See generally* State v. Fowler, 422 P.2d 125, 128 (Ariz. 1967) (failure to disclose knife found at scene of homicide constitutes misconduct because state's theory at trial was that deceased was unarmed). *But see* State v. Taylor, 537 P.2d 938, 954 (Ariz. 1975) (holding claims of subornation of perjury should be presented in collateral proceeding and not by motion for new trial; claim of newly discovered evidence is proper ground for motion for new trial).

21. For example, in State v. Van Den Berg, the court held that the defendant exercised due diligence in employing an investigator who learned of witness's prior juvenile record after the trial, when the prosecution had previously represented that the testifying witness had no prior record, and defense counsel had relied on the prosecutor's representations. 791 P.2d 1075, 1077-79 (Ariz. Ct. App. 1990).

22. For example, the Federal Rules of Criminal Procedure recognize reviewability of some unobjected-to errors in particularly egregious situations, providing, in pertinent part:

> (b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

FED. R. CRIM. P. 52(b). Similarly, the Federal Rules of Evidence provide:

> (d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

FED. R. EVID. 103(d).

23. A federal court "shall 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.*" 28 U.S.C. § 2254(a) (1977) (emphasis added).

state criminal proceedings provide an appropriate forum for initial litigation of many of the most significant federal constitutional issues.[24] Counsel must be cognizant of those protections afforded state criminal defendants by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Preservation of federal constitutional error requires timely assertion of these claims in language adequate to alert state trial and appellate judges of the source of authority upon which counsel and the accused intend to rely in pressing these claims.[25]

Generally, defense counsel should be aware that preservation of error for federal habeas purposes involves consideration of a number of factors that affect the conduct of the state trial, the direct appeal, and any state post-conviction litigation that precedes the federal petition.[26]

1. State Procedural Rules and Preservation of Federal Claims

At the outset, defense counsel must recognize that preservation of federal constitutional error is governed by state procedural rules relating to timely and adequate assertion of error at trial.[27] Federal rights violations may substantially prejudice the rights of the client, often outweighing the prejudice created by other investigative and trial error. However, the significance of the rights violation, when established, will not alter the requirements for proper preservation of error.[28] Last term,

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24. As the Court observed:

> The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia. See 7 State Court Journal, No. 1, p. 18 (1983). By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year. See Annual Report of the Director of the Administrative Office of the United States Courts 6 (1982). The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of "federal law" in the process. It is not surprising that this Court has become more interested in the application and development of federal law by state courts in light of the recent significant expansion of federally created standards that we have imposed on the States.

Michigan v. Long, 463 U.S. 1032, 1043 n.8 (1983).

25. In fact, subsections (b) and (c) of § 2254 mandate that state court defendants first assert federal claims in their state court proceedings.

26. Arizona provides that defendants may initiate state post-conviction litigation after conclusion of the direct appeal to assert claims that could not have been litigated on direct appeal. ARIZ. R. CRIM. P. 32.1; State v. Williams, 819 P.2d 962, 964 (Ariz. Ct. App. 1991) (holding ineffective assistance claims should be raised collaterally under Rule 32, rather than by motion for new trial).

27. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

28. The only recognized exceptions to the preservation requirement involve error that contributes to the conviction of an innocent person, resulting in a fundamental miscarriage of justice;

in *Coleman v. Thompson*,[29] the Court affirmed its basic commitment to respect for orderly state process. The Court held that if a state court applies the bar of procedural default when initially presented with a federal constitutional claim, federal courts will subsequently be barred from consideration of the claim.[30]

State trial counsel's failure to preserve federal constitutional claims will not be excused unless counsel's representation is constitutionally deficient under the standard for Sixth Amendment effectiveness announced in *Strickland v. Washington*.[31] Prior to *Coleman* and its predecessor, *Wainwright v. Sykes*,[32] the Court in *Fay v. Noia*[33] had held that counsel's failure could serve as cause for a federal habeas court to disregard state procedural default rules and reach the issue on the merits, unless the failure resulted from a deliberate attempt to bypass state procedure in favor of pursuing relief by federal habeas corpus.[34] However, in *Coleman*, the Court expressly overruled *Fay v. Noia* in rejecting reliance on this doctrine of "deliberate bypass." [35]

In *Murray v. Carrier*,[36] the Court concluded that a showing that counsel rendered constitutionally ineffective assistance to a state court defendant may serve to excuse state procedural default.[37] Thus, the net effect of recent decisions is likely to increase the stakes for trial counsel in effectively representing state court defendants because counsel cannot avoid application of the procedural bar short of a showing of ineffectiveness.[38] Consequently, the need to assert a claim of constitutional ineffectiveness to save a procedurally defaulted claim from the *Coleman* bar may become apparent in more cases.

State defense counsel must, therefore, be aware that failure to preserve an accused's federal constitutional claims will bar those claims

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that results from factors beyond the control of the defendant and counsel, such as misconduct on the part of the state; or that results from ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 495-96 (1986). Competent counsel's mere inadvertent failure to preserve error or to recognize a legally meritorious issue is not sufficient to warrant relief from the procedural default. *Id.* at 487-88.

29. 111 S. Ct. 2546 (1991).

30. *Id.* at 2565.

31. 466 U.S. 668, 686 (1984).

32. 433 U.S. 72, 87 (1977).

33. 372 U.S. 391, 437-39 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546, 2564-65 (1991).

34. 372 U.S. at 437-39.

35. 111 S. Ct. at 2564-65.

36. 477 U.S. 478 (1986).

37. *Id.* at 492.

38. *See Murray*, 477 U.S. at 487-88. Mere inadvertence or strategic error made by competent counsel is insufficient to avoid the bar of procedural default. *Id.*

from federal habeas review if state appellate courts apply procedural rules to hold those claims defaulted.[39] The Court has provided only the route of asserting ineffective assistance of counsel to avoid procedural bar to federal review of those claims,[40] except in circumstances where refusal to review the federal claim would result in a miscarriage of justice, such as conviction of an innocent defendant.[41] Thus, trial and appellate counsel should be prepared to properly defend their clients' federal constitutional rights at all steps of state proceedings to avoid being accused of ineffectiveness later.

2. Assertion of State Law Claims

Consideration of state law claims, whether grounded in state constitutional guarantees, statutory provisions, or rules, is not within the jurisdiction of federal reviewing courts.[42] State court counsel must, however, be concerned about proper preservation of these claims.[43] The development of independent state law grounds for disposition of criminal procedure complaints has seen rapid and widespread growth over

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39. Moreover, in Ylst v. Nunnemaker, the Court rejected the argument that a state appellate court not expressly addressing a claim of federal rights violation impliedly refused the claim on the merits. 111 S. Ct. 2590, 2594 (1991). The state court of appeals decision indicated that that court had refused to consider the federal claim because of procedural default. *Id.* at 2593. The United States Supreme Court held that, absent a subsequent express consideration and disposition of the federal claim on the merits, a federal habeas court lacks jurisdiction to entertain the claim. *See id.* at 2594-96. The Court declined to consider the silent state appellate opinion as presumptively disposing of the federal claim on the merits. *Id.*

40. For example, in Smith v. Murray, the Court held that competent counsel's decision not to raise an issue regarding admissibility of expert psychiatric testimony was a matter of strategy that would not excuse application of a procedural default bar by the state appellate courts. 477 U.S. 527, 534-35 (1986). Ultimately, the state procedural default precluded federal review of the claim that the evidence had been admitted in violation of Estelle v. Smith, 451 U.S. 454 (1981). *Smith v. Murray*, 477 U.S. at 533-34.

41. Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

42. Lewis v. Jeffers, 497 U.S. 764, 780-81 (1990) (holding that federal court may review violations of state law only insofar as they raise federal claims; rejecting claim that the Arizona Supreme Court had incorrectly applied state law in relating evidence to aggravating circumstance charged).

43. *See, e.g.*, State v. Roscoe, 700 P.2d 1312, 1326 (Ariz. 1984). Confronted by federal constitutional law rejecting the contention that jury sentencing in capital cases was mandated by the Eighth Amendment, Spaziano v. Florida, 468 U.S. 447 (1984), defense counsel presented the jury sentencing argument as one arising under the state constitution. *Id.* at 1326. The Arizona Supreme Court rejected the claim that the Arizona constitutional right to jury trial included in article 2, § 23, incorporated jury sentencing in capital cases because jury sentencing in capital cases was the practice at the time of adoption of state constitution. *Id.* Instead, the court held that the constitutional guarantee simply incorporated the common law right to jury trial, which included jury consideration only of the question of the accused's guilt or innocence. *Id.* The court thus upheld the judge-imposed sentence of death in the case. *Id.*

the past decade. State[44] and federal[45] jurists, practitioners, and commentators[46] have lamented an apparent retreat from the posture of expansion of individual rights often claimed to characterize the Warren Court, but probably also accurately reflecting majorities of the early Burger Court. Disposition of claims on state law grounds has proved the most important vehicle for avoiding further retrenchment on the part of the Supreme Court, particularly in individual cases, because expansion of state law grounds for decision has deprived the Court of jurisdiction to reverse determinations that are favorable to criminal defendants.

In response to state appellate court activism, the Supreme Court in *Michigan v. Long*[47] established a doctrine of presumptive jurisdiction to review state court determinations of federal constitutional claims[48] that either rest directly on interpretation of the federal charter or draw upon federal authority, even when those claims do not rest expressly on federal constitutional decisions, as a basis for decision.[49] Unless a

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44. *See generally* Stanley G. Feldman & David L. Abney, *Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115 (1988); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984). Authors Feldman and Utter were serving as justices on the Arizona and Washington Supreme Courts, respectively, at the time their articles were published.

45. *See generally* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (written while former Associate Justice William Brennan was still a member of the Supreme Court). In addition, see Justice Brennan's foreword to the *Symposium on the Arizona Constitution*, 20 ARIZ. ST. L.J. i (1988).

46. *See, e.g.*, Ronald K. L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981); Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 151, 171-76 (1988) (focusing on developments in Arizona state constitutional law); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 421-26 (1973-74).

47. 463 U.S. 1032 (1983).

48. *Id.* at 1041.

49. In pre-*Long* decisions, the Court had concluded that the failure of a state appellate opinion to expressly base its ruling on state law sources when disposing of a claim arising under both federal and state constitutions would afford the Court a basis for review. For example, in Delaware v. Prouse, the Court concluded that, although the Delaware Supreme Court's reference to both state and federal constitutions might have been construed to show that the decision rested on non-federal sources of law, that intent was not clearly present in the language of the decision. 440 U.S. 648 (1979). Thus, the Supreme Court proceeded with review on the merits. *Id.* at 651-52. Similarly, in Oregon v. Hass, the Court concluded that the state court relied on federal precedent in determining admissibility of a confession because the lower court's opinion cited no sources of state law, and the Court proceeded with review. 420 U.S. 714, 719-20 (1975). And in Oregon v. Kennedy, the Court declined to find that the state court's disposition actually rested on independent state grounds where the state precedent cited relied on interpretation of federal constitutional guarantees. 456 U.S. 667, 670-71 (1982).

reviewing state court expressly relies upon state law as an adequate and independent basis for decision,[50] a ruling favorable to the accused may ultimately be reversed by Supreme Court intervention. Of course, this action will necessarily occur on writ of *certiorari* to the state court filed by the prosecution,[51] and not on writ of habeas corpus, because the right to apply for habeas relief belongs only to an inmate in custody as a result of the state conviction.[52] Nevertheless, because counsel must be aware of the need to insulate favorable appellate rulings from further review on petition by the state, it is important for state trial and appellate counsel to assert and urge as independent theories for review the federal and state law provisions upon which the accused can arguably rely.

The utility of asserting both federal and state constitutional claims is demonstrated by the Michigan Supreme Court's recent disposition of a state constitutional claim. In *Harmelin v. Michigan*,[53] the United States Supreme Court determined that a mandatory life sentence imposed for possession of certain quantities of controlled substances did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.[54] The Court's decision overruled its prior holding in *Solem v. Helm*[55] because the majority concluded that the Eighth Amendment proportionality analysis relied upon by the court below was not grounded in sound constitutional doctrine.[56] Instead, the majority held that the Eighth Amendment did not prohibit imposition of a life sentence for the offense under consideration.[57]

Subsequently, however, the Michigan Supreme Court concluded that the state constitution did, in fact, prohibit imposition of such a disproportionate penalty, affording the defendant relief in *People v.*

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50. *Long*, 463 U.S. at 1041 ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent state grounds, we, of course, will not undertake to review the decision.").

51. For example, the State sought review in Michigan v. Long, 463 U.S. 1032 (1983); Oregon v. Kennedy, 456 U.S. 667 (1982); Delaware v. Prouse, 440 U.S. 648 (1979); and Oregon v. Hass, 420 U.S. 714 (1975).

52. 28 U.S.C. § 2254(a) provides that federal courts "shall 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." (emphasis added).

53. 111 S. Ct. 2680 (1991).

54. *Id.* at 2701-02.

55. 463 U.S. 277, 284-88, 303 (1983) (holding that life sentence without possibility of parole for recidivist whose prior convictions were all for property or petty crimes was "disproportionate" under the Eighth Amendment).

56. 111 S. Ct. at 2686-99.

57. *Id.* at 2701-02.

Bullock.[58] Thus, by asserting both state and federal claims as independent grounds for disposition, counsel for the accused effectively may preclude a federal determination that would deprive the client of relief initially granted by state appellate courts.

B. Presentation and Litigation of Federal Claims

To fully preserve federal claims for review by writ of habeas corpus, counsel in state proceedings must urge these claims on direct appeal, or, where appropriate, by state post-conviction writ.[59] The requirement that counsel include these claims in state appellate proceedings imposes a significant burden on appellate counsel obligated to develop a successful strategy for the appeal. Unless all federal claims are carried forward on direct appeal, or by post-conviction writ,[60] counsel must assume the risk that they will be barred from review by application of either the *Coleman* bar of procedural default or the rule of *Rose v. Lundy*[61] precluding federal court review of unexhausted federal claims.

1. Assertion of Federal Claims on State Direct Appeal

Clearly, counsel not only must preserve error by interposing timely objections during the pre-trial and trial process where violations of federally protected rights are implicated, but also must obtain a ruling from both the trial and appellate courts on the merits of the claim. Failure to press an objection or motion to formal ruling ultimately may result in a procedural bar to consideration of the claim when raised on direct appeal, while failure to press the claim on appeal may also result in a waiver of the contention, barring further review.[62]

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58. 485 N.W.2d 866, 872-77 (Mich. 1992).

59. Typically, the type of claim counsel may more appropriately assert by state post-conviction writ involves a matter that may not be fully developed factually in the appellate record, such as a claim of ineffective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 390-91 (1986); *accord*, State v. Williams, 819 P.2d. 962, 964 (Ariz. Ct. App. 1991) (holding that claim of ineffective assistance should be raised collaterally, rather than by motion for new trial).

60. Once a claim has been litigated to a ruling on the merits in a state direct appeal, the defendant need not reassert the same claim in state post-conviction proceedings to exhaust state remedies before presenting the claim in an application for a federal writ of habeas corpus. Brown v. Allen, 344 U.S. 443, 447 (1953).

61. 455 U.S. 509, 520 (1982).

62. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991) ("We now make [the rule] explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

State appellate counsel's obligation to provide effective assistance does not require counsel to present every conceivable, or even every colorable, issue for disposition on direct appeal.[63] The Supreme Court rejected the notion that an indigent accused was entitled to have all colorable claims litigated, even upon direct request to counsel, in *Jones v. Barnes*.[64] There, the majority noted the practice of presenting only those claims most likely to prove successful on direct appeal as a recognized tactic in making the most effective possible presentation of the case.[65] The Court reasoned that inclusion of points of error having little likelihood of success might well serve to distract an appellate court from the more persuasive grounds, or to dilute the impact of these potentially more successful points in the presentation.[66] Thus, the Court concluded that the strategy to be employed on direct appeal is to be determined by counsel in the exercise of counsel's professional judgment, rather than dictated by a seemingly non-professional preference of the client.[67]

Jones v. Barnes poses the problem that, in culling the points of error, counsel may jeopardize the client's opportunity for federal review of meritorious claims by concluding that certain claims are less likely to prove successful than other claims.[68] If those claims deemed most likely to succeed do fail to result in relief, then the client has lost the opportunity to pursue federal claims which might otherwise prove meritorious.

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63. However, a refusal to present a colorable claim urged by the defendant may subject counsel to a claim of ineffectiveness in the appellate representation. United States *ex rel.* Winters v. DeRobertis, 568 F. Supp. 1484, 1489 (N.D. Ill. 1983); *see also* United States *ex rel.* Winters v. Mizell, 644 F. Supp. 782, 792-93 (N.D. Ill. 1986) (subsequent disposition of the *DeRobertis* case, 568 F. Supp. at 1484, under a different name after denial of original writ for failure to exhaust state remedies).

64. 463 U.S. 745, 754 (1983).

65. *Id.* at 752-53. Chief Justice Burger referred to a number of prominent authorities in the field of appellate practice in observing that inclusion of all colorable claims in the brief on appeal tends to dilute the strength of the overall presentation and may obscure those claims most likely meritorious. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951); *see* ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 226-27 (2d ed. 1989); John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (Dec. 1940); John C. Godbold, *Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal*, 30 SW. L.J. 801, 809 (1976).

66. *Jones*, 463 U.S. at 753.

67. *Id.* at 751-54.

68. This type of strategic error on the part of otherwise competent counsel in assessing the likely merits of potential claims on appeal probably will prove fatal to attempts to seek federal review if the state appellate courts affirm. *See* Smith v. Murray, 477 U.S. 527, 533-34 (1986) (holding that procedural default resulting from deliberate decision not to pursue claim of error will not be excused if counsel was otherwise competent).

The classic example of strategic error in the presentation of federal claims is illustrated by the procedural history of the constitutional claim in *Caldwell v. Mississippi*.[69] There, trial counsel in a capital case had objected to an improper prosecutorial argument that deemphasized the sentencing jury's role in the process.[70] In effect, the prosecutor told the jurors that if they erred in imposing the death sentence, that error would be corrected on appeal.[71]

The issue was not urged on direct appeal.[72] However, the Mississippi Supreme Court alluded to the issue, concluding that the argument either was not improper, or if improper, was not sufficiently harmful to warrant reversal.[73] The United States Supreme Court then addressed the issue on Caldwell's petition for writ of *certiorari*, and a majority of the Court concluded that the argument contributed to imposition of a death sentence in violation of the Eighth Amendment.[74] Thus, a claim that the state court could have deemed defaulted because appellate counsel decided not to pursue the issue on direct appeal ultimately proved meritorious. The result suggests the value of presenting and urging all issues that raise claims of federal rights violations—particularly in capital cases.[75]

2. The Importance of a Disposition of the Federal Claim

Caldwell demonstrates not only the potential disaster in applying the *Jones* majority's advice without deference to rules regarding preservation of federal claims, but also the significance of obtaining a ruling on the merits of the federal claim in state proceedings. Unless a state court simply refuses to consider a federal issue or fails to address a properly preserved federal claim on its merits,[76] failure to obtain a

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69. 472 U.S. 320 (1985).

70. *Id.* at 324-25.

71. *Id.* at 325-26 (The prosecutor also stated his belief that automatic review of the death sentence by the state supreme court was "unfair.").

72. *Id.* at 326-27.

73. Caldwell v. State, 443 So. 2d 806, 807 (Miss. 1983).

74. 472 U.S. at 341.

75. The *Caldwell* Court observed that the Mississippi Supreme Court had adopted a policy of relaxing application of the procedural default rule in capital cases. *Id.* at 327-28. The federal Constitution clearly did not mandate this relaxation of procedural rules, as the Court's opinion in Coleman v. Thompson demonstrates. 111 S. Ct. 2546, 2565 (1991). In *Coleman*, the Court held that the state procedural default bar precluded federal review of constitutional claims, even in a capital case in which the death penalty had been imposed. *Id.* at 2565.

76. A state court decision that fails to dispose of a federal claim when timely and properly presented may prove sufficient to invoke the jurisdiction of the habeas court under Harris v. Reed, 489 U.S. 255, 262-63 (1989). The *Harris* Court recognized a presumption of rejection of

ruling on the federal claim in a state trial court may result in a state procedural bar eventually precluding federal habeas review.[77] Generally, the issue being reviewed by federal courts focuses only indirectly on the actual violation; instead, review focuses on the holding below in terms of its correct resolution of the federal claim.[78] In *Caldwell*, review in the United States Supreme Court was predicated on the *sua sponte* holding of the Mississippi Supreme Court, rather than on error asserted or argued on direct appeal.[79] Had the Mississippi court never addressed the issue, the Supreme Court likely would not have considered the error, no matter how egregious.[80]

Even when state procedural preservation rules have been violated by failure to timely object or to file an appropriate motion, a ruling on the merits of an otherwise defaulted federal claim is still possible in many jurisdictions through application of a doctrine of fundamental or plain error.[81] Justice Stevens recently highlighted the significance of

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the claim on the merits by the state court, fulfilling the requirement for exhaustion of the claim. *Id.* Under the federal habeas statute, a state court's refusal to even consider a contention that a state defendant's federal rights had been violated virtually frees the defendant from further state litigation prior to initiating an application for federal habeas corpus, unless state law provides a vehicle for review of the decision not to address the federal claims. 28 U.S.C. § 2254(b), (c) (1988).

77. *See, e.g.*, State v. Wilson, 793 P.2d 559, 560 (Ariz. Ct. App. 1990) (holding that even constitutional claims may be waived by procedural defects in suppression motion).

78. Consequently, harmless error rules are applicable in assessing proper disposition of federal claims by state courts. *See, e.g.*, Yates v. Evatt, 111 S. Ct. 1884, 1892-94 (1991) (applying harmless error rule to question of improper shifting of burden in jury instructions).

79. 472 U.S. at 341.

80. *See* Sochor v. Florida, 112 S. Ct. 2114, 2120 n.** (1992) (holding that disposition of petitioner's federal claim by state court's application of procedural default bar deprives Supreme Court of jurisdiction to hear merits of federal claim).

81. *See, e.g.*, State v. Gamble, 523 P.2d 53, 54 (Ariz. 1974) (recognizing as fundamental only error which "goes to the foundation of the case, or takes from the defendant a right essential to his defense"); State v. Smith, 665 P.2d 995, 999 (Ariz. 1983) (declining to hold that improper reference to matters outside the trial record by the prosecutor in closing argument constituted fundamental error subject to review in absence of timely objection); State v. Libberton, 685 P.2d 1284, 1290 (Ariz. 1984) (affirming existence of limited doctrine of fundamental error in Arizona trials); *see also* ARIZ. REV. STAT. ANN. § 13-4035 (1989) (requiring state supreme court in capital case in which death penalty imposed to review for fundamental error); State v. Roscoe, 700 P.2d 1312, 1327 (Ariz. 1984); *cf.* State v. Martin, 686 P.2d 937, 941-42 (N.M. 1984); State v. Ramirez, 648 P.2d 307, 308 (N.M. 1982) (holding that improper comment on accused's decision to remain silent constitutes fundamental error reviewable even in absence of contemporaneous trial objection); Almanza v. State, 686 S.W.2d 157, 159 (Tex. Crim. App. 1984) (applying fundamental error doctrine to unobjected to error in jury instructions where error prejudicial). This type of error may be characterized as jurisdictional or plain error. *See* FED. R. EVID. 103(d) (recognizing doctrine of plain error in matters of admission or exclusion of evidence). *But see*, Pharo v. State, 783 S.W.2d 64, 67-68 (Ark. Ct. App. 1990) (following Wicks v. State, 606 S.W.2d 366, 369-70 (Ark. 1980), holding that Arkansas does not recognize a doctrine of fundamental or plain error).

these doctrines in his concurring opinion in *Sochor v. Florida*.[82] There, the majority held that a failure to preserve federal error through timely objection to an instruction given to the capital defendant's sentencing jury deprived the Court of jurisdiction to review one of the grounds urged for reversal.[83] Justice Stevens observed that Florida applies a doctrine of fundamental error permitting consideration of issues not preserved which raise concerns about due process violations.[84] He noted that the Florida court did not specifically address the issues presented, but observed that the issues not preserved were without merit. He concluded, therefore, that the state supreme court had actually held that the issues were not meritorious, rather than that they were procedurally barred from review.[85]

Although Justice Stevens's position was not adopted by a majority of the Court, his separate opinion does point to the significance of the role of fundamental error in the preservation process. Appellate counsel must not only take care not to dismiss preserved federal claims deemed unlikely to succeed but also should specifically consider urging all claims suggesting due process violations for disposition on the merits in those jurisdictions in which fundamental or plain error doctrines are viable. Once the state court rules on the merits of the federal claim, the federal issue has been preserved for purposes of a later determination by federal courts of the correctness of the disposition.[86]

3. Ineffective Assistance Claims

Many of the legitimate claims that defendants convicted in state proceedings may raise in federal habeas involve questions about either the competence or the dedication of their state court counsel.[87] Thus,

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Interestingly, although the Arkansas courts have refused to recognize a doctrine of plain or fundamental error in appellate opinions, the Supreme Court included a plain error provision in adopting Arkansas Rule of Evidence 103(d).

82. 112 S. Ct. 2114, 2125-28 (1992) (Stevens, J., concurring in part and dissenting in part); *see also* Frank v. United States, 113 S.Ct. 363 (1992) (Stevens, J.) (noting suitability of plain error rule and addressing trial court's failure to instruct jury that an acquittal on the ground of insanity would not preclude continuing detention if the defendant remained dangerous in opinion on denial of certiorari).

83. 112 S. Ct. at 2119-20.

84. *Id.* at 2127.

85. *Id.* at 2127-28 (especially n.7).

86. Harris v. Reed, 489 U.S. 255, 262 (1989) (If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available.).

87. *See, e.g.*, State v. Roscoe, 700 P.2d 1312, 1324-25 (Ariz. 1984) (rejecting claim of ineffective assistance in capital trial based on counsel's failure to develop mitigating circumstances

proper litigation of these claims is essential for purposes of preserving them for federal review.

The right to effective assistance of counsel flows from the Sixth Amendment guarantee of assistance of counsel and extends to both the trial[88] and direct appeal[89] in state court. Evaluation of counsel's performance, however, often requires reviewing counsel to look beyond the record of trial to assess claims that trial counsel failed to properly investigate the case or neglected to present viable defenses.[90] Because a sufficient factual record to evaluate performance will often require post-trial proceedings, the Supreme Court recognized in *Kimmelman v. Morrison*[91] that ineffective assistance claims most often require collateral attack, rather than development on direct appeal on the trial record itself, even though some claims clearly can be discerned from the record.[92]

Consequently, counsel undertaking a direct appeal, state post-conviction writ, or federal habeas application must be aware of the need to evaluate the performance of those attorneys who previously have represented the client.[93] For many attorneys, this duty to consider prior performance may be distasteful, particularly when the client demanding review of counsel's performance is either factually guilty or personally non-engaging. Nevertheless, to fully and fairly represent the client, counsel may need to undertake an objective evaluation of prior counsel's performance despite the unsatisfactory posture that successor counsel may experience in the role.[94] This duty is particularly important in

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evidence, such as client's age, family ties, and lack of intent to kill; those facts probably would not have resulted in different result because trial court was aware of factors prior to sentencing). *But see* State v. Sullivan, 596 So. 2d 177, 190-92 (La. 1992) (holding counsel ineffective in failing to prepare mitigation defense in death penalty prosecution), *cert. granted*, No. 92-5129 (Oct. 19, 1992).

88. Strickland v. Washington, 466 U.S. 668, 686-87 (1984).

89. Evitts v. Lucey, 469 U.S. 387, 401 (1985); Entsminger v. Iowa, 386 U.S. 748, 751 (1967).

90. Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986) (holding that counsel rendered ineffective assistance in capital case in failing to investigate and develop mitigating circumstances evidence of defendant's mental retardation).

91. 477 U.S. 365 (1986).

92. *See, e.g.*, State v. Roscoe, 700 P.2d 1312, 1324-25 (Ariz. 1984) (rejecting claim of ineffectiveness on direct appeal even though record disclosed facts sufficient to demonstrate counsel's failure to develop mitigating circumstances where this evidence would not have affected outcome because trial court was already aware of mitigating factors).

93. The Arizona Supreme Court has observed that, when an appointing court is advised that ineffective assistance on the part of trial counsel may prove an issue on appeal, the better practice requires appointment of different counsel to prosecute the appeal. State v. Walton, 769 P.2d 1017, 1037 (Ariz. 1989), *aff'd*, 110 S. Ct. 3047 (1990).

94. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard 4-8.6 (directing successor counsel to investigate and raise claims of ineffectiveness in representation rendered by prior counsel when warranted by facts).

capital cases, where deficiency in performance may afford the accused the only avenue for relief from a death sentence.[95]

The duty to assert ineffectiveness is not itself free of considerations extraneous to the actual question of performance. For example, although state defendants are entitled, under the Sixth Amendment, to effective assistance of counsel at trial[96] and on direct appeal,[97] the Supreme Court has made clear that no comparable right exists in the prosecution of post-conviction, collateral actions, such as habeas corpus, in either state or federal courts.[98] Consequently, counsel's defective performance in post-conviction matters is not a ground for relief because, in the absence of a guarantee to assistance of counsel, there is no concomitant guarantee of *effective* assistance of counsel.[99] Thus, although ineffectiveness at the trial and direct appeal stages may serve either to afford an independent basis for relief or to excuse a failure to properly present meritorious claims, ineffectiveness in the post-conviction stage of litigation serves only to preclude review of claims that might otherwise have afforded relief.

The Court's current term has demonstrated that counsel's trial error may ultimately create lengthy litigation over effectiveness, even when the claim is rejected on the merits. In *Lockhart v. Fretwell*,[100] the Court considered a bizarre factual claim of ineffectiveness. Trial counsel, representing a state capital defendant, had failed to assert recent Eighth Circuit authority[101] holding that the statutory aggravating circumstance relating to pecuniary gain could not be predicated on the same robbery

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95. In State v. Roscoe, the court considered and rejected a claim of ineffective assistance in a capital context based on trial counsel's failure to develop and argue evidence of mitigating circumstances during the punishment hearing. 700 P.2d 1312, 1324-25 (Ariz. 1984). These mitigating circumstances, which included the defendant's age, his family ties, and his arguable lack of intent to kill during the commission of a felony, were known to the trial court, however. The Arizona Supreme Court concluded that counsel should have developed more effectively the defense case in sentencing. Nevertheless, any failure of performance did not result in a verdict prejudicing the capital defendant's rights and, thus, the second prong of the test for ineffectiveness set forth in Strickland v. Washington, 466 U.S. 668, 684 (1984), was not met.

96. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

97. Evitts v. Lucey, 469 U.S. 387, 401 (1985); Entsminger v. Iowa, 386 U.S. 748, 751 (1967).

98. Murray v. Giarratano, 492 U.S. 1, 7-13 (1989) (holding no constitutional right to assistance of counsel in post-conviction actions, even when death penalty imposed in state trial); Pennsylvania v. Finley, 481 U.S. 551, 554-59 (1987) (holding no constitutional right to counsel in state post-conviction proceedings, although state may provide for appointment of counsel). Consequently, defective performance of counsel in post-conviction actions does not result in a constitutional deprivation, and federal review does not lie to evaluate effectiveness claims. Coleman v. Thompson, 111 S. Ct. 2546, 2567-68 (1991).

99. *Coleman*, 111 S. Ct. at 2567-68.

100. 113 S. Ct. 838 (1993).

101. *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

underlying the capital offense because the aggravating circumstance unconstitutionally duplicated an element of the underlying felony.[102] Subsequently, in *Lowenfield v. Phelps*,[103] the Court rejected a similar argument of constitutionally impermissible duplication of an aggravating circumstance and offense element in a Louisiana prosecution. The Eighth Circuit than recognized *Lowenfield* as reversing its holding in *Collins* by implication.[104]

The precise issue presented in *Fretwell* involved whether the state court defendant could prevail on a claim of ineffectiveness of trial counsel in failing to preserve error when it was not clear that he would have obtained relief on direct appeal had the error been preserved.[105] The State conceded that trial counsel's performance was deficient, focusing its argument instead on the lack of prejudice demonstrated by the claim.[106]

Holding that the sentencing proceeding was "neither unfair nor unreliable,"[107] the Court reversed the Eighth Circuit's conclusion that relief was appropriate.[108] Petitioner was not entitled to the benefit of *Collins* despite the subsequent holdings in *Lowenfield* and *Perry v. Lockhart*.[109] Had counsel preserved the *Collins* objection, he might well have benefitted from the trial court's decision to comply with the holding there,[110] or he might have prevailed in the state supreme court had that court elected to follow that Eighth Circuit precedent.[111] But,

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102. *Id.* The state supreme court rejected the attack on direct appeal because counsel failed to preserve the error by objecting to the use of the aggravating circumstance in the sentencing phase of the trial. *Fretwell v. State*, 708 S.W.2d 630 (Ark. 1986) (affirming conviction and death sentence). The state court also rejected a post-conviction challenge of ineffective counsel based on counsel's failure to assert the *Collins* claim at trial. *Fretwell v. State*, 728 S.W.2d 180, 181 (Ark. 1987).

103. 484 U.S. 231 (1988).

104. *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989).

105. 113 S. Ct. at 841.

106. *Id.* at 842 n.1.

107. *Id.* at 843.

108. *Id.* at 845.

109. *Id.* at 844. Indeed, the majority essentially endorsed *Perry* as correctly decided, relying on Fretwell's failure to assert that *Collins* remained viable despite *Lowenfield*'s rejection of the identical reasoning. *See id.* at 843 n.4. Because Fretwell did not argue this point, however, the majority premised its consideration of the merits of the *Collins/Perry* dispute on the Eighth Circuit's conclusion that *Collins* had in fact been overruled by *Lowenfield*. *Id.*

110. *Id.* at 843.

111. *See id.* at 842. The *Fretwell* majority noted that a majority of the Eighth Circuit panel that concluded that Fretwell was entitled to relief on his ineffectiveness claim believed the state supreme court to have been bound by Eighth Circuit precedent on a matter of federal constitutional interpretation. *Id.* at 842. Justice Thomas, in his concurring opinion, specifically argued that state supreme courts are not bound to follow United States Circuit Court precedents, even in matters of federal constitutional construction, under the Supremacy Clause. *Id.* at 846.

according to the majority, the sentencing proceeding involved no prejudice because the outcome was neither unfair nor unreliable as a result of counsel's failure to assert a claim ultimately shown not to have existed for petitioner's benefit.[112]

Even though Fretwell did not ultimately obtain relief on his claim of ineffective counsel, the extensive litigation turned on factors external to that performance. Both the State and the Supreme Court readily agreed that trial counsel performed deficiently. The absence of legally demonstrable prejudice, the second prong of the *Strickland v. Washington*[113] test for determining when deficient performance results in a violation of the Sixth Amendment guarantee of effective assistance of counsel, eventually doomed Fretwell's claim. Irrespective of the final outcome, counsel's performance was weighed and found deficient throughout the course of extensive state and federal proceedings.

Thus, once meritorious constitutional claims are raised for federal review, proper representation in state proceedings ultimately rewards counsel, as well as the client. Adequate preservation of these claims facilitates review on the merits without reliance on accompanying assertions of ineffectiveness to properly invoke the habeas jurisdiction of the federal courts.

4. Fact-Finding on Federal Claims

Last term, in *Keeney v. Tamayo-Reyes*,[114] the Court ruled that federal habeas courts are bound by the record developed in any evidentiary hearing conducted on the state level.[115] Thus, where a claim for federal relief depends on the development of an independent evidentiary record, a federal habeas court is not free to order a second or successive hearing if the claim has already been litigated in state court.[116] Only if state authorities impair the opportunity to fully litigate or develop necessary

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112. 113 S. Ct. at 844 ("[R]espondent was not *entitled* to an objection based on 'double counting.' Respondent therefore suffered no prejudice from his counsel's deficient performance.") (emphasis added).

113. 466 U.S. 668, 687 (1984) (requiring the defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense).

114. 112 S. Ct. 1715 (1992).

115. *Id.* at 1719-20. This holding is consistent with 28 U.S.C. § 2254(d), which provides that state fact findings "shall be presumed to be correct" unless the federal petitioner can bring the case within a statutorily-authorized basis for further fact-finding. Federal habeas courts must defer to state fact-finding even if the facts were found by a state appellate court, rather than at the trial court level. Sumner v. Mata, 449 U.S. 539, 546 (1981).

116. 112 S. Ct. at 1719-21 (applying "cause and prejudice" test to claim of defective fact-finding at state court level arguably warranting additional evidentiary hearing by federal habeas court).

evidence will a habeas court be authorized to open up the record to an additional hearing to develop evidentiary facts.[117] *Keeney* overruled the principle of *Townsend v. Sain*,[118] which had permitted development of any necessary evidentiary record once a district court determined that the petition for habeas relief asserted a substantial federal claim.[119]

The practical impact of *Keeney* is to limit expenditure of federal habeas court time in the conduct of evidentiary hearings. Because the emerging principles of habeas corpus require state defendants to assert their federal claims in available state proceedings, a defendant must assert the right to an evidentiary hearing at the state level and develop all necessary factual bases to support the claim if a hearing is ordered by the state trial or post-conviction court.[120] Otherwise, the opportunity to develop a factual record essential to demonstrate entitlement to relief on a federal claim may well be fatally compromised.[121] An absolute denial of an evidentiary hearing by a state court probably affords the most likely opportunity for a state defendant to obtain a comprehensive evidentiary hearing once the jurisdiction of the federal habeas court has been properly invoked.

C. The Scope of Review

Even assuming trial counsel has correctly preserved federal error and all colorable federal claims have been resolved by state appellate and post-conviction courts, federal habeas courts will not necessarily have jurisdiction to consider all constitutional claims raised in the prosecution. Moreover, a flawed petition poses procedural impediments to consideration of many federal claims that might otherwise have proven meritorious.

1. Subject Matter Limitations

Although federal habeas corpus is a legislatively-created remedy, the Court has had occasion to limit the lower federal courts' scope of

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117. *Id.* at 1718-19. The majority recognized that additional fact-finding may be warranted where state officials have impaired the accused's ability to properly develop a record for review of federal claims. *Id.* at 1719-20.

118. 372 U.S. 293 (1963).

119. *Id.* at 317.

120. Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1719 (1992).

121. The *Keeney* Court did recognize application of a limited exclusion to the rule of deference to state fact-finding and default upon defendant's failure to properly pursue state fact-finding opportunities when denial of an evidentiary hearing would result in a fundamental miscarriage of justice, such as conviction of a factually innocent accused. 112 S. Ct. at 1721.

review of federal claims in habeas litigation.[122] Clearly, Congress could act to limit or expand habeas corpus jurisdiction, effectively imposing on the Court either greater or more restrictive authority in tailoring the remedy.[123]

Conversely, the Court may also act to expand the jurisdiction of federal habeas courts, as it arguably did this term in *Herrera v. Collins*.[124] There, the issue that had been raised in the district court involved a petitioner's claim of his factual innocence of the capital crime for which he had been convicted and sentenced to death.[125] The claim was based on newly discovered evidence of incriminating admissions made by his deceased brother, who claimed to have killed the two police officers.[126]

The Fifth Circuit, in reviewing the stay of execution ordered by the habeas court, concluded that Herrera had predicated his application on a claim of "actual innocence," standing alone without any substantial claim of violation of a federally protected right.[127] Relying on the Supreme Court's decision in *Townsend v. Sain*,[128] the Fifth Circuit refused to recognize Herrera's actual innocence claim in federal habeas corpus and vacated the stay of execution.[129]

Although the Supreme Court affirmed the Fifth Circuit's decision,[130] the concurring and dissenting opinions disclose that the majority favored the proposition that the Eighth Amendment would prevent execution

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122. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 474-82 (1976).

123. *See supra* notes 2-3 and accompanying text.

124. 113 S. Ct. 853 (1993), *affirming* 954 F.2d 1029 (5th Cir. 1992).

125. Herrera's conviction and sentence were affirmed on direct appeal by the Court of Criminal Appeals of Texas in *Herrera v. State*, 682 S.W.2d 313 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1131 (1985). He subsequently unsuccessfully sought post-conviction relief in state court, *Ex parte Herrera*, No. 12,828-02 (Tex. Crim. App., Aug. 2, 1985), and then challenged the use of identification testimony at his trial in a federal habeas corpus action. *Herrera v. Collins*, 904 F.2d 944 (5th Cir.), *cert. denied*, 498 U.S. 307 (1990).

126. *Herrera*, 113 S. Ct. at 869-70 (detailing inconsistencies that led the Justices to disbelieve Herrera's new claim of innocence, including: (1) inconsistencies between the facts asserted in the two affidavits Herrera offered to support his application for federal habeas relief and request for stay of execution; (2) the inconsistency between Herrera's apparent admission of guilt in a letter admitted at trial and his new claim of innocence; (3) conflicts between third party accounts in the affidavits and the testimony accepted as accurate at Herrera's jury trial). The Texas Court of Criminal Appeals had rejected this claim of innocence prior to the assertion in federal habeas. *Ex parte Herrera*, 819 S.W.2d 528, 528 (Tex. Crim. App. 1991) (en banc), *cert. denied*, 112 S. Ct. 1074 (1992).

127. 954 F.2d at 1033-34.

128. 372 U.S. 293, 317 (1963) (establishing that a claim of newly discovered evidence, by itself, is not cognizable in federal habeas corpus).

129. 954 F.2d at 1033-34.

130. 113 S. Ct. at 870.

of an actually innocent capital defendant.[131] The majority, however, concluded that Herrera's claim of innocence rested on insufficient evidence that he was not involved in the murder, particularly in light of the evidence adduced at trial, which included, most significantly, an incriminating letter apparently written by Herrera himself.[132] The majority, moreover, looked to the executive clemency process as the proper forum for asserting claims of actual innocence based on newly discovered evidence,[133] rather than creating any procedural right to litigate these claims in either the state[134] or federal courts.[135] However, the Court's awkward posture in disposing of *Herrera* suggests that rather than reaffirming the absolute bar to review of actual innocence claims in federal habeas,[136] the Court now perceives the possibility of an

131. The concurring opinions of Justice O'Connor, joined by Justice Kennedy, 113 S. Ct. at 874, and Justice White, 113 S. Ct. at 875, as well as the dissenting opinion of Justice Blackmun, joined substantially by Justices Stevens and Souter, 113 S. Ct. at 876, all demonstrate support for the proposition that execution of an innocent capital defendant would offend the Constitution. Only Justice Scalia, joined in his concurrence by Justice Thomas, was willing to adhere to the principle that claims of actual innocence are not cognizable in federal habeas corpus, even though adhering to that principle could entail denying habeas jurisdiction that would prevent the execution of an innocent defendant. 113 S. Ct. at 874-75.

132. 113 S. Ct. at 857-58 n.1.

133. 113 S. Ct. at 866-67.

134. *Id.* at 869-70. Justice O'Connor found the exact procedural context in which the case arose particularly important. The federal district court entered a stay of execution to permit the petitioner to apply for a post-conviction writ in the state trial court. 113 S. Ct. at 873. Justice O'Connor observed that the federal district court did not order the state courts to entertain the petitioner's newly-discovered-evidence claim on the merits as a matter of constitutional right, an approach that she characterized as "extraordinary." *Id.* Yet, the Court itself could have held that the Constitution mandates the state courts to consider newly discovered evidence claims, even when the usual time limit for presentation of such claims has passed. *See id.* The majority opinion notes that Arizona is one of numerous jurisdictions that limit the time frame for presenting claims of newly discovered evidence. 113 S. Ct. at 865 n.8; ARIZ. R. CRIM. PROC. 24.2(a)(1987) (providing that a newly discovered evidence claim must be presented within sixty days of judgment).

135. 113 S. Ct. at 866. Chief Justice Rehnquist, writing for the majority, considered the possibility that a claim of newly discovered evidence of actual innocence could be so factually compelling as to warrant federal consideration. *Id.* at 864. He observed:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.

113 S. Ct. at 869.

136. Justice Scalia explained that he joined the majority opinion based on his understanding that the majority left intact the prohibition on federal habeas review of actual innocence claims set forth in *Townsend v. Sain*, 372 U.S. 293, 317 (1963), despite the majority's consideration of the hypothetical case of compelling evidence of a capital accused's innocence. 113 S. Ct. at 875.

extraordinary factual circumstance in which the assertion of habeas jurisdiction would be appropriate.

a. Fourth Amendment Claims

The Court has thus far limited habeas jurisdiction in terms of category of claims only in the area of Fourth Amendment matters subject to enforcement by application of the judicially-imposed rule of evidentiary exclusion. In *Stone v. Powell*,[137] the Court held that federal habeas jurisdiction would not lie to consider a claim that previously had been fully and fairly litigated in the state courts.[138] Because the remedy imposed in *Mapp v. Ohio*[139]—application of the exclusionary rule—was essentially judicially created, the Court's decision to limit review of state court rulings may be seen as merely reflecting a rational limitation on the reviewability of determinations that are meant to address specific grievances in individual cases.

The practical effect of *Stone v. Powell* is two-fold: first, it necessarily narrows the class of search and seizure claims eventually subject to litigation in federal habeas courts; and second, it necessitates application for review by writ of *certiorari* of those state court rulings that dispose of Fourth Amendment claims adversely to defendants.[140] The post-*Stone v. Powell* history of Fourth Amendment litigation demonstrates continuing consideration of the role of privacy, the scope of power granted to law enforcement officials, and the application of the exclusionary rule, although a significant body of that case law has been produced by prosecution-sponsored applications for Supreme Court review.[141]

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137. 428 U.S. at 465.

138. *Id.* at 493-94.

139. 367 U.S. 643 (1961).

140. *See* 428 U.S. at 492-93, 480-82. *Stone v. Powell* substantially limits federal review of claims arising under the Fourth Amendment. *See id.* at 480-82. Nevertheless, state defendants retain the right to petition to the Supreme Court by writ of *certiorari* for review of an adverse holding by a state appellate court once the defendants have exhausted avenues for review in the state courts on direct appeal. *See* Payton v. New York, 445 U.S. 573, 587-89 (1980) (holding warrantless intrusion into suspect's house to effect arrest improper absent exigent circumstances).

141. In the aftermath of *Stone*, most Fourth Amendment questions ultimately resulting in resolution by the Supreme Court have been brought by prosecutors challenging state court decisions ordering exclusion of seized evidence. *E.g.*, Florida v. Bostick, 111 S. Ct. 2382, 2388-89 (1991) (upholding police request for consent to search passengers or luggage on bus); California v. Acevedo, 111 S. Ct. 1982, 1991 (1991) (holding police may search unopened container found in vehicle); Riverside County, California v. McLaughlin, 111 S. Ct. 1661, 1670 (1991) (holding delay of 48 hours in bringing arrestee before magistrate not *per se* unreasonable); California v. Hodari, 111 S. Ct. 1547, 1552 (1991) (holding fleeing suspect not seized until caught, and property disposed of by fleeing suspect not seized, but abandoned); Michigan Department of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding sobriety checkpoints conducted pursuant to articulated

b. Miranda Violation Claims

The Court has yet to limit review of claims generated by its other principal prophylactic rule imposed upon state proceedings—the rule governing provision of counsel and conduct of interrogation in *Miranda v. Arizona*.[142] However, the Court did consider this question this term in *Withrow v. Williams*, holding 5-4 not to preclude review of *Miranda* claims in federal habeas.[143] The split decision reflects dissenting opinions authored by Justices O'Connor, joined by Chief Justice Rehnquist, who favored preclusion of consideration of *Miranda* claims in federal habeas actions,[144] and Scalia, joined by Justice Thomas, who wrote in support of general deference to state disposition of federal claims which follow full and fair opportunity to litigate the calim.[145]

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standards); Alabama v. White, 496 U.S. 325, 332 (1990) (holding anonymous tip corroborated by observation of details sufficient to justify stop); Maryland v. Buie, 494 U.S. 325, 336-37 (1990) (holding that officers may search areas of home of arrested suspect to extent necessary to protect against sudden attack); Florida v. Riley, 488 U.S. 445, 451-52 (1989) (observing defendant's property from helicopter did not result in unconstitutional invasion of privacy); Michigan v. Chester, 486 U.S. 567, 574 (1988) (holding that suspect fleeing from police who have taken no action to stop or arrest is not seized when he disposes of cocaine within view of officers); California v. Greenwood, 486 U.S. 35, 43-44 (1988) (holding no expectation of privacy in opaque plastic garbage bags left for pickup outside curtilage of home); Illinois v. Krull, 480 U.S. 340, 359-60 (1987) (holding good faith exception to exclusionary rule extended to officers acting pursuant to state statute subsequently declared unconstitutional); Maryland v. Garrison, 480 U.S. 79, 88 (1987) (holding reasonable belief in accuracy of address by officers obtaining search warrant based on inaccurate description excuses error, and suppression of evidence not required); Colorado v. Bertine, 479 U.S. 367, 374-76 (1987) (holding inventory search of closed container in impounded auto did not violate Fourth Amendment); California v. Carney, 471 U.S. 386, 394-95 (1985) (holding that motor home being used for travel subject to automobile exceptions to warrant requirement); Florida v. Rodriguez, 469 U.S. 1, 6-7 (1984) (holding consent to search not rendered invalid because suspect not advised he could refuse); Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984) (holding mistake by judge who issued search warrant does not compel suppression of evidence); Florida v. Meyers, 466 U.S. 380, 382 (1984) (holding right to search automobile stopped on highway continues despite impoundment); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (upholding search of suspect's shoulder bag as inventory pursuant to arrest upheld); Illinois v. Gates, 462 U.S. 213, 241-42 (1983) (applying "totality of circumstances" test in determining lawfulness of search and seizure); New York v. Belton, 453 U.S. 454, 459-60 (1981) (holding valid arrest of persons recently in vehicle affords grounds for search of passenger compartment); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (holding inventory search of auto impounded for traffic infraction proper to protect owner's property).

142. 384 U.S. 436 (1966).

143. No. 91-1030, 1993 WL 119753 (U.S., decided April 21, 1993). The Court granted *certiorari* to review a Sixth Circuit decision. 112 S. Ct. 1664 (1992), *granting cert. to* 944 F.2d 284 (6th Cir. 1991).

144. No. 91-1030, 1993 WL 119753, at *11. Justice O'Connor had earlier taken the position that a *Stone v. Powell*-type rule of preclusion should be applied to federal habeas review of claims predicated on *Miranda* violations. Duckworth v. Eagan, 492 U.S. 195, 205 (1989).

145. 1993 WL 119753, at *20. Justice Scalia had joined in Justice O'Connor's concurrence in Duckworth v. Eagan, 492 U.S. at 205, in arguing for preclusion of *Miranda*-based claims in

Criminal defense counsel must be aware of any future limitation on federal habeas jurisdiction comparable to that imposed in *Stone v. Powell* to properly advise state court clients on appropriate procedural options available in the event their federal constitutional claims are rejected at the state trial and post-conviction stages of the process. Should the Court act on the invitation to exclude *Miranda*-based claims from habeas corpus, counsel must be aware and accordingly advise state defendants that federal review likely will be either totally precluded or seriously limited, suggesting the need to file for *certiorari* on potentially meritorious claims.

2. Limitations on Retroactivity

Even if the habeas court has jurisdiction to consider the subject matter of a state petitioner's claim, some petitioners will nevertheless be deprived of relief because their claims either were not pending on direct appeal or were not properly preserved when the United States Supreme Court generated a favorable rule. In *Teague v. Lane*,[146] the Court adopted a two-fold test for retroactivity when new rules are announced. Rules are "new" if existing precedent does not dictate the result; when it is debatable whether precedent dictates the result, the announcement of a new principle constitutes a "new rule."[147]

First, the Court held that new rules in the area of criminal procedure generally apply only to those cases in which an issue controlled by the new precedent are pending at the time the favorable rule is announced.[148] Second, the new rules may apply if they implicate fundamental due process protections.[149] The application of *Teague* itself is difficult, because the Court has subsequently concluded that "new" rules are applicable if they should have been anticipated by state courts as a result of reasonable readings of precedent or obvious trends in the development of the law.[150]

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federal habeas corpus. His concurrence in Withrow v. Williams reflects a more general notion of limitation based upon federal habeas court deference to state court conclusions of law. This approach is consistent with his position in Wright v. West, 112 S. Ct. 2482, 2486-91 (1992), joining Justice Thomas in observing that federal habeas tradition would not necessarily militate against adoption of a standard of review predicated on deference to state court determinations of law, as well as fact. *See infra* notes 175-86 and accompanying text (discussing *Wright v. West*).

146. 489 U.S. 288 (1989).

147. *Id.* at 301. A result is dictated by precedent when it is not "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990).

148. *Teague*, 489 U.S. at 310; *see also* Stringer v. Black, 112 S. Ct. 1130, 1135 (1992).

149. *Teague*, 489 U.S. at 307; *see, e.g.*, Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that Eighth Amendment requirement that capital sentencing jury consider claim of defendant's mental retardation in considering sentence constitutes new rule, but falls within exception to "new rule" non-retroactivity doctrine).

150. *Stringer*, 112 S. Ct. at 1138-40.

Consequently, the likelihood that a federal habeas court will afford relief on an issue subject to continuing litigation turns both on the interpretation it gives to newly emerging precedent pursuant to *Teague* and on proper preservation of the claim. The Court's decision in *Allen v. Hardy*,[151] demonstrates application of the "new" rule analysis. In *Hardy*, the state trial and appellate courts rejected the petitioner's claim that his trial jury had been improperly constituted because of the prosecutor's discriminatory use of peremptory challenges to remove minority venirepersons from his trial jury.[152] The petitioner had relied on the Court's prior holding in *Swain v. Alabama*,[153] which required a state criminal defendant to demonstrate a pattern of discriminatory use of peremptories by the state to establish an Equal Protection Claim under the Fourteenth Amendment.[154] Having failed to meet the evidentiary burden imposed in *Swain*, the petitioner then sought to rely on the more favorable rule of *Batson v. Kentucky*,[155] which overruled *Swain* as to both the evidentiary standard and the standard of proof required to establish a violation based on prosecutorial use of peremptory challenges in a racially discriminatory fashion.[156] The Court expressly held that the "new rule" announced in *Batson* relating to proof of discriminatory exercise of peremptory strikes would only apply to *Batson* claims pending on direct appeal at the time the *Batson* decision was issued, and not to claims initially made collaterally in post-conviction proceedings.[157] Subsequently, the Court held that the *Batson* rule would be available to all claims pending review on direct appeal at the time *Batson* was announced.[158]

Significantly, an Arizona petitioner may seek state post-conviction relief on the ground that a "new" rule, or favorable change in law following his conviction and affirmance on direct appeal, should be applied for his benefit in the interest of justice.[159]

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151. 478 U.S. 255 (1986).

152. *Id.* at 256 (citing People v. Allen, 422 N.E.2d 100, 104 (Ill. Ct. App. 1981)).

153. 380 U.S. 202 (1965).

154. *Hardy*, 478 U.S. at 256.

155. 476 U.S. 79 (1986).

156. *Hardy*, 478 U.S. at 258-59.

157. *Id.* at 257-59. Certainly, petitioner Allen sought to rely on *Batson* without delay; in fact, the decision was issued denying relief in his case on June 30, 1986, just two months following the Court's historic holding in *Batson* on April 30, 1986.

158. Griffith v. Kentucky, 479 U.S. 314 (1987) (holding that *Batson* claims pending on direct appeal at time of *Batson* decision are subject to application of rule against discriminatory use of peremptory challenges).

159. Arizona Rule of Criminal Procedure 32.1(g) permits the petitioner to seek retroactive application of a significant change in the law that, if applicable at the time of trial, probably

3. Procedural Bars to Federal Habeas Review

Apart from the impact of Court-imposed limitations on review of specific claims and application of new rules, at least three important procedural rules may serve to preclude determination of the merits of federal claims presented in habeas corpus proceedings. These rules relate to inclusion of unexhausted claims in the petition, procedurally defaulted claims, and claims presented in successive petitions.

a. Unexhausted Claims

One problem typically encountered in federal habeas actions is the tendency of *pro se* litigants and well-intentioned counsel to present claims not previously litigated in state courts. This problem may well result from deliberate strategic concerns on the part of counsel that a federal forum will prove more favorable than a state forum for consideration of federal claims, but the controlling statute[160] and case authority[161] require exhaustion of available state remedies before a habeas court may reach these claims. The State may plead failure of exhaustion defensively in opposition to the federal petition, and petitions presenting unexhausted claims or so-called "mixed petitions," containing some claims that have been exhausted and some unexhausted claims, are subject to dismissal upon timely motion by the State.[162] Upon dismissal, counsel may assert the unexhausted claims in state post-conviction actions or elect to refile and proceed only upon exhausted claims.[163]

b. Procedurally Defaulted Claims

As noted earlier, once a state court applies the bar of procedural default under state law to federal claims, that bar will serve to preclude

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would have had the result of overturning his conviction or sentence. State v. Slemmer, 823 P.2d 41, 46-51 (Ariz. 1991) (defining scope of court's authority under Rule 32.1(g) and adopting federal retroactivity analysis).

160. 28 U.S.C. § 2254(b) and (c) mandate exhaustion of available state remedies (unless further litigation would prove futile) before presentation of federal claims by application for federal writ of habeas corpus.

161. Rose v. Lundy, 455 U.S. 509, 520 (1982) (holding that federal district court will not grant a writ of habeas corpus unless all state remedies have been exhausted).

162. Granberry v. Greer, 481 U.S. 129, 134-35 (1987) (holding State is under duty to plead defendant's failure to exhaust state remedies, but failure to plead affords both habeas court and reviewing court discretion to consider federal claims on the merits).

163. *See* United States *ex rel.* Winters v. DeRobertis, 568 F. Supp. 1484, 1489-90 nn. 11-13 (N.D. Ill. 1983); United States *ex rel.* Winters v. Mizell, 644 F. Supp. 782, 785-86 (N.D. Ill. 1986) (refiling of petition for habeas corpus relief after court in *Winters v. DeRobertis* dismissed original petition to allow defendant to exhaust state court remedies).

litigation of the issues on federal habeas.[164] The practical impact of *Coleman v. Thompson* is thus to encourage state appellate and post-conviction courts to apply the bar of procedural default, rather than considering the merits of federal claims, to avoid relitigation of the claims in federal court. If the state court proceeds to dispose of the federal issues on the merits, the decision on the merits effectively overrides any claim of procedural default that might otherwise have proved successful to bar the subsequent federal litigation.[165]

c. Successive Petitions

In two recent decisions, the Court has limited the circumstances under which a federal habeas court may consider claims raised in successive or repetitive petitions for relief.[166] A federal habeas court may consider claims raised in a successive petition upon a showing of cause and prejudice explaining the failure to raise the claim in a prior petition, or if a claim of constitutional error is accompanied by a showing of the defendant's actual innocence of the crime of which he has been convicted in state court, as the Court held in *McCleskey v. Zant*.[167] Similarly, in *Sawyer v. Whitley*,[168] the Court held that, in a capital case, a federal habeas court may consider claims raised in a successive petition upon a showing that the defendant who has been sentenced to death was effectively "innocent" of an aggravating circumstance alleged by the prosecution and ultimately found by the sentencer to be supported by evidence and, thus, supportive of the capital sentence imposed.[169] Otherwise, the Court has held that a state defendant is entitled to present only a single petition for relief to the federal courts,[170] imposing upon counsel the duty to make certain that all colorable federal claims are presented in the first, and presumably only, petition for federal habeas corpus relief the defendant will be entitled to file.

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164. *See* Ylst v. Nunnemaker, 111 S. Ct. 2590, 2596 (1991) (rejecting Ninth Circuit reliance on presumption of reviewability of federal claims where state supreme court decision fails to address claim in post-conviction action, but prior state appellate decision held claim procedurally defaulted without reaching merits).

165. *See* Caldwell v. Mississippi, 472 U.S. 320, 327 (1985).

166. McCleskey v. Zant, 111 S. Ct. 1454, 1470-71 (1991); Sawyer v. Whitley, 112 S. Ct. 2514, 2518-19 (1992).

167. 111 S. Ct. at 1470.

168. 112 S. Ct. 2514 (1992).

169. *See id.* at 2521-22.

170. *See id.* at 2518; *see also* Kuhlmann v. Wilson, 477 U.S. 436, 454-55 (1986) (holding successive petitions presenting identical claims as those previously raised and decided on merits must be dismissed).

D. Standard of Review

Once a federal habeas court asserts jurisdiction over a petition presenting exhausted and procedurally non-defaulted claims, the court will proceed to dispose of the issues raised on the basis of the available record and any additional fact-finding necessitated by the state court's failure to afford the petitioner an adequate opportunity to develop the record.[171] The standard for review of these claims is a critical component in the balancing of federal and state judicial interests in habeas corpus.[172] Although the language of the statute requires deference to state fact-finding in this process,[173] the statute does not direct the habeas court to accord similar deference to state findings or conclusions of law. Instead, the Court has traditionally held that mixed questions of law and fact, such as the voluntariness and admissibility of a confession, are to be assessed by the habeas court independently of any prior state court determination.[174]

The right to *de novo* review of federal habeas claims was challenged this past term in *Wright v. West*.[175] There, the state argued that the federal courts should defer to reasonable interpretations of federal law made by state appellate and post-conviction courts.[176] The Fourth Circuit had rejected the sufficiency of evidence supporting a theft conviction.[177] The prosecution had relied, in part, on application of the traditional unexplained, possession-of-recently-stolen-property presumption.[178] The

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171. Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1720-21.

172. *See* Wright v. West, 112 S. Ct. 2482, 2498 (1992) (Kennedy, J., concurring).

173. 28 U.S.C. § 2254(d) (1977), provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct*. . . .

(emphasis added). The statute then sets forth a number of exceptions to this general rule of deference. *See id.*

174. Miller v. Fenton, 474 U.S. 104, 112 (1985).

175. 112 S. Ct. 2482, 2489-91 (1992).

176. The Court directed the parties to specifically consider and argue the issue:

> In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

112 S. Ct. 672, 672 (1991). The directive was issued on December 18, two days after the petition for writ of *certiorari* was granted. 112 S. Ct. 656, 656 (1991).

177. West v. Wright, 931 F.2d 262, 270 (4th Cir. 1991).

178. *Id.* at 268.

Fourth Circuit held that the minimal constitutional threshhold for evidentiary sufficiency could not be met by reliance on this presumption.[179]

The Supreme Court reversed in a fragmented decision, with all justices in agreement that the Fourth Circuit was simply incorrect in its major premise.[180] However, Justice Thomas, in an opinion joined by Chief Justice Rehnquist and Justice Scalia, speculated on the propriety of adopting a deferential standard of review in federal habeas actions, providing that state court determinations would not be disturbed by federal courts as long as they were reasonable in their conclusions, even if incorrect.[181]

The Thomas position drew spirited challenges from Justice O'Connor, joined by Justices Blackmun and Stevens,[182] and from Justice Kennedy,[183] who wrote separately to affirm the principle of *de novo* review in federal habeas actions. The separate concurrences of Justices White[184] and Souter[185] did not address this tangential issue and did not reveal their positions on deferential versus *de novo* review, leaving final resolution of this issue open.[186]

However, this term the Court has dramatically altered the burden of proving a constitutional violation warranting relief from a state court conviction in a federal habeas action. In *Brecht v. Abrahamson*,[187] Chief Justice Rehnquist, writing for a five member majority, concluded that the proper test for determining whether state court trial error warrants federal habeas relief is whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[188] In so

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179. *See id.* at 268-70 (relying on Jackson v. Virginia, 443 U.S. 307, 319 (1979), which set forth the constitutional test for sufficiency of evidence of proof beyond a reasonable doubt of each element of the offense, when viewed from the perspective of a rational trier of fact).

180. 112 S. Ct. at 2493. Justice White filed an opinion concurring in the judgment. *See id.* at 2493. Justice O'Connor, joined by Justices Blackmun and Stevens, concurred in the judgment. *See id.* Justice Kennedy filed a separate concurrence. *See id.* at 2498.

181. *See id.* at 2486-91.

182. *See id.* at 2493-98.

183. *See id.* at 2498-2500.

184. *See id.* at 2493.

185. *See id.* at 2500-03.

186. This issue was again raised during the current term in Withrow v. Williams, 1993 WL 119753. The majority noted that it had limited its consideration of the case to the *Miranda*-preclusion issue, *id.* at *10 n.2, but Justice Scalia, joined by Justice Thomas, dissented and expressed their preference for a rule of general federal habeas court deference to state court dispositions of federal claims. *Id.* at *21; *see supra* note 145 and accompanying text.

187. No. 91-7358, 1993 WL 119795 (U.S., decided April 21, 1993), *aff'g in part and rev'g in part*, 944 F.2d 1363 (7th Cir. 1991).

188. *Id.* at *12 (following the test applied in Kotteakos v. United States, 328 U.S. 750,

holding, the majority rejected continued reliance for federal habeas corpus purposes on the "harmless error" test of *Chapman v. California*,[189] which requires reversal of a state court conviction infected by constitutional trial error unless the error is shown to be "harmless beyond a reasonable doubt."[190]

Brecht leaves intact application of the *Chapman* test for harmless error in review on direct appeal.[191] However, the application of a more rigorous test in the review of federal habeas claims poses certain problems for habeas litigants and counsel. First, it necessarily means that direct review in state appellate courts offers substantially greater prospects for success, assuming these courts faithfully perform the harmless error analysis demanded by *Chapman*. Once the case reaches federal court by application for habeas relief, the entitlement to relief requires a showing of what amounts to "actual prejudice" instead of the presumed prejudice which underlies the *Chapman* rule.

Second, because *Brecht* essentailly shifts the burden to the habeas applicant, proof of the constitutional violation alone will be insufficient to ensure relief. Rather, counsel must be prepared to demonstrate a sound theory of prejudice to the habeas court in making the case for relief. This heightened burden for obtaining federal relief increases the need for state court trial counsel to lay the foundation for subsequent habeas attack by formulating and advancing the theoretical bases for claims of prejudice when they may not otherwise be apparent from the record. At a minimum, development of the theory of prejudice in the federal forum, accompanied by necessary supporting fact-finding, pri-

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776 (1946)). The Seventh Circuit had distinguished review of violations of prophylactic rules from review of violations of fundamental protected rights and concluded that a more rigorous test of prejudice might properly be applied to consideration of the former by federal habeas courts. 944 F.2d at 1374. The claim involved improper prosecutorial comment on the accused's post-arrest silence which followed police advisement of *Miranda* warnings. Impeachment with this post-arrest silence in this circumstance violates the Fifth Amendment under Doyle v. Ohio, 426 U.S. 610, 617-18 (1976), unlike consideration of post-arrest silence when the warnings have not been given. *See* Fletcher v. Weir, 455 U.S. 603, 606 (1982). The *Brecht* majority, unlike the Seventh Circuit, did not distinguish between violations of prophylactic rules and violations of fundamental rights in evaluating *Doyle*. Consequently, the holding in *Brecht* is not limited to claims involving violations of prophylactic rules. No. 91-7358, 1993 WL 119795, at *6-7. Instead, the opinion announces a rule generally applicable to claims that state court trial error has compromised constitutional guarantees. *Id.* at *7.

189. 386 U.S. 18 (1967).

190. *Id* at 24.

191. No. 91-7358, 1993 WL 119795, at *8. For example, in Arizona v. Fulminante, the Court applied the *Chapman* formulation to review, on direct appeal, the admission of a coerced confession. *See* 111 S. Ct. 1246, 1257 (1991).

marily at the state level,[192] will ultimately prove essential to preserving the federal constitutional claim for habeas review. *Brecht* thus raises the stakes for constitutional litigation conducted in the federal habeas forum and demands greater attention to theory and record-making from state trial counsel.

E. Conclusion

Effective representation of federal habeas petitioners now involves more than competent performance in the federal action itself. The most effective representation at this stage of a convicted state defendant's challenge may readily be compromised by counsel's failure during a state trial, on direct appeal, and during state post-conviction proceedings.

To preserve the client's right to seek federal review and avoid the claim of constitutional ineffectiveness that may afford relief from state procedural default, state counsel must properly preserve the record on federal constitutional claims by making timely objections on the record; developing correct theories of error and asserting emerging principles of law; and, when appropriate, fully developing facts to support federal claims in evidentiary hearings when afforded by state courts. Otherwise, the current state of federal habeas law not only invites, but virtually demands in many instances, investigation of state counsel's performance and competence preparatory to assertion of an ineffective assistance claim.

Thus, proper representation in state proceedings ultimately rewards counsel, as well as the client, once meritorious constitutional claims are raised for federal review. Adequate preservation of these claims facilitates review on the merits without reliance on accompanying assertions of ineffectiveness to properly invoke the habeas jurisdiction of the federal courts.

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192. *See supra* notes 114-21 and accompanying text for consideration of the impact of Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).