

**DEATH BY LOTTERY—PROCEDURAL BAR OF
CONSTITUTIONAL CLAIMS IN CAPITAL CASES
DUE TO INADEQUATE REPRESENTATION OF
INDIGENT DEFENDANTS**

STEPHEN B. BRIGHT*

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I. INTRODUCTION

After the execution of Washington Goode, a black man sentenced to be hanged for murder in Massachusetts in 1848, the Boston Herald observed that if a “white man who had money had committed the same crime, he would not have been executed.”¹ The same can and has been said with regard to many executions which

* Director, Southern Prisoners’ Defense Committee, Atlanta, Georgia; J.D., University of Kentucky, 1974. B.A., University of Kentucky, 1971. This article draws on the author’s experience in capital litigation for the last eleven years and the materials and testimony received as a member of the American Bar Association Task Force on Review of State Capital Cases. The Task Force conducted a study in 1989 of the death penalty review process and made recommendations which, after modification by the Criminal Justice Section of the ABA, were adopted by the ABA House of Delegates in February, 1990.

1. L. MASUR, *RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865* at 15 (1989).

occur today. A United States Supreme Court law clerk observed after a year of reviewing petitions in capital cases that "[w]hether somebody received the death penalty very often seemed to be a function of the lawyers. . . . [T]he death penalty frequently results from nothing more than poverty and poor lawyering."²

Poor people accused of capital crimes are frequently represented by inadequately compensated,³ inexperienced,⁴ and incompetent⁵ court-appointed attorneys. Poverty and poor lawyering may result in a less than vigorous defense at a trial where the death penalty

2. Sloan, *High Court's Handling of Death Cases*, *Fulton County Daily Report*, Mar. 25, 1987, at 2, col. 1. Race also continues to be a prominent factor in determining who dies. See *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987); *id.* at 325-34 (Brennan, J., dissenting); *id.* at 353-61 (Blackmun, J., dissenting); Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985).

3. Some states pay as little as \$1,000 to \$2,500 for representation in capital cases. Gradess, *The Road from Scottsboro*, *CRIM. JUST.*, Summer 1987, at 2, 46. See also, e.g., ALA. CODE § 15-12-21(d) (Supp. 1989) (\$1,000 limit on attorney compensation for out-of-court work; no limit on in-court work); ARK. STAT. ANN. § 16-92-108(b)(2) (1987) (limit of \$1,000 on all attorney work); MISS. CODE ANN. § 99-15-17 (Supp. 1989) (limit of \$1,000 per attorney, in capital cases (two attorney maximum)).

In most capital cases, such low rates amount to less than the minimum wage. For example, in one Mississippi case the hourly rate for the two lawyers who defended a death penalty case and were limited to \$1,000 amounted to \$2.98 and \$2.56. Brief for Appellant at 11-12, *State v. Wilson*, Nos. 89-301, 89-302 (Miss. 1989). When overhead expenses were figured in, the attorneys lost over \$20 per hour for their work on the case. *Id.* at 12 n.5.

4. See, e.g., *Bell v. Watkins*, 692 F.2d 999, 1008 (5th Cir. 1982) (holding that representation by an attorney who had recently graduated from law school and never tried a criminal case all the way to verdict does not constitute ineffective assistance of counsel), *cert. denied*, 464 U.S. 843 (1983); *State v. Leatherwood*, No. DP-70 (Miss. 1986) (trial transcript) (defendant represented by a public defender and a third year law student, the latter of whom examined half the witnesses), *rev'd on other grounds*, 548 So. 2d 389 (Miss. 1989); *Tyler v. Kemp*, 755 F.2d 741, 743-44 (11th Cir.) (upholding the lower court's finding that the defendant's attorney, admitted to the bar just a few months before trial, "was ineffective for failure to present mitigating evidence at the sentencing phase"), *cert. denied*, 474 U.S. 1026 (1985).

5. See American Bar Association Task Force on Review of State Capital Cases, *Toward a Most Just and Effective System of Review in State Death Penalty Cases*, ch. 2 (October 1989) (detailing instances of incompetent representation and concluding that the inadequacy of counsel is one of "the principal failings of the capital punishment process today"); Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 803-10 (1986) (detailing instances of inadequate representation); Wicker, *Defending the Indigent in Capital Cases*, 3 *Crim. Just. Ethics* 2 (1983) (observing a pattern of incompetent representation in capital cases).

is imposed.⁶ It may also mean less than full federal *habeas corpus* review.⁷ Failure of counsel to recognize a constitutional violation and properly preserve the issue may be deemed a waiver by the indigent defendant and a death sentence obtained in violation of the United States Constitution may be carried out.⁸

Such a result, particularly in capital cases, seems at war with this nation's commitment to equal justice⁹ and the guarantees of the Bill of Rights.¹⁰ One would reasonably expect that before a state executes one of its citizens, it establish that the process by which the conviction and death sentence were obtained satisfies constitu-

6. See, e.g., *Messer v. Kemp*, 760 F.2d 1080, 1093-1097 (11th Cir. 1985) (Johnson, J., dissenting), *cert. denied*, 474 U.S. 1088, 1088-91 (1986) (Marshall, J., dissenting) (at guilt phase, counsel gave no opening statement, presented no defense case, conducted cursory cross-examination, made no objections, then emphasized horror of crime in brief closing; at penalty phase, counsel failed to put on steady employment record, military record, church attendance, and cooperation with police, and in closing "repeatedly hinted that death was the most appropriate punishment"). Even though Messer's mental state was the only issue at both the guilt and penalty phases, he was denied a mental health expert because counsel failed to make an adequate showing that one was needed for the defense case. *Messer v. Kemp*, 831 F.2d 946, 954 (11th Cir. 1987) (en banc).

See also *Mitchell v. Kemp*, 483 U.S. 1026, 1026-32 (1987) (Marshall, J., dissenting from denial of certiorari) (attorney made no attempt to contact any mitigating witnesses, made no inquiries into client's academic, medical, or psychological history, and thus failed to present case in mitigation); *Aldrich v. Wainwright*, 777 F.2d 630, 642-44 (11th Cir. 1985) (Johnson, J., dissenting) (counsel was "totally unprepared" and unable to cross-examine effectively or present evidence that would have supported the client's alibi defense), *cert. denied*, 479 U.S. 918 (1986); *Alvord v. Wainwright*, 469 U.S. 956, 956-63 (1984) (Marshall, J., dissenting from the denial of certiorari) (counsel conducted no investigation into client's mental illness even though he had previously been found not guilty by reason of insanity); *Romero v. Lynaugh*, 884 F.2d 871, 875 (5th Cir. 1989) (counsel's entire closing argument, after thanking jury for its attention and asking client to stand, was "[y]ou are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say.") The death sentence was upheld in all of these cases. Messer and Mitchell have been executed.

7. Federal habeas corpus review, pursuant to 28 U.S.C. § 2254 (1982), is now well established as one of the "avenues of review so long and so well established that they must be counted among the basic 'protections' with which our system has 'surrounded' all persons convicted of crime." *Shaw v. Martin*, 613 F.2d 487, 491 (4th Cir. 1980) (quoting *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979)). See also J. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 21-24 (1988).

8. See *infra* notes 16-18, 29-40 and accompanying text; Liebman, *supra* n.7, at 350-362; Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 200-204 (1989).

9. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

10. U.S. CONST. amends. I-X. The procedural guarantees of the fourth, fifth, sixth and eighth amendments, made applicable to the states by the due process clause of the fourteenth amendment, apply in capital cases. See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981) (applying principles of fifth and sixth amendment); *Booth v. Maryland*, 482 U.S. 496, 501-502 (1987) (summarizing some of the eighth amendment principles applicable to capital trials).

tional standards.¹¹ Where a life is at stake, the state should not attempt to dodge this inquiry; it should meet it head on and establish that justice was done.

In practice, however, states successfully avoid the inquiry in one capital case after another. It has become evident that the courts in many areas, particularly in the South, where most of the executions in this country have taken place,¹² cannot provide capital trials that comport with the United States Constitution.¹³ Officials in those states make no secret of the fact that they cannot carry out executions without the strict enforcement of procedural bars to prevent review of constitutional errors by the federal courts.¹⁴

Quite often, states are successful in avoiding federal review of constitutional violations.¹⁵ Under the United States Supreme Court's decision in *Wainwright v. Sykes*,¹⁶ meritorious constitutional claims

11. See *Fay v. Noia*, 372 U.S. 391, 402 (1963) ("in a civilized society, government must always be accountable to the judiciary" for a defendant's sentence; "if the [sentence] cannot be shown to conform with the fundamental requirements of law, the individual is entitled to [relief]."). See also *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977))).

12. Ninety percent of the 120 executions between the resumption of the capital punishment in the 1970's and December 31, 1989, were carried out in the states of the old Confederacy: Texas (33 executions), Florida (21), Louisiana (18), Georgia (14), Virginia (8), Alabama (7), Mississippi (4), North Carolina (3), and South Carolina (2). NAACP Legal Defense Fund, *Execution Update*, January 18, 1990.

13. By this author's count, the federal courts had reviewed 85 capital cases from Georgia from 1976 to the end of 1989, and found constitutional violations which resulted in either the conviction or sentence being set aside in 58 of them (68.2 percent). Constitutional violations also occurred in some of the cases where relief was denied, but the issue was found to be waived by defense counsel. See *infra* notes 29-38 and accompanying text.

14. See, e.g., *Evans v. State*, 441 So. 2d 520, 531 (Miss. 1983) (Robertson, J., dissenting) (indicating that the Attorney General of Mississippi had recently begun asking the Mississippi Supreme Court to invoke procedural bars as a means of preventing federal review following judicial findings of constitutional violations in seven of the eight Mississippi capital cases reviewed by the federal courts), *cert. denied*, 467 U.S. 1264 (1984). See also *Wheat v. Thigpen*, 793 F.2d 621, 626 n.5 (5th Cir. 1986) (noting that vindication of constitutional rights in the federal courts has been described by the Mississippi Attorney General as "a '[c]rash [u]pon the [r]ocky [s]hores of the [f]ederal [j]udiciary.'" (quoting State's Response, *Edwards v. Thigpen*, 433 So. 2d 906 (Miss. 1983)), *cert. denied*, 480 U.S. 930 (1987); GA. CODE ANN. § 9-14-42 (Supp. 1989) (amending the post-conviction review statute in 1982 to erect a new procedural bar to review of claims after a number of death sentences had been set aside by the federal courts).

15. See *infra* notes 29-40 and accompanying text.

16. 433 U.S. 72 (1977).

may be barred from federal review because of an attorney's failure to satisfy state procedural rules¹⁷ or the attorney's failure to anticipate changes in the law.¹⁸ Although counsel's failure to preserve the constitutional violation may be the result of negligence, ignorance, or incompetence, it may still pass constitutional muster under the effective assistance of counsel standard adopted by the Court in *Strickland v. Washington*.¹⁹ This standard has been interpreted by some courts as "not requir[ing] that the accused, even in a capital case, be represented by able or effective counsel."²⁰

The lax standard of *Strickland v. Washington* and the strict procedural requirements of *Sykes* have become the gateposts on the road to legal condemnation. Between them pass "people of marginal intelligence, doubtful sanity, and debilitating poverty"²¹ who usually have no voice in the selection of their counsel²² and are unable to assert any control over the litigation process. Together *Strickland* and *Sykes* have fostered a substandard level of representation for the poor and arbitrary and inequitable results in the infliction of the death penalty.

Whether states will ever establish and adequately fund indigent defense programs to remedy the deficiencies of counsel remains to

17. *Id.* at 84-87.

18. See *Engle v. Isaac*, 456 U.S. 107, 130-34 (1982) (applying *Sykes*). See also *Smith v. Murray*, 477 U.S. 527, 533-36 (1986). *But cf.* *Reed v. Ross*, 468 U.S. 1, 13-16 (1984) (where there is "no reasonable basis in existing law" to assert the claim, a procedural default will be excused).

19. 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must show that counsel's performance was deficient under a standard of "prevailing professional norms," overcome a strong presumption of competency, and establish a reasonable probability that counsel's errors affected the outcome. *Id.* at 687-88, 696.

20. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

21. Teepen, *Killing in the Name of the Law*, ATLANTA J. & CONST., Sept. 5, 1987, page 17A. See also Lewis, Pincus, Feldman, Jackson & Bard, *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY No. 7, at 838 (July 1986) (finding high incidence of psychiatric, neurological and cognitive disorders among those condemned to die); Reid, *Low IQ Is a Capital Crime*, THE PROGRESSIVE, April 1988, at 24 (describing mental retardation and other disabilities of several persons sentenced to death).

22. An indigent defendant has no right to select the attorney who defends him. See, e.g., *United States v. Hampton*, 457 F.2d 299, 301 (7th Cir.), *cert. denied*, 409 U.S. 856 (1972); *Tibbett v. Hand*, 294 F.2d 68, 73 (10th Cir. 1961); *Preston v. State*, 257 Ga. 42, 44, 354 S.E.2d 135, 139 (1987); *Drumgo v. Superior Court*, 8 Cal. 3d 930, 934-35, 506 P.2d 1007, 1009, 106 Cal. Rptr. 631, 633, *cert. denied*, 414 U.S. 979 (1973).

be seen.²³ This article will focus on the inequities in capital punishment cases wrought by *Sykes* where defendants are not adequately represented. It will demonstrate that invocation of procedural bars based on defaults that were the result of ignorance, neglect or incompetence by defense counsel have no place in the review of cases involving the taking of life.²⁴

II. DECIDING WHO DIES: A PRINCIPLED SELECTION PROCESS OR THE LUCK OF THE DRAW?

The judicial process for selecting “the few cases in which [the death penalty is imposed] from the many cases in which it is not”²⁵ is supposed to be a principled one, in which those most deserving of death are identified based upon the circumstances of the crime and the background of the offender.²⁶ The United States Supreme Court has repeatedly held that the eighth amendment prohibits the arbitrary or capricious imposition of the death penalty.²⁷ In theory, at least, death is reserved for those who have committed the most heinous murders and are so far beyond redemption that they should be eliminated from the human community.

23. The prospects are not encouraging. See Bright, Kinnard & Webster, *Keeping Gideon from Being Blown Away*, CRIM. JUST., Winter 1990, at 10; Bizzaro, *Funding Crunch Is Eroding Rights Won In Gideon*, FLORIDA BAR NEWS, May 15, 1989, at 8.

24. At the time of this writing, there were several proposals before the Congress that would either improve or worsen the situation. Several proposals would adopt for the first time a statute of limitations for habeas corpus petitions. See, e.g., S.1757, 101st Cong., 1st Sess., 135 CONG. REC. S13474 (daily ed. Oct. 16, 1989); S.1760, 101st Cong., 1st Sess., 135 CONG. REC. S13480 (daily ed. Oct. 16, 1989). These provisions, if adopted, could result in the ultimate procedural default: the barring of *any* federal review because the lawyer for the petitioner did not file the papers on time. On the other hand, another proposal would allow federal courts to consider constitutional claims where the failure to preserve them was attributable to the ignorance or neglect of the attorney. See S.1757, *supra*, at S13475.

25. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

26. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (“[T]he fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”). See also *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (Georgia statutory procedures “require the jury to consider the circumstances of the crime and the criminal before it recommends sentence”); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (“the sentencer in capital cases must be permitted to consider any relevant mitigating factor”).

27. See, e.g., *Booth v. Maryland*, 482 U.S. 496, 508-09 (1987); *Beck v. Alabama*, 447 U.S. 625, 640 (1980); *Gregg*, 428 U.S. at 189.

In practice, however, the system for imposing capital punishment is most often a game of chance in which the winners and the losers are distinguished not by their criminal and moral culpability, but by the luck of the lawyers they draw.²⁸ This is illustrated by the cases of Smith²⁹ and Machetti,³⁰ two codefendants sentenced to death at separate trials by unconstitutionally composed juries within a few weeks of each other in the same county in Georgia.³¹ Machetti's lawyers challenged the jury composition in state court; Smith's lawyers did not because they were unaware of a United States Supreme Court decision decided only five days before Smith's trial began.³² A new trial was ordered for Machetti by the Eleventh Circuit Court of Appeals,³³ and, at that trial, a jury which fairly represented the community imposed a sentence of life imprisonment. The Eleventh Circuit refused to consider the identical issue in Smith's case because his lawyers did not preserve it.³⁴ Smith was executed, becoming the first person to die under the Georgia statute previously held constitutional in *Gregg v. Georgia*.³⁵

If Machetti had been represented by Smith's lawyers and vice versa in state court, Machetti would have been executed and Smith would have obtained federal *habeas corpus* relief. This is not how a principled selection process should work. Yet *Smith* is hardly an isolated example. The second person executed in Georgia was a mentally retarded offender, who was denied relief despite a jury in-

28. Other arbitrary factors, such as race, the exercise of prosecutorial discretion, exclusion of segments of the community from jury service, political influences, and the quality and availability of counsel at all stages of the process, continue to play a significant role in determining who dies. See *supra* n.2 and accompanying text; B. NAKELL & K. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987); Tabak & Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 62-89 (1989); Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573 (1985).

29. *Smith v Kemp*, 715 F.2d 1459 (11th Cir. 1983), *application for stay denied*, 463 U.S. 1344, *cert. denied*, 464 U.S. 1003 (1983).

30. *Machetti v. Linaham*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

31. *Id.* at 237-38. Women were systematically excluded from the jury pools from which Machetti's and Smith's juries were selected. See *id.* at 238-42.

32. Smith's trial lawyers disclosed in their application for clemency that they were unaware of *Taylor v. Louisiana*, 419 U.S. 522 (1975). *Application of Smith*, Ga. Board of Pardons and Paroles, at 33 (Dec. 6, 1983).

33. *Machetti*, 679 F.2d at 241-42.

34. *Smith v. Kemp*, 715 F.2d at 1476 (Hatchett, J., dissenting).

35. 428 U.S. 153 (1976).

struction which unconstitutionally shifted the burden of proof on intent³⁶ because his attorney did not preserve the issue by raising an objection at trial.³⁷ His more culpable codefendant was granted a new trial on the unconstitutional instruction.³⁸ Again, a switch of the lawyers would have reversed the outcomes of the two cases.

Many other executions have been carried out after courts refused to examine constitutional questions because of counsel's failure to preserve them. Two executions occurred after decisions by the United States Supreme Court that meritorious constitutional claims were barred because trial or appellate lawyers failed to recognize or preserve the issues.³⁹ Many others have been carried out after federal courts refused to address the merits of issues because of procedural bars invoked by the state under *Sykes*.⁴⁰

36. See *Francis v. Franklin*, 471 U.S. 307, 315-25 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 514-19 (1979).

37. *Stanley v. Kemp*, 737 F.2d 921, 922 (11th Cir.) (per curiam), *application for stay denied*, 468 U.S. 1220 (1984).

38. *Thomas v. Kemp*, 800 F.2d 1024 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

39. In *Dugger v. Adams*, 109 S. Ct. 1211 (1989), the Court held that relief was barred because the trial lawyer did not object to jury instructions which unconstitutionally reduced the jury's sense of responsibility for its decision. A panel of the Court of Appeals for the Eleventh Circuit had unanimously concluded that Adams had been unconstitutionally sentenced to death because of those instructions. *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), *modified sub. nom.*, *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987). Adams was executed by Florida on May 4, 1989. In *Smith v. Murray*, 477 U.S. 527 (1986), the Court held that review of a claim that psychiatric evidence has been obtained unlawfully was barred because it had not been properly raised on appeal by Smith even though it had been raised in an *amicus curiae* brief. Justice John Paul Stevens noted in dissent that "[t]he record . . . unquestionably demonstrates that petitioner's constitutional claim is meritorious, and that there is a significant risk that he will be put to death because his constitutional rights were violated." *Id.* at 539. He suggested that "the Court has lost its way in a procedural maze of its own creation" and "grossly misevaluated the requirements of 'law and justice' that are the federal court's statutory mission under the federal habeas corpus statute." *Id.* at 541. Smith was executed by Virginia on July 31, 1986.

40. It is seldom that a capital case decided by a federal court of appeals does not involve one or more issues that are procedurally barred. See, e.g., *Richardson v. Johnson*, 864 F.2d 1536 (11th Cir. 1989) (three of five issues in Alabama capital case barred from consideration), *cert. denied*, 109 S. Ct. 3175 (1989); *Julius v. Johnson*, 840 F.2d 1533, 1545-47 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 404 (1988); *Whitley v. Bair*, 802 F.2d 1487, 1496 n.17 (4th Cir. 1986) (all 15 issues in Virginia capital case barred from consideration), *cert. denied*, 480 U.S. 951 (1987); *Dobbert v. Strickland*, 718 F.2d 1518, 1524-25 (11th Cir. 1983) (issue of exclusion of jurors barred), *cert. denied*, 109 S. Ct. 1353 (1989); *O'Bryan v. Estelle*, 714 F.2d 365, 384-85 (5th Cir. 1983) (failure to give instruction on mitigating circumstances, later held to be a constitutional violation in *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989), barred), *cert. denied*, 465 U.S. 1013 (1984); *Antone v. Strickland*, 706 F.2d 1534 (11th Cir.) (review of instruction limiting the jury's consideration of mitigating evidence barred), *cert.*

III. THE GULF BETWEEN THE QUALITY OF COUNSEL REQUIRED BY SYKES AND THAT TOLERATED UNDER *STRICKLAND*

The United States Supreme Court held in *Wainwright v. Sykes*⁴¹ that failure of defense counsel to comply with a contemporaneous objection rule at trial precluded federal *habeas corpus* review of a constitutional claim. Prior to *Sykes*, a defendant's failure to preserve a constitutional claim in the state courts would not prevent review in federal court so long as the prisoner had not deliberately bypassed the state procedures.⁴²

Cases decided after *Sykes* have established virtually impossible requirements that defense counsel must be errorless and capable of anticipating changes in the law. A mistake or negligence on the part of counsel does not excuse a default.⁴³ Ignorance on the part of counsel of an emerging constitutional theory that is being litigated in other jurisdictions is no excuse for failing to raise an issue.⁴⁴ And failure to raise and preserve an issue that is completely without merit under existing case law will bar relief if the right is later recognized.⁴⁵

For an attorney to provide the representation anticipated by *Sykes* and subsequent cases, he or she must be completely conversant with federal constitutional decisions of the state and federal courts throughout the nation. The lawyer also must keep abreast of de-

denied, 464 U.S. 1003 (1983); *Bass v. Estelle*, 696 F.2d 1154 (5th Cir.) (issue of improper exclusion of juror barred), *cert. denied*, 464 U.S. 865 (1983); *Sullivan v. Wainwright*, 695 F.2d 1306 (11th Cir. 1983) (three of five issues barred), *cert. denied*, 464 U.S. 922 (1983). The petitioners in all of these cases have been executed. NAACP Legal Defense Fund, EXECUTION UPDATE, January 18, 1990 at 2-5. It is impossible to determine the number of issues that are not presented to the federal habeas corpus courts because it is clear that consideration will be barred due to procedural defaults.

41. 433 U.S. 72, 84-87 (1977). The Court held that a defaulted claim could be entertained by the federal court only if the habeas corpus petitioner could show cause for not complying with the state procedural rule and actual prejudice resulting therefrom.

42. *Fay v. Noia*, 372 U.S. 391 (1963). In determining "deliberate bypass," the Court employed the "intentional relinquishment of a known right or privilege" analysis of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and concluded that Noia in failing to present his claim on appeal to the state courts had not done it as a "tactical or strategic litigation step, or in . . . deliberate circumvention of state procedures." *Fay*, 372 U.S. at 440.

43. *Murray v. Carrier*, 477 U.S. 478 (1986).

44. *Engle v. Isaac*, 456 U.S. 107 (1982).

45. *Smith v. Murray*, 477 U.S. 527 (1986).

velopments in all of the federal circuits, the state appellate courts⁴⁶ and the writings of commentators. This is necessary so that counsel will be aware of all issues that are “percolating”⁴⁷ in those courts, recognize the “tools to construct [the] constitutional claim”⁴⁸ and then raise and present all issues long before they achieve general acceptance in the courts.

Moreover, the lawyer must be aware of the necessity of raising all of the these “percolating” issues even though they may be foreclosed by existing case law of the state and federal courts that have jurisdiction over the case. Otherwise, if the law changes due to a new United States Supreme Court decision, the defendant will be barred from obtaining relief because of his failure to assert an objection when it was meritless.⁴⁹

Unfortunately, the poor person accused of a capital crime is seldom, if ever, defended by a constitutional scholar possessing this extraordinary depth and range of knowledge of constitutional law.⁵⁰

46. See, e.g., *Reed v. Ross*, 468 U.S. 1, 25 (1984) (Rehnquist, J., dissenting). Justice Rehnquist would have denied Ross relief for not raising an issue at his North Carolina trial in March, 1969, based on “the reasoning employed” by a lower Connecticut court and the Eighth Circuit in two cases decided in June and November of 1968. *Id.* See also *Engle*, 456 U.S. at 107, 132 n.40 (1982) (refusing to excuse counsel’s failure to raise new claim because it had been litigated in some state and federal courts).

47. *Smith v. Murray*, 477 U.S. at 537.

48. *Engle*, 456 U.S. at 133. The Court in *Engle* stated that “[e]ven those decisions rejecting the defendant’s claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time.” *Id.* at 133 n.41. Thus, defense counsel must be aware of the *losing issues* being litigated in other jurisdictions in order to protect their clients’ rights.

49. In *Smith v. Murray*, counsel did not challenge on direct appeal to the state supreme court the admission of testimony by a psychiatrist about his interview with the defendant as a violation of the privilege against self-incrimination and the right to counsel because it was foreclosed by previous decisions of that court. 477 U.S. at 531. Thereafter, the Supreme Court sustained such a challenge in *Estelle v. Smith*, 451 U.S. 454 (1981). However, the Court held that review of the issue was barred in *Smith v. Murray* because of counsel’s failure to raise the issue on direct appeal. Notwithstanding the Court’s statement that the “process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail . . . is the hallmark of effective appellate advocacy,” *Smith*, 477 U.S. at 536 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)), the unmistakable lesson of *Smith v. Murray* is that there is no longer any such thing as a frivolous issue. Every issue must be raised in a capital case, no matter how hopeless at the time. Winnowing out weaker arguments can have, as it did in *Smith*, fatal consequences.

50. The Mississippi Supreme Court has observed that although “death penalty litigation has become highly specialized . . . few attorneys [in Mississippi] have ‘even a surface familiarity with seemingly innumerable refinements put on [the U.S. Supreme Court’s capital decisions]’” *Irving v. State*, 441 So. 2d 846, 856 (Miss. 1983).

Many capital cases are defended by small town lawyers who do not even specialize in criminal law, much less the subspeciality of capital punishment law.⁵¹

For example, a Georgia lawyer who has defended several capital cases was asked recently to name any criminal law decisions from any court with which he was familiar. Besides the case in which he was testifying, he was able to name only two: “*Miranda* and *Dred Scott*.”⁵² Last year Alabama executed one person whose lawyer filed no appellate brief with the Alabama Court of Criminal Appeals after the death sentence was imposed on a remand.⁵³

Yet lawyers with such limited knowledge of the law often satisfy the *Strickland* standard of minimally effective representation. The United States Supreme Court has held that “the Constitution . . . does not insure that defense counsel will recognize and raise every conceivable constitutional claim.”⁵⁴ The Georgia defense lawyer whose entire knowledge of “criminal law” is “*Miranda*” and “*Dred Scott*” has twice been held to satisfy the *Strickland* standard.⁵⁵ As Justice Thurgood Marshall has pointed out, “all manner of negligence, ineptitude, and even callous disregard for the client” passes

51. The appointment of individual private attorneys to cases from a list of available attorneys is the method of providing counsel in 69 percent of the counties in the South. Bureau of Justice Statistics, United States Department of Justice, *CRIMINAL DEFENSE FOR THE POOR*, 1986 at 3 (Sept. 1988). Many of the states that impose the death penalty most frequently—Alabama, Georgia, Mississippi, Louisiana, and Texas—have no state-wide indigent defense system. See, e.g., Bright, Kinnard & Webster, *Keeping Gideon from Being Blown Away*, *CRIM. JUST.*, Winter, 1990, at 10, 12 (describing the “hodgepodge of approaches to representation of indigent defendants in Georgia”); SPANZENBERG GROUP, *ANALYSIS OF COST OF COURT-APPOINTED COUNSEL IN VIRGINIA* (1985).

52. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Of course, *Dred Scott* was not a criminal case.

53. *Richardson v. State*, No. 4 Div. 624 Docket Entries (Ala. Crim. App., Oct. 3, 1978). *Richardson* was executed August 18, 1989. *Richardson*’s lawyer was later disbarred.

54. *Engle v. Isaac*, 456 U.S. 107, 134 (1982).

55. *Williams v. State*, 368 S.E.2d 742, 747-750 (Ga. 1988), *cert. denied*, 109 S. Ct. 3261 (1989); *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874 (1984). In *Birt*, the dissent would have found the attorney ineffective for failing to investigate and challenge jury pools that were unconstitutionally composed. *Birt*, 725 F.2d at 603-05 (Hatchett, J., dissenting). However, because the majority concluded that he was not ineffective, *Birt*’s conviction was upheld even though the jury which convicted him was drawn from a jury pool in which black people and women were systematically excluded. *Id.* at 596-601.

constitutional muster under the *Strickland* standard.⁵⁶ Nevertheless, a majority of the Supreme Court has decided that “[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington* . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.”⁵⁷ This is a remarkable statement. Surely there is *some* inequity in penalizing impoverished people for the ignorance, neglect and mistakes of lawyers they had no involvement in selecting. When the penalty is to allow an unconstitutionally obtained death sentence to be carried out, the inequity becomes even more apparent.

IV. THE UNCONSCIONABLE IMPACT OF SYKES ON THE POOR IN CAPITAL CASES CANNOT BE JUSTIFIED

While it may be appropriate in some types of litigation for litigants to suffer the consequences of mistakes made by their chosen counsel,⁵⁸ it is not acceptable in a process of deciding the life and death of poor people who had no involvement in the selection of their lawyers or in the failures of those lawyers to discharge their responsibilities.

Poor people charged with capital offenses in Alabama, Georgia, Mississippi, Texas and elsewhere usually have no alternative except to be represented by attorneys who lack the skill, knowledge, resources, financial incentive and willingness to protect their rights

56. Remarks of Justice Thurgood Marshall to the Second Circuit Judicial Conference, Sept. 1988. In an earlier address to the Second Circuit Conference, Justice Marshall stated: “Often trial counsel simply are unfamiliar with the special rules that apply in capital cases. . . . For example, I have read cases in which counsel was unaware that certain death penalty issues were pending before the appellate courts and that the claims should be preserved” Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1-2 (1986). A brief filed recently in the Georgia Supreme Court asserted that the “stable of attorneys used in death penalty cases [in one Georgia judicial circuit] would be rejected by even a decent glue factory.” Woolner, *Capital Counsel Must Be Paid*, *Fulton County Daily Report*, Feb. 23, 1990, at 6, 7 (quoting from brief in *Birt v. State*, Ga. S. Ct. No. S89A0068).

57. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

58. See, e.g., *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) (dismissal for counsel’s absence from hearing and failure to prosecute upheld because civil litigant “voluntarily chose this attorney as his representative . . . and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.”).

adequately. They have no remedy for the negligent or ignorant failure of their lawyers to protect their rights. On the way to the executioner, one has little chance of bringing a successful malpractice action⁵⁹ against the attorney who denied him his day in court by waiving a constitutional issue. Even if such an action were to succeed, the monetary recovery would be of little solace to the condemned as the executioner went about his grisly business.

Requiring these defendants to pay with their lives for the ignorance or neglect of their attorneys is simply too harsh, too inequitable and altogether inconsistent with the notion of a principled process of selecting those deserving of death based on their crime and background.

A. The Rationale For Sykes Is at Odds with the Reality of Representation of the Poor in Capital Cases

The majority in *Sykes* concluded that its procedural default rule would encourage the presentation of constitutional claims at the state criminal trial, thereby resulting in a trial “as free of error as possible.”⁶⁰ This assumes a defense counsel who is aware of the constitutional claim and is capable of preserving it. Where this critical ingredient to the adversary process is missing, an onerous procedural bar does nothing to remove a constitutional deficiency from the trial; it simply sweeps it under the rug.

Sykes does not encourage the states to provide competent counsel. Instead, *Sykes* and *Strickland* reward them for providing inadequate counsel. The state obtains two benefits from the poor representation the defendant receives: the likelihood of obtaining the death sentence is increased⁶¹ and any constitutional deficiencies that

59. In other types of litigation, “if an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice.” *Link v. Wabash R. Co.*, 370 U.S. at 633 n.10.

60. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

61. “[A]ccused persons who are represented by ‘not legally ineffective’ lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.” *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring) (emphasis original).

occur in the process may be insulated from review.⁶² Ironically, the result of *Sykes* and *Strickland* is that, so long as counsel is not so bad as to fall below the *Strickland* standard, the poorest level of representation at trial receives the least scrutiny in post-conviction review.

Sykes overlooks which side controls the selection of counsel in cases of indigent defendants. Its rationale may apply in the case of knowledgeable, sophisticated defendants who can afford to hire their own lawyers to protect their rights.⁶³ However, the poor person accused of a crime does not select his attorney; one is appointed for him. A local community, outraged over the murder of one of its members, usually has no incentive to protect the constitutional rights of the one accused of the killing.⁶⁴ Often court-appointed counsel do not welcome the assignment⁶⁵ or empathize with the plight of

62. In states which do not provide adequate counsel, it is not unusual for the state to argue that most, if not all, issues are precluded because defense counsel did not preserve them. *See, e.g.*, the cases cited, *supra* note 40.

63. Even a lawyer specializing in the defense of criminal cases cannot reasonably be expected to have the breadth of knowledge required by *Sykes*. *See supra* notes 43-48 and accompanying text. The busy trial lawyer, whose time is spent primarily interviewing clients and witnesses, preparing for trial, and trying cases cannot possibly keep up with all of the issues that are being litigated in all the state and federal courts throughout the land.

64. Appointment of counsel is usually made in the southern states by an elected judge who must be sensitive to the desires of his constituency to remain in office or advance to higher office. This may explain why a defendant in a capital trial in Mississippi was defended by a third-year law student who requested a moment to compose herself during trial because she had never been in court before, *State v. Leatherwood*, 548 So. 2d 389 (Miss. 1989); or a defendant in a Georgia capital trial was represented by an attorney who had been admitted to the bar just a few months before trial, *Tyler v. Kemp*, 755 F.2d 741, 743 (1985); or an Alabama trial was allowed to proceed even after the defense lawyer had been found intoxicated and sent to jail for a night during trial, *Haney v. State*, Record on Appeal at R846-49, Ala. Crim. App. No. 7 Div. 148 (1989); or a trial court in Georgia attempted, prior to the retrial of a capital case that had been reversed by the Supreme Court, *Amadeo v. Zant*, 486 U.S. 214 (1988), to replace two experienced lawyers who had won the new trial for the defendant with two lawyers who had no capital punishment experience. *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989).

65. *See, e.g.*, *Coleman v. Kemp*, 778 F.2d 1487, 1494-95, 1503, 1516, 1522 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986). There, the Court of Appeals described how all eight lawyers appointed to represent four persons facing the death penalty in a small, rural Georgia community publically made known their objections to the appointments. One attorney was quoted in the local newspaper as saying the appointment was "the worst thing that's ever happened to me professionally." *Id.* at 1503. Another said it would mean "the loss of money and friends." *Id.* at 1504. Another was quoted in the newspaper as saying about his appointment: "I despise it; I'd rather take a whipping . . . It's worse than taking a dose of Colomel [a laxative] but I have to take it. To refuse would be contempt of court." *Id.* at 1522.

their clients.⁶⁶ Counsel may have greater loyalty to the community from where future business will come than to the defendant he is appointed to represent.⁶⁷ Not infrequently, these court-appointed lawyers are less than zealous in their representation and do not serve the interests of their clients.⁶⁸

The strict procedural default rule adopted in *Sykes* also rests upon the Court's undocumented fear of "sandbagging"—the withholding of meritorious claims by lawyers who somehow know that an appellate court will surely sustain them on appeal. However, the dismal history of representation by court-appointed attorneys in capital cases indicates that most of them lack the sophistication required to "sandbag."⁶⁹ An attorney whose total knowledge of criminal law

66. See, e.g., *Dobbs v. Zant*, 720 F. Supp. 1566 (N.D. Ga. 1989). The defendant, a black man, was represented by a white defense attorney whose attitudes were described as follows by the District Court:

Dobb's trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County [Georgia]. . . .

Id. at 1577 (denying *habeas corpus* relief).

67. See, e.g., *Goodwin v. Balkcom*, 684 F.2d 794, 805-09 (11th Cir. 1982) (fears of negative public reaction led counsel to tell jury that he was appointed to defend the case and to conduct less than vigorous defense), *cert. denied*, 460 U.S. 1098 (1983); *Barrow v. State*, 239 Ga. 162, 163, 236 S.E.2d 257, 259 (1977) (attorney did not challenge underrepresentation of black citizens on grand jury because he wanted to be rehired as public defender, and "he felt adverse community pressure would inure to him personally if he attempted to have more blacks placed on the grand jury, and that he had obligations to other clients whom he did not want to jeopardize by bringing an unpopular motion").

68. See, e.g., *Amadeo v. Zant*, 486 U.S. 214 (1988) (court-appointed lawyers gave testimony that would bar *habeas corpus* relief for their former client; however, because testimony was not plausible and inconsistent with counsel's actions at the time of trial it was not credited); *Stano v. Dugger*, 883 F.2d 900, 916 (11th Cir. 1989) (defense counsel, who was interested in writing a book about the defendant if he was a serial killer, instructed the defense psychologist to tell police officer how best to exploit the defendant's mental disabilities in order to elicit confessions) (rehearing granted and opinion vacated Oct. 31, 1989); *Peek v. Kemp*, 784 F.2d 1479, 1540 (11th Cir. 1986), (Johnson, J., dissenting) (during jury deliberations on guilt, defense counsel stipulated to substitution of a juror at 12:30 a.m. without any questioning of juror who was replaced or requesting any reinstruction of jury; three minutes after the substitution, the jury returned a verdict of guilty), *cert. denied*, 479 U.S. 939 (1986).

69. Twelve years after *Sykes*, there has yet to be any evidence that attorneys engage in such

is "*Miranda* and *Dred Scott*" is hardly in a position to recognize and hide many constitutional issues.

But beyond these obvious limitations upon those who defend the poor in capital trials for as little as \$1,000 to \$2,500, almost any lawyer is going to try to prevail in the forum where the case is tried, not "save" an issue for an uncertain later day in a court whose composition and receptiveness to the issue cannot possibly be calculated at the time of trial.⁷⁰

B. The Protections of the Constitution Should Be Enforced In Capital Cases

Procedural bars based on defaults occurring because of ignorance, neglect or incompetence on the part of defense counsel have no place in the review of cases involving the taking of life. Execution is an extraordinary and irremediable penalty. If it is to be used at all, its use should be strictly limited to punishing offenders for their own conduct, not that of their lawyers. Allowing an unconstitutional execution to take place because the lawyer blundered makes a process that did not meet constitutional standards all the more arbitrary and inequitable.⁷¹

The Bill of Rights is not a collection of technicalities. It is this nation's most fundamental guarantees of fairness and justice. For 200 years we have revered these rights. This nation is respected and emulated throughout the world because we provide these safeguards of liberty and justice to even the least among us, even those who have offended us most grievously.

a practice. The ABA Task Force Report, *supra* n.5 at 168 (Manuscript Ed.), states: "It is our studied conclusion, based on extensive testimony on this question and our own experience, that capital trial and appellate lawyers rarely engage in the practice of sandbagging."

70. As Justice Brennan pointed out in his dissent in *Sykes*, the notion of sandbagging "simply offends common sense" because it would involve a lawyer withholding a meritorious claim from the trial court, thereby increasing the likelihood of conviction and forfeiting state review, and then attempting to deceive the federal habeas court by convincing it that he did not "deliberately bypass" the state procedures at the risk of being barred from federal review. *Wainwright v. Sykes*, 433 U.S. at 103 n.5 (Brennan, J., dissenting).

71. See *Dugger v. Adams*, 109 S. Ct. 1211, 1218 (1989) (Blackmun, J., dissenting). Justice Blackmun, joined by three other justices, accused the majority of "arbitrarily impos[ing] procedural obstacles to thwart the vindication of what appears to be a meritorious Eighth Amendment claim." *Id.*

On the other hand, the procedural default doctrine of *Wainwright v. Sykes* enjoys no such pedigree. It is a collection of technicalities. It is not the work of Jefferson, Madison, and Henry, but a thirteen-year-old, judicially created rule which frustrates vindication of the principles upon which this Republic was founded. While appearing to operate equally upon all, it falls most heavily upon the poor, who are usually defended by the inexperienced and the incompetent. Application of procedural bars, which has been aptly characterized as “unseemly” efforts to “pull the rug out from under” poor people because of mistakes by their court-appointed lawyers,⁷² does not serve the interests of justice.

V. CONCLUSION

As Judge Irving L. Goldberg has eloquently pointed out, we are trading away “the most precious legacy of Lord Coke, the power to discharge from the custody even one imprisoned by order of the King,” for one mess of pottage after another.⁷³ Interests of comity, expediency and finality are increasingly taking precedence over our most cherished and most fundamental notions of justice and fairness. This trend should be reversed. Ineptness on the part of a lawyer should not operate to strip away the protections of the Bill of Rights from the most important and unalterable decision made in our legal system. Federal courts should decide the merits of constitutional claims in all but the most exceptional cases, where it is clearly established by the state that there was actual withholding of a claim. Otherwise, the death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer.

72. *Evans v. State*, 441 So. 2d 520, 531 (Miss. 1983) (Robertson, J., dissenting), *cert. denied*, 467 U.S. 1264 (1984).

73. *Galtieri v. Wainwright*, 582 F.2d 348, 375 (5th Cir. 1978) (Goldberg, J., dissenting). *See also* *Bass v. Estelle*, 696 F.2d 1154, 1160-62 (5th Cir.) (Goldberg, J., specially concurring), *cert. denied*, 464 U.S. 865 (1983).

