AN ARGUMENT FOR REVIVING THE ACTUAL FUTILITY EXCEPTION TO THE SUPREME COURT'S PROCEDURAL DEFAULT DOCTRINE

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I. INTRODUCTION

A fundamental tenet of the Supreme Court's error preservation jurisprudence is that a criminal[1] defendant's failure to raise a legal claim, including a constitutional claim, during court proceedings (whether in the trial court or on appeal) "forfeits"[2] or "procedurally defaults" the claim on a subsequent

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1. Although this article focuses on the procedural default doctrine in criminal cases, its discussion is equally applicable to civil cases. *See Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1144-48 (9th Cir. 2001) (noting that the procedural default doctrine applies equally in criminal and civil cases); *Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1123-24 (5th Cir. 1997) (same). For reasons that are not entirely apparent, the vast bulk of appellate case law addressing the issue of futility in objecting and its implications for error preservation occurs in criminal cases. A few courts have addressed the futility issue in civil cases. *See e.g. Curtis Publg. Co. v. Butts*, 388 U.S. 130, 143-44, 172 n. 1 (1967) (plurality op. & Brennan, J., concurring) (excusing a procedural default of a First Amendment claim where, at the time of trial, "there was strong precedent" against the claim); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 129 (5th Cir. 1992) (excusing a procedural default in an admiralty case where there was a "solid wall of circuit authority" at the time of the trial that would have made an objection "in vain").

2. In *U.S. v. Olano*, 507 U.S. 725 (1993), the Supreme Court sought to clarify that the term "forfeit" rather than "waiver" is the appropriate concept to refer to a litigant's "failure to make a timely assertion of a right" which subjects the claim to a procedural default analysis. *Id.* at 733. Conversely, "waiver" is the "intentional relinquishment of abandonment of a known right." *Id.* In the procedural default context, a litigant typically unwittingly "forfeits" rather than knowingly "waives" a claim later raised for the first time on appeal or collateral review. Numerous lower courts even after *Olano* continue to use the term "waiver" to refer to what is really a forfeiture. *See e.g. U.S. v. Barnes*, 278

direct appeal or collateral attack of the defendant's conviction or sentence.[3] Although it has spoken inconsistently on the issue over the years, the Supreme Court's current approach is to "default" a claim not raised in a prior proceeding even if the court in that proceeding would have been utterly powerless to grant relief on the claim in view of extant appellate precedent that squarely foreclosed the claim.[4]

This article addresses the futility of objecting in view of adverse binding precedent and its implications under the procedural default doctrine, an issue that the Court has addressed repeatedly, beginning in 1947 with *Sunal v. Large*,[5] and most recently in 1998 in *Bousley*.[6] This article contends that as a matter of logic and equity the procedural default doctrine, as a general rule, should not be applied when an inferior court before which the defendant previously appeared (where a claim was not raised) would have been powerless to grant relief on that claim because then-governing precedent of a superior court dictated rejection of the claim.

Applying the procedural default doctrine in such a situation runs afoul of the centuries-old "fundamental maxim of jurisprudence,"[7] deeply rooted in common sense, that the law does not require "useless," "vain," or "futile" acts.[8] "Good

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F.3d 644, 646 (6th Cir. 2002). For clarity's sake, this article will use the term "procedural default" to refer to the concept of a litigant's "forfeiture" of a claim later raised on direct appeal or collateral review.

3. *See e.g. Wainwright v. Sykes*, 433 U.S. 72 (1977) (procedural default at trial in state court system); *Coleman v. Thompson*, 501 U.S. 722 (1991) (procedural default on appeal in the state court system); *Johnson v. U.S.*, 520 U.S. 461 (1997) (procedural default at trial in the federal court system); *Bousley v. U.S.*, 523 U.S. 614, 623 (1998) (procedural default on appeal in federal system).

4. *Compare e.g. O'Connor v. Ohio*, 385 U.S. 92, 93 (1966) (holding that futility of objecting in light of extant precedent excused a procedural default), and *Estelle v. Smith*, 451 U.S. 454, 468 n. 12 (1981) (same holding as *O'Connor*), *with Johnson v. U.S.*, 520 U.S. at 468 (holding that futility of objecting did not excuse a procedural default, but reviewing unpreserved error as "plain error"), and *Bousley*, 523 U.S. 614 (holding that futility did not constitute "cause" for procedural default). The conflicting holdings of these cases are addressed in Section III, *infra*.

5. 332 U.S. 174, 177-78 (1947).

6. 523 U.S. at 621-22.

7. *Mehrtash v. Mehrtash*, 112 Cal. Rptr. 2d 802, 805 (Cal. App., 4th Div. 2001).

8. Stated in various ways, the ancient maxim "*lex non cogit ad inutilia*," or "the law does not know useless acts," has been a fundamental tenet in Anglo-American jurisprudence for centuries. *See Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1999] 1 Lloyd's Rep. 36, 39 (English Court of Appeal 1998); *People v. Greene Co.*

judicial administration is not furthered by insistence on futile procedure."[9] Furthermore, requiring defense counsel to object on grounds that are clearly foreclosed by entrenched precedent subjects them to possible sanctions for raising "frivolous" claims.[10]

This issue takes on great practical importance in view of the Supreme Court's perennial practice of significantly altering the existing legal landscape in the criminal law arena by (1) outright overruling or seriously eroding precedent that previously had foreclosed a claim; or (2) finding merit in a claim that a consensus or near-consensus of lower courts had previously rejected and that the Court never had addressed previously.[11] Under the Court's current procedural default

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Supervisors, 12 Barb. 217, 1851 WL 5372, at *3 (N.Y. Sup. Ct. 1851); *see also Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."); *Cary v. Curtis*, 44 U.S. 236, 246 (1845) ("[T]he law never requires . . . a vain act."); *N.Y., New Haven & Hartford R.R. Co. v. Iannoti*, 567 F.2d 166, 180 (2d Cir. 1977) ("The law does not require that one act in vain."); *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, 707 (8th Cir. 1971) ("The law does not and should not require the doing of useless acts."); *Stevens v. U.S.*, 2 Ct. Cl. 95 (U.S. Ct. Cl. 1866) ("[T]he law does not require the performance of a useless act."); *Bohnen v. Harrison*, 127 F. Supp. 232, 234 (N.D. Ill. 1955) ("It is fundamental that the law does not require the performance of useless acts."); *In re Anthony B.*, 735 A.2d 893, 901 (Conn. 1999) ("It is axiomatic that the law does not require a useless and futile act."); *Wilmette Partners v. Hamel*, 594 N.E.2d 1177, 1187 (Ill. App. 1992) ("[I]t is a basic legal tenet that the law never requires a useless act.").

9. *Wade v. Mayo*, 334 U.S. 672, 681 (1948).

10. *See generally* Brent E. Newton, *When Reasonable Jurists Could Disagree: The Fifth Circuit's Misapplication of the Frivolousness Standard*, 3 J. App. Prac. & Process 157 (2001) (discussing the scenario when an appellate court finds a claim "frivolous" based on prior precedent of that court that forecloses the claim even when other courts have found merit in the claim); *see also U.S. v. McGuire*, 79 F.3d 1396, 1412 (5th Cir. 1996) (Wiener, J., concurring) ("To penalize defendants for failing to challenge entrenched precedent would only encourage frivolous objections and appeals."), *vacated*, 99 F.3d 671 (5th Cir. 1996) (en banc); *Meadows v. Holland*, 831 F.2d 493, 501 (4th Cir. 1987) (en banc) (Murnaghan, Phillips & Sprouse, J.J., dissenting) (criticizing the majority's refusal to excuse the procedural default based on extant, adverse precedent at trial as requiring defense counsel to engage "in [a] recital of frivolous, non-valid matters [foreclosed under extant law], for how could counsel say what was clearly not the law today would not become the law tomorrow?").

11. *See e.g. Atkins v. Va.*, 536 U.S. 304(2002) (overruling portion of *Penry v. Lynaugh*, 492 U.S. 302 (1989), and holding that a capital defendant's mental retardation bars his execution); *Ala. v. Shelton*, 535 U.S. 654 (2002) (limiting *Scott v. Ill.*, 440 U.S. 367 (1979), by holding that Sixth Amendment's right to counsel applied to misdemeanor cases where probation or suspended sentence, as opposed to "actual imprisonment," imposed); *Ring v. Ariz.*, 122 S. Ct. 2428, 2432 (2002) (overruling *Walton v. Ariz.*, 497 U.S. 639 (1990), and holding that juries, not judges, must find aggravating circumstances in capital cases); *Apprendi v. N.J.*, 530 U.S. 466 (2000) (dramatically altering prior Supreme Court

jurisprudence, criminal defendants who failed to object on a legal ground that was then squarely foreclosed by governing precedent and that only later became legally viable as a result of supervening precedent are generally out of luck when they attempt to raise the claim for the first time on direct appeal or collateral review.

Such an inequitable and illogical application of the procedural default doctrine should be abandoned. As discussed below, the Supreme Court should significantly modify its current approach to the futility issue. This article proposes such a modification, which, if adopted, would excuse procedural defaults when raising a claim at an earlier juncture in a case actually would have been futile from an objective standpoint—as opposed simply to being merely perceived as futile—and, thus, would have served no legitimate purpose.

II. THE PROCEDURAL DEFAULT DOCTRINE AND ITS RECOGNIZED EXCEPTIONS

The consequences of a procedural default are typically harsh for a criminal defendant, whether in state or federal court. A defendant in a state prosecution who did not raise a federal constitutional claim in accordance with state procedural requirements[12] and who subsequently raises a claim of error,

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jurisprudence and overruling a virtual consensus among lower courts on the issue by holding that any fact that increases maximum sentence is an "element" of offense that must be submitted to jury and proven beyond a reasonable doubt; state's label of fact as "sentencing factor" not dispositive); *U.S. v. Lopez*, 514 U.S. 549 (1995) (dramatically altering prior Supreme Court Commerce Clause jurisprudence by holding that Congress had exceeded its commerce regulatory authority by enacting 18 U.S.C. § 922(q)); *U. S. v. Gaudin*, 515 U.S. 506 (1995) (overruling near consensus among lower courts by holding that materiality of false statement is an "element" of 18 U.S.C. § 1001); *McNally v. U.S.*, 483 U.S. 350 (1987) (overruling consensus among lower courts by holding that federal mail fraud statute was inapplicable to a defendant's defrauding a victim of "intangible" right to "honest services"); *Penry v. Lynaugh*, *supra* (holding that Texas capital sentencing statute unconstitutional as applied to the defendant's mitigating evidence of mental retardation and child abuse; as dissenters noted, the majority's holding seriously retreated from prior approval of Texas statute in *Jurek v. Tex.*, 428 U.S. 262 (1976)); *Batson v. Ky.*, 476 U.S. 79 (1986) (overruling *Swain v. Ala.*, 380 U.S. 202 (1965), by holding that prosecutors may not use peremptory challenges to remove minority persons from jury based on racial motives).

12. All jurisdictions in this country apply some form of the "contemporaneous objection rule," in criminal and civil cases alike, which "requires an objection at the trial

even a meritorious one, on direct appeal to the United States Supreme Court[13] will not receive a ruling on the merits of the claim if the state procedural bar is deemed "adequate," which means that the state court's application of the state's procedural rule served a "legitimate state interest."[14] Similarly, on collateral review of a state defendant's conviction or sentence in a federal habeas corpus proceeding,[15] a defendant's constitutional claim will not receive a merits ruling if the state courts applied an "adequate" state law procedural ground unless the defendant shows both "cause" for his procedural default and "prejudice" resulting from the claimed error.[16] Failure to establish cause will bar consideration of the claim as a threshold matter, notwithstanding a showing of tremendous prejudice based on a

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level in order to preserve an argument for appeal." *Bader v. State*, 40 S.W.3d 738, 743-44 (Ark. 2001); *see generally Sykes*, 433 U.S. at 88-89. In addition, the vast majority of jurisdictions have a similar procedural default rule in criminal cases that provides that a claim not raised on direct appeal cannot ordinarily be raised on collateral (*i.e.*, habeas corpus) review. *See e.g. Ex Parte Pena*, 71 S.W.3d 336, 338 n. 7 (Tex. Crim. App. 2002); *Oken v. State*, 681 A.2d 30 (Md. 1996).

13. 28 U.S.C. § 1257 (1994).

14. *James v. Ky.*, 466 U.S. 341, 348-49 (1984); *Lee v. Kemna*, 534 U.S. 362, 375-78 (2002). In addition to being "adequate," a state law ground must also be "independent" in order to preclude federal review. A state law ground is "independent" if "resolution of [a] state procedural question [does not] depend[ ] on a federal constitutional ruling." *Stewart v. Smith*, 122 S.Ct. 2578, 2581 (2002) (per curiam).

15. *See* 28 U.S.C. §§ 2241, 2254 (2002).

16. *See* generally *Sykes*, 433 U.S. at 90-91. The federal courts will apply the cause-and-prejudice standard only if the last state court to have reviewed the federal constitutional claim procedurally defaulted the claim, *see Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Harris v. Reed*, 489 U.S. 255 (1989), or, if the claim was never raised in the state court system (and, thus, not procedurally defaulted by the state courts), the federal courts will apply the cause-and-prejudice standard if it is clear that the state courts would procedurally default the claim if the defendant were to return to the state court system. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989).Alternatively, if a defendant cannot show cause and prejudice, he still may receive a merits ruling if he can show his "actual innocence" by a preponderance of the evidence, *Schlup v. Delo*, 513 U.S. 298 (1995), or show by clear and convincing evidence that he was legally ineligible for the sentence imposed. *See Sawyer v. Whitley*, 505 U.S. 333 (1992); *Haley v. Cockrell*, 306 F.3d 257, 264-65 (5th Cir. 2002). The vast majority of defendants seeking to circumvent procedural defaults, of course, cannot make such an alternative showing.

The Supreme Court has yet to decide the issue of whether, on direct review (as opposed to federal habeas corpus review), a showing of "cause" and "prejudice" would excuse the otherwise "adequate" procedural default ruling by a state court. As discussed *infra*, at least when an objection would have been futile in view of then-governing appellate precedent, such futility both renders a state court's procedural default ruling an "inadequate" state law ground and constitutes "cause."

constitutional error.[17] In a series of decisions during the past two decades, the Supreme Court has held that, even if it would have been "futile" to have raised the procedurally defaulted claim in light of then-governing adverse appellate precedent, such futility does not excuse a procedural default.[18]

A defendant in a federal prosecution who did not object on a particular legal ground in the trial court is subject to the "plain error" variation of the procedural default doctrine on direct appeal to a United States Court of Appeals or the United States Supreme Court.[19] In order to prevail under the plain error standard, the defendant must establish on appeal that there was (1) an error committed in the federal district court; (2) the error was "plain" under the law in effect at the time of the lower court proceedings or the law in effect at the time of the appeal; (3) the error was sufficiently prejudicial in that it affected the defendant's "substantial rights"; and (4) such a prejudicial error "seriously affected the fairness, integrity, or public reputation of the judicial proceedings."[20]

The fourth prong of this plain error analysis vests tremendous discretion in an appellate court to determine whether such a showing has been made.[21] That is, even if a federal appellate court finds merit in the defendant's claim of prejudicial plain error, the court still possesses discretion to refuse to reverse the defendant's conviction or sentence based on the procedural default. Such discretion to affirm the judgment of the district court does not exist in a case of a meritorious claim of prejudicial error that was not procedurally defaulted in the lower court.[22] In *Johnson v. United States*,[23] the Supreme Court held that the plain error standard applies to a procedurally defaulted claim even if, at the time of the proceedings in the district court, governing appellate precedent would have made an objection utterly futile because a district court would have

17. *See Meanes v. Johnson*, 138 F.3d 1007, 1011 (5th Cir. 1998).

18. *Engle v. Isaac*, 456 U.S. 107, 130 (1982); *Smith v. Murray*, 477 U.S. 527, 534-35 (1986) (citing *Engle*); *Bousley*, 523 U.S. at 623 (citing *Engle*).

19. *U.S. v. Olano*, 507 U.S. 725, 734-35 (1993) (discussing Fed. R. Crim. P. 52(b)).

20. *Id.* at 735-37.

21. *Id.* at 735-36.

22. *See e.g. U.S. v. Marrero*, 486 F.2d 622, 627 (7th Cir. 1973) (citing Fed. R. Crim. P. 52(a)).

23. 520 U.S. 461 (1997).

had no power to grant relief on the claim, which only later became viable based on an intervening decision by the Supreme Court.[24]

A federal defendant who failed to raise a claim on direct appeal—whether or not it was preserved in the district court—faces the same stringent "cause and prejudice" standard applicable to state defendants in federal habeas corpus cases when the federal defendant raises the claim for the first time on collateral review under 28 U.S.C. § 2255.[25] Just as it held in *Engel* regarding state defendants, the Supreme Court in *Bousley* held that there is no "futility" exception to the procedural default doctrine for federal defendants on collateral review.[26]

In sum, according to the Supreme Court's current error preservation jurisprudence, the fact that a procedurally defaulted claim would have been foreclosed under extant appellate precedent does not enable the defendant asserting it later to escape either the plain error standard on a federal direct appeal or the cause-and-prejudice standard on collateral review.

III. MIXED SIGNALS REGARDING FUTILITY AS AN EXCEPTION TO THE PROCEDURAL DEFAULT DOCTRINE

The Supreme Court's first treatment of the futility issue occurred in 1947 in *Sunal v. Large*.[27] In *Sunal*, two defendants, Sunal and Kulick, were charged in federal court with draft evasion in separate cases. At their 1945 trials, they attempted to challenge their selective service classifications as erroneous as a defense to the charges—both men claimed to be religious ministers as opposed to mere conscientious objectors—but the trial court refused to permit them to raise such a defense to the jury.[28] After they were convicted and sentenced, neither appealed. Within a matter of days after the time for filing a direct appeal had expired, the Supreme Court granted certiorari in *Smith v. United States*[29] and *Estep v. United States*,[30] which

24. *Id.* at 468.

25. *U.S. v. Frady*, 456 U.S. 152, 167-68 (1982).

26. 523 U.S. at 622-23 (citing *Engle*, 456 U.S. 107).

27. 332 U.S. 174 (1947).

28. *Id.* at 175-76.

29. 325 U.S. 846 (1945) (granting certiorari).

were consolidated, and ultimately held that defendants charged with draft evasion could defend against such charges by challenging the correctness of their selective service classifications so long as they first had exhausted their administrative remedies within the Selective Service System.[31] Sunal and Kulick, who had exhausted their administrative remedies before trial, filed petitions for writs of habeas corpus, which challenged their convictions under *Estep*.[32]

A threshold issue in *Sunal* was whether the two defendants' failure to have raised their claim on direct appeal foreclosed habeas corpus relief on procedural grounds. Disagreeing with both the Second Circuit (in Kulick's case) and the Fourth Circuit (in Sunal's case), the Supreme Court held that the defendants' failure to raise the issue on direct appeal foreclosed their ability to do so on collateral review.[33] At the time of their decision not to file a direct appeal in 1945, precedent from all eight of the United State Courts of Appeals to have addressed the issue, including the Second and Fourth Circuits, had rejected precisely the defense that Sunal and Kulick had attempted to raise at their trials, and the Supreme Court recently had denied certiorari in one of those other cases.[34] More significant, at that time, extant Supreme Court precedent, *Falbo v. United States*,[35] certainly appeared, from an objective standpoint, to directly foreclose the claim.[36] As the Fourth Circuit observed in Sunal's case,[37] the Court's decision in *Falbo* "was very widely understood by the Bench and Bar" to foreclose the claim and that, indeed, it

30. 326 U.S. 703 (1945) (granting certiorari); *see also Sunal*, 332 U.S. at 176-77, n. 2 (discussing the timing of Sunal and Kulick's cases and the grants of certiorari in *Smith* and *Estep*).

31. *Estep v U.S.*, 327 U.S. 114 (1946).

32. *Sunal*, 332 U.S. at 176-77.

33. *Id.* at 183-84.

34. *See e.g. Estep*, 327 U.S. at 139; *Sunal v. Large*, 157 F.2d 165, 176, n 7 (4th Cir. 1947).

35. 320 U.S. 549 (1944).

36. In *Falbo*, the Court addressed the question of "whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing the registrant to report for the last step in the selective process." *Id.* at 554. The Court in *Falbo* held that Congress had not authorized such judicial review of the selective service classification in a subsequent draft evasion case. *Id.*

37. *Sunal v. Large*, 157 F.2d 165.

appeared that the trial court in Sunal's case had rejected the claim "on the supposed authority of the *Falbo* case."[38] The Second Circuit, in Kulick's case, in an opinion by Judge Learned Hand,[39] stated that there had been "an unusual consensus of judicial opinion against" the claim prior to *Estep* and that "there had not been any glimmer of a positive chance of success" at the time that Kulick failed to file a direct appeal.[40]

Notwithstanding the solid wall of lower court precedent against the claim and the apparent preclusive effect of *Falbo* (prior to the Court's decision in *Estep*), the Supreme Court in *Sunal* held that the defendants' failure to file a direct appeal raising the apparently foreclosed issue waived their right to federal habeas review. A majority of the Court, over the dissenting opinion of two Justices,[41] stated "we do not think that they should now be allowed to justify their failure [to file a direct appeal] by saying they deemed any appeal futile."[42]

The *Sunal* Court discounted the significance of the apparent precedential effect of *Falbo* at the time that Sunal and Kulick's right to file a timely direct appeal had expired, explaining that *Falbo* only applied to situations where a defendant (like Falbo) charged with draft evasion had not exhausted his administrative remedies and thus first challenged the propriety of his classification in a subsequent criminal prosecution for draft evasion.[43] Although such a distinction between a case like *Falbo* and a case like *Estep* was palpable to a majority of the Court in

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38. *Id.* at 168-69.

39. *U.S. ex rel. Kulick v. Kennedy*, 157 F.2d 811 (2d Cir. 1946).

40. *Id.* at 813-14.

41. *See Sunal*, 332 U.S. at 191 (Rutledge & Murphy, JJ., dissenting) (contending that "good reason existed" to excuse the defendants' failure to file a direct appeal). The dissenters contended that:

> Whether or not the inferior courts were justified in taking the *Falbo* decision for more than its specific ruling [*i.e.*, refusing to permit the defendant to collaterally challenge his selective-service classification in a criminal prosecution when he had failed to exhaust his administrative remedies], the fact remains that their broadly prevailing view was that [*Falbo*] had cut off all right to make such defenses as Sunal and Kulick tendered . . . . In that prevailing climate of opinion in those courts, there was hardly any chance that an appeal to the federal circuit court of appeals would bring any relief by their action.

Id. at 191-92.

42. *Id.* at 181.

43. *Id.* at 176-77.

Estep (and later in *Sunal*),[44] it was by no means clear to the bench and bar prior to the Court's articulation of such a distinction in *Estep*.[45] Indeed, in his concurring opinion in *Estep*, Justice Frankfurter pointed to the pre-*Estep* consensus, noting that "more than forty judges in the circuit courts of appeals" had interpreted *Falbo* to prevent a defendant in a draft evasion prosecution from challenging the validity of his classification at trial even if he had first exhausted his administrative remedies.[46] "Such was the impact of this Court's reasoning in the *Falbo* case," Justice Frankfurter noted.[47]

Sunal's unforgiving approach to futility was rarely mentioned by either the Supreme Court or the lower courts in the two decades that followed.[48] However, in 1966, *Sunal*'s precedential value was called into question, at least implicitly, by the Supreme Court's unanimous per curiam decision[49] in *O'Connor v. Ohio*,[50] which took a different tack regarding futility than the Court had taken in *Sunal*. In O'Connor's state court jury trial on larceny charges, the prosecutor, without objection from the defense, negatively commented on the defendant's invocation of his right to silence. On appeal to an

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44. Arguably, the distinction articulated in *Estep* was not a function of careful legal analysis but, instead, was a function of the fact that *Falbo* was decided while World War II was raging in early 1944 and *Estep* was decided in February of 1946, many months after the war had ended and after the fear of draft disruption had abided. *Cf. Falbo*, 320 U.S. at 559-60 (Murphy, J., dissenting) ("[T]he effective prosecution of the war in no way demands that petitioner be denied a full hearing of this case.").

45. *See Sunal*, 157 F.2d at 168; *see also U.S. v. Rinko*, 147 F.2d 1, 2 (7th Cir. 1945), *cert. denied*, 325 U.S. 851 (1945) (in a pre-*Estep* appeal where the defendant had exhausted his administrative remedies, the Seventh Circuit stated: "It is clear from the *Falbo* decision . . . . that the defendant was precluded from contesting [his classification] in defense to the indictment."). In a post-*Estep* decision, the Fifth Circuit stated that *Estep* had "modified" *Falbo*. *Wells v. U.S.*, 158 F.2d 932, 934 (5th Cir. 1946). This characterization is correct, insofar as the Court's decision in *Falbo* did not draw any distinction between a draftee's exhaustion of his administrative remedies and a draftee's non-exhaustion in terms of his ability to subsequently raise the issue in a criminal prosecution for draft evasion.

46. *Estep*, 327 U.S. at 137-39 (Frankfurter, J., concurring) (citing cases).

47. *Id.* at 139.

48. *See e.g. Gaitan v. U.S.*, 317 F.2d 494, 498 (10th Cir. 1963) (citing *Sunal* with approval).

49. "The Court . . . . has at times said [a per curiam, summary decision] does not have the same precedential [value] as does a case decided upon full briefing and argument." *Gray v. Mississippi*, 481 U.S. 648, 651 n. 1 (1987).

50. 385 U.S. at 93.

intermediate appellate court and Ohio's supreme court, O'Connor likewise never voiced objection to the prosecutor's comments during the trial. After the state appellate process was completed and while O'Connor's certiorari petition was pending, the Court decided *Griffin v. California*,[51] in which the Court first held that a prosecutor's comments on a defendant's invocation of his right to silence during trial violated the Fifth Amendment. After *Griffin*, the United States Supreme Court vacated the Ohio Supreme Court's judgment in O'Connor's case and remanded for reconsideration in light of the intervening decision in *Griffin*.[52]

On remand, the Ohio Supreme Court, citing, *inter alia*, the Supreme Court's decision in *Sunal*, procedurally defaulted O'Connor's Fifth Amendment claim raised under *Griffin* on the ground that he had failed to make that objection during the trial.[53] O'Connor then filed a second certiorari petition with the United States Supreme Court raising the Fifth Amendment claim. The State of Ohio responded to his petition by invoking the Ohio Supreme Court's procedural default ruling as an independent and adequate state law ground precluding review of the merits of O'Connor's federal constitutional claim. The United States Supreme Court disagreed with the state, holding that, in view of a "practice which Ohio had long allowed" under firmly entrenched Ohio law[54] that permitted prosecutors to comment on the accused's silence at trial, O'Connor's "failure to object . . . . cannot strip him of his right to attack the practice following its invalidation by this Court."[55] The Court agreed with the dissenting justices on the Ohio Supreme Court who had contended that "it would not have served any legitimate state interest or sound public purpose" in requiring an objection—in contradiction of entrenched state appellate precedent—prior to *Griffin*.[56]

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51. 380 U.S. 609 (1965).

52. *O'Connor v. Ohio*, 382 U.S. 286 (1965) (per curiam).

53. *State v. O'Connor*, 217 N.E.2d 685, 689 (Ohio 1966) (citing *Sunal*).

54. *O'Connor*, 385 U.S. at 93; *see also O'Connor*, 217 N.E.2d at 690-93 (O'Neill, Herbert & Brown JJ., dissenting) (noting that, prior to *Griffin*, both case law of the Ohio Supreme Court and Ohio Constitution art. I, § 10 permitted prosecutors to comment on a criminal defendant's invocation of his right to silence at trial).

55. 385 U.S. at 93.

56. *O'Connor*, 217 N.E.2d at 693 (O'Neill, J., dissenting).

In a subsequent case, the United States Supreme Court cited its decision in *O'Connor* for the proposition that the Ohio Supreme Court's application of its contemporaneous objection rule, as applied to the futility scenario in O'Connor's case, was an "inadequate state law ground."[57] In the wake of *O'Connor*, lower courts followed its holding that the futility of raising a claim based on extant state appellate precedent excused a procedural default.[58]

The Court's holding in *O'Connor* was consistent with its analogous decision the year before in *Douglas v. Alabama*.[59] In *Douglas*, the state trial court explicitly overruled the defendant's objections to the prosecution's admission of a non-testifying codefendant's out-of-court confession on Confrontation Clause grounds. On a subsequent occasion during the trial, when the prosecution actually read the codefendant's confession to the jury, the defendant did not re-urge his objection. On appeal, the state appellate court ruled that the defendant's failure to object on the subsequent occasion procedurally defaulted his Confrontation Clause claim.[60] The United States Supreme Court disagreed, holding that the state appellate court's procedural default ruling was not an "adequate" state law ground that deprived the Supreme Court of jurisdiction over the constitutional claim.[61] The Court reasoned that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected . . . ."[62] *Douglas*'s logic applies equally to the situation when an objection made in an inferior court would have been "patently futile" in light of binding appellate precedent that would have preordained an adverse ruling from the inferior court.

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57. *Cardinale v. La.*, 394 U.S. 437, 439 (1969).

58. *See e.g. Doby v. Beto*, 371 F.2d 111, 113 (5th Cir. 1967); *Wyley v. Warden*, 372 F.2d 742, 743 n. 1 (4th Cir. 1967), *overruled on other grounds; Jenkins v. Hutchinson*, 221 F.3d 679, 685 (4th Cir. 2000).

59. 380 U.S. 415 (1965).

60. *Id.* at 420-22.

61. *Id.* at 422-23.

62. *Id.* The Supreme Court reaffirmed its holding in *Douglas* in a subsequent case presenting a similar procedural default issue. *See Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990) (finding an inadequate state law ground in a case with a similar sequence of events in the trial court).

Towards the end of the 1960s, the Court issued two decisions that bolstered its per curiam decision in *O'Connor* and further signaled a retreat from *Sunal*. In *Grosso v. United States*,[63] and *Leary v. United States*,[64] the Court forgave the defendants' failure to assert, in a timely manner, First Amendment challenges to their convictions for willfully failing to pay federal taxes in connection with their illegal activities (gambling in *Grosso* and drugs in *Leary*).[65] The Court observed that the First Amendment claim was viable only after the Supreme Court's decision in *Marchetti v. United States*,[66] which was decided following the defendants' trials, and "given the [prior] decisions of this Court in [*United States v. Kahriger*[67] and *Lewis v. United States*[68]], which were on the books at the time of petitioner's trial [and only overruled later in *Marchetti*], we are unable to view his failure to present this issue as an effective waiver" of his First Amendment claim.[69] Writing for the en banc United States Court of Appeals for the District of Columbia Circuit in *United States v. Byers*,[70] then-Judge Scalia cited *Grosso* and *Leary* for the proposition that the futility of objecting based on then-binding appellate precedent excuses a procedural default, while rejecting the claim on the merits.[71]

In *Hankerson v. North Carolina*,[72] albeit only in dicta in a footnote, the Supreme Court appeared abruptly to abandon its forgiving position regarding futility in *O'Connor*, *Grosso*, and *Leary*, and to return to its unforgiving position in *Sunal*. The

63. 390 U.S. 62 (1968).

64. 395 U.S. 6 (1969).

65. *Leary*, 395 U.S. at 27; *Grosso*, 390 U.S. at 63.

66. 390 U.S. 39 (1968).

67. 345 U.S. 22, 32-33 (1953).

68. 348 U.S. 419 (1955).

69. *Grosso*, 390 U.S. at 70-71 (also noting Fifth Circuit's rejection of a similar challenge to federal gambling statute in *Haynes v. U.S.*, 339 F.2d 30 (5th Cir. 1964)); *accord Leary*, 395 U.S. at 27-28 (citing *Grosso*).

70. 740 F.2d 1104, 1109 n. 6 (D.C. Cir. 1984) (en banc).

71. The issue split the court. Judge Robinson, joined by Judge Wright, concurred in the judgment only, finding the issue procedurally defaulted and barred from review *Id.* at 1133 n. 52, 1137-38 (Robinson & Wright, JJ., concurring in the judgment). Judge Bazelon, writing for the dissenting judges, argued for the applicability of the futility exception and would have voted to reverse the petitioner's conviction. Id. at 1161 n. 138 (Bazelon, Wald, Mikva & Edwards, JJ., dissenting).

72. 432 U.S. 233 (1977).

Hankerson Court held that its decision in *Mullaney v. Wilbur*[73] was retroactively applicable to cases in which the trials occurred before *Mullaney*.[74] In dismissing the state's argument that such a retroactive application of the "new rule" of law announced in *Mullaney* (which overruled numerous state courts' precedents) would have "devastating" effect on the "administration of justice" around the country by requiring countless retrials, the Court stated in footnote eight:

> [W]e are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions [was] as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections . . . . The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object [at trial] is a waiver of any claim of error.[75]

Despite the fact that footnote eight was dicta (insofar as procedural default was not at issue in *Hankerson*), and despite the fact that it flatly contradicted the earlier holding of the Court in *O'Connor*, numerous lower federal courts followed the footnote in refusing to find that the futility of objecting in the state courts based on extant, adverse state appellate precedent (overruled by a supervening decision of the Supreme Court) excused a procedural default.[76]

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73. 421 U.S. 684, 702-04 (1975) (holding that the prosecution has the burden to prove beyond a reasonable doubt the absence of self-defense in a jurisdiction that has treated such a fact as an "element" of the offense).

74. *Hankerson*, 432 U.S. at 241-244.

75. *Id.* at 244 n. 8. Although more obliquely, the Court intimated the same thing in dicta in a footnote in *Mapp v. Ohio*, 367 U.S. 643, 659 n. 9 (1961) ("As is always the case, ... state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.").

76. *E.g. Cole v. Stevenson*, 620 F.2d 1055, 1062-63 (4th Cir. 1980); *Breest v. Perrin*, 495 F. Supp. 287, 292-93 (D.N.H. 1980); *see also U.S. ex rel. Maxey v. Morris*, 591 F.2d 386, 391 (7th Cir. 1979) (refusing to excuse a procedural default in state court based on futility of objecting based on extant state appellate precedent, although not citing *Hankerson*'s footnote eight).

In 1981, in *Estelle v. Smith*,[77] the Court, in a footnote, affirmed the Fifth Circuit's decision that a state defendant's failure to raise a claim at his trial did not procedurally default the claim on federal habeas corpus review "for the reasons stated by the Court of Appeals."[78] The Fifth Circuit had refused to apply the procedural default doctrine to the claim for three alternative reasons, one of which was "the alleged futility of objecting" based on prior directly adverse decisions of the highest state appellate court at the time of the trial.[79] In support of its holding regarding futility, the Fifth Circuit cited its prior decision in *Rummel v. Estelle*,[80] in which the en banc court had held that "[s]ince it is apparent that the Texas Court of Criminal Appeals ha[d] repeatedly rejected Rummel-like [claims], we are at a loss to see how any state interest would be served by demanding that Rummel make a futile gesture at his trial."[81] In the wake of the Supreme Court's decision in *Smith*, lower courts interpreted its footnote twelve as standing for the proposition that the procedural default doctrine does not apply when an objection in the trial court would have been futile under extant appellate precedent.[82]

The very next year, the Court again addressed the futility issue in *Engle v. Isaac*,[83] a federal habeas corpus case in which the defendant claimed that the jury instructions at his state trial

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77. 451 U.S. 454 (1981).

78. *Id.* at 468 n. 12 (citing *Smith v. Estelle*, 602 F.2d 694, 708 n. 19 (5th Cir. 1979)).

79. *Smith*, 602 F.2d at 708 n. 19.

80. 587 F.2d 651 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 263 (1980).

81. *Id.* at 653. Such reasoning—that no legitimate state interest would be served by applying the procedural default doctrine when an objection would have been entirely futile—is persuasive and fully consistent with other Supreme Court authority. *See e.g. Lee v. Kemna*, 534 U.S. 362, 378 (2002) (holding that a state procedural default rule that does not serve any legitimate state interest should not be applied on federal habeas corpus review).

The Supreme Court, which later granted certiorari in *Rummel*, did not reject or endorse this particular holding by the Fifth Circuit in *Rummel* and, instead, affirmed on the alternate basis (also articulated by the Fifth Circuit) that, under Texas procedural law, a contemporaneous objection was not required to preserve a facial constitutional challenge to a statute (the type of challenge made by Rummel). *Rummel*, 445 U.S. at 267 n. 7.

82. *See e.g. Guam v. Yang*, 850 F.2d 507, 512 n. 8 (9th Cir. 1988) (citing *Smith's* footnote 12) (en banc), *overruled by U.S. v. Keys*, 133 F.3d 1282, 1287 (9th Cir. 1998) (en banc); *U.S. v. Byers*, 740 F.2d 1104, 1109 n.6 (D.C. Cir. 1984) (en banc) (addressing preservation issue).

83. 456 U.S. 107 (1982).

had unconstitutionally shifted the burden of proof to him regarding the issue of self-defense. Isaac had not objected to the instructions at his 1975 trial and, when he raised the claim for the first time on appeal, the Ohio appellate courts refused to address the merits of the claim and, instead, found it procedurally defaulted.[84] Isaac proceeded to file a federal habeas corpus petition challenging the jury instructions under *Mullaney v. Wilbur*,[85] but the federal district court "determined that Isaac had waived any constitutional claims [about the jury instructions] by failing to present them to the Ohio trial court."[86]

On appeal, the Sixth Circuit, sitting en banc, held that his failure to comply with Ohio's contemporaneous objection rule at trial was an inadequate ground on which to foreclose habeas corpus relief. Citing *O'Connor*, the Sixth Circuit stated that, based on "well-established law" in Ohio at the time of Isaac's trial, "it would have seemed futile for Isaac to object to a jury instruction allocating to the defendant the burden of proving self-defense."[87] The court concluded that "[a] defendant cannot be expected to predict a change in the interpretation of state law when the law is so well-established and there has been no hint of a change in that law."[88]

A majority of the United States Supreme Court in *Engle*, in an opinion written by Justice O'Connor, disagreed with the en banc Sixth Circuit and held that Isaac's procedural default under Ohio's contemporaneous objection rule—his failure to raise the issue at trial—foreclosed federal habeas corpus relief.[89] The Court held that "the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial."[90] The Court reasoned that if a defendant "perceives a constitutional claim and believes it might find favor in the federal courts, he may not bypass the state courts simply

84. *Id.* at 115-16.

85. 421 U.S. 684 .

86. *Engle*, 456 U.S. at 117-18.

87. *Isaac v. Engle*, 646 F.2d 1129, 1133 (6th Cir. 1980) (en banc).

88. *Id.* (citing 385 U.S. 92). Rather than rely on the Supreme Court's decision in *O'Connor*, the dissenting Sixth Circuit judges cited the dicta in footnote eight in *Hankerson*, 432 U.S. at 244. *See Isaac*, 646 F.2d at 1140-41 (Merritt & Kennedy, JJ., dissenting.).

89. *Engle*, 456 U.S. at 130-35.

90. *Id.* at 130.

because he thinks they will be unsympathetic to the claim," for "[e]ven a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid," and "[a]llowing criminal defendants to deprive the state courts of this opportunity would contradict the principles" of federalism and comity that animate the Court's modern federal habeas corpus jurisprudence.[91] The Court reasoned that federalism requires that a "trial court [must have] the opportunity to correct the defect and avoid problematic retrials" and also that "state appellate courts [must have the] chance to mend their own fences and avoid federal intrusion."[92] Notably, the Court in *Engle* cited the footnote in *Hankerson* with approval but failed to cite the Court's prior inconsistent decisions in *O'Connor* or *Smith* regarding the futility of objecting as excusing a procedural default.[93]

Two years after *Engle*, in *Reed v. Ross*[94] a reconfigured majority of the Court led by Justice Brennan and joined by the three other dissenters in *Engle*,[95] appeared to breathe some life back into the futility exception, albeit in a passage that was mostly dicta. In *Reed*, the Court addressed whether the "novelty" of a particular claim at the time of a defendant's failure to assert it constitutes "cause" under the *Sykes* standard.[96] The *Reed* Court held that the "novelty" of a claim—defined as a claim with "no reasonable basis in existing law"—did constitute cause.[97] In discussing the meaning of the term "novelty," the majority in *Reed*, without mentioning the concept of "futility,"

91. *Id.* (citing *Wainwright v. Sykes*, 433 U.S. 72). The Court found support for its holding in the concurring opinion of Justice Powell in *Estelle v. Williams*, 425 U.S. 501, 515 (1976) (trial counsel's belief that an objection would be "futile" is not a basis to excuse a procedural default), and Judge Poole's dissenting opinion in *Myers v. Washington*, 646 F.2d 355, 364 (9th Cir. 1981) (Poole, J., dissenting) (futility cannot constitute cause if it means simply that a claim was "unacceptable to that particular court at that particular time"), *vacated and remanded*, 456 U.S. 921 (1982). *See Engle*, 456 U.S. at 130 n.35.

92. *Id.* at 128-29.

93. *Id.* at 134 n. 43 (citing *Hankerson*, 432 U.S. at 244 n. 8).

94. 468 U.S. 1 (1984).

95. In *Reed*, three of the four dissenting Justices—Chief Justice Burger and Justices Rehnquist and O'Connor—had been in the majority in *Engle*. *Id.*. at 21. The fourth dissenter in *Reed*, Justice Blackmun, concurred in the result in *Engle*. *See Engle*, 456 U.S. at 135.

96. 468 U.S. at 13.

97. *Id.* at 15-16.

obviously had it in mind:

> Although the question whether an attorney has a "reasonable basis" upon which to develop a legal theory may arise in a variety of contexts, we confine our attention to the specific situation presented here: one in which this Court has articulated a constitutional principle that had not been previously recognized but which is held to have retroactive application. In *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), we identified three situations in which a "new" constitutional rule, representing "'a clear break with the past,'" might emerge from this Court. *Id.*, at 549, 102 S.Ct. at 2587 (quoting *Desist v. United States*, 394 U.S. 244, 258-259, 89 S.Ct. 1030, 1038-1039, 22 L.Ed.2d 248 (1969)). First, a decision of this Court may explicitly overrule one of our precedents. *United States v. Johnson*, 457 U.S., at 551, 102 S.Ct., at 2588. Second, a decision may "overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." Ibid. And, finally, a decision may "disapprov[e] a practice this Court arguably has sanctioned in prior cases." Ibid. By definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement. Cases falling into the third category, however, present a more difficult question. Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.[98]

Although the Court here purported to discuss the "novelty" concept, clearly all three of the scenarios mentioned—(1) the

98. *Id.* at 17-18.

Court's overruling one of its prior precedents directly on point; (2) the Court's disapproval of a "longstanding and widespread" consensus or near-consensus on an issue by lower appellate courts where the Court previously had not addressed the issue, and (3) the Court's reversal of an implicit position it had taken in prior cases—are ones in which, prior to the action of the Supreme Court, it would have been futile for a defendant to have raised the claim in the lower courts.[99]

Two years after *Reed* was decided, the Supreme Court, in *Smith v. Murray*,[100] discussed both *Reed* and *Engle* in its treatment of the habeas corpus petitioner's procedural default. However, *Smith* did not resolve the apparent tension between the two cases because *Smith* did not involve any of the three scenarios of novelty/futility mentioned in *Reed*. Rather, *Smith* involved a claim that, at the time of the defendant's failure to raise it, had never been addressed in any manner by the United States Supreme Court and about which there was no consensus or near consensus among the lower appellate courts.[101]

In addressing *Reed*, which it distinguished, the *Smith* Court held that a claim is not "novel" if "at the time of the default the claim was 'available' at all" under extant precedent.[102] In Smith's case, although the state supreme court previously had rendered a decision in another case prior to Smith's trial that foreclosed his claim of error, the Supreme Court noted that "various forms of the claim he now advances had been percolating in [other] lower courts [around the country] for years at the time of his original appeal" when he failed to raise the claim.[103] Therefore, his claim was not considered "novel."[104] With respect to the futility issue, the Supreme Court held that,

99. Lower courts have questioned the continuing "vitality" of this dicta in *Reed* in light of *Bousley*, 523 U.S. 614; *see e.g. U.S. v. Moss*, 252 F.3d 993, 1002 (8th Cir. 2001).

100. 477 U.S. 527 (1986).

101. *Smith* involved a Fifth Amendment claim under *Estelle v. Smith*, 451 U.S. 454 (1981), based on the admission of a prosecution psychiatrist's testimony at the capital sentencing hearing. 477 U.S. at 530. At the time of Smith's direct appeal to the Virginia Supreme Court in 1978, *Smith v. Cmmw.*, 248 S.E.2d 135 150 (Va. 1978), that court previously had rejected the claim but, as noted by the court, other courts around the country had found merit in the claim. *See Gibson v. Cmmw.*, 219 S.E.2d 845, 847 (Va. 1975) (noting that "the authorities are divided" on the Fifth Amendment issue).

102. *Smith*, 477 U.S. at 537.

103. *Id.* at 534, 537; *see also id.* at 540 (Stevens, J., dissenting).

104. *Id.* at 537.

because Smith did not raise the issue on appeal to the state supreme court and urge that court to reconsider its prior, adverse decision, he could not show cause for his procedural default, notwithstanding the fact that he "had little chance of success in the [state supreme court]."[105] Citing *Engle*, the Court reasoned: "[I]t is the very prospect that a state court 'may decide, upon reflection, that the [claim] is valid' that undergirds the established rule that 'perceived futility alone cannot constitute cause . . . .' for 'allowing criminal defendants to deprive the state courts of [the] opportunity' to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity that animate *Sykes* and its progeny."[106]

Any life left in the futility exception (even if clothed in the "novelty" rubric) appeared extinguished in a series of decisions by the Supreme Court in the 1990s. The issue was first raised in *United States v. France*, in which the judgment of the Ninth Circuit was affirmed by an equally divided Court.[107] In *France*, the Ninth Circuit held that the procedural default doctrine was inapplicable because France's objection in the trial court would have been futile as a result of "a 'solid wall of [Ninth] [C]ircuit authority' which would have prevented the district court from correcting the alleged error."[108] After France's trial, the Supreme Court overruled the Ninth Circuit precedent that previously had foreclosed the claim that France ultimately raised for the first time on direct appeal. After the Supreme Court granted the government's certiorari petition, the parties predictably took diverse positions on the futility issue, each side citing Supreme Court precedent that supported its position.[109] The Justices,

105. *Id.* at 534.

106. *Id.* at 535.

107. 498 U.S. 335 (1991) (per curiam). Justice Souter did not participate. *Id.*

108. 886 F.2d 223, 228 (9th Cir. 1989) ("Objecting in the trial court to a clearly defined rule of the circuit [court] is futile, inasmuch as the trial court cannot overrule authority binding on it.").

109. *Compare* Brief of U.S., *U.S. v. France*, 498 U.S. 335, 1990 WL 508089, at *27 (contending that futility is not an exception to the procedural default doctrine; citing *Engle v. Isaac*, 456 U.S. at 130), *with* Brief of Respt., *U.S. v. France*, 498 U.S. 335, 1990 WL 508088, at **11-16 (contending that procedural default is inapplicable when an objection at trial would have been futile under extant appellant precedent, citing *e.g. Estelle v. Smith*, 451 U.S 454, and *Reed v. Ross*, 468 U.S. 1).

whose votes were evenly divided, did not resolve the futility issue in *France*.[110]

In 1997, in *Johnson v. United States*,[111] the Court addressed the issue left unresolved in *France* and held that the procedural default doctrine in federal direct appeals—that is, the "plain error" standard[112]—applied to a claim raised for the first time on appeal even if it would have been utterly futile to have objected in the district court in view of then-governing appellate precedent. At the time of Johnson's trial, the United States Court of Appeals for the Eleventh Circuit, whose precedent governed the federal district court in *Johnson*, had held that the "materiality" of an allegedly perjurious statement in violation of 18 U.S.C. § 1623 was not an "element" of the offense that had to be decided by the jury, as opposed to the trial court.[113] Only after Johnson's trial, in *United States v. Gaudin*,[114] did the United States Supreme Court overrule the Eleventh Circuit's precedent. On direct appeal to the Eleventh Circuit, Johnson raised the claim that the district court's instructed verdict on materiality was constitutional error. That court held that the claim was procedurally defaulted and, under the plain error standard, Johnson could not establish sufficient prejudice and convince the appellate court to exercise its discretion to reverse her conviction.[115]

In her brief filed with the Supreme Court, Johnson contended that the restrictive plain error standard should be inapplicable to a claim that would have been entirely foreclosed by "a solid wall of binding" appellate precedent at the time of the trial court proceedings.[116] The Supreme Court held that Federal Rule of Criminal Procedure 52(b)[117] "by its terms"

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110. An affirmance by an equally-divided Court is not an expression of approval of the lower court's judgment and, thus, has no precedential value. *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

111. 520 U.S. 461, 464-66 (1997).

112. Fed. R. Crim. P. 52(b) (2002).

113. *See e.g. U.S. v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983).

114. 515 U.S. 506, 522-23 (1995) (holding that "materiality" of a false statement was an "element" of the offense that must be submitted to the jury at a trial).

115. *U.S. v. Johnson*, 82 F.3d 429 (11th Cir. 1996).

116. Brief of Pet., *U.S. v. Johnson*, 520 U.S. 461, 1996 WL 741434, at **25-29.

117. Federal Rule of Criminal Procedure 52(b) provides: "Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the trial

applied to all claims raised for the first time on federal direct appeals and, because Johnson did not raise her claim in the district court, the plain error standard applied on appeal, notwithstanding the "solid wall" of Eleventh Circuit precedent that foreclosed the objection at the time of her trial.[118] The Court opined that Rule 52(b) was based on "careful balancing" of the "need to encourage all trial participants to seek a fair trial" with the Court's "insistence that obvious injustice be promptly addressed."[119] The Court claimed to "have no authority" to make any exceptions to Rule 52(b).[120]

The next year, in *Bousley v. United States*,[121] the Court dealt with a futility scenario similar to the one first addressed fifty years earlier in *Sunal*. In *Bousley*, the defendant was charged with violating 18 U.S.C. § 924(c)(1), which outlawed the "use" of a firearm during and in relation to a drug trafficking offense. At the time he was convicted in 1990, then-governing appellate precedent of the Eighth Circuit provided that a defendant "uses" a firearm during and in relation to a drug offense so long as the firearm was in "close proximity" and had some "nexus" to illegal drugs, even if the defendant did not "actively employ" the firearm.[122] In light of such entrenched precedent, Bousley did not attack his conviction on this ground in either the trial court or on his direct appeal to the Eighth Circuit, which occurred 1991. After the Supreme Court's 1995 decision in *Bailey v. United States*,[123] which overruled Eighth Circuit precedent by holding that "use" under § 924(c)(1) requires "active employment" of a firearm, Bousley contended for the first time in a collateral attack of his conviction pursuant to 28 U.S.C. § 2255 that his conviction was invalid under *Bailey*.

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court's attention." The rule was intended to be "a restatement of existing [case] law" at the time of its promulgation in 1944. *See id.*, Advisory Comm. Notes, 1944 Adoption, Note to Subdivision (b).

118. *Johnson*, 520 U.S. at 466.

119. *Id.*

120. *Id.* Whether the Court has such authority is discussed in notes 158 through 165, *infra*, and the accompanying text.

121. 523 U.S. 614.

122. *See e.g. U.S. v. Lyman*, 892 F.2d 751, 753-54 n.4 (8th Cir. 1989); *U.S. v. Townley*, 929 F.2d 365, 368-69 (8th Cir. 1991) (citing cases).

123. 516 U.S. 137, 146-50 (1995).

The Supreme Court held that Bousley had procedurally defaulted his claim by failing to raise it on direct appeal, thus subjecting the claim to *Sykes*'s "cause and prejudice" test.[124] In response to Bousley's argument that raising the claim in his appeal to the Eighth Circuit (which occurred in 1991, four years before *Bailey* was decided) would have been futile under entrenched Eighth Circuit precedent, the Supreme Court, citing *Engle*, held that his argument was "unavailing" because "'futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.'"[125]

Thus, in *Johnson* and *Bousley*, the Supreme Court found it irrelevant that governing appellate case law foreclosed the defendants' claims at the time of their procedural defaults. In so holding, the Court overruled a tremendous amount of lower court precedent, in both the direct appeal and collateral review contexts, which had held that a "solid wall" of appellate precedent (of the governing state supreme court, governing federal circuit court, or the United States Supreme Court) at the time of a defendant's lack of objection excused the procedural default.[126] Since *Bousley* and *Johnson*, the lower federal courts have refused to recognize any type of futility exception to the procedural default doctrine, even when there was binding Supreme Court precedent (later overruled or cast into serious doubt by a subsequent decision of the Court) that would have squarely foreclosed an objection at the time of the defendant's failure to object.[127] A few dissenting judges on the lower federal

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124. *Bousley*, 523 U.S. at 621-22.

125. *Id.* at 623 (quoting *Engle*, 456 U.S. at 130 n. 35).

126. *See e.g. U.S. v. Turman*, 104 F.3d 1191, 1193, 1195 (9th Cir. 1997); *Waldemer v. U.S.*, 106 F.3d 729, 731 (7th Cir. 1996); *U.S. v. Washington*, 12 F.3d 1128, 1139-40 (D.C. Cir. 1994); *U.S. v. Martinez*, 912 F.2d 1552, 1554-55 (1st Cir. 1990) (en banc; majority opinion joined by Breyer, C.J.); *U.S. v. France*, 886 F.2d 223, 227-28 (9th Cir. 1989), *aff'd by an equally divided court*, 498 U.S. 335 (1991); *Callanan v. U.S.*, 881 F.2d 229, 231 (6th Cir. 1989); *Bateman v. U.S.*, 875 F.2d 1304, 1307-08 (7th Cir. 1989); *Dalton v. U.S.*, 862 F.2d 1307, 1310 (8th Cir. 1988); *Guam v. Yang*, 850 F.2d 507, 512 n. 8 (9th Cir. 1988) (en banc); *U.S. v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988); *U.S. v. Byers*, 740 F.2d 1104, 1109 n.6 (D.C. Cir. 1984) (en banc) (Scalia, J.); *Rummel v. Estelle*, 587 F.2d 651, 653 (5th Cir. 1978) (en banc); *U.S. v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc).

127. *See e.g. U.S. v. Aparco-Centeno*, 280 F.3d 1084, 1087-90 (6th Cir. 2002) (subjecting defendant's claim based on *Apprendi v. N.J.*, 530 U.S. 466 (2000), which was decided while the defendant's appeal was pending, to "plain error" review, even though at

courts, however, have contended that there may be some life left in the futility exception, at least in certain circumstances.[128] These judges have reasoned that, at least in the collateral review context, the futility exception exists even after *Bousley* in circumstances where legal arguments were not simply foreclosed under the precedent of a particular lower appellate court but were "more generally unacceptable" in courts throughout the country.[129] Although *Johnson* and *Bousley* have appeared to have nailed the coffin shut on futility as an exception to the procedural default doctrine in the federal courts, a futility exception still exists in many states.[130]

IV. A COMMON-SENSE PROPOSAL FOR AN ACTUAL FUTILITY EXCEPTION TO THE PROCEDURAL DEFAULT DOCTRINE

As the foregoing analysis of the Supreme Court's varied treatment of the futility exception during the past six decades demonstrates, there has been little, if any, consistently applied logic in this area of the Court's error preservation jurisprudence. Common sense—which Chief Justice Rehnquist and Justice

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the time of the district court proceedings, the issue was foreclosed by *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998)); *U.S. v. Terry*, 240 F.3d 65, 72-73 (1st Cir. 2001) (same); *U.S. v. Pacheco-Zepeda*, 234 F.3d 411, 413-14 (9th Cir. 2000) (same); *McCoy v. U.S.*, 266 F.3d 1245, 1258-59 (11th Cir. 2001) ("The fact that every circuit which had addressed the issue [raised by the defendant] had rejected [the defendant's claim] . . . . simply demonstrates that reasonable defendants and lawyers could well have concluded that it would be futile to raise the issue. The problem with this position is that the Supreme Court could not have been clearer that futility does not constitute cause to excuse a procedural default."); *U.S. v. Moss*, 252 F.3d at 1002 (8th Cir. 2001) (same); *U.S. v. Sanders*, 247 F.3d 139, 145 (4th Cir. 2001) (same); *U.S. v. Smith*, 241 F.3d 546, 548 (7th Cir. 2001) ("[E]ven when the law is against a contention, a litigant must make the argument to preserve it for later consideration.").

128. *McCoy*, 266 F.3d at 1272-74 (Barkett, J., concurring in result); *Moss*, 252 F.3d at 1005-06 (Richard S. Arnold, J., dissenting); *U.S. v. Smith*, 250 F.3d 1073, 1073-77 (7th Cir. 2001) (Wood, Rovner & Williams, JJ., dissenting from denial of rehearing en banc).

129. *Smith*, 250 F.3d at 1075-76 (Wood, J., dissenting); *see also McCoy*, 266 F.3d at 1274 (Barkett, J., concurring in result only).

130. *See e.g. Black v. State*, 816 S.W.2d 350, 364-65 (Tex. Crim. App. 1991); *People v. Clark*, 789 P.2d 127, 154-55 n.33 (Cal. 1990); *State v. Goodyear*, 413 P.2d 566, 567-68 (Ariz. 1966); *Cmmw. v. Guerro*, 207 N.E.2d 887, 889-90 (Mass. 1965). If a state court fails to follow its own futility exception in finding a state defendant's federal constitutional claim in procedural default, such a procedural default ruling would not be "adequate" if invoked in subsequent federal court proceedings. *See Miller v. N.C.*, 583 F.2d 701, 704-06 (4th Cir. 1978); *cf. County Court of Ulster County v. Allen*, 442 U.S. 140, 150-51 (1979).

O'Connor, the leading proponents of abolishing the futility exception,[131] have recognized as being a relevant consideration in the procedural default context[132]—requires the Court to recognize that, at least in some situations, the futility of objecting should excuse a defendant's procedural default. Simply put, if at the time of the procedural default, the law of a superior court that governed the inferior court before which the defendant appeared unquestionably would have foreclosed a particular legal claim, then it makes absolutely no sense in law or logic to subject the claim to any type of restrictive review on direct appeal (*i.e.*, the plain error standard) on or collateral review (*i.e.*, the cause-and-prejudice standard).

In our common law system, it is axiomatic that an inferior court must follow the precedent of a superior court until it is overruled by the latter, even if appellate decisions in analogous contexts appear to undercut the validity of such precedent.[133] With respect to federal law issues, the Supremacy Clause[134] and the hierarchical structure of Article III of the Constitution, which speaks of the Supreme Court and "inferior" federal courts,

131. Chief Justice Rehnquist authored the majority opinions in *Bousley* and *Johnson*. Justice O'Connor authored the majority opinion in *Engle*.

132. *See Reed*, 468 U.S. at 21 (Rehnquist, J., Burger, C.J., Blackmun & O'Connor, JJ., dissenting) ("Today's decision will make less sense to laymen than it does to lawyers.").

133. *See e.g. Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) ("If precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions."); *U.S. v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000) ("[A]s a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it. We not may not reject . . . . Supreme Court precedent, even if, in a particular case, it seems pellucidly clear to litigants, lawyers, and lower court judges alike that, given the opportunity, the Supreme Court would overrule its precedent," citing *Bhandari v. First National Bank of Com.*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring); *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981) ("District courts are bound by the law of their own circuit."); *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 369 P.2d 937, 939 (Cal. 1962) ("Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdictions."); *see generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* 46 Stan. L. Rev. 817 (1994); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 Conn. L. Rev. 843 (1993).

134. U.S. Const. art. VI, cl. 2.

require this.[135] Therefore, if the governing decisional law of a superior court (whether an intermediate court or the jurisdiction's highest appellate court) dictated the resolution of a particular legal issue at a given point in time before an inferior court, a litigant's failure to raise the issue at that juncture ordinarily should not prejudice the litigant's right to raise the legal issue for the first time in a subsequent proceeding in the same case. The rationale for this futility exception is both fundamental fairness[136] and judicial economy.[137] This exception also would serve to promote (rather than frustrate) federalism and comity—the oft-cited rationale for the Supreme Court's habeas corpus jurisprudence—because requiring objections on

135. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 Yale L. J. 255, 276 n. 106 (1992).

136. *See O'Connor v. Ohio*, 385 U.S. at 93; *see also McCoy v. U.S.*, 266 F.3d at 1274 (Barkett, J., concurring in result) (criticizing as "patently unfair" the majority's refusal to excuse a procedural default where, at the time of the trial, "every [federal] circuit [court] in the country" had explicitly rejected the defendant's claim); *U.S. v. McGuire*, 79 F.3d at 1407 (Wiener, J., concurring) (contending that application of the "plain error" standard to an unobjected-to claim that, at the time of trial, was foreclosed by extant appellate precedent which was overruled only after the trial, is "patently unfair and logically antithetical to the purpose of [the] plain error [rule]" and "perverse"), *vacated*, 99 F.3d 691 (5th Cir. 1996) (en banc); *U.S. v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994) ("The supervening-decision doctrine reflects the principle that it would be unfair, and even contrary to the efficient administration of justice, to expect a defendant to object at trial where existing law appears so clear as to foreclose any possibility of success."); *Meadows v. Holland*, 831 F.2d 493, 501-03, n.13 (4th Cir. 1987) (en banc) (Murnaghan, Phillips & Sprouse, JJ., dissenting) (criticizing the majority for procedurally defaulting the habeas petitioner's claim when, at the time of his trial, when no objection was lodged, "any objection would have been futile" under controlling state appellate precedent; and contending that the majority was "expect[ing] [petitioner's trial lawyer] to achieve miracles")

137. *Smith*, 250 F.3d at 1077 (Wood, Rovner & Williams, JJ., dissenting from denial of rehearing en banc) ("I fear that the [court's] rule [that the futility of objecting did not excuse the procedural default] will create an administrative nightmare not only for defense counsel trying to represent their clients responsibly, but also for the district courts and this court. After this, defense counsel will have no choice but to file one 'kitchen sink' brief after another, raising even the most fanciful [claims] that could be imagined based on long-term logical implications from existing precedents."); *McGuire*, 79 F.3d at 1412 (Wiener, J., concurring) ("To penalize defendants for failing to challenge entrenched precedent would only encourage frivolous objections and appeals."); *Meadows*, 831 F.2d at 501 (Murnaghan, J., dissenting) (criticizing the majority's refusal to excuse the procedural default based on extant adverse precedent at trial as requiring defense counsel to engage "in [a] recital of frivolous, non-valid matters [foreclosed under extant law], for how could counsel say what was clearly not the law today would not become the law tomorrow?").

clearly foreclosed federal constitutional grounds wastes state courts' time.[138]

Such a futility exception to the procedural default doctrine is perfectly in sync with the principal purpose of our judicial system's requirement of error preservation, which is to permit an inferior court to have the first opportunity to correct any error and, thus, avoid an unnecessary appeal to a higher court or a retrial.[139] Repeatedly, in this regard, the Supreme Court has spoken of a procedural default occurring when a defendant forgoes the "procedural opportunity"[140] to have his claim ruled

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138. *See* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 Ariz. L. Rev. 115, 134 (1991).

139. *Engle*, 456 U.S. at 128-29 (stating that the purpose of procedural default doctrine is to afford a lower court "an opportunity to correct the defect and avoid problematic retrials"); *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998) ("The rationale for the contemporaneous objection rule is that it conserves judicial resources. A contemporaneous objection allows the [lower] court to correct the error at the time it occurs . . . ."); *U.S. v. David*, 83 F.3d 638, 643 (4th Cir. 1996)(affording a court "the opportunity to consider [a legal objection and] possibly avoid the commission of an error" is "the very purpose[] of the contemporaneous objection rule"); *see generally* Rhett R. Dennerline, Student Author, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 Ind. L. J. 985, 987-88 (1989).

There are other, less important rationales for the procedural default doctrine, including (1) affording the non-objecting party (as opposed to the court) the opportunity to cure the alleged error so as to obviate an appeal of the issue; and (2) encouraging development of the factual record regarding a legal issue so as to facilitate meaningful appellate review. *Id.*; *see also Wainwright v. Sykes*, 433 U.S. at 88-89; *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n. 1 (3d Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 523 (1983). Such rationales typically will not have any relevance when an inferior court was utterly powerless in light of extant appellate precedent to grant relief on an objection assuming that a defendant would have voiced it. In the overwhelming majority of such cases, the claim is a "pure" issue of law based on fully developed, uncontroverted facts. *See e.g. O'Connor*, 385 U.S. at 93.

In fairness, if the prosecution is faced with a defendant's objection raised for the first time on appeal or collateral review that would have been futile to make in the court below, the prosecution should be permitted, if it wishes, to make a credible showing that it would have obviated the error if an objection had been made in the court below (notwithstanding the fact that the then-governing law did not recognize an error). If such a showing could be made, then the futility exception should not apply. It is highly doubtful that the prosecution could make such a showing when, at the time of the prior proceeding, then-governing law foreclosed relief on the claim.

140. *See e.g. Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988); *Smith v. Murray*, 477 U.S. at 534. Notably, in this regard, both the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure provide that: "If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Fed. R. Crim. P. 51(b); *accord* Fed. R. Civ. P. 46. In the same spirit as these rules, if defendant lacked a meaningful "procedural opportunity" to object—because the ruling on

on by a court with the power to correct an alleged error.[141] Obviously, if an inferior court (whether a trial court or an inferior appellate court) lacks the power to correct an error as a result of extant appellate precedent of a higher court, no such "procedural opportunity" exists and the primary rationale for the contemporaneous objection rule does not exist.

This situation would not be one of subjective, "*perceived* futility" of which the Court spoke in *Smith v. Murray* and *Engle*,[142] but, instead, one of objective, *actual* futility.[143] Logically and equitably, such actual futility—as opposed to a defendant's mere perception of futility when in fact an objection would not necessarily have been futile—should excuse a procedural default. If, however, a court before which a defendant appears has the power to grant relief on particular claim of error (*i.e.*, a superior court addressing the same issue has not already ruled that such a claim lacks merit), then the futility exception should not apply. In *Engle* and *Smith*, the Court appeared to embrace a variation of this logic when it stated that "it is the very prospect that a state court 'may decide, upon reflection, that [the defendant's claim] is valid' that undergirds the established rule that 'perceived futility alone cannot constitute cause" for a procedural default in a federal habeas corpus case.[144] As discussed below, however, this "reconsideration possibility" rationale should be strictly limited

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the objection was preordained by then-governing appellate precedent—the absence of an objection should not later prejudice the defendant.

141. In *Wainwright v. Sykes*, the leading decision on procedural default, then-Justice Rehnquist's majority opinion appeared to recognize that the contemporaneous objection rule is validly applied only where "the substantive right claimed [for the first time on appeal or collateral review] *could have been safeguarded* if the objection had been raised in a timely manner at trial." 433 U.S. at 89 n.13 (emphasis added). If extant appellate precedent foreclosed a particular claim at the time of trial, the trial court could not have "safeguarded" the claim. Likewise, Justice Rehnquist's concern in *Sykes* that wily defense lawyers will "sandbag" by intentionally withholding an objection on a meritorious ground during trial as "security" in the event a jury returns a guilty verdict, *id.* at 89, obviously does not apply when a trial court had no power to grant relief on the claim.

142. *Smith*, 477 U.S. at 535 (quoting *Engle*, 456 U.S. at 130 n. 36) (emphasis added).

143. Other commentators have noted the difference between "perceived" and "actual" futility. *See* Kinports, *supra* n. 138, at 134 n. 88; Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 Hofstra L. Rev. 617, 651 n.182 (1984); Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposal*, 68 Iowa L. Rev. 609, 655-56, n. 219, 651 n.197 (1983).

144. *Smith*, 477 U.S. at 535 (quoting *Engle*, 456 U.S. at 130 n. 36).

to the situation when a defendant forewent an meaningful opportunity to have a state or federal appellate court rule on the merits of a claim and overrule its prior precedent. A meaningful possibility for reconsideration of an issue does not exist when a defendant appears before an inferior appellate court (*e.g.*, a state intermediate appellate court) or a "panel" of judges of an appellate court (which has no power to overturn a prior precedent of the full appellate court or precedent of a prior panel).[145]

In other contexts besides procedural default, the Supreme Court has designed procedural requirements to avoid futile actions. For instance, in its decisions concerning the exhaustion of administrative remedies—a doctrinal cousin of the procedural default doctrine—the Court has recognized that such exhaustion is not required when the administrative tribunal would be "powerless" under governing law to grant any relief.[146] Such a futility exception exists for state defendants who otherwise are required to exhaust available state remedies under 28 U.S.C. § 2254(b)(1) before filing federal habeas corpus petitions.[147] In *Lynce v. Mathis*,[148] for example, although the habeas corpus petitioner had not exhausted his federal constitutional claim in the state courts before filing his federal habeas corpus petition, the Court found that "exhaustion would have been futile" because the Florida Supreme Court previously had rejected an

145. *See* nn. 133-35, *supra*, nn 184-85, *infra*, and accompanying text.

146. *Montana Natl Bank of Billings v. Yellowstone County*, 276 U.S. 499, 505 (1928) ("Finally, it is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in [a prior case] would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision."). In *McCarthy v. Madigan*, 503 U.S. 140 (1992), the Court reaffirmed its 1922 decision in *Montana Natl Bank of Billings*. *See McCarthy*, 503 U.S. at 148; *see also Honig v. Doe*, 484 U.S. 305, 326 (1988) (exhaustion of administrative remedies not required "where exhaustion would be futile or inadequate"); *cf. Booth v. Churner*, 532 U.S. 731 (2001) (under Prison Litigation Reform Act, an inmate is required to exhaust prison's administrative remedies before filing § 1983 action even if inmate seeks only monetary relief and administrative tribunal has no ability to award money damages, so long as the administrative tribunal has authority to take some responsive action).

147. *See* Randy Hertz & James S. Liebman, 2 Fed. Habeas Corpus Prac. & Process, § 23.4a, at 989-90, n. 15 (4th ed., LexisNexis 2001) (citing cases).

148. 519 U.S. 433 (1997).

identical claim in prior cases and counsel for the state had "not suggested any reason why the Florida courts would have decided petitioner's case differently[149] Likewise, in order to prevent futility, the Court does not require, as part of the exhaustion requirement, that state defendants file certiorari petitions with the Court following an adverse ruling on a claim in the state courts.[150] The Court reasoned in that, because only a tiny fraction of certiorari petitions in criminal cases are granted, such a requirement would be pointless and cause a tremendous waste of judicial resources. "Good judicial administration is not furthered by insistence on futile procedure."[151]

Just as it has done in the exhaustion context and just as it once did in the procedural default context in the 1960s, beginning with *O'Connor*, the Supreme Court now should recognize an "actual futility" exception to the procedural default doctrine. Such an exception is appropriate both on direct appeals and on collateral review. In *Johnson*, the Supreme Court erroneously held that, if a claim would have been futile at trial and only became legally viable on appeal based on supervening appellate precedent, the plain error standard should nonetheless apply.[152] As Fifth Circuit Judge Wiener cogently argued in his concurring opinion in *United States v. McGuire*,[153] however, application of the plain error standard to such a once-futile claim given new life by supervening precedent is "patently unfair" in that it "penalize[s] the defendant for failing to perform the hollow and obnoxious act of objecting [at trial] in the face of well-settled precedent to the contrary."[154] With respect to Federal Rule of Criminal Procedure 52(b), which affords an appellate court discretion to correct "plain errors"—as opposed

149. *Id.* at 436 n. 4. This holding is at odds with *Engle*'s holding, in the procedural default context, that a state supreme court should have the opportunity to "reconsider" its position against a particular federal claim in prior cases. *Engle*, 456 U.S. at 130.

150. *Wade v. Mayo*, 334 U.S. 672, 680-81 (1948) ("Writs of certiorari are matters of grace. . . . [F]ailure to file a [certiorari] petition [after exhaustion of all available state court remedies] should not prejudice the right to a file a habeas corpus application in a [federal] court."); *but cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (requiring, as part of the exhaustion requirement, that a state defendant seek discretionary review of the state supreme court before filing federal habeas corpus petition).

151. *Wade*, 334 U.S. at 681.

152. *Johnson*, 520 U.S. at 466.

153. 79 F.3d 1396, 1406 (5th Cir. 1996), *vacated*, 99 F.3d 671 (5th Cir. 1996) (en banc).

154. *Id.* at 1407 (Wiener, J., concurring).

to Rule 52(a), which affords an appellate court no discretion to disregard a preserved, "harmful" error—Judge Wiener correctly pointed out that Rule 52(b) presupposes that a defendant has "forfeited" a claim by failing to object in the court below. In the actual futility scenario, however, a defendant "ha[s] nothing to which he could object [under the prevailing law] and thus nothing to *forfeit*."[155] Rather than the restrictive plain error standard, traditional harmless error analysis[156] should apply to such a claim based on supervening law.[157]

The Supreme Court in *Johnson* suggested that it had no power to carve out any "exception" to Rule 52(b)'s treatment of unpreserved claims.[158] The Court's claimed inability to circumvent Rule 52(b)'s strictures is untenable for two reasons. First and foremost, the Court's assertion in *Johnson* that plain error review is mandatory in all cases where no objection was made in the district court does not flow from the language of Rule 52(b), which states in full: "A plain error that affects substantial rights may be considered even though it was not brought to the [trial] court's attention."[159] Such language simply does not foreclose plenary review in the actual futility scenario. Rather, the supposed strictures contained in Rule 52(b) are actually contained in the Court's judicial gloss on Rule 52(b) in *United States v. Olano*.[160]

Second, in a closely analogous context, the Court has shown no such reluctance to interpret 28 U.S.C. § 1257, the *jurisdictional* statute that governs the Court's ability to review state court judgments by writ of certiorari, in a manner that permits unrestricted appellate review when a state court had

155. *Id.* at 1409.

156. *See Chapman v. Cal.*, 386 U.S. 18, 24 (1967) (setting forth the "harmless beyond a reasonable doubt" standard for claims of federal constitutional error raised on direct appeal); *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946) ("substantial and injurious effect of influence" standard of review for claims of non-constitutional error raised on appeal; codified in Fed. R. Crim. P. 52(a)); *see also Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (adopting *Kotteakos* standard for claims of federal constitutional error raised on federal habeas corpus review); *Ariz. v. Fulminante*, 499 U.S. 279, 307-09 (1991) (holding that automatic reversal is required for "structural" errors that are not amenable to traditional harmless-error analysis for "trial" errors).

157. *McGuire*, 79 F.3d at 1410-11 (Wiener, J., concurring).

158. *Johnson*, 520 U.S. at 466.

159. Fed. R. Crim. P. 52(b) (2002).

160. 507 U.S. 725 (1993).

applied a procedural default rule in an unreasonable manner. Although the Court for over a century has held that an "independent and adequate state law ground" (such as a valid procedural default ruling by a state supreme court) will deprive the Court of jurisdiction to review a federal constitutional claim on the merits under any type of standard, the Court likewise has long held that an "inadequate" state law ground does not deprive the Court of jurisdiction.[161] In such a case, an "inadequate" procedural default will be entirely excused, and the claim will receive plenary review, subject only to ordinary harmless error analysis, which is much less restrictive than plain error review.[162]

Indeed, this is precisely what occurred in *O'Connor*, where the Court found that the futility of objecting under pre-*Griffin* state precedent rendered the state supreme court's procedural default ruling an "inadequate state law ground."[163] It makes absolutely no sense for the Supreme Court to interpret 28 U.S.C. § 1257 as excusing an "inadequate" procedural default that occurred in the state courts (thus, subjecting the claim to plenary review) but to apply Rule 52(b)'s plain error standard and its demanding judicial gloss to an identically "inadequate" procedural default that occurred in federal district court. To do so turns federalism on its head. As the Court stated in *Kaufman v. United States*,[164] "[t]here is no reason to . . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations."[165]

The Court's willingness to forgive procedural defaults on appeal and eschew the plain error doctrine by engaging in plenary review was apparent in *City of Newport v. Fact*

161. *See e.g. Adams v. Robertson*, 520 U.S. 83, 87-88 (1997); *Wainwright v. Sykes*, 433 U.S. at 81; *Murdock v. Memphis*, 87 U.S. 590, 626 (1874).

162. *See Olano*, 507 U.S. at 734-35 (discussing the difference between plenary review under the traditional harmless error standard and review under the plain error standard).

163. *O'Connor*, 385 U.S. at 93; *see also Cardinale v. La.*, 394 U.S. 437, 439 (1969) (noting that, in *O'Connor*, it had treated the Ohio Supreme Court's procedural default ruling as an "inadequate" state law ground).

164. 394 U.S. 217 (1969).

165. *Id.* at 228.

Concerts, Inc.,[166] a civil appeal which involved a challenge to jury instructions not timely raised in the district court proceedings under Federal Rules of Civil Procedure 51.[167] In *City of Newport*, the Court refused to apply the plain error doctrine to the civil rights defendant's "procedural default"[168] on appeal. The underlying substantive issue was whether the district court erred in instructing the jury that punitive damages were recoverable in a section 1983 civil rights action against a municipality.[169] The Court reasoned that, because the law on the punitive damages issue was in a state of flux among the lower courts and had not previously been addressed by the Supreme Court, the "novel" claim being asserted on appeal should not be subjected to the "restrictive" plain error analysis.[170] The Court "conclude[d] that restricting [its] review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration."[171] Notably, Chief Justice Rehnquist, the author of the Court's subsequent decisions in *Johnson* and *Bousley* and the author of the dissenting opinion in *Reed v. Ross*,[172] joined the majority in *City of Newport*. Justices Brennan, Marshall, and Stevens dissented, criticizing the majority's apparent double standard regarding the plain error rule—one rule for criminal cases (which is less

166. 453 U.S. 247 (1981).

167. Federal Rule of Civil Procedure 51 provides: "No party may assign as an error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Another provision of the civil rules requires a party to "make[] known to the [trial] court the action which the party desires the court to take or that party's objection to the action of the court and the grounds thereof . . . ." Fed. R. Civ. P. 46 (2002)

168. *City of Newport*, 453 U.S. at 255 (describing the defendant's "failure to object to the [jury] charge at trial" as a "procedural default").

169. *Id.* at 255. The majority, after dispensing with the restrictive plain error standard—which, if applied, would have denied relief to the municipality in light of the fact that the law on the issue was not "plain" at the time of the appeal—held that punitive damages are not recoverable. *Id.* at 271.

170. *Id.* at 256.

171. *Id.* at 257.

172. 468 U.S. at 21 (Rehnquist, J., Burger, C.J., Blackmun & O'Connor, JJ., dissenting). Ironically, the dissenters in *Reed* would have applied the procedural default doctrine to bar consideration of the criminal defendant's claim as a result of his failure to raise the issue at his trial, *id.* at 25-26, notwithstanding the fact that the claim in *Reed* was clearly more "novel" at the time of his trial than the claim raised by the municipal defendant in the civil rights action in *City of Newport*.

forgiving to criminal defendants) and another for civil cases (which is more forgiving to civil rights defendants).[173]

In the collateral review context, the actual futility exception would require a federal court not simply to find "cause" for a procedural default, as was suggested in the dicta in *Reed v. Ross*.[174] Rather, the Court should *entirely excuse* the procedural default and afford plenary review to the claim in the same manner that the Supreme Court would afford plenary review to a federal constitutional claim coming to the Court on direct review under 28 U.S.C. § 1257 when the state court's procedural default ruling is deemed inadequate.[175] On collateral review, such a claim only would be subject to the modified harmless error standard set forth by the Supreme Court in *Brecht v. Abrahamson*.[176]

V. APPLICATIONS OF THE "ACTUAL FUTILITY" EXCEPTION

Stating the actual futility exception in general terms is much easier than applying it in the myriad situations that have arisen in past cases. There are essentially five different futility scenarios that raise the issue of whether, under each set of circumstances, the courts should excuse a procedural default. As

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173. *City of Newport*, 453 U.S. at 276 n 7 (Brennan, J., dissenting) (noting the "incongruity of [the majority's] result in light of parallel procedural requirements in the criminal area"). The dissenters contended that: "The Court's conclusion that petitioners' claim in this civil case should be heard despite the absence of plain error . . . . inverts the Rules, in violation of their spirit as well as their letter . . . . The Court's conclusion . . . . suggests that the courts should be stricter in enforcing procedural rules against prisoners facing incarceration than against civil defendants facing money judgments. The Court's priorities seem backwards to me." *Id.*

174. 468 U.S. 1, 17-18.

175. *See e.g. Osborne v. Ohio*, 495 U.S. 103, 123-26 (1990); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965).

176. 507 U.S. at 637. According to the two leading commentators, the *Brecht* harmless error standard and the "prejudice" component of the "cause and prejudice" standard are identical. *See* Hertz & Liebman, *supra* n. 147, at § 26.3c, 1225; *compare U.S. v. Frady*, 456 U.S. 152, 170 (1982) (broadly defining "prejudice" in the cause-and-prejudice standard as "actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions"), *with Brecht*, 507 U.S. at 637 (asking whether constitutional error had "a substantial and injurious effect or influence in determining the jury's verdict"). If that were indeed the case, it would not make a practical difference whether a formerly futile claim is subjected to plenary review on collateral review or, instead, is subject to the cause-and-prejudice test, assuming that the futility constituted cause.

discussed below, three of the five scenarios rise the level of "actual futility" which justify excusing a procedural default.

The first scenario presents the easiest application of the actual futility exception. It involves a state or federal defendant's failure to raise a federal law claim that, at the time of the procedural default, was squarely foreclosed by binding Supreme Court precedent. A state or federal trial court would be utterly powerless to grant any relief on the objection and, thus, no legitimate governmental interest would be served by requiring an objection. Likewise, a state or federal appellate court—even a state supreme court or en banc United States Court of Appeals—would be without power to overrule precedent of the United States Supreme Court, even precedent that "appears to rest on reasons rejected in some other line of decisions."[177] The inferior appellate court "should follow the [Supreme Court] case that directly controls, leaving to th[e] Court the prerogative of overruling its own decisions."[178] Despite the readily apparent logic of this application of the actual futility exception—which has never been rejected by the Supreme Court[179] and which finds support in dicta in *Reed v. Ross*[180]—numerous lower courts have refused to excuse procedural defaults under such circumstances.[181] Such decisions are erroneous.

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177. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

178. *Id.*

179. In *Sunal v. Large*, 332 U.S. at 177-78, which is discussed in Section III, *supra*, the defendants explained their failure to file a direct appeal in early 1945 based in part on the Supreme Court's decision in *Falbo v. United States*, 320 U.S. 549 (1944), which, at that time at least, "was very widely understood by the [b]ench and [b]ar" as being squarely on point and foreclosing the defendants' claim. *Sunal*, 157 F.2d at 168-69 . Nevertheless, , a majority of the Supreme Court, on a dubious basis, interpreted its earlier decision in *Falbo* as not squarely foreclosing the defendants claim as of early 1945. *Sunal*, 332 U.S. at 180-81. Therefore, the Court's decision in *Sunal* does not reject futility resulting from adverse Supreme Court precedent directly on point as being a valid excuse for a procedural default.

180. 468 U.S. at 17-18 (1984).

181. *See e.g. U.S. v. Aparco-Centeno*, 280 F.3d at 1087-90 (subjecting defendant's claim based on *Apprendi v. N.J.*, 530 U.S. 466, which was decided while the defendant's appeal was pending, to "plain error" review, even though at the time of the district court proceedings, the issue was foreclosed by *Almendarez-Torres v. U.S.*, 523 U.S. at 227); *U.S. v. Terry*, 240 F.3d 65, 72-73 (1st Cir. 2001) (same); *U.S. v. Pacheco-Zepeda*, 234 F.3d 411, 413-14 (9th Cir. 2001) (same); *Pitts v. Cook*, 923 F.2d 1568, 1571-73, n. 6 (11th Cir. 1991) (based on a state court's procedural default, refusing to address merits of defendant's Equal Protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), despite the fact that, at the time of the defendant's failure to raise the claim, *Batson* had not yet been decided

The second futility scenario is similar to the first. It involves the situation where, based on then-governing precedent of a state appellate court or an inferior federal appellate court (*i.e.* a United States Court of Appeals), a defendant failed to raise a foreclosed claim in a lower court governed by such appellate precedent. That scenario was played out in *O'Connor*, *Smith v. Estelle*, *Engle*, and *Johnson* (with the Supreme Court taking conflicting positions in these cases).[182] In each of the four cases, at the time of the defendant's procedural default in the trial court, controlling precedent of a superior appellate court (other than the United States Supreme Court) would have rendered an objection utterly futile because the trial court would have been powerless to grant any relief on the defendant's claim.[183] The Court in *O'Connor* and *Smith* correctly excused the procedural default under such circumstances. *Engle* and *Johnson*, which did not, should be overruled.

The third scenario—which occurred in *Sunal* and *Bousley*—presents a more difficult application of the exception than did the first two scenarios. It involves a defendant's failure to appeal a claim to an intermediate state appellate court or a "panel" of a federal circuit court that, under the court's rule of operating procedure,[184] had no power to overrule then-governing appellate precedent of the same court or a superior appellate

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and, instead, the Supreme Court's decision in *Swain v. Ala.*, 380 U.S. 202 (1965), squarely foreclosed defendant's Equal Protection claim); *Jones v. Butler*, 864 F.2d 348, 362-64 (5th Cir. 1988) (same).

182. *Compare O'Connor*, 385 U.S. at 93 (excusing the procedural default), and *Smith*, 451 U.S. at 468 n. 12 (same), *with Engle*, 456 U.S. at 130 (not excusing the procedural default), and *Johnson*, 520 U.S. at 466 (same).

183. *See O'Connor v. State*, 217 N.E.2d at 689 (O'Neill, Herbert & Brown JJ., dissenting), *rev'd*, 385 U.S. 82 ; *Isaac v. Engle*, 646 F.2d 1129, 1133 ; *Johnson*, 520 U.S. at 466.

184. *See e.g.* 3d Cir. Internal R. of Operating P. 9.1. A vacated panel decision of the Eighth Circuit held that the Constitution (in particular, Article III) required three-judge panels to follow prior panel decisions, even if such decisions were unpublished. *See Anastasoff v. U.S.*, 223 F.3d 898, 904 (8th Cir. 2000), *vacated on rehearing en banc on other grounds*, 235 F.3d 1054 (8th Cir. 2000); *but see Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (disagreeing with the vacated panel decision in *Anastasoff*); *see also Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 262 (5th Cir. 2001) (Smith, Jones & DeMoss JJ., dissenting from denial of rehearing en banc) (noting the importance of the controversial issue raised in *Anastasoff*).

court (other than the United States Supreme Court).[185] This scenario is somewhat similar to the prior scenarios discussed, in that the intermediate appellate court is effectively "powerless"[186] to overrule the prior precedent of the same court. Although the possibility of en banc review exists in any appeal to state or federal intermediate appellate court, such en banc review—which could overrule a prior "panel" decision—is extremely rare in practice. En banc decisions comprise less than one percent of a typical appellate court's rulings.[187] In fact, many federal circuit courts actively discourage petitions for en banc review, some even threatening sanctions against counsel who petition for en banc review in cases not deemed clearly worthy of such "extraordinary" review.[188]

In *Engle* and *Smith v. Murray*, the Supreme Court stated that the possibility that a state appellate court might choose to reconsider an issue previously decided adversely to criminal defendants in a prior case was a reason for not permitting futility to serve as "cause" for a procedural default.[189] In neither case did the Court deal with the third scenario discussed above, where an intermediate appellate court (or a panel thereof) does not have the power to reconsider prior precedent. Although a defendant in the third scenario could seek reconsideration of such adverse precedent by petitioning for en banc review by the full intermediate appellate court, or by petitioning for discretionary review by a state supreme court in the case of a state intermediate appellate court that is bound by adverse

185. Every federal circuit court has a well-established rule that a three-judge "panel" of the court cannot overrule the controlling decision of a prior panel absent intervening authority from the en banc court or Supreme Court. *See* Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 Ohio St. L. J. 2025, 2031-32, nn. 20-21 (1999) (citing cases). Many state intermediate courts follow the same rule. *See e.g. Cmmw. v. McCormick* 772 A.2d 982, 984 n. 1 (Pa. Super. 2001); *In Interest of L.D.B.*, 924 P.2d 642, 645 (Kan. App. 1996); *O'Brien v. State*, 478 So.2d 497, 499 (Fla. App. 1985).

186. *Moore v. Off. Personnel Mgt.*, 113 F.3d 216, 218 (Fed. Cir. 1997).

187. Berman & Cooper, *supra* n. 185, at 2031-32, n. 21 (noting that in fiscal year 1997, there were only a total of sixty-five en banc dispositions in the federal system out of nearly 25,000 appeals terminated).

188. *See e.g.* 5th Cir. Loc. R. 35.

189. *Smith*, 477 U.S. at 535 (quoting *Engle*, 456 U.S. at 130 n. 36).

precedent of the state supreme court,[190] requiring a defendant to seek such en banc review or discretionary review—both of which occur very infrequently—is not wise policy. "Good judicial administration is not furthered by insistence on futile procedure."[191]

The fourth scenario involves a defendant, state or federal, who fails to raise a claim on appeal before an appellate court (other than the United States Supreme Court) which has the power to recede from or overrule prior adverse precedent foreclosing the claim. This situation was present in *Smith v. Murray*.[192] In that case, the state defendant, on his direct appeal to the Virginia Supreme Court, failed to raise a federal constitutional claim that had been rejected in a prior decision of that court.[193] The Supreme Court held that, by not asking the Virginia Supreme Court to reconsider its prior ruling, the defendant had procedurally defaulted his claim for purposes of subsequent federal habeas corpus review.[194] The fourth scenario is one of "perceived," as opposed to "actual," futility because there was a possibility, even if not a significant one, that the

190. In *O'Sullivan v. Boerckel*, 526 U.S. at 847 (1999), the Court held that, as part of the exhaustion requirement under 28 U.S.C. § 2254(b)(1) and (c), a state defendant must raise a federal constitutional claim in a petition for discretionary review filed with the state supreme court after the claim has been rejected by a state intermediate court. *Id.* at 847. However, *O'Sullivan* did not involve the situation where the state intermediate court had denied a claim based on extant, directly-controlling precedent of the state supreme court. Therefore, *O'Sullivan* did not address the futility scenario discussed above. *Cf. Lance v. Mathis*, 519 U.S. 433, 436 n. 4 (1997) (exhaustion doctrine does not require state defendant to seek review by state supreme court of a claim rejected by that court in prior case; such a procedural requirement would be "futile").

Assuming that *O'Sullivan* is considered inconsistent with the application of the actual futility exception to the third scenario discussed above, its reasoning would not apply to a federal direct appeal and, instead, would only apply to state defendants. *O'Sullivan* was a federal habeas corpus case in which the Court was addressing the statutory requirement that federal habeas corpus petitioners first exhaust state court remedies before seeking relief from the federal courts on collateral review. 526 U.S.. at 851. Principles of federalism and comity, which were relevant in *O'Sullivan, see id.* at 844-45, are obviously absent on a direct appeal in a federal case.

191. *Wade*, 334 U.S. at 681 (1948) (holding that a state defendant does not have to file a certiorari petition with the United States Supreme Court after denial of relief by state appellate courts before filing a federal habeas corpus petition).

192. 477 U.S. at 534-37.

193. *Id.* at 534-37; *see also Gibson*, 219 S.E.2d at 847 (noting that "the authorities are divided" on the Fifth Amendment issue).

194. 477 U.S. at 535-37.

state supreme court would overrule its prior adverse precedent and grant the defendant relief.

The final scenario involves a defendant who failed to raise a claim in an inferior court based on a good-faith, although objectively mistaken, belief that then-governing precedent of a superior court squarely foreclosed the claim. Unless, from an objective standpoint, reasonable jurists would have considered the claim squarely foreclosed by extant precedent,[195] the procedural default doctrine should apply because it was not actually futile to raise the claim. In other words, if the legal or factual basis of a particular claim is objectively distinguishable from extant adverse precedent—and, thus, such precedent does not necessarily foreclose the claim[196]—then a defendant's mistaken perception that the claim was foreclosed by the precedent should not excuse the procedural default.

VI. CONCLUSION

The actual futility exception promotes fundamental fairness and serves other legitimate purposes. First, it prevents the waste of judicial resources by excusing litigants from burdening courts with claims on which the courts have no power to grant relief. Second, it prevents well-intentioned, zealous defense counsel, who seek to err on the side of making "shotgun" objections in order to avoid procedurally defaulting claims that might one day possess merit, from being subject to ethical sanctions for raising

195. *Cf. Graham v. Collins*, 506 U.S. 461, 477 (1993) (employing such an objective "reasonable jurists" standard to determine whether a claim requires application of a "new rule of law" for retroactivity purposes). *See also Teague*, 489 U.S. at 301.

196. This is not to say that a particular claim was actually futile simply because extant precedent undermined—although did not squarely foreclose—the claim. Unless then-controlling precedent *"dictated"* that the claim be denied, from an objective standpoint, *cf. Teague*, 489 U.S. at 301, the claim was not actually futile. For instance, in *Sunal*, the defendants' mistaken belief that the Supreme Court's prior decision in *Falbo* squarely foreclosed their claim was, according to the Court in *Sunal*, not objectively reasonable (notwithstanding the fact that eight circuits also had this understanding). *Sunal*, 332 U.S. at 177-81. However, as discussed above, the defendants had an independent basis excusing their procedural default in light of then-governing circuit court precedent that squarely foreclosed their claim. *See Sunal*, 157 F.2d at 168-69; *Kulick*, 157 F.2d at 813-14. Thus, *Sunal* falls under the third scenario mentioned above. If the defendants had only relied on *Falbo*, and no such wall of circuit court precedent existed, the Supreme Court's conclusion that their reliance on *Falbo* was unreasonable would be sufficient to procedurally default their claim.

issues then deemed "frivolous."[197] Finally, in cases involving state defendants, the actual futility exception promotes—rather than frustrates—principles of federalism and comity by lessening the burdens on state courts faced with foreclosed arguments made by defendants seeking to preserve federal constitutional claims for subsequent federal court review.

In accordance with the centuries-old axiom that "[t]he law does not require the doing of a futile act,"[198] the Supreme Court should modify its current error preservation jurisprudence so as to create an "actual futility" exception as set forth above. The Court should overrule or at least modify decisions such as *Johnson* and *Bousley* and breathe new life into prior precedent such as *O'Connor*.[199]

197. *See e.g. McKnight v. Gen. Motors Corp.*, 511 U.S. 659, 659-60 (1994) (per curiam) (reversing Seventh Circuit's ethical sanctions imposed on a litigant for raising a claim deemed "frivolous" by the court when, according to the Supreme Court, the claim was not objectively frivolous at the time it was raised because other courts had found merit in the claim; observing that the litigant raised the claim because he intended to preserve it for further appellate review).

198. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

199. *Stare decisis* should not prevent the Court from overruling such faulty precedent. *See Hohn v. U.S.*, 524 U.S. 236, 251-52 (1998) ("The role of *stare decisis* . . . . is somewhat reduced . . . . in the case of a procedural rule . . . . which does not serve as a guide to lawful behavior. . . . Here we have a rule of procedure that does not alter primary conduct.").