Notes

THE "GREAT WRIT" MAY ONCE AGAIN DELIVER JUSTICE TO THE MOST DESERVING PRISONERS: AN ANALYSIS OF ARIZONA CRIMINAL RULE OF PROCEDURE 31.2(b) IN LIGHT OF *BEAM V. PASKETT*

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"I've been burned again. This should teach me: Never trust a man with a blanket. Get me my lawyer." Sally Brown to Linus Van Pelt.[1]

INTRODUCTION

Like Linus Van Pelt awaiting the Great Pumpkin each Halloween, capital defendants typically find themselves facing a long, lonely and disappointing situation when they await their chance at the "Great Writ."[2] Until about twenty years ago, the law allowed a capital defendant whose lawyer inadvertently failed to raise a fundamental claim at the state level to receive habeas corpus review on that claim by a federal court.[3] Subsequently, a more conservative Supreme Court, concerned with increasing the autonomy of state courts and streamlining capital appeals, handed down a series of decisions holding that even an unintentional mistake could bar a capital defendant from obtaining the

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1. Videotape: It's the Easter Beagle, Charlie Brown (Hi-Tops 1974).

2. The "Great Writ" is a common shorthand way of referring to a writ of habeas corpus. Habeas corpus, Latin for "you release the body," has the primary function of releasing prisoners from unlawful imprisonment. BLACK'S LAW DICTIONARY defines habeas corpus as follows:

> "[a] form of collateral attack. An independent proceeding instituted to determine whether a defendant is being unlawfully deprived of his or her liberty.... Initially, the writ only permitted a prisoner to challenge a state conviction on constitutional grounds that related to the jurisdiction of the state court. But the scope of the inquiry was gradually expanded, and...the writ now extends to all constitutional challenges."

BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

3. In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court held that when a lawyer's failure to raise a claim at the state level is not deliberate, federal courts have the power to review the state prisoner's federal constitutional claim. *Id.* at 398–99.

once "Great Writ."[4] However, *Beam v. Paskett*,[5] a 1993 Ninth Circuit Court of Appeals decision, brought hope to Arizona capital defendants harboring constitutional claims that their lawyers failed to raise. The *Beam* court held that it is immaterial whether a lawyer fails to raise a claim challenging a capital sentence at the state level when a state statute requires its supreme court to review for sentencing errors. Although later Ninth Circuit cases have threatened to close the door to those on Arizona's death row relying on the *Beam* holding, an analysis of Arizona policy and case law proves these cases misguided.[6] Arizona and other states enforcing the death penalty[7] now must interpret their own death penalty statutes to determine which, if any mistakes by a capital lawyer at the state court level deserve federal review.

Although the United States Supreme Court has yet to address whether states are constitutionally required to provide capital defendants an automatic appeal to their state supreme court,[8] all but a few of the thirty-eight states with a valid death penalty presently provide such an appeal.[9] In *Beam*, when the Ninth Circuit analyzed how Idaho's automatic appeal statute[10] might affect a

4. *Fay* was the law until 1977 when Justice Rehnquist overturned the deliberate standard for fear that it might encourage lawyers to "sandbag" issues. Wainwright v. Sykes, 433 U.S. 72, 89 (1977). *See infra* notes 248–52 for discussion on sandbagging.

5. 3 F.3d 1301, 1305–07 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

6. See *infra* notes 158–213 and accompanying text for discussion of recent Ninth Circuit case law.

7. The Fourth, Seventh and Eighth Circuits have recently addressed whether the death penalty statutes in Virginia, Illinois and Missouri, respectively, allow capital defendants to raise claims in federal court that were not presented to the state courts. *See* Bennett v. Angelone, 92 F.3d 1336, 1344 (4th Cir. 1996); Collins v. Gramley, 868 F. Supp. 950, 964 (N.D. Ill. 1994); Nave v. Delo, 62 F.3d 1024, 1039 (8th Cir. 1995).

8. *See* Linda E. Carter, *Mr. Justice Potter Stewart: Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 114 n.119 (1987).

9. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 213 n.14 (1990).

10. IDAHO CODE § 19–2827 (1996). Review of death sentences -- Preservation of records states:

> (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Idaho and to the attorney general together with a notice prepared by the clerk and a report prepared by the trial judge setting forth the findings required by § 19–2515(d), Idaho Code, and such other matters concerning the sentence imposed as may be required by the Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and punishment prescribed. The report may be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Idaho.
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> (b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by way of appeal.
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> (c) With regard to the sentence the court shall determine:
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> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
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> (2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in § 19–2515, Idaho Code, and
>
> (3) Whether the sentence of death is excessive.
>
> (d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

capital defendant's claims on federal habeas review, it found that Idaho's statute effectively allowed capital defendants to obtain federal review on issues not directly raised before the Idaho Supreme Court.[11] The court reasoned that because Idaho's capital appeal statute requires the Idaho Supreme Court to review the record for possible errors in sentencing, whether or not raised by the defendant, the federal court will presume that the Idaho Supreme Court performed its duty.[12] A presumption that the Idaho Supreme Court reviewed for any sentencing error, raised or not, foreclosed the state from arguing that the defendant's failure to raise a sentencing claim denied the Idaho courts the first opportunity to address the claim(s). However, the Ninth Circuit explicitly left open whether the same analysis would apply to Arizona's death penalty appeal statute, Arizona Rule of Criminal Procedure 31.2(b).[13] At stake for an Arizona capital defendant is the opportunity to raise federal constitutional issues on federal habeas corpus appeal that his attorney failed to present to the state courts because of mistake, neglect, or inadvertence.[14]

The emergence of two contrasting views interpreting the Arizona Supreme Court's duty to review unraised federal claims left the elucidation of Rule 31.2 (b) ripe for Ninth Circuit review.[15] In *Woratzeck v. Lewis*,[16] the Arizona Federal District Court claimed that the reasoning applied to the Idaho statute analyzed in *Beam* did not apply to Arizona's statute.[17] However, both *Falcone v. Lewis*,[18] an unpublished opinion from a panel on the Ninth Circuit Court of Appeals, and *Villafuerte v. Lewis*[19] suggested that the Ninth Circuit might reverse *Woratzeck* and hold that *Beam* requires federal courts to address issues on federal habeas corpus appeal even when they were neither raised nor

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(e) In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.
(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.
(g) The Supreme Court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975.

Id.

11. Beam v. Paskett, 3 F.3d 1301, 1305–07 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

12. *Id.* at 1306.

13. *Id.* at 1305–06. ARIZ. R. CRIM. P. 31.2(b) states:
When a defendant has been sentenced to death, the clerk, pursuant to Rule 26.15, shall file a notice of appeal on his behalf at the time of entry of judgment and sentence. Such notice shall be sufficient as a notice of appeal by the defendant with respect to all judgments entered and sentences imposed in the case.

14. Oftentimes an attorney's mistakes do not rise to the level of Sixth Amendment ineffective assistance of counsel. In these cases a defendant may not be able to raise issues in a later proceeding if his or her attorney inadvertently failed to raise these claims at an earlier trial or appeal. *See* Murray v. Carrier, 477 U.S. 478, 486–88 (1986) (stating that an attorney's procedural default caused by mistake is equivalent to a default stemming from design); Smith v. Murray, 477 U.S. 527, 533–39 (1986) (applying procedural default to a capital defendant whose attorney made an inadvertent mistake).

15. *See infra* notes 165–99 and accompanying text.

16. 863 F. Supp. 1079 (D. Ariz. 1994).

17. *Id.* at 1095–96.

18. No. 93–17178, 1994 U.S. App. LEXIS 19631 (9th Cir. June 30, 1994).

19. 75 F.3d 1330, 1335–36 (9th Cir. 1994).

addressed by the Arizona Supreme Court.[20] Nonetheless, despite what looked like a promising situation for Arizona capital defendants awaiting a federal hearing, a series of Ninth Circuit decisions after *Falcone* and *Villafuerte* misinterpreted Arizona case law quashing any such hopes. These cases held that Arizona's fundamental error review[21] did not require the Arizona appellate courts to review constitutional claims that a lawyer inadvertently failed to raise. However, this Note shows why a proper analysis of Arizona cases and policy, like the Great Pumpkin, should soon surprise everyone and deliver justice to the most deserving prisoners.[22]

Part I of this Note introduces the *Beam* decision and explains the dispute between advocates of states' rights and defenders of individual constitutional rights.[23] Part II provides a necessary background discussion of the legal principles involved, including: a history of the "Great Writ,"[24] the United States Supreme Court's habeas corpus jurisprudence,[25] application of exhaustion and procedural default rules in death penalty cases,[26] and the requirement that states base their procedural bars on an adequate and independent state ground.[27] Part III discusses the dispute within the Ninth Circuit over how to apply *Beam* to Rule 31.2(b) and looks at how other circuits are addressing their respective state capital punishment statutes. Part IV addresses the policy decisions that Arizona will face regardless of how the Ninth Circuit interprets Arizona's law.[28] Part V proposes an interpretation of Rule 31.2(b) that will meet Arizona's policy objectives.[29]

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20. *Falcone*, 1994 U.S. App. LEXIS 19631, at *7.

21. Fundamental error is error involving the loss of a constitutional right. State v. Gendron, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). However, ARIZ. REV. STAT. ANN. § 13–4035, requiring the Arizona courts to review the record for fundamental error, was repealed by 1995 Ariz. Sess. Laws 1995, ch. 198, § 1. The Arizona Supreme Court in State v. Smith, 184 Ariz. 456, 910 P.2d 1 (1996), held that the repeal of § 13–4035 is procedural and not substantive and therefore fully retroactive. Nonetheless, the cases discussed in this Note, as well as many capital cases that federal district courts will address in the near future, received fundamental error review by the Arizona Supreme Court before the repeal took effect. *See, e.g.*, State v. Kemp, 185 Ariz. 52, 67, 912 P.2d 1281, 1296 (1996) (holding that the court reviewed for fundamental error before deciding *State v. Smith*). Moreover, as will be discussed below, the Arizona Supreme Court has consistently held itself to a standard of review for capital cases that exceeds only a review for fundamental error. Furthermore, the Supreme Court explicitly left open whether the repeal of ARIZ. REV. STAT. ANN. § 13–4035 will affect its review of the propriety of a death sentence. *Kemp*, 185 Ariz. at 67, 912 P.2d at 1296.

22. As all fans of Charles Schultz's cartoon strip *Peanuts* know, Linus Van Pelt believes that the Great Pumpkin will rise from the pumpkin patch on Halloween and deliver presents to the most sincere boys and girls.

23. *See infra* notes 30–66 and accompanying text.

24. *See infra* notes 67–92 and accompanying text.

25. *See infra* notes 72–92 and accompanying text.

26. *See infra* notes 93–141 and accompanying text.

27. *See infra* notes 142–57 and accompanying text.

28. *See infra* notes 219–63 and accompanying text.

29. *See infra* notes 263–79 and accompanying text.

I. THE DISPUTE

A. *Issues at Stake*

The ability of the federal courts to review federal habeas corpus petitions from state defendants has a long and complex history.[30] The topic of federalism[31] typically creates a battle line that pits those in favor of states' rights against those in favor of individual constitutional rights.[32] This Note argues that in death penalty cases, the Supreme Court's unyielding devotion to state sovereignty has proven harmful to citizens as well as to both state and federal courts.[33] A possible compromise solution that protects state sovereignty while preserving individual constitutional rights is the Idaho mandatory review provision as analyzed in *Beam*.[34] Interpreted correctly, the Arizona automatic capital appeal statute,[35] like the Idaho provision interpreted in *Beam*,[36] allows states to voluntarily cede some sovereignty to ensure that their citizens will not be executed without a federal review of their case.[37]

B. *State Efforts to Add Safeguards to Death Penalty Cases*

In the context of a capital case, federalism issues take on critical importance for both defendants sentenced to death, and American society as a whole.[38] When presented with this polemic debate, the Rehnquist Court has consistently chosen in favor of state sovereignty[39] without differentiating cases where the individual liberty at stake is the defendant's life.[40] However, state

30. For a thorough discussion of the history of the federal habeas corpus review, see generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

31. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (defining federalism as a "system in which there is sensitivity to the legitimate interests of both State and National Governments" protecting federal rights without "unduly interfer[ing] with the legitimate activities of the States.").

32. *See American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, in* IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 9, 115 (1990). *See also* A.B.A. Crim. Justice Section, *American Bar Association Policy Recommendations on Death Penalty Habeas Corpus*, 40 AM. U. L. REV. 9, 115 (1990) [hereinafter *ABA Policy Recommendations*].

33. *See infra* notes 219–35 and accompanying text.

34. Beam v. Paskett, 3 F.3d 1301, 1306–07 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

35. ARIZ. R. CRIM. P. 31.2(b). *See supra* note 13 and accompanying text.

36. IDAHO CODE § 19–2827. *See supra* note 10 and accompanying text.

37. *See infra* notes 263–79.

38. The decision to respect a state's right to implement its laws without review from the federal courts says more than just what political system Americans prefer; it also shows how much trust we are willing to put into a state court system's ability to assure that a human life is not lost in violation of the values that the Constitution reflects. Arguably, the value that Americans are willing to place on assuring a citizen's life is not taken in violation of the Constitution is the most fundamental question a society can ask in evaluating the importance of the structure of its laws and procedures.

39. Lisa R. Duffett, *Habeas Corpus and Actual Innocence of the Death Sentence After* Sawyer v. Whitley: *Another Nail into the Coffin of State Capital Defendants*, 44 CASE W. RES. L. REV. 121, 123 (1993).

40. Murray v. Giarratano, 492 U.S. 1, 9 (1989) (Chief Justice Rehnquist stated that "[w]e have...refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus.").

legislatures, as recently noted in *Beam*, are willing to recognize that the gravity of a death sentence distinguishes a capital case.[41]

In response to the United States Supreme Court's outlawing of the death penalty in 1972,[42] states enacted procedures to ensure that the death penalty would be fairly and consistently applied.[43] Arizona, among other states, went one step further and created mandatory or automatic appeals to its supreme court in all capital cases. [44] These automatic, or mandatory appeals that were self-imposed by state legislatures require state supreme courts to review the entire sentencing record for error.[45]

C. Beam v. Paskett

In *Beam v. Paskett*, Idaho charged Albert Ray Beam and Michael Shawn Scroggins with the rape and murder of a thirteen-year-old girl.[46] The Idaho Supreme Court reversed Scroggins' conviction but affirmed Beam's.[47] Beam, faced with execution, filed the "Great Writ."[48] His first petition was denied.[49] After a series of decisions and remands,[50] the Ninth Circuit Court of Appeals

41. Beam v. Paskett, 3 F.3d 1301, 1306–07 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

42. Furman v. Georgia, 408 U.S. 238, 313 (1972) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and...there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.") (White, J., concurring).

43. Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the modifications that some states had made in their capital sentencing procedures corrected the unconstitutional arbitrariness in previous capital sentencing schemes).

44. *See* State v. Brewer, 170 Ariz. 486, 492 n.3, 826 P.2d 783, 789 n.3 (1992) ("We note that at least 22 states' 'statutes or rules employ language indicating that their appellate courts must review at least the sentence in every capital case.'") (quoting Whitmore v. Arkansas, 495 U.S. 149, 174 n.1 (1990) (Marshall and Brennan, J.J., dissenting)); State v. White, 168 Ariz. 500, 520–21, 815 P.2d 869, 889–90 (1991) ("Although the Supreme Court does not require any specific or heightened standard of appellate review in capital cases,...we undertake an extensive, independent review of each death sentence handed down under Arizona law.") (citations omitted).

45. State v. Osborn, 631 P.2d 187, 192–93 (Idaho 1981) (claiming that "[d]eath is clearly a different kind of punishment from any other that may be imposed, and I.C. § 19–2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken."). *See also* Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978).

> We recognize, of course, that the doctrine of waiver is, in our adversary system of litigation, indispensable to the orderly functioning of the judicial process. There are, however, occasional rare situations where an appellate court must consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure. One such situation is surely the imposition of capital punishment. That this is a unique penalty requiring special jurisprudential treatment is a concept now embodied in the statutory law of this Commonwealth. Thus section 1311(g) of the Crimes Code expressly provides that "(a) sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania...."

Id. at 180.

46. Beam v. Paskett, 3 F.3d 1301, 1302 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

47. *Id.* at 1303.

48. *See infra* notes 67–70.

49. *See* Beam v. Paskett, 744 F. Supp. 958 (D. Idaho 1990).

50. The state court found three aggravating factors in Beam's case. In Idaho, the court must find at least one statutory aggravating factor and determine that the aggravating circumstances outweigh any mitigating circumstance before imposing the death penalty. IDAHO

reversed the Idaho Supreme Court's imposition of the death penalty.[51] The Ninth Circuit found that the Idaho sentencing judge's application of the "continuing threat" aggravating factor[52] violated the Eighth Amendment by applying the death penalty based on characteristics that had no measurable effect on penalogical goals.[53] Most would probably agree that the Ninth Circuit was correct in deciding that the Idaho court erroneously singled out a defendant for execution because of a history of being forced to commit incest with his mother by his father, acts of homosexuality, and "abnormal" sexual relations with older and younger women. However, before the Ninth Circuit could reach this issue, the court first had to address the state's claim that the defendant was procedurally barred from raising an issue on federal habeas corpus appeal that his attorney failed to raise at the state level.[54]

In response to the state's procedural default claim, the Ninth Circuit held that Idaho's mandatory review of death penalty procedures[55] required the Idaho Supreme Court to determine specific federal claims even when a capital defendant does not raise those claims.[56] Although the Idaho Supreme Court did not explicitly address the claim that the defendant raised on federal habeas corpus review, *Beam* held that federal courts will presume that reviewing state courts carried out their statutory obligations; therefore, the Idaho court must have implicitly rejected the claim.[57] By requiring the Idaho Supreme Court to decide specific federal claims, the Idaho Legislature not only assured an Idaho capital defendant a thorough state court review of his sentence,[58] but also

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CODE § 19–2515. The United States Court of Appeals for the Ninth Circuit affirmed the conviction but vacated the death sentence, holding that IDAHO CODE § 19–2515(6)'s "utter disregard" aggravating factor—that the defendant exhibited utter disregard for human life—was unconstitutionally vague. Beam v. Paskett (Beam I), 966 F.2d 1563 (9th Cir. 1992). The Supreme Court vacated the Ninth Circuit's judgment and remanded Beam's case back to the Ninth Circuit. Arave v. Beam, 113 S. Ct. 1837 (1993). On remand, the issues before the court were whether Beam's conviction was constitutional and if so, whether the sentence imposed was also constitutional. *Beam*, 3 F.3d at 1305. The court affirmed the former but held that the sentencing procedure was unconstitutional. *Id.* at 1312.

51. *Beam*, 3 F.3d at 1312.

52. IDAHO CODE § 19–2515(h)(8) provides that "the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a *continuing threat* to society." IDAHO CODE § 19–2515(h)(8) (1996) (emphasis added). In death penalty cases the sentencing court must find at least one aggravating factor to meet federal constitutional standards. Gregg v. Georgia, 428 U.S. 153, 196 (1976). Idaho must find that the aggravating factor(s) outweigh any mitigating factors. IDAHO CODE § 19–2515(c).

53. *Beam*, 3 F.3d at 1305. The trial court judge based his opinion about Beam's inability for rehabilitation largely on the fact that "the defendant ha[d] a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant." *Id.* at 1308. According to the Ninth Circuit, the trial court found that these exclusively non-violent, consensual, or involuntary sexual acts singled the defendant out for execution. *Id.* at 1308. The presentence report stated that: "Beam's father forced Beam and his retarded older brother to have sex with Beam's mother while Beam's father watched. If anyone refused, Beam's father would beat the recalcitrant party." *Id.* at 1308 n.6. According to the Ninth Circuit, Idaho violated the Eighth Amendment because the court applied the death penalty to a particular offender based on a characteristic that had "no measurable contribution to acceptable goals of punishment." *Id.* at 1309–10 (citations omitted).

54. *Id.* at 1305.

55. IDAHO CODE § 19–2827 (1994).

56. *Beam*, 3 F.3d at 1306.

57. *Id.*

58. *See* State v. Osborn, 631 P.2d 187, 192–93 (Idaho 1981) ("[W]e may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with

allowed the defendant to raise capital sentencing claims on federal habeas corpus review without having to show cause or prejudice[59] for procedurally defaulting federal claims in state court. [60]

Beam left open the question of what effect, if any, Arizona's automatic capital appeal statute[61] has on an Arizona capital defendant's ability to obtain federal habeas corpus review when he or she fails to fairly present a claim to the Arizona Supreme Court.[62] Opposing views ensued in the Ninth Circuit Federal District Courts over how to interpret Arizona's requirement that the Arizona Supreme Court review capital sentences for *all fundamental error.*[63] In spite of a recent trend in the Ninth Circuit toward denying any relationship between Arizona's fundamental error and/or its independent review of capital sentences and the doctrine of procedural default, this Note argues that Arizona should disregard these cases in order to protect capital defendants' constitutional rights.

Regardless of how the Ninth Circuit interprets Arizona's Rule 31.2(b), Arizona will have to decide: (1) whether the Arizona courts should adopt the Ninth Circuit's adaptation of Rule 31.2(b) and its rejection of the reasoning in *Beam*;[64] or (2) expand the Ninth Circuit Court's reasoning in *Beam*, as applied in *Falcone*, allowing defendants to raise any non-frivolous constitutional claim in judgment or sentencing; [65] or as this author will argue, (3) adopt the reasoning of *Beam* in conjunction with the deliberate bypass test created in *Fay v. Noia.*[66]

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which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below.").

59. *Beam*, 3 F.3d at 1306 (referring to the cause and prejudice requirement created in Wainwright v. Sykes, 433 U.S. 72 (1977)). In *Wainwright*, Justice Rehnquist held that state prisoners could not raise an issue in federal court that was not properly raised in state court unless the prisoner could show both cause for not complying with the state procedural rule and actual prejudice resulting therefrom. *Wainwright*, 433 U.S. at 84–87. *See also* Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663, 709, 718 (1985).

60. *Beam*, 3 F.3d at 1306.

61. ARIZ. R. CRIM. P. 31.2(b).

62. *Beam*, 3 F.3d at 1305–06.

63. *See, e.g.*, State v. Brewer, 170 Ariz. 486, 493, 826 P.2d 783, 790 ("Thus, once a defendant files an appeal, which is automatic in capital cases, we are expressly required by statute to review issues affecting *both* judgment and sentencing in our search for fundamental error."), *cert. denied*, 506 U.S. 872 (1992).

64. Woratzeck v. Lewis, 863 F. Supp. 1079, 1095 (D. Ariz. 1994) (rejecting the claim that the logic in *Beam* applies to Arizona's automatic appeal statute).

65. *Falcone v. Lewis*, No. 93–17178, 1994 U.S. App. LEXIS 19631, at *7–*9 (9th Cir. June 30, 1994) (holding that *Beam* allows federal courts to address constitutional claims raised on federal habeas appeal even if the petitioner failed to properly raise those issues in state court).

66. 372 U.S. 391 (1963). *See infra* notes 263–79 and accompanying text.

II. HISTORY OF THE "GREAT WRIT"

A. Application to the States

Habeas corpus,[67] or as it is often called, the "Great Writ," has common law roots dating back to as early as the eleventh century.[68] Brought to England by the Normans following their successful invasion of 1066, the 'Great Writ' was combined with England's summoning process to correct injustices of inferior courts.[69] The "Great Writ" was so embedded in the founding fathers' notions of justice that the Constitution states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[70] In 1867, Congress extended the right of habeas corpus relief to state prisoners restrained in violation of the Constitution or any treaty of the United States.[71]

B. Pigs Get Fat but Hogs Get Slaughtered; Comity and the Habeas Corpus Pendulum

In an effort to console the 'Great Pumpkin,' Linus Van Pelt writes "Face it, Santa Claus has had more publicity but being number two, perhaps you try harder!" Similarly, capital defendants now must try very hard to find the 'Great Writ' because as between individual liberty and comity,[72] the present Supreme Court places more emphasis on the latter.

In 1886, *Ex parte Royall*[73] marked the beginning of the Supreme Court's role as mediator between state and federal interests by denying federal habeas corpus appeals to state prisoners until the state had a chance to rule on the case.[74] The Court soon extended the priority given to state trial courts in *Ex*

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67. *See supra* note 2.

68. *See* Deirdre J. Cox, *The Robert Alton Harris Decision: Federalism, Comity, and Judicial Civil Disobedience*, 23 GOLDEN GATE U. L. REV. 155, 165 n.82 (1993) (claiming that although habeas corpus originally was a way to compel appearance before the King, it developed through the centuries into its modern-day role of providing relief from detention). For a more complete historical analysis of the "Great Writ" see DUKER, *supra* note 30.

69. Jed Mills, *About Habeas Corpus*, CRIM. L.J. Sept. 1996 at 8, 9.

70. U.S. CONST. art. I, § 9, cl. 2.

71. Judiciary Act of Feb. 5, 1867, ch. 27, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2241(c)(3) (1994)). *See Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325–26 (1868) (stating that the Habeas Corpus Act of 1867, which empowered federal courts to hear challenges to state convictions "is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."). *Cf.* Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 754–55 (1987) (stating that federal habeas corpus expanded with the incorporation of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment, which increased the likelihood that states would violate the Constitution in criminal cases).

72. The Supreme Court has defined comity as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and...belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971).

73. 117 U.S. 241 (1886).

74. *Id.* at 251–52.

parte Royall to include an equal respect for the state appellate process.[75] In 1948, Congress codified guidelines for federal courts to follow.[76] It is important to note that Congress did not actually take away federal jurisdiction in habeas cases;[77] instead, it simply codified the amorphous doctrine of federal-state comity.

If *Ex parte Royall* was a wake-up call to the abuses of a pervasive federal court,[78] the dissent in *Frank v. Magnum*[79] proved to be a slap in the face to those who advocated taking away the writ from federal courts.[80] Justice Oliver Wendell Holmes felt that the impact of the federal courts' deference to state courts went too far when the Supreme Court refused to grant habeas relief to a prisoner whose trial had been dominated by a mob.[81] Justice Holmes' classic dissent in *Franks* defines habeas corpus as "cut[ting] through all forms and go[ing] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, it opens the inquiry whether they have been more than an empty shell."[82]

In 1923, the Court adopted Justice Holmes' dissent in *Franks*, holding that where the state courts fail to protect basic constitutional rights, federal courts should intervene.[83] This line of reasoning continued through the Warren Court where the Court gave it structure in its 1963 decision *Fay v. Noia*.[84] However, the broader application of federal habeas review provided to state prisoners by

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75. *See Ex parte* Fonda, 117 U.S. 516, 518 (1886) (denying federal habeas writ until state appellate remedies were exhausted). *See also* Pepke v. Cronan, 155 U.S. 100, 101 (1894) (denying habeas writ until exhaustion of state post conviction remedies).

76. The current version of 28 U.S.C. § 2254 (1988) provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State...corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(a)–(c) (1994).

77. Federal-state comity does not impose a jurisdictional requirement on federal courts. CHARLES A. WRIGHT ET AL., 17 FEDERAL PRACTICE AND PROCEDURE 651–54 (1978).

78. In *Royall*, a state prisoner appealed to the federal courts for habeas corpus relief before the state courts had brought him to trial. 117 U.S. at 245.

79. 237 U.S. 309 (1915).

80. The Court refused to grant habeas corpus relief to a prisoner sentenced to death in a trial dominated by the mob because the Court did not find that the mob control effectively took away the court's jurisdiction. *Id.* at 327.

81. *Id.* at 349 (Holmes, J., dissenting).

82. *Id.* at 346 (Holmes, J., dissenting).

83. Moore v. Dempsey, 261 U.S. 86 (1923).

84. 372 U.S. 391 (1963). In 1963, the Supreme Court held that federal courts had the power to review a state prisoner's federal constitutional claim notwithstanding his failure to raise the claim in the state courts. *Id.* at 398–99. However, federal judges had to refuse review if the state prisoner had deliberately bypassed the state procedures for tactical or strategic reasons. *Id.* at 438–39.

the Warren Court was short-lived. Starting in 1977, the Supreme Court narrowed the federal habeas statute procedurally,[85] and then later, substantively.[86]

The current restrictions on federal habeas appeals are indicative of the larger problem of access to the federal courts.[87] For a state-convicted defendant seeking federal habeas corpus review, the procedural morass created by the Rehnquist Court is daunting.[88] For a state, the Rehnquist Court's devotion to state sovereignty[89] can be intrusive,[90] time consuming,[91] and moreover, increases the chances that states will unconstitutionally execute their citizens.[92]

C. Exhaustion of State Remedies

Presently, there are many obstacles that may prevent a state capital defendant from obtaining a federal writ of habeas corpus.[93] Currently, Arizona

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85. *See* Wainwright v. Sykes, 433 U.S. 72, 78 (1977) (ruling that habeas petitioner who failed to object at trial must show cause and prejudice). *See also* Rose v. Lundy, 455 U.S. 509, 522 (1982) (holding that federal courts must dismiss habeas petitions that contain both exhausted and unexhausted claims).

86. *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976) (holding that federal habeas was not available for Fourth Amendment claim that petitioner had full and fair opportunity to litigate in state court).

87. *See* Frank J. Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287 (1983).

88. *See* Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 5 (1991).

89. Duffett, *supra* note 39, at 128–29 ("In particular, the Rehnquist Court has made it more difficult to mount *procedurally defaulted* or *repetitive* habeas challenges to state court errors.").

90. *See* Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 537 (1995) (asserting that although federalism and comity are supposed to avoid undue intrusion into state processes, the habeas decisions are leading in the opposite direction).

91. *Id.* at 539 (stating that the impact of the recent Court decision in Rose v. Lundy, 455 U.S. 509 (1982), encourages state court prisoners to raise trivial claims to ensure that they will preserve all issues). *See, e.g.*, Jennison v. Goldsmith, 940 F.2d 1308, 1311 (9th Cir. 1991) (claiming that federal habeas petitioners must return to state courts with issues that the state supreme court had expressly claimed to have no interest in reviewing).

92. *See A.B.A. Policy Recommendations*, *supra* note 32, at 109–11 (stating that the Rehnquist Court's decisions will result in relatively higher percentages of executions for unconstitutionally convicted or sentenced defendants).

93. *See* Rachel A. Van Cleave, *When Is an Error Not an "Error"? Habeas Corpus and Cumulative Error Analysis*, 46 BAYLOR L. REV. 59 (1994). There are five general situations that lead to a federal court's denial of a habeas petitioner's request for a hearing. The first situation is where a petitioner claims that the state introduced evidence in the state trial in violation of the Fourth Amendment. As long as the petitioner had a full and fair opportunity to litigate the claim in state court, the federal courts will not question the state court's decision on Fourth Amendment grounds. *Id.* at 59–62; Stone v. Powell, 428 U.S. 465, 486 (1976). Second, states bar petitioners from bringing a federal habeas claim based on a violation of a state law unless the violation is tantamount to a federal constitutional violation. Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). Third, a federal court will deny a petitioner a hearing if the federal court finds the constitutional error claimed is harmless. Chapman v. California, 386 U.S. 18, 22 (1967). Next, a federal court may deny a petitioner a hearing if the petitioner has not exhausted all of his claims in the state court. *Rose*, 455 U.S. at 522. Finally, a federal court will deny a habeas petition and enforce the state court's procedural bars when the state claims that the petitioner failed to follow the state court rules. Engle v. Isaac, 456 U.S. 107, 135 (1982).

allows the exhaustion doctrine, accompanied by the rule of procedural default, to bar federal habeas review on the merits of claims that Arizona attorneys inadvertently fail to raise.[94]

Before becoming eligible to petition a federal court for a writ of habeas corpus, 28 U.S.C. § 2254(b) and (c) require state prisoners to exhaust all available state judicial remedies.[95] Although the exhaustion doctrine is not jurisdictional,[96] the Supreme Court has held that it "creates a strong presumption in favor of requiring the prisoner to pursue his available state remedies."[97] Federal courts generally will not reach the merits of a constitutional claim unless the petitioner has carried his claim through the proper state judicial processes which include: (1) trial and direct appeal; (2) state post-conviction review; and (3) federal habeas corpus review.[98]

The basis for the exhaustion doctrine is comity: "an accommodation of our federal system defined to give the state an initial opportunity to pass upon and correct alleged violations of its prisoner's federal rights."[99] Because comity is not jurisdictional,[100] a state may explicitly waive the exhaustion doctrine,[101] or, as in *Beam*,[102] create a statute that implicitly waives a state's right to procedurally bar a defendant from raising federal claims.[103] *Falcone*[104] held

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94. *See* Woratzeck v. Lewis, 863 F. Supp. 1079, 1094–95 (D. Ariz. 1994) (refusing to allow petitioner to include claims on federal appeal that his state post-conviction relief counsel failed to raise in prior state proceeding).

95. 28 U.S.C. § 2254(b), (c) (1994) embodies what is known as the exhaustion doctrine.

96. Reed v. Ross, 468 U.S. 1, 9 (1984) (claiming that the federal courts retain the power to consider the merits of procedurally defaulted claims because the doctrine of procedural default is based on comity, not jurisdiction).

97. Castille v. Peoples, 489 U.S. 346, 349 (1989) (quoting Granberry v. Greer, 481 U.S. 129, 131 (1987)). *See also Rose*, 455 U.S. at 515 (holding that petitioners must exhaust state remedies except in unusual circumstances); Picard v. Connor, 404 U.S. 270, 278 (1977) (holding that federal claims must first be fairly presented to state courts before being presented to federal courts). Some exceptions to the exhaustion doctrine include inordinate delay in the state's processes, rigid application of doctrine on a given issue, and undue interference by state officials in the petitioner's utilization of state remedies. *A.B.A. Policy Recommendations, supra* note 32, at 124–25 nn.415–17. *See also* Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (holding that futility allows an exception to the exhaustion doctrine when there is no opportunity for redress in the state court or if the corrective process is so deficient as to be considered futile).

98. Tabak & Lane, *supra* note 88, at 8, 10. *See* Murray v. Carrier, 477 U.S. 478, 489 (1986). *See also* Smith v. Digmon, 434 U.S. 332, 333 (1978) (stating that exhaustion requires the defendant to present the federal claim to the highest court of the state that has power to review the question. If the state allows more than one avenue for raising the claim, the petitioner only needs to exhaust one); Brown v. Allen, 344 U.S. 443, 448–49 n.3 (1953) (holding that if the federal petitioner raised all relevant issues before the highest court of the state on direct appeal, there is no need to do so once again on state post-conviction review).

99. Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam) (quoting Fay v. Noia, 371 U.S. 391, 438 (1963)). *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (defining comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and...belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways").

100. *See supra* note 96 and accompanying text.

101. *See supra* note 96 and accompanying text.

102. Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

103. *Id.* at 1306.

104. Falcone v. Lewis, No. 93–17178, 1994 U.S. App. LEXIS 19631 (9th Cir. June 30, 1994).

that section 13–4035 of the Arizona Revised Statutes[105] requires Arizona appellate courts to review the entire record, including unraised constitutional claims for error; the Arizona courts review for all constitutional error gives it the first opportunity to rule on constitutional claims and thus implicitly waives Arizona's right to require petitioners to exhaust federal constitutional errors in state court.[106] Whether Arizona should apply *Falcone's* analysis to Rule 31.2(b) will be the focus of sections III,[107] IV[108] and V[109] of this note.

D. State Procedural Default Rules

While the exhaustion doctrine merely gives the state the first chance at addressing federal issues,[110] state procedural default rules give primacy to a states' procedural rules over the merits of the petitioner's claims.[111] In *Fay v. Noia*,[112] the Supreme Court held that a petitioner did not procedurally default issues for federal habeas review if he could show that he was not deliberately bypassing the state court.[113] Under the *Noia* standard, federal courts agreed to review a capital defendant's constitutional claims even when the defendant's state attorney inadvertently failed to raise those claims.[114] Although many commentators agree that the *Noia* standard provided a balance between a respect for the states' procedural rules and the desire to protect capital defendants from their lawyers' mistakes,[115] the Supreme Court has virtually overruled *Noia*.[116]

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105. *See supra* note 21 and accompanying text.

106. *Falcone*, 1994 U.S. App. LEXIS 19631, at *8–*9. *See also* State v. Brewer, 170 Ariz. 486, 492–94, 826 P.2d 783, 789–91 (1992) (reviewing § 13–4035(A); holding that although § 13–4035(A) states "the supreme court shall review all rulings affecting the *judgment*," the purpose of mandatory appeals in capital cases mandates that Arizona also review the *sentence* for fundamental error) (emphasis added).

107. *See infra* notes 158–218 and accompanying text.

108. *See infra* notes 219–62 and accompanying text.

109. *See infra* notes 263–79 and accompanying text.

110. 28 U.S.C. § 2254(b), (c) (1994). *But see* IRA P. ROBBINS, THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES 113 (1982) (suggesting the possibility that the exhaustion requirement may constitutionally require state collateral review).

111. *See* Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (explaining that procedural default is the flip side of exhaustion because with exhaustion, state remedies are still available to the defendant. With procedural default, the state has foreclosed all further opportunities for review in the state system) (quoting Fay v. Noia, 372 U.S. 391, 438 (1963)). *See also* Coleman v. Thompson, 501 U.S. 722, 732 (1991) (holding that a petitioner who fails "to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance").

112. 372 U.S. 391 (1963).

113. *Id.* at 434, 438.

114. *Id.* at 439, 440 (waiver must be "an intentional relinquishment of a known right or privilege" and if failure to raise a claim was not a "tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures," no waiver exists).

115. *See, e.g.*, Robert S. Catz, *The Death Penalty and Federal Habeas Corpus: A Modest Legislative Proposal*, 20 CONN. L. REV. 895 (1988) (arguing for a return to *Fay v. Noia* because it provided an appropriate balance between the interests of society and those of the capital defendant sentenced to death). *But see A.B.A. Policy Recommendations, supra* note 32, at 198 (minority report) ("With due regard to the views expressed by the majority report, I nevertheless must disagree with any proposal calling for the abolition or curtailment developed in *Murray v. Carrier*.").

116. *A.B.A. Policy Recommendations, supra* note 32, at 101 (noting that *Murray v. Carrier* may have left open the deliberate bypass test when the attorney decides not to take an appeal). However, because every state has some form of automatic appeal in capital cases, the

In 1977, *Wainwright v. Sykes* [117] marked the beginning of a rigid and relentless enforcement of state procedural rules.[118] Imposing a higher burden on capital defendants than *Noia, Wainwright* held that capital defendants could not procure federal review by merely showing that they were not deliberately trying to subvert the state judicial system.[119] Instead, the petitioner must show cause for failing to preserve the error[120] and prejudice resulting from the error.[121] Justice Brennan, dissenting in *Sykes*, asked "[h]ow should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant's trial counsel?"[122] To Justice Brennan's dismay, the Supreme Court in *Murray v. Carrier*[123] answered that question by holding that when an attorney makes an inadvertent mistake, the client suffers.[124] The Court subsequently took *Carrier* to the extreme in *Smith v. Murray*,[125] where the Court held that *Carrier* applied in capital cases; now, a client may lose his life as a result of the lawyer's inadvertent mistake.

The present Supreme Court has such a high regard for state procedural rules that the *Wainwright* cause and prejudice test must be applied by federal courts unless "a constitutional violation has probably caused the conviction of one who is innocent of the crime."[126] Although a defendant can meet the cause test by proving that his attorney was constitutionally ineffective,[127] the

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Noia test seems to be nonexistent for capital defendants. *See* Eric Rieder, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 151 (1985).

117. 433 U.S. 72 (1977).

118. Duffett, *supra* note 39, at 129.

119. Wainwright v. Sykes, 433 U.S. 72, 87–90 (1977).

120. *Id.* at 84–87. To show cause, a prisoner must be able to prove that an "objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Although ineffective assistance of counsel meets the cause prong of the cause and prejudice test, an inadvertent or negligent mistake does not rise to the level of ineffective assistance of counsel. *Id.* at 488 (claiming that ineffective assistance of counsel would pass the cause test).

121. *Wainwright*, 433 U.S. at 84–87. To show prejudice, a prisoner must show that had he presented the claim it would have made a difference. Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663, 718 (1985).

122. 433 U.S. at 100 (Brennan, J., dissenting).

123. 477 U.S. 478 (1986).

124. *Murray*, 477 U.S. at 486–88. The Supreme Court held that, absent constitutional ineffectiveness, an attorney's procedural default caused by mistake is not distinguishable from a default stemming from design. Justice O'Connor writing for the majority stated that "we discern no inequity in requiring [the defendant] to bear the risk of attorney error that results in a procedural default." *Id.* at 488. The Court went on to say that the state's interests are affected no less whether counsel's default occurs by strategy or through ignorance or inadvertence. *Id.* at 488–92. Justice Brennan found it "cruelly unfair to bind a defendant to his lawyer's inadvertent failure to prevent prejudicial constitutional error—thus barring access to federal review—where the consequence to the defendant is death." *Id.* at 525–26 (Brennan, J., dissenting).

125. 477 U.S. 527 (1986).

126. McCleskey v. Zant, 499 U.S. 467, 494 (1991). *See also* Herrera v. Collins, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.").

127. Strickland v. Washington, 466 U.S. 668 (1984). In *Strickland*, the Court held that the test for ineffective assistance of counsel requires that the defendant show both "that counsel's representation fell below an objective standard of reasonableness" and prejudice that "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686–88. The prejudice factor is proved by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

constitutionally ineffective test set out by the Supreme Court is cumbersome and often times impossible to meet.[128]

Some commentators assert that the difficulty in showing that an attorney was constitutionally ineffective, accompanied by procedural default rules, actually encourage provincial and prosecutorial-minded states to provide inadequate counsel.[129] An attorney's negligent mistake that fails to rise to the level of constitutional ineffectiveness at the state level can still be serious enough to result in his client's execution.[130] It is true that mistakes occur throughout the justice system, but procedural bars prevent federal attorneys from correcting a state attorney's mistake once they recognize it.[131]

In capital cases, state procedural bars play a critical role in federal habeas corpus review.[132] Because failure to properly raise a claim at the state level can cost a defendant his life, federal attorneys vigorously argue that the state attorney was ineffective to achieve a federal review on the merits.[133] Like an epilogue to a black humor novel, some commentators have posited that federal courts now spend more time addressing ineffective assistance claims than it would take to address the merits of the habeas petition.[134]

When a federal court addresses the *merits* of a habeas claim, defendants in capital cases are more likely to be successful in obtaining relief when

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128. *See A.B.A. Policy Recommendations*, *supra* note 32, at 216 n.23 (separate statement by Stephen B. Bright) (claiming that the *Strickland* ineffective assistance standard is so stringent that it allows seriously inadequate attorneys to pass the effective test).

129. *See, e.g., id.* Bright argues that states wishing to increase the likelihood of obtaining the death sentence are advantaged by providing inadequate attorneys whose mistakes will be insulated from review by the federal courts.

130. *Id.* at 276. Stephen B. Bright illustrates a vivid example of the difference between inadequate and ineffective assistance of counsel. In a case involving two co-defendants, one co-defendant's attorney objected to the systematic exclusion of women from the jury while the other co-defendant's attorney did not. In the latter case, the state executed the client without a federal review because his attorney, unaware of a U.S. Supreme Court decision on point, Taylor v. Louisiana, 419 U.S. 522 (1975), failed to preserve the issue. *Id.* at 211–12. Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir.), *application denied*, 463 U.S. 1344, *cert. denied*, 464 U.S. 1003 (1983). The first co-defendant's attorney did raise the issue and the federal courts ordered a new trial resulting in a life sentence instead of death. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

131. *See supra* note 128, at 276. *See also* Duffett, *supra* note 39, at 129. Robbins, *supra* note 11 at 76 (emphasizing the importance of following state procedural rules as those rules can "foreclose later consideration of matters that were not properly raised at trial").

132. *A.B.A. Policy Recommendations*, *supra* note 32, at 92. *See also* Robbins, *supra* note 9 (stating that state procedural default rules are of crucial importance in capital cases because of the possibility of a lawyer's unintentional error resulting in his client's death).

133. *A.B.A. Policy Recommendations*, *supra* note 32, at 92.

134. *See* Larry W. Yackle, Book Review, 36 RUTGERS L. REV. 375, 394 (1983) (reviewing IRA P. ROBBINS, THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES (1982)) ("Anyone who reads the advance sheets knows that the greater proportion of judicial time in habeas cases is spent wrestling with threshold procedural matters of extraordinary complexity."); Friedman, *supra* note 89, at 533–34 (claiming that death cases have been tied up for so long in litigating procedural issues that the defendants may have been executed sooner if relief had been granted on the merits).

Anyone familiar with Louis-Ferdinand Céline's novel *Death on the Installment Plan* can't help but notice the similarities between the constant illogical twists of fate that serve to punish the protagonist, and the Supreme Court's habeas corpus jurisprudence. Whereas in the former, the protagonist's perpetual misfortune becomes humorous for fans of the macabre, tying up a capital defendant's claims on procedural grounds for longer than it would take to look at the merits, all in an effort to save time, is disturbing.

compared to their non-capital counterparts.[135] Although capital defendants are often successful when the federal courts address their claims, a capital defendant is just as unlikely as a non-capital defendant to meet the cause and prejudice test when his or her attorney makes an ignorant or inadvertent mistake by failing to comply with a state procedural rule.[136] The Rehnquist Court, however, disregards the noticeable differences in capital habeas review, and requires that capital and non-capital defendants equally show cause and prejudice for failure to comply with a state procedural rule. [137]

Beam[138] recognizes an exception to the Rehnquist Court's failure to differentiate between capital and non-capital cases.[139] The Ninth Circuit examined how Idaho's mandatory review statute might affect capital defendants who attempt to raise claims on federal habeas corpus review that their attorneys did not fairly present to the Idaho Supreme Court.[140] The court stated that although state procedural bars generally prevent defendants from raising claims for the first time at the federal level, the Idaho legislature created an exception to the procedural default claim in capital cases by mandating the Idaho Supreme Court to decide federal issues whether or not the defendant presents any sentencing claims to the state.[141]

E. Procedural Bar And Independent and Adequate State Ground

How state death penalty statutes affect a state's internal appeals process, and what effect these statutes may have on federal habeas corpus petitions is a recent source of Arizona death penalty litigation.[142] While the Rehnquist Court continues to whittle away at the once "Great Writ" in the name of comity,[143] the

135. *A.B.A. Policy Recommendations*, *supra* note 32, at 109 ("[R]ate of success for appeals from denial of habeas corpus relief in non-capital cases is estimated at 7% or less." In capital cases, one study found that between 1976 and 1983, more than 73% of the federal habeas petitions reviewed were decided in favor of the defendant. Another study by Jack Boger puts the figure at "up to 60%, and Judge Gobold has made a 'horseback guess' that one-third of capital cases have constitutional error...that deserves an order."). One possible explanation for the disparate rates of error in capital versus non-capital cases is the difficulty in trying a capital case. *See* Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation,* 90 MICH. L. REV. 626, 645 (1991) (stating that capital litigation is "perhaps the most technically difficult form of litigation known to the American legal system").

136. Vreeland, *supra* note 135.

137. Murray v. Giarratano, 492 U.S. 1, 9 (1989) ("We have...refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus."). For an excellent argument on why the difficulty in trying a capital case should result in different standards for ineffective assistance of counsel claims in capital cases, see Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994).

138. Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

139. *Id.* at 1305 (claiming that although a petitioner normally would have to show cause and prejudice for failing to raise a claim, IDAHO CODE § 19–2827 relieves capital defendants from this burden).

140. *Id.*

141. *Id.*

142. *See, e.g.*, Jeffers v. Lewis, 38 F.3d 411 (1994); Woratzeck v. Lewis, 863 F. Supp. 1079 (D. Ariz. 1994). For a discussion of these two cases, see *infra* notes 165–99 and accompanying text.

143. *See supra* notes 96–99 and accompanying text.

state courts are not so free from limitations.[144] States may not preclude federal review of state decisions when a state's procedural rule is not independent of the federal claim and not adequate to warrant withdrawal of federal relief.[145] Therefore, federal courts must first interpret the independence of state statutes or procedural rules before accepting or denying a hearing on the merits of a defendant's federal claim.[146] Next, the federal court must ensure that the state procedural bar is adequate.[147]

The *Wainwright* cause and prejudice test[148] does not apply to a petitioner's federal claims unless the claimed state procedural default is independent of the federal claim and adequate to warrant withdrawal of federal relief.[149] In *Ake v. Oklahoma*, the United States Supreme Court held that a procedural default is not independent of a state procedural bar that depends on an antecedent determination of federal law.[150] The Court held that because Oklahoma reviews for fundamental error, and defines federal constitutional errors as "fundamental," the state could not prevent the petitioner from raising any federal constitutional claims on independent state grounds.[151]

In *Beam*,[152] the Ninth Circuit rejected the state's argument that the petitioner procedurally defaulted his claim by failing to fairly present the claim

144. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443, 447–48 (1965) ("[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves a legitimate state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.").

145. *See* Harris v. Reed, 489 U.S. 255 (1989); Ake v. Oklahoma, 470 U.S. 68, 74 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded."); Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917) ("[W]here the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."); Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1991) (holding that habeas petitioners do not have to show cause and prejudice if the procedural default is not independent of the federal claim).

146. Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("When a state prisoner has defaulted his federal claims in state court *pursuant to an independent and adequate state procedural rule*, federal habeas review is barred unless the prisoner can demonstrate cause for the [procedural] default and actual prejudice") (emphasis added). *See also* Michigan v. Long, 463 U.S. 1032, 1040–41(1983) (requiring that state law ground be clear from the face of the opinion); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (applying *Long* to procedural default grounds); Harris v. Reed, 489 U.S. 255, 262 (1989) (applying *Caldwell* and *Long* in a habeas corpus decision).

147. *See, e.g.*, Walker v. Endell, 850 F.2d 470, 473 (9th Cir. 1987) (holding that if the state courts themselves bypass the petitioner's default and consider his claims on the merits the procedural default is not "adequate"), *cert. denied*, 488 U.S. 926, 981 (1988).

148. *See supra* notes 120–21 and accompanying text.

149. Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

150. *Id.* at 75. In *Ake*, Oklahoma argued that the Supreme Court could not review an issue that the petitioner did not raise in the state court because comity required the Court to respect Oklahoma's procedural bar. The Court found that Oklahoma's procedural bar did not apply to fundamental error and Oklahoma conceded at oral argument that federal constitutional errors are fundamental. *Id. See also* Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("[W]here non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.").

151. *Ake*, 470 U.S. at 74.

152. 3 F.3d 1301 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

to the state court.[153] Relying on *Ake*, the Ninth Circuit stated that even if the defendant failed to fairly present the claim,[154] he would not have to show cause and prejudice because the state procedural bar is not independent of the federal claim.[155] In recognition of the reasoning in this line of cases, petitioners in the Ninth Circuit continue to argue that Arizona's review for fundamental error, defined as constitutional error, prevents Arizona from procedurally barring a defendant from petitioning a federal court on independent grounds.[156] Although recent decisions in the Ninth Circuit combined with Arizona legislation ending fundamental error review suggest that efforts in the Ninth Circuit may be futile, the Arizona Supreme Court has specifically left the question open for the review of capital sentences.[157]

III. FEDERAL COURT TREATMENT OF *BEAM*

A. *The Ninth Circuit's Comity of Fundamental Errors:* Woratzeck v. Lewis, Martinez-Villareal v. Lewis, *and* Poland v. Stewart

Recently, a series of Ninth Circuit Court of Appeals' cases attempted to answer the question *Beam* left open by interpreting the effect of Arizona's appellate review procedures on the state's ability to argue procedural default of federal claims. The first two cases, *Falcone v. Lewis*[158] and *Villafuerte v. Lewis*,[159] aptly explained how Arizona's fundamental error review could prevent an Arizona defendant from procedurally defaulting a claim not specifically raised before the Arizona Supreme Court.[160] *Martinez–Villareal*,[161]

153. The petitioner claimed that the "continuing threat" aggravating factor used to sentence him was unconstitutionally vague. *Id.* at 1312. *See also supra* notes 52–53 and accompanying text.

154. 3 F.3d at 1305. The court held that the defendant fairly presented his claim because Beam referred to the Idaho death penalty statute that includes a duty for the Idaho Supreme Court to correct any misapplication of the state's aggravating factors. However, the court in *Beam* went on to note that its holding did not need to rely on any "magic words" invoked by the defendant because the Idaho statute required the court to review the sentencing court's application of aggravating factors regardless of whether the defendant claims that they were misapplied. *Id.*

155. *Id.* at 1306.

156. Woratzeck v. Lewis, 863 F. Supp. 1079, 1094–95 (D. Ariz. 1994); Falcone v. Lewis, No. 93–17178, 1994 U.S. App. LEXIS 19631, at *7 (9th Cir. June 30, 1994).

157. *See* 1995 Ariz. Sess. Laws ch.198, § 1.

158. *Falcone*, 1994 U.S. App. LEXIS 19631.

159. 75 F.3d 1330 (9th Cir. 1996).

160. Citing an Arizona case, State v. Gendron, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991), *Falcone* defined fundamental error in Arizona as error involving the loss of a federal constitutional right. *Falcone*, 1994 U.S. App. LEXIS 19631, at *7. Contrary to *Woratzeck*, *Falcone* held that *Beam* allows Arizona defendants to raise issues for the first time on federal habeas corpus appeal without the requirement of showing cause and prejudice. *Falcone*, 1994 U.S. App. LEXIS 19631, at *7. Although *Beam* restricted a capital defendant to only raising unaddressed *sentencing* claims, *Falcone*'s reasoning carried to its logical conclusion would give Arizona defendants the right to raise any constitutional claim that affected either the judgment or the sentencing. *Falcone* does not distinguish between review of the record for sentencing error and review for error of judgment. *Falcone*, 1994 U.S. App. LEXIS 19631, at *7. *See, e.g.*, State v. Brewer, 170 Ariz. 486, 493, 826 P.2d 783, 787 (1992) (holding that the Arizona Supreme Court reviews both the trial and sentencing record for error). *C.f.* Beam v. Paskett, 966 F.2d 1563, 1570 (1992) ("The exception to procedural default created by section 19–2827 does not extend to every issue that may or may not arise as to pretrial and trial proceedings, but only applies to the sentencing procedure and death sentence.") (citations omitted).

Poland v. Stewart[162] and *Woratzeck v. Lewis*,[163] however, misinterpreted Arizona law by failing to look at the reasoning in *Falcone* and *Villafuerte* or other on point Arizona and Ninth Circuit case law.[164] The result of *Woratzeck, Martinez-Villareal* and *Poland v. Stewart* is illogical and fails to protect important constitutional rights. This Note offers the analysis of Arizona case law that was lacking in *Woratzeck, Martinez-Villareal, and Poland.* Contrary to these Ninth Circuit decisions, the following analysis shows that Arizona's capital appeal procedure may, in many cases, allow a defendant to raise claims on federal habeas review for the first time.

1. Woratzeck v. Lewis *Fails to Recognize the Arizona Supreme Court's Interpretation of Its Duty Under Rule 31.2(b).*

The Arizona Federal District Court in *Woratzeck* held that Rule 31.2(b), unlike mandatory review provisions, does not "obligate the court to consider certain potential errors nor does it provide advance notice that its mandatory review constitutes an implicit rejection of specific claims."[165] While it is true that Rule 31.2(b) itself does not give specific guidance to the court on what issues to review,[166] it remains unclear on what basis the court concluded that claims that petitioners cannot default in "mandatory review" states such as Idaho can be procedurally defaulted in Arizona.[167]

The petitioner in *Woratzeck* claimed that Arizona Rule of Criminal Procedure 31.2(b), read in conjunction with § 13–4035 of the Arizona Revised Statutes[168] required the Arizona Supreme Court to automatically review every capital sentence *and* search the record for "fundamental error."[169] Relying on *Beam*, the petitioner argued that because Arizona defines fundamental error as federal constitutional error, there is no independent and adequate state ground to allow the state to claim a procedural default.[170] Essentially, the petitioner demonstrated that the logical conclusion of Arizona's definition of fundamental error left the petitioner with unfettered discretion to raise any new non-frivolous federal constitutional claim on federal appeal.[171]

In *Villafuerte*, the Ninth Circuit Court of Appeals stated that in "extremely limited circumstances, we recognize that some issues may be so important that overriding considerations concerning the integrity of the system will excuse a party's failure to raise the issue in the trial court." 75 F.3d at 1335-36. This limited exception is known as the doctrine of "fundamental error." However, the court did not find the need to overrule *Woratzeck v. Lewis* because the state's procedural default argument was erroneous on other grounds. *Villafuerte*, 75 F.3d at 1335–36.

161. Martinez–Villareal v. Lewis, 80 F.3d 1301 (9th Cir.), *cert. denied sub nom.* Martinez–Villareal v. Stewart, 117 S. Ct. 588 (1996).

162. 104 F.3d 1099 (9th Cir. 1996).

163. 863 F. Supp. 1079 (D. Ariz. 1994).

164. The author notes that *Falcone*, an unpublished case, may be more useful to an academic than a practicing attorney.

165. *Id.*

166. Rule 31.2(b) simply states that the notice of appeal will be automatically filed by the clerk and will be sufficient notice of all judgments entered and sentences imposed. ARIZ. R. CRIM. P. 31.2(b).

167. *Woratzeck*, 863 F. Supp. at 1095.

168. *See supra* note 21 and accompanying text.

169. *Woratzeck*, 863 F. Supp. at 1095.

170. *Id.*

171. *Id.* See *supra* notes 142–57 and accompanying text for a discussion of independent and adequate state ground.

The defendant's argument in *Woratzeck* seems to be reified in *Falcone*.[172] The Ninth Circuit Panel in *Falcone* found that Arizona courts must review the entire record for fundamental error.[173] Therefore, under *Falcone*, even if a petitioner fails to raise a claim, Arizona cannot find that the defendant procedurally defaulted that claim on an independent and adequate state ground.[174] Besides simply claiming that the petitioner's argument would be contrary to public policy, *Woratzeck* only offered the circular argument that the petitioner's claim brought to its logical conclusion would "virtually eradicate the doctrine of procedural default in Arizona."[175]

Woratzeck made two broad claims in interpreting Arizona Rule of Criminal Procedure 31.2(b). First, the court stated that Arizona does not provide an advance notice that its review of capital cases constitutes an implicit rejection of specific claims.[176] Standing alone, courts could interpret this argument, as in *Falcone*, to require a more, rather than a less extensive review by the Arizona Supreme Court.[177] Next, *Woratzeck* concluded that virtually eradicating procedural default in Arizona is against public policy.[178] This conclusion begs the question of what constitutes Arizona public policy. A discussion of current arguments on how best to deal with capital cases will show that the Arizona Legislature's limits on Arizona's procedural default rule in capital cases will promote rather than detract from Arizona's public policy goals.[179]

Rule 31.2(b) requires the clerk to file a notice of appeal and this notice of appeal will suffice for all judgments and sentences imposed in a capital case.[180] Arizona Rule of Criminal Procedure 31.14(b) gives Rule 31.2(b) appeals precedence over all other appeals.[181] The automatic appeal is not only a right given to the defendant, but as seen in Rule 31.15(a)(3), a defendant may not refuse to accept an automatic appeal.[182]

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172. Falcone v. Lewis, No. 93–17178, 1994 U.S. App. LEXIS 19631 (9th Cir. June 30, 1994).

173. *Id.* at *7. *See supra* notes 142–57 and accompanying text (discussing independent and adequate state ground).

174. *Falcone*, 1994 U.S. App. LEXIS 19631, at *7.

175. *Woratzeck*, 863 F. Supp. at 1095–96.

176. *Id.* at 1095. The discussion of Arizona case law below proves that contrary to the assumption made in *Wortazeck*, Arizona does provide advance notice of which claims receive review.

177. *Falcone*, 1994 U.S. App. LEXIS 19631, at *7. While a defendant in a mandatory review state can only raise sentencing claims enumerated in the state statute, under the reasoning in *Falcone*, an Arizona defendant could conceivably raise any non-frivolous federal constitutional claim that arose out of either the sentencing procedure or the judgment itself. *See, e.g.*, State v. Brewer, 170 Ariz. 486, 493, 826 P.2d 783, 790 ("Thus once a defendant files an appeal, which is automatic in capital cases, we are expressly required by statute to review issues affecting both judgment and sentencing in our search for fundamental error."), *cert. denied*, 506 U.S. 872 (1992).

178. *Woratzeck*, 863 F. Supp. at 1095–96.

179. *See infra* notes 220–62.

180. *See supra* note 6 and accompanying text.

181. ARIZ. R. CRIM. P. 31.14 (b).

182. ARIZ. R. CRIM. P. 31.15, Motion to Dismiss:

> a. Voluntary Dismissal
>
> (1) By Stipulation. If all the parties to an appeal sign and file with the clerk of the Appellate Court an agreement that the appeal be dismissed, the clerk shall enter the case as dismissed in the docket. No mandate or other process shall issue without an order by the court.

The Arizona Legislature surpassed what the Supreme Court required of states by requiring a heightened standard of appellate review for capital cases.[183] The Arizona Legislature's call for higher judicial standards in capital appeals is echoed by the Arizona Supreme Court in its own view of the distinct requirements mandated by a trial court's imposition of the death penalty.[184] As noted in *Woratzeck*, the scope of review required by the Arizona Legislature's capital appellate review statutes is not as explicit as its Idaho counterpart at issue in *Beam*.[185] Section 19–2827 of the Idaho Code requires the Idaho Supreme Court to consider the following sentencing factors: (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, (2) whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19–2515 of the Idaho Code, and (3) whether the sentence of death is excessive.[186]

Woratzeck arbitrarily and mistakenly distinguished Arizona Rule of Criminal Procedure 31.2(b) from section 19–2827 of the Idaho Code[187] by failing to observe that the Arizona Supreme Court employs the same analysis as the Idaho Supreme Court in reviewing capital appeals.[188] The Arizona Supreme Court interprets Rule 31.2(b) to require a specific review of the trial court's sentence in capital cases.[189] A review of Arizona case law reveals that the

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(2) By Motion of the Appellant. An appellant may file a motion with the clerk of the Appellate Court to dismiss the appeal. Such motion shall be granted by the court unless dismissal would be prejudicial to the interests of another party.
(3) Exception. Rule 31.15 (a) does not apply to automatic appeals filed under Rule 31.2(b).

ARIZ. R. CRIM. P. 31.15; *See also* State v. Brewer, 170 Ariz. 486, 494, 826 P.2d 783, 791 ("[T]he propriety of the death penalty is not for the defendant or the trial court alone to decide. That decision rests also with this court upon automatic appeal...regardless of defendant's own death wish."), *cert. denied*, 506 U.S. 872 (1992).

183. *See* State v. White, 168 Ariz. 500, 520–21, 815 P.2d 869, 889–90 (1991) (Corcoran, J., concurring) (Interpreting Arizona's death statute Justice Corcoran stated, "[a]lthough the Supreme Court does not require any specific or heightened standard of appellate review in capital cases we undertake an extensive, independent review of each death sentence handed down under Arizona law.") (citations omitted).

184. *Id.* at 526, 815 P.2d at 895 (Feldman, C.J., concurring) (In his concurring opinion Chief Justice Feldman stated that "[w]hile the law may require us to play God by choosing who shall live and who shall die, I believe it is incumbent on us to recognize our own fallibility and use every method available to reduce our errors."); State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976) ("It has been our policy not to disturb the sentence imposed by the trial court, absent a clear abuse of discretion, when it is within the statutory limits.... However, the gravity or the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed.") (citations omitted).

185. Woratzeck v. Lewis, 863 F. Supp. 1079, 1095 (D. Ariz. 1994).

186. *See supra* note 10 and accompanying text.

187. *Woratzeck*, 863 F. Supp. at 1095 (holding that Rule 31.2 (b) is distinguishable from Idaho Code §19–2827 because the latter explicitly lists what factors the courts are to review for while the former does not).

188. *See infra* notes 191–99 and accompanying text.

189. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976) ("The legislature charged this court with the duty to correct sentences which are illegal and sentences where we find that the punishment imposed is greater than the circumstances of the case warrant.... Furthermore, because A.R.S §13–454 sets out the factors which must be found and considered by the sentencing court, we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances.").

Arizona Supreme Court performs this specific review by analyzing the exact same factors explicitly enumerated in section 19–2827 of the Idaho Code.[190]

The first factor that the Idaho Supreme Court must review is whether the trial court imposed the death sentence *under the influence of passion, prejudice, or any other arbitrary factor.*[191] In *State v. Richmond*,[192] the Arizona Supreme Court held that when performing a review of a death sentence, it is necessary to determine if the sentence was imposed *under the influence of passion, prejudice or any other arbitrary factors.*[193]

Next, section 19–2827 requires the Idaho Supreme Court to review every capital case to ensure that the evidence supports the judge's finding of a statutory *aggravating circumstance* enumerated in section 19–2515 of the Idaho Code.[194] In performing appellate review of a capital case, the Arizona Supreme Court ruled that it is necessary to review the record to find whether evidence supports the sentencing court's finding of statutory *aggravating factors.*[195] The Arizona Supreme Court therefore independently reviews every capital sentence to determine whether the trial judge correctly applied the aggravating factors listed in section 13–703 of the Arizona Revised Statutes.[196]

Finally, the Idaho Supreme Court must review all capital sentences to find whether the sentence of death is excessive in a particular case.[197] In *Richmond*, the Arizona Supreme Court held that it will independently review all capital sentences to determine whether the sentences of death are excessive or disproportionate to the penalty imposed.[198] Moreover, the Arizona Supreme Court has consistently held that it will not limit itself to errors that defendants allege when performing its duties in capital cases on automatic appeal.[199]

2. Martinez–Villareal's *Conclusory Statement Results in a Fundamental Error.*

After *Woratzeck*, *Falcone*, and *Villafuerte*, the stage was set for the Ninth Circuit to thoroughly review the relationship, if any, between Arizona's

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190. *See infra* notes 191–99 and accompanying text.
191. IDAHO CODE §19–2827(c)(1).
192. 114 Ariz. 186, 560 P.2d 41 (1976).
193. *Id.* at 196, 560 P.2d at 51.
194. IDAHO CODE § 19–2827(c)(2) (1986). *See supra* note 10 and accompanying text.
195. State v. Hill, 174 Ariz. 313, 326, 848 P.2d 1375, 1388 (1993) ("[W]e review the sentencing hearing and aggravating and mitigating circumstances to ensure that proper procedures were followed and the proper factors determined and weighed.") (citing State v. Cook, 170 Ariz. 40, 60, 821 P.2d 731, 751 (1991), *cert. denied*, 506 U.S. 846 (1992)), *cert. denied*, 510 U.S. 898 (1993).
196. State v. Brewer, 170 Ariz. 486, 493–94, 826 P.2d 783, 790–91 (1992).
197. IDAHO CODE § 19–2827(c)(3) (1996). *See supra* note 10 and accompanying text.
198. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976); *Cook*, 170 Ariz. at 60, 821 P.2d at 751 (1991) (holding that whenever a trial court imposes the death penalty, the Arizona Supreme Court will review the record and make a separate and independent determination of whether the death penalty is appropriate).
199. State v. Ceja, 115 Ariz. 413, 415, 565 P.2d 1274, 1276 (holding that the Arizona Supreme Court independently reviewed the record to ensure that the lower courts accorded defendant a fair trial even though the defendant did not allege any error in the trial), *cert. denied*, 434 U.S. 975 (1997); State v. Jordan, 114 Ariz. 452, 454, 561 P.2d 1224, 1226 (1976) (holding that the Arizona Supreme Court will review issues not raised in the appellant's brief), *vacated on other grounds*, 438 U.S. 911 (1978). *See also Brewer*, 170 Ariz. at 493, 826 P.2d at 787 ("If the record reveals that the trial court for whatever reason, improperly sentenced a defendant to death, we must overturn that sentence.").

fundamental error review and a capital defendants ability to raise claims before the federal courts. The Ninth Circuit Court of Appeals in *Martinez-Villareal* was the first court to answer that question. Offering no analysis, and relying simply on a 1991 Arizona Court of Appeals decision, the Ninth Circuit in *Martinez-Villareal*[200] surmised that fundamental error review in Arizona does not effect subsequent procedural preclusion.[201]

A more thorough analysis of Arizona case law exposes the error in *Martinez-Villareal's* conclusory statement. Arizona has long held that *when an error is fundamental,* a defendant's failure to object does not waive his rights on appeal.[202] Moreover, *Martinez-Villareal,* like *Woratzeck v. Lewis,* failed to address an earlier Ninth Circuit decision explicitly recognizing that Arizona's fundamental error review may allow a defendant to raise an issue not objected to at trial.[203] If the *Martinez-Villareal* court's conclusion about Arizona law had

200. Martinez–Villareal v. Lewis, 80 F.3d 1301 (9th Cir.), *cert. denied sub nom.* Martinez–Villareal v. Stewart, 117 S. Ct. 588 (1996).

201. *Id.* at 1306.

202. State v. Mincey, 130 Ariz. 389, 397, 636 P.2d 637, 645 (1981), *cert. denied,* 455 U.S. 1003 (1982). *See also* State v. Curry, 1996 WL 515320, at *4 (Ariz. Ct. App. 1996) (despite defense counsel's failure to object at trial, jury instruction on crime that did not exist constituted fundamental error allowing the court of appeals to review and vacate conviction); State v. Ritch, 160 Ariz. 495, 498, 774 P.2d 234, 237 (Ct. App. 1989) (finding that state's argument that lack of objection by counsel precludes argument later lacks merit because error was fundamental and could be raised at any time); State v. Orendain, 185 Ariz. 348, 353, 916 P.2d 1064, 1069 (Ct. App. 1996) (error in drug possession instruction which reduced state's burden of proof could not be waived on review), *vacated,* 1997 WL 61280, at *2 (Ariz. 1997); State v. Hardwick, 183 Ariz. 649, 651, 905 P.2d 1384, 1386 (Ct. App. 1995) (state's use of inadmissible hearsay evidence constituted fundamental error); State v. Krone, 182 Ariz. 319, 323, 897 P.2d 621, 625 (1995) (even though trial counsel did not request instruction, it is fundamental error to omit such an instruction in a capital case and may be appropriate for retrial); State v. Lautzenheiser, 180 Ariz. 7, 10, 881 P.2d 339, 342 (1994) (defense counsel's failure to object at trial does not preclude Arizona Supreme Court from reversing when judge's improper influence amounts to fundamental error); State v. Lopez, 175 Ariz. 79, 82, 853 P.2d 1126, 1129 (Ct. App. 1993) (right to counsel is a fundamental right and although defendant never cited proper rules violated by trial court, appellate court can raise issue on its own if harm is fundamental error); Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 176 Ariz. 383, 387, 861 P.2d 668, 672 (Ct. App. 1993) ("Fundamental error is not waived even in the absence of an objection.") (citations omitted); State v. Luque, 171 Ariz. 198, 200, 829 P.2d 1244, 1246 (Ct. App. 1992) (holding that error violating state constitutional provision is fundamental and not waived despite defendant's failure to raise at trial court); State v. Jannamon, 169 Ariz. 435, 439, 819 P.2d 1021, 1025 (Ct. App. 1991) ("Although the defendant's argument never was presented to the trial court, we will consider this issue for the first time on appeal because it is a fundamental—not a 'technical'—error to convict a person for a crime when the evidence does not support a conviction."); State v. Flowers, 159 Ariz. 469, 472, 768 P.2d 201, 204 (Ct. App. 1989) ("Where a defendant has been denied an essential component of due process, such denial constitutes fundamental error.... Fundamental error is not waived."); State v. Gardfrey, 161 Ariz. 31, 33, 775 P.2d 1095, 1097 (1989) ("Because the error was fundamental, [defendant] did not waive the issue by failing to object at trial."); State v. Newfield, 161 Ariz. 470, 473, 778 P.2d 1366, 1369 (Ct. App. 1989) (failure of defense counsel to object to jury instruction does not foreclose review when failure to instruct on element constitutes fundamental error); State v. Vild, 155 Ariz. 374, 378, 746 P.2d 1304, 1308 (Ct. App. 1987) (although failure to object during closing argument usually constitutes waiver, prosecutor's comments on defendant's post-arrest silence may be fundamental error).

203. Dickey v. Lewis, 859 F.2d 1365, 1368 n.3 (9th Cir. 1988) (noting that the Arizona Supreme Court holds that when an error is fundamental, failure to raise issue originally does not default claim on appeal); Villafuerte v. Lewis, 75 F.3d 1330, 1336 (9th Cir.) (noting without deciding that Arizona's review for fundamental errors might "prevent the state from later arguing that errors arguably within the definition of fundamental error are procedurally barred even

been limited to its facts, the lack of analysis might not have had such a detrimental effect on capital defendants. However, later decisions in the Ninth Circuit show that *Martinez-Villareal* is impacting Arizona's capital defendants.[204]

3. Poland v. Stewart*: Geese, Ganders and Straight Face Arguments.*

In *Poland v. Stewart,* the Ninth Circuit Court of Appeals applied *Martinez-Villareal* to a capital case thereby rejecting convicted Poland's attempt to receive a hearing in federal court to determine whether his attorney was ineffective. *Poland,* like *Martinez–Villareal* offered no analysis of Arizona case law relating fundamental error and procedural default. Indicative of the confusion in the Ninth Circuit over how to apply Arizona law, *Poland* cited *State v. Curtis,* an anomalous Arizona case for support. *Poland* cited *State v. Curtis* for the proposition that review for fundamental error has no effect on a post-conviction proceeding. A plain reading of *Curtis* shows that the Arizona Court of Appeals held the *exact opposite* of the proposition made in *Poland.*

The petitioner in *Curtis* claimed that a jury instruction given by the trial court was constitutionally infirm. Finding that petitioner's claim involved fundamental error, the *Curtis* court held that the issue had been implicitly reviewed by the first appellate court, even though petitioner did not raise it on his first appeal. It demonstrates confusion on the part of the Ninth Circuit to cite an opinion holding that the state courts implicitly reviewed issues that petitioner failed to raise on appeal to support the proposition that a federal court will not hear a claim that state courts did not have a chance to review.

A similar argument as that made in *Curtis,* was also made in *Jeffers v. Lewis.*[205] In *Jeffers,* the Arizona Supreme Court distinguished the review process for non-capital cases from capital cases.[206] In non-capital cases the court held that it would not disturb the sentence of a trial court absent a clear abuse of discretion.[207] However, in capital cases the court held that it "painstakingly examine[s] the record to determine whether it has been erroneously imposed."[208] Jeffers argued that the state failed to weigh the evidence in sentencing because the court did not explicitly show its analysis.[209] The Ninth Circuit applied *Beam*[210] to *Jeffers* holding that in "this circuit we presume state courts follow the law even when they fail to so indicate."[211]

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though not specifically discussed by the Arizona Supreme Court."), *reh'g granted,* 81 F.3d 915 (9th Cir. 1996).

204. *See* Lambright v. Lewis, 932 F. Supp. 1547, 1560–61 (D. Ariz. 1996) (finding that the decision in *Martinez–Villareal* precludes further analysis of whether Arizona's fundamental error review prevents procedural preclusion); Poland v. Stewart, 104 F.3d 1099, 1110 (9th Cir. 1996) (citing *Martinez–Villareal* for the proposition that when a petitioner's lawyer fails to raise a claim at the state level, Arizona's fundamental error review will not save that claim for federal habeas review even in the context of a death sentence).

205. 38 F.3d 411 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 1709 (1995).

206. *Id.*

207. *Id* at 413.

208. *Id.*

209. *Id.*

210. Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), *cert. denied sub nom.* Arave v. Beam, 114 S. Ct. 1631 (1994).

211. *Jeffers,* 38 F.3d at 415.

Using *Beam, Jeffers* found it permissible to execute a defendant when the Arizona Supreme Court was silent by claiming that the Arizona Supreme Court implicitly decided all fundamental issues in a capital case.[212] In contrast, *Woratzeck* and *Poland* affirmed death sentences by arguing that *Beam* does not require a presumption that a silent Arizona court addressed all fundamental issues but instead only those that the defendants specifically raised.[213] Thus, while in its prosecutorial role, Arizona argues that the Arizona Supreme Court reviews for all fundamental error, the Ninth Circuit asserts Arizona does not specifically review for all fundamental error when a defense lawyer attempts the argument. What is good for the goose should be good for the gander. It simply defies logic to allow a state attorney to argue that the Arizona Supreme Court implicitly addressed claims that it did not explicitly discuss on the record yet at the same time forbid a federal capital attorney from doing the same.

B. Other Circuits

The Ninth Circuit holding in *Beam v. Paskett* has prompted other circuits to consider the effect of their respective state death penalty statutes on a state's ability to argue procedural default. Although the case law outside the Ninth Circuit is less developed, it is important to note that other circuits grappling with this problem are paying close attention to their respective state's case law.

In *United States* ex rel. *Collins v. Welborn*[214] the Illinois District Court compared Illinois' death penalty statute to Idaho's. The court found the Idaho statute analyzed in *Beam* distinguishable.[215] However, unlike the Ninth Circuit, *Welborn* went a step further and looked at Illinois' case law to see whether the Illinois Supreme Court reviews for error that a defendant does not raise.[216] As noted above, a review of Arizona case law reveals that the Arizona Supreme Court consistently examines the record for error whether raised by a defendant or not. Likewise, in *Nave v. Delo*,[217] the Eighth Circuit Court of Appeals held that, although *Beam* applied to the factors set out in Missouri's mandatory review statute, the scope of that review was ultimately a question of state law.[218]

IV. ARIZONA'S PUBLIC POLICY

The Arizona Supreme Court held that when reviewing capital cases its review will go beyond that which a defendant raises himself.[219] If the Arizona Supreme Court is willing to address claims that a defendant fails to raise in a capital case, why might Arizona not want federal courts to do the same? The *Woratzeck* decision found that it would violate public policy to hold that

212. *Id.*

213. Woratzeck v. Lewis, 863 F. Supp. 1079, 1095 (D. Ariz. 1994); Poland v. Stewart, 104 F.3d 1099, 1110 (9th Cir. 1996).

214. 868 F. Supp. 950 (N.D. Ill. 1994), *cert. granted in part*, 117 S. Ct. 726 (1997).

215. *Id.* at 965.

216. *Id.* (concluding that Illinois case law demonstrates that the Illinois Supreme Court does not review for claims that are not raised).

217. 62 F.3d 1024 (8th Cir. 1995).

218. *Id.* at 816. *See also* Bennett v. Angelone, 92 F.3d 1336, 1344–45 (4th Cir.) (noting the similarities between the statute analyzed in *Beam* and the Virginia mandatory review statute yet leaving open whether the Fourth Circuit will adopt the reasoning in *Beam*), *cert. denied*, 117 S. Ct. 503 (1996).

219. *See supra* note 198–99 and accompanying text.

Arizona Rule of Criminal Procedure 31.2(b) requires an implicit waiver of state claims not addressed by the Arizona Supreme Court.[220] If *Woratzeck* is correct, as opposed to merely begging the question, what public policy forbids capital defendants from obtaining a federal review of their case?

The view espoused by *Woratzeck* assumes that the paramount public policy consideration is to respect Arizona's procedural rules.[221] While public policy includes a respect for finality and the orderly administration of the state judicial process, it also obligates society to respect an individual's right to a fair trial that upholds his or her constitutional rights.[222]

Advocates of state sovereignty claim that to expand a defendant's right to a federal habeas corpus review impedes the finality of state court judgments and subverts the state judge's authority.[223] However, at least one state supreme court judge claims that in death penalty cases he feels no resentment when federal courts review the merits of a habeas petitioner's claim.[224] Moreover, many other state judges express relief that the final determination of a state death penalty case comes from the federal courts.[225]

When a state enacts a statute that makes a state procedural rule antecedent on a determination of federal law, that state gives up the right to bar a federal court from hearing claims from a defendant who failed to follow the state's procedural rules.[226] The state is not giving up jurisdiction because the doctrine of procedural default is based only on comity.[227] Thus, the federal courts already have jurisdiction to decide cases when state courts waive the exhaustion doctrine.[228]

Automatic appeal statutes that require states to review all death penalty cases for error still allow the state court judges to have the first chance at reviewing the record for federal constitutional error.[229] Mississippi Supreme Court Justice James Robertson dissented from Mississippi's application of a state procedural bar in a capital case arguing that the "best way to insulate...decisions from federal 'tampering' is to get the cases right here."[230] Likewise, if the Arizona Supreme Court performs its duty by reviewing every

220. Woratzeck v. Lewis, 863 F. Supp. 1079, 1095–96 (D. Ariz. 1994).

221. *Id.*

222. *A.B.A. Policy Recommendations, supra* note 32, at 115 (stating that the current debate in death penalty review is whether a capital defendant's execution based on an infirm trial should make the integrity and fairness of the process according to constitutional law paramount or whether finality and the orderly administration of state criminal justice should take precedent).

223. *A.B.A. Policy Recommendations, supra* note 32, at 41 (stating that "[s]ome members of the state judiciary...view federal habeas corpus review of state court criminal convictions an affront to their sovereignty.").

224. Mississippi Supreme Court Justice James Robertson showed his disdain for state procedural bars preventing federal review of his decisions by claiming that procedural bars do not promote the interests of justice. *A.B.A. Committee Report, supra* note 32, at 93 n.276.

225. *Id.* at 31.

226. Ake v. Oklahoma, 470 U.S. 68 (1985). *See also* Donald L. Bell, *The Adequate and Independent State Grounds Doctrine: Federalism, Uniformity, Equality and Individual Liberty,* 16 FLA. ST. U. L. REV. 365 (1988) (stating that the adequate and independent state grounds doctrine would eliminate the hurdles of procedural default that often bar death sentenced individuals from asserting their federal rights).

227. Reed v. Ross, 468 U.S. 1, 9 (1984).

228. *A.B.A. Policy Recommendations, supra* note 32, at 133.

229. *See supra* note 8 and accompanying text.

230. Evans v. State, 441 So. 2d 520, 532 (Miss. 1983) (Robertson, J., dissent).

capital case for fundamental error, federal court review will not undermine its authority.[231]

A. Speed

Those in favor of the death penalty often criticize the time and expense involved in putting a defendant to death. Although the Supreme Court claims to be promoting states' interest in finality by restricting a state defendant's access to federal habeas corpus review, some commentators believe that the Court has actually increased the delay between sentencing and execution.[232] Since exhaustion of state remedies requires further delays, states could accelerate death penalty litigation by regularly invoking the waiver doctrine.[233] Waiving state claims allows the federal courts to decide the merits of a petition.[234] A scholar recently commented on the importance of leaving open habeas corpus review to state prisoners, noting that "we would not send two astronauts to the moon without providing them with at least three or four back up systems. Should we send [scores of persons] to prison with even less reserves?"[235]

B. Inadequate Yet Not Ineffective Assistance of Counsel

In *Murray v. Carrier*,[236] the Supreme Court held that, absent constitutional ineffectiveness, an attorney's procedural default caused by mistake is not distinguishable from a default stemming from design.[237] Justice O'Connor, writing for the majority, ruled that the state's interests are affected no less whether the counsel's default occurs by strategy or through ignorance or inadvertence.[238] The Court's failure to distinguish between an attorney's tactical reasons for raising an issue and his or her inadvertent or negligent failure to raise an issue overturns the holding in *Fay v. Noia*.[239] One of the

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231. As noted in note 20, Arizona repealed ARIZ. REV. STAT. § 13–4035 (1995), requiring Arizona appellate courts to review for fundamental error. However, many of the appeals that the federal district courts will hear during the next few years were decided under this standard. Additionally, the end of fundamental error review has not yet barred the Arizona Supreme Court from performing a similar independent review of death sentences. *See* State v. Kemp, 185 Ariz. 52, 66–67, 912 P.2d 1281, 1295–96 (1996).

232. Friedman, *supra* note 90, at 533–34 (claiming that death cases are tied up for so long in litigating procedural issues that defendants may be executed sooner if relief is granted on the merits).

233. *A.B.A. Policy Recommendations, supra* note 32, at 131. The majority of the ABA found that a state's invocation of the waiver doctrine ameliorates the need for additional protracted litigation. *Id. Cf.* Jennison v. Goldsmith, 940 F.2d 1308, 1311 (9th Cir. 1991) (requiring habeas petitioner to return to state court even though the state supreme court had expressed lack of interest in habeas petitions).

234. *A.B.A. Policy Recommendations, supra* note 32, at 131.

235. Donald P. Lay, *Modern Administrative Proposals for Federal Habeas: The Rights of Prisoners Preserved*, 21 DEPAUL L. REV. 701, 710 (1972).

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

237. *Id.* at 486–88.

238. *Id.*

239. Fay v. Noia, 372 U.S. 391 (1963). In 1963, the Supreme Court held that federal courts had the power to review a state prisoner's federal constitutional claim not withstanding his failure to raise the claim in the state courts. *Id.* at 398–99. However, federal judges had to refuse review if the state prisoner had deliberately bypassed the state procedures for tactical or strategic reasons. *Id.* at 438–39. Justice Rehnquist overturned the *Noia* standard in *Wainwright v. Sykes*. Wainwright v. Sykes, 433 U.S. 72 (1977). According to Justice Rehnquist, the rule in *Noia* might encourage lawyers to "sandbag" issues. *Id.* at 89. See *infra* notes 48–52 for a discussion of sandbagging.

benefits of mandatory review procedures and automatic appeal statutes is that they offer a defendant sentenced to death some protection against an attorney's inadvertent mistake. By returning to the deliberate bypass test first used in *Fay v. Noia*, Arizona can take advantage of the automatic appeal statute's safeguard against attorney negligence in capital cases, while preserving the integrity and respect for the Arizona court system.

Some of the reasons to distinguish the appellate review standards for capital attorneys include: lack of experience,[240] inadequate standards for appointment,[241] unrealistic statutory caps,[242] and lack of attorneys willing to accept death penalty cases.[243] Most lawyers who try capital cases are not capital specialists.[244] The Supreme Court acknowledges the difficulty involved in capital cases[245] and the ABA notes that there is a much higher rate of inadvertent mistakes in capital cases because of the "myriad legal developments and legal complexities in this area."[246] In 1990, out of more than 2,500 death row inmates, 99.5% were indigent and unable to afford a private attorney.[247]

C. Sandbagging

Justice Rehnquist, writing for the majority in *Wainwright v. Sykes*, rejected *Fay v. Noia's* deliberate bypass test because he felt that the deliberate bypass test encouraged lawyers to "sandbag."[248] Sandbagging, according to Justice Rehnquist, is a method that defense attorneys employ by failing to raise issues in state courts with the expectation of gaining an advantage at trial while still preserving the option of being able to raise those claims on appeal in federal court.[249] Justice Brennan dissenting in *Sykes*, found that Rehnquist's analysis of the actions of defense attorneys "simply offends common sense."[250]

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240. Duffett, *supra* note 39, at 152.

241. *Id.*

242. *Id.* at 153. *See also* Fred Strasser, *$1,000 Fee Cap Makes Death Row's Justice a Bargain for the State*, NAT'L L.J., June 11, 1990, at 5 (calculating the attorney's compensation in some cases to amount to less than five dollars per hour).

243. Linda Williams, *Death-Row Inmates Often Lack Help for Appeals, but Few Lawyers Want to Do Distasteful Work*, WALL ST. J., Aug. 27, 1987, at 48 (noting there is a severe shortage of capital lawyers).

244. *A.B.A. Policy Recommendations, supra* note 32, at 111 (Non-capital specialists "necessarily comprise the great majority of the attorneys who try and appeal capital cases.").

245. Murray v. Giarratano, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J., concurring) (noting "[t]he complexity of our jurisprudence in this area").

246. *A.B.A. Policy Recommendations, supra* note 32, at 111. Mississippi Supreme Court Justice Robertson claims that frequently a case is well tried but many issues are not raised that could have vacated a death sentence because the average Mississippi criminal defense lawyer has no familiarity with the intricacies involved in capital cases. *Id.* at 110 n.360.

247. Duffett, *supra* note 39, at 128.

248. Wainwright v. Sykes, 433 U.S. 72, 89 (1977).("The rule of Fay v. Noia...may encourage 'sandbagging' on the part of defense lawyers who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."). For a thorough discussion of sandbagging, see Bob Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987–88).

249. *Wainwright*, 433 U.S. at 89.

250. *Wainwright*, 433 U.S. at 104 n.5. Justice Brennan stated that Justice Rehnquist presumably means, first, that [counsel] would hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with

A clear majority of an ABA task force addressing the issue of sandbagging found that the problem is not that serious for the same reasons that Justice Brennan listed in his *Sykes* dissent.[251] Concurring in *Murray v. Carrier*, Justice Stevens joined by Justice Blackmun noted a distinction between trial and appellate procedures claiming that the "state interest in procedural rigor is weaker [on appeal] than at trial, and the transcendence of the Great Writ is correspondingly clearer."[252]

D. Arizona Concerns

In *State v. White*,[253] Arizona Supreme Court Chief Justice Stanley Feldman sadly acknowledged that capital sentences have been and may possibly still be "arbitrarily, wantonly, and freakishly imposed, often on grounds of race, religion, or minority status." [254] Furthermore, Chief Justice Feldman said it is "obvious the rich man is much more likely to evade the death penalty than the poor man,...and variations in prosecutors, judges, juries, community emotions and the type of victim all play some part in the result.[255] *Jeffers v. Lewis*[256] affirmed Chief Justice Feldman's assumptions about the inconsistencies that plague capital punishment in Arizona. *Jeffers* stated that since 1973, Arizona trial courts have erroneously sentenced more than one-third of their 164 capital defendants to death.[257] Aware of the problems in Arizona trial courts, and the inconsistencies that arise out of poor representation, the Arizona Supreme Court has consistently held itself to a high standard in reviewing capital cases.[258] The Arizona Supreme Court explicitly stated that when presented with a capital appeal, the court reviews issues that the defendants did not raise at trial[259] or in the appellant's brief.[260]

Those in favor of limiting federal habeas corpus review might argue that Arizona's heightened standard of review for capital appeals obviates the need to give state defendants the additional safeguard of federal review. However, the Arizona Supreme Court itself acknowledged the importance of federal habeas

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> respect to these claims (subject to whatever "plain error" rule is available). Third, to carry out his scheme he would now be compelled to deceive the federal habeas court and to convince the judge that he did not "deliberately bypass" the state procedures. If he loses on this gamble, all federal review would be barred, and his "sandbagging" would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into [doing this] by Fay. I do not.

Id.

251. *A.B.A. Policy Recommendations*, *supra* note 32, at 117.
252. Murray v. Carrier, 477 U.S. 478, 507 (1986).
253. State v. White 168 Ariz. 500, 815 P.2d 869 (1991) (Feldman, C.J., concurring).
254. *Id.* at 525, 815 P.2d at 894.
255. *Id.*
256. Jeffers v. Lewis, 38 F. 3d 411 (1994).
257. *Id.* at 438 (citations omitted).
258. State v. Brewer, 170 Ariz. 486, 493, 826 P.2d 783, 790 (1992) ("We have long held...that we are bound by the gravity of the death penalty to insure proper compliance with Arizona's death penalty statute."); *White*, 168 Ariz. at 526, 815 P.2d at 895 (Feldman, C.J., concurring) ("While the law may require us to play God by choosing who shall live and who shall die, I believe it is incumbent on us to recognize our own fallibility and use every method available to reduce our errors.").
259. State v. Ceja, 115 Ariz. 413, 415, 565 P.2d 1274, 1276 (1977).
260. State v. Jordan, 114 Ariz. 452, 454, 561 P.2d 1224, 1226 (1976) (citing State v. James, 110 Ariz. 334, 519 P.2d 33 (1974)).

review of death penalty cases in *Smith v. Lewis*.[261] In *Smith*, the court held that "the condemned person and society require effective representation in federal habeas corpus proceedings, because they usually constitute the final stage of judicial review before the state takes a person's life. We must ensure that all legitimate constitutional issues are properly resolved there, because there will be no second chance."[262] The Arizona court's recognition of the importance of meaningful representation on federal habeas review of death penalty cases would ring hollow if the state procedurally barred federal habeas attorneys from raising claims that the state courts and attorneys may have failed to recognize.

V. RECOMMENDATION FOR ARIZONA'S INTERPRETATION OF RULE 31.2(b)

The Arizona Supreme Court interprets the legislature to require the court to correct illegal death sentences and insure that the death sentence is properly and constitutionally applied.[263] The automatic appeal mechanism, *Arizona Rule of Criminal Procedure* 31.2(b), gives the court the "opportunity and the vehicle to assess the legality of the sentence in each capital case."[264] The standard the Arizona Supreme Court applies on capital review is of critical importance to capital defendants seeking federal habeas review for issues not raised to or by the Arizona Supreme Court.

For capital cases reviewed before *State v. Smith*,[265] the Arizona Supreme Court reviewed the record for fundamental errors.[266] Whether the repeal of section 13–4035 will affect capital cases in the future is an open question. At least one Arizona Supreme Court case suggests that the repeal of section 13–4035 should not apply to capital cases. *State v. Carriger*,[267] held that the constitutional difference between the death penalty and other sentences requires the Arizona courts to address the merits of claims that would otherwise be barred in a noncapital case.[268]

At a minimum, the Arizona Supreme Court has intimated that it will still review unraised sentencing claims. In *State v. Brewer*, the Arizona Supreme Court held that its duty to review death penalty cases goes beyond a review for "fundamental error."[269] The court held that the gravity of the death penalty called for a de novo review of the trial court's rulings concerning aggravating and mitigating factors and an independent decision as to whether the state should impose the death penalty.[270] Therefore, in all cases decided *after* the Arizona state appellate courts stopped reviewing for fundamental error, a defendant should not be procedurally barred from bringing an unraised

261. Smith v. Lewis, 157 Ariz. 510, 514, 759 P.2d 1314, 1318 (1988).
262. *Id.*
263. *Brewer*, 170 Ariz. at 493, 826 P.2d at 787; State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976); State v. Smith, 136 Ariz. 273, 279, 665 P.2d 995, 1001 (1983) (finding of ineffective assistance of counsel at sentencing part of the Arizona Supreme Court's "fundamental error" review).
264. *Brewer*, 170 Ariz. at 493, 826 P.2d at 790.
265. 184 Ariz. 456, 910 P.2d 1 (1996).
266. *See supra* note 21.
267. 143 Ariz. 142, 692 P.2d 991 (1984).
268. *Id.* at 148, 692 P.2d at 997.
269. *Brewer*, 170 Ariz. at 493, 826 P.2d at 790.
270. *Id.*

sentencing claim before the federal courts.[271] Moreover, the Arizona Supreme Court may on its motion decide that the inherent problems with capital representation combined with the gravity of the punishment, requires fundamental error review on the judgment itself.[272]

In 1990, the ABA formed a task force to address the problems with federal habeas corpus review in capital cases.[273] With few exceptions, the ABA task force witnesses strongly advocated for a return to the standard of deliberate bypass set up in *Fay v. Noia*.[274] The general consensus among the ABA, and numerous scholars addressing the issue, is that the courts should not impose the extraordinary and irremediable punishment of execution due to a correctable mistake by an inadequate state lawyer.[275]

While it is unlikely that the current United States Supreme Court will listen to the clamor within the legal community, states themselves have the ability to crawl out from the procedural catacombs that the Supreme Court has put in place. While it does seem counterintuitive to argue that a state may best protect its citizens by giving back some of its sovereignty, the "way in which we choose who will die reveals the depth of moral commitment among the living.[276] States such as Arizona may prove their integrity by acknowledging the shortcomings of capital defense and the need for additional review in capital cases.

It is possible that an en banc Ninth Circuit Court of Appeals will review its recent decisions and find that Arizona's procedural bars are ineffective. For instance, the Ninth Circuit Court of Appeals, in an unpublished opinion, has already held that *Beam* applies to Arizona and prevents Arizona from procedurally barring a defendant from raising issues that he or she did not fairly present to the Arizona appellate courts.[277] Additionally, two Ninth Circuit decisions recognizing the relationship between Arizona's fundamental error review and procedural default are at odds with the Ninth Circuit's most recent pronouncements.[278] Finally, a comparison between the statute analyzed in *Beam*, and Rule 31.2(b), shows that *Woratzeck* is on shaky ground in the Ninth Circuit.

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271. See supra notes 21 and accompanying text.

272. *See* State v. Curry, Nos. CA–CR 94–0617, 1 CA–CR 95–00561, 1996 WL 515320 (Ariz. Ct. App.) (holding that repeal of ARIZ. REV. STAT. ANN. § 13–4035 does not prevent Arizona courts from reviewing for fundamental error because "[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.") (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

273. *A.B.A. Policy Recommendations*, *supra* note 32, at 13.

274. *Id.* at 113–14. Witnesses advocating a return to *Noia* claimed that the current system's method of allowing unintentional counsel errors to bind a client is "a meat-ax approach to the resolution of issues," "papers over constitutional violations," and "lessens respect for the law." Another task force witness questioned how one could defend "the proposition that the availability of federal relief for a constitutionally defective death sentence should depend on whether the defendant's trial counsel recognized the error." Id. at 296 n.369. But see minority report where Richard Inglehart, Chief Assistant Attorney General of California argued that "[t]he Noia standard...is tantamount to [having] no procedural default rule at all." *Id.* at 114.

275. *See supra* note 32 and accompanying text.

276. McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

277. Falcone v. Lewis, No. 93–17178, 1994 U.S. App. LEXIS 19631 (9th Cir. June 30, 1994).

278. *See supra* note 203.

If, as this author predicts, the Ninth Circuit reverses *Woratzeck*, and its progeny, the Arizona courts and legislature will have the option to overturn that decision. If the Ninth Circuit continues to misinterpret Arizona case law, the Arizona courts are free to give guidance to the federal courts. In a similar context, Arizona Supreme Court Justice Stanley Feldman stated that "[w]e should not ignore well-reasoned Arizona authority just because four United States Supreme Court justices change their interpretation of what federal Due Process requires. Five years from now, the plurality may change. What then for Arizona?"[279] Considering Arizona's efforts to ensure a fair trial in capital cases, along with a desire to allow meaningful appellate review and a timely and efficient review process, Arizona should waive their procedural default rules for federal constitutional claims in all cases other than those where an attorney "deliberately bypasses" the system. By returning to the *Fay v. Noia* standard, Arizona can provide a check against the reportedly rare situations where an attorney attempts to strategically maneuver around the Arizona state courts. The current trend in the Supreme Court shows that unless Arizona takes the step to protect its citizens from the excess rope called state sovereignty, it will likely continue hanging its citizens for the faults of their lawyers.

279. State v. Youngblood, 173 Ariz. 502, 513, 844 P.2d 1152, 1163 (1993) (Feldman, C.J., concurring in part and dissenting in part).