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Habeas Corpus

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HABEAS CORPUS

OVERVIEW

Due to the large number of habeas corpus petitions which eventually find their way to the Tenth Circuit, the *Tenth Circuit Survey*, for the first time, devotes a separate article to coverage of the more significant habeas corpus cases. In past issues, habeas questions have been addressed in the criminal law and procedure articles.

During the past survey period, the Tenth Circuit decided several noteworthy habeas cases involving the contemporaneous objection rule—a state rule of procedure requiring timely objection at trial in order for the objectionable issue to be heard on appeal. The article also considers a few cases in which the Tenth Circuit qualified the exhaustion of state remedies principle. Finally, this survey covers an appeal of a denial of a habeas petition based on an ineffective assistance of counsel claim, one of the few cases in which a habeas petitioner encountered success at the Tenth Circuit.

I. THE CONTEMPORANEOUS OBJECTION RULE

The Tenth Circuit Court of Appeals recently heard three significant cases involving the contemporaneous objection rule. Two of the cases, *Runnels v. Hess*,¹ and *Hux v. Murphy*,² limited the principles set forth by the United States Supreme Court in *Wainwright v. Sykes*.³ The third, *Almond v. Angelone*,⁴ refused to apply the *Sykes* cause and prejudice test and reviewed the case, notwithstanding the fact that the petitioner presented claims in his petition for federal habeas corpus relief that he failed to present in his initial state post-conviction petition.

A. Background

One of the leading Supreme Court cases addressing a habeas petitioner's failure to comply with the contemporaneous objection rule is *Wainwright v. Sykes*.⁵ In *Sykes*, respondent Sykes sought federal habeas corpus review, claiming that his state court conviction had resulted from inculpatory statements made by him and wrongly admitted into evidence. Sykes did not object to the evidence when it was presented at trial, nor later on appeal. He objected to the evidence unsuccessfully in a motion to vacate his conviction and in two state habeas corpus peti-

1. 713 F.2d 596 (10th Cir. 1983).

2. 733 F.2d 737 (10th Cir. 1984).

3. 433 U.S. 72 (1977).

4. No. 83-1550 (10th Cir. Oct. 18, 1983).

5. 433 U.S. 72 (1977). *Sykes* involved the Florida contemporaneous objection rule. Under the Florida rule, a criminal defendant must move to suppress inculpatory statements before trial. The trial judge may, at his discretion, hear a motion or an appropriate objection at trial. FLA. R. CRIM. P. 3.190(i).

tions.⁶ The United States Supreme Court, relying heavily on its earlier decisions in *Davis v. United States*⁷ and *Francis v. Henderson*,⁸ held that Sykes was barred from federal habeas corpus review because he failed to contemporaneously object to the admission of his inculpatory statements and did not show both cause for the noncompliance and actual prejudice from the noncompliance.⁹ The *Sykes* Court concluded its decision by underscoring the advantage of adopting the cause and prejudice test of *Francis* over the more lenient deliberate bypass test of *Fay v. Noia*.¹⁰

The *Fay v. Noia* deliberate bypass test, announced by the Court in 1976, per Justice Brennan, allows a federal judge to deny habeas corpus review only if the petitioner "deliberately by-passed the orderly procedure of the state courts."¹¹ The *Sykes* cause and prejudice standard, however, severely restricted *Fay's* broad grant of review, leaving petitioners only with the dubious assurance that the cause and prejudice test adequately guarantees that a federal habeas corpus court will not be barred "from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."¹²

The cause and prejudice test has several advantages over the deliberate bypass test. It allows the court to avoid the difficult task of prying into the state of mind of the petitioner, or his counsel, for purposes of determining whether the "bypass" was deliberate. The test also equitably affords petitioners an opportunity to explain their failure to object and goes to the core of the issue: whether the petitioner has suffered actual harm or prejudice as a result of the error. Furthermore, the cause and prejudice standard places greater emphasis on the state court proceeding than does *Fay v. Noia*. Justice Rehnquist reasoned in *Sykes*:

The accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of

6. Sykes alleged that he did not understand his *Miranda* rights due to his intoxicated condition at the time of his arrest. *Sykes*, 433 U.S. at 74-75.

7. 411 U.S. 233 (1973). The *Davis* Court held that under rule 12(b) the petitioner waived his objection, reasoning: "no reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to the trial Petitioner has shown no cause why the court should grant him relief from his waiver of the objection" *Id.* at 244-45 (quoting the district court opinion).

8. 425 U.S. 536 (1976). In *Francis*, the Court upheld a felony murder conviction where the petitioner was seeking collateral relief from the state court, claiming that blacks had been excluded from the grand jury that indicted him. The Court held that the rule that the petitioner must show not only cause for his failure to challenge but also actual prejudice, applied with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state court conviction.

9. 433 U.S. at 86-87.

10. 372 U.S. at 391.

11. *Id.* at 438.

12. *Sykes*, 433 U.S. at 91.

guilt or innocence of one of its citizens.¹³

Hence, finality, comity and economy are all clear results of the cause and prejudice test. It is unknown, however, whether this stricter standard in fact provides relief to petitioners who have suffered an actual miscarriage of justice.

B. *Runnels v. Hess*

The Tenth Circuit first received *Runnels v. Hess*¹⁴ in 1981 on an appeal from the district court's grant of *Runnels's* petition for a writ of habeas corpus. *Runnels* had petitioned for federal habeas relief in the district court, after exhausting his state remedies. *Runnels* attacked his conviction on the ground that during trial the prosecutor violated his fifth amendment right against self-incrimination by improperly emphasizing *Runnels's* failure to testify.¹⁵ The district court agreed and granted the writ.

The Tenth Circuit vacated and remanded the original district court decision with instructions that the lower court proceed consistent with the cause prong of the *Sykes* decision.¹⁶ The district court complied, denying the writ. However, while the appeal of this district court opinion was pending, the Supreme Court decided *Engle v. Isaac*¹⁷ and *United States v. Frady*,¹⁸ leading the Tenth Circuit again to remand the case for findings regarding the effect of *Frady* and *Isaac* on the cause and actual prejudice prongs of *Sykes*.¹⁹

Not surprisingly, in its "Findings on Partial Remand," the district court stated that under *Isaac* and *Frady*, *Runnels* failed to make a sufficient showing of cause and actual prejudice required for habeas corpus

13. *Id.* at 90. For a discussion of the contributions the contemporaneous objection rule makes to criminal litigation, see *id.* at 88-91.

14. 653 F.2d 1359 (10th Cir. 1981) (An Oklahoma state circuit convicted *Runnels* of rape and sentenced him to 63 years imprisonment); See also *Runnels*, 713 F.2d 596 (10th Cir. 1983) (Order on Remand).

15. See *Runnels v. State*, 562 P.2d 932, 937 (Okla. Crim. App.), cert. denied, 434 U.S. 893 (1977).

16. 653 F.2d at 1364. "We, however, are unable to find any facts in the record bearing on defense counsel's reasons or cause for noncompliance with the Oklahoma contemporaneous objection rule. . . . Proof of cause for noncompliance is essential; mere speculation that it existed is not enough." *Id.*

17. 456 U.S. 107 (1982). *Isaac* presented the question whether a convicted respondent, who failed to comply with OHIO R. CRIM. P. 30 requiring contemporaneous objections to jury instructions, may challenge the constitutionality of those instructions in federal habeas corpus proceedings under 28 U.S.C. § 2254. Applying the cause and prejudice standard in *Sykes*, the Court held that respondent was barred from asserting his constitutional claim in the federal habeas corpus proceeding due to his failure to comply with Ohio's contemporaneous objection rule at the trial. *Id.* at 108.

18. 456 U.S. 152 (1982). *Frady*, originally sentenced to death by electrocution by a jury in the Federal District Court for the District of Columbia for first-degree murder and robbery, was resented to a life term by the court of appeals. The issue before the United States Supreme Court, however, was whether *Frady's* failure to object to a jury instruction at trial may prevent him from challenging the instruction fifteen years later under FED. R. CRIM. P. 30. Applying the cause and prejudice test of *Sykes*, the Court concluded that *Frady* fell short of meeting his burden of showing actual prejudice and thus habeas corpus relief could not be granted. *Id.* at 153.

19. 713 F.2d at 597.

relief. The district court concluded that it erred in granting Runnels's writ of habeas corpus.²⁰ The Tenth Circuit agreed with the district court's finding and quashed the writ.²¹

The essence of the cause requirement of *Sykes* was clearly articulated in the district court's "Additional Findings on Partial Remand."²² The district court found that under the current law, Runnels may not have satisfied the cause requirement.²³ Emphasizing principles of comity and finality of state court criminal judgments,²⁴ and noting that cause based wholly upon circumstantial and speculative factors would not be accepted by the Supreme Court,²⁵ the district court determined that Runnels's showing would not satisfy the "cause" element. The court found that Runnels did not show adequate cause even though his inability to present testimony on the cause issue was solely due to the intervening death of his trial counsel.²⁶

The Tenth Circuit approved the district court's heavy emphasis on the "clear distinction drawn in *Frady* between standards of proof applicable upon direct appeal and upon subsequent collateral attack."²⁷ To obtain collateral relief, a prisoner must clear a significantly higher hurdle than would exist on direct appeal. This is due to society's legitimate interest in the finality of state criminal judgments and in encouraging parties to seek a fair trial in the original criminal actions.²⁸

The Tenth Circuit similarly rejected Runnels's showing of prejudice. Citing *Isaac* and *Frady*, the court determined that the actual prejudice standard in a state prisoner's federal habeas corpus challenge requires a greater showing of prejudice than is necessary to show plain error on direct appeal.²⁹ Federal courts, in consideration of comity and finality of state decisions, set a higher standard for habeas review of state convictions than for direct review of federal convictions.³⁰ The circuit court thus set a standard of prejudice that required Runnels to demon-

20. *Id.*

21. *Id.* at 600.

22. *See id.* at 597-98.

23. *Id.* at 598.

24. *Id.* at 598. The idea of comity and finality of criminal judgments is a recurrent theme running through many habeas cases. *See, e.g., Sykes*, 433 U.S. at 74 (1977); *Engle*, 456 U.S. at 135.

25. 713 F.2d at 598 (citing *Isaac* and *Frady*).

26. 713 F.2d at 598.

27. *See id.* at 598-99.

28. *See Frady*, 456 U.S. at 162-66.

29. *See id.* at 599. *See also* FED. R. CRIM. P. 52(b). The "plain error" rule gives the courts of appeals the power to correct particularly excessive errors on appeal notwithstanding a defendant's trial default. The rule provides: "Plain errors or default affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b). By its terms, aid may be given under the rule only on appeal from a trial that was attended by error so "plain" that the trial judge and prosecutor were negligent in approving it, even absent the defendant's timely objection. The rule was intended for use on direct appeal. *See Frady*, 456 U.S. at 163.

30. 713 F.2d at 599 (quoting *Isaac*, 456 U.S. at 134-35). *See also Frady*, 456 U.S. at 166 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The Court in *Isaac* also noted that the "plain error" standard is too vague to correct the miscarriages of justice that might be at stake in federal habeas petitions. 456 U.S. at 134-35.

strate that the prosecutor's remarks at trial worked to his "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."³¹ The court concluded that Runnels failed to meet the cause and prejudice criteria as explained in *Isaac* and *Frady*.³² Because Runnels was unable to show cause for his counsel's noncompliance with the contemporaneous objection rule, and because he was unable to show he was actually prejudiced by the prosecutor's remarks, the Tenth Circuit reversed the district court's grant of Runnels's writ of habeas corpus and quashed the writ.³³

Judge Logan, dissenting, found that the majority applied the actual prejudice criterion of *Sykes* too strictly. He emphasized the Oklahoma Court of Criminal Appeals' finding that actual prejudice had been demonstrated since the prosecutor's statements amounted to reversible error.³⁴ According to Judge Logan, short of showing actual innocence, a state court's determination that a defendant suffered actual prejudice is "the most conclusive demonstration of prejudice possible."³⁵ Judge Logan argued that had defense counsel timely objected, a new trial would have been ordered for the petitioner; "instead he is serving a long prison term."³⁶

Judge Logan then admonished the majority's rigid application of the cause criterion. His argument was based on the reasonable premise that in some cases it will be "impossible to conclusively prove there was or was not cause."³⁷ Asserting that the defense counsel was 74 years old, of poor health, hard of hearing, and died before the habeas proceeding,³⁸ Judge Logan maintained that the cause test was unreasonable here. Defense counsel's poor health and hearing problems constituted circumstantial evidence that he never heard the prosecution's prejudicial comments.³⁹ Because counsel's intervening death prevented the court from discovering why counsel failed to object, and because Runnels had suffered actual prejudice, Judge Logan argued that the cause and prejudice requirements had been met.⁴⁰

Judge Logan concluded his dissent by recalling the majority statement in *Isaac*: "The terms 'cause' and 'actual prejudice' are not rigid concepts In appropriate cases, those principles must yield to the imperative of a fundamentally unjust incarceration [W]e are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard."⁴¹ According to Judge Logan, *Isaac*

31. 713 F.2d at 599 (citing *Frady*, 456 U.S. at 170).

32. 713 F.2d at 600.

33. *Id.*

34. *Id.* at 600-01 (Logan, J., dissenting).

35. *Id.* at 600.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.*

41. *Id.* at 601 (quoting *Isaac*, 456 U.S. at 135). *See also Sykes*, 433 U.S. at 91; *id.* at 94-97 (Stevens, J., concurring).

stands for the proposition that if a petitioner shows a "fundamental miscarriage of justice," relief should follow, notwithstanding petitioner's inability to conclusively show cause for any failure by his attorney.⁴² Thus, Judge Logan reproofed the majority's strict application of the *Sykes* cause and prejudice standard. Accordingly, he would have upheld the writ of habeas corpus.

C. Hux v. Murphy

The question presented to the Tenth Circuit in *Hux v. Murphy*⁴³ was whether a habeas petitioner must satisfy the "cause and prejudice" test when he has failed to comply with the state contemporaneous objection rule, but where the state courts have nevertheless proceeded to consider the claim on its merits on direct appeal.⁴⁴ In *Hux*, the petitioner sought habeas relief alleging that the Oklahoma trial court issued an erroneous jury instruction.⁴⁵ The instruction stated that there is a "legal presumption that one intends the obvious and natural consequences of his acts, unless the contrary is shown."⁴⁶ Hux did not object to the constitutionality of the instruction at the trial but did challenge it on direct appeal.⁴⁷

The Oklahoma Court of Criminal Appeals affirmed Hux's conviction by applying the "fundamental error" exception to the contemporaneous objection rule.⁴⁸ The court stated that as the instruction did not raise itself to the level of fundamental error, Hux could not obtain a reversal on direct appeal.⁴⁹ Later, in response to Hux's petition for federal habeas corpus, the district court repeated the two-prong test in *Sykes*, stating that since Hux had not objected to the instruction at trial, he could now challenge it only by satisfying the cause and prejudice standard.⁵⁰ The district court then dismissed the petitioner's claim for his failure to adequately demonstrate cause and actual prejudice.⁵¹

In overturning the district court's decision to dismiss the petition, the Tenth Circuit limited the cause and prejudice standard according to *Ulster County Court v. Allen*.⁵² The circuit court held that the lower court had improperly applied the *Sykes* cause and prejudice test when it should

42. 713 F.2d at 601.

43. 733 F.2d 737 (10th Cir. 1984). Ruel Hux was convicted by a jury in an Oklahoma state court of second degree burglary, and sentenced to twenty-eight years imprisonment.

44. *Id.* at 738-39.

45. *Id.* at 738.

46. *Id.* See also Record on Appeal to Okla. Crim. App., vol. 1, at 10. After deciding to hear the petition on its merits, the Tenth Circuit discussed at length the issue of whether this instruction amounted to a violation of Hux's right to due process. This right was in jeopardy of being violated since the state can obtain a conviction only upon proof beyond a reasonable doubt of all elements of a crime. 733 F.2d at 739.

47. 733 F.2d at 738.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. 442 U.S. 140 (1979) (holding that absent a showing by the state legislature or state courts that a federal constitutional claim is barred by some state procedural rule, a federal court may entertain the claim).

have adopted the law declared in the more recent *Ulster* decision. In *Ulster* the Court found that a habeas petitioner need not satisfy the cause and prejudice standard for failing to comply with a state procedural rule if the state courts consider the claim on its merits on direct appeal.⁵³ The Tenth Circuit emphasized that under *Ulster* the cause and prejudice standard is only applicable when "state courts invoke state law to dismiss a defendant's federal claims on procedural grounds."⁵⁴ In *Hux*, the Oklahoma Court of Criminal Appeals reviewed *Hux's* claim on the merits under its "fundamental error" rule, notwithstanding his procedural default at trial.⁵⁵ Therefore, the *Sykes* standard was inappropriately applied by the district court, and the Tenth Circuit was able to hear the petitioner's claim on the merits. The Tenth Circuit thus confined the expansion of the *Sykes* cause and prejudice standard. The cause and prejudice test now must yield when a petitioner fails to timely object at trial but the state appellate court nevertheless proceeds to consider the petitioner's claim on its merits on direct appeal.

In his concurring opinion, Judge Barrett agreed with the majority's decision to hear the petitioner's writ of habeas corpus, but disagreed with its failure to apply the cause and prejudice standard.⁵⁶ Relying on the strict interpretations of the cause and prejudice standard in *Runnels v. Hess*,⁵⁷ Judge Barrett asserted that all federal habeas corpus challenges require a showing of cause and prejudice when petitioners do not lodge contemporaneous objections.⁵⁸ Judge Barrett noted that "the 'cause' and 'prejudice' standard is a difficult one to hurdle in terms of proof," and concluded that *Hess* could not meet the standard.⁵⁹

D. *Almond v. Angelone*

Hux illustrated the Tenth Circuit's willingness to maintain the *Sykes* standard within its reasonable limitations. Similarly, in *Almond v. Angelone*,⁶⁰ the circuit court limited the expansion of the *Sykes* cause and prejudice standard by articulating a distinction between the failure to comply with the contemporaneous objection rule as in *Sykes*, and the failure to raise an issue on direct appeal that is later raised in the federal habeas petition.

In *Almond*, issues not raised in the petitioner's first state post-conviction petition were raised in his federal habeas petition.⁶¹ Thus, the question before the Tenth Circuit was whether the petitioner's failure to present these claims in his first post-conviction petition prevented the

53. *Id.* at 141.

54. 733 F.2d at 739 (citing *Ulster*, 442 U.S. at 147-54).

55. 733 F.2d at 739.

56. 733 F.2d at 740 (Barrett, J., concurring).

57. *See supra* notes 5-11 and accompanying text (explaining cause and prejudice test).

58. 733 F.2d at 740 (Barrett, J., concurring) (citing *Engle v. Isaac*, 456 U.S. 107 (1982); *United States v. Frady*, 456 U.S. 152 (1982)).

59. 733 F.2d at 740 (Barrett, J., concurring).

60. No. 83-1550, (10th Cir. Oct. 18, 1983).

61. *Id.* at 3.

circuit court from reaching the merits of the claims. The district court found that the petitioner's claims were precluded from habeas consideration since he failed to successfully demonstrate cause and prejudice as required by *Sykes*.⁶²

The Tenth Circuit, in finding that the claims could be reached and were in fact properly before the court, stated that "to apply *Sykes* to the facts here, where the procedural default consists of a failure to raise an issue in the first state post-conviction proceeding, would be an extension of *Sykes* which we chose not to undertake here."⁶³ The Tenth Circuit turned instead to the 1972 Supreme Court decision of *Murch v. Mottram*⁶⁴ which, relying on *Fay v. Noia*,⁶⁵ applied the deliberate bypass standard.⁶⁶

The Tenth Circuit first considered the deliberate bypass standard in *Holcomb v. Murphy*.⁶⁷ Under *Holcomb*, when a federal habeas petitioner fails to raise an issue in his direct criminal appeal, the deliberate bypass test of *Fay v. Noia* applies, not the cause and prejudice test of *Sykes*.⁶⁸ In its decision, the court in *Holcomb* stated that "*Fay v. Noia* is still the law and enunciates a broad enough rule to permit federal habeas consideration of issues not raised in the direct state appeal."⁶⁹ This illustrates the Tenth Circuit's willingness to apply the deliberate bypass test absent a Supreme Court decision specifically requiring the cause and prejudice standard. The Tenth Circuit's use of the deliberate bypass standard also illustrates its inclination to hear a prisoner's claim unless the law clearly shows that the petitioner has waived his rights.

Accordingly, the Tenth Circuit in *Almond*, after finding no showing of a deliberate bypass⁷⁰ on the petitioner's part, heard the claims on their merits. Nevertheless, the court affirmed the district court's finding that the petitioner's claims were without merit.⁷¹

II. EXHAUSTION OF STATE REMEDIES

In 1982, the United States Supreme Court decided *Rose v. Lundy*,⁷²

62. *Id.* at 4. The petitioner was claiming ineffective assistance of counsel as counsel did not investigate the post-arrest confession and counsel never got a psychiatrist's report. See *id.* at 3-4.

63. *Id.* at 5.

64. 409 U.S. 41 (1972). *Murch v. Mottram* was a pre-*Sykes* case in which an issue not raised by the petitioner in his first state post-conviction proceeding was raised in his federal habeas petition. The Court held that the petitioner deliberately chose to bypass orderly state procedures. The Court in *Sykes* did not discuss *Murch*.

65. 372 U.S. 391 (1963).

66. See *supra* text accompanying notes 10-12.

67. 701 F.2d 1307 (10th Cir.), *cert. denied*, 103 S. Ct. 3546 (1983).

68. *Almond*, slip op. at 5.

69. *Id.* (quoting *Holcomb*, 701 F.2d at 1312). See also *Guzzardo v. Bengston*, 643 F.2d 1300 (7th Cir.), *cert. denied*, 452 U.S. 941 (1981).

70. *Almond*, slip op. at 6.

71. *Id.* at 7.

72. 455 U.S. 509 (1982) (where respondent Noah Lundy, following a jury trial, was convicted on charges of rape and crimes against nature. He was sentenced to the state penitentiary to serve consecutive terms of 120 years on the rape charge and from 5-15 years on the crimes against nature charge).

adopting a "total exhaustion" policy. Under this policy, a habeas corpus petitioner must exhaust all of his claims at the state level before he may petition a federal district court for habeas relief.⁷³ The Court in *Lundy* held that a district court cannot consider habeas petitions which contain both unexhausted and exhausted claims.⁷⁴

In response to *Lundy*, the Tenth Circuit heard *Smith v. Atkins*,⁷⁵ addressing a federal habeas petition containing both exhausted and unexhausted claims. The district court considered two of the issues and found them to be frivolous, then dismissed the remaining issues on the ground that the petitioner had failed to exhaust his state remedies as required under 28 U.S.C. § 2254(c).⁷⁶ In reversing and remanding the case to the district court the Tenth Circuit discussed a nuance of the "total exhaustion" requirement.⁷⁷ The Tenth Circuit first noted that "[a]s a preliminary matter . . . the district court must 'review the record in a § 2254 proceeding at least summarily in order to determine whether all claims have been exhausted.'" ⁷⁸

The *Smith* court then attempted to clarify some of the existing confusion as to exactly what is precluded by the exhaustion doctrine. Citing *Brown v. Allen*,⁷⁹ the court explained that the exhaustion doctrine does not automatically preclude federal habeas relief any time there remains a state remedy.⁸⁰ The court stated that "[w]hen a petitioner presents the exact constitutional issue to the state courts on direct appeal, sufficient exhaustion for purposes of 28 U.S.C. § 2254(c) will be presumed."⁸¹ Then, under the exhaustion doctrine, a petitioner may resort to the federal courts to determine whether the state courts gave the issue "full and fair consideration."⁸²

The *Smith v. Atkins* decision was handed down after the district court

73. *Id.* at 510.

74. *Id.* at 522.

75. 678 F.2d 883 (10th Cir. 1982) (Smith challenged his state conviction of three counts of kidnapping, one count of aggravated kidnapping, and one count of robbery).

76. 28 U.S.C. § 2254(c) (1982) states: "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."

77. *See* 678 F.2d at 884.

78. *Id.* (quoting *Lundy*, 455 U.S. at 527 (Blackman, J., concurring)).

79. 344 U.S. 443 (1953) (holding that when a state prisoner's claim has been decided adversely to him by the state supreme court on direct review of his conviction, he has complied with 28 U.S.C. § 2254, which requires him to exhaust state remedies before a federal court may entertain his application for habeas corpus). *See id.* at 446-50. The Court added two points to this finding. First, under such circumstances, the prisoner need not pursue a collateral remedy in the state courts based on the same evidence and issues. *Id.* at 447-50. Second, § 2254 should not be interpreted as requiring prisoners to make repetitious applications to state courts for relief. *Id.* at 448 n.3.

80. *See* 678 F.2d at 884-85 (quoting *Rose v. Lundy*, 455 U.S. at 524 n.1).

81. 678 F.2d at 885. The Tenth Circuit directed the district courts to *Sandoval v. Rodriguez*, 461 F.2d 1097 (10th Cir. 1972), and the "legal versus factual" dichotomy contained therein for guidance when determining whether the "exact" legal issue has been presented. *Smith v. Atkins*, 678 F.2d at 885.

82. 678 F.2d at 885.

decided *Wilson v. Rayl*.⁸³ Due to the continued confusion in the trial court, the Tenth Circuit heard *Wilson v. Rayl* on December 10, 1983.⁸⁴

In *Wilson v. Rayl* a Kansas court convicted the petitioner, Wilson, of robbery, burglary, and felony theft.⁸⁵ The Kansas Court of Appeals affirmed,⁸⁶ and the Kansas Supreme Court denied a petition for review.⁸⁷ In Wilson's petition for a federal writ of habeas corpus, he set forth the same grounds for relief as were presented to the Kansas appellate courts.⁸⁸ Before filing this action in federal court, however, Wilson did not avail himself of his state post-conviction remedies.⁸⁹ The district court dismissed the action because Wilson failed to exhaust state remedies before filing for relief in federal court.⁹⁰ The Tenth Circuit, citing its holding in *Smith v. Atkins*, reversed and remanded the case, holding that the district court erred in dismissing Wilson's petition for failure to exhaust state remedies.⁹¹ Wilson's direct appeals were denied by the state supreme court, so the Tenth Circuit found that Wilson's petition for habeas corpus was properly before the federal district court, notwithstanding his failure to exhaust state post-conviction remedies. Both *Smith v. Atkins* and *Wilson v. Rayl* illustrate the Tenth Circuit's willingness to hear state prisoners' habeas corpus petitions even though all state remedies are not in fact totally exhausted.

Wilson v. Rayl is notable for the concurring opinion of Judge Barrett.⁹² In his concurrence, Judge Barrett addressed the argument advanced by the prison warden, that the rule in *Smith v. Atkins* is too "cumbersome."⁹³ Counsel for the warden maintained that the *Smith* decision should be overruled because petitioners, rather than trial judges, should bear the burden of proving exhaustion of state remedies.⁹⁴

Judge Barrett, however, reduced the confusion over who has the burden of showing exhaustion. Stating that the initial burden of persuasion remains on the petitioner, the judge explained:

If it appears from the papers and records before the federal

83. No. 82-1242 (10th Cir. Dec. 10, 1983).

84. On the issue of exhaustion of state remedies, the Tenth Circuit also heard *Martinez v. Romero*, No. 82-1726 (10th Cir. June 29, 1983). The record did not clearly show that petitioner had exhausted his state remedies, so the Tenth Circuit remanded the case to the district court for the purpose of determining whether petitioner had exhausted his state remedies. The Tenth Circuit ruled that state prosecutors cannot waive the exhaustion requirement. *Id.* at 4 (citing *Naranjo v. Ricketts*, 696 F.2d 83, 87 (10th Cir. 1982)).

85. No. 82-1242, slip op. at 2.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 3.

92. *Id.* at 4 (Barrett, J., concurring).

93. *Id.*

94. *Id.* at 3. The circuit court dismissed this claim by asserting that a circuit court should not overrule a prior decision of the same court made up of different judges. The court added that "[t]o do so puts the law [of the Circuit] into a state of flux, and no one can tell what the law will be until the composition of the court is determined." *Id.* at 3 (quoting *United States v. United States Vanadium Corp.*, 230 F.2d 646, 649 (10th Cir. 1956)).

district court that the identical factual or legal issue was presented and decided by the highest state court, then the issue has in fact been exhausted. Where, however, it is not apparent to the federal district court from the papers and records filed by the petitioner that available state remedies have been fully exhausted, the burden of proof on the exhaustion issue does not shift either to the state or to the federal district court to show such exhaustion.⁹⁵

Hence, Judge Barrett's concurring opinion in *Wilson v. Rayl* provides authority for the proposition that the burden of proof remains on the petitioner to show that the exact issue has been decided by the highest state court and is therefore exhausted.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Although the Tenth Circuit dealt with the issue of ineffective assistance of counsel in many of the petitions for habeas corpus relief during the period covered by this survey,⁹⁶ only one case actually discussed the matter at length. That case, *Maldonado v. Winans*,⁹⁷ did not present the Tenth Circuit with an unfamiliar fact pattern.

In *Maldonado*,⁹⁸ petitioner, under the direction of his counsel pled guilty to a charge of escape from the New Mexico State Penitentiary.⁹⁹ Maldonado, the petitioner, offered the guilty plea in exchange for the prosecution's promise not to use a prior conviction to upgrade the sentence.¹⁰⁰ Maldonado, however, believed the prior conviction was invalid and informed his counsel of this, but his counsel still advised him to plead guilty.¹⁰¹ Later, Maldonado, with different counsel, proved the prior conviction to be invalid.¹⁰² Thus, petitioner argued that his guilty plea was uninformed and involuntary due to his counsel's poor advice.¹⁰³

For reasons unknown, defense counsel waived any claims of ineffective assistance of counsel, and the district court focused its decision

95. No. 82-1242, slip op. at 2-3 (Barrett, J. concurring).

96. See *Almond v. Angelone*, No. 83-1550 (10th Cir. Oct. 18, 1983) (petitioner alleged he was denied effective assistance of counsel at his trial and appeal; the Tenth Circuit found petitioner's counsel met the constitutional standard pronounced in *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.), cert. denied, 445 U.S. 945 (1980)); *Franklin v. Manfin*, No. 82-2287 (10th Cir. Aug. 31, 1983) (holding that a petitioner has a right to counsel at reopening of parole revocation hearings); *Maldonado v. Winans*, 728 F.2d 438 (10th Cir. 1984) (see *infra* notes 107-119 and accompanying text); *Martinez v. Romero*, No. 82-1726 (10th Cir. June 29, 1983) (petitioner alleged ineffective assistance of counsel but the Tenth Circuit Court vacated and remanded the case to the district court to determine the issue of exhaustion, and the circuit court never addressed the question of effective assistance of counsel); *Runnels v. Hess*, 713 F.2d 596 (10th Cir. 1983) (prisoner's counsel was hard of hearing, sick during the prisoner's trial, and failed to make a timely objection that, if made, would have allowed a finding of reversible error); see also *supra* notes 14-42 and accompanying text.

97. 728 F.2d 438 (10th Cir. 1983).

98. *Id.*

99. *Id.* at 439.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

solely on the voluntariness of petitioner's guilty plea.¹⁰⁴ The Tenth Circuit, however, rejected the lower court's holding, and declared that "effective assistance of counsel . . . is indispensable to a voluntary guilty plea."¹⁰⁵ The circuit court added that "the standard of legal representation required by the sixth amendment¹⁰⁶ is indistinguishable from that required by the fifth amendment¹⁰⁷ for purposes of guaranteeing a voluntary guilty plea in this case."¹⁰⁸ Thus, the Tenth Circuit vacated and remanded the district court decision for further consideration of the requirement of adequate defense counsel under the "fifth *and* sixth amendments."¹⁰⁹

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104. *Id.*

105. *Id.*

106. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. 6.

107. The fifth amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. 5. Under the fifth amendment, all guilty pleas must be voluntary. *See, e.g., Brady v. United States*, 397 U.S. 742 (1970).

108. 728 F.2d at 439 (citing *Hammond v. United States*, 528 F.2d 15 (4th Cir. 1975)).

109. *Id.* (emphasis in original).