

Sec. 2—Judicial Power and Jurisdiction Cl. 2—Original and Appellate Jurisdiction

claim on the merits.¹³⁶² With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim only if it decided the petitioner had deliberately bypassed the opportunity in the prior proceeding to raise it; if not, “[n]o matter how many prior applications for federal collateral relief a prisoner has made,” the court must consider the merits of the new claim.¹³⁶³

Third, the most controversial of the 1963 cases, *Fay v. Noia*,¹³⁶⁴ dealt with the important issue of state defaults, of, that is, what the effect on *habeas* is when a defendant in a state criminal trial has failed to raise in a manner in accordance with state procedure a claim which he subsequently wants to raise on *habeas*. If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the state’s “independent and adequate state ground” bars direct federal review of the claim.¹³⁶⁵ Whether a similar result prevailed upon *habeas* divided the Court in *Brown v. Allen*,¹³⁶⁶ in which the majority held that a prisoner, refused consideration of his appeal in state court because his papers had been filed a day late, could not be heard on *habeas* because of his state procedural default. The result was changed in *Fay v. Noia*, in which the Court held that the adequate and independent state ground doctrine was a limitation only upon the Court’s appellate review, but that it had no place in *habeas*. A federal court has power to consider any claim that has been procedurally defaulted in state courts.¹³⁶⁷

Still, the Court recognized that the states had legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had discretion to deny a *habeas* petitioner relief if it found that he had

¹³⁶² 373 U.S. at 15. In codifying the *Sanders* standards in 1966, Pub. L. 89-711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the “ends of justice” language. Although it was long thought that the omission probably had no substantive effect, this may not be the case. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

¹³⁶³ 373 U.S. at 17-19.

¹³⁶⁴ 372 U.S. 391 (1963). *Fay* was largely obliterated over the years, beginning with *Davis v. United States*, 411 U.S. 233 (1973), a federal-prisoner post-conviction relief case, and *Wainwright v. Sykes*, 433 U.S. 72 (1977), but it was not formally overruled until *Coleman v. Thompson*, 501 U.S. 722, 744-51 (1991).

¹³⁶⁵ *E.g.*, *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Herb v. Pitcairn*, 324 U.S. 117 (1945). In the *habeas* context, the procedural-bar rules are ultimately a function of the requirement that petitioners first exhaust state avenues of relief before coming to federal court.

¹³⁶⁶ 344 U.S. 443 (1953).

¹³⁶⁷ *Fay v. Noia*, 372 U.S. 391, 424-34 (1963).