That is no longer the law. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules."[1388] The "miscarriage-of-justice" element is probably limited to cases in which actual innocence or actual impairment of a guilty verdict can be shown.[1389] The concept of "cause" excusing failure to observe a state rule is extremely narrow; "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[1390] As for the "prejudice" factor, it is an undeveloped concept, but the Court's only case establishes a high barrier.[1391]

The Court continues, with some modest exceptions, to construe *habeas* jurisdiction quite restrictively, but it has now been joined by new congressional legislation that is also restrictive. In *Herrera*

[1388] Coleman v. Thompson, 501 U.S. 722, 750 (1991). The standard has been developed in a long line of cases. Davis v. United States, 411 U.S. 233 (1973) (under federal rules); Francis v. Henderson, 425 U.S. 536 (1976); Engle v. Isaac, 456 U.S. 107 (1982); Murray v. Carrier, 477 U.S. 478 (1986); Harris v. Reed, 489 U.S. 255 (1989). *Coleman* arose because the defendant's attorney had filed his appeal in state court three days late. Wainwright v. Sykes involved the failure of defendant to object to the admission of inculpatory statements at the time of trial. Engle v. Isaac involved a failure to object at trial to jury instructions.

[1389] *E.g.*, Smith v. Murray, 477 U.S. 527, 538–39 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986). In Bousley v. Brooks, 523 U.S. 614 (1998), a federal post-conviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted more narrowly the elements of the offense than had the trial court in Bousley's case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate "actual innocence" so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

[1390] Murray v. Carrier, 477 U.S. at 488. This case held that ineffective assistance of counsel is not "cause" unless it rises to the level of a Sixth Amendment violation. *See also* Coleman v. Thompson, 501 U.S. 722, 752–57 (1991) (because petitioner had no right to counsel in state postconviction proceeding where error occurred, he could not claim constitutionally ineffective assistance of counsel). The actual novelty of a constitutional claim at the time of the state court proceeding is "cause" excusing the petitioner's failure to raise it then, Reed v. Ross, 468 U.S. 1 (1984), although the failure of counsel to anticipate a line of constitutional argument then foreshadowed in Supreme Court precedent is insufficient "cause." Engle v. Isaac, 456 U.S. 107 (1982).

[1391] United States v. Frady, 456 U.S. 152, 169 (1982) (under federal rules) (with respect to erroneous jury instruction, inquiring whether the error "so infected the entire trial that the resulting conviction violates due process").