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## Ake v. Oklahoma: The New "Fundamental Error" Exception to Wainwright v, Sykes

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## CASE NOTES

### *Ake v. Oklahoma*: The New "Fundamental Error" Exception to *Wainwright v. Sykes*

#### I. INTRODUCTION

In *Wainwright v. Sykes* the United States Supreme Court held that a prisoner's failure to comply with Florida's contemporaneous objection rule precluded federal habeas corpus review of his *Miranda* claim unless the prisoner could show cause for non-compliance and actual prejudice resulting from the state procedural bar.<sup>1</sup> The Supreme Court determined that Florida's contemporaneous objection rule constituted an adequate and independent state ground for decision.<sup>2</sup> Thus, federal courts could refuse to review the defaulted federal constitutional claim "[a]s a matter of comity but not of federal power."<sup>3</sup> Today, *Sykes* means that "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief."<sup>4</sup>

*Sykes* is a virtually insurmountable barrier for prisoners who procedurally defaulted on federal constitutional claims in state court.<sup>5</sup> In 1982, Justice Brennan remarked that "on the Court's present view it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause.'"<sup>6</sup> Because the cause-prejudice standard is difficult to

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1. 433 U.S. 72 (1977). For an excellent background discussion of *Sykes*, see Note, *On the Threshold of Wainwright v. Sykes: Federal Habeas Court Scrutiny of State Procedural Rules and Rulings*, 83 MICH. L. REV. 1393, 1393-1410 (1985).

2. 433 U.S. at 86-87.

3. *Id.* at 82-83 (citing *Fay v. Noia*, 372 U.S. 391, 399 (1963)); see also *County Court v. Allen*, 442 U.S. 140, 154 (1979) (citing *Sykes* for the proposition that honoring the state procedural bar accords "appropriate respect to the sovereignty of the States in our federal system"); cf. *infra* note 21.

4. *Engle v. Isaac*, 456 U.S. 107, 129 (1982).

5. See Note, *supra* note 1, at 1394-95.

6. *Engle v. Isaac*, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting).

satisfy, state prisoners seek to avoid its application. This note identifies an exception to the *Sykes* cause-prejudice standard.

The Supreme Court recently recognized a "fundamental error" exception to *Sykes*. In *Ake v. Oklahoma*<sup>7</sup> the Court said that if state procedural default rules are subject to fundamental error exceptions,<sup>8</sup> and if federal constitutional error is deemed fundamental error, then the state procedural bar depends on an antecedent ruling on federal law. A state procedural bar that depends on an antecedent federal law ruling is not an independent ground for a state court decision.<sup>9</sup> If the state ground is not independent, *Sykes* is not relevant.

This note explores *Ake*'s ramifications by scrutinizing the fundamental error doctrines of Oklahoma, Florida, and Arizona.<sup>10</sup> The Oklahoma doctrine of fundamental error is examined in order to view the Supreme Court's *Ake* analysis in context. Examination of Florida's fundamental error doctrine reveals that the *Ake* exception to *Sykes* is unavailable in Florida because federal constitutional error by state courts is not necessarily fundamental error in Florida.<sup>11</sup> Finally, review of Arizona's fundamental error doctrine indicates that the *Ake* exception is available in Arizona because Arizona appellate courts are statutorily obligated to review the trial record for fundamental error, which includes federal constitutional error. Arizona's procedural default rules do not apply if fundamental error has occurred. By comparing and contrasting the fundamental error doctrines of these three states, this note illustrates the application and bounds of the fundamental error exception to *Sykes*.

7. 105 S. Ct. 1087 (1985).

8. In many states, procedural default rules (e.g., Florida's contemporaneous objection rule) do not apply when fundamental error has occurred. See *infra* notes 30-33, 42-45, 48 and accompanying text. "Fundamental error" is defined by state law. In Oklahoma, for example, fundamental error is defined as an error going to the "foundation of the case" that denies "the defendant a right which was essential to his defense." *Tucker v. State*, 675 P.2d 459, 461 (Okla. Crim. App. 1984).

9. *Ake*, 105 S. Ct. at 1092-93.

10. Oklahoma law was applied in *Ake*. Florida law was applied in *Sykes*. Arizona law is examined because the doctrine of fundamental error is exceptionally well developed in that state.

11. This conclusion is critical; otherwise, *Sykes* could be read as implicitly rejecting a fundamental error exception to the cause-prejudice standard. See *infra* notes 24-25, 40-45 and accompanying text.

## II. THE *Ake* EXCEPTION TO *Wainwright v. Sykes*

### A. *Wainwright v. Sykes*

In *Sykes* the Supreme Court held that a prisoner's failure to comply with Florida's contemporaneous objection rule precluded federal habeas corpus review of his *Miranda* claim unless the prisoner could show cause for noncompliance and actual prejudice resulting from the state procedural bar.<sup>12</sup>

Until *Ake* only one exception to the *Sykes* standard had been identified. *Sykes* does not bar federal habeas corpus review of a federal constitutional claim forfeited by procedural default in state court if the state court ignores the procedural default and reviews the constitutional claim on the merits.<sup>13</sup> In *County Court v. Allen* the Court stated:

Our conclusion that it was proper for the federal courts to address respondents' claim is confirmed by the policies informing the "adequate state ground" exception to habeas corpus jurisdiction. The purpose of that exception is to accord appropri-

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12. See *Sykes*, 433 U.S. at 72; see also *Engle v. Isaac*, 456 U.S. 107, 129 (1982) ("[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.").

The Court refused to define "cause" in *Sykes*, see 433 U.S. at 87, but has since held that "novelty" of a constitutional issue constitutes *Sykes* "cause." A "novel" constitutional claim is one that was unidentifiable when procedural default occurred. See *Reed v. Ross*, 104 S. Ct. 2901, 2909 (1984) (excusing failure to raise on appeal a constitutional claim that was unidentifiable when procedural default occurred). The courts of appeals agree that attorney incompetence likewise constitutes *Sykes* "cause." See, e.g., *Carrier v. Hutto*, 724 F.2d 396 (4th Cir. 1983); *Garrison v. McCarthy*, 653 F.2d 374 (9th Cir. 1981); cf. *Clay v. Irving*, 749 F.2d 427, 431-32, 434 (7th Cir. 1984) (after holding counsel's failure to appeal amounted to a sixth amendment violation, the court held in the alternative that a less-than-usual showing of cause was required because defendant had been severely prejudiced), cert. denied, 105 S. Ct. 2344 (1985); *Runnels v. Hess*, 653 F.2d 1359, 1364 (10th Cir. 1981) ("We agree that in some instances 'ineffective counsel, short of that necessary to make out a Sixth Amendment claim, will satisfy the "cause" prong.'") (quoting *Tyler v. Phelps*, 622 F.2d 172, 177 (5th Cir. 1980), vacated, 643 F.2d 1095 (1981), cert. denied, 456 U.S. 935 (1982)) (emphasis by the *Hess* court).

This note does not address what constitutes *Sykes* "cause." Rather, the focus here is on avoiding the cause-prejudice standard altogether.

13. See *Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982) ("If [the state] had exercised its discretion to consider respondent's claim, then their initial default would no longer block federal review."); *County Court v. Allen*, 442 U.S. 140, 153-54 (1979); cf. *Bradford v. Stone*, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979) (assuming that "the state's failure to rest exclusively upon the procedural default permits us to reach the federal question") (emphasis added); see also Note, *supra* note 1, at 1393 n.2 ("The power of habeas courts to review state court holdings on the merits of federal questions is one of the few certainties in the changeable law surrounding the writ.").

ate respect to the sovereignty of the States in our federal system. *Wainwright v. Sykes*, 433 U.S. at 88. But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim.<sup>14</sup>

Thus, if a state court ignores a procedural default and reviews a forfeited federal constitutional claim on the merits, the state prisoner is entitled to have his claim reviewed independently in a federal habeas corpus proceeding.<sup>15</sup>

### B. *Ake v. Oklahoma*

In *Ake* the defendant failed to repeat his request for a psychiatric evaluation in his motion for a new trial. Because of this procedural default, the state argued that the petitioner was barred under *Engle v. Isaac*<sup>16</sup> from raising that claim before the Supreme Court.<sup>17</sup>

The Supreme Court noted that the Oklahoma waiver rule does not apply to fundamental error and that under Oklahoma law federal constitutional errors are fundamental.<sup>18</sup> In these circumstances, the Court reasoned that

the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional

14. 442 U.S. 140, 154 (1979) (footnote omitted).

15. In *Sykes* the Court said:

[S]ince *Brown v. Allen*, 344 U.S. 443 (1953), it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule of *Brown v. Allen* is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure.

433 U.S. at 87 (emphasis in original).

16. 456 U.S. 107 (1982); see also *supra* note 4 and accompanying text.

17. Brief for Respondent at 47-48, *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985); see also *Ake*, 105 S. Ct. at 1092.

18. 105 S. Ct. at 1092. In *Oklahoma* fundamental error is defined as error going to the "foundation of the case" that denies "the defendant a right which was essential to his defense." *Tucker v. State*, 675 P.2d 459, 461 (Okla. Crim. App. 1984); see also *Tobler v. State*, 688 P.2d 350, 353 (Okla. Crim. App. 1984); cf. *Meadows v. Meadows*, 619 P.2d 598, 601 (Okla. 1980) ("[F]undamental error is error which renders a judgment void.").

question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

. . . [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. . . . In such a case, the federal law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. In this case, the additional holding of the state court—that the constitutional challenge presented here was waived—depends on the court's federal law ruling and consequently does not present an independent state ground for the decision rendered.<sup>19</sup>

Rejecting the state's *Engle v. Isaac* argument,<sup>20</sup> the Supreme Court held that it had jurisdiction to review the case.<sup>21</sup>

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19. *Ake*, 105 S. Ct. at 1093.

20. See *supra* notes 4, 12 and accompanying text.

21. *Ake*, 105 S. Ct. at 1092. *Ake* did not mention *Sykes* or apply the cause-prejudice standard because *Ake* was reviewed by the Supreme Court on a grant of certiorari to the Oklahoma Court of Criminal Appeals. But see *supra* notes 16-20 and accompanying text (Oklahoma relied on *Engle v. Isaac*, a case that applied the cause-prejudice standard, for its argument that the Supreme Court was without jurisdiction to hear *Ake*'s claim). Unlike *Sykes*, federal habeas court power to review a procedurally defaulted claim was not at issue. The distinction is unimportant, however, because after *Sykes* the availability of federal habeas review depends upon whether the state procedural ground is adequate and independent. Under *Sykes*, federal habeas review is barred when (1) an adequate and independent state procedural ground exists, and (2) there is no showing of cause and prejudice. See *Sykes*, 433 U.S. at 78-87. *Ake* is relevant to *Sykes* analysis because it identifies a situation in which the state procedural ground is not independent. *Ake* constitutes an exception to application of *Sykes*' cause-prejudice standard, because if the state ground is not independent, the cause-prejudice inquiry is never reached.

To the extent *Sykes* employs adequate and independent state ground analysis to limit the scope of federal habeas corpus review, it rejects the Court's position in *Fay v. Noia*, 372 U.S. 391 (1963). In *Fay*, the Court held that "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." *Id.* at 399. *Fay* rejected "as unsound in principle . . . the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision." *Id.* at 434. Under *Fay*, the standard limiting direct Supreme Court review of procedurally defaulted claims is more restrictive than the standard limiting federal habeas corpus review of defaulted claims. See *id.* at 399-434. This remains the case under *Sykes*, because even if an adequate and independent state ground exists (a condition that would preclude direct review), federal habeas review is appropriate if cause and prejudice are shown.

### C. *The Fundamental Error Exception*

Under *Ake*, if state procedural default rules do not apply to fundamental error, and if federal constitutional errors are fundamental, the state makes application of the procedural bar depend on whether federal constitutional error has been committed. The state ground is not independent because before imposing the procedural bar the state court must rule, at least implicitly, on the merits of the federal constitutional question.<sup>22</sup> Under these circumstances, *Sykes* and its progeny have no application.<sup>23</sup>

Prior to *Ake*, federal circuits had addressed the question whether a fundamental error exception to *Sykes* existed. In *Hockenbury v. Sowders*, the Sixth Circuit considered the number of states that had "plain error," "manifest injustice," and other fundamental error exceptions to their contemporaneous objection rules and concluded that allowing a fundamental error exception to *Sykes* would give the cause-prejudice standard no effect whatsoever.<sup>24</sup> *Sykes* itself, said the court, had implicitly

22. The Court's language raises the question whether the *Ake* exception is an extension of the recognized "review on the merits" exception that applies when the state court, in spite of procedural default, addressed the merits of the constitutional claim. See *supra* notes 13-15 and accompanying text. Although the two exceptions are facially similar, they address different situations.

Under the earlier-recognized review on the merits exception, the federal court will review the claim whenever the state court itself reviewed the claim in spite of the procedural default. The question under this exception is whether the state court has actually reviewed the claim on the merits. Under the *Ake* exception, the question is not whether the state court actually reviewed the claim on the merits, but rather whether the state court's decision whether or not to review on the merits depended on an implicit or explicit ruling that no federal constitutional error occurred. This ruling is not an ultimate ruling on the merits; it is rather a preliminary determination by the state court that the defendant has or has not alleged facts that might constitute federal constitutional error. In some cases, the state court may determine that no federal constitutional error has been alleged and not review the claim on the merits. Under the *Ake* exception, this claim will still be reviewable in federal habeas court because the state's preliminary determination depended on an interpretation of federal law.

*Ake* itself demonstrates this distinction. Had the review on the merits exception been applied, the federal courts may not have reviewed the claim because the state court arguably never ruled on the merits of the claim. However, federal review was available under the *Ake* exception because the state court's decision not to review on the merits depended on its preliminary determination that no federal constitutional error had been alleged.

Because the exceptions are so closely related, a habeas corpus petitioner confronting *Sykes* bar will probably find it convenient to combine the "fundamental error" and "review on the merits" arguments.

23. See *supra* notes 21-22 and accompanying text.

24. 633 F.2d 443 (6th Cir.), *denying petition for reh'g from* 620 F.2d 111, *cert. de-*

rejected a fundamental error exception because there is a fundamental error exception to Florida's contemporaneous objection requirement.<sup>25</sup> However, as seen below,<sup>26</sup> federal constitutional error is not necessarily fundamental error in Florida. Therefore, the *Ake* fundamental error exception is not available in Florida and *Ake* and *Sykes* do not conflict.

In *Runnels v. Hess* the Tenth Circuit stated in dicta that "[c]arving out fundamental error exceptions to *Sykes* would seriously undermine its force."<sup>27</sup> Interestingly, however, the fundamental error exception in *Hess* was the same one involved in *Ake*.<sup>28</sup> Therefore, *Ake* implicitly rejects the *Hess* dicta.

To summarize, although several authorities question the wisdom of a fundamental error exception to *Sykes*,<sup>29</sup> the Supreme Court has now recognized such an exception. Moreover, the exception articulated in *Ake* is not inconsistent with *Sykes*. For the exception to apply, state law must provide that fundamental error negates procedural default and that federal constitutional error is fundamental error.

### III. THE FUNDAMENTAL ERROR DOCTRINES OF OKLAHOMA, FLORIDA, AND ARIZONA

In order to examine the scope of the *Ake* fundamental error exception to *Sykes*, the fundamental error doctrines of Oklahoma, Florida, and Arizona are reviewed. Oklahoma's fundamental error doctrine is reviewed to give context to the *Ake* analysis. The question then addressed is whether the *Ake* exception is available in Florida and Arizona. The following analysis illustrates the application and bounds of *Ake*'s fundamental error exception.

#### A. Fundamental Error in Oklahoma

In *Ake* the Supreme Court cited *Hawkins v. State*<sup>30</sup> for the proposition that the Oklahoma waiver rule does not apply to

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*nied*, 450 U.S. 933 (1980).

25. *Id.* at 444.

26. See *infra* notes 40-45 and accompanying text.

27. 653 F.2d 1359, 1363 (10th Cir. 1981).

28. Oklahoma law was applied in both *Hess* and *Ake*.

29. See *supra* notes 24-28 and accompanying text; see also Note, *supra* note 1, at 1419-21.

30. 569 P.2d 490 (Okla. Crim. App. 1977).



fundamental error.<sup>31</sup> In *Hawkins* the defendant attempted to assign as error on appeal a point he had not argued in his motion for new trial.<sup>32</sup> The Oklahoma court held that "only assignments of error presented in the motion for new trial will be considered on appeal, unless such error complained of its [sic] fundamental."<sup>33</sup>

The Supreme Court said that "[u]nder Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are 'fundamental.'"<sup>34</sup> Two Oklahoma cases were cited for this proposition. In *Buchanan v. State* the Oklahoma Court of Criminal Appeals held that it was fundamental error for the prosecuting attorney to comment on the defendant's election to remain silent prior to trial.<sup>35</sup> In *Williams v. State* the prosecutor had defined the law to the jury, called the defendant a liar in the jury's presence, informed the jury that several elements of the crime were uncontested and established facts, told the jury that the defendant was no longer presumed innocent, and elicited sympathy for the victim from the jury.<sup>36</sup> The *Williams* court said that "[a]lthough the comments in this case were not accompanied by contemporaneous objections, we find that their combined effect deprived Williams of his fundamental right to a fair and impartial trial."<sup>37</sup>

*Buchanan* and *Williams* do not unequivocally state that in Oklahoma all federal constitutional errors are fundamental errors. Oklahoma's concession at oral argument that federal constitutional error is fundamental was therefore significant to the Court.<sup>38</sup>

31. 105 S. Ct. at 1092. See *supra* note 18 for Oklahoma's definition of fundamental error.

32. 569 P.2d at 493.

33. *Id.*; cf. *Gaddis v. State*, 447 P.2d 42, 46 (Okla. Crim. App. 1968) ("Errors, not fundamental or jurisdictional in character, will not be considered on appeal unless they are incorporated in the motion for new trial and the ruling thereon excepted to and assigned as error.") (quoting *Grant v. State*, 385 P.2d 925, 926 (Okla. Crim. App. 1963)), modified, 507 P.2d 915 (Okla. Crim. App. 1973).

34. 105 S. Ct. at 1092.

35. 523 P.2d 1134, 1137 (Okla. Crim. App. 1974) ("The defendant had a clear constitutional right to remain silent from the moment she became a suspect. The prosecuting attorney's comment upon the defendant's failure to make a statement or to raise her defense of an alibi prior to trial constitutes a clear, fundamental, and reversible error on the State's part.")

36. 658 P.2d 499, 500-01 (Okla. Crim. App. 1983).

37. *Id.* at 501.

38. See 105 S. Ct. at 1092.

The importance of the Court's finding that in Oklahoma federal constitutional error is fundamental error cannot be over-emphasized. After finding that federal constitutional errors are fundamental, the Court concluded that the state ground was not independent because the state made application of the procedural bar depend on whether federal constitutional error had been committed.<sup>39</sup>

### B. Fundamental Error in Florida

Florida's fundamental error exception to procedural default is interesting because Florida law was applied in *Wainwright v. Sykes*. As mentioned earlier, the Sixth Circuit said in *Hockenbury v. Sowders* that *Sykes* implicitly rejected a fundamental error exception to the cause-prejudice standard.<sup>40</sup> Under this view, *Sykes* and *Ake* directly conflict. In fact, examination of Florida's fundamental error exception to procedural default reveals that *Sykes* and *Ake* do not conflict because federal constitutional error is not necessarily fundamental error in Florida.<sup>41</sup>

The Florida Supreme Court in *Clark v. State* held that a contemporaneous objection was necessary to preserve as a point on appeal an improper comment on a defendant's exercise of his right to remain silent.<sup>42</sup> According to the state court "even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. . . . An improper comment on defendant's exercise of his right to remain silent is constitutional error, but it is not fundamental error."<sup>43</sup> More recently the Florida Supreme Court in *Ray v. State* recognized that the doctrine of fundamental error is an exception to the contemporaneous objection rule,<sup>44</sup> but reiterated that "constitutional error might not be fundamental error and . . . even constitutional rights can be waived if not timely presented."<sup>45</sup>

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39. *Id.* at 1093; see also *supra* notes 18-19 and accompanying text.

40. See *supra* notes 24-25 and accompanying text.

41. In Florida, "[f]undamental error," which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Clark v. State*, 363 So. 2d 331, 333 (Fla. 1978).

42. 363 So. 2d 331, 332 (Fla. 1978).

43. *Id.* at 333.

44. 403 So. 2d 956, 960 (Fla. 1981).

45. *Id.* at 961; see also *Robinson v. State*, 442 So. 2d 284, 285-86 (Fla. Dist. Ct. App. 1983) ("Even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court."); *Nova v. State*, 439 So. 2d 256, 261 n.4

Because the second requirement for application of the *Ake* exception—that federal constitutional error constitute fundamental error—does not exist in Florida, the *Ake* exception is unavailable to a prisoner convicted under Florida law. Therefore, *Sykes*, a case that applied Florida law, did not implicitly reject the fundamental error exception articulated in *Ake*.

### C. Fundamental Error in Arizona

In Arizona, upon an appeal taken by a defendant from a final judgment of conviction, the appellate court is required to search the entire record for fundamental error.<sup>46</sup> This review for

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(Fla. Dist. Ct. App. 1983) (“[V]iolation of a constitutional right which is not of such magnitude as to be fundamental error is waived by a failure to raise it on direct appeal . . . .”) (emphasis in original).

46. Ariz. Rev. Stat. Ann. § 13-4035 (1978) provides:

A. Upon appeal from a final judgment of conviction, the supreme court shall review all rulings affecting the judgment, even though a motion for a new trial was not made. . . .

B. Upon an appeal taken by a defendant from a judgment, the supreme court shall review the entire record.

Arizona courts have consistently adhered to this statutory mandate. See *State v. Sorrell*, 132 Ariz. 328, 329, 645 P.2d 1242, 1243 (1982) (“We are required by A.R.S. § 13-4035 . . . to search the record for fundamental error . . . .”); *State v. Romero*, 130 Ariz. 142, 147, 634 P.2d 954, 959 (1981) (“A.R.S. § 13-4035(B) requires us to review the entire record on appeal. The purpose of this review is to search for fundamental error . . . .”); *State v. Eliason*, 25 Ariz. App. 523, 527, 544 P.2d 1124, 1128 (1976) (“Under [A.R.S. § 13-4035], this Court is required to search the record for fundamental error . . . .”); *Stata v. Valdez*, 23 Ariz. App. 518, 521-22, 534 P.2d 449, 452-53 (1975) (“Even though the appellant is represented by counsel on appeal, it is incumbent upon this court to search the record for fundamental error.”); *State v. Ponds*, 4 Ariz. App. 326, 326, 420 P.2d 193, 193 (1966) (review for fundamental error necessary even though court-appointed counsel advised the court that he had carefully searched the record and had found no reversible error).

Although the statute refers to the “supreme court,” it has been applied to all Arizona appellate courts. See *State v. Eliason*, 25 Ariz. App. 523, 527, 544 P.2d 1124, 1128 (1976) (“Under [A.R.S. § 13-4035], this Court [the Arizona Court of Appeals, an intermediate appellate court] is required to search the record for fundamental error . . . .”).

Fundamental error has been defined in Arizona as “such error as goes to the foundation of the case, or which takes from a defendant a right essential to his defense.” *State v. Nettz*, 114 Ariz. 296, 299, 560 P.2d 814, 817 (Ariz. Ct. App. 1977) (quoting *State v. Cassius*, 21 Ariz. App. 78, 82, 515 P.2d 903, 907 (1973), *vacated on other grounds*, 110 Ariz. 485, 520 P.2d 1109 (1974)).

fundamental error is independent.<sup>47</sup> Procedural default rules do not apply when fundamental error has occurred.<sup>48</sup>

Under Arizona case law, federal constitutional error is fundamental error. As the court stated in *Smith v. State*: "Fundamental error . . . usually, if not always, involves the loss of federal constitutional rights."<sup>49</sup> More recently, in *State v. Burton* the Arizona Supreme Court said that "[c]onstitutional error is one form of fundamental error."<sup>50</sup> Indeed, Arizona courts often use the terms fundamental error and constitutional error synonymously.<sup>51</sup>

Thus, both *Ake* requirements are met in Arizona. State procedural default rules do not apply to fundamental error and federal constitutional errors are deemed fundamental. Therefore, the *Ake* exception is available to an Arizona prisoner confronting *Sykes* bar. This conclusion that the *Ake* exception is

47. See, e.g., *State v. Allen*, 140 Ariz. 412, 682 P.2d 417 (1984) (sua sponte review for fundamental error); *State v. Smith*, 136 Ariz. 273, 665 P.2d 995 (1983) (sua sponte review of an issue not raised in appellate briefs); *State v. Post*, 121 Ariz. 579, 580, 592 P.2d 775, 776 (1979) ("Although not argued by defendant in his appeal . . . error is apparent in the reconstructed record, and this Court is required to search the record for fundamental error."); *State v. Ceja*, 115 Ariz. 413, 415, 565 P.2d 1274, 1276 (1977) ("The appellant has not brought to our attention any deficiencies in the conduct of the trial itself. We have nevertheless made an independent review of the record . . ."); *State v. Church*, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973) (finding fundamental error although issue not raised on appeal); *State v. Gilreath*, 107 Ariz. 318, 319, 487 P.2d 385, 386 (1971) ("[A] court should notice defects on its own initiative which affect substantial rights, principally those affecting constitutional rights, solely to prevent a miscarriage of justice."), *cert. denied*, 406 U.S. 921 (1972).

48. See *State v. Henley*, 141 Ariz. 465, 468, 687 P.2d 1220, 1223 (1984) (contemporaneous objection-waiver rule does not apply to fundamental error); *State v. Routhier*, 137 Ariz. 90, 95, 669 P.2d 68, 73 (1983) (no procedural default where fundamental error has occurred), *cert. denied*, 104 S. Ct. 985 (1984); *State v. Sorrell*, 132 Ariz. 328, 329, 645 P.2d 1242, 1243 (1982) ("We are required by A.R.S. 13-4035 . . . to search the record for fundamental error even if the defendant failed to object at trial or to raise the issue on appeal."); *State v. Eliason*, 25 Ariz. App. 523, 527, 544 P.2d 1124, 1128 (1976) ("Under [A.R.S. § 13-4035], this Court is required to search the record for fundamental error, regardless of defendant's failure to object at trial or to raise the issue on appeal."). *But see State v. Hudgens*, 102 Ariz. 1, 3, 423 P.2d 90, 92 (indicating that procedural waiver rules apply to constitutional errors), *cert. denied*, 389 U.S. 873 (1967).

49. 114 Ariz. 415, 420, 561 P.2d 739, 744 (1977).

50. 144 Ariz. 248, 251, 697 P.2d 331, 334 (1985).

51. See, e.g., *Stata v. Thomas*, 133 Ariz. 533, 537-38, 652 P.2d 1380, 1384-86 (1982) (repeated reference to error of a "fundamental or constitutional nature"); *State v. Shing*, 109 Ariz. 361, 368, 509 P.2d 698, 705 (1973) (Jacobson, C.J., concurring) (referring to "fundamental (constitutional) error"); see also *State v. Corrales*, 138 Ariz. 583, 594-95, 676 P.2d 615, 626-27 (1983); *State v. Routhier*, 137 Ariz. 90, 96, 669 P.2d 68, 73-74 (1983), *cert. denied*, 464 U.S. 1073 (1984); *State v. Adamson*, 136 Ariz. 250, 268-72, 665 P.2d 972, 990-94 (1983) (Feldman, J., dissenting).

available in Arizona means that *Sykes* has no effect whatsoever in Arizona. Because Arizona appellate courts must review the record for fundamental error—which, by definition in Arizona, includes all federal constitutional error—there can never be a case in which the state appellate courts can impose a procedural default without ruling, at least implicitly, on the merits of all federal constitutional questions.<sup>52</sup>

The case for applying the *Ake* exception is stronger in Arizona than in Oklahoma. *Ake* assumes that the Oklahoma courts inquire *sua sponte* whether there has been fundamental error before imposing a procedural bar.<sup>53</sup> Arizona appellate courts, on the other hand, are statutorily obligated to review the record for fundamental error. The Arizona court must certify that it has reviewed the record for fundamental error and has found none.<sup>54</sup> If fundamental error is discovered, procedural default rules do not apply.<sup>55</sup> In addition, appellate review for fundamental error is independent.<sup>56</sup> And unlike any Oklahoma court, the Arizona Supreme Court has unequivocally stated that federal constitutional error is fundamental error.

#### IV. CONCLUSION

*Ake v. Oklahoma* recognizes a fundamental error exception to *Wainwright v. Sykes*. This exception applies if, under a particular state's law, fundamental error negates procedural default and federal constitutional error is deemed fundamental error. When these conditions are satisfied, "the State [makes] application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal con-

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52. To the extent the *Ake* exception is available in other states besides Oklahoma and Arizona, the concerns voiced in *Hockenbury v. Sowders*, 633 F.2d 443 (6th Cir.), denying petition for reh'g from 620 F.2d 111, cert. denied, 450 U.S. 933 (1980), and *Runnels v. Hess*, 653 F.2d 1359 (10th Cir. 1981), are legitimate. See *supra* notes 24, 27 and accompanying text.

53. This assumption may not be realistic. It seems more likely, absent a statutory obligation to review, that the fundamental error issue must be raised by the parties.

54. See, e.g., *State v. Salazar*, \_\_\_ Ariz. \_\_\_, \_\_\_, 707 P.2d 944, 947 (1985) ("Pursuant to A.R.S. § 13-4035, we have searched the entire record for fundamental error and have found none."); *State v. Kreps*, \_\_\_ Ariz. \_\_\_, \_\_\_, 706 P.2d 1213, 1218 (1985) ("[W]e have searched the entire record for fundamental error, A.R.S. § 13-4035, and have found none.").

55. Cf. Note, *supra* note 1, at 1416-21 (discussion of discretionary—rather than mandatory—forgiveness of procedural defaults).

56. See *supra* note 47 and accompanying text.

stitutional error has been committed.”<sup>57</sup> Therefore, the state ground for decision is not independent of federal law, and *Wainwright v. Sykes* is irrelevant.

*Ake* and *Sykes* do not conflict because the *Ake* exception is unavailable under Florida law. Although Florida has a fundamental error exception to procedural default, federal constitutional error is not always fundamental error in that state.

Finally, review of Arizona law leads to the conclusion that the *Ake* exception is available to an Arizona prisoner seeking federal habeas corpus review of procedurally forfeited federal constitutional claims. In Arizona, state procedural default rules are subject to fundamental error exceptions, and state appellate courts must review the trial record for fundamental error. Because federal constitutional error is fundamental error in Arizona, the state court must—at least implicitly—rule that there has not been federal constitutional error before it can impose a procedural default. The state ground is not independent because it depends on an antecedent ruling on federal law. Therefore, federal habeas corpus review of Arizona prisoners’ constitutional claims is not subject to the cause-prejudice standard of *Wainwright v. Sykes*. To the extent the law of other states is similar to Arizona’s, the *Ake* exception renders *Sykes* of no effect.

*Thayne G Lowe*

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57. *Ake*, 105 S. Ct. at 1093.

