

# The Burger Court Opinion Writing Database

*Engle v. Isaac*

456 U.S. 107 (1982)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

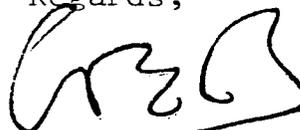
February 16, 1982

Re: No. 80-1430 - Engle v. Isaac

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

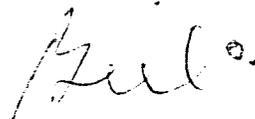
February 10, 1972

Re: Engle v. Isaac (No. 80-1430)

Dear Sandra:

I will circulate a dissent in due course.

Sincerely,

A handwritten signature in cursive script, appearing to read "A. O'Connor", is written below the typed name.

Justice O'Connor

Copies to the Conference

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: 24 March 1982

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE  
CORRECTIONAL INSTITUTE, PETITIONER *v.*  
LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[March —, 1982]

JUSTICE BRENNAN, dissenting.

Today's decision is a conspicuous exercise in judicial activism. In its eagerness to expatiate upon the "significant costs" of the Great Writ, *ante*, at 16-18, and to apply "the principles articulated in *Wainwright v. Sykes*," 433 U. S. 72 (1977), *ante*, at 14, to the cases before us, the Court demonstrably misreads and reshapes the habeas claim of at least one of the state prisoners involved in this action. Respondent Isaac presented exactly one claim in his habeas petition. That claim *did not even exist* until after Isaac was denied relief on his last direct appeal. As a result, Isaac could not have "preserved" his claim in the state courts: He simply committed no "procedural default," and the Court is thus clearly wrong to apply *Sykes* to his claim in order to relegate it to the dustbin. The Court then compounds its error when it attempts to articulate the "principles" of *Sykes*: In purporting to give content to the "cause" standard announced in that case, the Court defines "cause" in a way supported neither by *Sykes* nor by common sense. I dissent from both of these errors, which are discussed in turn below.

I

Respondent Isaac was indicted in May 1975; he was con-

Handwritten notes: "WB" and "me" with a large diagonal line through them.

Pages 1, 3, 5-13, 15,  
and footnote renumbering.

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: \_\_\_\_\_

Recirculated: 1 April 1982

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE  
CORRECTIONAL INSTITUTE, PETITIONER *v.*  
LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[April —, 1982]

JUSTICE BRENNAN, dissenting.

Today's decision is a conspicuous exercise in judicial activism—particularly so since it takes the form of disregard of precedent scarcely a month old. In its eagerness to expatiate upon the “significant costs” of the Great Writ, *ante*, at 17-19, and to apply “the principles articulated in *Wainwright v. Sykes*,” 433 U. S. 72 (1977), *ante*, at 14, to the cases before us, the Court demonstrably misreads and reshapes the habeas claim of at least one of the state prisoners involved in this action. Respondent Isaac presented exactly one claim in his habeas petition. That claim *did not even exist* until after Isaac was denied relief on his last direct appeal. As a result, Isaac could not have “preserved” his claim in the state courts: He simply committed no “procedural default,” and the Court is thus clearly wrong to apply *Sykes* to his claim in order to relegate it to the dustbin. Moreover, the Court does so by ignoring the holding only last month in *Rose v. Lundy*, — U. S. — (March 3, 1982): namely, that a habeas petition that contains *any* unexhausted claims must be dismissed by the habeas court. The Court then compounds its error when it attempts to articulate the “principles” of *Sykes*: In purporting to give content to the “cause” standard announced in that case, the Court defines “cause” in a way supported

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 16, 1982

Re: 80-1430 - Engle v. Isaac

Dear Sandra,

I had been inclined to reach the merits of the colorable constitutional issue you identify and to reverse on that question. I am now content with your resolution and join your opinion.

Sincerely yours,



Justice O'Connor

Copies to the Conference

cpm

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 10, 1982

Re: No. 80-1430 - Engle v. Isaac

Dear Sandra:

I await the dissent.

Sincerely,



T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

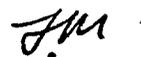
March 25, 1982

Re: No. 80-1430 - Engle v. Isaac

Dear Bill:

Please join me in your dissent.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
 Washington, D. C. 20543

March 11, 1982

CHAMBERS OF  
 JUSTICE HARRY A. BLACKMUN

Re: No. 80-1430 - Engle v. Isaac

Dear Sandra:

You already have a Court for your opinion. You have my vote, too, if you could make the following changes. Most of them, I believe, are minor.

1. Eliminate the word "initial" in the third line of footnote 26 on page 15. The presence of this word seems to me to suggest that the Sykes issue was raised sometime before the District Court. I believe that, in fact, the State did not present the issue until the case reached the Court of Appeals.

2. In the same footnote you reject Bell's contention that the State waived its Sykes claim by presenting it for the first time before the Court of Appeals. According to the petitioner, however, Bell raises the State's waiver for the first time in this Court. Should not respondent's argument be answered on that ground rather for "prudential considerations"? It seems somewhat anomalous to permit the State to prevail on the argument that Bell failed to object at trial when the State itself is guilty of a similar default.

3. Eliminate footnote 32 on page 18.

4. Eliminate all of the text on page 23 except the last sentence. I believe that none of the respondents raises a Sixth Amendment claim. The material I suggest for deletion is therefore dictum.

5. Eliminate the second sentence of the first paragraph on page 24.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

March 12, 1982

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

Re: No. 80-1430 - Engle v. Isaac

Dear Sandra:

My primary difficulty with your opinion is footnote 32.

I therefore shall not join your opinion. At the end of the next draft, please show the following:

"JUSTICE BLACKMUN concurs in the result."

Sincerely,



Justice O'Connor

cc: The Conference

February 10, 1982

80-1430 - Engle v. Isaac, et al

Dear Sandra:

This is a personal supplement to my formal join note. I like very much your opinions in both this case and Frady.

Engle is a difficult case in view of the peculiar Ohio situation. I think you wrote a deft and masterful opinion. I make two comments, one simply as a matter of information and the other a suggestion for your consideration.

As the author of Mullaney, I was particularly interested in the way you dealt with it. Although I would not have said - perhaps understandably - that the Mullaney claim in Isaac was "patently without merit", I do agree that there may be a difference - as you suggest - between an "element of a crime" and "an affirmative defense", even though the state has chosen to assume the burden of disproving the latter. I may write briefly in concurrence if other Justices in dissent challenge your position on Mullaney.

I particularly liked Part III A in which you discussed habeas corpus. Its abuse has been a subject of special interest to me. Our views are entirely congruent. If you have not done so, you might take a look at my concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218 250, and particularly pp. 262, 264. What I wrote in Bustamonte became the "law of the land" in Stone v. Powell, 428 U.S. 465 (1976). You may wish to cite these cases as they are strongly supportive of your views.

With or without these additions, your opinions in Isaac and Frady will add a significant measure of needed rationality to this area of our criminal justice system.

Sincerely,

Justice O'Connor

LFP/vde

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 10, 1982

80-1430 Engle v. Isaac, et al

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

Copies to the Conference

LFP/vde

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 10, 1982

Re: No. 80-1430 Engle v. Isaac

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

Copies to the Conference

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice O'Connor

From: Justice Stevens

Revised: FEB 18 '82

Re-circulated: \_\_\_\_\_

1st PRINTED DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE  
 CORRECTIONAL INSTITUTE, PETITIONER *v.*  
 LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SIXTH CIRCUIT

[February —, 1982]

JUSTICE STEVENS, concurring in part and dissenting in part.

A petition for a writ of habeas corpus should be dismissed if it merely attaches a constitutional label to factual allegations that do not describe a violation of any constitutional right. In Part IIA of its opinion, the Court seems to agree with this proposition. See *ante*, at 10-12. The Court nevertheless embarks on an exposition of the procedural hurdles that must be surmounted before confronting the merits of an allegation that "states at least a plausible constitutional claim." *Ante*, at 14. Those rules, the Court states, "do not depend upon the type of claim raised by the prisoner." *Ante*, at 19. Yet, the Court concludes, they will not bar relief for "victims of a fundamental miscarriage of justice." *Ante*, at 25.

In my opinion, the Court's preoccupation with procedural hurdles is more likely to complicate than to simplify the processing of habeas corpus petitions by federal judges.<sup>1</sup> In

<sup>1</sup>The Court establishes in this case and in *United States v. Frady*, — U. S. —, that "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his . . . procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *Id.*, at —. I joined *Frady* because the Court applied the prejudice prong of the cause

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

2nd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE  
CORRECTIONAL INSTITUTE, PETITIONER *v.*  
LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[February —, 1982]

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SDJC  
Pursuant to the dissent

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor  
Circulated: FEB 9 1982

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILlicothe  
CORRECTIONAL INSTITUTE, PETITIONER, v.  
LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[February —, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Wainwright v. Sykes*, 433 U. S. 72 (1977), we held that a state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, could not litigate that claim in a § 2254 habeas corpus<sup>1</sup> proceeding without showing cause for and actual prejudice from the default. Applying the principle of *Sykes* to this case, we conclude that respondents, who failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions, may not challenge the constitutionality of those instructions in a federal habeas proceeding.

I

Respondents' claims rest in part on recent changes in Ohio criminal law. For over a century, the Ohio courts required criminal defendants to carry the burden of proving self-de-

<sup>1</sup>Title 28 U. S. C. § 2254(a) empowers "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "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." This statutory remedy may not be identical in all respects to the common-law writ of habeas corpus. See *Wainwright v. Sykes*, 433 U. S. 72, 78 (1977).

17-18

NO!!!

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

*file*

February 11, 1982

No. 80-1430 Engle v. Isaac

Dear Lewis,

Thank you for your letter concerning the referenced case. I am delighted you have seen fit to join the opinion.

Your suggestions are excellent. When I circulate the next printed draft, I will add the changes noted in the attached copy of pp. 11, 17 and 18.

Sincerely,

*Sandra*

Justice Powell

Enclosure

against them. Since Ohio defined its crimes in this manner, respondents contend, our opinions in *In re Winship*, 397 U. S. 358 (1970); *Mullaney v. Wilbur*, 421 U. S. 684 (1975), and *Patterson v. New York*, 432 U. S. 197 (1977), require the prosecution to prove absence of self-defense beyond a reasonable doubt. A plurality of the en banc Sixth Circuit seemed to accept this argument in Isaac's appeal, finding that due process required the State "to meet the burden that it chose to assume." 646 F. 2d, at 1135.

~~We find this claim patently without merit.~~<sup>19</sup> Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare *Mullaney v. Wilbur*, *supra*, with *Patterson v. New York*, *supra*. These decisions, however, do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime.<sup>20</sup> The Due Process Clause

<sup>19</sup> The State suggests that the ineffectiveness of this claim demonstrates that respondents suffered no actual prejudice from their procedural default. We agree that the claim is insufficient to support habeas relief, but do not categorize this insufficiency as a lack of prejudice. If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable. It is unnecessary in such a situation to inquire whether the prisoner preserved his claim before the state courts.

<sup>20</sup> Definition of a crime's elements may have consequences under state law other than allocation of the burden of persuasion. For example, the Ohio Supreme Court interpreted § 2901.05(A) to require defendants to come forward with some evidence of affirmative defenses. *State v. Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976). Defendants do not bear the same burden with respect to the elements of a crime; the State must prove those elements beyond a reasonable doubt even when the defendant introduces no evidence. See, e. g., *State v. Isaac*, 44 Ohio Misc. 87, 337 N. E. 2d 818 (Munic. Ct. 1975). Moreover, while Ohio requires the trial court

careful  
view of our  
prior decisions  
reveals that  
his claim is

litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." Schneekloth v. Bustamonte, 412 U.S. 218, 262 (1973) (POWELL, J., concurring). See also Stone v. Powell, 428 U.S. 465 (1976).

extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders v. United States*, 373 U. S. 1, 24-25 (Harlan, J., dissenting). See also *Hankerson v. North Carolina*, 432 U. S. 233, 247 (1977) (POWELL, J., concurring in the judgment). By frustrating these interests, the writ undermines the usual principles of finality of litigation.<sup>31</sup>

Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Wainwright v. Sykes*, *supra*, at 90. Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.

We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a

addition to n. 30. Start on new line, no indent]

145 (1970).

<sup>31</sup>Judge Friendly and Professor Bator suggest that this absence of finality also frustrates deterrence and rehabilitation. Deterrence depends upon the expectation that "one violating the law will swiftly and certainly become subject to punishment, just punishment." Rehabilitation demands that the convicted defendant realize "that he is justly subject to sanction, that he stands in need of rehabilitation." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *supra* n. 30, at 146.

Justice POWELL, elucidating a position that ultimately commanded a majority of the Court, similarly suggested: ←

TP indent ] "No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further

See Schlusky v. Bustamonte, 412 U.S. 218, 263-265 (1973) (POWELL, J., concurring).

80-1430—OPINION

18

ENGLE v. ISAAC

habeas writ may, in theory, entitle the defendant only to re-trial, in practice it may reward the accused with complete freedom from prosecution.

Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.<sup>32</sup>

In *Wainwright v. Sykes*, we recognized that these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum.<sup>33</sup> The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules. These considerations supported our *Sykes* ruling that, when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.

<sup>32</sup> During the last two decades, our constitutional jurisprudence has recognized numerous new rights for criminal defendants. Although some habeas writs correct violations of long-established constitutional rights, others vindicate more novel claims. State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands.

<sup>33</sup> Counsel's default may stem from simple ignorance or the pressures of trial. We noted in *Sykes*, however, that a defendant's counsel may deliberately choose to withhold a claim in order to "sandbag"—to gamble on acquittal while saving a dispositive claim in case the gamble doesn't pay off. See 433 U. S., at 89-90.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 12, 1982

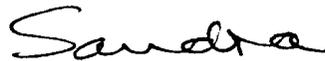
No. 80-1430 Engle v. Isaac

Dear Harry,

I am circulating a draft with several revisions which I hope will alleviate several of your concerns as expressed in your letter dated March 11. I am reluctant to delete footnote 32 and all of the text on page 23. The language on page 23 is helpful, in my view, and it applies only to the claims in this case. I would prefer to await Bill's dissent before making an additional deletion.

I hope you will consider joining the opinion with the proposed changes, and perhaps merely noting separately your view as to the language on page 23 and in footnote 32.

Sincerely,



Justice Blackmun

Copies to the Conference

pp. 14, 14, 15, 17, 18, 20, 23

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: MAR 12 1982

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE  
CORRECTIONAL INSTITUTE, PETITIONER, v.  
LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[February —, 1982]

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I

Respondents' claims rest in part on recent changes in Ohio criminal law. For over a century, the Ohio courts required criminal defendants to carry the burden of proving self-de-

<sup>1</sup>Title 28 U. S. C. § 2254(a) empowers "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "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." This statutory remedy may not be identical in all respects to the common-law writ of habeas corpus. See *Wainwright v. Sykes*, 433 U. S. 72, 78 (1977).

Pp 14-17, 20, 27

Stylistic Changes Throughout

fn's renumbered

To: The Chief Justice  
Justice Brennan  
Justice White  
✓ Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: 3/27/82

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE  
CORRECTIONAL INSTITUTE, PETITIONER, *v.*  
LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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[February —, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

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<sup>1</sup>Title 28 U. S. C. § 2254(a) empowers "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "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." This statutory remedy may not be identical in all respects to the common-law writ of habeas corpus. See *Wainwright v. Sykes*, 433 U. S. 72, 78 (1977).

Stylistic Changes Throughout

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: **APR 2 1982**

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE  
CORRECTIONAL INSTITUTE, PETITIONER, *v.*  
LINCOLN ISAAC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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[April —, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

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I

Respondents' claims rest in part on recent changes in Ohio criminal law. For over a century, the Ohio courts required criminal defendants to carry the burden of proving self-de-

<sup>1</sup>Title 28 U. S. C. § 2254(a) empowers "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "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." This statutory remedy may not be identical in all respects to the common-law writ of habeas corpus. See *Wainwright v. Sykes*, 433 U. S. 72, 78 (1977).

HAB

Supreme Court of the United States

Washington, D. C. 20543

April 13, 1982

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-1430 Engle v. Isaac  
No. 81-1056, Washington v. Myers

This petition for certiorari is from the Ninth Circuit. In 1959, the Washington Supreme Court affirmed respondent's conviction for second degree murder. Two decades later, respondent petitioned the Washington Supreme Court for post-conviction relief, claiming that the jury instructions at his trial unconstitutionally shifted the burden of proving intent. The state court held that respondent's failure to raise this issue in his initial appeal barred his subsequent challenge. CA9 subsequently found that respondent was entitled to federal habeas relief on his burden-of-proof claim. In reaching this result, CA9 ruled that respondent had shown cause for his procedural default because his claim "depend[ed] on changes in the prevailing law and presumptions and burdens of proof occurring many years after the appeal." Petn for cert 20.

Engle rejected a similar attempt to base cause on a change in the law. It is true that respondent Myers' claim of cause is stronger than the claims considered in Engle. Myers was tried more than a decade before our decision in In re Winship, 397 U.S. 358 (1970), so, unlike the habeas petitioners in Engle, he could not have relied upon that decision to raise his constitutional claim at trial. Nevertheless, I recommend that we GVR for reconsideration in light of Engle. This would give CA9 an opportunity to consider whether its result is fully consistent with Engle. A remand might also resolve an existing conflict between CA9 in this case and CA4 in No. 80-6701, Ross v. Reed (see accompanying memorandum).

My conference notes indicate that this case was not held for No. 80-1595, United States v. Frady. Nevertheless, I recommend that we mention Frady in any order remanding for further consideration. CA9 found actual prejudice, as well as cause, stemming from Myers' default. While this result might well withstand our analysis in Frady (finding no actual prejudice on a somewhat different set of facts), a remand solely in light of Engle might imply that we approved CA9's finding of actual prejudice. The lower courts are likely to perceive Engle as "the cause case" and Frady as "the prejudice case." I would not want any remand in this case to imply our view of CA9's ruling on actual prejudice. The safest course, I believe, is to GVR for reconsideration in light of Engle and Frady.

Sincerely,

*Sandra*

HAB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 13, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-1430 Engle v. Isaac  
No. 80-1595 United States v. Frady

No. 80-6863, Tyler v. Phelps

This petition for certiorari is from the Fifth Circuit. Louisiana convicted petitioner Tyler of first degree murder. The trial judge instructed the jury, without objection from Tyler's counsel, that "unless and until the presumption is ... outweighed [by evidence in the case to the contrary], the jury is bound to find ... that the defendant intended the natural and probable consequences of his act." After exhausting state remedies, Tyler filed a §2254 action, claiming that this instruction unconstitutionally shifted the burden of proof. The DC denied relief, and CA5 affirmed. Tyler's failure to challenge the instruction at trial, CA5 found, waived his claim under state law. Tyler, moreover, failed to show "cause" for this default, because he offered no explanation at all for it. Finally, CA5 noted that the legal basis of Tyler's claim was available at the time of his trial, because he was tried after this Court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975).

Tyler's cert petition asserts that counsel's "good faith ignorance" of his constitutional claim supplies cause for the default. Our decision in Engle, however, forecloses this claim. Like the habeas petitioners in Engle, Tyler was tried several years after our decision in In re Winship, 397 U.S. 358 (1970). Accordingly, he did not "lac[k] the tools to construct [his] constitutional claim." Engle slip op., at 24. CA5's decision is otherwise consistent with our opinions in Engle and Frady. Accordingly, I recommend denial of this petition.

Sincerely,



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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 13, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-1430 Engle v. Isaac  
No. 80-1595 United States v. Frady

No. 80-6701, Ross v. Reed

This petition for certiorari is from the Fourth Circuit. In 1969, North Carolina convicted petitioner Ross of second degree murder. After exhausting his state remedies, Ross sought a federal writ of habeas corpus on the ground that the trial judge's jury instructions unconstitutionally shifted the burden of proving self-defense to him. The District Court dismissed the petition, finding that Ross had failed to preserve his objection before the state courts. The Fourth Circuit denied a certificate of probable cause to appeal and dismissed the appeal on the District Court's reasoning.

Ross' petition for certiorari claims, inter alia, that he had cause for his default because he completed his direct appeals in 1969, before this Court's opinions revealed the constitutional defect in the trial court's instructions. Engle, which involved a similar challenge to the constitutionality of a burden-of-proof instruction, rejected an attempt to derive cause from the fact that the constitutional claim was "unknown" at the time of trial. In Engle, however, we relied upon the fact that the habeas petitioners were tried after our decision in In re Winship, 397 U.S. 358 (1970). Ross, tried before Winship, has a stronger claim that he "lacked the tools to construct [his] constitutional claim." Engle slip op., at 24.

I recommend that we GVR for reconsideration in light of Engle. CA4 may adhere to its result, finding that Ross' claim was available even in 1969. The reasoning employed in Engle, however, could alter CA4's decision. Moreover, a remand might lead to resolution of a conflict between this case and CA9's decision in No. 81-1056, Washington v. Myers (see accompanying memorandum). In Myers, CA9 held that a defendant tried before Winship did have cause for his failure to object to a burden-shifting jury instruction. Now that Engle has resolved this issue for defendants tried after Winship, I believe we should give the lower courts the first opportunity to consider whether a different result obtains for defendants tried before Winship. Remanding both this case and Myers should accomplish that result without implying this Court's view of the matter.