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Novel Issues, Futile Issues, and Appelate Advocacy: The Troubling Lessons of Bousley v. United States.

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NOVEL ISSUES, FUTILE ISSUES, AND APPELLATE ADVOCACY: THE TROUBLING LESSONS OF *BOUSLEY v. UNITED STATES*

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I. INTRODUCTION

Briefing and arguing novel issues on appeal can offer real intellectual pleasure to the criminal defense lawyer. Novel issues engage one's interest and sharpen one's skills, forcing consideration of unfamiliar arguments and untried reasoning. They require the lawyer to tie together unrelated lines of authority, to reach behind and beyond established precedent, and to invoke jurisprudential fundamentals or sound judicial policy. In these ways, novel issues can break an attorney out of her routine practice and invigorate her advocacy. Most important, novel issues promise great rewards: if the claim succeeds, the benefits flow not only to an individual client, but also to the criminal justice system as a whole.

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But if novel issues are the balm of criminal appellate practice, then futile issues[1] are its bane. No lawyer likes to raise hopeless issues. They needlessly consume one's time and energy. They exasperate the opposition and annoy the court, diminishing one's credibility with both. Perhaps worst of all, raising futile issues contributes to the public perception that lawyers—and particularly criminal defense lawyers—lack judgment, discretion, and integrity.

All these considerations support the settled advice that, while novel issues may be raised on appeal, futile issues should not be. Experts have long told appellate lawyers that the best briefs present fewer, stronger issues.[2] As Michael E. Tigar has explained, "[a]n advocate does not enhance the chances of winning by throwing in marginal issues," even if she is "afraid of 'missing something.'"[3] In Tigar's view, cutting the weaker issues is part of the job: appellate attorneys "are trained—and paid—to make [these] judgments."[4]

Judges have been even more forthright in encouraging issue selectivity.[5] "Winnowing out weaker arguments," as the Supreme

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1. Futile issues, for purposes of this article, are those that have little or no chance of success. *See* RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 778 (2d ed. 2001) (defining futility to mean: "incapable of producing any result; ineffective; useless; not successful").

2. *See* Jones v. Barnes, 463 U.S. 745, 751-52 (1983) (observing that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues"); William F. Causey, *The Credibility Factor in Appellate Brief Writing*, 99 F.R.D. 235, 238 (1984) (asserting that "[e]ffective brief writing flows in part from the principle that less is better"); The Honorable Lawrence W. Pierce, *Appellate Advocacy: Some Reflections from the Bench*, 61 FORDHAM L. REV. 829, 835-36 (1993) (arguing that weaker arguments distract the court from the stronger arguments).

3. MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 9.08, at 444 (3d ed. 1999).

4. *Id.*

5. *See, e.g.*, The Honorable David M. Ebel et al., *What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates*, 31 N.M. L. REV. 255, 257 (2001) (warning practitioners to "make only sound arguments and eliminate the weaker ones"); Abner J. Mikva, *Counsel Lack Selectivity in Appellate Advocacy*, LEGAL TIMES, Nov. 15, 1982, at 10 (writing that, "Asking attorneys to highlight the meat and potatoes of the case[ ] does not mean that the spices included in the entrée[,] or the dessert that follows[,] should be taken off the menu. But it does suggest that serving eight different vegetables will detract from the main course."), *quoted in* The Honorable Lawrence W. Pierce, *Appellate Advocacy: Some Reflections from the Bench*, 61 FORDHAM L. REV. 829, 836 (1993).

Court has put it, "is the hallmark of effective advocacy."[6] Justice Robert H. Jackson long ago explained that "[m]ultiplicity hints at lack of confidence . . . [m]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one."[7] Judge Ruggero J. Aldisert of the Third Circuit warns against the "forensic infection" caused by weak contentions: "Bad arguments infect the good."[8]

The experts' advice to forego raising weak issues would seem to be most applicable to issues that have previously been rejected by the appellate court hearing the claim. Raising such issues is the ultimate exercise in futility; even if the claim has logical or emotional force, appellate courts are typically bound to reject it by court rule,[9] or at the very least by the doctrine of *stare decisis.*[10]

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6. Smith v. Murray, 427 U.S. 527, 536 (1986) (quoting *Barnes*, 463 U.S. at 751).

7. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951).

8. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 8.4, at 115 (rev. 1st ed. 1996).

9. *See* United States v. Prince-Oyibo, 320 F.3d 494, 498 (4th Cir. 2003) (adhering to the principle of following precedent absent a Supreme Court ruling or an en banc proceeding); United States v. Rodriguez, 311 F.3d 435, 438-39 (1st Cir. 2002) (holding that a panel decision may not be overruled unless there is an intervening event, such as a Supreme Court case, an en banc ruling, a statutory overruling, or in "extremely rare circumstances" where persuasive case law suggests that the court should not be bound by a prior panel decision); United States v. Lee, 310 F.3d 787, 789 (5th Cir. 2002) (stating that a prior panel can only be overruled by a subsequent Supreme Court ruling or an en banc decision); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (holding that a panel may overrule prior panel precedent when there is an intervening Supreme Court case); Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 623 (8th Cir. 2002) (noting that panels are normally bound by prior panel decisions); Walker v. Southern Co. Serv., 279 F.3d 1289, 1293 (11th Cir. 2002) (concluding that the law of the circuit is well-settled that a prior panel decision can be overruled only by the Supreme Court or an en banc court proceeding); United States v. King, 276 F.3d 109, 112 (2d Cir. 2002) (noting that a panel will not overrule a prior panel's decision unless there is an intervening Supreme Court case or an en banc circuit court decision); LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (explaining that only the full court can overrule a panel decision); United States v. Jones, 21 F.3d 165,169 n.4 (7th Cir. 1994) (citing Seventh Circuit Rule 40(f) for the proposition that a panel that wishes to overrule a prior panel decision may not publish its opinion until a majority of the entire court's members decline to rehear it en banc); *In re* David L. Smith, 10 F.3d 723, 724 (10th Cir. 1993) (emphasizing that a panel cannot overrule a prior panel's decision in the absence of an en banc decision or a Supreme Court precedent); Nationwide Ins. Co. of Columbus, Ohio v. Patterson, 953 F.2d 44, 46 (3d Cir. 1991) (explaining that a panel must follow prior panel holdings unless overruled by Supreme Court precedent or an en banc proceeding); Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985) (indicating that a prior circuit decision can be overruled by either a Supreme Court decision or an en banc holding).

For this reason, it seems clear that issues that are meritless under current, binding law should be dropped in favor of issues the law supports, or even novel issues not yet considered by the court. As former New York Chief Justice Sol Wachtler has stated, "[t]he most important issue should be the lead point, weaker issues should be placed toward the end of the brief and meritless issues should be placed in the garbage."[11] Cut futile issues, and present only "the most promising issues" for review; these rules of refinement serve the "goal of vigorous and effective advocacy."[12]

Or so one would think. But a line of Supreme Court decisions culminating in *Bousley v. United States*[13] may force lawyers and judges to reconsider these settled principles. *Bousley* is not a criminal appeal, but a habeas corpus case that involves the "procedural default" doctrine. Like any procedural default ruling, *Bousley* looks with critical hindsight at the decisions made by appellate counsel, punishing the defendant for her lawyer's failure to preserve an issue.[14] In this instance, the Court punished the defendant for counsel's failure to raise a claim on appeal. Eleven courts of appeals had rejected it,[15] including the court before which the appeal was brought. In refusing to excuse this default, the Supreme Court effectively warns that counsel must raise even those claims

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10. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (discussing that, "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . [W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it." (citing B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921))).

11. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 8.4, at 117 (rev. 1st ed. 1996).

12. *See* Jones v. Barnes, 463 U.S. 745, 752-54 (1983) (expanding on the importance of being selective when choosing issues to raise on appeal); *see also* William F. Causey, *The Credibility Factor in Appellate Brief Writing*, 99 F.R.D. 235, 237-38 (1984) (noting that selection of issues is an important step in effective brief writing).

13. 523 U.S. 614 (1998).

14. Although the client ultimately bears the consequences of the procedural default doctrine, it is counsel who chooses the issue for appeal. The choice of issues differs from the decision to take an appeal, which like the decision to go to trial or to take the stand in one's own defense, is left to the client. *See Barnes*, 463 U.S. at 751 (citing Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)). Rather, it is the lawyer who ultimately decides what issues to raise on appeal. *Id.* at U.S. at 751-54; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-8.3(d) (3d ed. 1993) (noting that counsel has the authority to decide what issues to raise on appeal, and if he chooses not to raise an issue the client wishes to raise, he should advise the client of his pro se briefing rights).

15. *See* United States v. Bailey, 36 F.3d 106, 113-14 (D.C. Cir. 1994) (collecting cases).

that current law forecloses, so as to preserve them in case the law changes in the future. As a result, *Bousley* may require criminal defense lawyers to depart from the settled advice that they should winnow out clearly hopeless issues in favor of potentially winning ones.

In attempting to gauge the effect of *Bousley* on appellate advocacy, we begin by comparing its application of the procedural default doctrine with that in *Reed v. Ross*,[16] the Supreme Court's first foray into the question of procedural default and the choice of issues on appeal. We then consider the future of *Bousley*'s holding, focusing on two more recent Supreme Court decisions that suggest the different directions that *Bousley*'s progeny might take. We end by identifying factors that, in light of *Bousley*, should be considered by appellate counsel in deciding whether to buck the experts' advice and raise a hopeless issue solely to preserve it for the future.

II. "NOVELTY" AS "CAUSE" FOR APPELLATE PROCEDURAL DEFAULT: *REED V. ROSS*

The procedural default doctrine states that before a prisoner may raise an issue in a habeas corpus proceeding, he must have adequately preserved the issue, both in the trial court and on direct appeal.[17] If he did not, he has "defaulted" on the claim, and he will not be heard unless he can show "cause and prejudice"[18] for the

16. 468 U.S. 1 (1984).

17. *See* Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROC. 521, 527-44 (2002) (providing a thorough history of the origin of the procedural default doctrine).

18. The cause and prejudice rule was originally developed as a gloss on former Federal Rule of Criminal Procedure 12(b)(2) (now Federal Rule of Criminal Procedure 12(b)(3)(B) and 12(e)), which required that pretrial motions and objections to the makeup of the grand jury be raised before trial or else waived, but allowed the court "for cause shown [to] grant relief from the waiver." FED. R. CRIM. P. 12(b)(2)(f). In *Davis v. United States*, 411 U.S. 233 (1973), the Supreme Court applied this rule to a petitioner raising a challenge to the makeup of the grand jury in a 28 U.S.C. § 2255 petition. *Davis*, 411 U.S. at 235. The Court required that the petitioner demonstrate cause for not raising the issue before trial, and prejudice resulting from the alleged constitutional violation. *Id.* at 243-245. In *Francis v. Henderson*, 425 U.S. 536, 542 (1976), the cause and prejudice standard was applied to a state habeas petitioner who had failed to object to the makeup of the grand jury before his state trial. Although there was no state rule similar to Federal Rule of Criminal Procedure 12(b)(2), the Court found that there was "no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." *Id.* at 542 (citing Kaufman v. United States, 394 U.S. 217, 228 (1969)).

default.[19] Because it requires preservation on appeal, as well as at trial,[20] the procedural default doctrine links future habeas rights with the present choice of appellate issues. This raises a real dilemma for criminal defense counsel: the procedural default doctrine tells lawyers to raise issues to preserve a client's future rights even if, by multiplying claims, it weakens his current chances on appeal.

The Supreme Court first considered the implications of the procedural default doctrine for counsel's choice[21] of appellate issues in *Reed v. Ross*.[22] Ross had gone to trial on North Carolina murder charges, claiming self-defense and lack of malice.[23] Under settled

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19. *See* Bousley v. United States, 523 U.S. 614, 622 (1998) (reiterating that a habeas petitioner who has procedurally defaulted a claim must show cause and prejudice for the default, unless he can demonstrate his "actual innocence").

20. *See* Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (indicating that as a general habeas standard, the cause and prejudice standard was originally applied to defaults occurring at trial). *Sykes* involved a Florida state prisoner who failed to object at trial to the admission of his statements made to police on the ground that he did not understand his *Miranda* warnings. *Id.* at 75. On habeas review, the Supreme Court held that the petitioner could not raise the issue absent a demonstration of both cause and prejudice. *Id.* at 85. The Supreme Court applied this standard, in part, to ensure that the trial was treated as the "main event," rather than a step along the way to post-conviction collateral review. *Id.* at 90. The Supreme Court justified its policy by citing to the benefits of all possible issues being presented at trial: witnesses' memories are freshest at trial; the judge can better study the demeanor of the witnesses when making factual determinations necessary for deciding constitutional questions; and the outcome of the litigation is more final. *Id.* at 88. These justifications are not present when appellate counsel fails to raise an issue on appeal. *See* Carol C. Cooke, Note, *Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review*, 38 STAN. L. REV. 463, 474-75 (1986) (arguing that the rationale for applying the cause and prejudice standard to trial defaults is inapplicable to appellate default cases). Nonetheless, the Court has refused to differentiate between trial and appellate default in applying the cause and prejudice test. *See* Reed v. Ross, 468 U.S. 1, 10-11 (1984) (explaining the advantages to deciding a case on direct appeal rather than on habeas review, i.e., that on direct review the appellate court is still focused on the case and evidence is more likely to still be available).

21. This Article focuses on counsel's choice of issues to raise on appeal. When counsel has failed to file any appeal at all, the Supreme Court long applied a different, more liberal procedural default rule. *See* Fay v. Noia, 372 U.S. 391, 438 (1963) (holding that federal habeas courts could find that a petitioner who failed to bring a direct appeal in state court had procedurally defaulted her claim only if her lawyer had "deliberately bypassed" state review). This narrow holding stood until *Coleman v. Thompson*, 501 U.S. 722 (1991), when the Supreme Court explicitly held that the cause and prejudice standard applied to all procedural defaults in the appellate context, not just to those defaults where appellate counsel had failed to raise a particular issue. *Coleman*, 501 U.S. at 750-51.

22. *Ross*, 468 U.S. at 6.

23. *Id.* at 6-7.

law at the time, Ross carried the burden of proving these defenses.[24] The jury was instructed as to Ross's burden,[25] and he was convicted. Ross did not challenge the jury instructions on appeal, presumably "because they were sanctioned by a century of North Carolina law."[26]

Six years after Ross's appeal, in *Mullaney v. Wilber*,[27] the Supreme Court held that placing the burden on the defendant to show that he acted in the heat of passion violated due process. Two years after *Mullaney*, the Court held that this new rule of constitutional law would apply retroactively to convictions already on the books.[28] Based on these changes in the law, Ross sought habeas relief. The State claimed, however, that the procedural default doctrine barred relief, because Ross had failed to preserve the burden-shifting issue on direct appeal.[29] The Supreme Court rejected the State's argument. It found that even though appellant had failed to preserve the issue, there was "cause" for defense counsel's default because, at the time of appeal, the burden-shifting

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24. *Id.* at 7; *see also* State v. Hankerson, 220 S.E.2d 575, 586 (1975) (noting North Carolina's long-standing rules that a defendant must prove to the jury that he acted in the heat of passion to rebut the presumption of malice, and must prove self-defense to rebut the presumption of unlawfulness).

25. *See Ross*, 468 U.S. at 7 n.4 (stating that Ross did not object, but that the state of North Carolina did not require a contemporaneous objection to preserve any jury instruction issue for appeal).

26. *Id.*.

27. 421 U.S. 684 (1975).

28. *See* Hankerson v. North Carolina, 432 U.S. 233, 243-44 (1977) (holding that *Mullaney* applied retroactively because its new rule was designed to overcome inaccurate guilty verdicts and substantially improve the jury's ability to reach the truth at trial). The standard for determining retroactivity used in *Hankerson* was later changed in *Teague v. Lane*, 489 U.S. 288 (1989). In *Teague*, the Supreme Court held that, generally, new constitutional rules of criminal procedure are applicable on direct review but are not applicable on habeas review. *Teague*, 489 U.S. at 311. The Court allowed two exceptions to this rule of non-retroactivity. First, a new rule of criminal procedure would apply on collateral review if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* (citing Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). Second, a new rule would apply on habeas review if the rule is a "watershed" rule of criminal procedure, i.e., a rule that, if not applied, would "undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction." *Id.* at 315.

29. *Ross*, 468 U. S. at 7-8.

issue was "so novel that its legal basis [was] not reasonably available to counsel."[30]

In reaching its holding, the Court expressly considered the need to promote effective appellate advocacy and avoid placing unnecessary burdens on the appellate courts:

> If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable.[31]

Thus, courts "should not encourage criminal counsel" to argue settled, unfavorable issues in every case, on the "possibility that some day [the settled law] may be overruled."[32]

The reasoning in *Ross* provided a partial answer to a dilemma that defense counsel faced in considering novel appellate issues. The decision seemed to allow lawyers to select the best issues on the basis of existing law, without fear that their decisions would deprive clients of the benefit of later legal developments not apparent at the time of appeal.[33]

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30. *Id.* at 16.

31. *Id.*

32. *Ross*, 468 U.S. at 16 n.11.

33. However, just two years after *Ross*, the Supreme Court in *Smith v. Murray* held that a claim would not be considered "novel" on habeas merely because state law had foreclosed it on direct review. 477 U.S. 527, 536 (1986). At Smith's state court sentencing, the prosecution introduced statements Smith made about his prior offenses during a psychiatric examination. *Id.* at 533. Smith objected to the introduction of the statements at trial, but did not raise the issue on appeal because Virginia state law squarely foreclosed the claim. *See* Gibson v. Commonwealth, 219 S.E.2d 845, 847 (Va. 1975) (foreclosing objections to the admissibility of psychiatric evidence at trial). When the Virginia Supreme Court later reversed its position on the admissibility of such statements, Smith filed a habeas petition. The United States Supreme Court concluded that the claim was not "novel" under the *Ross* standard. *Smith*, 477 U.S. at 536. Although the claim was foreclosed by state precedent, "various forms of the claim . . . had been percolating in the lower courts for years at the time of his original appeal," and had been accepted, in some form, by several federal courts of appeals. *Id.* at 536-537; *see also* Gibson v. Zahradnick, 581 F.2d 75, 78-79 (4th Cir. 1978) (collecting cases from seven other circuits recognizing, at the time of Smith's appeal, that the use of the results of compulsory psychiatric examinations on the issue of guilt violates the Fifth Amendment). The Court therefore found the claim availa-

For appellate lawyers reading *Ross*, the key question was how to determine if an issue was so unlikely that it need not be raised. The answer to this question turned on whether the issue had "no reasonable basis" in current law.[34] *Ross* discussed a number of situations in which a new rule announced by the Court might be said to have had "no reasonable basis" beforehand.[35] The Court found that "there will almost certainly have been no reasonable basis" for an issue that arises when it explicitly overrules its own precedent; nor will there be a prior reasonable basis when a ruling overturns "a long-standing and widespread practice" that has been approved by "a near-unanimous body of lower court authority."[36] Other issues might also be said to lack a reasonable basis if they run contrary to the practice prevailing at the time of appeal, depending on how directly the practice is sanctioned, how firmly entrenched the practice is in that jurisdiction, and how strongly other jurisdictions oppose the practice.[37]

The discussion in *Ross* gave lawyers a rule of thumb for deciding whether to raise a particular issue on appeal: the more settled the authority against a claim, the less likely that it was "reasonably available," and the better chance a client would have of showing "cause" in a future habeas proceeding in a changed legal landscape. In this way, *Ross*'s holding dovetailed nicely with the advice of appellate experts: it left appellate counsel relatively free to raise winning issues, or even unsettled ones, and avoid those that were hopeless under current law.

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ble, and held that the petitioner could not rely on its novelty as cause for failing to raise it. *Smith*, 477 U.S. at 537. After *Smith*, courts of appeals applied *Ross* even more narrowly, even before the Supreme Court's reexamination of the law in *Bousley*. *See, e.g.*, Ruff v. Armontrout, 77 F.3d 265, 267 (8th Cir. 1996) (holding that counsel's failure to raise a challenge to the prosecution's use of its peremptory strikes in a racially discriminatory manner was not excused as "novel," even though *Batson v. Kentucky*, 476 U.S. 79 (1986), had yet to be decided); Heffernan v. Norris, 48 F.3d 331, 333-34 (8th Cir. 1995) (holding that counsel's failure to challenge the court's decision to involuntarily medicate his client was not excused because the claim was "novel," even though, at the time of petitioner's trial and appeal, the Supreme Court had not yet decided *Riggins v. Nevada*, 504 U.S. 127 (1992), which declared that such medicating violated defendants' Fourth and Sixth Amendment rights).

34. *Ross*, 468 U.S. at 16.

35. *Id.*

36. *Id.* at 17 (quoting United States v. Johnson, 457 U.S. 537, 551 (1982)).

37. *Id.* at 17-18.

III. Requiring That "Futile" Issues Be Raised: *Bousley v. United States*

If *Ross* gave appellate lawyers a handy rule for deciding which issues to raise and how to preserve them for the future, *Bousley* appeared to provide the exception that swallows it. In *Bousley*, the Supreme Court reexamined the relationship between "novel" and "futile" issues in determining cause for procedural default.[38] It did so in the wake of one of the most important federal criminal law decisions of the last decade: *Bailey v. United States*.[39]

In *Bailey*, the Court considered the scope of 18 U.S.C. § 924(c), a widely-used federal law that severely punishes defendants who used or carried firearms during drug offenses and violent crimes.[40] Contrary to the views of the courts of appeals, the Supreme Court held in *Bailey* that the defendant must "actively" employ the firearm to "use" it within the meaning of § 924(c).[41] With this holding, *Bailey* instantly turned losing arguments into winning ones in courts around the country.

Bousley was prosecuted before the Court decided *Bailey*.[42] He was arrested for trafficking drugs in his garage and a firearm was found in his bedroom.[43] Bousley pleaded guilty to a drug possession charge and to "using" the firearm during the drug crime, in violation of § 924(c).[44] He appealed the quantity of drugs used to calculate his sentence, but did not challenge the factual basis for the § 924(c) charge.[45] This was understandable; at the time of the appeal, Eighth Circuit precedent was clear that evidence like that

38. Bousley v. United States, 523 U.S. 614, 622-23 (1998).

39. 516 U.S. 137 (1995).

40. Bailey v. United States, 516 U.S. 137, 142-50 (1995).

41. *Id.* at 150.

42. *See Bousley*, 523 at U.S. 614 (indicating that Bousley's prosecution pre-dated the *Bailey* decision).

43. *Id.*

44. *Id.*

45. *See* Fed. R. Crim. P. 11(b)(3) (requiring that the court, before accepting a guilty plea, determine that there is a factual basis for it) (formerly Rule 11(f)).

in his case would constitute "use" under § 924(c).[46] Other circuits were in substantial agreement on the point.[47]

After *Bailey* changed the law, Bousley's habeas corpus case came before the Supreme Court.[48] Although the Court concluded that *Bailey*'s interpretation of § 924(c) applied retroactively to Bousley's case,[49] it found that Bousley defaulted any challenge to § 924(c)'s applicability by not raising it on direct appeal.[50] Bousley asserted "cause" for this default, arguing that the legal basis for his

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46. *See* United States v. Matra, 841 F.2d 837, 841-42 (8th Cir. 1988) (holding that a gun in control, although not actual possession, of defendant was "used" in relation to a drug trafficking offense).

47. At the time of Bousley's direct appeal, it appeared that every circuit would have found the evidence sufficient. *See, e.g.*, United States v. Paz, 927 F.2d 176, 179 (4th Cir. 1991) (holding that constructive possession was enough to constitute "use"); United States v. Hadfield, 918 F.2d 987, 998 (1st Cir. 1990) (holding that the district court should be concerned with whether the gun is "available for use"); United States v. Vasquez, 909 F.2d 235, 240 (7th Cir. 1990) (holding that the conviction was supported when guns and drugs are present in the same location); United States v. Long, 905 F.2d 1572, 1577 (D.C. Cir. 1990) (citing United States v. Matra, 841 F.2d 837, 840-41 (8th Cir. 1988), which indicates that possession of a gun constitutes "use" if it is an integral part of the offense); United States v. Molinar-Apodaca, 889 F.2d 1417, 1424 (5th Cir. 1989) (holding that the government must show that the gun was available for "use" in connection with the defendant's drug trafficking); United States v. Evans, 888 F.2d 891, 896 (D.C. Cir. 1989) (accepting that firearms need not be brandished to be considered "used" in drug trafficking); United States v. McKinnell, 888 F.2d 669, 675 (10th Cir. 1989) (holding that "use" is satisfied if "the defendant has 'ready access' to the firearm"); United States v. Alvarado, 882 F.2d 645, 653 (2d Cir. 1989) (affirming that courts can find "use" when guns are an integral part of a drug offense); United States v. Poole, 878 F.2d 1389, 1393 (11th Cir. 1989) (holding that possession will constitute "use" "if the possession is an integral part of . . . the drug trafficking offense"); United States v. Acosta-Cazares, 878 F.2d 945, 952 (6th Cir. 1989) (relying on the Fifth Circuit's indication that "use" can be broadly constructed under the statute); United States v. Theodoropoulos, 866 F.2d 587, 596 (3d Cir. 1989) (stating that firearms need not be brandished to be considered in "use"); United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (holding that a firearm, by emboldening the defendant to act, is "used" for the purposes of 924(c)).

48. Bousley's case was filed under 28 U.S.C. § 2255, the prescribed statutory vehicle for collateral challenges to federal convictions.

49. *Bousley*, 523 U.S. at 621. The Court found that Bousley's claim was not *Teague*-barred. *Id.*; *see also* Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"). The Court ruled that Bousley's argument was not new, and, even if it was, *Bailey* announced a statutory interpretation, not procedural change in the law. *See Bousley*, 523 U.S. at 620-21 (explaining that "we think [*Teague*] is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress."). Justice Stevens noted that *Bailey* did not change the law, "[i]t merely explained what § 924(c) had meant ever since the statute was enacted." *Id.* at 625 (Stevens, J., concurring in part and dissenting in part).

50. *Bousley*, 523 U.S. at 620.

claim was not available at the time of his appeal.[51] He argued that, until *Bailey* was decided, "'any attempt to attack [his] guilty plea would have been futile.'"[52]

The Court rejected Bousley's arguments.[53] While recognizing *Ross*'s holding that the novelty of a claim may provide cause for a procedural default, the Court found that Bousley's claim was not novel.[54] At the time Bousley's appeal was filed, "the Federal Reporters were replete" with cases involving challenges similar to the one raised in *Bailey*.[55] The Court also rejected the claim that raising the issue before the Eighth Circuit would have been futile.[56] "[F]utility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'"[57]

Although *Bousley* does not purport to overrule *Ross*, its ruling seems directly contrary to the reasoning of the earlier decision.[58] *Ross* held that, in deciding whether a novel claim had "no reasonable basis" at the time of appeal, one could look to the settled nature of a particular practice in the court of appeals, and the near

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51. *Id.* at 622-23.

52. *Id.* at 623.

53. The Court remanded the case to the district court to determine if the error in Bousley's "plea colloquy 'has probably resulted in the conviction of one who is actually innocent,'" which would entitle Bousley to relief despite his default. *Id.* (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)). According to the Court, "actual innocence" is not legal insufficiency, but rather "factual innocence." *Id.*

54. *Bousley*, 523 U.S. at 622.

55. *Id.*

56. *Id.* at 623.

57. *Id.* (quoting Engle v. Isaac, 456 U.S. 107, 130 n.35 (1982)). *Bousley* relies heavily on *Isaac*, even though that case's holdings arose in a far different context. *Isaac* involved defense counsel's failure to object at trial to state jury instructions that placed the burden of proof on the defense–an issue similar to that in *Ross*. Unlike *Ross*, however, the trial in *Isaac* occurred after numerous *successful* challenges had been raised around the country to burden-shifting, including a challenge in the Supreme Court itself. *Isaac*, 456 U.S. at 131-33 & nn.39-42. By contrast, when *Bailey* was decided, no circuit had held that active employment was required to meet the "using" prong of § 924(c). United States v. Bailey, 36 F.3d 106, 113-14, 120 n.1 (D.C. Cir. 1994) (en banc) (collecting cases) (Williams, J., dissenting).

58. *See* Daniels v. United States, 254 F.3d 1180, 1191 (10th Cir. 2001) (explaining "[w]hile the cause inquiry continues to analyze whether a claim was 'reasonably available' prior to a change in law, the Supreme Court narrowed the broad *Reed* 'novelty' test in *Bousley* . . . .[t]hus, even a futile claim may be 'reasonably available' for 'cause' purposes prior to a change in the law").

unanimity of other courts that had addressed the issue.[59] In *Bousley*, the Court ignores these factors. It states that a lawyer must raise every claim that "'other defense counsel have perceived and litigated,'"[60] whether successfully or not. Nor does it matter that the court in which the appeal is filed has squarely decided the issue against the client's position; to avoid procedural default, the issue must be raised.[61]

As the First Circuit has recognized, strict application of the principles announced in *Bousley* could lead to perverse results.[62] *Bousley*'s prescription appears to encourage litigants "to raise over and over issues seemingly already settled in the circuit."[63] Indeed, the decision appears to emphasize adversely settled issues over issues on which the law remains unclear. According to *Bousley*, an issue on which there is no precedent may be considered "novel" under *Ross*.[64] An issue already litigated and rejected by the courts, however, must be raised to avoid procedural default.[65] "[I]t seems an odd result that a default is not excused where counsel failed to make an objection because the law was squarely against him, but . . . may be excused where there was no controlling precedent against the claim."[66]

The ruling in *Bousley* revives the dilemma addressed by *Ross*, and as a result it poses serious difficulties for criminal appellate lawyers. In gauging whether to raise an issue on appeal, counsel must do more than decide whether the issue has merit under current law. Several lower courts have strictly applied *Bousley*'s procedural default rule, rejecting claims of cause even when the law was unanimously against the defendant's position, and had been for many years.[67] Even if the issue is a loser under today's prece-

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59. Reed v. Ross, 468 U.S. 1, 14 (1984).

60. *Bousley*, 523 U.S. at 623 n.2 (quoting *Isaac*, 456 U.S. at 134).

61. *Id.* at 622-23.

62. Brache v. United States, 165 F.3d 99, 102 (1st Cir. 1999).

63. *Id.* at 103.

64. *Bousley*, 523 U.S. at 622.

65. *Id.* at 623.

66. Simpson v. Matesanz, 175 F.3d 200, 212 (1st Cir. 1999), *cert. denied*, 528 U.S. 1082 (2000).

67. An alarming example of this trend is found in the context of the reinterpretation of the federal drug statutes in the wake of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A number of courts have found that *Apprendi* claims are not so novel as to constitute cause for procedural default, even though "every circuit which had addressed the issue had re-

dent, counsel must speculate whether the court of appeals or the Supreme Court might overturn or modify that law in the future.[68] If so, the issue must be raised to avoid procedural default.[69] As the dissenters in *United States v. Smith*[70] predicted, defense counsel may be forced to raise futile and useless issues under a strict application of *Bousley*.[71] Under a strict application of *Bousley*, "defense counsel will have no choice but to file one 'kitchen sink' brief after another, raising even the most fanciful defenses that could be imagined based on long-term logical implications from existing precedents."[72]

IV. THE FUTURE OF *BOUSLEY*'S HOLDING: *O'SULLIVAN V. BOERCKEL* AND *MASSARO V. UNITED STATES*

While appellate courts and scholars have noted the implications of *Bousley* for appellate defense lawyers,[73] the Court itself did not

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jected the proposition that became the *Apprendi* rule." McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); *see also* United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001) (finding no cause for not raising *Apprendi* claim); United States v. Sanders, 247 F.3d 139, 145-46 (4th Cir. 2001) (denying cause for failure to raise an *Apprendi* claim); United States v. Smith, 241 F.3d 546, 548-49 (7th Cir. 2001) (holding no cause existed for failing to raise an *Apprendi* claim).

68. Such speculation will be difficult at best. For example, how many lawyers could have predicted that the Supreme Court would rule, contrary to all but one of the circuits, that "materiality" is an issue to be decided by the jury, rather than the judge? Yet the Court did reach this conclusion in *United States v. Gaudin*, 515 U.S. 506, 523 (1995), and it has since penalized defendants whose counsel did not have the foresight to raise the issue before *Gaudin* was decided. *See* Johnson v. United States, 520 U.S. 461, 464-65 (1997) (applying plain error standard on appeal because the defendant failed to object to the judge's materiality finding pre-*Gaudin*).

69. It is important to note that, while raising a losing issue under current precedent can be a delicate question of effective advocacy, it is not ordinarily a question of legal ethics. Raising losing issues in good faith is a legitimate function of the appellate lawyer. As the American Bar Association explains, even "if the ground upon which the client seeks relief lacks any legal support or is contravened by existing law, counsel may nonetheless argue for extension, modification, or reversal of existing law." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-8.3, cmt. at 241 (3d ed. 1993). The difference *Bousley* makes is that, while under the ethics rules we *may* raise a losing issue without fear of sanctions, under *Bousley* appellate counsel *must* raise it, or face procedural default.

70. 250 F.3d 1073 (7th Cir. 2001).

71. United States v. Smith, 250 F.3d 1073, 1077 (7th Cir. 2001) (Wood, J., dissenting from denial of rehearing en banc).

72. *Id.*

73. *See* Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROCESS 521, 522

address this issue in reaching its decision. In two more recent decisions, however, the justices have begun to gauge those implications with mixed results. In *O'Sullivan v. Boerckel*,[74] the Court gave little reason to hope that habeas default rules will be tailored to resolve the dilemma faced by attorneys briefing direct appeals.[75] Although *Boerckel* may seem distinguishable from *Bousley*—it involves a different stage of appellate practice, and a different habeas doctrine—its holding presents similarly troubling consequences for selecting issues on appeal. On the other hand, the more recent decision of *Massaro v. United* States[76] offers some comfort to appellate lawyers struggling with the current state of the procedural default doctrine. In *Massaro*, the Supreme Court excused the failure to raise a class of claims from appellate presentation, in part on the ground that an exception was necessary to avoid untoward consequences for appellate advocacy.[77] Thus, while *Boerckel* may have compounded the problems faced by appellate defense lawyers in the wake of *Bousley*, the *Massaro* Court, to some degree, indicated that it understood the problems it had created with its inflexible procedural default rules.[78]

A. Boerckel: *Default and Discretionary Appellate Review*

The Supreme Court's decision in *Boerckel* expands the procedural default rules to apply to failures to take discretionary appeals. Boerckel had been convicted in an Illinois court; he raised seven issues on appeal.[79] After his convictions were affirmed, Boerckel unsuccessfully presented three of the seven issues to the Illinois Supreme Court in a petition for discretionary review.[80] When Boerckel sought federal habeas relief, he included appellate issues that he had omitted from his state supreme court petition. The

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(2002) (urging abandonment of the procedural default doctrine when a criminal defendant was powerless to raise a claim in a lower court).

74. 526 U.S. 838 (1999).

75. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 839 (1999) (indicating that "[f]ederal habeas relief is available to state prisoners *only* after they have exhausted their claims in state court" and that all claims must have been previously addressed by a state court) (emphasis added).

76. 123 S. Ct. 1690 (2003).

77. Massaro v. United States, 123 S. Ct. 1690, 1694-95 (2003).

78. *Id.* at 1696.

79. *Boerckel*, 526 U.S. at 840.

80. *Id.* at 839.

district court found that these issues had been procedurally defaulted, because they had not been raised to the state's highest court.[81]

The Supreme Court agreed. Framing the issue alternatively as one of "exhaustion of remedies" or "procedural default," the Court ruled that state prisoners must give the state courts, including those exercising discretionary review, the "full opportunity to resolve any constitutional issues."[82] The Court rejected Boerckel's argument that presenting all issues to the Illinois Supreme Court was unnecessary because that court considers only "questions of broad significance" and discourages the filing of petitions raising "routine allegations of error."[83] The Court found that, because the Illinois high court is not barred from considering routine issues, criminal defendants must give it the opportunity to hear such issues to avoid defaulting their claims.[84]

Like *Bousley*, *Boerckel* seems to raise the stakes for counsel selecting appellate issues. The strategic arguments for issue selectivity on appeal gain even more force before courts that exercise discretion whether to review a case. Such courts are not "primarily concerned with the correction of errors in lower court decisions."[85] Instead, they consider "'only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.'"[86] Because of the focus on issues of broader import, "only a few questions are worth presenting to" a court with discretionary jurisdiction.[87]

Boerckel tends to undercut these strategic considerations. Despite the obvious value of issue selectivity, *Boerckel* may force attorneys to increase the number of marginal issues they raise to the nation's discretionary courts. As Justice Stevens explained in his dissent, any required multiplication of claims will undermine the

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81. *Id.* at 841-42.

82. *Id.* at 845.

83. *Id.* at 846.

84. *Boerckel*, 526 U.S. at 846-47.

85. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 163 (7th ed. 1993) (quoting Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi.)

86. *Id.* at 164 (citation omitted).

87. *Id.* at 337.

"useful and effective advocacy" that discretionary review is meant to foster:

> "'[W]innowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy." This maxim is even more germane regarding petitions for certiorari. The most helpful and persuasive petitions for certiorari to this Court usually present only one or two issues, and spend a considerable amount of time explaining why those questions of law have sweeping importance and have divided or confused other courts. Given the page limitations that we impose, a litigant cannot write such a petition if he decides, or is required, to raise every claim that might possibly warrant reversal in his particular case.[88]

This problem is exacerbated by the rarity of high court review. Supreme courts, both federal and state, typically agree to hear very few cases.[89] Yet many jurisdictions require appointed counsel to seek such a hearing if the client requests.[90] Given the slim chances of obtaining discretionary review, attorneys required to file requests before the high courts may come to view their primary duty as avoiding default, rather than winning a hearing on the merits.

It is not clear whether *Boerckel* will apply to petitions for certiorari in the U.S. Supreme Court. In this context, the distinction be-

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88. *Boerckel*, 526 U.S. at 858 (Stevens, J., dissenting) (citations and quotation marks omitted).

89. *See id.* at 858 (Breyer, J., dissenting) (noting the low percentage of cases actually granted review by state high courts). The U.S. Supreme Court grants review of only 100 cases each year of the more than 7000 petitions it receives. *See* The Justices' Caseload, *A Brief Overview of the Supreme Court*, *at* http://www.supremecourtus.gov/about/justicecaseload.pdf (noting the infrequent rate at which the Supreme Court grants review of cases). For criminal cases in which counsel has been appointed, the chance of receiving a Supreme Court hearing is less than half of one percent. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 164 (7th ed. 1993).

90. *See, e.g,* U.S. Ct. of App. 5th Cir. 28 U.S.C.A. app. III § 4 (2003) (noting that appointed counsel must file certiorari petition if requested by defendant, unless relieved of duty by court of appeals); U.S. Ct. of App. 1st Cir. Rule 46.5(c), 28 U.S.C.A. (2003) (stating that appointed counsel is responsible for filing a certiorari petition if the client requests and it is reasonable to do so, and that if there are not reasonable grounds for filing a certiorari petition, the attorney must request leave of the court to withdraw); U.S. Ct. of App. D.C. Cir. 28 U.S.C.A. CJA Plan § 4 (2003) (stating that appointed counsel is responsible for filing a certiorari petition if the client requests, and if there are no non-frivolous grounds, counsel must notify the client and explain that he may ask the court to appoint new counsel or file such a petition pro se); IOWA R. CRIM. P. 2.29 (West 2002) (providing the right to appointed counsel to seek state discretionary review). *See generally* Austin v. United States, 513 U.S. 5, 6-7 n.1 (1994) (per curiam) (discussing certiorari requirements of other federal circuit plans).

tween "exhaustion of remedies" and "procedural default" may be important. The exhaustion requirement applies only to habeas challenges to state court convictions.[91] If *Boerckel* is viewed as an exhaustion case, then it may have limited applicability. As Justice Stevens pointed out, however, *Boerckel* actually appears to be about procedural default, not exhaustion.[92] Subsequent decisions have done little to clarify *Boerckel*'s meaning.[93] If *Boerckel* is a procedural default case, then the Court may subsequently find its reasoning just as sound in the context of federal appeals as in state appeals. The Court has repeatedly applied procedural default rules developed in state proceedings to bar claims in federal ones; indeed, *Bousley* is such a case.[94]

B. Massaro: *Raising Ineffective Assistance As an Appellate Claim*

If the *Boerckel* Court seemed determined to limit habeas claims, regardless of the effect on the ability of appellate defense lawyers

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91. 28 U.S.C. § 2254(c) (1994).

92. *Boerckel*, 526 U.S. at 850-53 (Stevens, J., dissenting). The majority seemed to agree with Justice Stevens's analysis on this point. *Id.* at 847-49.

93. *See* Peterson v. Lampert, 319 F.3d 1153, 1156 (9th Cir. 2002) (en banc) (treating *Boerckel* as a procedural default case); *cf.* Edwards v. Carpenter, 529 U.S. 446, 542-53 (2000) (noting "inseparability" of exhaustion and procedural default rules).

94. *See* Bousley v. United States, 523 U.S. 614, 622-24 (1998) (illustrating that procedural default rules in state proceedings bar federal claims). If *Boerckel* is ultimately held to be a procedural default case, its most disturbing consequence may be its effect on ineffective assistance of counsel claims. Currently, it is well settled that ineffective assistance is cause for a procedural default. Coleman v. Thompson, 501 U.S. 722, 753-54 (1991). Accordingly, a defendant who did not raise an issue on appeal can still seek habeas relief if he can show that his lawyer's decision to forego the issue was constitutionally ineffective. Such a showing is difficult at best, per the Supreme Court's holding that "[t]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Murray v. Carrier, 477 U.S. 478, 478 (1986). However, it will be impossible to argue that ineffective assistance excuses procedural default in the context of a petition for discretionary review. Criminal defendants do not have the right to appointed counsel to pursue discretionary appeals. Wainwright v. Torna, 455 U.S. 586, 587 (1982) (per curiam). Absent a constitutional right to counsel, a lawyer's performance, no matter how incompetent, cannot be a Sixth Amendment violation. *Coleman*, 501 U.S. at 752-53. Accordingly, ineffective assistance would not be cause for the procedural default identified in *Boerckel*. *See* Anderson v. Cowan, 227 F.3d 893, 899-901 (7th Cir. 2000) (holding that, under *Boerckel*, the habeas petitioner defaulted his claim by not raising it to Illinois Supreme Court; ineffective assistance could not be cause for this default, as petitioner had no constitutional right to counsel to pursue discretionary review).

to advocate effectively for their clients, the Court in *Massaro* appeared willing to frame its habeas law with effective appellate advocacy in mind.[95] In *Massaro*, the Court resolved a circuit split on the issue of whether a claim of ineffective assistance of counsel could be raised for the first time in a habeas petition. The Second and Seventh Circuits had formerly held that some claims of ineffective assistance of counsel not raised on direct appeal would be subject to the procedural default doctrine.[96] The other circuit courts had rejected this rule and had refused to apply procedural default rules to any ineffective assistance claim.[97] The Supreme Court agreed with the majority rule.[98]

The Court began its opinion by explaining that, while the cause and prejudice standard applied to most claims raised for the first time on collateral review,[99] it was "neither a statutory nor a constitutional requirement," but "a doctrine adhered to by the courts to

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95. Massaro v. United States, 123 S. Ct. 1690, 1693 (2003).

96. *See* Billy-Eko v. United States, 8 F.3d 111, 115 (2d Cir. 1993) (holding that the cause and prejudice standard would only be applied to an ineffective assistance claim raised for the first time on habeas when the defendant was represented by new counsel on appeal and the claim was based on the record made at trial); *see also* Guinan v. United States, 6 F.3d 468, 471 (7th Cir. 1993) (applying a similar rule).

97. *See* United States v. Jake, 281 F.3d 123, 132 n.7 (3d Cir. 2002) (stating that "ineffective assistance of counsel [claims] should ordinarily be raised . . . [under] 28 U.S.C. § 2255 rather than on direct appeal"); United States v. Evans, 272 F.3d 1069, 1093 (8th Cir. 2001) (indicating that ineffective assistance of counsel claims should be raised under § 2255 and not on direct appeal); United States v. Neuhausser, 241 F.3d 460, 474 (6th Cir. 2001) (finding that ineffective assistance claims are improper on direct appeal and should be brought under § 2255); United States v. Richardson, 167 F.3d 621, 626 (D.C. Cir. 1999) (noting that because ineffective assistance claims require evidentiary hearings, the claims are not proper for direct review); United States v. Rivas, 157 F.3d 364, 369 (5th Cir. 1998) (preventing the litigation of ineffective assistance claims on direct appeal, unless they were raised in district court); United States v. Cofske, 157 F.3d 1, 2 (1st Cir. 1998) (per curiam) (opining that an ineffective assistance claim is not permitted on direct appeal); United States v. King, 119 F.3d 290, 295 (4th Cir. 1997) (requiring ineffective assistance claims be raised in district court under § 2255 rather than on direct appeal); United States v. Galloway, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc) (providing that ineffective assistance claims are proper under collateral review, not direct appeal); United States v. Rewald, 889 F.2d 836, 859 (9th Cir. 1989) (demonstrating the court's reluctance to permit a defendant to raise an ineffective assistance of counsel claim on direct appeal); United States v. Griffin, 699 F.2d 1102, 1107-09 (11th Cir. 1983) (requiring ineffective assistance of counsel claim be brought under collateral review rather than direct appeal).

98. *See Massaro*, 123 S. Ct. at 1693 (agreeing that requiring criminal defendants to bring claims of ineffective assistance of counsel on direct appeal does not promote the objectives of the procedural default rule).

99. *Id.*

conserve judicial resources and to respect the law's important interest in the finality of judgments."[100] The Court concluded that these interests would not be promoted by applying the procedural default rules to claims of ineffective assistance.[101]

While some of the Court's reasons for its ruling were specific to the problems of bringing ineffective assistance claims on direct appeal,[102] other reasons for allowing counsel to bring claims for the first time on collateral review seemed to apply more broadly. The Court explained that subjecting ineffective assistance claims to procedural default rules "would create perverse incentives for counsel on direct appeal."[103] "To ensure that a potential ineffective assistance claim is not waived–and to avoid incurring a claim of ineffective [assistance of] counsel at the appellate stage–counsel would be pressured to bring claims of ineffective trial counsel, regardless of merit."[104] This recognition, while certainly apt, is not limited to ineffective assistance claims, a fact noted by Justice Stevens in his *Boerckel* dissent.[105]

While the risk of appellate counsel being found ineffective for failing to raise an issue on appeal is small, counsel is always pressured by the procedural default doctrine, under the rule of *Bousley*, to bring meritless claims in order to preserve them for habeas review.[106] Appellate counsel is in the awkward position of having

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100. *Id.*

101. *Id.*

102. *See id.* at 1694 (discussing whether a direct or collateral appeal is preferable, taking into consideration the purpose of trial records). For example, the Court noted that trial records are not developed for the purpose of ineffective claims. Rather, they are focused on guilt and innocence, "and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis." *Id.* The court also noted that awkwardness could result from appellate counsel's challenge of trial counsel's effectiveness, even when counsel were not the same, stating that "[a]ppellate counsel [will] often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence." *Id.* at 1695.

103. *Massaro*, 123 S. Ct. at 1695.

104. *Id.*

105. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 850-53 (1999) (Stevens, J., dissenting) (providing a general discussion of the exhaustion of remedies in a federal writ of habeas corpus case).

106. *See* Murray v. Carrier, 477 U.S. 478, 487-88 (1986) (pointing out that arguments have repeatedly been made that counsel's failure to raise an argument that was "reasonably available" constitutes ineffective assistance, which would provide cause for procedural

to raise issues directly foreclosed by the governing case law every time there is a possibility the law may change and could then be used to his client's advantage in a habeas petition. The Court, at least in one area of the law, seems to recognize the problems created by *Bousley*, and has attempted to limit them.

Although *Massaro* may offer some hope for relief in the future, criminal defense lawyers must, for now, contend with the unsettled, and unsettling, implications *Bousley* has for appellate practice. "Unless and until the Supreme Court overrules its decisions that futility cannot be cause, laments about those decisions forcing defense counsel to file 'kitchen sink' briefs in order to avoid procedural bars . . . are beside the point."[107]

V. CHOOSING ISSUES IN A *BOUSLEY* WORLD

Given the current legal landscape, lawyers for the time being will have to abandon the simple rule of thumb suggested by *Ross*, replacing it with a far more complicated calculus for determining whether to raise a foreclosed issue. No longer can an attorney decide not to raise an issue simply because the settled law is against him; he will also have to consider how likely it is that the law will remain settled in the future. In making this determination, it will not be enough that all the circuits, or even the Supreme Court, have rejected a claim. *Bousley* and other cases show that the Supreme Court can easily reject a majority, or even a unanimous position of the lower courts,[108] and that the Court can also revisit its own rulings,[109] particularly regarding constitutional issues.[110] The

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default). *But see* Engle v. Isaac, 456 U.S. 107, 133-34 (1981) (indicating that the right to a fair trial and competent attorney does not ensure the recognition and raising of every conceivable claim); *see also* Pitts v. Cook, 923 F.2d 1568, 1573 (11th Cir. 1991) (noting that "there will often be a 'gap' between the spheres of novelty and ineffective assistance of counsel") (citing Pelmer v. White, 877 F.2d 1518, 1523 (11th Cir. 1989)).

107. McCoy v. United States, 266 F.3d 1245, 1259 (11th Cir. 2001) (citation omitted).

108. *See* United States v. Gaudin, 515 U.S. 515, 522-23 (1994) (reversing all but one of the courts of appeals, holding that the jury must decide the issue of "materiality" in an 18 U.S.C. § 1001 prosecution).

109. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (reversing recent Court precedent, holding that the Eighth Amendment does not bar states from allowing victim impact evidence in front of a capital sentencing jury).

110. *See* Agostini v. Felton, 521 U.S. 203, 235 (1997) (contending that the policy underlying *stare decisis* "is at its weakest" when the Supreme Court interprets the Constitution); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (describing *stare decisis* as a policy based on principle rather than an exorable command, which allows the Court to

appellate lawyer will not only have to identify these future issues, but also weigh the benefits of raising the issues against the risk that including them will clog her brief, thereby reducing the chances of the client winning other issues on appeal.[111]

Weighing the possible future benefit of a currently losing issue is made even more complicated by the other obstacles the law places in the way of habeas relief. Procedural default is just one of the many hurdles a habeas petitioner must overcome before she can succeed in a collateral attack. For example, even if her prescient appellate lawyer preserved a previously foreclosed claim, a habeas petitioner cannot win in federal court unless the adverse law has been reversed within one year of her conviction becoming final, the limitations period for seeking habeas relief.[112] For the petitioner to obtain relief, the winning ruling would have to be retroactively applicable,[113] and it would have had to be so prejudicial as to justify collateral relief.[114] Appellate counsel, in deciding whether a fore-

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avoid the constraint of precedent when considering unworkable or badly reasoned governing decisions). "[*S*]*tare decisis* does not prevent . . . overruling a previous decision" when "there has been a significant change in, or subsequent development of, our constitutional law." *Agostini*, 521 U.S. at 235-36. On the contrary, "a decision is properly overruled where 'development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking.'" *Id.* at 236 (citation omitted).

111. One way to reduce this risk is by clearly identifying any foreclosed issue, and indicating to the appellate court that it is raised only to preserve it for possible future review. *See* United States v. Reyes-Maya, 305 F.3d 362, 365 (5th Cir. 2002) (noting that the defendant on direct appeal raised an argument foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1993), so as to meet the preservation requirements of *Bousley*).

112. 28 U.S.C. §§ 2244(d)(1), 2255 (2003). For certain new legal decisions, the one-year limit is tolled. *See* 28 U.S.C. § 2255(3) (2003) (indicating that the limitations period begins to run on the date that a constitutional right is recognized by the Supreme Court, if the rule is newly recognized by the Court and made retroactively applicable to cases on collateral review); 28 U.S.C. § 2244(d)(1)(C) (2003) (stating that the period begins to run on the date that a constitutional right is recognized by the Supreme Court, if that right is newly recognized and made retroactively applicable to cases on collateral review).

113. *See* Teague v. Lane, 489 U.S. 288, 310-11 (1989) (holding that new rules of criminal procedure are not generally retroactive). The scope of *Teague*'s prohibition on collateral relief is far from settled. *Compare* Bousley v. United States, 523 U.S. 614, 620 (1998) (refusing to apply *Teague* to a statutory interpretation of substantive criminal law), *with* United States v. Gonzales, 327 F.3d 416, 421-22 (5th Cir. 2003) (finding that a statutory interpretation based on *Apprendi* could be considered a new procedural rule for *Teague* purposes).

114. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (to justify habeas relief, an error at trial must have "'had substantial and injurious effect or influence in determining the jury's verdict'") (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

closed issue will one day provide the basis for a successful collateral challenge, must consider all these requirements.

VI. CONCLUSION

Although we have tried to identify ways to cope with the difficult choices *Bousley* places on appellate counsel, attorneys will often be required to spend significant time evaluating the effect of *Bousley*'s broad procedural default rule in determining which issues to raise on appeal. In many cases, the rule will require counsel to raise meritless claims in order to preserve them for habeas review.[115] These may be the kind of choices that appellate lawyers are "paid . . . to make,"[116] but the rule nevertheless places them at a disadvantage. An attorney who must spend time evaluating and raising issues directly foreclosed by the governing case law will have less time to evaluate and raise issues that could win the appeal under current law, or even novel issues that could help the client. The latter is the kind of advocacy to which we aspire. But for now, *Bousley* gives us the kind of advocacy with which we must live.

115. *See* United States v. Galloway, 56 F.3d 1239, 1241 (10th Cir. 1995) (noting that the "threat of . . . procedural bar has doubtless resulted in many claims being asserted on direct appeal only to protect the record . . . unnecessarily burden[ing] both the parties and the court").

116. MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 9.08, at 444 (3d ed. 1999).