U.S. Department of Justice
Office of Legal Policy

Report to the Attorney General

Federal Habeas Corpus Review of State Judgments

May 27, 1988

Truth in Criminal Justice Series
Report No. 7

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Washington, D. C. 20530

The function of the criminal justice system might best be summed up as the protection of the innocent. In criminal prosecutions, an extensive system of rights and procedures guards against the conviction of an innocent person. Equally important, enforcement of the criminal law in all its phases -- crime prevention, police investigations, criminal prosecutions and corrections -- also aims at protection of the innocent. By detecting, convicting and punishing those who break our laws, we protect innocent people from the depredations of criminals.

To protect the innocent effectively, the criminal justice system must be devoted to discovering the truth. The truth is the surest protection an innocent defendant can have. Uncovering the truth and presenting it fully and fairly in criminal proceedings is also of critical importance to the effort to restrain and deter those who prey on the innocent.

Over the past thirty years, however, a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process and that require the concealment of relevant facts at trial. This trend has been a cause of grave concern to many Americans, who perceive such rules as being at odds with the goals of the criminal justice system. Within the legal profession and the law enforcement community, debate over these rules has been complicated by disagreements about the extent to which constitutional principles or valid policy concerns require the subordination of the search for truth to other interests.

This report is a contribution to that debate. It was prepared by the Office of Legal Policy, a component of the Department of Justice which acts as a principal policy development body for the Department. At my request, the Office of Legal Policy has undertaken a series of studies on the current status of the truth-seeking function of the criminal justice system.

This volume, "Federal Habeas Corpus Review of State Judgments," is the seventh in that series. It reviews the historical development of the federal habeas corpus jurisdiction; examines the contemporary operation of that jurisdiction as a

means by which lower federal courts review state judgments; and discusses the constitutional and policy considerations affecting the continuation or restriction of this type of review. It also analyzes the prospects for reform in this area, considering both legislative and litigative options.

In light of the general importance of the issues raised in this report and its companion volumes, it is fitting that they be available to the public. They will generate considerable thought on topics of great national importance, and merit the attention of anyone interested in a serious examination of these issues.

Edwin Meese III

EDWIN MEESE III
Attorney General

Executive Summary

Under contemporary practice, a state prisoner who has exhausted his avenues of appeal in the state court system may continue to litigate the validity of his conviction or sentence by applying for habeas corpus in a federal district court. In the habeas corpus proceeding, the prisoner may raise and secure a redetermination of the same claims of federal right that have already been fully litigated and rejected at the multiple levels of adjudication and review in the state court system. In practical effect, this procedure places federal trial judges in the position of reviewing courts, with authority to overturn the considered judgments of state courts of appeals and state supreme courts in criminal cases.

An intelligent assessment of this review jurisdiction must start from a clear understanding of the fact that the contemporary "writ of habeas corpus" by which the lower federal courts review state judgments is not the Great Writ of the Constitution and the common law. Rather, it is a purely statutory remedy that is fundamentally different from the traditional habeas corpus remedy whose suspension is prohibited by the Constitution. The emergence of this non-constitutional remedy as the basis for a quasi-appellate jurisdiction of the lower federal courts in state criminal cases is essentially the result of judicial innovations that have taken place since the 1950's. In Justice Powell's words, the result of this development is that we now have a system of review that "assures no end to the litigation of a criminal conviction," a system that "is viewed with disbelief by lawyers and judges in other countries."

This Report carries out a review of the historical development of the federal habeas corpus jurisdiction; examines its contemporary character and operation; and discusses relevant policy considerations. The Report concludes that federal habeas corpus as a post-conviction remedy for state prisoners should be abolished or limited as far as possible. The limited reform proposals that were passed by the Senate in 1984 and that are currently before Congress as title II of the proposed Criminal Justice Reform Act provide the best immediate prospect for improvement.

In greater detail, the main findings and recommendations of the Report are as follows:

I. History of Habeas Corpus

The right to habeas corpus as understood at common law and by the framers of the Constitution was essentially a right to judicial protection against unlawful executive detention. A person who had been taken into custody by executive authorities could apply to a court to issue a writ of habeas corpus which would direct the custodian to produce the prisoner and state the cause of his commitment. If the government made an adequate return stating that the petitioner was being held on a criminal charge, the court could set bail for the petitioner in cases where bail was legally authorized, and otherwise would allow him to remain in detention pending trial. If the government could state no legal ground for the detention, the court would order his release.

Thus, habeas corpus in its traditional character was essentially a pre-trial remedy which guarded against executive oppression. It could not be used to challenge a person's incarceration pursuant to the judgment of a court unless the judgment was void because the court lacked jurisdiction.

The Constitution's prohibition of suspension of the writ of habeas corpus was intended to perpetuate habeas corpus in its traditional character as a check on lawless incarceration by executive authorities. The right to habeas corpus under the Constitution and under the First Judiciary Act, enacted in 1789, was also only a limitation on the power of the federal government, and had no application to persons detained or incarcerated pursuant to state authority.

In 1867, Congress created an enlarged statutory habeas corpus remedy -- not confined to federal prisoners -- to provide a federal remedy for former slaves who were being held in involuntary servitude in violation of the recently enacted Thirteenth Amendment. The remedy under the Habeas Corpus Act of 1867 was initially applied in a manner consistent with the traditional nature of habeas corpus; it could generally not be used to challenge imprisonment pursuant to the judgment of a competent tribunal. Following *Moore v. Dempsey* in 1923, a somewhat broader approach emerged in the decisions under which relief on federal habeas corpus could be available if no meaningful process existed in the state courts for considering a prisoner's federal claims. Finally, innovative judicial decisions of the 1950's and 1960's effectively transformed federal habeas corpus into a general appellate jurisdiction of the lower federal courts over state criminal judgments by eliminating the conven-

tional limitations on the scope and availability of habeas corpus review and drastically expanding the federal rights of state defendants.

Legislative changes in federal habeas corpus since 1867 have generally been directed to restricting its availability to prisoners in state or local custody. For example, Congress has barred access to federal habeas corpus for persons convicted in the local court system of the District of Columbia; created a presumption of correctness for state court fact-finding in habeas corpus proceedings; and enacted a rule that unreasonably delayed petitions can be dismissed in certain circumstances.

Congress has also given partial approval on a number of occasions to more far-reaching reforms. In 1956, and again in 1958, the House of Representatives passed legislation proposed by the Judicial Conference that would have virtually eliminated federal habeas corpus for state prisoners. In 1968, legislation that would have abolished federal habeas corpus as a post-conviction remedy for state prisoners reached the Senate floor as part of the proposed Omnibus Crime Control and Safe Streets Act. In 1984, the Senate passed by a vote of 67 to 9 legislation supported by the Administration that would create a time limit for habeas corpus applications, narrow the standard of review for previously adjudicated claims, and effect a number of other important reforms. These proposals are currently before Congress as title II of the proposed Criminal Justice Reform Act (S. 1970 and H.R. 3777).

II. The Current Jurisdiction

Habeas corpus applications by state prisoners were a relatively rare occurrence prior to the creation of a quasi-appellate federal habeas corpus jurisdiction by judicial decisions of the 1950's and 1960's. However, they now constitute a major category of federal litigation. In 1941, state prisoners filed 127 habeas corpus petitions in the federal district courts. In 1961, the corresponding figure was 1,020. In 1987, it was 9,542.

More detailed statistical information is available from an extensive empirical study of habeas corpus litigation that was funded by the Department of Justice and completed in 1979. The study indicated that habeas corpus litigation entails substantial burdens for judges and state authorities, but rarely results in the granting of relief to the petitioner. There is no reason to believe that a "better" result is obtained in any

objective sense in the small proportion of cases in which the federal habeas court does reach a different conclusion from the state courts.

The study also indicated that most habeas corpus petitioners had been convicted of serious, violent offenses. Over 80% had been convicted after trial and about the same percentage had had or were having direct appellate review of their cases in the state system. About 45% had pursued collateral remedies in the state courts and over 30% had filed at least one previous federal petition. Thus, federal habeas corpus typically serves to provide additional review for prisoners whose cases have already received an abundance of judicial process in comparison with the average criminal case.

The 1979 study also found extraordinary delays in habeas corpus filings in comparison with normal appellate mechanisms. About 40% of petitions in the study were filed more than five years after conviction and nearly a third were filed more than ten years after conviction. Delays of up to more than fifty years from conviction were noted in some cases in the study.

The problem of delay is particularly acute in capital cases, which are characterized by interminable litigation and re-litigation that impede the execution of death sentences. Thirty-seven states authorize capital punishment and about 2,000 prisoners are currently under sentence of death, but fewer than a hundred executions have occurred in the past twenty years. The federal habeas corpus jurisdiction provides an avenue for obstruction and delay in these cases which the state legislatures are powerless to address.

The Supreme Court in its current habeas corpus decisions has given weight to considerations of finality and federalism that were ignored or shrugged off in the expansive decisions of the 1960's. A number of significant limitations have resulted. For example, *McMann v. Richardson* in 1970 and *Tollett v. Henderson* in 1973 narrowed the range of claims that can be raised on habeas corpus by prisoners who have pled guilty. *Wainwright v. Sykes* in 1977 restricted the raising of claims in federal habeas corpus proceedings that were not properly raised before the state courts. *Stone v. Powell* in 1976 barred consideration of Fourth Amendment exclusionary rule claims by federal habeas courts where state proceedings provide a "full and fair opportunity" to litigate such claims. *Sumner v. Mata* in 1981 strengthened the interpretation and

application of the statutory presumption in favor of deference by federal habeas courts to the factual determinations of state courts.

III. Considerations of Policy

Various contemporary features of the federal habeas corpus jurisdiction reflect a failure of the standards and procedures associated with federal habeas corpus to keep pace with its expanding scope. This expansion has come about almost entirely through judicial innovation, without legislative sanction. No legislature would pass a law stating that a defendant has a right to appeal his conviction, but that he may wait as long as he wishes before doing so. No legislature would pass a law stating that a defendant may appeal again and again if dissatisfied with the results the first time around. No legislature would pass a law stating that a defendant has a right to further mandatory review of a nearly unlimited range of alleged procedural errors that have already been thoroughly considered and rejected by other courts of appeals. Yet all of these characteristics can be found in the current federal habeas corpus jurisdiction.

Proposals for correcting these anomalies are frequently met with the fallacious contention that doing so would interfere with the Great Writ of the common law, whose suspension is prohibited by the Constitution. Contentions of this sort reflect a simple verbal confusion. The common law writ referred to in the Constitution and the contemporary statutory writ by which the lower federal courts review state judgments are not the same. The constitutional "writ of habeas corpus" is a remedy that federal prisoners can use before trial to test the existence of grounds for detention by executive authorities. The current statutory "writ of habeas corpus" is a remedy that state prisoners can use after trial and exhaustion of state appellate remedies to secure additional review of the judgments of state courts. These two writs have fundamentally different functions and are directed against the actions of different governments. They have nothing in common but a name.

Various other arguments have been offered in support of the current system of review of state judgments by the lower federal courts through "habeas corpus." On examination, these arguments generally conceal a one-sided concern with defense interests -- and a correlative disregard of competing public interests and constitutional values -- or an unjustified preference for aggrandizing the lower federal courts at the expense of the state judiciaries, or some combination of these two biases. Both history

and contemporary practice refute the notion that defendants in state proceedings must routinely have access to a federal forum for the adjudication of their federal claims. The argument that habeas corpus review promotes increased fidelity to the Constitution or furthers the interests of justice is also unpersuasive. The notion that habeas corpus litigation provides a beneficial type of "recreational therapy" for prisoners ignores the fact that frivolous and harassing litigation is itself a seriously antisocial activity, and disregards its potential effect of increasing the arrogance of unrepentant criminals.

IV. Reform Options

In 1983, Attorney General William French Smith suggested that the optimum solution to the problems of the federal habeas corpus jurisdiction would be the enactment of legislation abolishing federal habeas corpus as a post-conviction remedy for state prisoners. We agree. A reform of this sort would not affect in any manner the traditional writ of habeas corpus whose suspension is prohibited by the Constitution and would not upset any deep-seated tradition or historically sanctioned practice. State convicts would retain the right to seek direct review of their cases by the Supreme Court following such a reform, in addition to having access to the appellate and collateral review mechanisms provided in the state court systems. The same reform has already been in effect for close to twenty years in the District of Columbia, with no discernible adverse effect on the quality or fairness of criminal proceedings.

A second possibility would be to limit federal habeas corpus to the role of a backstop remedy, whose availability would be conditioned on a state judicial system's failure to provide some meaningful process for raising and deciding a federal claim. This would also constitute a fundamental improvement over the pointless redundancy of the current system.

A final legislative option is limited reform measures focusing on particular problems of abuse or excess that arise under the current system of review. This approach is taken in the reform legislation that was passed by the Senate in 1984 as S. 1763 and that is now before Congress as title II of the proposed Criminal Justice Reform Act (S. 1970 and H.R. 3777). The legislation would create a one-year time limit on habeas corpus applications, normally running from exhaustion of state remedies; establish a relatively simple and uniform standard of review under which the federal habeas court would generally defer to the state

courts' determination of a claim if the determination was reasonable and arrived at by procedures consistent with due process; clarify the standards for entertaining claims that were not properly raised before the state courts; and effect various technical improvements in habeas corpus procedure. These limited reform proposals provide the best immediate prospect for effecting basic improvements over the current system of review.

Finally, it may be possible to achieve some significant improvements through litigation, though the litigative options are constrained by existing statutory standards and settled judicial precedents. The possibilities in this area include securing judicial decisions extending the deferential standard of *Stone v. Powell* -- which now applies to Fourth Amendment exclusionary rule claims -- to *Miranda* and *Massiah* claims; securing the uniform application of restrictive standards concerning the raising of claims that were not properly raised before the state courts; and securing a stronger interpretation of the rule permitting the dismissal of unreasonably delayed petitions.

The proceedings of the [Constitutional] Convention do not cast much direct light on just what the Framers assumed the "privileges" of the writ to be; but it was of course the clear contemporaneous understanding that the fundamental function of the writ was to test executive detention and that convictions by a criminal court of competent jurisdiction could not be reexamined on habeas corpus at all.

-- Hart & Wechsler's
The Federal Courts and the Federal System

Another cause of overload of the federal system is [28 U.S.C.] § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy.

-- Justice Lewis F. Powell

If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court.

-- Justice Sandra Day O'Connor

TABLE OF CONTENTS

FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS

Introduction

The objective of the law in criminal prosecution, the Supreme Court has stated, is twofold: "that guilt shall not escape or innocence suffer." [1] As the earlier reports in this series have documented, the criminal justice system in the United States has, in many areas, lost sight of this simple truth. The process of investigation and adjudication in criminal cases is burdened with rules and procedures that are in conflict with its basic function.

A number of our earlier reports have been concerned with impediments to the search for truth that have their primary impact at the stages of investigation and trial. For example, the police are frequently barred by the *Miranda* rules from engaging in non-coercive, constitutionally proper questioning of suspects. At trial, these rules and other judicially created rules may require that a defendant's pre-trial statements be concealed from the jury, though freely-given, probative, and reliable. Similarly, the search and seizure exclusionary rule requires that the trier be kept ignorant of physical evidence of unquestioned reliability and probative value.[2]

The objectives of accuracy and substantive justice may also be disserved beyond the point of conviction by unsound mechanisms of appeal and review. The government is generally barred from seeking correction by an appellate court when the public is endangered through the erroneous acquittal of a criminal, but review of convictions at the instance of the defendant is, in contrast, essentially open-ended. Under the contemporary operation of the federal habeas corpus jurisdiction, a person convicted of a crime by a state court may repeatedly seek to have his conviction overturned in the lower federal courts, with no particular

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[1] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[2] *See* Office of Legal Policy, *Report on the Law of Pre-Trial Interrogation* 35, 36-37, 43-44, 47-52, 53-56, 62-63, 76-79, 97 & n.157 (1986) (Truth in Criminal Justice Report No. 1); Office of Legal Policy, *Report on the Search and Seizure Exclusionary Rule* (1986) (Truth in Criminal Justice Report No. 2); Office of Legal Policy, *Report on the Sixth Amendment Right to Counsel under the Massiah Line of Cases* (1986) (Truth in Criminal Justice Report No. 3).

limit on how long he may wait before doing so. The grounds on which relief from the state court judgment is sought may cast no doubt on the defendant's factual guilt, and may turn on close or unsettled questions on which the lower federal courts themselves disagree.

The frequent practical effect of this procedure is to convert "the process of review in criminal cases into a kind of interminable game, an open-ended hunt for official error. In this attenuated process the question is not whether an innocent defendant, mistakenly convicted, may enlist the aid of an appellate court in correcting a miscarriage of justice. Rather, it is whether a persistent defendant, however guilty, may eventually get lucky and persuade some judge or court to find error, given unlimited opportunities to do so." [3]

This report examines the process by which we have come to have a system of review which "assures no end to the litigation of a criminal conviction," a system which "is viewed with disbelief by lawyers and judges in other countries." [4] Section I reviews the history of habeas corpus. Section II describes the current federal habeas corpus jurisdiction. Section III discusses pertinent policy considerations. Section IV sets out the possibilities and prospects for reform.

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[3] Remarks of Assistant Attorney General Stephen J. Markman at a Seminar on the Administration of Justice sponsored by the Brookings Institution, Annapolis, Maryland, at 1-2 (Mar. 8, 1986).

[4] Address of Justice Lewis F. Powell before the American Bar Association Division of Judicial Administration, at 9 (Aug. 9, 1982).

I. HISTORY OF HABEAS CORPUS

The right to habeas corpus as understood at common law and by the framers of the Constitution was essentially a right to judicial protection against unlawful executive detention. The habeas corpus remedy could not be used to challenge the detention of a person pursuant to the judgment of a court unless the judgment was void because the court lacked jurisdiction. The Constitution's prohibition of suspension of the writ of habeas corpus was intended to perpetuate habeas corpus in its traditional character as a check on lawless incarceration by executive authorities. The right to habeas corpus under the Constitution and under the First Judiciary Act, enacted in 1789, was also only a limitation on the power of the federal government, and had no application to persons detained or incarcerated pursuant to state authority.

In 1867, Congress created a broader statutory habeas corpus remedy to provide a federal remedy for former slaves who were being held in involuntary servitude in violation of the recently enacted Thirteenth Amendment. While later applications of the statutory remedy went beyond the narrow compass anticipated by its framers, its scope initially remained quite limited. In the initial period of judicial application, the courts generally adhered to the traditional standards under which a prisoner could not challenge his incarceration pursuant to the judgment of a court unless the judgment was void because the court lacked jurisdiction. Following *Frank v. Mangum* in 1915 and *Moore v. Dempsey* in 1923, a somewhat broader inquiry emerged in the decisions under which federal habeas corpus could be available if no meaningful process existed in the state courts for considering a prisoner's federal claims. The final step in the creation of the current habeas corpus jurisdiction came in decisions of the 1950's and 1960's which eliminated the conventional limitations on the scope and availability of habeas corpus review and drastically expanded the federal rights of state defendants. The practical effect of this development has been to create a general appellate jurisdiction of the inferior federal courts in relation to state criminal judgments.

The legislative interventions in the development of the habeas corpus jurisdiction since 1867 have consistently involved restrictions on the availability of federal habeas corpus to prisoners in state or local custody. Congress has barred access to federal habeas corpus for persons convicted in the local court system of the District of Columbia; conditioned appeals from district court denials of habeas corpus petitions

on obtaining a certificate of probable cause; created a presumption of correctness for state court fact-finding in habeas corpus proceedings; and enacted a rule that delayed petitions can be dismissed in certain cases on grounds of "laches." Congress has also given partial approval on a number of occasions to reform proposals that would have virtually abolished federal habeas corpus for state prisoners or enacted more far-reaching limitations on its availability.

A. The Common Law, the Constitution, and the First Judiciary Act

At common law, habeas corpus was essentially a means of securing judicial review of the existence of grounds for executive detention. If a person was taken into custody by executive authorities, he could petition a court to issue a writ of habeas corpus, which would order the custodian to produce the prisoner and state the cause of his commitment. If the government made an adequate return stating that the petitioner was being held on a criminal charge, the court could set bail for the petitioner, or would allow him to be detained pending trial, depending on whether the offense charged was bailable or non-bailable. If the government could state no legal ground for holding the petitioner, the court would order his release.[5]

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[5] *See, e.g.*, Oaks, *Habeas Corpus in the States -- 1776-1865*, 32 U. Chi. L. Rev. 243, 243-45, 262 (1965); Oaks, *Legal History in the High Court -- Habeas Corpus*, 64 Mich. L. Rev. 451, 451, 460-61, 468 (1966); Hart & Wechsler's *The Federal Courts and the Federal System* 1513 (2d ed. 1973); R. Rader, *Bailing Out a Failed Law: The Constitution and Pre-Trial Detention* in P. McGuigan & R. Rader, eds., *Criminal Justice Reform: A Blueprint* 91, 94-96 (1983); *Developments -- Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1042-45 (1970) [hereafter cited as "*Developments*"].

The description in the accompanying text reflects the basic functions of the common law writ of habeas corpus ad subjiciendum (the "Great Writ"). The writ assumed its mature form in the Habeas Corpus Act of 1679, 31 Car. 2, c.2, which strengthened and partially codified the common law procedures for eliciting a statement of charges and enforcing bail rights. The Act exempted persons committed on charges of felony or treason from the benefits of the writ under its general provisions, but prescribed time limits for indicting and trying such persons. *See id.*; Collings, *Habeas Corpus for Convicts -- Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335, 337-38 (1952).

Habeas corpus could also serve some miscellaneous functions in the common law period, such as testing the validity of process under which a person was held before trial, challenging unlawful restraint by private persons, or testing a committing court's jurisdiction. A general survey of early American practice appears in Oaks, *supra* (1965 article).

The importance of habeas corpus in this character -- as a safeguard against arbitrary executive detention -- was recognized by the framers, who included in the Constitution a prohibition of suspending the writ of habeas corpus, "unless when in Cases of Rebellion or Invasion the public safety may require it." The writ of habeas corpus referred to in the Suspension Clause of the Constitution, however, differs in two fundamental respects from the present-day statutory writ by which the lower federal courts review state criminal judgments.

First, the right to habeas corpus set out in the Constitution was only intended as a check on abuses of authority by the federal government, and was not meant to provide a judicial remedy for unlawful detention by state authorities. This point is evident, to begin with, from the placement of the Suspension Clause in Section 9 of Article I of the Constitution, which is an enumeration of limitations on the power of the federal government. The corresponding enumeration of restrictions on state authority in Section 10 of Article I contains no right to habeas corpus.

The same understanding was evident in the debate over the Suspension Clause at the constitutional convention. There was no dissent from the desirability of protecting the right to habeas corpus from federal interference, but the convention divided on whether a proviso should be stated to this general principle that would enable the federal government to suspend the writ in emergency situations. It was assumed in the debate at the convention that the states would remain free to suspend the writ even if the Suspension Clause were adopted in an unqualified form, and it was argued unsuccessfully that this made federal suspension power unnecessary.[6] Shortly after the ratification of the Constitution, the First Congress in 1789 made the restriction of the federal habeas corpus right to federal prisoners explicit, providing in the First Judiciary Act (ch. 14, § 20, 1 Stat. 81-82):

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[6] *See* 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 438 (1966); 3 *id.* at 157, 213, 290. The majority was evidently unpersuaded that the individual states' suspension power would be equal to the exigencies of invasion and rebellion. The minority position also failed to take account of the potential need to suspend the writ in response to rebellion *by* a state, as opposed to rebellion *against* a state. This point assumed reality when the writ was suspended through federal action during the Civil War.

> [T]he justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol [i.e., jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same . . . .

Second, the writ referred to in the Constitution, as noted above, was the common law writ of habeas corpus, whose essential function was to serve as a check on arbitrary executive detention. Recognition of the common law scope of the writ is reflected in the Constitution's authorization of the suspension of the writ in cases of rebellion or invasion, whose obvious purpose was to permit in such circumstances executive detention unconstrained by normal legal processes and standards.[7] As Blackstone explained:

> To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to [jail], where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure . . . . [T]he . . . legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing . . . . [T]his experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.[8]

The framers' conception of habeas corpus as a check on executive abuses and a pre-trial remedy that could be used to elicit a statement of the cause of commitment and enforce bail rights was also reflected in other ways in the materials associated with the adoption and implementation of the Constitution. Before the proviso to the Suspension Clause

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[7] *See* the sources cited in note 6 *supra.*

[8] 1 *Commentaries on the Laws of England* 131-32 (1765).

permitting suspension in cases of rebellion or invasion was voted on at the constitutional convention, a final objection was heard that the suspension authority was unnecessary because judges already had discretion to commit persons or bail them in most important cases.[9] In Federalist No. 84, Hamilton explained the habeas corpus right in the proposed Constitution by citing Blackstone's characterization of habeas corpus as a remedy for arbitrary, secret imprisonment. As noted above, the First Judiciary Act described the function of the writ as "inquiry into the cause of commitment" and referred to its availability to federal prisoners "committed for trial."

B. The Habeas Corpus Act of 1867

Between 1789 and the end of the Civil War, there was little change in the character of federal habeas corpus. In response to particular incidents of state resistance to the execution of federal law and interference with a foreign agent, acts of 1833 and 1842 extended the availability of federal habeas corpus to certain agents of foreign governments and to federal officers detained in the states for acts done in carrying out their duties.[10] In other respects, the First Judiciary Act's limitation of the availability of habeas corpus in the federal courts to persons in federal custody remained operative. The writ's application to federal prisoners continued to be limited to its common law functions.

After the Civil War, however, Congress enacted the Habeas Corpus Act of 1867, which extended the availability of the federal writ to persons "restrained of . . . liberty" in violation of federal law, without any requirement of federal custody. The Act was drafted in response to a resolution of December 19, 1865, of the House of Representatives directing its Judiciary Committee

> to inquire and report to this House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of Congress of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitu-

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[9] 2 M. Farrand, *supra* note 6, at 438.

[10] Meyers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 33 (1965).

tional amendment abolishing slavery.[11]

The "resolution of March 3, 1865" referred to in this directive was a measure pre-dating the Thirteenth Amendment (*see* 13 Stat. 571) which freed the families of Black Union soldiers who lived in areas that were not covered by the earlier Emancipation Proclamation. The reference to the constitutional amendment abolishing slavery was to the Thirteenth Amendment, which went into effect the day before the directive was adopted.

The initial version of the bill resulting from this directive extended the availability of habeas corpus in the federal courts to persons held in "slavery or involuntary servitude," but a later version of the bill, which was eventually enacted, contained the broader "restraint of liberty" language. The probable reason for this language change may be found in the efforts of the slave states to circumvent emancipation by enacting oppressive apprenticeship, contract labor, and vagrancy laws that restrained the liberty of former slaves. The broader language of the final version of the bill would have been more readily applicable to restraints of liberty under these laws than the earlier "slavery or involuntary servitude" version.[12]

The reformulated bill was brought up on the floor of the House of Representatives by Representative Lawrence in the first session of the 39th Congress. The general merits of the proposal were not debated, but Representative Le Blond objected to a proviso in the bill which stated that it was inapplicable to persons held by the military authorities on charges of military offenses or of participation in rebellion against the federal government prior to the passage of the act. Lawrence responded that the bill was not addressed to the situation of persons in military custody. Rather, he explained, the bill was introduced pursuant to the resolution of December 19, 1865 (pp. 7-8 *supra*), and would correct the inadequacy of federal jurisdiction to protect the rights and liberties of the persons referred to in the resolution. Following this brief interchange, the bill was passed by the House.[13]

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[11] Cong. Globe, 39th Cong., 1st Sess. 87 (1865).

[12] *See* Mayers, *supra* note 10, at 34-35, 43-44.

[13] Cong. Globe, 39th Cong., 1st Sess. 4150-51 (1866). *See generally* Mayers, *supra* note 10, at 36-38.

In the Senate, the bill was then brought up by Senator Trumbull, whose discussion of the measure indicated that it was a House bill with which he had limited familiarity. As in the House, the debate was brief, and focused on the proviso relating to persons in military custody and some minor collateral issues. In the course of the debate, Trumbull pointed out that the Judiciary Act of 1789 limited the habeas corpus jurisdiction of the federal courts to persons held under federal laws. He stated that the point of the bill was to extend the availability of federal habeas corpus to persons who might be held under state laws in violation of the Constitution or laws of the United States (Cong. Globe, 39th Cong., 1st Sess. 4228-30). Trumbull's explanation may have been an improvisation based on the face of an unfamiliar proposal,[14] or may have been an unelaborated reference to the state laws which were being used to keep freed slaves in a *de facto* state of servitude.[15] On account of the objections raised about collateral matters in the Senate, the bill was held over. It passed in the next session without further significant debate (Cong. Globe, 39th Cong., 2d Sess. 730, 790).

Overall, the legislative history of the Act shows a clear purpose of providing a federal remedy for emancipated slaves who were being deprived of liberty in the states. It does not show that the creation of a broadly applicable federal remedy for state prisoners was intended or anticipated.[16]

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[14] *See* Mayers, *supra* note 10, at 38-39.

[15] In 1868, while arguing for withdrawal of the Supreme Court's jurisdiction to review the denial of habeas corpus to a person in military custody, Senator Trumbull explained the original purpose of the Act of 1867 as follows (Cong. Globe, 40th Cong., 2d Sess. 2096): "The act of 1789 authorized the issuing of . . . writs in cases where persons were deprived of their liberty under . . . color of authority of the United States. Why, then, was the Act of 1867 passed? It was passed to authorize writs of *habeas corpus* to issue in cases where persons were deprived of their liberty under State laws or pretended State laws. It was the object of the Act of 1867 to . . . meet a class of cases which was arising in the rebel States, where, under pretense of certain State laws, men made free by the Constitution of the United States were virtually being enslaved, and it was also applicable to cases in the State of Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage." *Accord, id.* at 2168 (Representatives Hubbard and Wilson). Maryland was mentioned separately from the "rebel" states in Trumbull's statement because it was a slave state that sided with the Union. *See* Mayers, *supra* note 10, at 43-44, 52 & n. 80.

[16] Some post-enactment statements indicated that the Act of 1867 was adopted to protect Union loyalists or officers, as well as freed slaves, from persecution in the rebel states. *See Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 322 (1867) (argument of Senator

However, the language of the Act -- together with the absence of committee reports and the perfunctory discussion of its purpose on the House and Senate floors -- contained the seeds of later expansive developments. On its face, the enacted bill provided a general authorization for exercising federal habeas corpus jurisdiction for the benefit of persons who were being denied liberty in violation of federal law. In contrast, the initial version of the proposal (*see* p. 8 *supra*) had expressly limited its application to persons held in slavery or involuntary servitude.

This difference in formulation would not have appeared particularly significant at the time of the bill's enactment in 1867. Imprisonment pursuant to the judgment of a court was generally not considered to be in violation of law for purposes of habeas corpus, even if the judgment was predicated on legal error.[17] Moreover, there were virtually no limitations on restraints of liberty in the states under federal constitutional or statutory law, aside from the Thirteenth Amendment and related civil rights legislation: The rights of criminal defendants against the states under the original Constitution were minimal; the Bill of Rights did not apply to the states; and the Fourteenth Amendment had not yet been proposed or ratified.[18] However, with the ensuing expansion of federal procedural rights through constitutional amendment and judicial innova-

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Trumbull as counsel for the government); Cong. Globe, 40th Cong., 2d Sess. 2126 (1868) (Senator Buckalew). This interpretation was initially proffered in the context of efforts to prevent Southern resisters from using the Act to challenge the military governance of the subjugated Confederacy. It may have originated as an afterthought which permitted unfavorable comparisons between the resisters who sought to use the Act and the loyal persons it was meant to protect. *See* Mayers, *supra* note 10, at 48-52 & n. 70. It may also have reflected some confusion between the Habeas Corpus Act and other Reconstruction measures. *See id.* at 39 n. 37; Cong. Globe, 40th Cong., 2d Sess. 2119-20. Even if these post-enactment statements are taken as accurate, however, they show no broader purpose than dealing with specific evils arising from the unique conditions attending Reconstruction.

[17] *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-03 (1830); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 466, 474-75 (1963); Oaks, *supra* note 5, at 262 (1965 article).

In the final stages of the Senate debate on the Habeas Corpus Act, Senator Johnson raised the possibility of an application being made under the Act by a person convicted and imprisoned in a state, but his statements indicate that he was considering the case of a person in federal custody being held within the territory of a state pursuant to the judgment of a federal tribunal that lacked jurisdiction. *See* Cong. Globe, 39th Cong., 2d Sess. 730, 790. Granting relief in such a case would have been consistent with the traditional scope of habeas corpus. *See* pp. 11-12 *infra*.

[18] *See* Mayers, *supra* note 10, at 44-45, 52-55.

tion, the potential resulted for broad federal court review of state criminal judgments, to the extent that the federal courts were willing to abrogate the traditional restrictions on the function of the habeas corpus remedy. The course by which these restrictions were eroded and eventually abandoned is examined in the next part of this report.

C. Subsequent Judicial Developments

The development of the federal habeas corpus jurisdiction subsequent to 1867 falls naturally into three stages. In the initial period, the common law standards generally remained in effect and habeas corpus could not be used to challenge a conviction entered by a court of competent jurisdiction. In the course of the second period, the jurisdictional standard was supplanted by a general approach under which the availability of federal habeas corpus would depend on whether the state had provided some meaningful process for considering a defendant's federal claims. In the third period, innovative decisions of the 1950's and 1960's effectively converted the federal habeas corpus jurisdiction into a general appellate jurisdiction of the inferior federal courts in relation to state criminal judgments.

1. The Jurisdictional Standard

As discussed earlier, the essential function of the common law habeas corpus remedy that was incorporated into the Constitution was to guard against abuses of executive power affecting personal liberty. Imprisonment pursuant to the judgment of a court could accordingly not be challenged through a habeas corpus application. The only significant qualification to this principle was that the question of a committing court's jurisdiction could be raised in a habeas corpus proceeding, reflecting the view that a judgment entered without jurisdiction was a nullity.[19]

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[19] *See, e.g., Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-03 (1830); Oaks, *supra* note 5, at 261-62 (1965 article). Even jurisdictional challenges were often effectively precluded by a presumption that a court of general jurisdiction acted within the scope of its authority. A broader inquiry was authorized in relation to the judgments of "inferior" courts under a rule that the jurisdiction of such a court must be shown affirmatively. However, "inferior" courts in the relevant sense only included certain courts of limited jurisdiction -- for example, a court martial might be so classified -- and did not include the regular lower federal courts or state courts of general jurisdiction. *See Ex parte Watkins*, 28 U.S. at 203-05, 207-09; W. Church, *A Treatise on the Writ of Habeas Corpus* §§ 266-68 (2d ed. 1893).

a. Federal Prisoners

The Supreme Court consistently applied these common law principles in relation to federal prisoners in its early decisions under the First Judiciary Act. For example, in *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-03 (1830), the Supreme Court refused to consider the merits of a habeas corpus application alleging that the petitioner had been convicted pursuant to a defective indictment. The Court explained:

> A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be . . . . It puts an end to inquiry concerning the fact, by deciding it . . . . An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

The enactment of the Habeas Corpus Act of 1867 made it possible for federal prisoners to point to that Act, as well as to the original habeas corpus provisions of the First Judiciary Act, as the basis for their applications. This did not, however, result in any change in the scope of the writ. Federal convicts were still confined to the assertion of jurisdictional defects.[20]

Post-Civil War cases involving federal prisoners did, however, generate some extension of the notion of a "jurisdictional" defect.[21] The Supreme Court held in *Ex parte Siebold*, 100 U.S. 371, 375-77 (1879), that a conviction pursuant to an unconstitutional statute could be attacked on habeas corpus, stating that "[a]n unconstitutional law is void, and is as no law," and that "if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." This

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[20]This was consistent with the intent behind the 1867 Act. Federal habeas corpus had been available to federal prisoners under settled common law standards from the beginning of the nation, and both the House and Senate managers of the 1867 Act emphasized that its purpose was to create an enlarged jurisdiction for the benefit of certain persons who were "restrained of . . . liberty" in the states (*see* pp. 8-9 *supra*). They presumably would have taken it for granted that the traditional standards would continue to apply in any overlapping application of the new jurisdiction to federal prisoners.

[21]*See* Bator, *supra* note 17, at 465-74; *Developments*, *supra* note 5, at 1045-48.

doctrine, as the cited passages indicate, reflected the notion that a prosecution pursuant to an invalid statute was tantamount to a prosecution carried out without any kind of legal authority. The late nineteenth century cases also reflected a greater willingness to grant review by habeas corpus where a claim implicated the sentencing authority of the committing court.[22]

The tendency to apply an extended notion of "jurisdiction" in certain areas apparently resulted in part from the pressures generated by the general preclusion of appellate review in federal criminal cases during most of the nineteenth century. Even this limited extension of habeas corpus review was curtailed after federal defendants were given the right to appeal.[23] Throughout this period, the general rule continued to be that a conviction would not be overturned in a habeas corpus proceeding if the court rendering the judgment had the authority to hear and decide the case.[24]

b. State Prisoners

In relation to state prisoners, it became apparent in the early cases that the text of the 1867 Act provided inadequate guidance concerning the exercise of the enlarged federal habeas corpus jurisdiction it had created. State defendants filed petitions under the Act while state proceedings were underway or after they had been concluded, but the Act contained no provision concerning deference to prior state adjudications or pending state proceedings. Rather, it provided simply that the district court was to find the facts in a summary fashion on the basis of the testimony and arguments of the interested parties.

These features of the Habeas Corpus Act become more understandable when one considers its narrow original purpose. The typical case anticipated by the Act's framers would not have been that of a defendant in a state prosecution, but of an emancipated slave who was unlawfully being kept in a state of servitude by a private slaveholder, perhaps under the purported authority of a state statute re-designating the slave as an "apprentice" or holding him to a labor contract under threat of criminal sanctions. In such a case, the question of deference to state judicial

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[22] *See* Bator, *supra* note 17, at 467-68, 471-72.

[23] *See id.* at 473-74 (rejection in early twentieth century cases of habeas corpus review of constitutionality of criminal statutes).

[24] *See id.* at 471-74, 483-84.

processes would not arise. Moreover, the Civil Rights Act of 1866 authorized the removal of state proceedings to federal court as protection against violations of its provisions by state authorities.[25] Thus, there already existed in 1867 a more complete protection against violations of the narrow range of existing federal rights in state prosecutions. This would also have tended to eliminate any reason for the framers of the Habeas Corpus Act to anticipate or make provision for the case of a defendant who asserted violations of federal rights in state judicial proceedings.[26]

Hence, the state defendant who sought relief under the Habeas Corpus Act presented a case whose procedural ramifications had not been addressed in the formulation of the statute. When cases of this sort did subsequently arise, the Supreme Court adopted two doctrines in dealing with them.

First, the Court held that the power conferred by the Habeas Corpus Act should ordinarily not be exercised until the state courts had had an opportunity to address the petitioner's allegations in the normal course of state proceedings. The doctrine was first articulated by the Court in *Ex parte Royall*, 117 U.S. 241 (1886), which rejected a petitioner's pre-trial challenge to his detention on a state indictment pursuant to an allegedly unconstitutional statute. The doctrine deriving from *Ex parte Royall* and its progeny, termed the requirement of "exhaustion of state remedies," is now codified as 28 U.S.C. § 2254(b)-(c).

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[25] The Civil Rights Act conferred national citizenship on blacks and provided for equality of civil rights regardless of race. Section 3 of the Act authorized removal to federal court of state proceedings against persons who were denied or could not enforce in the state courts the rights secured by the Act, and state proceedings against officers for acts done pursuant to the Civil Rights Act or the Freedmen's Bureau Act. *See* Act of April 9, 1866, 39th Cong., 1st Sess., ch. 31, 14 Stat. 27.

[26] *See* Mayers, *supra* note 10, at 43-48.

The only reference to the effect of state proceedings in the Act of 1867 was a provision declaring "null and void" state proceedings relating to the subject of a habeas corpus petition which took place while habeas corpus proceedings or appeals therefrom were underway, or after a final judgment in such proceedings discharging the petitioner. Considering the general purpose of the Act, the obvious point of this provision was to prevent a slaveholder from invoking state judicial processes to regain custody of the slave after habeas corpus proceedings had been instituted. *See id.* at 47-48.

Second, in cases involving state prisoners -- as in cases involving federal prisoners -- the jurisdictional standard was applied, following the traditional understanding of the nature and function of the habeas corpus remedy. In the absence of a jurisdictional defect, violations of a defendant's constitutional rights in state proceedings were not grounds for relief in federal habeas corpus proceedings.[27]

2. Adequacy of State Processes

The second stage in the development of the statutory habeas corpus remedy -- in which the jurisdictional standard of review was ultimately abandoned -- arose from the decisions of *Frank v. Mangum*, 237 U.S. 309 (1915), and *Moore v. Dempsey*, 261 U.S. 86 (1923).

In *Frank v. Mangum*, the petitioner argued that relief on federal habeas corpus should be available because the state proceedings involved denials of due process -- specifically, mob influence on the trial and the defendant's absence from the court when the verdict was returned -- that were sufficient to divest the trial court of jurisdiction and make the judgment against the defendant a nullity (237 U.S. at 318-23). The Supreme Court rejected this argument on the ground that the petitioner had not established that he had been subjected to any denial of due process.[28] In addressing these issues, the Court emphasized that the state proceedings as a whole had to be considered, including the "corrective process" provided by the state for considering the trial irregularities alleged by the petitioner. In light of the state courts' consideration and rejection of the petitioner's contentions in the context of new trial motions and appeals to the state supreme court, the Court found that no

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[27] *See* Bator, *supra* note 17, at 478-84; *Developments*, *supra* note 5, at 1048-50; *Fay v. Noia*, 372 U.S. 391, 452-54 (1963) (Harlan, J., dissenting). The extended notion of a "jurisdictional" defect encompassing the unconstitutionality of the governing statute was also applied in cases involving state prisoners. *See* Bator, *supra*, at 479-80; *Developments*, *supra*, at 1049.

[28] The Court assumed that a due processs violation would constitute a "jurisdictional" defect because the Fourteenth Amendment denies the state authority (jurisdiction) to deprive a person of life or liberty without due process. *See* 237 U.S. at 326-28, 331-32. However, this did not entail any broad scope of review because of the narrowness of the general concept of due process at that time -- notice and an opportunity to be heard before a competent tribunal -- and because of the Court's insistence that the whole course of the state proceedings must be considered in determining whether adequate process had been provided. *See id.* at 326-27, 335-36, 340.

due process violation had occurred.[29]

Eight years later, the Court invoked the *Frank* decision's standards in holding that another mob-domination claim could properly be reviewed on habeas corpus. *Moore v. Dempsey*, 261 U.S. 86 (1923), involved several black defendants who had been convicted of murder and sentenced to death in a situation of widespread racial conflict and violence in Arkansas. The Supreme Court of Arkansas upheld the convictions with an essentially conclusory rejection of the defendants' allegations of mob domination at trial.[30]

The defendants then applied for federal habeas corpus on the ground that "the proceedings in the State Court, although a trial in form, were only a form, and that the [defendants] were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law" (261 U.S. at 87). The district court dismissed the petition. The Supreme Court overturned the dismissal, holding that federal habeas review was properly available, in the absence of adequate state corrective process, to examine a claim that the state trial was a sham proceeding conducted under mob domination (261 U.S. at 90-92):

> In *Frank v. Mangum*. . . it was recognized of course that if in fact a trial is dominated by a mob . . . and . . . "if the State, supplying no corrective process, carries into execution a judgment . . . produced by mob domination, the State deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law . . . are not to be corrected in that way. But if the case is that the whole proceeding is a mask -- that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility

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[29]The "corrective process" point was emphasized in rejecting the claim of mob-domination. The claim relating to the defendant's absence at the end of the trial was rejected on the ground that the state could validly treat it as waived in light of the procedural history of the case (237 U.S. at 338-44).

[30]*See* Bator, *supra* note 17, at 488-89.

> that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights . . . . We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.

The specific holding in *Moore v. Dempsey* was narrow,[31] and later habeas corpus decisions continued for some time to speak the language of "jurisdictional" error. As a practical matter, however, cases following *Moore* showed a greater receptivity toward utilizing habeas corpus as a means of reviewing claims which could not be raised or considered by other means.[32] In *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942), the Court held explicitly that non-jurisdictional claims could be entertained in certain circumstances in habeas corpus proceedings.[33]

It must be emphasized, however, that the relaxation of standards in this period did not immediately result in a quasi-appellate habeas corpus jurisdiction. *Moore v. Dempsey* itself had observed that "[i]t certainly is true that mere mistakes of law . . . are not to be corrected" by habeas corpus,[34] and much later decisions continued to reflect a conception of habeas corpus as a backstop remedy which would only come into play if

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[31] The Court's decision in *Moore* is intelligible in terms of common law habeas corpus standards. It apparently reflected the view that the general rule against challenging the results of a judicial proceeding on habeas corpus did not apply if there had been no real judicial proceeding. There was evidence that the trial court had effectively acted as an instrument of the mob, rather than as a judicial forum in any realistic sense, making the proceedings "void." *Cf. Ashe v. Valotta*, 270 U.S. 424, 426 (1926) (in *Moore* there was allegedly "only the form of a court under the domination of a mob").

[32] *See Mooney v. Holohan*, 294 U.S. 103 (1935); *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938).

[33] *Waley* involved a habeas corpus petition by a federal prisoner who alleged that his guilty plea was coerced. The Court held that the claim could be raised on habeas corpus because the alleged threats against the petitioner were off the record and could not be considered on appeal (316 U.S. at 104-05).

[34] 261 U.S. at 91; *see Knewel v. Egan*, 268 U.S. 442, 445-47 (1925) ("*habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged . . . the judgment of state courts in criminal cases will not be reviewed on *habeas corpus* merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted").

its unavailability would effectively leave the petitioner with no possible remedy.[35] The general approach of the period was summed up by the Court in *Ex parte Hawk*, 321 U.S. 114, 118 (1944):

> Where the state courts have considered and adjudicated the merits of [a petitioner's] contentions . . . a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated . . . . But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney v. Holohan*. . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore v. Dempsey*, 261 U.S. 86; *Ex parte Davis*, 318 U.S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless.[36]

3. Creation of a Quasi-Appellate Habeas Corpus Jurisdiction

The final stage in the expansion of the federal habeas corpus jurisdiction came in the decisions of *Brown v. Allen*, 344 U.S. 443 (1953), *Townsend v. Sain*, 372 U.S. 293 (1963), and *Fay v. Noia*, 372 U.S. 391 (1963). These decisions abrogated the conventional limitations on the habeas corpus remedy and also provided that habeas corpus review was not to be subject to the normal constraints applicable in direct review by appellate courts. In conjunction with the expansion of substantive constitutional rights by decisions of the 1960's, this created a general reviewing jurisdiction of the inferior federal courts over the judgments of state courts in criminal cases.

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[35] *See* Bator, *supra* note 17, at 493-99.

[36] The facts of the cases cited in relation to potentially appropriate circumstances for habeas corpus review were as follows: In *Mooney v. Holohan*, 294 U.S. 103 (1935), the petitioner alleged that his conviction was solely based on the prosecution's knowing use of perjurious testimony, and that the factual basis of this claim could not have been discovered through reasonable diligence prior to his new trial motion and state appeal. It was unclear whether this type of claim could be raised under any state remedy. *Moore v. Dempsey* was the mob-domination case discussed at pp. 16-17 *supra*. In *Ex parte Davis*, the petitioner alleged that he could not pursue a state appeal because the state would not provide a free transcript of a trial court proceeding and he could not afford to pay for a transcript.

a. Expansion of the Scope of Review

Brown v. Allen involved state prisoners whose claims of discrimination in jury selection and coerced confessions had been considered and rejected in state proceedings. The Supreme Court nevertheless reexamined the merits of the prisoners' claims before affirming the state judgments when they were brought up on habeas corpus. In the words of Professor Henry Hart, the decision "manifestly broke new ground":

> [The decision] seems to say that due process of law in the case of state prisoners is not primarily concerned with the adequacy of the state's corrective process or of the prisoner's personal opportunity to avail himself of this process . . . but relates essentially to the avoidance in the end of any underlying constitutional error.[37]

In its specific formulation, *Brown v. Allen* involved two major opinions -- the formal opinion of the court authored by Justice Reed, and a separate opinion by Justice Frankfurter.[38] Justice Reed's opinion for the Court was characterized by a certain vagueness in its treatment of the standard-of-review issue. The Court noted that a state court's determination of a petitioner's claims was not *res judicata*, but emphasized that a federal court had discretion to reject a petition on the state record if satisfied that "the state process has given fair consideration . . . and has resulted in a satisfactory conclusion," and that no hearing "on the merits, facts or law" was required if the court was "satisfied that federal constitutional rights have been protected" (344 U.S. at 458, 463- 64). In turning to the specific claims raised in the case, the Court stated that it was reviewing the district court's conclusion that the state "accorded petitioners a fair adjudication of their federal questions" (344 U.S. at 465), but it then proceeded to carry out a detailed consideration of the merits of those questions.

Justice Frankfurter's opinion was far more emphatic in its specification of the duties of a federal habeas court in reviewing a state judgment. State fact-finding could be relied on, he stated, in the absence of some

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[37] *Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 106 (1959).

[38] Justice Frankfurter wrote formally for the Court only on the effect in a habeas corpus proceeding of a prior denial of certiorari by the Supreme Court. *See* 344 U.S. at 451-52. However, four other Justices apparently agreed with the general views expressed in his opinion. *See id.* at 488, 497, 513.

"vital flaw" in the state process, but Congress has "commanded" federal district judges to exercise independent judgment concerning questions of law and the application of law to fact (344 U.S. at 506-09):

> State adjudications of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide . . . .
>
> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge . . . . Although there is no need for the federal judge . . . to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right . . . .
>
> These standards . . . preserve the full implication of the requirement of Congress that the District Judge decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts. Congress has . . . seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus.

Unfortunately, Justice Frankfurter failed to explain the provenance of the legislative mandate that a federal trial judge reconsider the substantive accuracy of state court determinations of such questions and that he override those determinations whenever he happens to disagree with them. No such purpose can be inferred from the legislative history of the Habeas Corpus Act of 1867, and Congress never subsequently voiced any objection to the far narrower standards of review that had been applied in innumerable decisions by the Supreme Court and lower federal courts between 1867 and 1953.

The legislative history of the version of the habeas corpus statutes that was before the Court in *Brown v. Allen* -- enacted as part of the 1948 revision of the Judicial Code -- also did not provide any support for the legislative "command" discerned by Justice Frankfurter. Rather, it showed an assumption that a prisoner could seek federal habeas corpus relief if he was denied a "fair adjudication" of his federal claims in state proceedings.[39] This was not the quasi-appellate standard of *Brown v. Allen*, but the adequacy-of-state-process standard that had emerged in decisions following *Moore v. Dempsey*.

Finally, Justice Frankfurter failed to explain why Congress -- which allegedly had mandated that federal trial judges protect constitutional rights by automatically re-determining relevant non-factual issues -- nevertheless left the same judges with discretion to let possible constitutional violations go by if they resulted from erroneous state court determinations of the facts relevant to the resolution of a constitutional claim.[40]

The last major steps in the expansion of the habeas corpus jurisdiction came in 1963, with the decisions of *Townsend v. Sain*, 372 U.S. 293, and *Fay v. Noia*, 372 U.S. 391.

In *Townsend*, the Court replaced the rather diffuse pronouncements of *Brown v. Allen* concerning the discretion of district judges to defer to state fact-finding with a detailed set of limitations on the authority of federal habeas courts to respect state court determinations. Specifically, the Court held that a new evidentiary hearing would have to be held by the habeas court whenever "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence;

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[39]The House bill contained explicit "fair adjudication" language in proposed 28 U.S.C. § 2254. The House Committee Report, H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947), characterized this as declaratory of existing law as set out in *Ex parte Hawk* (*see* pp. 17-18 *supra*), a decision that gave a particularly clear statement of the principle of deference to adequate state processes. The Senate deleted this language and made other changes because the House formulation conflated the standard of review and the exhaustion requirement and because it was assumed that review under the fair adjudication standard would be available in any event following exhaustion of state remedies. *See* S. Rep. No. 1559, 80th Cong., 2d Sess. 9 (1948).

[40]*See generally* Bator, *supra* note 17, at 502.

(5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing" (293 U.S. at 313). The Court in *Townsend* also stated that the district judge may not defer to the state courts' findings of law and must independently apply federal law to the facts, indicating that these points had been settled by Justice Frankfurter's opinion in *Brown v. Allen* (293 U.S. at 318).

Finally, in *Fay v. Noia,* the Court addressed the question of when federal habeas courts could consider claims that had not been raised before the state courts in conformity with applicable state procedural rules. Proceeding under remarkable misconceptions concerning the historical function of habeas corpus,[41] the Court held that procedural defaults which would bar raising a claim on direct review would not be accorded the same effect in habeas corpus proceedings. Rather, a claim could be denied on such grounds only if a petitioner "deliberately by-passed" state procedures, and even in such a case, entertaining the claim would remain within the discretionary authority of the federal habeas judge.

b. Expansion of Substantive Rights

Thus, by the early 1960's, the Supreme Court had removed practically all significant limitations on the ability of federal district courts to entertain and review federal claims raised by state prisoners in habeas corpus proceedings.

The effect of these innovations was vastly magnified by the concomitant increase in the federal rights that were available for assertion. The Court's caselaw of the 1960's was characterized by unprecedented expansions of the general concept of constitutional due process; innovative decisions which held, contrary to earlier precedent, that most of the specific procedural provisions of the Bill of Rights applied in state proceedings; and expansive interpretations and extensions of those provisions. The general effect of this development was to eliminate state discretion with respect to most basic questions of criminal procedure, and to make it possible to dress up almost any sort of alleged

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[41] *See* Oaks, *supra* note 5 (1966 article); Mayers, *supra* note 10; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 170-71 (1970); Hart & Wechsler's *The Federal Courts and the Federal System* 1465-66 (2d ed. 1973).

procedural irregularity or error as a constitutional claim. As Judge Friendly has observed:

> [T]he limitation of collateral attack to "constitutional" grounds has become almost meaningless . . . .
>
> The dimensions of the problem of collateral attack today are a consequence of two developments. One has been the Supreme Court's imposition of the rules of the fourth, fifth, sixth and eighth amendments concerning unreasonable searches and seizures, double jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, assistance of counsel, and cruel and unusual punishments, upon state criminal trials. The other has been a tendency to read these provisions with ever increasing breadth . . . . The result of these two developments has been a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis.
>
> Any claimed violation of the hearsay rule is now regularly presented not as a mere trial error but as an infringement of the sixth amendment right to confrontation. Denial of adequate opportunity for impeachment would seem as much a violation of the confrontation clause as other restrictions on cross-examination have been held to be. Refusal to give the name and address of an informer can be cast as a denial of the sixth amendment's guarantee of "compulsory process for obtaining witnesses." Inflammatory summations or an erroneous charge on the prosecution's burden of proof become denials of due process. So are errors in identification procedures. Instructing a deadlocked jury of its duty to attempt to reach a verdict or undue participation by the judge in the examination of witnesses can be characterized as violations of the sixth amendment right to a jury trial. Examples could readily be multiplied. Today it is the rare criminal appeal that does *not* involve a "constitutional" claim . . . .
>
> Whatever may have been true when the Bill of Rights was read to protect a state criminal defendant only if the state had acted in a manner "repugnant to the conscience of

> mankind," the rule prevailing when *Brown v. Allen* was decided, the "constitutional" label no longer assists in appraising how far society should go in permitting relitigation of criminal convictions.[42]

In conjunction with the elimination of constraints on the scope and availability of habeas corpus review, the pervasive constitutionalization of state procedure effectively converted the federal habeas corpus jurisdiction into a general review jurisdiction of the inferior federal courts in relation to state criminal judgments. While the claims that could be asserted were still limited to "constitutional" claims, the relative trivialization of the concept of constitutional error tended to deprive this constraint of practical significance.

D. Subsequent Legislative Developments

Following the enactment of the Habeas Corpus Act of 1867, Congress has never moved ahead of the courts in extending the scope or availability of federal habeas corpus. Its interventions in this area have primarily been directed to limiting or offsetting the effects of judicial innovations that resulted in an increased availability of federal habeas corpus.

The earliest and best-known restriction of the federal habeas corpus jurisdiction following the Civil War resulted from the case of *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). The Reconstruction Act of 1867 (Act of March 2, 1867, ch. 153, § 3, 14 Stat. 428) divided the rebel states into military districts and authorized the use of military commissions or tribunals to control the civilian population in the subjugated areas. The framers of the Habeas Corpus Act of 1867 had sought to guard against its use by persons in military custody through an express proviso in the legislation, but the proviso only exempted from the Act's coverage persons held for military offenses or for "having aided or abetted rebellion . . . prior to the passage of this act." This did not, by its terms, apply to acts of resistance subsequent to the passage of the Habeas Corpus Act, and Southern resisters promptly attempted to take advantage of the loophole.

McCardle, a civilian held in custody by the military authorities for trial by a military commission, was denied a writ by a federal district

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[42] Friendly, *supra* note 41, at 149, 155-57.

court, and appealed the denial to the Supreme Court. Concerned that the Supreme Court might hold the Reconstruction scheme unconstitutional, Congress divested the Court of jurisdiction over appeals under the Habeas Corpus Act of 1867. The Court upheld the validity of this restriction in *Ex parte McCardle, supra*, and dismissed the appeal. The Court's review jurisdiction under the Act was not restored until 1885.[43]

While the earliest legislative restriction of habeas corpus under the Act of 1867 related to a federal prisoner, the focus of subsequent concerns has been state prisoners' use of the Act to challenge their convictions. As early as 1884, a House Judiciary Committee Report (H.R. Rep. No. 730, 48th Cong., 1st Sess.) strongly criticized the practice of lower federal courts under the Act of entertaining challenges to state convictions. In the Committee's view, the Act was part of the legislative response to the danger to Union loyalists and resistance to emancipation that existed in the Confederacy following the Civil War, and was not meant to give the inferior federal courts the authority to overturn the judgments of state courts. However, the Committee declined to take any direct action against this type of review on the grounds that the "special causes" which had motivated the Act's adoption might still exist to some extent, and that restoring the Supreme Court's appellate jurisdiction might be adequate to secure a satisfactory construction of the Act.

In the current century, a number of significant restrictions on federal habeas corpus have been enacted, and more far-reaching reforms have received partial approval by Congress on a number of occasions. Measures currently in effect and other reform efforts will be discussed separately.

1. Reforms Currently in Effect

Under the provisions of 28 U.S.C. § 2553 and Fed. R. App. P. 22, a state prisoner is barred from appealing the denial of habeas corpus by a district court unless a circuit judge or district judge certifies that there is probable cause for the appeal. This requirement derives from an enactment of 1908 whose specific purpose was to curb the use of habeas corpus appeals and the associated stay of state proceedings to delay the execution of capital sentences. It currently serves the general purpose of avoiding the need for a full-dress appeal where the petitioner cannot

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[43] *See* Mayers, *supra* note 10, at 41 & n. 44, 51 & n. 76.

make a substantial showing of a denial of a federal right.[44]

In 1966, Congress enacted 28 U.S.C. § 2254(d), which creates a presumption of correctness for state court fact-finding in habeas corpus proceedings if certain conditions are satisfied, and provides that the petitioner has the burden of overcoming this presumption by "convincing evidence." This goes beyond the rule of *Townsend v. Sain* (*see* pp. 21-22 *supra*), which only held that a habeas court could dispense with an evidentiary hearing in certain circumstances.[45]

In 1976, Congress adopted Rule 9(a) as part of a general set of procedural rules for habeas corpus proceedings. The rule provides that a petition may be dismissed if the state has been prejudiced in its ability to respond by delay in filing unless the petitioner shows that the petition is based on grounds he could not have discovered through reasonable diligence before the circumstances prejudicial to the state occurred. This overturned judicial precedents which held that petitions could not be dismissed on grounds of delay ("laches").[46]

In addition to the foregoing reforms affecting state prisoners, two noteworthy changes affecting the habeas corpus right of federal prisoners have been brought about through legislation.

First, in the 1948 revision of the Judicial Code, Congress replaced habeas corpus as a post-conviction remedy for federal prisoners with a statutory motion remedy codified as 28 U.S.C. § 2255. The rule of habeas corpus procedure requiring a prisoner to apply to the court having

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[44] *See generally Barefoot v. Estelle*, 463 U.S. 880, 892-93 & n.3 (1983).

The utility of the certificate-of-probable-cause requirement has been limited by the vesting of authority in district judges as well as circuit judges to grant certification, and by its inapplicability to appeals in collateral proceedings involving federal prisoners. Proposed remedial legislation is discussed at p. 64 *infra*.

[45] Section 2254(d) was enacted as part of legislation proposed by the Judicial Conference that also contained restrictions relating to repetitive applications (now § 2244(b)-(c)). The Committee Reports are S. Rep. No. 1797, 89th Cong., 2d Sess., and H.R. Rep. No. 1892, 89th Cong., 2d Sess.

The utility of the § 2254(d) presumption has been limited by the fact that it only applies to purely factual determinations and by the vagueness of some of the statutory conditions on the application of the presumption. Proposed remedial legislation is discussed at p. 63 *infra*.

[46] The background, interpretation, and limitations of Rule 9(a) are discussed at pp. 69-71 *infra*.

jurisdiction over the place where he is incarcerated had resulted in a concentration of habeas corpus petitions in the judicial districts containing major federal prisons. Section 2255 effected a more equitable distribution of prisoner litigation among the district courts by providing instead that a prisoner must apply to the court that sentenced him. It did not change the substantive standards governing applications for collateral relief by federal prisoners, but did tend to ensure that applications for such relief would be made in the district where pertinent records and witnesses are most readily available, "where the facts with regard to the procedure followed are known to court officials, and where the United States Attorney who prosecuted the case will be at hand to see that these facts are fairly presented." [47]

Second, in establishing a separate court system for the District of Columbia in 1970, Congress barred D.C. prisoners from seeking habeas corpus in the federal courts, limiting them instead to a collateral remedy in the D.C. courts. The practical effect of this reform is that prisoners in D.C. have no access to the lower federal courts to review their convictions or sentences, but such review remains available for persons convicted in the substantially similar court systems of the states. The Supreme Court upheld the constitutionality of this reform in *Swain v. Pressley*, 430 U.S. 372 (1977).[48] The significance of the experience in D.C. is further discussed in a later portion of this report (pp. 57-59 *infra*).

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[47] Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 175, 178 (1949); *United States v. Hayman*, 342 U.S. 205, 212-19, 220-21 (1952).

[48] The Court rejected the argument that the motion remedy under the D.C. Code is an inadequate substitute for habeas corpus because the D.C. judges (like most state judges) lack life tenure. *See* 430 U.S. at 381-83. The Court also relied on the fact that the Code preserves the potential availability of habeas corpus where the motion remedy "is inadequate or ineffective to test the legality of . . . detention." However, this qualification has proven to be essentially theoretical. No decision has found the local remedy inadequate or ineffective to examine alleged errors at the trial level. *See generally Garris v. Lindsay*, 794 F.2d 722 (D.C. Cir. 1986). *Streater v. Jackson*, 691 F.2d 1026 (D.C. Cir. 1982), raised the possibility that a D.C. prisoner's claim of ineffective assistance of counsel on appeal might be considered on federal habeas corpus in light of the unavailability of the statutory motion remedy to review appellate proceedings, but the federal petition was dismissed in light of the D.C. Court of Appeals' subsequent rejection of the petitioner's claims. *See Streater v. United States*, 478 A.2d 1055 (D.C. App. 1984).

2. Other Reform Efforts

In the 1948 revision of the Judicial Code, the requirement of exhaustion of state remedies in habeas corpus proceedings was codified in 28 U.S.C. § 2254. The codification, after stating that access to federal habeas was generally barred unless state remedies were exhausted, went on to specify:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The enactment of this provision -- now § 2254(c) -- was the culmination of efforts by the Judicial Conference in the course of the 1940's to secure the limitation of federal habeas corpus for state prisoners.[49] Judge Parker, who chaired the Judicial Conference's habeas corpus committee and played the leading role in its work on this legislation, explained that the provision would generally bar access to federal habeas corpus in any state which permitted repetitive recourse to its collateral remedies. He also expressed the view that this would have the practical effect of abolishing federal habeas corpus as a post-conviction remedy for state prisoners across the board:

> The effect of this . . . provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts; for, in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court . . . on application for certiorari . . . . [T]here should be no more cases where proceedings of state courts, affirmed by the highest courts of the state, . . . will be reviewed by federal circuit or district judges.[50]

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[49] *See generally* Parker, *supra* note 47; *Reports of the Judicial Conference of the United States* 22-23 (1943), 22 (1944), 28 (1945), 21 (1946), 46 (April 1947), 17-18 (Sept. 1947).

[50] Parker, *supra* note 47, at 175-78.

Notwithstanding the unequivocal language of the provision of § 2254(c) and Judge Parker's observations concerning its meaning, the Supreme Court in *Brown v. Allen* refused to give it effect (344 U.S. at 447-50), and held that exhaustion does not require repetitive recourse to state remedies. In reaching this result, the Court stated that it was unwilling to accept so radical a change from prior habeas practice without "a definite congressional direction."

Shortly after *Brown v. Allen*, the Judicial Conference tried again. The legislation it proposed this time provided that a federal habeas corpus application by a person in custody pursuant to the judgment of a state court could be entertained

> only on a ground which presents a substantial Federal constitutional question (1) which was not theretofore raised and determined, (2) which there was no fair and adequate opportunity theretofore to raise and have determined, and (3) which cannot thereafter be raised and determined in a proceeding in the State court, by an order or judgment subject to review by the Supreme Court of the United States on writ of certiorari.[51]

This proposal was supported by the Judicial Conference, the Conference of (State) Chief Justices, the National Association of Attorneys General, the section on judicial administration of the American Bar Association, and the Department of Justice.[52] Following hearings in the first session of the 84th Congress before a subcommittee of the House Judiciary Committee,[53] it was voted out by the Judiciary Committee (H.R. Rep. No. 1200) and passed by the House of Representatives on Jan. 19, 1956 (102 Cong. Rec. 935-40). It was passed a second time by the House of Representatives on March 18, 1958 (104 Cong. Rec. 4668, 4671-75).

In the course of Congress's consideration of this proposal, the proponents of the legislation pointed out that the use of habeas corpus as a writ of review was a recent development that was unrelated to its historical function. The general purpose of the legislation was to bar

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[51] *Habeas Corpus*: Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 84th Cong., 1st Sess. 1 (1955).

[52] *See id.* at 7.

[53] Cited in note 51 *supra*.

access to habeas corpus in the inferior federal courts whenever a means was available for raising a claim and creating a record for Supreme Court review in the state courts. It was argued that this reform would correct the increased caseload burdens, indefinite prolongation of litigation, delay in carrying out capital sentences, and conflict between the state and federal judiciaries that had resulted from the recent expansions of federal habeas corpus. It was also noted that legislation to the same effect had been enacted in the 1948 revision of the Judicial Code, and that the new legislation was necessitated by the Supreme Court's refusal in *Brown v. Allen* (*see* pp. 28-29 *supra*) to give effect to this reform in the absence of a clearer expression of legislative intent (102 Cong. Rec. 935-36, 939).

Despite repeated passage in the House, the Judicial Conference's proposal was never brought to a vote in the Senate. In contrast, the next "abolition" proposal that made significant progress in Congress originated in the Senate. Title II of the proposed Omnibus Crime Control and Safe Streets of 1968 was formulated as a general response to Warren Court activism in the criminal justice area.[54] It contained provisions designed to overturn *Miranda v. Arizona* and other Supreme Court decisions barring the use of traditionally admissible evidence, and also contained a provision, proposed 28 U.S.C. § 2256, which would have abolished federal habeas corpus as a post-conviction remedy for state prisoners:

> The judgment of a court of a State . . . in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed, vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior [federal] court . . . shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or writ of certiorari granted to review, a determination made with respect to such judgment upon review thereof by the highest court of that State having jurisdiction to review such judgment.[55]

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[54]Title II is generally discussed in the first Report in this series. *See* Office of Legal Policy, *Report on the Law of Pre-Trial Interrogation* 64-67 (1986).

[55]114 Cong. Rec. 14182.

The bill was voted out by the Senate Judiciary Committee. The Committee Report stated that the proposal relating to habeas corpus would correct the problems of delay and abuse resulting from recent Supreme Court decisions that had transformed habeas corpus into a quasi-appellate mechanism. In supporting the constitutionality of the reform, the Report noted that the constitutional writ of habeas corpus was only a means of eliciting a statement of the grounds for detention and could not be used to challenge a conviction by a court with jurisdiction; that the Constitution's preservation of the habeas corpus right only operates against the federal government and not the states; and that the Habeas Corpus Act of 1867 was only enacted as a means of enforcing the Thirteenth Amendment.[56]

Following extensive debate on the Senate floor, a compromise was reached under which the anti-*Miranda* provisions of the legislation -- now 18 U.S.C. § 3501 -- were retained, but proposed 28 U.S.C. § 2256 and the other provisions of Title II restricting federal court jurisdiction were deleted.[57]

The contemporary focus of legislative reform efforts has been bills based on a set of limited reform proposals that Attorney General William French Smith initially transmitted to Congress in 1982.[58] The current reform proposals would establish a one-year time limit on habeas corpus applications by state prisoners, normally running from exhaustion of state remedies; narrow the standard of review in habeas corpus proceedings; clarify the circumstances under which claims that were not properly raised before the state courts can be raised in habeas corpus proceedings; make technical improvements in habeas corpus procedure; and institute certain comparable reforms in the collateral remedy for federal prisoners. The nature and rationale of these proposals are more fully discussed in a later portion of this Report (pp. 61-64 *infra*).

These proposals were approved by the Senate Judiciary Committee and passed by the full Senate in 1984 by a vote of 67 to 9.[59] In the 99th

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[56] *See* 1968 U.S. Code Cong. & Admin News 2150-53.

[57] *See* Report, *supra* note 54, at 66-67.

[58] *See generally The Habeas Corpus Reform Act of 1982*: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982).

[59] In the 98th Congress, the proposals were transmitted by the President to Congress as title VI of the proposed Comprehensive Crime Control Act. Following hearings, *see Comprehensive Crime Control Act of 1983*: Hearings on S. 829 Before the Subcomm. on

Congress (1985-86) they were not brought to a vote in the Senate because of filibustering by opponents of the legislation at Senate Judiciary Committee mark-ups.[60] In the House of Representatives they have been introduced with broad sponsorship in various bills,[61] which have invariably been buried at the subcommittee level in the House Judiciary Committee. No significant action has occurred in the House because of opposition by the House leadership.

In the current (100th) Congress, the reform proposals have recently been transmitted to Congress again by the President as title II of the proposed Criminal Justice Reform Act (H.R. 3777 and S. 1970).

II. THE CURRENT JURISDICTION

Justice Robert Jackson, in his separate opinion in *Brown v. Allen*, complained that judicial expansions of the federal habeas corpus jurisdiction were resulting in "floods of stale, frivolous and repetitious petitions [which] inundate the docket of the lower courts and swell our own" (344 U.S. at 536). The "flood" to which Justice Jackson referred consisted of 541 petitions in the preceding year (1952). In comparison, 9,542 federal habeas corpus petitions were filed by state prisoners in the most recent reporting year (ending June 30, 1987). As these figures indicate, habeas corpus applications were a relatively rare occurrence prior to the creation of a quasi-appellate federal habeas corpus jurisdiction by judicial decisions of the 1950's and 1960's, but now constitute a major category of federal litigation. More detailed statistical and quantitative information is set out in the first part of this section.

While the volume of habeas corpus litigation has grown in recent years, the marked tendency of the Supreme Court's decisions since the start of the 1970's has been to draw back from the heady expansion of inferior federal court review of state judgments that characterized the Court's habeas corpus jurisprudence of the 1960's. The most significant

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Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 16-17, 32-41, 160-65 (1983), the proposals were voted out by the Senate Judiciary Committee as a separate bill (S. 1763), *see* S. Rep. No. 226, 98th Cong., 1st Sess. (1983), and passed by the Senate, *see* 130 Cong. Rec. 1854-72 (1984).

[60]There was an additional hearing in the 99th Congress. *See Habeas Corpus Reform*: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985).

[61]*E.g.*, H.R. 5594 of the 98th Congress.

decisions of the current period are described briefly in the second part of this section.

A. Empirical Findings

Information concerning the volume of habeas corpus applications and other federal litigation is available in the Annual Reports of the Director of the Administrative Office of the U.S. Courts. As noted above, these figures show that large-scale habeas corpus litigation by state prisoners is a recent phenomenon in historical terms. In 1941 there were 127 petitions. In 1961 there were 1,020. The number of applications thereafter increased astronomically in the course of the 1960's, reaching 9,063 in 1970; subsided in the early 1970's, reaching a low of 6,866 in 1977; and has since increased fairly steadily. The figures for habeas corpus petitions filed by state prisoners in the federal district courts over the past ten years are as follows:[62]

1978	1979	1980	1981	1982	1983
7,033	7,123	7,031	7,790	8,059	8,532

1984	1985	1986	1987
8,349	8,534	9,045	9,542

More detailed statistical information is available from a study of habeas corpus litigation that was funded by the Justice Department and

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[62]The figures in the text are drawn from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. The aggregate figures for state prisoner habeas corpus petitions include, in addition to normal petitions in which jurisdiction is predicated on claimed violations of federal rights ("federal question" petitions), a small number of petitions by prisoners in United States territories where the federal courts have jurisdiction over local criminal matters ("local jurisdiction" petitions). For example, the 1987 figure of 9,542 comprised 9,524 "federal question" petitions and 18 "local jurisdiction" petitions, and the 1986 figure of 9,045 comprised 9,040 "federal question" petitions and 5 "local jurisdiction" petitions. In addition to reporting 9,542 habeas corpus petitions by state prisoners, the most recent report (1987) noted 1,808 habeas corpus petitions and 1,664 "motions to vacate sentence" by federal prisoners (Table C2).

A tabular summary of the volume of prisoner litigation between 1961 and 1982 appears in S. Rep. No. 226, 98th Cong., lst Sess. 4 n.11 (1983). A more comprehensive summary of statistical data relating to habeas corpus litigation appears in Special Report of the Bureau of Justice Statistics, *Federal Review of State Prisoner Petitions : Habeas Corpus* (March 1984) [hereafter cited as "Statistical Report"].

completed in 1979. The study, carried out by Professor Paul Robinson, examined a sample containing 1,899 petitions filed between 1975 and 1977, which comprised about one-eighth of all habeas corpus applications filed in the country in the relevant period.[63] The general picture of habeas corpus litigation that emerges from the available empirical data and other factual information is as follows:

1. Workload and Results

The work involved in processing habeas corpus cases constitutes a substantial burden on state officials and the court system. In connection with a typical petition, the state is required to transmit records and to respond to the legal and factual contentions raised by the petitioner. The district court must review the record to the extent necessary and redetermine each claim that is properly presented, working from the evidentiary basis set out in the record together with the submissions and arguments of the parties. Frequently the district court's decision is appealed, resulting in additional work for judges, state officials and defense counsel at the level of the federal courts of appeals.[64] Since a prisoner is required to exhaust state remedies before seeking federal habeas corpus, the lure of an additional level of review in the federal courts -- in which claims rejected at the state level are open to relitigation -- results in increased recourse to state remedies. The availability of federal habeas corpus accordingly increases the workload of the state courts as well as the federal courts.[65]

Despite the substantial expenditure of prosecutorial and judicial resources entailed in habeas corpus litigation, the normal outcome is dismissal of the petition or affirmance of the state judgment. In the 1979 study, only 3.2% of petitions resulted in any form of relief and only 1.7%

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[63] The findings of the study were initially reported in P. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* (Federal Justice Research Program 1979). The data gathered in the study was later independently analyzed in Allen, Schachtman, & Wilson, *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 Rutgers L. Rev. 675 (1982). A concise summary of the main findings of these reports appears in Statistical Report, *supra* note 62, at 5-7.

[64] *See* P. Robinson, *supra* note 63, at 21-23; *The Habeas Corpus Reform Act of 1982*: Hearing on S.2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 42-44 (1982); *Comprehensive Crime Control Act of 1983*: Hearings on S.829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 41 (1983).

[65] *See generally* Friendly, *supra* note 41, at 144 n. 10.

resulted in an order directing release from custody.[66] Even these low figures cannot be taken as reliable indications of the "benefits" of habeas corpus review, since there is no reason to believe that the federal court determination in such cases is generally "better" than the contrary state judgment it supersedes. In purely descriptive terms, a successful petition normally means only that a federal trial judge disagreed with a number of state trial and appellate judges.[67] The judgmental or subjective nature of the determinations required is suggested by the large differences observed in the 1979 study between the granting rates for different federal judges -- a small number of judges accounted for a large proportion of successful petitions.[68] As Judge Friendly has observed:

> In the vast majority of cases we agree with the state courts . . . . In the few where we disagree, I feel no assurance that the federal determination is superior . . . . [W]e do not know how many of these [successful habeas] cases represented prisoners . . . whom society has grievously wronged . . . or how many were black with guilt. The assumption that many of them fall in the former category is wholly unsupported.[69]

In considering the low incidence of successful petitions, an analysis of the study data concluded that "[i]f one considers only the statistically measurable benefits of habeas review, they appear to be outweighed by the costs of expansive habeas review." [70]

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[66] *See* P. Robinson, *supra* note 63, at 4(c), 14.

[67] Even where an appellate panel affirms the granting of a writ, the issue remains one of disagreement among federal and state judges who are equally bound to uphold the Constitution and federal law. *See generally* pp. 42-49 *infra*.

[68] *See* P. Robinson, *supra* note 63, at 53 (out of 51 judges who handled state habeas petitions, three judges accounted for 29.9% of all petitions granted and twelve judges accounted for over two-thirds of all petitions granted).

[69] Friendly, *supra* note 41, at 165 n. 125, 148 & n. 25; *see Brown v. Allen*, 344 U.S. 443, 540 (1953) (opinion of Jackson, J.) ("Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal . . . is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.").

[70] Allan, Schachtman, & Wilson, *supra* note 63, at 683. *But cf. id.* at 683-90 (noting non-quantitative costs and benefits alleged for habeas corpus review). These non-quantitative considerations are examined at pp. 40-53 *infra*.

2. Character of Petitioners and Prior Proceedings

The 1979 study indicated that habeas corpus petitioners constitute a highly atypical class of prisoners. Most petitioners had been convicted of serious, violent offenses. Over 80% had been convicted after trial, and practically the same proportion had had, or were having, direct appellate review of their cases in the state system. Moreover, about 45% of petitioners had pursued collateral remedies in the state courts, including over 20% who had filed two or more previous state petitions. Over 30% of petitioners had filed at least one previous federal petition.[71]

In contrast, the vast majority of state defendants plead guilty and have no trial or appeal. Thus, habeas corpus typically operates as a mechanism for providing additional review to prisoners whose cases have already received an abundance of judicial process in comparison with the average criminal case.

3. Delay in Filing

Another finding of the 1979 study is that there are frequently enormous delays between the conclusion of the normal adjudicatory process in the state courts and the filing of a habeas corpus petition. About 40% of the petitions in the study were filed more than five years after conviction and nearly a third were filed more than ten years after conviction. Still longer delays were noted in some cases in the study, up to more than fifty years from the time of conviction.[72]

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[71] *See* P. Robinson, *supra* note 63, at 4(a), 7, 15. Even where a petitioner has not had prior state court review of his claims, this does not imply that means for raising such claims are unavailable in the state courts. Prisoners frequently by-pass state remedies and file procedurally defective habeas corpus petitions. *See id.* at 13.

[72] *See* Allen, Schachtman, & Wilson, *supra* note 63, at 703-04. The cited report's characterization of this data as showing that "lengthy delay . . . rarely occurs," *see id.*, is idiosyncratic.

Legitimate post-conviction delays in filing of up to a few years can result from the exhaustion requirement, but this cannot account with any frequency for time intervals exceeding a decade, which the study found to be common. The average time prisoners took to exhaust state remedies was 2.8 years from conviction. *See id.* at 705. This average figure would actually exaggerate the time necessary to complete the state review process, since it would be inflated by cases in which prisoners failed to pursue certain claims at trial or on direct review and then delayed a number of years before presenting them on collateral attack in the state system.

Delays of the length and frequency noted in the report also cannot be explained on the

The tolerance shown in habeas corpus proceedings for lengthy delays in seeking review is particularly striking in comparison with other procedures for seeking review or re-opening of criminal judgments in the federal courts, which are subject to definite time limits. Federal defendants, for example, generally must decide whether to appeal within ten days (Fed. R. App. P. 4(b)); state convicts seeking direct review of their convictions in the Supreme Court generally must apply within sixty days (Sup. Ct. R. 20); and even a federal prisoner who claims to have new evidence of his innocence discovered after trial is subject to a two-year time limit on seeking a new trial under Fed. R. Crim. P. 33.

The problem of delay has been particularly acute in capital cases. In such cases, the continuation of litigation prevents the sentence from being carried out. While thirty-seven states currently authorize capital punishment, and about 2,000 prisoners are currently under sentence of death, the typical capital case is characterized by interminable litigation and re-litigation, and fewer than a hundred executions have been carried out in the past twenty years.[73] The federal habeas corpus jurisdiction provides an avenue for obstruction and delay in these cases which the states are powerless to address. Attorney General William French Smith has observed:

> [T]he inefficiency of current court procedures has resulted in a de facto nullification of the decisions of most state legislatures to impose capital punishment for some crimes. The "public interest" organizations that routinely involve themselves in the litigation carried on in capital cases have fully exploited the system's potential for obstruction. Delay is maximized by deferring collateral attack until the eve of execution. Once a

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basis of petitions challenging events that occurred some time after conviction, such as parole denial or revocation. Petitions of this sort were a small part of all petitions in the study; nearly a third of all petitions were filed more than ten years after conviction, but the average time intervals for petitions challenging post-conviction events were far less than that; and the average delay in the various districts covered by the study was not correlated with the incidence of such petitions. *See id.* at 703-04 n. 103, 706 & nn. 109-10.

[73] NAACP Legal Defense and Educational Fund, *Death Row, U.S.A.* (Nov. 1, 1987). A general analysis of the problem of dilatory habeas corpus litigation in capital cases appears in Statement of Associate Deputy Attorney General Paul Cassell concerning Habeas Corpus and Capital Punishment Litigation before the Subcomm. on Government Information, Justice, and Agriculture of the House Comm. on Government Operations (Feb. 26, 1988) (hearing held in Madison, Florida).

> stay of execution has been obtained, the possibility of carrying out the sentence is foreclosed for additional years as the case works its way through the multiple layers of appeal and review in the state and federal courts.
>
> The solution to this problem lies in part in the reform of state court procedures . . . . The efficacy of state reforms is severely limited, however, by the availability of federal habeas corpus, which cannot be limited by the state legislatures . . . . It . . . prevents correction of the practical nullification of all capital punishment legislation that has resulted from litigational delay and obstruction.[74]

Overall, the available data provides a more definite empirical content to Justice Jackson's characterization of habeas corpus petitions as "stale, frivolous and repetitious." The delays involved in habeas corpus litigation greatly exceed those allowed under any other appellate mechanism, the prospect of success is slight, and the review that is provided generally amounts to another round on claims that have already been thoroughly worked over in the state courts.

B. Recent Judicial Decisions

The Supreme Court, in its current habeas corpus jurisprudence, has given weight to considerations of finality and federalism that were ignored or shrugged off in the expansive decisions of the 1960's. While the Court's ability to make changes in this area is constrained by precedent and existing statutory provisions, some noteworthy limitations have emerged in recent decisions. The most important decisions include the following:

First, the decisions in *McMann v. Richardson*, 397 U.S. 759 (1970), and *Tollett v. Henderson*, 411 U.S. 258 (1973), generally limit a defendant

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[74] Smith, *Proposals for Habeas Corpus Reform*, in P. McGuigan & R. Rader, eds., *Criminal Justice Reform: A Blueprint* 137, 145-46 (1983).

Executions have resumed on a significant basis within the past few years, though the number carried out remains a minute fraction of the number of prisoners under capital sentence. The causes of this development presumably include the Supreme Court's resolution of various issues in its capital punishment caselaw whose uncertainty had previously impeded executions, and a toughening of the Court's stance toward delay in capital cases through habeas corpus litigation. *See generally Barefoot v. Estelle*, 463 U.S. 880 (1983).

challenging a guilty plea in a habeas corpus proceeding to the claim that he was denied effective assistance of counsel in connection with the plea. This normally precludes challenges to pleas based on alleged antecedent violations of constitutional rights, such as a claim that the plea resulted from a coerced confession obtained at an earlier point.

Second, the Court has narrowed the grounds for excusing procedural defaults in habeas corpus proceedings. Under normal standards of appellate review, claims that are not properly raised in a proceeding in a lower court are generally barred on review. Nevertheless, *Fay v. Noia*, 372 U.S. 391 (1963), held that a failure to raise a claim in conformity with state procedural rules would not justify dismissing the claim in a subsequent federal habeas corpus proceeding unless the defendant "deliberately bypassed" state procedures (*see* p. 22 *supra*). *Fay v. Noia* 's rejection of all ordinary concepts of finality and orderly procedure has since been repudiated by the Court, which held in *Wainwright v. Sykes*, 433 U.S. 72 (1977), that procedural defaults will generally not be excused unless the petitioner establishes "cause" for the default and "prejudice" resulting from the alleged violation. Later decisions have generally given narrow readings of the notion of "cause," holding, for example, that an attorney's error in failing to raise a claim is not "cause" in the relevant sense unless it was so serious as to amount to constitutionally ineffective assistance of counsel.[75]

Third, in *Stone v. Powell*, 428 U.S. 465 (1976), the Court held that Fourth Amendment exclusionary rule claims cannot be raised on federal habeas corpus, so long as a "full and fair opportunity" to litigate the claim was provided in state proceedings. As a practical matter, this generally bars review of Fourth Amendment claims in habeas corpus proceedings.[76]

Fourth, the decision in *Sumner v. Mata*, 449 U.S. 539 (1981), put teeth in 28 U.S.C. § 2254(d)'s general rule of deference to state court fact-finding (*see* p. 26 *supra*). It required lower federal courts to identify the specific statutory criterion that was not satisfied in cases in which the presumption of correctness for state fact-finding is not applied, and to explain the basis for the conclusion that the criterion was not satisfied.

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[75] The most recent and comprehensive explication of the "cause and prejudice" standard appears in *Murray v. Carrier*, 477 U.S. 478 (1986).

[76] *See* Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 Colum. L. Rev. 1 (1982).

III. CONSIDERATIONS OF POLICY

Federal habeas corpus operates today as a quasi-appellate mechanism by which the litigation of state criminal cases can be continued and indefinitely prolonged in the lower federal courts. While it is generally taken for granted that one appeal as a matter of right beyond the trial stage satisfies the interest in fairness to the individual litigant, habeas corpus provides additional mandatory review beyond the various levels of direct review and collateral review in the state court systems. While federal review of the judgments of state courts has traditionally been confined to direct review in the Supreme Court, the current habeas corpus jurisdiction enables individual federal trial judges to overturn the considered judgments of state supreme courts in criminal cases.

A particularly striking feature of the current system is the failure of the standards and procedures associated with federal habeas corpus to keep pace with its expanding scope. If habeas corpus is limited to providing a judicial check on arbitrary detention by executive authorities -- the basic scope of the "habeas corpus" right under the Constitution (*see* pp. 4-7 *supra*) -- there is no need for time limits or rules concerning deference to prior judicial determinations. If a statutory habeas corpus remedy authorizes original proceedings in the federal district courts to challenge the continued enslavement of blacks in violation of the post-Civil War emancipation (*see* pp. 7-11 *supra*), there is similarly no need or place for any particular constraints on the proceedings.

However, once habeas corpus has been transformed into a regular appellate mechanism -- by which state prisoners may obtain additional review of claims that have already been considered and rejected at multiple levels of the state court system -- the result is an essentially redundant litigative process which imposes costs and strains that would not be tolerated in any other context. No legislature would pass a law stating that a defendant has a right to appeal, but that he may wait as long as he wishes before doing so. No legislature would pass a law stating that a defendant may appeal again and again if dissatisfied with the results the first time around. No legislature would pass a law stating that a defendant has a right to further mandatory review of a nearly unlimited range of alleged procedural errors that have already been thoroughly considered and rejected by other courts of appeals. Yet all of these characteristics can be found in the current federal habeas corpus

jurisdiction.[77]

To the extent that this extraordinary type of review is to be retained, one would expect to find some extraordinary justification for doing so. The policy considerations bearing on this question will be examined in the remainder of this section.

A. Traditional Reverence for the Great Writ and its Constitutional Status

Proposals for modifying the existing scope of federal habeas corpus are frequently met with confused arguments that such proposals would interfere with the Great Writ of the common law, whose suspension is prohibited by the Constitution outside of extreme situations of public emergency. The traditional esteem of habeas corpus, it is argued, precludes or at least strongly militates against any reform that would impair its scope or availability.[78]

Arguments of this sort do not rise above the level of a simple logical fallacy -- the fallacy of equivocation[79] -- because the common law writ referred to in the Constitution and the contemporary statutory writ by which lower federal courts review state judgments are distinct remedies that, in fact, have nothing to do with each other. The constitutional "writ of habeas corpus" is a remedy that federal prisoners can use before trial to test the existence of grounds for detention by executive authorities.[80] The current statutory "writ of habeas corpus" is a remedy that state

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[77] As discussed elsewhere in this Report, there is no time limit on habeas corpus applications and the restriction of the claims raised to federal questions has become largely meaningless (pp. 22-24, 36-37 *supra*). Delay in filing is constrained only by the "laches" doctrine of 28 U.S.C. § 2254 Rule 9(a). Under Rule 9(b), grounds for relief rejected on the merits in an earlier federal petition may be dismissed if presented again in a successive petition, but dismissal on this basis is a matter of discretion and grounds not previously presented can be dismissed only if their earlier omission "constituted an abuse of the writ."

[78] *See, e.g.*, Friendly, *supra* note 41, at 142, 170-71 (noting and responding to argument).

[79] "Equivocation" involves drawing specious inferences by using a term with a particular meaning at one point in an argument and using the same term with another meaning at a different point in the argument. This occurs in arguments which infer that the contemporary statutory "habeas corpus" remedy should not be restricted because the common law revered and the Constitution protects a different "habeas corpus" remedy.

[80] *See* pp. 4-7 *supra*. As a practical matter, there is virtually never any need to use the constitutional writ in contemporary criminal cases because other rules and mechanisms

prisoners can use after trial and exhaustion of state appellate remedies to secure additional review of judicially imposed detention.

The only discernible similarities between these two remedies are that (1) they have the same name, and (2) both can be used -- albeit in completely different circumstances -- to seek relief from detention or incarceration which is alleged to be legally unjustified. Similarity (1) is purely verbal, and similarity (2) would apply equally to all other mechanisms for reviewing or re-opening criminal judgments, such as ordinary appeals and new trial motions. No one has yet suggested that the use of appeals and new trial motions to challenge convictions and imprisonment transforms them into "habeas corpus" in the constitutional sense. The grounds for identifying the current statutory habeas corpus remedy with the traditional writ safeguarded by the Constitution are equally insubstantial.

B. The Right to a Federal Forum

Another argument commonly offered in support of the existing habeas corpus jurisdiction is that a person asserting a federal claim has a right to have access to a federal forum for the adjudication of that claim.[81]

The short answer to this argument is that the Constitution itself and historical practice are inconsistent with the existence of such a right. The constitutional convention was divided on the question whether lower federal courts should be established, and accordingly left the matter to Congress's discretion. Since the Constitution does not require that lower federal courts exist at all, there can be no right of access to such courts for any particular claim.[82]

In terms of historical practice, the general federal question jurisdiction of the federal courts is a late nineteenth century development. Prior to that time, litigants asserting claims under the federal Constitution or federal laws were frequently limited to filing suit in state court, and even

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have developed which ensure that an arrestee will be promptly notified of the charges against him and brought to trial on those charges. *See, e.g.*, Fed. R. Crim. P. 5.

[81] *See* Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605, 627-28 & n. 57 (1981) (noting and responding to argument).

[82] *See id.*; Hart & Wechsler's *The Federal Courts & the Federal System* 11-12 (2d ed. 1973); *Allen v. McCurry*, 449 U.S. 90, 103 (1980).

today, there are some areas in which federal causes of action can only be brought in state court. When litigants currently assert federal defenses or immunities in suits brought in state court, they generally have no right of removal to federal court, and can obtain a hearing in a federal forum only in the infrequent cases in which the Supreme Court grants review.[83]

In state criminal cases, the federal habeas corpus jurisdiction was not a general reviewing mechanism with respect to federal claims prior to the historically recent expansion of the federal habeas corpus jurisdiction (*see* pp. 11-22 *supra*). Currently, if a criminal defendant is only sentenced to a fine, he has no access to federal habeas corpus for consideration of his federal claims, since habeas corpus can only be used to challenge unlawful custody. If a defendant is sentenced to less than a few years in prison, habeas corpus review is also likely to be barred as a practical matter, since his sentence will have run its course by the time state remedies are exhausted.

If a defendant has pleaded guilty, a federal habeas court is generally barred from entertaining a claim of an antecedent violation of a constitutional right under the rule of *McMann v. Richardson* and *Tollett v. Henderson*. In other circumstances, access to a federal forum may be barred by the rule of *Stone v. Powell* concerning Fourth Amendment claims, the "cause and prejudice" procedural default standard of *Wainwright v. Sykes*, or the laches doctrine of habeas corpus rule 9(a) (*see* pp. 26, 38-39 *supra*).

Thus, the premise of this argument -- that there is generally a right to have a federal forum hear a federal claim -- has no basis in reality. If the argument rests on the more modest assertion that there are special reasons for providing access to a federal forum in light of the high stakes involved in criminal cases, then it must fall back on other arguments that would establish this underlying assumption. The most common argument on this point -- that federal courts show superior sensitivity and receptiveness to the constitutional claims advanced by criminal defendants -- is addressed in the next part.

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[83] *See* Bator, *supra* note 81, at 606 n. 3; *District Court Reorganization*: Hearing on H.R. 5994 and Related Bills before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 48-52 (1984).

C. Enforcement of the Constitution

Perhaps the most common justification offered for the current habeas corpus jurisdiction is that the federal courts have a superior sensitivity to federal rights and are more receptive than the state courts to claims based on such rights. Ensuring the adequate protection of constitutional rights for criminal defendants accordingly requires that review of state court decisions on federal claims be available in the inferior federal courts.[84]

This argument depends on a questionable empirical generalization about the disposition of the federal courts and the state courts which is obviously not true in many particular instances, if it is true at all. Decisions by state courts which define the rights of defendants more expansively than the decisions of federal courts are not uncommon.[85] Normally, federal habeas courts reach the same conclusion as the state courts (*see* pp. 34-35 *supra*). However, even if it were true that federal courts are generally more likely to grant defendants' claims, it would not follow that greater fidelity to the Constitution will result from expansive federal court review.

In its basic provisions, the Constitution establishes a republican form of government under which public policy decisions at the federal level are made by a legislature accountable to the public in the enactment of laws and an executive accountable to the public in their execution. The federal government as a whole is confined to the exercise of the powers enumerated in the Constitution, and any powers not so delegated "are reserved to the States . . . or to the people" (Amendment X).

This general system of self-government is qualified by constitutional provisions establishing various important rights against the government. Even these provisions, however, reflect a recognition of the need to maintain a fair balance between the individual's right to security against crime and the right of defendants and suspects to be free of governmental abuse or overreaching. For example, the Fourth Amendment does not bar non-consensual searches and seizures in the investigation of crime,

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[84] This argument is developed at length in a broader setting in Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). A general response appears in Bator, *supra* note 81, at 623-35.

[85] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 498-501 (1977).

but generally prohibits such activities only if they are *unreasonable*. The Fifth Amendment creates no presumption against obtaining incriminating admissions from a suspect or defendant and using them in prosecution, but only bars *compelling* a person to be a witness against himself.[86] The Fifth Amendment also recognizes that the government may properly deprive offenders of life, liberty, and property in furtherance of law enforcement objectives, stipulating only that it may not do so *without due process*. The Eighth Amendment does not bar severe punishment for serious crimes, or even capital punishment, but only prohibits punishment that is *cruel and unusual*. A judge who erroneously grants a claim by misinterpreting or disregarding the Constitution's limitations on the scope of the rights it defines departs from the Constitution no less than a judge who erroneously denies a claim that validly asserts a constitutional right.

With these considerations in mind, there is little force to the argument for habeas corpus review based on allegedly superior federal court sensitivity to constitutional values. It has not been shown that federal courts are generally more likely than state courts to respect the Constitution's limitations on judicial overriding of legislative and executive decisions affecting criminal investigation and prosecution. It has also not been shown that federal courts are more likely to respect the Constitution's limitations on federal authority over state procedures, or the Constitution's limitations on the scope of particular federal rights that may be applicable in state proceedings. Overall, there is no particular plausibility to the view that federal habeas corpus review results in greater fidelity to the Constitution. The argument to the contrary reflects partisanship for expansive interpretations of selected portions of selected provisions of the Constitution, rather than a commitment to the Constitution itself. As Professor Paul Bator has observed:

> We are told that federal judges will be more receptive to constitutional values than state judges. What is really meant, however, is that federal judges will be more receptive to *some* constitutional values than state judges. And the hidden assumption of the argument is that the Constitution contains only one or two *sorts* of values: typically, those which protect

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[86] *See generally* Office of Legal Policy, *Report on the Law of Pre-Trial Interrogation* 102-03 (1986).

the individual from the power of the state, and those which assure the superiority of federal to state law.

But the Constitution contains other sorts of values as well. It gives the federal government powers, but also enacts limitations on those powers. *The limitations, too, count as setting forth constitutional values.* Will the federal judge be more sensitive than the state judge in insuring that these limitations are complied with? Whose institutional "set" is likely to make one more sensitive to the values underlying the tenth amendment? Is a federal judge likely to be more receptive than the state judge in honoring other structural principles, such as separation of powers? Why don't these sorts of issues ever seem to count?[87]

D. The Need for Surrogate Supreme Courts

Another argument for the current habeas corpus jurisdiction is that the expansion of federal rights and the increase in the general volume of litigation in recent times has made it impossible for the Supreme Court to maintain an adequate degree of supervision over the state judiciaries in criminal cases through direct review. It is accordingly necessary to empower the lower federal courts to review state criminal judgments -- in effect, to serve as surrogate Supreme Courts -- to maintain an adequate reviewing capacity at the federal level.[88]

Taken in its most obvious sense, this argument presupposes that extensive day-to-day oversight of the state judiciaries by federal courts is currently necessary to secure an acceptable degree of compliance with Supreme Court precedent by the state courts. The weaknesses of this argument are similar to the weaknesses of the argument that habeas corpus review is essential to securing fidelity to the Constitution. It assumes with no adequate basis that state courts are insufficiently sensitive or receptive to claims of federal right based on Supreme Court precedent,[89] and ignores the full range of constitutional values that are

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[87] Bator, *supra* note 81, at 631-34.

[88] *See* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L. J. 895, 897-98 (1966).

[89] *See* Bator, *supra* note 81, at 629-31 (disputing, in relation to habeas corpus review, alleged superiority of federal judges in sensitivity and competence under contemporary conditions); Friendly, *supra* note 41, at 165 n. 125 (similar); O'Connor, *Trends in the*

recognized in the Supreme Court's decisions. Are federal courts more likely than state courts to implement faithfully the Supreme Court's decisions limiting judicial authority to override legislative and executive decisions affecting criminal investigation and prosecution? Are federal courts more likely to respect the Court's decisions concerning the limits of federal authority over state procedure, or its decisions concerning the limits on the scope of particular federal rights that apply in state proceedings?

Overall, there is no particular plausibility to the view that habeas corpus review results in greater fidelity to Supreme Court precedent. Indeed, the Court is regularly required to devote a portion of its limited time to reviewing and overturning the decisions of lower federal courts which have erroneously granted writs of habeas corpus in reviewing state cases.[90]

A somewhat different version of the "surrogate Supreme Court" argument holds that habeas corpus review is necessary to secure uniformity in the interpretation and application of federal law. In this sense, however, the lower federal courts are inherently incapable of serving as surrogate Supreme Courts. Only the Supreme Court itself can prescribe nationally uniform and nationally binding caselaw rules. The close to a hundred federal district courts and twelve regional federal appellate courts can differ in their decisions concerning matters that the Supreme Court has not resolved, and their views on such issues are not binding on the state courts outside of the particular cases brought up on federal habeas corpus.

Moreover, even in areas in which there is no review of state judgments in the lower federal courts -- e.g., civil litigation -- the state

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Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801, 812-14 (1981) (similar); Smith, *supra* note 74, at 149 (unlikelihood under contemporary circumstances of state court misapplication or resistance to Supreme Court precedent); *see also* Neuborne, *supra* note 84, at 1119 ("We are not faced today with widespread state judicial refusal to enforce clear federal rights.").

[90] *See Habeas Corpus Reform*: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 52-53 (1985) [hereafter cited as "1985 Hearing"] (listing of recent decisions in which Supreme Court overturned federal court of appeals decisions favorable to habeas corpus petitioners). The cited cases include both cases in which the court of appeals' decision was wrong on the merits and cases in which the court of appeals did not comply with the limitations on habeas corpus review.

courts are attentive to the opinions of the federal appellate courts on unsettled questions of federal law, and the conclusions they reach are likely to fall within the range of options appearing in the decisions of the federal courts of appeals. In general, it is not apparent that the interest in uniformity is significantly advanced by habeas corpus review, and not apparent that harmful disparities would occur with any greater frequency if the state supreme courts had the same latitude as federal appellate courts to adopt different resolutions and make their own judgments concerning questions that the Supreme Court has left open.

On a more mundane level, the "surrogate Supreme Court" argument is sometimes raised as a caseload issue. The restriction or elimination of habeas corpus review, it is argued, would result in an excessive burden on the Supreme Court's direct review jurisdiction.

However, the Justices of the Supreme Court do not appear to share this concern, since a number of them have spoken out strongly in favor of fundamental restrictions on federal habeas corpus, and the general trend of the Court's recent decisions has been to limit the availability of federal habeas corpus.[91] Recourse to the Supreme Court on direct review is limited by a normal sixty day limit under Supreme Court Rule 20, a safeguard against a burdensome volume of applications that is simply lacking in the case of habeas corpus. Moreover, the Supreme Court is regularly required each term to grant certiorari in a number of cases to resolve unsettled questions of habeas corpus procedure or to reverse unsound decisions by federal appellate courts granting writs of habeas corpus. For the foregoing reasons, there is no adequate basis for believing that limiting or eliminating federal habeas corpus would result in any net increase in the Supreme Court's caseload.

Finally, it may be noted that the current habeas corpus jurisdiction arose in a period in which the criminal justice systems in many states were undermined by state-enforced racial segregation. This evil has since been corrected by the civil rights legislation of the 1960's and by the Supreme Court's decisions following *Brown v. Board of Education*. In commenting on the import of these changes for habeas corpus review, Attorney General William French Smith has observed:

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[91] *See* S. Rep. No. 226, 98th Cong., 1st Sess. 5-6 & nn. 13-16 (1983) (statements by Justices critical of habeas corpus); pp. 38-39 *supra* (recent decisions limiting habeas corpus).

The unique historical circumstances obtaining at the time of the decision of *Brown v. Allen* may have led the Supreme Court to see a need for a broad supervisory authority of the lower federal courts over state criminal proceedings. One may question the validity of perpetuating this authority into a time when the circumstances that gave rise to it no longer exist.[92]

E. Providing a Vehicle for the Articulation of Constitutional Rights

It is sometimes asserted that habeas corpus proceedings provide an important vehicle for the articulation of constitutional rights by the federal courts.[93]

In relation to the Supreme Court, this assertion is groundless. Most of the Court's important decisions in the past thirty years concerning constitutional criminal procedure have been made in direct review cases. While some important issues have fortuitously been addressed in the context of habeas corpus litigation, the same issues could have been considered and decided in cases coming up on direct review. In relation to the federal courts of appeals, most rulings by these courts on constitutional questions occur in the context of appeals from convictions in federal prosecutions. Habeas corpus review does sometimes enable federal appellate courts to pass on the constitutionality of unique features of state procedure that have no counterpart in federal proceedings, where the proper resolution on the basis of Supreme Court precedent is unclear. However, unless some other argument establishes that the decisions of federal appellate courts on these unsettled questions are likely to be "better" than those of state supreme courts, there is no particular value in having lower federal courts "articulate" the relevant rules.

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[92]Smith, *supra* note 74, at 149; *see* Bator, *supra* note 81, at 631 ("the argument seems to me to derive primarily from a special historical experience, involving the division of the country on the issue of racial segregation, which is no longer of dominating significance in governing the attitudes of state court judges"); *see also* Neuborne, *supra* note 84, at 1119 n. 55 ("The widespread breakdown of Southern justice which motivated enactment of the Civil Rights Act of 1871 . . . and similar breakdowns during the height of the civil rights movement which provoked calls for significant expansions of federal jurisdiction . . . do not exist today").

[93]*See* 1985 Hearing, *supra* note 90, at 41, 52 (argument and response).

F. Correcting Injustices

Another argument is that habeas corpus review is needed to correct miscarriages of justice occurring in state proceedings.[94]

A first problem with this argument is that habeas corpus review is a very poorly suited means to this end. Guilt and innocence, as such, are not in issue in habeas corpus litigation; only violations of constitutional rights can be asserted. A federal habeas court may overturn a state conviction on the basis of a constitutional violation that does not cast any doubt on the factual accuracy of the verdict. Conversely, even conclusive proof of innocence does not support the issuance of a writ, in the absence of constitutional violations in the state proceedings. As a practical matter, it is not federal habeas corpus, but the various remedies available to defendants at the state level that provide the essential vehicle for the correction of miscarriages of justice.[95]

A second problem with this argument is that it fails to address the question of limits. There is no limit in principle to the number of layers of review that can be piled on top of each other. If fifty levels of mandatory review were added to those now available, no doubt each additional level might detect and correct some potential injustice that had gotten by at all earlier stages. However, unless it is maintained that every prisoner should be given a trial de novo whenever he wants one, there is an unavoidable need to make the judgment that the costs of permitting additional re-litigation at some point outweigh its benefits.[96] The infrequency with which relief is granted and the dearth of cases in recent years in which demonstrated injustices have been corrected through habeas corpus (*see* pp. 34-35 *supra*) tend to support the conclusion that the existing habeas corpus jurisdiction goes well beyond that point. In general, it is assumed that one appeal as of right strikes the proper balance. Habeas corpus review provides far more than that.

Finally, in assessing the force of this argument, it must be kept in mind that justice is due to the actual and potential victims of crime, and to society at large, as well as to suspects and defendants. Injustice occurs when the convictions of criminals are overturned after the lapse of time

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[94] *See* Bator, *supra* note 81, at 613-14 n. 25 (noting and responding to argument).

[95] *See* 1985 Hearing, *supra* note 90, at 45-46.

[96] *See* Bator, supra note 81, at 614 & n. 27.

has made re-trial impossible. Injustice also occurs when the anguish of crime victims and their families is prolonged for years or decades by continued litigation and the prospect that the person who has ruined their lives may yet be set free to claim other victims. The open-ended review of state judgments by federal habeas corpus, extending far past the conclusion of the normal adjudicatory process, carries particularly acute risks of causing such injustices.[97]

G. Effects on the Behavior of Prisoners

It is sometimes asserted that engaging in habeas corpus litigation provides valuable "recreational therapy" for prisoners, relieving the tensions generated by the prison environment and helping to keep them occupied.[98]

While it is true that some prisoners who spend their time preparing and litigating habeas corpus petitions may be diverted from other harmful activities -- e.g., assaulting other inmates or engaging in drug abuse -- it must also be recognized that frivolous and harassing litigation is itself a seriously antisocial activity that carries substantial costs to the system. More basically, viewing emotional gratification to petitioners as an independent ground for authorizing habeas corpus review presupposes a view of the federal courts as a kind of video arcade for bored prisoners who should be free to toy with the system in order to keep them out of worse sorts of trouble. This is irreconcilable with the proper view of courts as impartial organs of the law whose function is to entertain genuine claims of legal right and accurately resolve them.

This argument also assumes that engaging in habeas corpus litigation will in fact improve the attitudes of prisoners and lessen their disposition to commit antisocial acts. However, the view is widely held by judges and writers that it has the opposite effect. Like other forms of litigation, habeas corpus litigation provides prisoners with a cost-free means of striking at the system and gaining increased esteem among fellow inmates. The more specific message of permitting endless challenges to convictions and sentences is that the system never really regards the prisoner's guilt as an established fact, and that he need never accept and deal with it. While the ability to command the time and attention of

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[97] Some cases illustrating these points are described in the Appendix to this Report.

[98] *Cf.* Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction § 4261, at 588 (1978) ("prisoners thrive on it as a form of occupational therapy").

judges and prosecutors by filing a petition may be gratifying to many prisoners, any positive "recreational" value of this practice must be balanced against its potential effect of increasing the arrogance of unrepentant criminals. As Professor Bator has observed:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibility of justice that cannot but war with the effectiveness of the underlying substantive commands . . . . The first step in achieving [rehabilitation] may be a realization by the convict that he is justly subject to sanction . . . and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.[99]

H. Other Arguments

Other arguments are also occasionally offered in support of habeas corpus review. For example, it is said that habeas corpus provides a necessary means for securing a relatively detached and "isolated" consideration of a defendant's federal claims, free of the multiplicity of issues and factual complications that characterize earlier stages of litigation. This argument would be more convincing if there were no appellate courts in the states. In fact, however, the federal habeas court's review is typically a revisiting of claims that have already received detached consideration, in a setting isolated from the exigencies of trial litigation, in the course of the prisoner's appeals in the state court system.

Another argument is that habeas corpus review of state judgments fosters a constructive "dialogue" between state and federal courts concerning the issues that arise in habeas corpus litigation.[100] However,

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[99] Bator, *supra* note 17, at 452; *see* Friendly, *supra* note 41, at 146; *Spalding v. Aiken*, 460 U.S. 1093, 1096-97 (1983) (statement of Burger, C.J.); *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring).

[100] *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

habeas corpus is not needed to create such a dialogue. In the absence of habeas corpus review, prosecutors and defense attorneys in criminal cases would continue to cite both state and federal precedents supporting their positions, and the judges of each system would continue to consider the views of their counterparts in the other system in the ordinary course of litigation. To the extent that habeas corpus does foster a federal-state dialogue, it is not a dialogue of equals, but of superior and inferior. It is the federal habeas court that gets the final word on the disposition of the particular case under review, and the state courts within its domain may depart from its views only at the risk of having their judgments overturned in other cases that turn on the same issue.[101] Unless some other reason can be given for subordinating the highest courts of the states to the lower federal courts in this manner, the desirability of "dialogue" on these unequal terms is less than obvious.

IV. REFORM OPTIONS

The review of history and policy in the earlier sections of this report shows that the statutory habeas corpus remedy in its contemporary character is unrelated to the historical and constitutional functions of the Great Writ (pp. 4-7 *supra*). In its specific operation it is inconsistent with basic principles of adjudicatory procedure that are taken for granted in other contexts (pp. 37, 40 *supra*). The arguments typically offered in support of the current jurisdiction generally reflect partisanship for defense interests -- regardless of countervailing public interests and the actual balance of interests struck by the Constitution -- or an unjustified preference for aggrandizing the lower federal courts at the expense of the state judiciaries, or some combination of these two biases (pp. 40-53 *supra*).

At the level of terminology, it might be beneficial to adopt some different name for the current review jurisdiction of the lower federal courts in relation to state judgments -- e.g., re-styling state prisoners' challenges to their convictions and sentences as applications for "a writ of federal review" rather than petitions for "a writ of habeas corpus".

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[101] Cover & Aleinikoff, *supra* note 100, at 1036, is accordingly wrong in stating that the Warren Court's innovations have resulted in "a dialogue on the future of constitutional requirements in criminal law in which state and federal courts were required both to speak and listen as equals." The situation in habeas corpus would be equalized only if state trial judges were given the authority to overturn the judgments of the federal courts in federal criminal cases.

This would provide a characterization that accurately reflects the nature of the existing jurisdiction. It might help curb the confusion between that jurisdiction and the traditional Great Writ which chronically impedes clear thinking in this area and is routinely exploited by opponents of needed reforms.

At the level of substantive reform, various options may be considered. The affirmative case for adopting such reforms to curb the contemporary abuse of habeas corpus has been aptly summarized by Attorney General William French Smith in an article published in 1983:

> First, the availability of habeas corpus to state prisoners, beyond the various remedies and layers of review available in the state courts, has little or no value in avoiding injustices or ensuring that the federal rights of criminal defendants are respected. The state prisoners who seek federal habeas corpus are generally among the least deserving element of the prison population . . . . [T]he typical habeas corpus applicant is challenging his imprisonment for a seriously violent crime for which he was convicted after trial. The typical applicant has already secured extensive review of his case in the state courts, having pursued a state appeal and also often having initiated collateral attacks in the state courts on one or more occasions . . . . There is no reason to believe that the state courts' consideration of the claims of defendants who subsequently seek federal habeas corpus is deficient in any significant number of cases . . . .
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> Second, the present system of review is demeaning to the state courts and pointlessly disparaging to their efforts to comply with federal law in criminal proceedings . . . . This difficulty is aggravated by the particular procedures and rules of review that are presently employed in habeas corpus proceedings. A single federal judge is frequently placed in the position of reviewing a judgment of conviction that was entered by a state trial judge, reviewed and found unobjectionable by a state appellate court, and upheld by a state supreme court . . . .
>
> Third, the current system of federal habeas corpus defeats the important objective of establishing at some point an end to litigation. A prisoner may seek federal habeas corpus

> many years after the normal conclusion of state criminal proceedings. The lapse of time and the resulting disappearance of evidence and witnesses may render response to the applicant's contentions -- or re-trial in the event that he prevails on his claims -- difficult or impossible . . . .
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> Fourth, the current system is wasteful of limited resources. At a time when both state and federal courts face staggering criminal caseloads, we can ill afford to make large commitments of judicial and prosecutorial resources to procedures of dubious value in furthering the ends of criminal justice. Such commitments are necessarily at the expense of the time available for the stages of the criminal process at which the questions of guilt and innocence and basic fairness are most directly addressed . . . . The time spent on habeas corpus applications in federal courts is a particularly questionable indulgence. As noted earlier, the matters raised in such applications have, in general, already been considered and decided by the state courts. All too often the contentions raised reflect only the imaginings of idle prisoners who turn to "writ-writing" as a means of diversion or continued aggression against society . . . .
>
> A fifth and final criticism is that the present system of habeas corpus review creates particularly acute problems in capital cases . . . . It . . . prevents correction of the practical nullification of all capital punishment legislation that has resulted from litigational delay and obstruction.[102]

On the basis of the foregoing considerations, Attorney General Smith concluded that "the most effective response to the problems resulting from federal habeas corpus for state convicts would be the elimination of federal habeas corpus in that area."[103] We agree. This reform option will be discussed in the initial part of subsection A of this section, followed by discussions of other legislative reform options. These include the option of confining federal habeas corpus review to cases where a meaningful process for considering a petitioner's federal claims was denied in the state courts, and the option of enacting limited reform

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[102] Smith, *supra* note 74, at 142-46.

[103] *Id.* at 149-50.

legislation like that passed by the Senate in 1984. Subsection B examines the possibility of achieving reforms through litigation.

A. Legislative Options

1. Abolition of Federal Habeas Corpus for State Prisoners

Having reviewed the history of habeas corpus from its common law origins to its contemporary operation, and having fully considered the relevant policy issues, we agree with Attorney General Smith that "the simple abolition of federal habeas corpus for state criminal convicts" would be "[t]he most straightforward solution to the tensions, burdens, and inefficiencies presently resulting from federal habeas corpus." [104] A provision that would have had this effect was included in title II of the proposed Omnibus Crime Control and Safe Streets Act of 1968 (pp. 30-31 *supra*). The same effect could be achieved by a simpler formulation along the following lines:

> No court of the United States other than the Supreme Court, and no judge of a court of the United States, shall have jurisdiction to entertain any challenge to the validity of a person's detention pursuant to the judgment of a state court, or to the execution of any other sentence imposed by a state court.

For reasons discussed earlier, there can be no doubt concerning the constitutionality of this type of reform. It would have no effect whatsoever on the Great Writ whose suspension is prohibited by the Constitution. [105]

Eliminating federal habeas corpus for state prisoners also would "not upset any deep-seated tradition or historically sanctioned practice." [106] The First Judiciary Act's general restriction of federal habeas corpus to federal prisoners remained operative until the enactment of the Habeas Corpus Act of 1867, and even thereafter, the availability of

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[104] *Id.* at 147-48.

[105] *See* pp. 4-7, 41-42 *supra*; *The Habeas Corpus Reform Act of 1982*: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 103-07 (1982) (opinion of Office of Legal Counsel).

[106] Smith, *supra* note 74, at 147-48.

federal habeas corpus to state prisoners remained largely a theoretical matter prior to the past thirty years. Its elimination would be limited in substantial effect to practices that have emerged since the 1950's (*see* pp. 7-24 *supra*).

A reform of this sort would also not restrict or impair the traditional, constitutionally-based mechanism for maintaining the supremacy and uniformity of federal law through direct review of the judgments of the highest courts of the states by the Supreme Court. State convicts would retain the right to seek Supreme Court review, in addition to having access to the appellate and collateral review mechanisms provided in the state court systems.[107]

A final point in support of this approach is that Congress has already effectively abolished federal habeas corpus in one substantial jurisdiction -- the District of Columbia -- with no discernible adverse effect on the quality or fairness of criminal proceedings (*see* p. 27 *supra*). This naturally raises the question why the same approach should not be tried in relation to the substantially similar judicial systems of the states. Judge Carl McGowan has observed:

> A matter that has rankled relations between state and federal courts for some years now is the collateral attack on final state criminal convictions provided by Congress in the federal courts. A state prisoner who has unsuccessfully exhausted his avenues of state trial and appellate relief can, even many years later when retrial is not practically feasible, attack that conviction in the federal district court as violative of federal law, and procure his release if such a violation is established. Since the same claim of federal law violation can [be], and often is, made in the trial and appellate courts of the state, with certiorari review available in the Supreme Court, the state judges understandably have some difficulty in seeing why their work should be reexamined in the federal courts whenever a colorable claim of violation is alleged.

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[107] The fact that state prisoners would not always have access to a federal forum for consideration of their federal claims is not objectionable either on constitutional grounds or as a matter of policy. Such access is frequently not available even under the current system of review. *See* pp. 41-53 *supra*; *Allen v. McCurry*, 449 U.S. 90, 102-03 (1980).

The one place where this cannot be done is in the District of Columbia . . . . Some twelve years ago Congress enacted a comprehensive reorganization of both the local and federal courts in the District . . . . In doing . . . this, the Congress . . . provided in the D.C. Code for collateral attack upon a D.C. criminal conviction to be made in the new and improved D.C. court system. It explicitly declared, however, that no further collateral challenge could be made in the federal courts in the District of Columbia. Thus it is that for some years now, although a state prisoner across the Potomac in Virginia, or one over the line in Maryland, has a second chance for collateral review of his conviction in the federal courts in those states, a state prisoner in the District of Columbia does not.

[T]he Supreme Court ultimately held that Congress could constitutionally make the choice it did, articulating that result in terms which would appear to give Congress the same latitude to end in all of the states collateral attack by state prisoners in the federal courts. There have been no reports, so far as I am aware, of egregious injustices to District of Columbia prisoners because of this denial of state habeas jurisdiction in the federal courts . . . .

The early finality of criminal convictions is generally desirable, and especially so when that can be assured without duplication of judicial effort. The resources of the federal courts at the present time are strained by their own criminal caseloads. They should not have to exercise a supervisory authority over the administration of state criminal laws unless that is plainly necessary in the interest of justice.

Certainly there appears to have been a steadily increasing sensitivity by state judges to claims of federal right -- a sensitivity that can only be frustrated by needless subjection to second-guessing by federal judges. Since Congress has in effect made the District of Columbia a laboratory for testing the need for federal collateral attack by state prisoners, the Congress would do well to study carefully the actual results of that experiment. If it turns out to be positive, then the opportunity exists to eliminate simultaneously a significant number of cases from the federal courts and a condition which

has always roiled the waters of federal-state relations.[108]

2. Deference to Adequate State Processes

A second reform option would be to limit the scope of review on federal habeas corpus to the question whether adequate processes were provided in the state courts for considering the petitioner's federal claims. While formulations of this approach could vary considerably in detail, the basic idea would be to treat federal habeas corpus as a backstop measure, which would only come into play if a state judicial system had failed to provide some meaningful opportunity for raising a federal claim and having it decided. This was, in part, the approach taken in the Judicial Conference's proposal that was passed twice by the House of Representatives in the 1950's.[109]

This approach would essentially restore habeas corpus to the function it fulfilled in the intermediate period of its expansion, between the decision in *Moore v. Dempsey* in 1923 and the creation of a quasi-appellate habeas corpus jurisdiction by *Brown v. Allen* and related decisions (*see* pp. 15-18 *supra*). It would amount to a general application of the current approach to review of Fourth Amendment claims in habeas corpus proceedings under the rule of *Stone v. Powell*, which bars re-litigation so long as a "full and fair opportunity" for litigating the claim was provided in the state courts (*see* p. 39 *supra*). Justice O'Connor has advocated the general application of this type of standard:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a

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[108] McGowan, *The View From an Inferior Court*, 19 San Diego L. Rev. 659, 667-69 (1982).

[109] The Judicial Conference proposal would have barred access to federal habeas corpus with respect to claims that had actually been determined in the state courts or that could still be raised and determined in the state courts, but otherwise would have permitted access to federal habeas corpus if there had been no "fair and adequate opportunity" to raise a claim and have it determined in state proceedings. *See* p. 29 *supra*.

> step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court.[110]

Another way of looking at this reform is as an application of normal *res judicata* principles in habeas corpus proceedings. In general, a litigant who has unsuccessfully asserted a claim in a state proceeding is not free to litigate the same claim over again in federal court. This principle was explicitly affirmed by the Supreme Court in *Allen v. McCurry*, 449 U.S. 90 (1980), which held that rejection of a constitutional claim in a state criminal proceeding estops the defendant from asserting the same claim in a later § 1983 suit in federal court, so long as the state proceedings provided a full and fair opportunity to litigate the claim.

This approach to habeas corpus reform has sometimes been defended as superior to the abolition approach on the ground that it would ensure the existence of some means of creating an evidentiary record on a claim for purposes of Supreme Court review, and that it would preserve an incentive for state courts to provide fair procedures for the consideration of federal claims.[111] However, the force of the record-for-review point is not great in the contemporary period, in light of the fact that state proceedings do currently provide ample means for raising the full range of federal claims that may be asserted by defendants.[112] There is also no reason to believe that the state judicial systems now require a special "incentive," beyond the traditional availability of direct review of state judgments in the Supreme Court, to provide fair processes for the consideration of defendants' claims.

Conversely, preserving habeas corpus review under an adequacy-of-state-process standard has some unattractive features. Since the enjoyment of habeas corpus litigation by state prisoners is not wholly dependent on a realistic possibility of success, litigation would continue in this area by prisoners alleging that they had been denied fair state processes for considering their claims, and a substantial amount of work

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[110] O'Connor, *supra* note 89, at 814-15.

[111] *See* pp. 29-30 *supra* (Judicial Conference reform proposal designed in part to ensure means of creating record for Supreme Court review). *Cf.* Bator, *supra* note 17, at 455-60 (favorable assessment of some review of adequacy of state process).

[112] *Cf.* P. Robinson, *supra* note 63, at 22 (habeas corpus applications normally decided on basis of evidentiary record of state proceedings and submissions of parties).

could be required in disposing of these petitions. Basic restrictions on the federal habeas corpus jurisdiction would also predictably elicit from some federal courts and judges the normal resistance of government institutions to new constraints on their power. The preservation of review of the availability, "adequacy," or "fairness" of state proceedings could accordingly provide a basis for eroding or diluting these restrictions.

In general, however, this approach would constitute a fundamental improvement over the pointless redundancy of the current system, though not as clean and complete a solution as the simple abolition of federal habeas corpus for state prisoners. Its optimal formulation would be a narrow provision preserving federal habeas review only where a state system provides no means by which a federal claim can be raised or could have been raised in the course of the state process.[113]

3. Limited Reform Legislation

A final reform option would not attempt to make basic changes in the character of the federal habeas corpus jurisdiction, but would focus instead on correcting particular problems of abuse or excess that arise under the current system of review. Legislation containing a set of limited reform proposals of this type has been under consideration by Congress since 1982. These measures, which have the support of the Administration, the Conference of (State) Chief Justices, the National Association of Attorneys General, the National District Attorneys Association, and the National Governors Association, were passed by the Senate in 1984. They have recently been transmitted by the President to Congress again as title II of the proposed Criminal Justice Reform Act (S. 1970 and H.R. 3777).[114] The specific reforms included in the proposals are as follows:

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[113] *Cf. Mooney v. Holohan*, 294 U.S. 103 (1935) (unclear whether claim cognizable under any state remedy, where petitioner alleged that conviction was solely based on prosecution's use of perjury and that the factual basis of the claim could not have been discovered through reasonable diligence prior to his new trial motion and state appeal); *Garris v. Lindsay*, 794 F.2d 722 (D.C. Cir. 1982) (regarding provisions of D.C. Code and 28 U.S.C. § 2255 limiting potential availability of habeas corpus to cases where other remedies are inadequate or ineffective to test the legality of detention).

[114] *See* p. 31 *supra*; *Comprehensive Crime Control Act of 1983*: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., lst Sess. 226-27, 235-36, 287-88, 309-11, 1111-12 (1983). The formal resolution of the National Governors Association, *id.* at 235-36, endorsed the basic recommendations of an earlier but generally similar set of reform proposals. *Cf. Habeas Corpus Procedures*

First, there is currently no time limit on habeas corpus applications. As noted earlier (p. 40 *supra*), this approach reflects a failure of the procedures associated with federal habeas corpus to keep pace with its expanding scope, and constitutes a departure from normal principles of finality that would not be countenanced in connection with any other appellate mechanism. As Justice Powell has observed:

> Another cause of overload of the federal system is [28 U.S.C.] § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy.[115]

The specific corrective proposed in the legislation is a one-year limitation period on habeas corpus applications, normally running from exhaustion of state remedies. The start of the limitation period would be deferred in case a state unlawfully prevented filing, and in connection with newly recognized rights and newly discovered claims.

This reform would create an important check on the interminable continuation of litigation that characterizes the current system of review. It is, however, quite generous in comparison with the time limits on other federal appellate remedies in its normal starting point, duration, and exceptions. By way of comparison, a federal defendant must normally decide whether to appeal within 10 days of conviction, and a state defendant seeking Supreme Court review must normally apply within 60 days of affirmance of his conviction by the highest state court. Even a federal defendant who seeks a new trial on grounds of newly discovered evidence must apply within two years of final judgment. As the Senate Judiciary Committee Report on the reform legislation observed, "[t]he last-mentioned limitation has the particularly curious effect that a Federal prisoner who discovers proof of his innocence more than two

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Amendments Act of 1981: Hearing on S. 653 before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 4-8 (1981) (earlier reform bill).

[115] Address Before the American Bar Association Division of Judicial Administration, Aug. 9, 1982.

years after final judgment has no judicial remedy, but must seek executive clemency, while a State or Federal prisoner who asserts violations of Constitutional rights which may cast no real doubt on his guilt is afforded a Federal judicial remedy without limitation of time. The time limitation rule . . . would reduce this discrepancy, bringing the availability of [habeas corpus] into closer conformity with the approach taken by Federal law in other contexts to maintenance of orderly procedures and assurance of finality in criminal adjudication." [116]

The second major reform proposed in the legislation is a general narrowing and simplification of the standard of review. Under the current system, state court fact-finding is presumed to be correct (subject to potential rebuttal by "convincing evidence") if a number of conditions set out in 28 U.S.C. § 2254(d) are satisfied, but the federal habeas court is required to make an independent determination of questions of law and to apply the law independently to the facts (*see* pp. 19-22 *supra*). This can result in the overturning of a judgment -- following the passage of years and affirmance by the appellate courts of the state -- though the federal habeas court recognizes that the decision turns on close or unsettled questions on which courts may reasonably differ and on which the federal courts themselves may disagree. It can also require hair-splitting decisions whether a state determination is purely one of fact or reflects an application of law to fact, since the review standard for factual questions (deference allowed if several conditions are satisfied) differs from the standard of review for mixed questions of law and fact (re-adjudication uniformly mandated). The legislation would correct these problems and others by establishing a relatively simple and uniform review standard under which the federal habeas court would generally defer to the state determination of a claim if it concluded that that determination was reasonable in its resolution of legal and factual issues and was arrived at by procedures consistent with due process. [117]

A third reform in the legislation is a codification of the caselaw standards for excusing procedural defaults in habeas corpus proceedings. This would bring greater definiteness and clarity to the law in this area and make it clear that the properly restrictive standards that the Supreme Court has developed since *Wainwright v. Sykes* apply to all types of

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[116] S. Rep. No. 226, 98th Cong., lst Sess. 8-10, 16-18 (1983). The legislation would also create a comparable time limit on § 2255 motions by federal prisoners. *See id.* at 30-31.

[117] *See id.* at 6-7, 22-28.

defaults.[118]

Finally, the reform legislation incorporates two reforms of a more technical nature that would reduce the redundancy and inefficiency of habeas corpus litigation. It would provide that a federal habeas court can deny a petition on the merits despite the petitioner's failure to exhaust state remedies. This would avoid the waste of time and judicial resources that currently results when a prisoner presenting a hopeless petition to a federal court is sent back to the state courts to exhaust state remedies. The legislation would also vest the authority to issue certificates of probable cause for appeal in habeas corpus proceedings exclusively in the judges of the courts of appeals. This would avoid the waste of time and effort that now occurs when a court of appeals is required to hear an appeal on a district judge's certification, though it believes that the certificate was improvidently granted.[119]

B. Litigative Options

The Supreme Court, in its current habeas corpus jurisprudence, has shown a sensitivity to interests of finality, federalism, and effective law enforcement that were simply shrugged off or discounted in the caselaw of the 1960's. For example, Justice O'Connor's opinion for the Court in *Engle v. Isaac*, 456 U.S. 107, 126-28 (1982), observed:

> Collateral review of a conviction 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

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[118] *See id.* at 7-8, 12-16, 30. In *Murray v. Carrier*, 477 U.S. 478, 485-92 (1986), the Supreme Court effectively endorsed the definition of the "cause and prejudice" standard proposed in the reform legislation, expressing confidence that this standard would generally be adequate to guard against injustices. However, the Court indicated that a procedural default should also be excused "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 495-96. This additional ground for excusing defaults has been incorporated into the most recent version of the reform proposals, transmitted by the President to Congress as title II of the proposed Criminal Justice Reform Act.

[119] *See* S. Rep. No. 226, 98th Cong., 1st Sess. 10, 18-19, 21-22 (1983). Following a recommendation of Judge Friendly, *see* Friendly, *supra* note 41, at 144 n. 9, the legislation would also create a certificate of probable cause requirement for appeals by federal prisoners in § 2255 motion proceedings.

attention will ultimately be focused not on whether conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community" . . . . By frustrating these interests, the writ undermines the usual principles of finality of litigation.

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" . . . . 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 . . . .

Finally, . . . [t]he 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 State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

In line with these views, the Court has generally been receptive to limitations on the availability of federal habeas corpus for state prisoners, to the extent that such restrictions are consistent with existing statutory standards and can be carried out in a principled manner (*see* pp. 38-39 *supra*). While the potential gains through litigation are realistically more limited than those that might be achieved through legislation, some significant possibilities remain open in this area. Three examples -- relating to deference to adequate state processes, the standard for excusing procedural defaults, and dismissal of unreasonably delayed petitions -- will be discussed in the remainder of this part.

1. Applying the Stone v. Powell Standard to Other Claims

In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court adopted a rule of deference to state processes which generally precludes consideration of Fourth Amendment claims in federal habeas corpus proceedings (*see* p. 39 *supra*). The Court noted that the exclusionary rule for Fourth Amendment violations is not a constitutional right, but a judicially created remedy designed to deter such violations. Considering

the high cost to the truth-finding process of excluding reliable and probative evidence of guilt, and the negligible contribution that applying the exclusionary rule in federal habeas corpus proceedings would make to its deterrent effect, the Court held that Fourth Amendment claims would not be subject to habeas corpus review so long as there was a "full and fair opportunity" to litigate the claim in state proceedings.

However, in *Rose v. Mitchell*, 443 U.S. 545, 559-64 (1979), the Court declined to apply the same deferential standard to habeas review of claims of racial discrimination in grand jury selection, though such claims -- like Fourth Amendment claims -- do not bear on the reliability of the verdict reached at trial. In reaching this result, the Court emphasized the long-standing historical practice of regarding such claims as grounds for the reversal of a conviction, and the fact that state judges in entertaining such claims are effectively required to judge their own actions in administering the grand jury system. In another case, *Jackson v. Virginia*, 443 U.S. 307, 321-24 (1979), the Court rejected the application of the *Stone v. Powell* standard to a claim that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt, noting that "[t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." Finally, in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court rejected application of the *Stone v. Powell* standard to a claim of constitutionally ineffective assistance of counsel based on counsel's failure to pursue a Fourth Amendment claim in a timely manner. The Court relied primarily on the fact that the incompetence claim related to the denial of a constitutional right of the defendant rather than to the application of a judicially created remedy, and on the view that the possibility of raising or litigating such a claim in state proceedings is limited in light of a defendant's dependence on his attorney.

The reasoning in these decisions indicates that the applicability of the *Stone v. Powell* standard to other types of claims does not depend on any single consideration, but may be influenced by various factors. They suggest that the following factors would weigh in favor of applying the *Stone v. Powell* standard to a claim: (1) the type of violation asserted in the claim generally does not implicate the factual accuracy of a petitioner's conviction, (2) the claim relates to alleged violations of rights by law enforcement officers, as opposed to violations occurring in proceedings under judicial control, (3) the claim relates to the application of an evidence-exclusion sanction for such violations, (4) there is no deep-seated historical practice of overturning convictions on the basis of

the type of violation asserted in the claim, and (5) there is no intrinsic difficulty in raising or litigating the type of violation asserted in the claim in state proceedings.

Applying these factors, a strong case can be made for applying the *Stone v. Powell* standard to claims that voluntary statements obtained by the police from suspects should be excluded on the basis of alleged *Miranda* violations.[120] A good case can also be made, considering the same factors, for applying the *Stone v. Powell* standard to claims that voluntary statements made to undercover operatives or the police should be excluded on the basis of *Massiah* (pre-trial right to counsel) violations.[121]

2. Clarifying the Scope of the Procedural Default Standard

The Supreme Court has made it clear that the "cause and prejudice" standard of *Wainwright v. Sykes* (*see* p. 39 *supra*) generally applies to failures to raise particular claims at trial or on appeal. However, the Court has reserved the question whether it applies to the

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[120]The *Miranda* procedures and the related rule of evidence exclusion are not constitutional requirements, but prophylactic measures created in 1966 to guard against unconstitutional coercion by police officers in custodial interrogation. In the absence of actual coercion, the use at trial of a defendant's voluntary statements obtained in violation of *Miranda* would generally raise no question concerning the accuracy of the conviction. *Miranda* claims can be raised and litigated in state proceedings as readily as Fourth Amendment exclusionary rule claims. *See generally* Office of Legal Policy, *Report on the Law of Pre-Trial Interrogation* 76-79, 102 (1986) (Truth in Criminal Justice Report No. 1); *Wainwright v. Sykes*, 433 U.S. 72, 87 n. 11 (1977) (applicability of *Stone v. Powell* standard to *Miranda* claims not addressed). A number of federal circuits have declined to extend the *Stone v. Powell* standard to the review of *Miranda* claims. However, the refusal in each case has apparently been based on the fact that the Supreme Court has not yet made such an extension, and has involved no effort to analyze the issue. *See Harryman v. Estelle*, 616 F.2d 870, 872 n.3 (5th Cir.) (en banc), *cert. denied*, 449 U.S. 860 (1980); *Patterson v. Warden*, 624 F.2d 69 (9th Cir. 1980); *Wilson v. Henderson*, 584 F.2d 1185, 1189 (2d Cir. 1978); *see also Hinman v. McCarthy*, 676 F.2d 343, 348-349 (9th Cir.), *cert. denied*, 459 U.S. 1048 (1982) (following *Patterson*, *supra*).

[121]*See generally* Office of Legal Policy, *Report on the Sixth Amendment Right to Counsel under the Massiah Line of Cases* (1986) (Truth in Criminal Justice Report No. 3); *Brewer v. Williams*, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring) (applicability of *Stone v. Powell* standard to Fifth and Sixth Amendment claims analogous to Fourth Amendment claims is an open question); *Nix v. Williams*, 467 U.S. 431, 450 n. 7 (1984) (applicability of *Stone v. Powell* standard to *Massiah*-type claim not addressed).

decision to forego an appeal entirely, or whether the standard of *Fay v. Noia* continues to govern in that context.[122] If *Wainwright v. Sykes* applies, a defendant could generally raise a claim that he forfeited at the state level by a failure to appeal only if he could establish that the failure to pursue an appeal resulted from constitutionally ineffective assistance of counsel. If it does not, then the belated raising of such claims on federal habeas corpus could be barred only if the defendant "deliberately bypassed" a state appeal.

A strong argument can be made that the "cause and prejudice" standard should apply across the board, particularly when one considers that even the virtually complete default of potential claims that results from pleading guilty is currently assessed under this type of standard under the rule of *McMann v. Richardson* and *Tollet v. Henderson* (*see* pp. 38-39 *supra*). In arguing for this approach, the Committee Report on the reform legislation that was passed by the Senate in 1984 observed:

> The Committee believes that it is preferable to employ the "cause and prejudice" standard as the exclusive standard governing the excuse of procedural defaults in habeas corpus proceedings . . . . [I]t is sufficiently flexible to give appropriate weight to [relevant] distinctions . . . . Insofar as decisions normally committed to the personal choice of the defendant [e.g., appeal] tend to be of basic importance to the further conduct of a case, poor advice by counsel in relation to such decisions is more likely to render his assistance Constitutionally ineffective, providing "cause" . . . .
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> In practical terms, decisions normally committed to the personal choice of the defendant that may result in the forfeiture of Federal claims are likely to be the decision whether to plead guilty and the decision whether to pursue an appeal. The effect of the decision to plead guilty on access to Federal habeas corpus is already governed by special caselaw rules, focusing on the effectiveness of counsel's assistance, . . . and would not be changed by enactment of the bill. The decision concerning appeal can also be appropriately handled under this type of standard. If an "effectiveness of counsel" standard is adequately protective of defendants' interests in connection with guilty pleas -- which normally result in

[122] *See Murray v. Carrier*, 477 U.S. 478, 492 (1986).

forfeiture of the possibility of raising Federal claims both at trial and on appeal -- such a standard would also seem adequately protective in connection with decisions not to appeal, which only result in forfeiture of the possibility of raising Federal claims on appeal.[123]

3. Strengthening the Interpretation of the Laches Rule

Rule 9(a) of the habeas corpus procedural rules provides roughly that unreasonably delayed habeas corpus petitions may be dismissed if the state has been prejudiced in its ability to respond by the delay (*see* p. 26 *supra*). Rule 9(a) is not, and by its nature cannot be, a satisfactory substitute for a normal time limitation rule. It differs from the limitation rules of other criminal law remedies (*see* pp. 37, 62 *supra*) in that: (1) it does not establish any definite time beyond which further litigation is barred, (2) its application depends on a showing that the state has been prejudiced in its ability to respond to the petition by delay in filing, (3) it does not apply if the petitioner raises grounds of which he could not have had knowledge prior to the prejudicial occurrence by the exercise of reasonable diligence, and (4) it only provides that a petition *may* be dismissed if the foregoing conditions are satisfied. Determining when the claim was reasonably discoverable and if and when the state was prejudiced can be burdensome and time-consuming, and the judgmental and unpredictable nature of the determination limits the Rule's utility as a deterrent to belated filing. On account of the Rule's limitations, it provides no assurance that a petition will be dismissed even in cases involving enormous delays in filing.[124]

Rule 9(a) is, however, all that is available in this area at the present time, and its potential utility has been undermined by a narrow judicial construction. The Rule identifies prejudice to the state's "ability to respond to the petition" resulting from delay as the basis for dismissal. In *Aiken v. Spalding*, 684 F.2d 632 (9th Cir. 1982), the court held that this refers only to the state's ability to respond to the particular claims raised in the petition. Under this interpretation, the fact that unjustified delay by the petitioner has made it difficult or impossible to re-try him in the

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[123] S. Rep. No. 226, 98th Cong., 1st Sess. 15-16 (1983).

[124] *See, e.g., Spalding v. Aiken*, 460 U.S. 1093 (1983) (statement of Burger, C.J., concerning denial of certiorari); *Buchanon v. Mintzes*, 734 F.2d 274 (6th Cir. 1984), *cert. dismissed*, 471 U.S. 154 (1985); *Alexander v. Maryland*, 719 F.2d 1241 (4th Cir. 1983).

event that a writ is granted cannot be given any weight in applying the Rule. The same interpretation has been reiterated in other decisions without any independent analysis.[125]

However, an examination of the relevant legislative history shows that the state's "response" to the petition can validly be understood as encompassing re-trial of the petitioner in the event that the petition is granted. The Advisory Committee Note to the substantially identical and concurrently promulgated Rule 9(a) for § 2255 motion proceedings stated explicitly that the purpose of the rule was to "prevent movants from withholding their claims so as to prejudice the government both in meeting the allegations of the motion *and in any possible retrial*" (emphasis added).[126] The same understanding was implicit in testimony on behalf of the Judicial Conference before the responsible Congressional

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[125] *See Alexander v. Maryland*, 719 F.2d 1241, 1247 n. 10 (4th Cir. 1983); *Strahan v. Blackburn*, 750 F.2d 438, 441 (5th Cir. 1985). In *Vasquez v. Hillery*, 474 U.S. 254, 264-65 (1986), the Court rejected a suggestion in Justice Powell's dissent that the Court should create a caselaw rule allowing dismissal of delayed grand jury discrimination claims where substantial prejudice to the possibility of a re-trial has resulted. In discussing this question the Court noted that a Rule 9(a) dismissal had been denied by the district court, and stated that "Congress has not seen fit . . . to provide the State with an additional defense to habeas corpus petitions based on the difficulties that it will face if forced to retry the defendant." This remark assumed the narrower interpretation of Rule 9(a), but it was evidently based on a facial reading of the Rule, and constituted dictum on an issue that was not presented in the case. There is no reason to believe that the Court would regard it as controlling in a case that actually presented the question of what types of prejudice can be considered in a Rule 9(a) dismissal motion.

In the same context in *Vasquez v. Hillery*, *supra*, the Court noted that a Judicial Conference advisory committee had made a proposal, which had not been adopted, to amend Rule 9(a) to state explicitly that dismissal based on prejudice to re-trial was permitted, and that Congress had not created a time limit on habeas corpus applications. However, the purpose of the proposed rule change cited by the Court was to "make clear that the laches principle in [Rule 9(a)] also applies when the state . . . has been prejudiced in its ability to retry the petitioner." 52 U.S.L.W. 2145 (1983). The notice of this proposed clarification did not state or suggest that such prejudice could not be considered under a proper reading of the current Rule. *See id.* As discussed earlier, pp. 31-32, 61-64 *supra*, the Senate overwhelmingly passed legislation in 1984 that would have created a definite time limit on habeas applications. The failure of the House of Representatives to pass comparable legislation has no apparent relevance to the interpretation of current Rule 9(a).

[126] The Note also quoted passages from judicial opinions which emphasized the prejudice to the possibility of re-trial created by delay in filing. *See id.*

committee.[127]

In rejecting this understanding, the court in *Spalding* discerned a general hostility on Congress's part to the purposes of Rule 9(a). In fact, however, Congress rejected arguments raised at the hearings on the proposed rules that Rule 9(a) should not be enacted,[128] and only changed the Rule by deleting two sentences which would have created a presumption of prejudice to the government in case a petition was filed after a five-year period which would normally run from conviction. The legislative history indicates that the reasons for this change were (1) a concern that the five-year period running from conviction could expire in some cases before a prisoner was able to exhaust state remedies, (2) the view that the state is in a better position than the petitioner to show whether it has been prejudiced by delay, and (3) the view that the formulation without a definite time period specification would be consistent with existing law, including the provision of 28 U.S.C. § 2255 that "[a] motion for . . . relief may be made at any time."[129] None of these reasons provides a basis for distinguishing between prejudice in meeting a petitioner's claims and prejudice to the possibility of re-trial, or suggest a legislative purpose to reject the interpretation presented to Congress in the Advisory Committee's notes.

Thus, a good argument can be made that reading "prejudice" under the rule to include prejudice to the possibility of re-trial is more consistent with the rule's intended interpretation than the narrow facial reading adopted in *Aiken v. Spalding*, as well as that the interpretation adopted in that decision imposes a limitation on the type of prejudice that can be considered which makes no sense in principle.[130]

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[127] *See Habeas Corpus*: Hearings on H.R. 15319 before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 107 (1976) (illustration of "prejudice" under the Rule by case of prisoner considering delay until unavailability of government witness would prevent new trial and reconviction).

[128] *See id.* at 20-23, 25-27, 29-40, 32-43, 36-37.

[129] *See id.* at 32-33, 50-52, 107-08, 111-14; 1976 U.S. Code Cong. & Admin. News 2478, 2481 & nn. 8-9 (House Judiciary Committee Report); 122 Cong. Rec. 30222-23 (1976); *id.* 30758.

[130] *See Aiken v. Spalding*, 684 F.2d at 634 (Poole, J., concurring).

Conclusion

In characterizing the development of the current habeas corpus jurisdiction and the reaction to proposed reforms, Judge Friendly has observed:

> Legal history has many instances where a remedy initially serving a felt need has expanded bit by bit, without much thought being given to any single step, until it has assumed an aspect so different from its origin as to demand reappraisal -- agonizing or not. That, in my view, is what has happened with respect to collateral attack on criminal convictions. After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning. Any murmur of dissatisfaction with this situation provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant.[131]

The "felt need" which habeas corpus has served in its historical and constitutional function is one of basic importance in any civilized system of justice. In its traditional character, it upholds the rule of law by ensuring that the government cannot detain a person without specifying the charges against him and bringing him to trial on those charges (*see* pp. 4-7 *supra*).

In contrast, the current statutory "habeas corpus" remedy by which lower federal courts review state judgments is simply an attenuated appellate mechanism by which prisoners who have already been tried and convicted, and who have unsuccessfully appealed their convictions (often repeatedly), can re-litigate in the lower federal courts the same claims that have been rejected at the various stages of adjudication and review in the state court systems. This review jurisdiction of the lower federal courts in state criminal cases is a recent outgrowth -- based on innovative judicial decisions of the 1950's and 1960's -- from a narrow statutory remedy created for completely different purposes in the Reconstruction

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[131] Friendly, *supra* note 41, at 142.

era. It has no relationship in character or function to the Great Writ whose suspension is prohibited by the Constitution. They have nothing in common but a name (*see* pp. 7-24, 41-42 *supra*).

The resistance to necessary reforms based on confusion between the current statutory "habeas corpus" remedy and the constitutional writ of habeas corpus is a depressing testament to the power of terminology to overpower substance and stifle intelligent reflection. Calling a decoy a duck does not make it fly. Calling the existing review jurisdiction of the lower federal courts over state judgments "habeas corpus" does not make it into the Great Writ of the Constitution and the common law.

Putting aside the erroneous identification of the current statutory remedy and the traditional writ of habeas corpus, we see no reason to retain federal habeas corpus for state prisoners in its contemporary character. Mandatory review of claims that have been rejected in earlier appellate proceedings goes beyond any legitimate interest of fairness to defendants, and the absence of reasonable time limits and rules against repetitive application would be dismissed as absurd if suggested in connection with any other appellate mechanism. There is no reason to believe that preserving this extraordinary type of review yields any benefits that outweigh its very substantial costs to the interests in finality, federalism, and rational application of criminal justice resources (*see* pp. 32-38, 40-53 *supra*).

As suggested by Attorney General William French Smith, abolishing federal habeas corpus for state prisoners would be the optimum reform in this area. The Constitution allows this, because the "writ of habeas corpus" it safeguards is unrelated to the current post-conviction "habeas corpus" remedy, and because its prohibition of suspension of the writ creates no right to a federal court remedy for persons in state custody. State prisoners would continue to be able to secure review of their cases following such a reform through the various appellate and collateral review mechanisms provided in the state courts, and would also retain the traditional right to seek direct review by the Supreme Court (*see* pp. 56-59 *supra*).

Congress has enacted a number of restrictions on federal habeas corpus for state prisoners which are currently in effect, and has made substantial moves towards a more complete solution on several occasions. When the first glimmerings of the expansive potential of federal habeas corpus appeared in the late nineteenth century, Congress reacted

with dismay, but deferred direct corrective action in the expectation that restoring the Supreme Court's review jurisdiction in habeas corpus cases might suffice to rein in the lower federal courts (*see* p. 25 *supra*).

When the Supreme Court itself began to incline toward increasingly expansive habeas corpus review of state judgments in the middle part of this century, the Judicial Conference promoted reform legislation whose practical effect would have been close to abolition. Legislation that was arguably of this character was enacted in 1948, but the Supreme Court in *Brown v. Allen* refused to give it effect in the absence of a clearer expression of legislative intent. Legislation that was unmistakably of this character was passed by the House of Representatives in 1956 and again in 1958. Ten years later, legislation that would have abolished federal habeas corpus for state prisoners reached the Senate floor as part of the proposed Omnibus Crime Control and Safe Streets Act of 1968 (*see* pp. 28-31 *supra*).

In 1970, in creating the current court system for the District of Columbia, Congress barred access to federal habeas corpus for D.C. prisoners. Thus, "although a state prisoner across the Potomac in Virginia, or one over the line in Maryland, has a second chance for collateral review of his conviction in the federal courts in those states, a state prisoner in the District of Columbia does not." [132] No adverse effect on the quality or fairness of proceedings in D.C. has been observed to result from this reform (*see* pp. 27, 57-59 *supra*).

The Supreme Court as well has shown an increasing recognition in recent years of the costs of the existing system of habeas corpus review, and has adopted a number of limitations on its scope and availability. However, the potential for reform through litigation is limited by the constraints of precedent and existing statutory standards (*see* pp. 38-39, 64-71 *supra*).

Whether or not a general legislative solution along the lines of the District of Columbia reform or earlier "abolition" proposals is practically feasible at the present time, the potential exists for basic improvements through limited reform legislation addressed to the clearest abuses and excesses of the existing system of habeas corpus review. Legislation of this type was initially proposed by the Justice Department in 1982, and was passed by the Senate in 1984 by a vote of 67 to 9 (*see* pp. 31-32, 61-64

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[132] McGowan, *supra* note 108, at 668.

supra). Substantially the same reform proposals have recently been transmitted by the President as title II of the proposed Criminal Justice Reform Act (S. 1970 and H.R. 3777), and now await Congress's action. As Attorney General Smith observed in 1983:

> The writ of habeas corpus that currently burdens state officials and the federal judiciary, vexes federal-state relations, and defeats the ends of criminal justice is not the writ of habeas corpus that was esteemed by the founders of our nation and accorded recognition in the Constitution. The diversion of the Great Writ from its historic function is the source of its current disrepute and the problems it has engendered. Its availability, in particular, to state criminal convicts to challenge their convictions in federal court may well be an institution whose time has passed. For the immediate future the best prospect for meaningful reform lies with the Administration's legislative proposals. These proposals would go far toward correcting the major deficiencies of the present system of federal habeas corpus in terms of federalism, proper regard for the stature of the state courts, and the needs of criminal justice.[133]

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[133] Smith, *supra* note 74, at 153.

Appendix: Habeas Corpus Cases

As noted at the start of this report, the contemporary system of federal habeas corpus review of state judgments can convert "the process of review in criminal cases into a kind of interminable game, an open-ended hunt for official error. In this attenuated process the question is not whether an innocent defendant, mistakenly convicted, may enlist the aid of an appellate court in correcting a miscarriage of justice. Rather, it is whether a persistent defendant, however guilty, may eventually get lucky and persuade some judge or court to find error, given unlimited opportunities to do so." [134] This appendix describes some particular cases that illustrate the costs of a system which permits the indefinite continuation of litigation in criminal cases.

1. The Hillery Case. On the night of March 21, 1962, fifteen-year-old Marlene Miller was at home alone, sewing a dress that she expected to wear on her sixteenth birthday. Marlene never got to wear the dress. On the following morning, her body was found in an irrigation ditch near her house. She had been subjected to an attempted rape, and the sewing scissors she had been using, monogrammed with her name, were embedded up to the handles in her throat.

Booker Hillery, who was out on parole from an earlier rape conviction, was arrested for the crime, convicted, and sentenced to death. Hillery's conviction marked the start of sixteen years of litigation in the state courts.

The conviction and sentence were initially upheld by the Supreme Court of California on appeal in 1963 (386 P.2d 477). In 1965, that court upheld Hillery's conviction again on re-hearing, finding all his claims to be without merit or non-prejudicial, and characterizing the evidence of guilt as "overwhelming" (401 P.2d 382, 395).[135] However, the jury that sentenced Hillery to death had been given instructions relating to the possibility of release on parole if a life term was imposed and the possibility of reduction of the sentence that were inconsistent with a California Supreme Court decision which followed Hillery's trial and

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[134] Remarks of Assistant Attorney General Stephen J. Markman at a Seminar on the Administration of Justice sponsored by the Brookings Institution, Annapolis, Maryland, at 1-2 (Mar. 8, 1986).

[135] Hillery applied for review of this decision by the United States Supreme Court. The Court denied certiorari (386 U.S. 938)

initial appeal. The case was accordingly remanded for a new penalty trial (401 P.2d 384-85, 395).

At the second penalty trial, Hillery was again sentenced to death, and the sentence was upheld by the California Supreme Court on appeal in 1967 (423 P.2d 208). Hillery subsequently filed a petition for state habeas corpus in the California Supreme Court, presenting a new challenge to the result of the second penalty trial. A potential juror had been excused at that trial after she stated that she thought that she could not sentence anyone to death in any case or follow state law relating to capital punishment. The California Supreme Court believed that the trial judge's questioning on this point and the juror's responses were inadequate under the standard of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and overturned Hillery's capital sentence again (457 P.2d 565).

This decision in 1969 was followed by a third penalty trial, at which Hillery was sentenced to death for the third time. He appealed to the California Supreme Court, raising various claims attacking his conviction and sentence. In 1974, that court affirmed the conviction again, but the sentence was changed to life imprisonment on the basis of a 1972 California Supreme Court decision holding capital punishment to be inconsistent with the state constitution. That decision had been promptly overturned through amendment of the state constitution by initiative, but this change was deemed too late to affect Hillery's case (519 P.2d 572). In 1978, Hillery engaged in a final round of state habeas corpus litigation which terminated with the denial of his petition by the California Supreme Court.[136]

The conclusion of sixteen years of state court litigation in Hillery's case was, to borrow Judge Friendly's phrase, only "the end of the beginning."[137] Later in 1978, he filed a petition for habeas corpus in federal district court, alleging that blacks had been intentionally excluded from the grand jury that indicted him in 1962. This issue had been raised, prior to Hillery's initial trial, before the state superior court judge responsible for grand jury selection (Judge Wingrove). There had been no blacks on the seven grand juries selected by that judge, though blacks constituted about 5% of the county's population in the relevant period, and blacks had served on trial juries. In ruling on a motion to quash the

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[136] *See Vasquez v. Hillery*, 474 U.S. 254, 256 & n.2, 279 n.10 (1986); *id.*, Brief for Petitioner at 5-6 and Brief for Respondent at 3.

[137] Friendly, *supra* note 41, at 142.

indictment, Judge Wingrove denied that the absence of blacks on the grand juries he had selected was the result of discrimination, and stated that he had made unsuccessful efforts to identify qualified blacks for grand jury service. In particular, he had previously asked Hillery's lawyer (who was black) to identify such persons, and had considered selecting a particular black resident of the county for grand jury service, but declined to do so after determining that it would interfere with the prospective juror's regular employment. Judge Wingrove's rejection of this discrimination claim was affirmed by the California Supreme Court on appeal. The discrimination claim was later rejected again in state habeas corpus proceedings.[138]

Hillery's federal habeas corpus petition re-presenting this claim was litigated over a period of five years before the district court (496 F. Supp. 632; 533 F. Supp. 1189; 563 F. Supp. 1228). In 1983, the district court finally reached the merits of the claim and granted the writ. The evidence before the court included the records of state proceedings; testimony given in the federal proceedings by Hillery's former lawyer in support of the claim that he had unsuccessfully litigated in the state courts twenty years earlier; and a statistical analysis of grand jury selection in Kings County up to the time of Hillery's case. Judge Wingrove was not available to testify in response to the charge that he had engaged in intentional discrimination on the basis of race, having died many years before the federal proceedings.

In granting the writ, the district court identified as supporting evidence the absence of blacks on grand juries although blacks constituted about 4.6% of the adult population in the county,[139] Judge Wingrove's knowledge that his standards for grand jury service did not result in any blacks being selected,[140] the subjective nature of the

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[138] *See* 386 P.2d at 486-87; 401 P.2d at 392-93; and sources cited in note 136 *supra*.

[139] Much of the district court's opinion was devoted to a statistical analysis supporting the conclusion that the absence of blacks on grand juries "was unlikely to be due solely to chance or accident," assuming random selection from the general adult population (563 F. Supp. 1241-46). This point, however, was of slight relevance to the ultimate issue in the case, since the grand jury selection process was not random. The question presented was whether the statistical disparity resulted from non-racial conditions on service in an obviously non-random selection process, as opposed to the deliberate exclusion of potential grand jurors on the basis of race.

[140] The district court made the stronger assertion that Judge Wingrove continued to select only persons meeting his standards "with full knowledge that such action would mean

selection process,[141] and the fact that Judge Wingrove did select a black person to serve on a grand jury in the year following Hillery's indictment.[142] The court refused to credit Judge Wingrove's explanation of his actions in the state record and also discounted the state's explanation that the county's black residents were largely engaged in itinerant farmwork and would have suffered economic hardship from grand jury service.[143] The district court's decision was affirmed by the Ninth Circuit on appeal in 1984 (733 F.2d 644).

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that no blacks would serve" (563 F. Supp. 1247). However, the basis for this assertion was not explained, and Judge Wingrove did select a black grand juror in the following year (563 F. Supp. 1248).

[141] The district court dismissed as irrelevant Judge Wingrove's explanation in the state record that grand juries in Kings County rarely considered criminal matters, and primarily performed a watchdog function with respect to the operations of county government (563 F. Supp. 1233, 1250). However, this point was relevant as support for a non-discriminatory purpose behind a practice of using certain judgmental standards in selecting grand jurors. In relation to a body whose essential function was oversight of county government, it was not unreasonable to want to choose "people who are interested in the community, civic minded, the better type of our citizens" and "someone who has some substance, some interest in government, some interest in community activities, civil activities, people that take an interest that way." 563 F. Supp. 1232 (quoting Judge Wingrove's explanation of selection standards). *See generally* JA-33 and Brief for Petitioner at 38-40, *Vasquez v. Hillery*, 474 U.S. 254 (1986) (description of grand jury functions and statutory conditions on service).

[142] Judge Wingrove's selection of a black grand juror was cited by the district court as evidence that he had intentionally excluded blacks from grand juries on the ground that it evidenced a change from prior practice after the discrimination issue was raised in Hillery's case (563 F. Supp. 1248-49). One wonders what would have happened if Judge Wingrove had *not* subsequently selected any black grand jurors. Presumably that would also have been cited as additional evidence supporting the discrimination claim.

[143] *Cf. Los Angeles Times*, Jan. 20, 1986 ("Raymond Niday, 63, a Lemoore insurance man who was foreman of the grand jury that indicted Hillery . . . said . . . that economics, not race, was the governing factor in selecting grand jury members: 'Three classes of people served on the grand juries, a businessman able to sustain his family whether he worked on a day-to-day basis or not, a retired person or a housewife. Farm laborers, wage earners, blue collar people could not afford to serve on grand juries. You would have created a hell of an imposition on any person in those categories. They had to be out earning their living. . . . Blacks at that time in this county were at the lower end of the economic scale, just as many whites were. If a person had the ability to [participate], he or she would never have been excluded. . . . The evidence was totally overwhelming against Hillery. We had no other alternative but to indict him. . . . The court's decision [overturning Hillery's conviction] is a travesty, transposing an incident that happened nearly a quarter of a century ago into the present day. . . . The futility of it all upsets me.'").

The state applied for certiorari to the Supreme Court, and the Court granted review (474 U.S. 254). The Court upheld the granting of the writ, emphasizing that a finding of racial discrimination in grand jury selection has traditionally been grounds for reversing a conviction, and rejecting the idea of creating a limitation on the raising of such claims on review in light of prejudice to the state's ability to re-try the petitioner. Justice Powell, joined in dissent by Justice Rehnquist and Chief Justice Burger, stated:

> Respondent, a black man, was indicted by a grand jury having no black members for the stabbing murder of a 15-year-old girl. A petit jury found respondent guilty of that charge beyond a reasonable doubt, in a trial the fairness of which is unchallenged here. Twenty-three years later, we are asked to grant respondent's petition for a writ of habeas corpus -- and thereby require a new trial if that is still feasible -- on the ground that blacks were purposefully excluded from the grand jury that indicted him. It is undisputed that race discrimination has long since disappeared from the grand jury selection process in Kings County, California. It is undisputed that a grand jury that perfectly represented Kings County's population at the time of respondent's indictment would have contained only one black member. Yet the Court holds that respondent's petition must be granted, and that respondent must be freed unless the State is able to reconvict, more than two decades after the murder that led to his incarceration.
>
> It is difficult to reconcile this result with a rational system of justice.

The dissent went on to argue that the establishment of Hillery's guilt by proof beyond a reasonable doubt at a fair trial demonstrated that he had not been prejudiced in any legally relevant sense by discrimination in the selection of the grand jury, and that permitting such a non-guilt-related claim to be litigated indefinitely -- despite substantial prejudice to the possibility of re-trial -- goes beyond what is reasonably warranted for deterring discriminatory practices.[144]

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[144] *Cf.* Fed. R. Crim. P. 12(b) and Advisory Committee Note (challenges to grand jury selection waived if not raised before trial); Remarks of Assistant Attorney General Stephen J. Markman at a Seminar on the Administration of Justice sponsored by the Brookings Institution, Annapolis, Maryland, at 4 (Mar. 8, 1986) ("[I]n *Vasquez v.*

The Supreme Court's decision entailed that the state would either have to release Hillery or give him a new trial, although there was no reason to doubt the accuracy of his conviction in 1963 for murdering Marlene Miller. The impact of the Court's decision on the victim's community and family were described as follows in a *Time Magazine* article entitled "Seeing Justice Never Done":

> Hanford, California, is a farm community, the kind of place where people know each other by name and trust each other by nature. "You can go downtown without a dime in your pocket, do your shopping and come back to pay later," says City Councilman J. Brent Madill. . . . In any town, the brutal killing of a teenage girl leaves a deep mark, but in Hanford the wound remains, 24 years after the crime. And now the U.S. Supreme Court has rubbed the wound open again all these years later. . . .
>
> "Where's the justice?" asks Councilman Madill. "Is there any justice?" Most of Hanford believes little attention was given to deterring the larger evil. . . .
>
> Neighbors say that Marlene's parents, now in their 70's, dread the possible reopening of the case. They still reside in Hanford, though the house they lived in at the time of their daughter's death has long since been torn down. The memories have been harder to demolish. "The sad thing is that it keeps coming back," says Marlene's brother Walter Jr. "We have not been allowed the time to heal." And the end is still not in sight.[145]

Hillery. . . the conviction of the defendant for murdering a fifteen-year-old girl was reversed after twenty-three years of . . . litigation on grounds of discrimination in the selection of the grand jury . . . despite the absence of any unfairness in the defendant's trial. . . . As the dissenting Justices noted, '[i]t is difficult to reconcile this result with a rational system of justice.' No purpose of affording justice to the individual defendant can explain it, since there is no reason to believe that his conviction was anything other than accurate and just. Nor can it be explained in terms of providing a systemic deterrent to the specific evil for which relief was granted. Allowing defendants to challenge the grand jury selection process for some reasonable time would suffice to deter such wrongs. Allowing them to do so forever is irrational and absurd.").

[145] *Time Magazine*, Feb. 17, 1986; *see Los Angeles Times*, Nov. 17, 1986 ("A trial that takes place so many years after the original crime only 'causes the victims more suffering,' said Bernard Miller, the uncle of the slain girl. The family spent a lifetime trying to forget a tragedy, he said, and now they are forced to remember. . . . 'My

The state authorities resolved to re-try Hillery, though doing so presented extraordinary difficulties after the lapse of a quarter of a century. Six thousand pages of transcripts from earlier proceedings had to be reviewed. A number of key witnesses from the original trial were dead; locating surviving witnesses and other persons with relevant knowledge involved tracking down about 115 people throughout the country. At the original trial, Hillery was discredited through the admission of false alibi statements that he made to the police following his arrest; these statements were ruled inadmissible at the re-trial because the police had not observed restrictions on custodial questioning which emerged in subsequent judicial decisions.[146] Hillery's testimony from the 1963 trial was also excluded.[147] However, physical evidence had been retained from the original trial on account of Hillery's reputation as a persistent litigator, and additional evidence was generated from this material through the use of contemporary forensic technology. The loss of witnesses was partially offset in some instances by having proxies read transcripts of their testimony from earlier proceedings at the second trial.

On December 18, 1986, Hillery was again convicted of murdering Marlene Miller in 1962, and sentenced to life imprisonment. Re-trying

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brother and his wife were terribly traumatized,' he said. 'They've tried to live with it and get on with their lives. But how can they when the courts keep tossing it back at them? They're going to have to go back in that courtroom and relive the thing all over again.'").

[146] In *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964), the Supreme Court held that statements obtained from a suspect in custodial interrogation could not be used at trial if the suspect had requested and been denied counsel and had not been told that he had a right to remain silent. The Supreme Court of California, in addressing one of Hillery's appeals in 1965, had held that the questioning of Hillery violated *Escobedo* and a related state decision because the police had not told Hillery that he had a right to counsel and a right to remain silent (401 P.2d 382, 384, 394). Of course no such requirement existed when Hillery was questioned in 1962, *see* Office of Legal Policy, *Report on the Law of Pre-Trial Interrogation* 25-32, 38-39, 55 56 (Feb. 12, 1986) (Truth in Criminal Justice Report No. 1), and the California Supreme Court found in its 1965 decision that the admission of Hillery's pre-trial statements at his trial was harmless error "in light of the other overwhelming evidence of guilt" (401 P.2d 394-95). However, the 1965 finding that the admission of Hillery's statements was improper was deemed to be "the law of the case" and sufficient to require their exclusion at his second trial in 1986.

[147] Hillery's testimony at the original trial included a reiteration of his pre-trial alibi story -- which was shown to be false by other evidence -- and also brought out the fact that he had a prior rape conviction (386 P.2d 481-82; 401 P.2d 395). These facts were concealed from the jury at the re-trial in 1986.

Hillery had cost the county over $250,000. Within hours of the conviction, a notice of appeal was filed with the California Court of Appeal; Hillery's appeal is now pending before that court. And the end is still not in sight.[148]

2. The Aiken Case. Arthur Aiken and Antonio Wheat robbed gas stations and killed the attendants. Following their third robbery and murder within a single month in 1965, they were apprehended by the police.

Aiken was advised of his rights after being taken into custody. He was initially unwilling to talk to the police when questioned, and stated repeatedly during a brief portion of the interrogation that he wanted a lawyer and did not want to say anything. However, after Aiken was confronted with his accomplice Wheat's refusal to retract statements which imputed primary responsibility for one of the killings to Aiken, he became eager to give his version of the crimes, and provided detailed confessions which inculpated him in two of the murders. At trial, Aiken was convicted of three counts of murder and sentenced to death (434 P.2d 10, 14-15, 27-29).

The conviction was appealed to the Supreme Court of Washington, which remanded the case for additional fact-finding concerning the propriety of admitting Aiken's confessions. The trial court concluded that the confessions had been properly admitted, and the state supreme court, agreeing, upheld the judgment.[149]

In reaching this result, the court noted that continued questioning following a request for counsel or an expression of unwillingness to talk is inconsistent with the restrictions on custodial questioning created by *Miranda v. Arizona*, 384 U.S. 436 (1966). However, in light of *Johnson v. New Jersey*, 384 U.S. 719 (1966), *Miranda* did not apply retroactively to cases, like Aiken's, in which the trial preceded the *Miranda* decision (434 P.2d 21-22).

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[148] *See Los Angeles Times*, Dec. 19, Dec. 3, Nov. 25, and Nov. 17, 1986. Additional information concerning the re-trial and subsequent proceedings was provided by Robert Maline, the Kings County District Attorney who prosecuted the re-trial, Ronald Fahey, who served as special prosecutor in connection with the re-trial, and the Kings County Auditor's office.

[149] The court also rejected various other claims raised by Aiken, including claims relating to pre-trial publicity, denial of severance, admission of evidence, and jury instructions (434 P.2d 35-40).

The court also rejected arguments (434 P.2d 22-24, 31-34) that Aiken's confession was involuntary or inconsistent with the more limited restrictions on interrogation announced by the Supreme Court in the decision of *Escobedo v. Illinois*, 378 U.S. 478 (1964). The trial court had found that Aiken did not confess because of overreaching by the police, but out of a desire to rebut his accomplice's statements portraying Aiken as the main actor in one of the killings. The trial court also found that the officers conducting the interrogation -- which was taperecorded -- did not hear Aiken's remarks about wanting a lawyer or being unwilling to talk. The grounds for this conclusion included the denial of all officers involved that they had heard such statements; the fact that Aiken "held his head down . . . spoke softly, slurred his words, and . . . let his voice trail off"; interference by numerous noises from outside with audibility in the interview room; the distance of the interviewing officers from Aiken; and the great difficulty of hearing on the tape many of Aiken's answers -- including the disputed statements -- as a result of which the trial court did "not believe that the interrogating officers heard, nor could possibly . . . have heard, any request for an attorney or desire to remain silent" (434 P.2d 27-33).

Following the affirmance of Aiken's conviction by the Washington Supreme Court in 1967, he applied to the United States Supreme Court for review. The Court granted certiorari (392 U.S. 652), vacated the judgment, and remanded the case to the state courts for reconsideration in light of the decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), regarding exclusion of potential jurors who oppose the death penalty, and the decision in *Bruton v. United States*, 391 U.S. 123 (1968), regarding the admission in a joint trial of a co-defendant's confession which implicates the defendant.

On remand, the Washington Supreme Court reaffirmed the conviction and sentence in 1969, finding that the state procedures followed in Aiken's trial had been consistent with the new constitutional rules that were subsequently announced in *Witherspoon* and *Bruton* (452 P.2d 232). The United States Supreme Court disagreed on the *Witherspoon* issue, and overturned Aiken's death sentence in 1971 (403 U.S. 946). On remand, Aiken was re-sentenced to three consecutive life terms.

Aiken's case was then quiet for eight years. In 1979, however, he filed a petition for habeas corpus in federal district court. The district court dismissed the petition on grounds of delay in filing under Rule 9(a) of the habeas corpus procedural rules. A panel of the Ninth Circuit

Court of Appeals reversed the dismissal and remanded the case for findings on the issue of whether the state had been prejudiced by Aiken's delay. The district court found prejudice to the possibility of re-trying Aiken and dismissed the petition a second time under Rule 9(a). The court of appeals, in 1982, then reversed the second dismissal, holding that prejudice to the possibility of re-trial can never be grounds for a Rule 9(a) dismissal (684 F.2d 632; pp. 69-71 *supra*).

The state applied to the Supreme Court for review, and the Court denied certiorari in 1983. In a statement concerning the denial of certiorari, Chief Justice Burger observed (460 U.S. 1093):

> The time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing stale claims that were fully ventilated in state courts. . . . The astonishing facts underlying this petition are illustrative and instructive.
>
> On October 14, 1965, a jury . . . found Arthur Aiken and his codefendant guilty of murder in the first degree for the robbery and slayings of three gas station attendants . . . . On direct appeal, Aiken advanced numerous challenges to his conviction. Following a remand to the trial court, the Washington Supreme Court affirmed the conviction and the sentence. . . . On petition for certiorari to this court, the conviction was vacated and the case remanded for reconsideration. . . . After a second petition for certiorari, the conviction was again vacated and remanded. . . . The state trial court then resentenced Aiken to three consecutive life prison terms.
>
> On July 26, 1979, *fourteen years* after his original conviction and *eight years* after his resentencing, Aiken filed this [habeas corpus] petition. . . . He raised claims concerning pretrial publicity, the voluntariness of his confession, and the trial court's failure to grant severance -- all claims that had been raised and decided . . . in his first appeal to the Washington Supreme Court. . . .
>
> On February 22, 1980, the District Court denied the habeas petition . . . [under] . . . Habeas Corpus Rule 9(a). The Court of Appeals for the Ninth Circuit reversed, holding that prejudice may not be presumed. On remand, the state

> presented evidence that it could locate only 30 of the 87 witnesses who testified at trial and that 136 of the State's 138 exhibits were lost or destroyed. Finding that the evidence demonstrated that it would be difficult to retry Aiken . . . the District Court again dismissed the petition. . . . The Court of Appeals for the Ninth Circuit again reversed, reasoning that Rule 9(a) allows consideration only of the State's difficulty in "respond[ing] to the [habeas] petition," and not consideration of the difficulty in retrying the petitioner.

Following the Supreme Court's denial of certiorari in 1983, the case was returned to the district court, which reached a decision on Aiken's petition in 1985. That court observed:

> Aiken's conviction, which will soon reach its twentieth anniversary, has been before the [state] trial court twice, the Supreme Court of Washington four times, the Supreme Court of the United States three times, the United States Court of Appeals twice, and is before this court for the third time.[150]

The district court rejected all of Aiken's claims on the merits including the claim that admission of his confessions violated his rights under the Sixth, Fifth, and Fourteenth Amendments.

On the Sixth Amendment issue, the district court deferred to the state trial court's determination that the interviewing officers had not heard Aiken's requests for counsel, finding it to be fairly supported by the record. While the result reached on this claim was correct, the district court's reliance on the state court's findings and rationale was unnecessary. The Sixth Amendment right to counsel cannot attach before a defendant is formally charged with a crime or initially brought into court. *See Moran v. Burbine*, 475 U.S. 412, 428-32 (1986). Since these events had not occurred at the time of Aiken's interrogation (434 P.2d 14-15, 27-29, 54), his rights under the Sixth Amendment were not violated even if the officers did hear his requests for counsel.[151]

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[150]The opinion generated in the district court was a magistrate's report that was approved and adopted by the court. *Aiken v. Spalding*, Report and Recommendation in Case No. C79-892R (W.D. Wash., June 14, 1985); Judgment of District Court in Case No. C79-892R (W.D. Wash., Sept. 5, 1985). References to the statements and reasoning of the "district court" refer to the magistrate's report.

[151]The principal case establishing that the Sixth Amendment right to counsel cannot

On the question of the voluntariness of Aiken's confession (the Fifth and Fourteenth Amendment issue), the district court found -- like the state courts almost twenty years earlier -- that Aiken had not confessed because of police coercion, but in order to respond to his accomplice Wheat's effort to shift most of the blame to Aiken. The district court also found the case to be indistinguishable from *Frazier v. Cupp*, 394 U.S. 731 (1969) -- another case involving a post-*Escobedo* but pre-*Miranda* interrogation -- in which the Supreme Court upheld the admission of a confession obtained through continued questioning after the defendant had expressed a desire to talk to a lawyer.

Aiken appealed the district court's denial of the writ to the Ninth Circuit Court of Appeals. A panel of the Ninth Circuit, in 1988, then dismissed the petition for failure to exhaust state remedies, although Aiken had previously litigated all of his claims in state court and the state had conceded before the district court that state remedies were exhausted.[152] In the district court proceedings, Aiken had presented new evidence in support of his confession claim -- specifically, a sound expert's enhancement and analysis of the taperecording -- which had not been presented to the state courts. The panel believed that this evidence "substantially improves the evidentiary basis for Aiken's right-to-counsel and voluntariness arguments," and accordingly should be considered in the first instance in the state courts.[153]

Thus, nine years of federal habeas corpus litigation -- following six years of state and federal litigation on direct review and eight years of

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attach prior to formal accusation, *Moran v. Burbine*, 475 U.S. 412 (1986), came after the district court's decision. The Supreme Court had previously taken the same position in different factual settings in *United States v. Gouveia*, 467 U.S. 180 (1984), and the plurality opinion in *Kirby v. Illinois*, 406 U.S. 682 (1972).

[152] *Aiken v. Spalding*, 841 F.2d 881 (9th Cir. 1988).

[153] For reasons suggested in the textual discussion of the district court's decision (pp. 86-87 *supra*), this conclusion was unwarranted. Even if the "new evidence" did establish that the officers heard Aiken's requests for counsel, there could be no Sixth Amendment violation, since adversarial judicial proceedings had not commenced at the time of his interrogation. Both the district court and the state courts also made determinations that rebutted Aiken's involuntariness claim and that were independent of the question whether the officers had heard his statements (specifically, the finding that Aiken's confession resulted from a desire to refute his accomplice's accusation rather than from any misconduct by the police). Prior assessment of the "new evidence" by the state courts is unnecessary because -- even taken for all it might be worth -- it would not entitle Aiken to relief on his confession claim.

pure delay -- failed to produce a federal court resolution of the merits of the claims raised in Aiken's petition. If his claims are again presented to and rejected by the state courts, he will then be free to commence another round of habeas corpus litigation in the lower federal courts.

3. The Witt Case. On October 28, 1973, Johnny Witt was out bow and arrow hunting with a younger friend, Gary Tillman. The two men had spoken on other occasions about killing a human, and had stalked persons like animal prey. On that day, they waylaid 11 year old Jonathan Kushner as he rode his bicycle along a path through a wooded area. Tillman struck Jonathan on the head with a star bit from a drill. Witt and Tillman then wrestled the struggling boy to the ground, bound and gagged him, and placed him in the trunk of Witt's car. They drove to a deserted grove and discovered when they opened the trunk that the victim had died by suffocating from the gag. They then "dug a grave for the Kushner boy and . . . slit his stomach so it would not bloat. Before burying the victim, Witt and Tillman performed various acts of sexual perversion and violence to Kushner's body." [154]

Witt was turned in to the sheriff's department by his wife, and gave a detailed confession to the crime following his arrest. At trial, he was convicted of murder and sentenced to death. The Supreme Court of Florida upheld the conviction and sentence on appeal in 1977 (342 So.2d 497). The United States Supreme Court denied certiorari (434 U.S. 935; 434 U.S. 1026).

Witt then applied for post-conviction relief in the state trial court. The application was denied, and the Florida Supreme court affirmed the denial in 1980. The court noted that "Witt raises essentially six issues, all of which he admits either were raised in the direct appeal from his conviction and sentence, or could have been raised at that time." The court went on to find that alleged changes in caselaw subsequent to Witt's initial appeal were insufficient to justify the relitigation or belated raising of these claims (387 So.2d 922). The United States Supreme Court again denied certiorari (449 U.S. 1067).

In 1980, Witt applied for habeas corpus in federal district court. The district court denied the writ. On appeal, a panel of the Eleventh Circuit Court of Appeals upheld the rejection of most of Witt's claims,

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[154] *Witt v. Wainwright*, 714 F.2d 1069, 1071 (11th Cir. 1983); *Wainwright v. Witt*, 469 U.S. 412, 414 (1985); *Witt v. State*, 342 So.2d 497, 499 (Fla. 1977).

but concluded that the writ should be granted on the basis of improper exclusion of a potential juror.

The specific claim was that three prospective jurors who opposed capital punishment had been excused on inadequate grounds. The defense had raised no objection to excusing these individuals during jury selection in 1974, and the same type of claim had been rejected by the Supreme Court of Florida in Witt's initial appeal. Nevertheless, the Eleventh Circuit focused on one prospective juror who was excused after she indicated that she was opposed to capital punishment and that her death penalty beliefs would interfere with her sitting as a juror and judging the guilt or innocence of the defendant. This was deemed improper under the standards of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and resulted in the overturning of Witt's sentence by the federal appellate panel in 1983 (714 F.2d 1069).

The Supreme Court granted certiorari and reversed the granting of the writ in 1985 (469 U.S. 412). The Court held that excusing a potential juror is proper if his views on capital punishment would substantially impair the performance of his duties as a juror, and that a state court determination that a potential juror is so biased is entitled to a presumption of correctness under the standards of 28 U.S.C. § 2254(d).

The Supreme Court's decision on January 21, 1985, reinstating Witt's capital sentence was followed by the usual last-minute flurry of applications seeking to prevent or delay the execution of the sentence. Witt unsuccessfully applied for post-conviction relief in the state trial court, alleging ineffective assistance of trial counsel and re-presenting on a different theory his earlier objection to the exclusion of certain prospective jurors who opposed capital punishment. The Supreme Court of Florida affirmed the denial of relief (465 So.2d 510). The court found that the belated raising of the ineffective assistance of counsel claim was an abuse of procedure in light of the decision of Witt's attorney not to raise such a claim in the first state post-conviction proceeding, and also rejected the claim on the merits. The court similarly found that the belated raising of the revised juror-exclusion claim was unjustified and also noted that the theory underlying the claim had been rejected in earlier decisions.

Witt applied for habeas corpus and a stay of execution in federal district court, presenting the same ineffectiveness of counsel and juror-exclusion claims. The district court dismissed the petition as an abuse of

the writ and denied a certificate of probable cause for appeal on March 1, 1985. The Eleventh Circuit Court of Appeals affirmed the denial of a stay and a certificate of probable cause on March 4, 1985, agreeing that the petition was an abuse of the writ and finding that it presented no substantial ground upon which relief might be granted (755 F.2d 1396). The Supreme Court denied an application for a stay of execution, denied certiorari, and denied a petition for rehearing of the denial of certiorari and a stay of execution on March 5, 1985 (470 U.S. 1039, 1046).

On March 6, 1985, after eleven years of litigation, Witt's death sentence for murdering Jonathan Kushner was finally carried out.

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