COLLATERAL ATTACK OF CONVICTIONS

ABF Final Report

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I. Introduction

The subject of this report, collateral attack of convictions, is a jurisprudential construct which serves to mediate between Federal constitutional guarantees in criminal proceedings for the individual and the State's power to define, judge, and exact penalties for criminal acts within its borders. To determine whether or not collateral proceedings, State or Federal, are necessary, desirable, or inevitable is not our concern here. Nor are Federal collateral attack proceedings per se except insofar as they represent the raison d'etre of State proceedings. Those subjects are important and have attracted considerable attention and deserve more but here we are attempting to begin with the temporal beginning, state proceedings, and describe how many, from whom, and with what result, in order to permit more informed judgments to be made as to the need, nature, effect of possible change in the existing system.

For the purposes of this study a collateral attack is defined as a judicial procedure instituted outside the normal trial and direct appeal process, subsequent to conviction and which seeks to modify or vacate the conviction and/or sentence. Currently, every state has a statutory procedure (or court rule) which provides such a remedy although the nature, scope, and subject matter of the proceedings differ widely (see Table I). Four states afford a remedy by way of general habeas corpus and eight more through a modified form of habeas corpus. The 38 remaining states and the Federal system have fashioned a specific remedy in lieu of habeas corpus typically broader in application but more stringent in procedural implementation.

Characteristically, the general habeas corpus procedure is limited to convictions where the court lacked jurisdiction either initially or through

some subsequent error in the proceedings. For example, in states where a felony prosecution must proceed by grand jury indictment failure to obtain a valid indictment would constitute a proper ground for collateral attack by general habeas corpus.

Some states, notably California, have vastly increased the scope of habeas corpus without altering the basic procedural scheme. As a result anamalous situations such as one trial court acting as a reviewing court for another in one case, with the roles reversed in a subsequent case, can and do occur.

Furthermore the fact that in general habeas corpus decisions are not appealable, by the petitioner res judicata does not apply, and there are no temporal limitations on filing, creates a situation where a determined petitioner can subvert the procedure by multiple filings. Because jurisdiction normally lies in the court in the county where the prisoner is serving his sentence a relatively few courts bear the impact of such a strategy. Understandably the court may give short shrift to such a petitioner, often on technical grounds, usually unexplained, as a means of coping with the perceived misuse of the great writ. Mr. Justice Jackson underscored the broader problem: "It must prejudice the occasional meritorious application (in habeas corpus matters) to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[1]

In the last decade, especially, a vast majority of states have enacted special procedures or modified habeas corpus to specifically deal with post-conviction collateral actions. In no case is the action solely limited to jurisdictional defects. Typically the remedy is broadened to encompass federal or state constitutional defects (14 states), as well as statutory

infirmities (32 states). Along the same line the early requirement of custody in habeas corpus has been broadened to include not only total physical restraint but also mere control as in parole (24 states), or probation (23 states), and even incohate harm such as the effect of one conviction on a possible subsequent conviction. In most states with modified or independent procedures the action is filed in the county of conviction (40 states) rather than where the prisoner may be found (6 states). A temporal limitation on filing is normally absent with only three states specifying maximum number of years to filing; Illinois, 20 years; Wyoming and New Jersey, 5 years. On the other hand, 12 states require that the possibility of appeal be exhausted prior to filing, while Arkansas, by Supreme Court Rule prohibits filing a collateral attack if a direct appeal was had.

In 40 of the states the scope of the collateral attack procedure is limited by provisions for waiver, res judicata, or invalidation of successive petitions. Waiver and res judicata are both applied in 28 states; waiver alone or in combination with limitation of successive petitions in three states; and a limitation on successive petitions only in 6 states.

Unlike the general rule in habeas corpus counsel is provided for indigent petitioners in 35 of the 46 states with substitute collateral attack procedures. However, the petitioner has the burden of preparing the initial petition in all those states and in at least 10 states the original petition must meet some level of probity before counsel will be appointed. Nine states provide a form for the petitioners use which is designed to assist the petitioner and court in the matter. The requirement of an answer or motion to dismiss is present in 25 of the states. In practice, if an answer is required before the court undertakes any screening, that burden shifts to the attorney

general or states attorney as the case may be. Likewise a hearing is discretionary in 42 of the states and a response by motion to dismiss or answer is required in only 25 states. Findings of fact are mandatory in all cases in only 12 states, and in an additional 18 states if a hearing has been held.

As the foregoing amply demonstrates state procedures for collateral attack of convictions is an area of law where the Brandeis "laboratory of the individual states"[2] has functioned to produce a variety of approaches to a common problem--providing a forum for the balancing of Federal Rights and State prerogatives. This report will examine in a quantitative way a cross section of those efforts.

Early in 1971 this study began as a preliminary exploration of the feasibility of an empirical study of collateral attacks of convictions. Although much of the heat in published sources focused on the interplay between state and federal procedures, the core issues appeared to be, in the first instance, related to the functioning of state procedures. Thus state procedures became the focus of the study with a follow-up of state cases into the federal system reserved for another time.

The original proposal modestly stated: "The ultimate goal will be to suggest practices and procedures which will not only assure the prisoner's constitutional rights but also conserve judicial resources. To accomplish this goal two types of data will be collected for each jurisdiction selected for study: (1) The statutes, rules, and decisions, together with a description of the practices which obtain; and (2) statistical data which are relevant to understanding and evaluating the process." As it turned out, not unexpectedly, the second aspect proved to be the more difficult and time consuming portion of the study. It soon became clear that the reason for the lack of hard data was the effort and thus expense of collecting it. A search of

published data for courts across the nation revealed that with few exceptions only gross tallies of not very carefully defined categories of cases were available. Personal estimates of officials as to the frequency of collateral attacks ranged from a very few to a figure which would include virtually everyone imprisoned. Often such a range in estimates existed even in a single jurisdiction.

Eventually two factors which would bear heavily on the methodology became clear: (1) original data would have to be collected from source documents and (2) collateral attack is a relatively infrequent occurrence when measured against total convictions.

Before any final decision on the strategy to be employed was made, we decided to conduct feasibility studies in a limited number of jurisdictions to better educate our guesses as to both the costs of various approaches to the data and the availability of the data.

For each state we prepared a summary in tabular form of various "known" data which appeared to be relevant. The information included population, Federal Circuit, types of legal remedies available, possible data sources, and various relationships between federal writ applications, court commitments, crime index and prison population. From the fifty we selected fifteen states which appeared to include a range of population and judicial circuits with a representative range of combinations of the remaining items. California, Colorado, Connecticut, Florida, Illinois, Louisiana, Maine, Massachusetts, Missouri, Nebraska, New York, Pennsylvania, Texas, Virginia, and Wisconsin were thereby included.

For each of these states a detailed description of the statutory procedures was prepared and liaison established with court and correctional personnel. As we developed more information in these states it became

painfully clear that no state would be "easy" in terms of the data collection process. Each state had advantages and shortcomings either in terms of the practices and procedures or where and if the data could be found. Finally California, Illinois, Texas, Colorado, and New York were selected for site visits to establish and test data collection procedures. At about this time, Missouri took under active consideration a rule change which would have implemented a procedure whereby appellate review of both the original conviction and collateral matters would be consolidated into a single procedure. Because such a change would have permitted a unique opportunity to evaluate one of the major procedural reforms being urged, we hoped to include Missouri as a study jurisdiction. Unfortunately, to date the rule has not been implemented.

The feasibility studies had three main goals: (1) Determine the availability and locale of data; (2) establish the methodology to be employed; (3) collect data in a small sample of cases to test the process and establish the cost involved.

Two approaches were tested as viable means of accomplishing the goals of the study: (1) Determine who had filed collateral attacks for a period of time and collect relevant data for all or a sample of such cases (Filers Study); (2) Determine who were potential filers for a period of time and collect relevant data for all or a sample of such cases (Prisoners Study).

The Filers Study had the advantage of maximizing the data concerning those who had filed collateral attacks and at a low cost, if it could readily be determined who were filers. As a result in each state we sought a ready means of identifying filers.

Two conditions had to be met: first, all filers (for the period) would have to be identifiable, and second, the procedure would have to be less costly than the alternative Prisoners Study. The Prisoners Study was based

on the fact that collateral attack of conviction is almost exclusively a procedure utilized by imprisoned felons. The approach would be to identify all prisoners (convicted felons who began serving a prison sentence) and determine who among them had initiated collateral attack proceedings. Since we were fairly certain that collateral attack was a relatively low frequency occurrence, a relatively large number of prisoners would have to be selected in order to yield a number of filers sufficiently large for meaningful analysis.

The feasibility studies began in Illinois in 1972 and throughout the study Illinois served as a benchmark and/or pilot jurisdiction for the various phases. Our first attempt was to develop the filers list; that is, to determine if a complete list of those who had filed collateral attacks could be built.

We found that such a listing did not exist either in the judicial or correctional system. Illinois procedure required filing in the court of the county of original conviction. Of the 102 counties in Illinois only the largest, Cook County, maintained a separate docket for collateral attacks. In the other counties the filing was made a part of the original conviction file. In those counties the docket entry might or might not disclose the nature of the filing. At the appellate level things were somewhat better. An alphabetic card index was maintained by the Supreme Court Clerk for all actions originating with prisoners and it was believed that "99 percent" of those who filed in the trial courts eventually appealed to the Supreme Court. However, a check of a small sample of Cook County filings against the Supreme Court index indicated that only a minor fraction of the trial court determinations were in fact appealed. Thus the utility of the card index was limited to subsequent appellate activity of filers. At the trial court level we found that we could not determine

without a great expenditure of time the number of individual defendants processed. Summary court statistics reflected only indictments handled. In some counties the multiple offender had a single indictment with multiple counts while in others he had multiple indictments with a single count. Thus we could not determine the number of individuals processed without considerable difficulty.

The correctional department record procedures also presented difficulties. All prison admittees were processed initially in two reception centers, one in the northern part of the state and the other in the extreme southern tip of the state. They could be found in four institutions. The central records were minimal and contained only enough information to trace the underlying conviction to the appropriate county. Furthermore a system-wide, single, unique identifier was not utilized. As a prisoner was transferred he was given a number unique to the institution which would be his so long as he was serving any portion of that sentence in that institution. Since the prisoner's full file was transferred with him, in some cases it would be necessary to check four institutions to obtain information concerning a single prisoner.

Despite these drawbacks the Prisoners Study appeared to be more efficient since in any case some data could only be obtained from prison records. More importantly, filers and non-filers could be compared directly since the universe could be given an inclusive definition--prison admitees during a particular period of time. If only filers constituted the universe, comparisons could not be drawn with non-filers and projections based upon admissions would be impossible without a careful design and execution of a second census or sampling of non-filers. The additional effort required in dealing with a larger sample from the beginning would be offset by the combined data generated.

As to the data we would seek initially, we purposefully set out to find records which would permit us to gather as much information as might be

relevant. With respect to the offender his age, race, prior criminal record, occupation, education and marital status were considered the minimum. The offense for which he was sentenced together with the county, date of arrest, bail history, original charge, representation, plea, procedure, judge, and date of disposition were included. The date of appeal and disposition together with any collateral attacks was included. For each collateral attack a separate schedule of information was to be prepared which included the petitioner, where and when file, when prepared, representation and dates, a summary statement of each allegation, any answer, and whether general or particular as well as the relief requested. Supplementary evidence was to be noted along with the type of proceeding and date, parties present, judge, disposition, and reasons given.

To assist in defining the universe we drew two small samples of 25 each. One consisted of all prisoners still serving time who were admitted prior to 1967. The second was drawn from admissions from 1967 to the date of sampling. The "older" sample established the degeneration of recorded information as the span to conviction increased. Items of information appeared and were dropped and reappeared. Statutory procedures and substantive provisions changed over the the years. Court and prison records were relegated to inactive (and inaccessible) storage or destroyed after basic records were photocopied. In general, the older the record the more spurious factors appeared which tended to degrade the information we were seeking.

At this point we decided to sample a five-year period from 1967 through 1971. The period would be recent enough to assure a current view of collateral attack, as well as sufficiently removed from the basic restructuring of criminal procedure which began in the early sixties. The cases also would be recent enough to facilitate the record search, yet not so current as not to have reached a decision. The five-year span would permit some examination of

trends from year to year and reduce the possibility of choosing a short period which was not characteristic. An examination of filings in Cook County for the year 1968 revealed that almost all were by prisoners who had been admitted in the preceding two or three years.[3] Thus, it appeared that a filer began his activity relatively soon after reaching the prison, and the span would yield a fairly accurate projection of total filings.

Our attention next shifted to California which had much to recommend it as a study jurisdiction. Without a doubt California has had the most sophisticated statewise record-keeping system for the longest period of time. We hoped to be able to utilize it directly to gather our data. Procedurally it differed from Illinois in that habeas corpus without special procedural modification was the principal avenue of collateral attack. In that respect it was similar to a number of states including New York. The three-tiered court system was unlike Texas and Illinois yet somewhat simpler than New York's two trial courts and two appellate levels.

The correctional system, too, had significant features which could have a bearing on collateral attacks. In Illinois the sentence passed by the trial judge was a range within a statutory range, the minimum of which established the earliest parole consideration and the maximum the final discharge of the sentence. Upon admission the prisoner has a good notion of his situation in terms of total time to be served. California on the other hand, has a system whereby the range is determined by statute with the Adult Authority finally fixing the term to be served. Until the sentence is finally discharged the Adult Authority can increase or decrease the actual term to be served. As a result the California prisoner is much less certain than his Illinois counterpart of what the future may hold. The possible affect of this uncertainty in terms of collateral attack appeared to be an interesting variation for study.

Despite the excellent central record-keeping system it could not be determined from the information gathered who had filed and who had not. As in Illinois, a hand search of records was required. However, since the filing would be appropriate only in the court where the prisoner was located, only a small fraction of trial court's records would have to be checked. Further, the Department of Corrections maintained in a central location, under several files, a current case history for each prisoner. Supplementing the written records, a computer punch card is prepared for each prisoner containing a skeleton case history. Most important for our purposes there was a single unique identifier for each offender which could be utilized to match court records and correctional files. Thus prisoners with the same name could be easily differentiated in the records. Equally important, a sample could be drawn by virtually any dimension we would choose, i.e., date of conviction, date of admission, county, etc.

The California authorities were most receptive to the study and agreed to give us both complete access to the data and any assistance we might require. As the study progressed we had occasion to make heavy demands of time and effort which were always met in an open, congenial and professional manner.

Initially, New York appeared to be an excellent prospect as a study jurisdiction. Under the aegis of the judicial conference computerized central recording system designed to track collateral attacks had been instituted.[4] Unfortunately, the system was voluntary and began only in 1971. Procedurally, however, New York was a morass with a number of overlapping remedies. In addition to common law coram nobis there was a statutory form of coram nobis;[5] common law motion for resentence; habeas corpus;[6] and a recently enacted motion to vacate judgment[7] and motion to set aside sentence[8] which could be filed at any time after conviction. The jurisdictional requirements of the various remedies meant that a search

for records would have to be conducted in the court of conviction, and any court with jurisdiction over any locale where a prisoner was admitted or transferred. We were advised, however, that a copy of every filing was available in the prisoner's record jacket at each institution. Indeed, copies were to be found in the records but a cross-check between local court records and the prison files of about 50 inmates in one institution revealed that a substantial number of filings were not copies or noted. Moreover, in approximately 20 percent of the cases the original indictment number was not to be found in the prison records. Thus, any systematic study comparable to Illinois or California would have been exceedingly costly in terms of time since names would have to be searched for in alphabetical dockets in order to locate trial records. Because of these difficulties we decided not to attempt a full study at that time. Hopefully the central registry would permit a thorough study of collateral attacks in New York in the future.

Texas presented a good opportunity to study a state with criminal appellate jurisdiction lodged in a single special appellate court.[9] Its prison population was roughly comparable to California's yet there were significant differences in virtually every dimension of criminal justice administration.[10]

Methodologically one of the greatest problems appeared to be the fact that there are county or district courts having jurisdiction over felony offenses in each of the 256 counties. If each prisoner's filing activity had to be determined by a local search of court records the costs would be several times as much as the other jurisdictions and perhaps even more than New York.

Fortunately two sources of information concerning filers existed. First of all, a daily log or prisoner filings with the courts was maintained within

the department of corrections. In addition, a "yellow slip" documenting the notarization and mailing of instruments to the courts was placed in each prisoner's file. Second, and as it turned out more importantly, the Court of Criminal Appeals maintained an alphabetical index of all filings by prisoners. Under Texas law habeas corpus is the exclusive post conviction remedy and the court of criminal appeals has exclusive original jurisdiction, The writ is filed in the court of conviction which makes findings of fact and conclusions of law and transmits them to the clerk of the Court of Criminal Appeals. Only that court can determine the issues, and grant or deny relief. As a result, applications reach a central repository in the Court of Criminal Appeals. For the first time we had a jurisdiction wherein we could be confident that filers could be identified with relative ease and from a single source.

Since Illinois, California, and Texas are relatively large jurisdiction we felt that the study of a "small" jurisdiction was important in order to provide some information about jurisdictions where the scale of the enterprise was on a very different order. Among the smaller states, Colorado was selected. In terms of the number of imprisoned felons Colorado had only an eighth to a quarter as many as the other jurisdictions yet was similar to Texas and California in its prisoner's per 100,000 population and almost twice as high as Illinois. Its F.B.I. crime index figures were surprisingly similar to the "larger" jurisdictions we had selected. Thus, in a rough way, we felt their "crime problem" was not insignificant and was comparable to the other jurisdictions.

Procedurally, habeas corpus modified and enlarged by fule of court was the basic procedure. Some complexity was introduced by the fact that the legislature had recently enacted both a comparable statutory procedure with some important differences,[11] and new and generally lower sentencing schedules.

We felt that those effects could be controlled for, and would provide some insight into the affect on filing of a broadly applicable change in law.

The feasibility study disclosed that although there was a listing of prisoner communications with the court it was uneven in terms of completeness. Further, how the communication would be listed was determined by the prisoner said it was, whereas the court's view of the nature of the communication was controlling for us. Thus it appeared that again we would have to search original court documents in order to gather data. This prospect was moderated somewhat by the fact that the population of the state is concentrated in a relatively narrow band in the Eastern portion of the state.

II. Definitions and Data Collection

A. Collateral Attack

Earlier we defined a collateral attack as a judicial procedure instituted outside the normal trial and direct appeal process; subsequent to conviction; which seeks to modify or vacate the conviction and/or sentence. Operationally we have defined a collateral attack as above with the added stipulation that it be "filed" in a state court of competent jurisdiction by or on behalf of a prisoner. In other words we have adopted the particular court's own notion of what may be filed or brought to its attention for judicial disposition.

In most courts this is an all encompassing definition since the clerk will treat as a filing all written communications addressed to the court which appear in any way to relate to a justiciable matter. However, in some courts varying degress of prefiling screening reportedly could and did occur. On the other hand matters which did not meet our definition such as writs of habeas corpus to obtain bail were treated in the same way

as collateral attacks.

For example, in some courts a discursive letter by a prisoner to a judge would not be filed and thus not considered collateral attack, while in other courts it would be given a docket number and thereby brought to the attention of the judge.

Over time, as judges, clerks, and practices changed so also could the conditions for actual filing. The operational definition, however, can be uniformly applied across the courts and states despite those variations and has the virtue of necessarily including all actions of any possible affect.

Although the problem may seem to be a matter of a distinction without a difference, in one state, Colorado, a significant number of proceedings of a collateral nature which in fact resulted in relief for the prisoner would not have been "filed" in other states.

Our operational definition includes the requirement of competent jurisdiction because we did not search for filings in courts without possible jurisdiction, such as, courts inferior to felony trial courts. We did search out all court files with possible appellate jurisdiction.

B. Population of Reference

Adult male felons admitted to prison by court commitment during a five-year period constitute the parent population in this study. Under the statutes, rules, and practices of the states studied it is that group from which come virtually all filers. Females are excluded because they constitute only a small fraction of all prisoners or filers. For example, in Colorado, only 4.1% or 204 were female. Of that number only 28 or 13.7% had filed collateral attack petitions, although 4.1% of the admittees were females only 3% of all filers were female. Thus females do not appear to file at a disproportionately higher rate and most likely file at a somewhat

lower rate than males. In either case, the overall effect would be insignificant.

Imprisoned felons were chosen because the relevant law during the time period of the study typically limited the applicability of the procedure to that group. Undoubtedly a small number of misdemeanants and probationers filed collateral attacks but we found no indication that their number would be sufficiently large to justify a systematic study.

As we have defined the parent population, only those admitted during the time period upon conviction are included. Thus a parole violator admitted earlier but readmitted during the study period was excluded. However, if the readmission was based on a new conviction then he would be included. Similarly, a probation violator sentenced to prison during the study period would enter the parent population. Finally, anyone convicted and sentenced two or more times during the study period would enter the parent population for each occurrence but, if selected in the sample, data for only the corresponding conviction and admission would be gathered.

C. Source and Types of Data

Three sources of data were utilized in this study, all consisting of official records. First prison files were examined and the following information extracted: Prisoner Form; (Appendix A) the name, prison number, age on admission date, race, I.Q., education, occupation, marital status, prior record, county of conviction, case number, crime convicted, type of proceeding, counsel; sentence, including earliest parole date, minimum expiration date, maximum expiration date, dates of parole hearings, and dispositions, and dates of release or discharge, number of disciplinary actions taken and dates, and duration of isolation, good time reductions, and institutional grade.

Court records were examined for filings subsequent to conviction and all collateral attack filings by a member of the sample were examined. In most jurisdictions either a separate file and index was maintained for all post-conviction filings or the filings were added to the original case file and index. For each original filing and supplemental filing the following information was extracted: P.C. Form; (Appendix B.) the county of filing, case number, filing date, date of preparation of the petition, formal designation of the type of petition, petitioners name, nature of custody, representation, the nature and type of hearing, the length of hearing, the judge, parties present, the nature of any supporting evidence, the answer or motions by the state and any supporting evidence, the decision and disposition. For each separate filing all allegations raised and each answer and the relief requested was summarized. In addition to collateral attack filings appeallate court records were also searched for docketed direct appeals (Appeal Form) and the date of filing, court, disposition, cite if any, and disposition date noted for each case.

As anyone who has worked with "official records" knows, their quality, completeness, and accessibility vary considerably. Conflicting information in various documents is not uncommon. To resolve these conflicts we applied a "best evidence" rule wherever possible. For example, to avoid a conflict between an intake interview description of prior record and the actual "rap sheet" only the rap sheet information was utilized. In a conflict between a court's mittimus order and an administrative summary of that order the mittimus would control.

Each state, each court, and each prison had its own nuisances in record handling and keeping. Fortunately, the record keepers in every instance were willing and able to instruct and assist us in extracting the data we required.[12]

III. Sampling and Data Collection Process

Because of the size of the parent population sampling techniques were employed in each state. For each state a specific procedure was designed and executed to provide an appropriate and comparable sample given the specific nature of the laws, practices, procedures, facilities and available records. Because of the differences from state to state each one will be described separately.

A. Illinois

In Illinois a prisoner is admitted to the system via one of two intake faciilities located in the northeastern or extreme southern portion of the state. Upon admission he is given a sequential six digit identification number which he retains so long as he is assigned to the state penitentiary associated with that intake facility. However, if he is transferred to another facility he is given an additional or new number specific to that facility. Upon readmission to any facility during the course of serving a particular sentence he resumes his original identification number. Thus an individual prisoner may have several identification numbers depending upon the number of institutions to which he has been transferred. There is no single identification number which is in system wide use. However, all prisoners initially receive an identification number from one of the two facilities.

The sample, then, was drawn from the two intake rosters. A number was chosen randomly between 1 and 11 and then every 11th number was selected. If the number was that of a woman or transferee the next valid number was chosen. The sampling yielded a list of 1068 individuals. Identifying information for each underlying conviction was obtained from the intake center-penitentiary records and organized by county, name, and docket number.

Throughout the preliminary phases of the study, the estimates as to the number of prisoners who filed collateral attacks were quite variable and although generally high we were uncertain of a proper sample size. On the one hand, if almost everyone filed we could reduce the size of the sample without much loss of information. On the other hand, if considerably fewer than 30 per cent to 40 per cent filed we would have to increase the sample size to assure a sufficient number of filers for meaningful analysis. Since the California study was also underway and with similar wide ranging estimates, we decided to search for filings by sample members in a few of the larger counties. The results indicated that only about 10 per cent or about a third as many of the sample members had filed. As a result it appeared that we would have a more than sufficient number of non-filers but not enough filers for analysis. The sample was then increased by systematically selecting two additional prison numbers within the original eleven number range. This process resulted in a final sample of 3,304 individuals or three out of eleven new admissions over the five-year period from January 1, 1967 through December 31, 1971. In order to conserve our resources we decided to collect full information on all filers found and all non-filers who were chosen in the first sample. Thus a Prison Form, Appeal Form, and P.C. form was completed for every prisoner who had collaterally attacked his conviction. For those prisoners who had not, and were members of the original sample, a prison form and an appeal form, if applicable, was completed.

B. California

Unlike Illinois, in California a single unique identifying number is assigned by the Department of Corrections to each admittee received by court commitment. The number is sequential and utilized so long as he is serving that sentence with one exception. If, while on parole, the prisoner is

convicted of a new crime and sentenced to a term in addition to the original sentence he will be assigned a new number. However, such cases were few and easily identified.

California is by far the leading state in terms of computer processing of criminal justice data and we made full use of that fact.[13] For example, the actual sampling utilized an existing computer card deck sorted by year of admission containing the prison numbers of more than 26,500 male admittees from January 1, 1967 to December 31, 1971.

As in Illinois, the estimates as to the number of filers we could expect to find was typically high and again quite variable. Our initial sample draw selected one in twenty-four or 1106 admissions over the five-year period. As it turned out, Illinois and California have roughtly similar rates of filing. Again after searching the court records, we were forced to re-sample at twice the original rate. The full sample, then, is one in eight admittees, with complete data for all filers (N=286) and prison form and appeal data for the originally selected non-filers (N=1106).

C. Texas

Unlike Illinois and California it was possible to determine the number of collateral attack filers from a single source, the Texas Court of Criminal Appeals files. Although each prisoner files his collateral attack in the trial court of the county of conviction (Texas has 256 counties!), under Texas law the trial court only is to process the application making findings of fact and tentative conclusions of law. The Court of Criminal Appeals has jurisdiction over the writ and only it may finally decide the matter. As a result, all filings of prisoner collateral attacks are forwarded for disposition to that court. Although the Court of Criminal Appeals files contained all filings for our study period, the filing system was alphabetical with each filer receiving a file number which he retained thereafter, independent of subsequent convictions and related filings.

Thus, all the records were searched by date of filing and all filings during the relevant period were checked to determine which in fact were filed by male prisoners admitted on a new conviction during our study period. This search yielded 926 male filers admitted to the Texas Department of Corrections between January 1, 1967 and December 31, 1971. We determined that half of these would be sufficient for analysis comparable to the other states and drew every other individual ordered by prison admission number. This process yielded a total of 463 filers over the time period.

Non-filers were then selected separately. Each prisoner admitted with a new court commitment to the Department of Corrections receives a sequential six digit number which he retains until that sentence is discharged as in California. Thus the total number of admissions for our period could be determined by subtracting the first number iissued in 1967 from the last number issued in 1971, or 29,680 admissions. A systematic sample was drawn by taking every 60th file unless that file was a female or a filer. If a 60th case was that of a filer or a female, the next succeeding case was selected. This sampling process yielded a total of 495 non-filers. As before a Prison Form and Appeal Form was completed for each non-filer. For each filer a Prison Form, Appeal Form and P.C. Form was completed.

Usable data was obtained for 485 of the 495 non-filers and 400 of the 463 filers. The relatively large number of filers excluded is largely (38 cases) because they did not meet our definition of a filer when all their filings were examined. In many of those cases (13) the filing related to a pre-conviction filing or a filing related to an earlier conviction. In the remaining cases (25) the case file could not be located.

D. Colorado

The final study jurisdiction, Colorado, presented its own unique set of

problems for sampling process. First of all, in order to avoid the under-sampling problems encountered in Illinois and Texas we decided to search for filings by all admittees during the five-year sample period before deciding on the sample to be drawn for the data collection phase.

Colorado has two state facilities, the penitentiary at Canon City and a State Reformatory at Buena Vista. Under Colorado law a judge may sentence most felons to either institution but under differing sentences. If sentenced to the penitentiary the offender receives a minimum and maximum sentence similar to Illinois.[14] If sentenced to the reformatory the judge has made a decision that early parole is desirable. The sentence is indeterminate as a minimum, with a parole hearing mandatory within nine months, to a maximum which is the statutory maximum for that offense.[15]

A listing of all penitentiary admissions was readily available as each admittee with a new court commitment was assigned a sequential number as in California and Texas. However, felons sentenced to the reformatory were not separately identified. Moreover, a new number was issued for each re-entry, whether from parole, new conviction, or any release to the community. Thus a reformatory inmate might and often did have several identification numbers. The number of felony admissions by court commitment per year was not known. As a result, we were forced to utilize existing weekly prisoner movement lists to construct a master list of admissions which excluded misdemeanants and multiple entries of the same prisoner serving a simple sentence. The list was ordered by original admission data.

Combining the penitentiary and reformatory lists yielded a parent population total of 5598 individuals; 3026 from the penitentiary and 2572 from the reformatory. A master list was generated by computer for each county of conviction, and utilized in the search of court records for filers. Unfortunately, an undetected processing error caused most of the 1970

Reformatory admissions not to appear on the list (N=324). The error was not discovered until after the record search of the 63 counties was completed. As a result, it was not economically feasible to gather the lost information. As a check, however, Denver court records were re-examined and we estimate that approximately 20 filers statewide were lost. It should be emphasized that only filer information was lost. Prison form information was gathered for the entire 1970 reformatory sample. There were no significant differences in the characteristics of the 1970 group as compared to the 1969, 1971 or overall admissions. Thus the 1970 admissions appeared "average" overall.

In Colorado, a collateral attack must be filed in the county of conviction. Thus the 63 counties as well as the Supreme Court were systematically searched for filings by the parent population and the post conviction data form completed for each filing. This search produced a total of 997 filers; 874 from Canon City and 123 from Buena Vista. Based on these figures we decided to sample 50% (N=437) of the Canon City filers and all of the Buena Vista filers (N=123). The master list was then cleaned to exclude the filers and a 25% N=539) sample of the Canon City population and a 12.5% (N=306) sample of the Buena Vista population was drawn systematically by admission date.

A prison form and appeal form was completed for each member of the sample (N-1405). In tabular form the Colorado sample is as follows:

	Total Filers	Proportion Sampled	No. of Filers in Sample	Total Non-filers	Proportion Sampled	Number of Non-filers in Sample
Penitentiary	847	.5	437	2156	.25	539
Reformatory	123	1.0	123	2449	.125	306
All	997	.55	550	4605	.18	845

Field Work

The data were collected by field teams made up of law students or recent law graduates.[16] Prior to any data collection they were trained both in the law relating to collateral attacks and data collection techniques. Appendix C exemplifies the manuals utilized for one state, California, as well as the forms utilized. All work was completed under the direct supervision of a member of the headquarters staff[17] either personally or through almost daily telephone conferences. The tedious and exacting job of converting the completed forms into computer readable form was done separately and subsequent to the data collection phase. A special team was organized and trained and a coding manual (Appendix C) for each state prepared. In order to assure accuracy in the coding process each form was re-checked by another member of the team and a random sample of completed coding forms was checked by a member of the headquarters staff. The exchange of forms for checking also tended to assure uniformity in application or the manual directions.

During the actual field collection of data, a small number of blind cases were selected for replication. An error rate of less than one percent was found to be present. Thus it appears that the information extracted reliably reflects the data contained in the formal records.

One indication of the sheer magnitude of the task is that the basic data file consists of approximately 50,000 I.B.M. data cards containing 4,000,000 bits of information.

Once coded, standard single column, intercolumn, and interfile techniques were applied to clean the raw data. These cleaning procedures consist of a series of logical statements which are then utilized to test the accuracy of the data. For example, the date of admission to the prison must

be later than the data sentenced. All cases which do not meet this test are identified and checked to source forms to determine whether an error in coding or collecting data in fact exists, what the correct information may be, or that the information cannot be supplied for that case. The new data is then incorporated into the file and additional runs are made until all such discrepancies have been resolved. Of course some errors are not susceptible to the cleaning process. In the example above the date of admission may be later than the date of sentencing but either or both dates may still be wrong. As a result, the test is only a weak one, detecting errors in only one direction and with rather wide latitude. In general such tests are most useful in detecting coding or keypunching errors where transposition of numbers can occur. They are nonetheless essential to assure the reliability of the processed data and were carried out in this study.

The end result of the data collection and processing is to be found at Appendix D. The data are given for each state, properly weighted as between filers and non-filers in the sample, for all, filers and non-filers.

STATE AND CITATION	TYPE OF POST-CONVICTION PROCEDURE			SUBSTANTIVE LIMITATIONS ON TYPE OF ALLEGED DEFECT			BURDEN OF PROOF		PROCEDURAL LIMITATIONS																	
									TYPE OF RESTRAINT THAT ALLOWS FILING					FILING PLACE												
	Habeas Corpus	Modified Habeas Corpus	Modern Independent	Constitutional Only	Constitutional and Nonconstitutional	Jurisdictional Only	Defendant	State	Incarceration for Felony	Incarceration for Misdemeanor	In County Jail	Probation	Parole	Other than County Convicted	County Convicted	Statute Provides Counsel for Indigent Defendant	No Filing Fee Paid by Indigent Defendant	Response Required	Hearing Discretionary	Court to Which Appeal May Be Taken 1. Supreme 2. Appellate	May Be Filed at Any Time	Form Provided	Provisions for: 1. Waiver 2. Res Judicata 3. Subsequent Petitions	Presence at Hearing: 1. Mandatory 2. Conditionally Mandatory 3. Discretionary	Findings of Fact: 1. Mandatory 2. Mandatory after a Hearing 3. Discretionary	Broad Remedy
ALABAMA Ala. Code tit. 15, §§ 1 to 43 (1959)	X					X	X		X	X	X			X		X		No	X	1, 2	X	No	None	1	3	No
ALASKA Alaska Sup. Ct. R. Crim. P. 35(b) to (k) (1968)			X		X		X		X	X	X	X	X		X	X[a]	X	Within 30 days by answer or motion	X	1	X	X	1, 2	3	2	X
ARIZONA Ariz. Sup. Ct. R. Crim. P. 32 (1973)			X		X		X		X	X	X	X	X		X	X[b]	X	Within 20 days of filing	X	2[c]	X	X	1, 2	1	2	X
ARKANSAS Ark. Sup. Ct. R. Crim. P. 1 (Supp. 1973)			X		X		X		X	X	X				X	X[d]	X	No	X	1	X[e]	No	1, 2, 3	1	1	X
CALIFORNIA Cal. Ann. Penal Code §§ 1473 to 1508 (1970)	X					X	X		X	X	X			X				No	X	None	X	No	None			No
COLORADO Colo. Sup. Ct. R. Crim. P. 35(b) (Supp. 1974)			X		X		X		X	X	X	X			X			No	X	1	X	No	3		1	X
CONNECTICUT Conn. Gen. Stat. Ann. §§ 52-466 to 52-470 (1960)	X			Federal Constitutional claims		X	X		X	X	X			X				No	Summary hearing required[f]	[g]	X	No	None			No
DELAWARE Del. Super. Ct. Crim. R. 35(a) (1974)			X		X		X		X	X	X	X	X		X			No	X	1	X[b]	No	3		2	X
FLORIDA Fla. Sup. Ct. R. Crim. P. 3.850 (1973)			X		X		X		X	X	X				X			No	X	2	X[i]	No	3		2	X
GEORGIA Ga. Code Ann. tit. 50, §§ 127-1 to 127-11 (1974)		X		X			X		X	X	X			X				Within 20 days by answer or motion	X[j]	1	X	No	1		1	X
HAWAII Hawaii Rev. Stat. tit. 36, §§ 660-3 to 660-37 (Supp. 1974)		X			X		X		X	X	X			X		X		No	X	1	X	X	None	2		No
IDAHO Idaho Code Ann. §§ 19-4901 to 19-4911 (Supp. 1974)			X		X		X		X	X	X	X	X		X	X	X	Within 30 days by answer or motion	X	1	X	No	1, 2	3	2	X

COLLATERAL ATTACK PROCEDURES—*Continued*

STATE AND CITATION	TYPE OF POST-CONVICTION PROCEDURE			SUBSTANTIVE LIMITATIONS ON TYPE OF ALLEGED DEFECT			BURDEN OF PROOF		PROCEDURAL LIMITATIONS																		
									TYPE OF RESTRAINT THAT ALLOWS FILING					FILING PLACE													
	Habeas Corpus	Modified Habeas Corpus	Modern Independent	Constitutional Only	Constitutional and Nonconstitutional	Jurisdictional Only	Defendant	State	Incarceration for for Felony	Incarceration for Misdemeanor	In County Jail	Probation	Parole	Other than County Convicted	County Convicted	Statute Provides Counsel for Indigent Defendant	No Filing Fee Paid by Indigent Defendant	Response Required	Hearing Discretionary	Court to Which Appeal May be Taken 1. Supreme 2. Appellate	May Be Filed at Any Time	Form Provided	Provisions for: 1. Waiver 2. Res judicata 3. Subsequent Petitions	Presence at Hearing: 1. Mandatory 2. Conditionally Mandatory 3. Discretionary	Findings of Fact: 1. Mandatory 2. Mandatory after a Hearing 3. Discretionary	Broad Remedy
ILLINOIS Ill. Rev. Stat. ch. 38, §§ 122-1 to 122-7 (1974)			X	X			X		X	X	X				X	X	X	Within 30 days by answer or motion	X	2	With-in 20 years	No	1, 2	3		X
INDIANA Ind. Sup. Ct. R. Crim. P. P.C. 1 (1973)			X		X		X		X	X	X	X	X		X	X	X	Within 30 days by answer or motion	X	1, 2	X	X	1, 2	3	1	X
IOWA Iowa Code Ann. §§663A.1 to 663A.8 (Supp.1975)			X		X		X		X	X	X	X	X		X	X	X	Within 30 days by answer or motion	X	1	X	No	1, 2	3	2	X
KANSAS Kan. Stat. Ann. § 60-1507 (1964)			X		X		X		X	X	X				X	X		No	X	1	X	X	3	3	2	X
KENTUCKY Ky. Ct. App. R. Crim. P. 11.42 (1972)			X		X		X		X	X	X				X	X[k]		Within 20 days	X	2	X	No	1, 2		2	X
LOUISIANA La. Code Crim. P. arts. 362 to 370 (1967)		X			X		X		X	X	X				X			No	X	None	X[l]	No	None	1		No
MAINE Me. Rev. Stat. Ann. tit. 14, § 5502 (1964); Me. R. Crim. P. 35(b) (Supp. 1974)		X			X		X		X	X	X	X	X		X	X[m]		Within 20 days by answer or motion	X	1	X	No	1, 2			X
MARYLAND Md. Ann. Code art. 27 §645A (1971); Md. R.P. BK 40 to BK48 (1971)			X		X		X		X	X	X	X	X		X	X[n]	X	Within 15 days by answer or motion	Mandatory on first petition[o]	2	X[p]	No	1, 2	3	1	X
MASSACHUSETTS Mass. Gen. Laws ch. 250, §§ 1, 2, 9-13 (1968)			X Writ of error		X		X		X	X	X	X	X	[q]					X		X	No	1, 2		2	No
MICHIGAN Mich. Comp. Laws Ann. § 770.1 (1968)			X Delayed motion for new trial		X		X		X	X	X	X	X		X						X	No	None			No
MINNESOTA Minn. Stat. Ann. §§ 590.01 to 590.06 (Supp. 1974)			X	X			X		X	X	X	X	X		X	X	X	Within 20 days by answer or motion	X	1	X[r]	No	2, 3	2	2	X
MISSISSIPPI Miss. Code Ann. §99-35-145 (1972)			X	X			X		X	X	X	X	X		X			No	X	1	X	No	1		2	X

COLLATERAL ATTACK PROCEDURES—*Continued*

STATE AND CITATION	TYPE OF POST-CONVICTION PROCEDURE			SUBSTANTIVE LIMITATIONS ON TYPE OF ALLEGED DEFECT			BURDEN OF PROOF		PROCEDURAL LIMITATIONS																		
									TYPE OF RESTRAINT THAT ALLOWS FILING					FILING PLACE													
	Habeas Corpus	Modified Habeas Corpus	Modern Independent	Constitutional Only	Constitutional and Nonconstitutional	Jurisdictional Only	Defendant	State	Incarceration for Felony	Incarceration for Misdemeanor	In County Jail	Probation	Parole	Other than County Convicted	County Convicted	Statute Provides Counsel for Indigent Defendant	No Filing Fee Paid by Indigent Defendant	Response Required	Hearing Discretionary	Court to Which Appeal May Be Taken 1. Supreme 2. Appellate	May Be Filed at Any Time	Form Provided	Provisions for: 1. Waiver 2. Res Judicata 3. Subsequent Petitions	Presence at Hearing: 1. Mandatory 2. Constitutionally Mandatory 3. Discretionary	Findings of Fact: 1. Mandatory 2. Mandatory a Hearing 3. Discretionary	Broad Remedy
MISSOURI Mo. Sup. Ct. R. Crim. P. 27.26 (Supp. 1975)			X		X		X		X	X	X				X	X[s]	X	No	X	2	X[t]	X	1, 2, 3	2	1	X
MONTANA Mont. Rev. Code Ann. §§ 95-2601 to 95-2608 (1969)			X		X		X		X	X	X	X	X		X[u]	X		No	X	1	X[v]	No	1, 2, 3	3	2	X
NEBRASKA Neb. Rev. Stat. § § 29-3001 to 29-3004 (Cum. Supp. 1974)			X	X			X		X	X	X				X	X		No	X	1	X	No	3	3	2	X
NEVADA Nev. Rev. Stat. § § 177.315 to 177.385 (1967)			X	X			X		X		X				X	X	X	Within 90 days by answer or motion	X	1	X[w]	No	1, 2	2	2	
NEW HAMPSHIRE N.H. Rev. Stat. ch. 534 § § 1 to 31 (1974)	X					X	X		X	X	X			X Any county				No	X	None	X	No	No	3		No
NEW JERSEY N.J. Sup. Ct. R. Crim. P. § § 3:22-1 to 3:22-12 (1971)			X		X		X		X	X	X	X	X		X	X[x]	X	Within 30 days by answer or motion	X	None	With-in 5 years[y]	No	1, 2	2	1	X
NEW MEXICO N.M. Stat. Ann. § 41-15-8 (1972)			X		X		X		X	X	X				X	X[z]		No	X	1	X	No	3	3	2	X
NEW YORK N.Y. Crim. P. Law § § 440.000 to 440.040 (McKinney 1971)			X		X		X		X	X	X	X	X		X			No	X	2	X	No	2	1		X
NORTH CAROLINA N.C. Gen. Stat. § § 15.217 to 15.222 (Cum. Supp. 1974)			X		X		X		X	X	X				X	X	X	Within 30 days by answer or motion	X[aa]	2	X	No	1, 2	3	2	X
NORTH DAKOTA N.D. Cent. Code § § 29-32-01 to 29-32-10 (1974)			X		X		X		X	X	X	X	X		X	X	X	Within 30 days by answer or motion	X	1	X	No	1, 2	3	2	X
OHIO Ohio Rev. Code Ann. § § 2953.21 to 2953.24 (Supp. 1974)			X	X			X		X	X	X	X	X		X	X[bb]		Within 10 days by answer or motion	X	2	X	No	1, 3	1	1	X
OKLAHOMA Okla. Stat. Ann tit. 22, § § 1080 to 1088 (Supp. 1974)			X		X		X		X	X	X	X	X		X	X[cc]	X	Within 30 days by answer or motion	X	2	X	No	1, 2	3	1	X
OREGON Ore. Rev. Stat. §§ 138.510 to 138.680 (1974)			X		X		X		X	X	X	X	X	X		X	X	Within 30 days by answer or motion	Required (ex parte if only law issue)	2	X[dd]	No	1, 2	2	1	X

COLLATERAL ATTACK PROCEDURES—*Continued*

STATE AND CITATION	TYPE OF POST-CONVICTION PROCEDURE			SUBSTANTIVE LIMITATIONS ON TYPE OF ALLEGED DEFECT			BURDEN OF PROOF		PROCEDURAL LIMITATIONS																		
									TYPE OF RESTRAINT THAT ALLOWS FILING					FILING PLACE													
	Habeas Corpus	Modified Habeas Corpus	Modern Independent	Constitutional Only	Constitutional and Nonconstitutional	Jurisdictional Only	Defendant	State	Incarceration for Felony	Incarceration for Misdemeanor	In County Jail	Probation	Parole	Other than County Convicted	County Convicted	Statute Provides Counsel for Indigent Defendant	No Filing Fee Paid by Indigent Defendant	Response Required	Hearing Discretionary	Court to Which Appeal May Be Taken 1. Supreme 2. Appellate	May Be Filed at Any Time	Form Provided	Provisions for: 1. Waiver 2. Res judicata 3. Subsequent Petitions	Presence at Hearing: 1. Mandatory 2. Conditionally Mandatory 3. Discretionary	Findings of Fact: 1. Mandatory 2. Mandatory after a Hearing 3. Discretionary	Broad Remedy
PENNSYLVANIA Pa. Stat. Ann. tit. 19, § § 1180-1 to 1180-14 (Supp. 1974)			X	X			X		X	X	X	X	X		X	X		Within 20 days by answer or motion	X	2	X	No	1, 2[ee]		1	X
RHODE ISLAND R.I. Gen. Law § § 10-9.1-1 to 10-9.1-9 (Supp. 1974)			X		X		X		X	X	X	X	X		X[ff]	X	X	Within 20 days by answer or motion	X	1	X	No	1, 2		3	2	X
SOUTH CAROLINA S.C. Code Ann. § § 17-601 to 17-612 (Cum. Supp. 1974)			X		X		X		X	X	X	X	X		X	X	X	Within 30 days by answer or motion	X	1	X	No	1, 2		3	2	X
SOUTH DAKOTA S.D. Comp. Laws Ann. § § 23-52-1 to 23-52-16 (Supp. 1974)			X		X		X		X	X	X	X	X		X	X	X	Within 20 days by answer or motion	X	1	X[gg]	No	1, 2		3	2	X
TENNESSEE Tenn. Code Ann. §§ 40-3801 to 40-3824 (Cum. Supp. 1974)			X	X			X		X	X	X				X	X	X	Within 30 days	X	2	X[hh]	X	1, 2		2	1	X
TEXAS Tex. Code Crim. P. art. 11.07 (Supp. 1974)		X				X	X		X		X				X			No	X	None	X	No	None			2	No
UTAH Utah R. Civ. P. § 65B(i) (Supp. 1973)			X	X			X		X	X	X				X	X	X	Within 10 days by answer or motion	Mandatory except where legality of confinement already adjudged	1	X	No	1, 2, 3		1	1	X
VERMONT Vt. Stat. Ann. tit. 13, § § 7131 to 7137 (1974)			X		X		X		X	X	X				X	X	X	No	X	1	X	No	3		1	2[ii]	X
VIRGINIA Va. Code Ann. § § 8-596 to 8-603 (Cum. Supp. 1974)		X		X			X		X	X	X				X[jj]			No	X	None	X	Yes, required use[kk]	No		1	1	No
WASHINGTON Wash. Rev. Code Ann. § § 7.36.010 to 7.36.250 (1961)		X		X			X		X	X	X			X			X	No	No	None	X	X	None		1		No
WEST VIRGINIA W. Va. Code Ann. § § 53-4A-1 to 53-4A-11 (Cum Supp. 1974)		X			X		X		X	X	X			Any circuit court		X	X	No	X	1	X[ll]	No	1, 2		1	1	X

COLLATERAL ATTACK PROCEDURES—*Continued*

STATE AND CITATION	TYPE OF POST-CONVICTION PROCEDURE			SUBSTANTIVE LIMITATIONS ON TYPE OF ALLEGED DEFECT			BURDEN OF PROOF		PROCEDURAL LIMITATIONS																		
									TYPE OF RESTRAINT THAT ALLOWS FILING					FILING PLACE													
	Habeas Corpus	Modified Habeas Corpus	Modern Independent	Constitutional Only	Constitutional and Nonconstitutional	Jurisdictional Only	Defendant	State	Incarceration for Felony	Incarceration for Misdemeanor	In County Jail	Probation	Parole	Other than County Convicted	County Convicted	Statute Provides Counsel for Indigent Defendant	No Filing Fee Paid by Indigent Defendant	Response Required	Hearing Discretionary	Court to Which Appeal May Be Taken 1. Supreme 2. Appellate	May Be Filed at Any Time	Form Provided	Provisions for: 1. Waiver 2. Res Judicata 3. Subsequent Petitions	Presence at Hearing: 1. Mandatory 2. Conditionally Mandatory 3. Discretionary	Findings of Fact: 1. Mandatory 2. Mandatory after Hearing 3. Discretionary	Broad Remedy
WISCONSIN Wis. Stat. Ann. § 974.06 (1971)			X		X		X		X	X	X				X	X		No	X	1	X	No	1, 2	3	2	X
WYOMING Wyo. Stat. Ann. §§ 7-408.1 to 7-408.8 (Cum. Supp. 1974)			X	X			X		X						X	X	X	Within 30 days by answer pr motion	X	1	Within 5 years	No	1, 2	3		X
National Conference of Commissioners on Uniform State Laws, Second Revised Uniform Post-Conviction Procedure Act (1966)			X		X		X		X	X	X	X	X		X	X	X	Within 30 days by answer or motion	X	Yes	X	No	1, 2, 3	3	2	X
American Bar Association Standards Relating to Post-Conviction Remedies (Approved Draft, 1968)			X		X		X		X	X	X	X	X		X	X	X	Within 30 days by answer or motion	X	Yes	X	Yes	1, 2, 3	1	2	X
28 U.S.C. § 2255			X		X		X		X	X	X				X			No	X	2	X	No	1, 2, 3	3	2	X

FOOTNOTES

a. Counsel will be appointed for an indigent petitioner where court determines that the application shall not be summarily disposed of on the pleadings. Alaska Sup. Ct. R. Crim. P. 35 (f) (1968).

b. If the petitioner desires appointed counsel he must complete under oath the questionnaire provided by the court. If the court is satisfied that petitioner is indigent the court shall appoint counsel who may file an amended petition within 15 days of appointment. Ariz. Sup. Ct. R. Crim. P. 32.5 (b) (1973).

c. An appeal from the denial of the post conviction petition is allowed, however, the aggrieved party within ten days after the ruling of the court must move the court for rehearing. Only after a denial for a motion for rehearing may the party then petition the appropriate appellate court for review of the actions of the trial court. Id. §32.9.

d. Counsel is appointed for the prisoner for a hearing in the circuit court and appeal to the supreme court, if the petitioner alleges that he is unable to employ counsel and pay costs, and the court is satisfied that the allegation is true. Ark. Sup. Ct. R. Crim. P. 1 (3) (Supp. 1973).

e. Only a prisoner whose case was not appealed to the Supreme Court may file a post conviction petition. Id. Rule 1 (a).

f. A judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case by hearing the testimony and arguments therein, and inquire fully into the cause of imprisonment, and shall thereupon dispose of the case as law and justice require. Conn. Gen. Stat. Ann. §52-470 (1960).

g. No appeal from the judgment rendered in a habeas corpus proceeding brought in order to obtain his release by or on behalf of one who has been convicted of a crime shall be taken, unless the judge before whom the case was tried or a justice of the Supreme Court of errors, within 10 days after the case is decided, certifies that a question is involved in the decision which ought to be reviewed by the Supreme Court of errors. Id.

h. An application may be filed at any time, provided, however, that post conviction relief shall not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction. Del. Super. Ct. Crim. R. 35(a) (1974).

i. In the authors comment after Fla. Sup. Ct. R. Crim. P. 3.850 (1973), the author points out that it is important to note that although the rule authorizes a motion may be made any time, Criswell v. State, 187 So. 2d 342 (1966), precludes a motion to vacate while a direct appeal of the criminal conviction is pending in the appellate court, since all jurisdiction is in the appellate court until determination of the appeal.

j. It seems unclear whether a hearing is discretionary or mandatory. [illegible]. Code Ann. tit 50 §127 (6) (1974) provides that the court shall set the [illegible]se for hearing on the issues within a reasonable time after the filing of [illegible]e defensive pleadings. It is not clear whether the motion to dismiss [illegible]he petition may be granted without a hearing.

k. If the answer raises a material issue of fact that cannot be determined [illegible] the face of the record the court shall grant a prompt hearing and, if the [illegible]rant is without counsel of record and is financially unable to employ counsel, [illegible]e court shall appoint counsel to represent him in the proceeding, including [illegible]peal. Ky. Ct. App. R. Crim. P. 1142 (5) (1972).

l. La. Code Crim. P. art. 363 (1967) provides that the writ of habeas [illegible]rpus shall not be granted to a convicted person for a cause under art. 362, [illegible]., if he may appeal, or has done so and the appeal is pending.

m. Counsel will be appointed for indigent petitioners when a petitioner [illegible]uests, however, the petition must be filed in good faith, have merit, and [illegible] be frivolous, for a counsel to be appointed. Me. Rev. Stat. Ann. tit. 14, [illegible]06 (1964).

n. If the petitioner alleges that he is unable to employ counsel, the [illegible]k of the court in which the petition was filed shall notify the Public [illegible]ender of that district. Md. Rules of Procedure BK 41 (3) (1971).

o. Md. Rules of Procedure BK 44 (1971), and Vernon v. Warden, Md. [illegible]itentiary, 11 Md. APP 340, 274 A.2d 405 (1971).

p. A petition may be filed at any time except that where an appeal [illegible] been taken from the judgment of conviction to the court of appeals or the [illegible]rt of special appeals, it shall not be necessary to take any action [illegible]hatsoever on the petition until the judgment of conviction becomes final in [illegible] court to which the appeal was taken. Md Ann. Code art. 27, §645A (e) (1971).

q. The petition may be entered in any county. Mass. Gen. Laws ch. 250, [illegible] (1968).

r. Post conviction application may be made at any time except at a [illegible] when direct appellate relief is available. Minn. Stat. Ann. §590.01 [illegible]pp. 1974).

s. If a motion presents questions of law or issues of fact the court [illegible]ll appoint counsel immediately to assist the prisoner if he is an indigent [illegible]on. Id. §27.26 (h).

t. A motion to vacate, set aside or correct a sentence cannot be [illegible]tained while an appeal from the conviction and sentence is pending, or [illegible]ing the time within which an appeal may be perfected. Mo. Sup. Ct. R. [illegible]. P. §27.26(b)(2) (Supp. 1975).

u. A petitioner may move the court which imposed the sentence or the Supreme Court or any justice of the Supreme Court to vacate, set aside, or correct the sentence. Id.

v. Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal may file a petition. Mont. Rev. Code Ann. §95-2601 (1969).

w. Unless there is good cause shown for delay, proceedings under this section shall be filed within one year following the entry of judgment of conviction or, if an appeal has been taken from such judgment, within one year from the final decision on or pursuant to the appeal. Nev. Rev. Stat. §177.315 (3) (1967).

x. If the petition is the first one filed by the defendant attacking the conviction, the judge shall as of course, unless the defendant affirmatively states his intention to proceed pro se, refer the matter to the office of the public defender. On subsequent petitions counsel shall be assigned only upon application therefore and showing good cause. N. J. Sup. Ct. R. Crim. P. §3.22-6(a), (b) (1971).

y. Petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than five years after rendition of judgment or sentence to be attacked unless it alleges the facts showing that the delay beyond set time was due to the defendants excusable neglect. Id. §3.22-12.

z. Counsel will be appointed unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief. N.M. Stat. Ann. §41-15-8(b) (1972).

aa. It would seem that a hearing is mandatory except that the court may grant a motion to dismiss on the pleadings. N.C. Gen. Stat. §15-220 (Cum. Supp. 1974).

bb. Counsel will be appointed if the petition is sufficient on its face, and the petitioner is indigent. Ohio Rev. Code Ann. §2953.24 (Supp. 1974).

cc. Counsel necessary in representation shall be made available to the applicant after filing the application, on a finding by the court that such assistance is necessary to provide a fair determination of meritorious claims. Okla. Stat. Ann. tit. 22 §1082 (Supp. 1974).

dd. A motion for post conviction relief shall not be made while such motions, as motion in arrest of judgment, motion for a new trial, or direct appellate relief of the sentence or conviction are still available. Ore. Rev. Stat. §138.540 (1974).

ee. Any person desiring to obtain relief under this act should set forth all of his then available grounds for such relief for any particular sentence he is currently serving in such petition and he shall be entitled to only one petition for each such crime. Pa. Stat. Ann. tit. 19 §1180-5(b) (Supp. 1974).

ff. An action to secure post conviction relief shall be brought in the court in which the judgment of conviction was entered, except that a person seeking relief from a judgment entered by the district court shall bring his action in the superior court for Providence County. R.I. Gen. Law § 10-9. 1-2 (Supp. 1974).

gg. A petition for relief under this chapter may be filed at any time except that proceedings thereunder cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which such appeal may be perfected. S. D. Comp. Laws Ann §23-52-4 (Supp. 1974).

hh. The prisoner in custody, under sentence of a court of this state, may petition for post conviction relief under this chapter, at any time after he has exhausted his appellate remedies, or his time for appeal in the nature of a writ of error has passed, and before the sentence has expired or has been fully satisfied. Tenn. Code Ann §49-3802 (Cum. Supp. 1974).

ii. Vt. Stat. Ann. tit. 13 §7133 (1974) was interpreted in In re Bashaw, 278 A.2d 752 (1971). That case held that where summary action was undertaken in a proceeding in the nature of post conviction remedy, proper implementation of the statutory purpose required the court to support its ruling by stating the conclusions of law upon which it predicated its action.

jj. Only the court or any judge thereof in vacation which entered the original judgment order of conviction or convictions complained of in the petition shall have the authority to issue the writs of habeas corpus, where the prisoner is held under criminal process. Va. Code Ann. §8-596(b)(1) (Cum. Supp. 1974).

kk. Every petition filed by a prisoner seeking a writ of habeas corpus must be filed on the form set forth in the statute. Failure to use such form and to comply substantially with such form shall entitle the court, to which such petition is directed, to return such petition to the prisoner pending the use of and substantial compliance with such form. Every petition filed by a prisoner, seeking a writ of habeas corpus, shall be filed on a form to be approved and provided by the office of the attorney general. Id. §8-596.1(a),(b).

ll. The petition for habeas corpus may be filed at any time after the conviction and sentence in criminal proceedings have been rendered and imposed and after time for taking of an appeal with respect thereto has expired, or the right of appeal with respect thereto has been exhausted. W. Va. Code Ann. §53-4a-1(e) (Cum. Supp. 1974).

INTRODUCTION

1. Brown v. Allen, 344 U.S. 443, 537 (1953).

2. New York State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

3. At that time the collateral attack procedure had a 5 year limitation. See Chapter 1 p___.

4. The "Central Index for Post Conviction Applications" was instituted July 1, 1971.

5. New York CC.P. §§465(7), 466.

6. Id. Article 7 §7001.

7. Id. §440.10.

8. Id. §440.20.

9. See Chapter 1, Texas at p____.

10. Id.

11. See Chapter 1, Colorado at p____.

12. The list of those who assisted us would include over 180 court clerks, scores of prison clerks, and tens of prison officials. We thank them once again for their assistance.

13. Special thanks is due Mr. Hutchins, Mr. Wilkins, and _____.

14. See Chapter 1, Colorado at p___.

15. Colo. Rev. Stat. Ann. §16-11-301.

16. Their names include . . .

CHAPTER I

OVERVIEW OF COLLATERAL ATTACK PROCEDURES

The states selected for study represent a broad spectrum of collateral attack procedures. Illinois, one of the first states to provide a special procedure independent of habeas corpus and other post conviction remedies to collaterally test convictions, limits availability to constitutional issues but mandates the assistance of counsel and allows for appeal as a matter of right. California and Texas procedures are firmly rooted in habeas corpus but each has evolved a distinctive procedural approach. In Texas the petition must be filed in the trial court and only the Criminal Court of Appeals may grant relief. In California, on the other hand, the practice at the time of the study was to permit filings at the trial and/or appellate levels having jurisdiction over the place the petitioner was restrained. Both states require that the claim be based on a jurisdictional defect, but California has vastly expanded the scope of that concept.

The Colorado remedy, fashioned by rule of court and later by statute is the broadest of all in scope, testing both constitutional and non-constitutional claims, at the trial court level with appeal to the supreme court.

In this section we will highlight for each state studied the substantive and procedural aspects of collateral attacks in order to place our quantative findings in their proper context. As a result this summary is not exhaustive of all the nuances in each state nor by any means a guide to practice. It does however identify the major dimensions of the process during the study period in each state. As other aspects relate to the exposition of our findings we will note them. Note also that we have used the common term petition throughout, rather than application, motion, etc. in order to simplify exposition.

1. Illinois

The Illinois procedure has existed with little change for almost three decades. As such it represents one of the earliest efforts in providing a single, more broadly applicable, and available remedy for state prisoners. Its origin lies in a state penitentiary rule which required that a prisoner must retain counsel before he could pursue post conviction procedures to test his confinement. When the Federal District Court in the 1944 case of U.S. ex rel. Bongiorno v. Ragen,[1] declared the rule unconstitutional, Illinois prisoners literally became the majority of filers in forma pauperis for certiorari before the Supreme Court. This fact focused attention on the procedural problems of the then current remedies, the write of error, statutory coram nobis, and state habeas corpus. One commentator summarized the prisoner's situation at that time as follows:

> Thus although in theory Illinois had three post conviction remedies, it was difficult to determine in a given case which of these a convicted prisoner could utilize. Because each of these three post conviction remedies had its own peculiar function, it was possible for the Illinois Attorney General before the Supreme Court of the United States to confront indigent prisoners with technical arguments when post-conviction relief was sought. For example, where an indigent filed a petition for a writ of habeas corpus he was confronted with the argument that the proper procedure was a motion in the nature of writ of error coram nobis because the facts being alleged were not known to the trial court at the time judgment of conviction was entered. Where he proceeded by petition for writ of error coram nobis he was confronted with the technical argument that the facts alleged were known to the trial court; therefore, the proper procedure was writ of error. Where he sought writ or error, he was confronted with the technical argument that the facts being urged were in the bill of exceptions and since bills of exceptions cost money and had not been included he could not get an adjudication of his constitutional claim. These were sophisticated, and indeed in most instances highly successful arguments, which resulted virtually in foreclosing post-conviction relief to Illinois prisoners prior to 1949.[2]

Finally, in Marino v. Ragen Mr. Justice Rutledge's measured warning impelled corrective action:

> [T]he Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one. If the only state remedy is the possibility that the attorney general will confess error when he determines that flagrant case will not survive scrutiny by this Court, it is hardly necessary to point out that the federal courts should be open to a petitioner even though he has not made his way through several courts applying for habeas corpus, then writ of error, and finally coram nobis.[3]

A commission was appointed and drafted a court rule setting out a procedure for post conviction hearings. The Supreme Court of Illinois declined to adopt the rule but upon submission as a bill in the legislature it was enacted into law as the Post Conviction Hearing Act of 1949.[4]

Since then until the time of our study the principal amendment to the Act was to increase the limitation on filing from five to twenty years in 1965, and reads as follows:

> ARTICLE 122. POST-CONVICTION HEARING
>
> 122-1. Petition in the Trial Court. Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the State's Attorney by any of the methods provided in Rule 7 of the Supreme Court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceedings under this Article shall be commenced more than 20 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

122-2. Contents of Petition. The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

122-3. Waiver of Claims. Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.

122-4. Pauper Petitions. If the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person and order a transcript of the proceedings delivered to petitioner in accordance with Rule of the Supreme Court. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.

122-5. Proceedings on Petition. Within 30 days after the filing and docketing of the petition or within such further time as the court may set, the State shall answer or move to dismiss. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such order as to amendment of the petition or any other pleading or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases.

122-6. Disposition in Trial Court. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

122-7. Review. Any final judgment entered upon such petition may be reviewed by the Supreme Court as an appeal in civil cases.

ARTICLE 122. POST CONVICTION HEARING

A. Who may petition for relief

Section 122-1 establishes the basic nature and scope, and availability of the remedy. Although limited on its face to persons "imprisoned in the penitentiary" the Illinois Supreme Court made an early ruling that that term included female felons in the woman's reformatory as well as men awaiting execution in Cook County Jail. At the time of our study however, probationers, parolees, and misdemeanants did not appear to come under the provisions of the act. Some question also existed if after filing an intervening release on parole or discharge would render the petition moot. The Illinois Supreme Court has ruled that release on parole or discharge will not automatically have that effect where error or delay by the trial court in disposition of the petition was a factor.[5] As a practical matter we found that petitioners did not actively pursue pending collateral attacks once released from prison.

The time limitation change of 5 to 20 years had no effect on our study since our population was drawn exclusively from those convicted after the increased limit. The fact that only a relative handful of prisoners actually serve more than 20 years and likely would have exhausted their remedies long before then makes it questionable whether the limitation would ever have a significant impact. At any rate since no absolute federal limitation exists the limitation only means that the prisoner may have direct access to the

Federal Courts at that time.

B. Where the petition is filed

Section 122-1 mandates that the petition be filed with the clerk of the court of conviction who must docket and bring the petition promptly to the attention of the court. Some disagreement exists as to whether it is advisable to have the court of conviction review its own actions in a collateral attack proceeding.[6] At the suggestion of the Supreme Court[7] the practice in Illinois and especially in Cook County is to assign the matter to the convicting judge whenever possible, even if he is no longer on the criminal calendar. Although we cannot objectively resolve the issue from our data, it should be noted that relief in Illinois is obtained as infrequently as in California where the filing is typically not in the court of conviction. Both Texas and Colorado require filing in the court of conviction with the former having the lowest rate of relief and the latter the highest rate. Thus it would appear that factors other than the familiarity of the sitting judge with the case are more critical to the outcome.

C. Contents of the Petition

Section 122-2 describes what the petition shall contain. Unlike Texas and California a standard form petition is not mandated or in general use. Argument and citation of authorities are to be omitted from the petition but supporting evidence including affidavits and records must be included or their absence explained. Section 122-4 assures the indigent petitioner a free transcript of the trial record. The statute itself provides no substantive guidance for the

petitioner merely stating that he must ". . . clearly set forth the respects in which petitioner's constitutional rights were violated." However, as we shall shortly see counsel is readily available and such guidance is less critical than where the petitioner must meet a certain standard in his pleading before counsel will be made available. Further, since counsel will normally file a supplemental petition the pro se petitioner need not have unusual ability in drafting the original petition.

The requirement that any previous attempts to secure relief be included in the verified petition is meant to assist the state and the court in determining possible issues of waiver or res judicata which may be present. Although proceedings under the act are considered as civil in nature and separate from the original criminal proceeding we found that in practice petitions are filed with the original case typically under the original indictment number and thus prior petitions are readily found in the record.

D. Assistance of counsel

Section 122-4 as implimented by Supreme Court rule 651 provides counsel for virtually every petitioner. Since the original passage of the act in 1949 the provision for counsel has been an essential element of the procedure and a concomitant of the statutory waiver provisions. In the drafters' view the underlying policy of the act to provide one opportunity to fully test claims of denial of constitutional rights would be unattainable without effective assistance of counsel.[8] The Illinois Supreme Court has adopted that view and in 1968 explicitly

stated that counsel must be provided the pro se petitioner even if the original filing raises no arguable ground for relief.[9]

The Supreme Court went even further and mandated both by case law and finally by Court Rule[10] that counsel in every case consult with the petitioner by mail or in person, examine the record, ascertain the possible deprivations of constitutional rights and amend the pro se petition as necessary. On appeal, unless counsel can so certify, the court will automatically grant a new proceeding to the petitioner.

No other state studied provides counsel so readily nor under such direct control in terms of counsels' duty towards the petitioner.

E. Multiple petitions

The policy of the Illinois Act is to provide one plenary procedure. By the terms of the act "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."[11] However, we have already seen an exception where counsel lacks due diligence in pursuing the issues. Other exceptions likely exist where fundamental fairness dictates such as a retroactive change in law or a new decision which could not have been reasonably anticipated at the time of the original petition.

The relationship between direct appeal and collateral attack under the Act is more complex. Since under the Act a petition may be filed once the petitioner is imprisoned he need not wait until his appeal is decided. In fact given the doctrine of res judicata as applied in Illinois he may find it desirable to pursue both remedies at the same time. Illinois adheres to the general rule that has been taken errors raised even of a constitutional nature are fully determined

and res judicata or if not raised, but of record, waived.[12] On the other hand, if no appeal is taken nothing is lost if there are no errors of a non-constitutional nature.[13] Where the prisoner has both non-constitutional errors of record and an incomplete record with respect to constitutional errors pursuing both a direct appeal as to the non-constitutional errors of record and attempting to augment the record through collateral attack at the same time may be effective. In 1969 the Supreme Court of Illinois indirectly approved of the tactic in Moore[14] when it consolidated Moore's direct appeal and his appeal from a denial of collateral relief. Our data indicates that thereafter there was a significant shift among petitions to filing under the act while their appeal was still pending. Even in cases where only constitutional errors of record appear, initiating both avenues of relief simultaneously may greatly reduce the time between conviction and exhaustion of remedies. Our data shows that on the average a direct appeal takes more than two years and a collateral attack almost as long to be decided. The vast majority of prisoners are paroled or discharged months before that full cycle can be completed.

F. Procedure

Under section 122-5 the state must answer the petition or move to dismiss within 30 days of the docketing of the petition. However, the court may extent that period and may order further pleadings on its own motion or that of the parties. In addition, the court may permit the petitioner to withdraw the petition without prejudice at any time prior to entry of judgment. Again these statutory provisions are meant to assure that the proceedings, once

completed will have provided ample opportunity for the petitioner to have fully litigated his constitutional rights and thus provide the foundation for the statutory waiver provision.

A hearing is held only if there are factual issues in dispute. Normally the need for a hearing is determined by the state filing a motion to dismiss. If the petition survives the motion a hearing is held. Only if the prisoner's testimony is required does he have a right to be present at the hearing.[15] There is no right to a jury trial.

Under section 122-6 the court may grant relief "with respect to the judgment or sentence in the former proceedings." Discharge, re-trial, or re-sentencing may be ordered. Thus, it appears that under the wording of the section post-sentencing errors including appeal matters and parole determinations are not subject to collateral review. However, the Illinois Supreme Court has found the act applicable where the trial court failed to properly admonish the defendant of his right to appeal, provision of counsel and right to a transcript.[16]

E. Appeal

Both the state and the petitioner have a right to appeal an adverse decision. Until June of 1971 the appeal was directly to the Illinois Supreme Court, thereafter by Supreme Court rule the Appellate Courts had exclusive jurisdiction.[17]

By Illinois Supreme Court rule the clerk of the trial court must give notice to the petitioner that he has the right to appeal and, if indigent, to counsel and a transcript of the collateral proceedings.[18] The appeal is governed by criminal appellate procedure

rather than civil although the procedure is deemed civil in nature. As such the court may reverse, affirm or modify either the collateral or original judgment including by reducing the sentence or the degree of the offense.[19]

2. California

Although a specialized procedure for collateral attack has been urged in California for more than twenty-five years,[1] statutory habeas corpus remains the principal means of securing relief. As a result the courts have vastly expanded the scope of habeas corpus to accommodate the Federally mandated rights of prisoners on a piece meal basis. The result is a cumbersome procedure whose means often do not comport with the ends being sought.

The relevant portions of the statute for our purposes are as follows:[21]

§ 1473. Persons authorized to prosecute writ

Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.

§ 1474. Application by petition; signature; contents; verification

APPLICATION FOR, HOW MADE. Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known;
2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists;
3. The petition must be verified by the oath or affirmation of the party making the application.

§1475. Method of granting; grounds for discharge after remand; courts which may issue writ on subsequent applications; return, verification and contents of application; service

The writ of habeas corpus may be granted in the manner provided by law. If the writ has been granted by any court or a judge thereof and after the hearing thereof the prisoner has been remanded, he shall not be discharged from custody by the same or

any other court of like general jurisdiction, or by a judge of the same or any other court of like general jurisdiction, unless upon some ground not existing in fact at the issuing of the prior writ. Should the prisoner desire to urge some point of law not raised in the petition for or at the hearing upon the return of the prior writ, then, in case such prior writ had been returned or returnable before a superior court or a judge thereof, no writ can be issued upon a second or other application except by the appropriate court of appeal or some judge thereof, or by the Supreme Court or some judge thereof, and in such an event such writ must not be made returnable before any superior court or any judge thereof. In the event, however, that the prior writ was returned or made returnable before a court of appeal or any judge thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said Supreme Court or some judge thereof.

Every application for a writ of habeas corpus must be verified, and shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application, and if any such prior application or applications have been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise.

Whenever the person applying for a writ of habeas corpus is held in custody or restraint by any officer of any court of this state or any political subdivision thereof, or by any peace officer of this state, or any political subdivision thereof, a copy of the application for such writ must in all cases be served upon the district attorney of the county wherein such person is held in custody or restraint at least 24 hours before the time at which said writ is made returnable and no application for such writ can be heard without proof of such service in cases where such service is required. . . .

§ 1481. Production of body; exceptions

BODY MUST BE PRODUCED, WHEN. The person to whom the writ is directed, if it is served, must bring the body of the party in his custody or under his restraint, according to the command of the writ, except in the cases specified in the next section.

§ 1482. Hearing without production of body; illness or infirmity of person in custody; adjournment

WHEN HEARING MAY PROCEED WITHOUT PRODUCTION OF THE BODY. When, from sickness or infirmity of the person directed to be produced, he cannot, without danger, be brought before the Court or Judge, the person in whose custody or power he is may state that fact in his return to the writ, verifying the same by affidavit. If

the Court or Judge is satisfied of the truth of such return, and the return to the writ is otherwise sufficient, the Court or Judge may proceed to decide on such return, and to dispose of the matter as if such party had been produced on the writ, or the hearing thereof may be adjourned until such party can be produced.

§ 1483. Time for hearing and examination of return, etc.

HEARING ON RETURN. The Court or Judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return, and such other matters as may be properly submitted to their hearing and consideration.

§ 1484. Pleading to return; summary hearing; compelling attendance of witnesses

PROCEEDINGS ON THE HEARING. The party brought before the Court or Judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discahrge. The Court or Judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

§ 1487. Discharge of person in custody by virtue of process; grounds

GROUNDS OF DISCHARGE IN CERTAIN CASES. If it appears on the return of the writ that the prisoner is in custody by virtue of process from any Court of this State, or Judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restrictions of the last section:

1. When the jurisdiction of such Court or officer has been exceeded;
2. When the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge;
3. When the process is defective in some matter of substance required by law, rendering such process void;
4. When the process, though proper in form, has been issued in a case not allowed by law;
5. When the person having the custody of the prisoner is not the person allowed by law to detain him;
6. Where the process is not authorized by any order, judgment, or decree of any Court, nor by any provision of law;
7. Where a party has been committed on a criminal charge without reasonable or probable cause.

§ 1506. Appeals; criminal cases; jurisdiction; application for hearing in supreme court; judicial council rules; bail; stay of execution

An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the Judicial Council. If the people appeal, or petition for hearing in either the court of appeal or the Supreme Court, the defendant shall not be discharged from custody pending final decision upon the appeal or petition for hearing and he must, in any case in which a judgment of conviction has become final, be retaken into custody if he has been discharged; provided, however, that in bailable cases the defendant may be admitted to bail, in the discretion of the judge, pending decision of the appeal or petition for hearing. If the order grants relief other than a discharge from custody, the trial court or the court in which the appeal or petition for hearing is pending may, upon application by the people, in its discretion, and upon such conditions as it deems just stay the execution of the order pending final determination of the matter.

§ 1508. Judge or court before which writ may be made returnable

(a) A writ of habeas corpus issued by the Supreme Court or a judge thereof may be made returnable before the issuing judge or his court, before any court of appeal or judge thereof, or before any superior court or judge thereof.
(b) A writ of habeas corpus issued by a court of appeal or a judge thereof may be made returnable before the issuing judge or his court or before any superior court or judge thereof located in that appellate district.
(c) A writ of habeas corpus issued by a superior court or a judge thereof may be made returnable before the issuing judge or his court.

A. Who may petition for relief

Section 1473 is broadly worded to include both imprisonment or restraint of any type. Actual physical restraint is not required.[22] Therefore, habeas corpus relief is available to petitioners admitted

to bail,[23] to petitioners challenging revocation of probation when judgment and sentence have been pronounced but execution thereof has been stayed suspended,[24] to petitioners challenging proposed conditions of probation.[25] Nor is it necessary for the petitioner to claim of right to release from all restraint; he may request a ruling on the invalid portion of the restraint.[26] The conditions of imprisonment or restraint may also be determined.[27] For the purposes of this study and to assure comparability among the states, petitions which do not allege error in the judgment or sentence have been excluded. Further, only if the petitioner was imprisoned does he enter our sample. As a result our findings relate only to those convicted and sentenced to prison who are challanging that aspect of the process.

By its terms the statute places no limitation on the time of filing although the courts have applied the doctrine of laches to all petitions for the writ. Therefore, the petition will be dismissed unless the petitioner explains any significant delay in filing the writ or pursuing a direct appeal.[28]

B. Where the petition is filed

Under the California Constitution and California practice a petitioner initially may file in the superior court, the Court of Appeal or the Supreme Court of California.[29] Until the 1966 amendment to the California Constitution jurisdiction of the respective courts was exclusively dependant upon the place of confinement. Since then it has gradually become clear that there is only one geographical limitation under California law and that by statute.[30] However, the

practice of filing in the court with jurisdiction over the place of confinement was so firmly rooted that during our study period virtually no shift in practice occurred.[31] In fact as late as 1971 the California Supreme Court was recommending transfer of certain cases to the county of conviction rather than direct filing.[32] As a result, only 11 California trial courts were required to entertain petitions from prisoners convicted throughout the state.

C. Contents of the petition

As of January 1, 1966 petitioners are directed to utilize a form petition as specified by rule of court.[33]

Although the similarity between the 20 questions on the form and the once popular parlor game of that name is purely coincidental the approach is much the same. That is it is presumed that the answers to the questions are within the knowledge of the petitioner. But is the ordinary prisoner able to "State concisely the grounds on which you base your allegation that the imprisonment or detention is illegal" along with the facts which support the allegation.[34] It would appear that the form itself should provide more substantive guidance. A checklist of possible grounds for relief is usually rejected for two reasons: (1) the belief that prisoners will "manufacture" errors with the assistance of the checklist in the hope of succeeding; and/or (2) such a list must necessarily be vague in some respects and subject to constant updating as new constructs of due process emerge. Clearly the second reason establishes the need for professional assistance rather than reliance on lay pleading

whether or not a form is to be employed. As to the first reason for rejection of a more explicit format, it proves too much. That same reasoning would also lead to the prohibition of access to any legal materials which would identify possible grounds for relief. Until counsel is provided on a routine basis as in Illinois, it is difficult to view the collateral attack procedure as anything but a gesture of concern for constitutional irregularities in the conviction process.

D. Assistance of counsel

There is no provision for appointment of counsel at any stage of the habeas corpus proceeding in California. Our data show that only about 10 per cent of the petitions have the assistance of counsel in preparing the original petition. In most courts, if an order to show cause is issued or a hearing ordered, counsel, if requested, will be provided. However only about six per cent of the petitions ever reach that stage. Our data show that only about 15 per cent of the petitioners ever had the assistance of counsel for any of their petitions. In the majority of those cases counsel had been retained. One disturbing fact is that almost half of the petitioners with counsel succeeded in obtaining a hearing. Thus the lack of counsel appears to be a decided disadvantage in obtaining a full determination of the issues. If counsel were more generally available it is likely that more petitions would survive immediate dismissal.

E. Procedure

The statute contemplates that after filing, the writ will either be granted or denied; and if granted a return made; a traverse;

a hearing; and, finally remand a discharge from custody. The California courts, however, utilize an order to show cause rather than issuance of the writ itself, principally to avoid the need for the production of the prisoner in every instance. When the petition is summarily denied, as it is in more than 85 per cent of the filings, the petitioner may again file in any court as res judicata does not apply. However, under § 1475 if a hearing is held and the prisoner is remanded to custody, a successive petition must be filed in the court of appeal and if again unsuccessful in the California Supreme Court. Thus under statutory habeas corpus, as implemented in California, hearings are seldom held, or if held constitute only the first tier of a three tiered system and tends to require multiple filings.

The court is not required to make findings of fact and few judges at the superior court level regularly do so. In part this may be due to the fact that subsequent proceedings by the petitioner are de novo proceedings rather than in the nature of an appeal. As a result specificity in the determination by the lower court are not required by the reviewing courts.

Although there is no provision for appeal by the petitioner from a denial of his petition, the State may directly appeal from an order granting relief to the petitioner.[35] The decision of the court of appeal may be appealed by either party to the California Supreme Court as a matter of right.[36] Pending that final determination the petitioner may not be discharged.[37]

Overall, the California procedure, though broad in application, is cumbersome in execution and does not provide an indigent prisoner equal standing in the litigation of his contentions of constitutional defects.

3. Texas

As in California the Texas collateral attack procedure is by writ of habeas corpus. Procedurally however, Texas has fashioned a unitary procedure quite unlike California's three tiered system.

The relevant portions of the Texas habeas corpus statute at the time of our study are as follows:

ARTICLE

11.01. What writ is

The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to any one having person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.

11.02. To whom directed

The writ runs in the name of "The State of Texas." It is addressed to a person having another under restraint, or in his custody, describing, as near as may be, the name of the office, if any, if the person to whom it is directed, and the name of the person said to be detained. It shall fix the time and place of return, and be signed by the judge, or by the clerk with his seal, where issued by a court.

11.03. Want of form

The writ of habeas corpus is not invalid, nor shall it be disobeyed for any want of form, if it substantially appear that it is issued by competent authority, and the writ sufficiently show the object of its ussuance.

11.04. Construction

Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it.

11.05. By whom writ may be granted

The Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion to grant the writ under the rules prescribed by law.

11.07. Return to certain county; procedure after conviction

After indictment found in any felony case, and before conviction, the writ must be made returnable in the county where the offense has been committed.

After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas. The writ may issue upon the order of any district judge, and said judge may upon presentation to him of a petition for said writ, set the same down for a hearing as to whether the writ should issue, and ascertain the facts, which facts shall be transmitted to the Court of Criminal Appeals with the return of the writ if same is issued after such hearing. Provided further, that should such writ be returned to the Court of Criminal Appeals without the facts accompanying same, or without all the facts deemed necessary by the Court of Criminal Appeals, said court may designate and direct any district judge or judges of this State to ascertain the facts necessary for proper consideration of the issues involved; and it shall be the duty of the official court reporter of the district judge or judges so designated to forthwith prepare a narration of the facts adduced in evidence upon any such hearing and transmit the same to the clerk of the Court of Criminal Appeals within ten days of the date of such hearing. And it shall be the duty of the district clerk of the county wherein the writ is issued to make up a transcript of all pleadings in such case and to transmit the same within ten days to the clerk of the Court of Criminal Appeals. Provided, that upon good cause shown, the time may be extended by the Court of Criminal Appeals for filing of such narration of facts or transcript.

The clerk of the Court of Criminal Appeals shall forthwith docket the cause and same shall be heard by the court at the earliest practicable time. Upon reviewing the record the court shall enter its judgment remanding the petitioner to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Upon any hearing by a district judge by virtue if this Act, the attorney for petitioner, and the State, shall be given at least one full day's notice before such hearing is held.

11.12. Who may present petition

Either the party for whose relief the writ is intended, or any person for him, may present a petition to the proper authority for the purpose of obtaining relief.

11.14. Requisites of petition

The petition must state substantially:

1. That the person for whose benefit the application is made is illegally restrained in his liberty, and by whom, naming both parties, if their names are known, or if unknown, designating and describing them;

2. When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a copy cannot be obtained;

3. When the confinement or restraint is not by virtue of any writ, order or process, the petition may state only that the party is illegally confined or restrained in his liberty;

4. There must be a prayer in the petition for the writ of habeas corpus; and

5. Oath must be made that the allegations of the petition are true, according to the belief of the petitioner.

11.15. Writ granted without delay

The writ of habeas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever.

11.21. Constructive custody

The words "confined," "imprisoned," "in custody," "confinement," "imprisonment," refer not only to the actual, corporeal and forcible detention of a person, but likewise to any coercive measures by threats, menaces or the fear of injury, whereby one person exercises a control over the person of another, and detains him within certain limits.

11.22. Restraint

By "restraint" is meant the kind to control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right.

11.23. Scope of writ

The writ of habeas corpus is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the poser in fact exists, it is exercised in a manner of degree not sanctioned by law.

11.32. Custody pending examination

When the return of the writ has been made, and the applicant brought before the court, he is no longer detained on the original warrant or process, but under the authority of the habeas corpus. The safekeeping of the prisoner, pending the examination or hearing, is entirely under the direction and authority of the judge or court issuing the writ, or to which the return is made. He may be bailed from day to day, or be remanded to the same jail whence he came, or to any other place of safekeeping under the control of the judge or court, till the case is finally determined.

11.39. Who shall represent the State

If neither the county nor the district attorney be present, the judge may appoint some qualified practicing attorney to represent the State, who shall be paid the same fee allowed district attorneys for like services.

11.59. Obtaining writ a second time

A party may obtain the writ of habeas corpus a second time by stating in a motion therefor that since the hearing of his first motion important testimony has been obtained which it was not in his power to produce at the former hearing. He shall also set forth the testimony so newly discovered; and if it be that of a witness, the affidavit of the witness shall also accompany such motion.

Article 11.07 is the provision in terms of the procedure to be followed. As such it distinguishes Texas procedure from that which obtains in California.

Under Article 11.07 the writ of habeas corpus is the exclusive procedure for relief by collateral attack from a felony conviction. The unique aspect is that, in essence, the procedure mandates a two step, yet unitary, procedure with decision making power residing exclusively in the

Texas Court of Criminal Appeals--the highest (and only) criminal appellate court.

In Ex Parte Young[38] the Court of Criminal Appeals set out the procedure to be followed. As the court construed Article 11.07, the petition for the writ should in all cases be directed to the district court of conviction. Earlier petitions were filed directly in the Court of Criminal Appeals under the Texas Constitutional allocation of power to issue the writ to that Court.[39] However, the court determined that to implement Article 11.07 it would no longer entertain such a writ . . ." unless it be shown that the petition, or one containing like sworn allegations of fact, has been presented to the judge of the convicting court.[40] The court did not, however, grant the district courts the power to grant relief. The court held that under the terms of the Article the writ is returnable to itself for disposition. The only exceptions made were that the district court could 1) provide for counsel or record on appeal, 2) determine the voluntariness of confessions, 3) and conduct nunc pro tunc proceedings to correct the record. Other forms of relief including discharge could only be ordered by the Court of Criminal Appeals.

The district court, however, could issue the writ, conduct a hearing, and make findings of fact. If it did so it then was directed to transmit a narration of the facts developed at the hearing, as well as, findings of fact and conclusions of law.

In some respects the writ procedure is parallel to the appellate procedure with the exception of the ultimate power of the district court to grant relief.

Under Texas appellate procedure the appellate briefs are filed in the district court. Under Article 40.09 § 12 the trial court has a duty to decide from the briefs and argument, if any, whether the defendant should be permitted to withdraw his notice of appeal and be granted a new trial. The trial court has 30 days after the filing of the States' brief to rule on the motion. If it fails to do so the records and briefs are transmitted to the Court of Criminal Appeals for review. In effect, the procedure gives the trial judge an opportunity to review the judgment in light of the briefs and argument for error and correct it, without the need for review by the Court of Criminal Appeals.

The difference between the appellate procedure and the habeas corpus procedure is that in the latter the district court has only very limited power to grant relief.

As mentioned earlier, our data search was limited to the Court of Criminal Appeals records. As a result, a filer in Texas is one whose petition has reached the Court of Criminal Appeals on transmittal from the district court. While this appears to be a stricter criterion than that in the other states studied, unless the petition is passed upon by the Court of Criminal Appeals it is of no effect.

It appears that at some point the petition does reach that court. The list of court filings maintained by the Department of Corrections was checked against the court index with virtually all being found as well as other petitioners not so listed. Thus, we are confident that our findings from the Court of Criminal Appeals are valid and, at any rate, meet the operational definition of filers.

4. Colorado

In Colorado our study period began in 1968 through 1972, one year later than the other jurisdictions. During this period much legislative and judicial activity took place which affected the study.

The basic collateral attack procedure was set out by rule of court, mandating a procedure to be utilized in lieu of habeas corpus:

> Rule 35. Correction or Vacation of Sentence
>
> (a) Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a remittitur issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review, or having the effect of upholding a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.
>
> (b) Post Conviction Remedy for Prisoner in Custody. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution or laws of Colorado, or of the Constitution of the United States, or that the court imposing the sentence was without jurisdiction to do so, or that the sentence was in excess of the maximum sentence authorized by law, or that the statute for the violation of which the sentence was imposed is unconstitutional, or was repealed before the prisoner contravened its provisions, or that after judgment a violation of the constitutionally guaranteed rights occurred, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the sentence, or to make such order as necessary to correct a violation of his constitutional rights. Unless the motion and the files and record of the case show to the satisfaction of the court that the prisoner is not entitled to relief, the court shall cause a copy of said motion to be served on the prosecuting attorney, grant a prompt hearing thereon and take whatever evidence is necessary for the disposition of the motion. In all cases, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal, or that the statute upon which the sentence was based is unconstitutional, or was repealed before the prisoner contravened its provisions, or that there was a violation of the prisoner's constitutional rights which was not raised and disposed of on appeal, the court shall vacate and set aside the judgment, impose a new sentence, or grant a new trial, or discharge the prisoner, or make such orders as may appear appropriate to restore a right which was violated. The court may stay its order for discharge of the prisoner pending Supreme Court review of the order. If the court

> orders a new trial, the transcript of testimony given at the trial which resulted in the vacated sentence by witnesses who have since died or otherwise become unavailable, may be used at the new trial. The court need not entertain a second motion or successive motions for similar relief based upon the same or similar allegations on behalf of the same prisoner. The order of the trial court granting or denying the motion is a final order reviewable on appeal.
>
> (c) Credit for Time Already Served. Whenever the court resentences a defendant under this Rule, it shall order that the new sentence be operative as of the time of the defendant's confinement under the original sentence, in which case any period of confinement under the terms of the vacated sentence shall be credited to the defendant as having been served under the new sentence so imposed.
>
> (d) Prerequisite to Habeas Corpus. No application for a writ of habeas corpus shall be entertained in any court in this state on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this Rule 35 if it appears that he has failed to apply for relief by motion under its provisions.

Rule 35(b) was modified July 30, 1970, to eliminate the custody requirement by simply stating "One who is aggrieved". . . may file. In all other respects the rule remained the same.

The remedy was broadly conceived allowing relief when: 1) The sentence imposed or the judgment of conviction is in violation of the Constitution or laws of Colorado or the Constitution of the United States; 2) The court imposing the sentence was without jurisdiction to do so; 3) The sentence was in excess of the maximum sentence authorized by law; 4) The statute for the violation of which the sentence was imposed is unconstitutional or was repealed before the prisoner contravened its provisions; 5) After judgment a violation of constitutionally guaranteed rights occurred.

Thus, both constitutional and non-constitutional or statutory matters may be raised and the trial court is given broad powers to correct the error. One limitation does exist. If the matter was

raised and disposed of on appeal the trial court cannot grant relief. Note however that the matter must have been actually raised on appeal. If the issue had not been determined and no appeal was pending, the court could act.[42] No principle of waiver attaches.

The trial court of conviction has sole jurisdiction of the matter and unless the petition, file and record of the case demonstrate that the petitioner is not entitled to relief, a hearing must be held. The court must make findings of fact and conclusions of law in every case. An adverse decision is reviewable by appeal by either party. If not appealed the issue may not again be raised,[43] yet the federal courts will find failure to exhaust state remedies.[44] The trial court is also granted the power to dismiss second or successive petitions which are redundant.

Lacking under the rule is any provision for counsel or free transcript for the indigent prisoner. The court has held that before a transcript will be provided the petitioner must show that he is entitled to relief.[45]

The legislature became active in this area and passed a statutory collateral attack procedure, effective July 1, 1972, which closely followed the suggestions of the ABA Minimum Standards for Criminal Justice, Post Conviction Remedies.[46]

> 40-1-510. Postconviction remedy. (1) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make applications for postconviction review. An application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:
>
> (a) That the conviction was obtained or sentence imposed in violation of the constitution or laws of the United States or the constitution or laws of this state;
>
> (b) That the applicant was convicted under a statute that is in violation of the constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(c) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(d) That the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(e) That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice;

(f) That there has been significant change in the law, applied to applicant's conviction or sentence, requiring in the interests of justice retroactive application of the changed legal standard;

(g) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

(h) That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

(2) Procedures to be followed in implementation of the right to postconviction remedy shall be as prescribed by rule of the supreme court of the state of Colorado.

In addition to broadening the basis for relief, the statute appeared to alter the res judicata affect of appeal. Even if an appeal had been had, the procedure could be utilized.

The most activity, by far, was the result of 401-510(1)(F) which permitted relief on the ground that there had been a significant change in law which in the interest of justice required a retroactive application of the changed legal standard. A large number of prisoners claimed that their sentences should be reduced under this provision after the Criminal Code was amended to provide for generally lower sentences.[47] Although the Code was to be effective July 1, 1972, many prisoners sentenced prior to that date, petitioned under 40-1-510(1)(F) for a reduction in their sentence. It appeared that that was in fact the intent of the legislature. That is, the legislature felt that the provision would provide an opportunity for the courts to equalize sentences among the two groups of prisoners. After our study period, on October 29, 1973, the Colorado Supreme Court

finally struck down that provision. It held in People v. Herrera that such a legislative delegation of power infringed upon the governor's exclusive constitutional power to commute a sentence after a conviction had become final. In the interim, however, our data shows that a number of petitioners did receive a judicial resentencing as a result of a filing under 40-1-510.

A second major issue in collateral attack in Colorado relates to granting of credit for pre-sentence confinement. Prior to mid-1972, Colorado case law held that jail time credit was not a matter of right. Colorado, unlike Illinois, had no statute mandating automatic credit for jail time. Thus, credit for jail time was a discretionary matter for the sentencing court to consider in passing sentence.

As a matter of practice the court's mittimus would often recite that presentence confinement had been considered in passing sentence. The sentence, however, would be the maximum sentence proscribed by law. Petitioners contended, and the Colorado Supreme Court agreed, it was mathematically impossible for the sentence to reflect a credit for jail time and that if it did the sentence, as passed, then exceeded the statutory maximum for the crime.[49]

After the Jones case the legislature passed the following presentence confinement statute:

> Sentencing--consideration of presentence confinement.
>
> (1) in sentencing a defendant to imprisonment, the sentencing judge shall take into consideration that part of any presentence confinement which the defendant has undergone with respect to the transaction for which he is to be sentenced.
>
> (2) The judge shall state in pronouncing sentence, and the judgment shall recite, that such consideration has been given, but no sentence shall be set aside or modified on review because of alleged failure to give such consideration unless the record clearly shows that the judge did not, in fact, consider the presentence confinement when imposing sentence.

(3) If the maximum sentence imposed is longer than the statutory maximum for the offense less the amount of allowable presentence confinement, it shall be presumed that the judge did not consider the presentence confinement.

(4) The provisions of this section shall apply to defendants sentenced before or after the July 1, 1972, effective date of this section.[50]

The statute requires the judge to account for the presentence confinement by passing a sentence less than the statutory maximum by at least the period of presentence confinement. The retroactivity provision on its face makes any sentence which does not meet the condition stipulated illegal and thus within the purview of 35(A) and/or 35(b), as well as, 40-1-510.

In People v. Nelson,[51] however, the court ignored the statute and chose to presume that if the sentencing judge said that he had taken presentence confinement into consideration and yet had given the statutory maximum, he acted properly. The court indirectly distinguished the case from the statute by implying that since the sentence was passed as the result of a plea bargain the sentencing judge was free to disallow jail time.

These two issues, the retroactivity of the new sentencing standards and the proper accounting for presentence jail time, dominated the collateral attack filings in Colorado during our study period. Given the fact that those two issues affect one of the prisoners chief concerns--his sentence--the result is inevitable.

CHAPTER 1 FOOTNOTES

1. United States ex rel. Bongiorno v. Ragen, 54 F.Supp. 1973 (N.D. Ill. 1944), aff'd, 146 F.2d 349 (7th Cir.), cert. denied, 325 U.S. 865, 65 Sup. Ct. 1194 (1945).

2. George N. Leighton, Post-Conviction Remedies in Illinois Criminal Procedure; Illinois Criminal Procedure (11) Vol. 1966, Fall, p. 569.

3. 332 U.S. 561, 567, 68 Sup. Ct. 240, 244 (1947).

4. Act of Aug. 4, 1949, No. 630, p. 722.

5. See People v. Davis, 39 Ill.2d 325, 235 N.E.2d 634, (1968); People v. Neber, 41 Ill.2d 126, 242 N.E.2d 179 (1968).

6. See ABA Standards 2.1, p. 31.

7. See People v. Mamolella, 42 Ill.2d 69, 73, 245 N.E.2d 485, 487 (1969).

8. Albert Jenner, "The Post Conviction Hearing Act," 9 F.R.D. 347, 350 (1950).

9. See People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 556 (1968); People v. Jones 43 Ill.2d 160, 251 N.E.2d 218 (1969).

10. Ill. Rev. Stat. ch. 110A § 651(c)(1975).

11. Id. ch. 38 § 122-3 (1975).

12. See People v. Collins, 39 Ill.2d 286, 235 N.E.2d 570 (1968); People v. Clements 38 Ill.2d 213, 230 N.E.2d 185 (1967).

13. See People v. Rose, 43 Ill.2d 273, 253 N.E.2d 456 (1969).

14. People v. Moore, 42 Ill.2d 73, 246 N.E.2d 299 (1969); rev'd on other grounds, 408 U.S. 786 (1972).

15. People v. Hamby, 39 Ill.2d 290, 235 N.E.2d 572 (1968).

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16. People v. Griffin, 9 Ill.2d 164, 137 N.E.2d 485 (1958); People v. Covington, 45 Ill.2d 105, 257 N.E.2d 106 (1970).

17. Ill. Rev. Stat. ch 110A § 651(c) (1975).

18. Id. § 651(b) (1975).

19. Id. § 615(b) (1975).

20. Note: Use of Habeas Corpus for Collateral Attack on Criminal Judgments 36 C.L.R. 420 (1948).

21. Cal. Pen. Code Ann. §§ 1473-1508 (West 1970).

22. In re Jones, 57 Cal.2d 860, 22 Cal. Rptr. 478, 372 P.2d 310 (1962); (not rendered moot by parole or trial, citing In re Stantos, 169 Cal. 607, 147 P.264 (1915)); In re Taylor, 216 Cal. 113, 115, 13 P.2d 906 (1932) (actual detention not necessary); In re Smiley, 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

23. In re Berry, 68 Cal.2d 137, 65 Cal. Rptr. 273, 436 P.2d 273 (1968).

24. In re Thomas, 27 Cal. App.3d 31, 103 Cal. Rptr. 567 (1972).

25. In re Bushman, 1 Cal.3d 767, 83 Cal. Rptr. 375, 463 P.2d 127 (1970). Habeas corpus may be used to review the validity of the sentence or order of probation; or to challenge the legality of any proposed conditions of probation.

26. Neal v. California, 55 Cal.2d 11, 9 Cal. Rptr. 607, 357 P.2d 839 (1960).

27. Application of Gonsalves, 48 C.2d 638, 311 P.2d 483 (1957); Ex parte Riddle, 57 Cal.2d 848, 22 Cal. Rptr. 472, 372 P.2d 304 (1962).

28. Ex parte Swain, 34 Cal. 300, 209 P.2d 793 (1949); In re Streeter, 66 Cal.2d 47, 56 Cal. Rptr. 824, 827, 423 P.2d 976, 979 (1967). The court in Streeter said errors that might have been raised on appeal could not be considered on collateral attack by habeas corpus, where no reason was alleged sufficient to excuse failure to appeal.

29. Cal. Const. art 6, § 4, 4b, 5, 10; Cal. Pen. Code Ann. § 1475, 1508 (West 1970).

30. The Court of Appeals may order the writ returnable only before that court or a superior court within its district. Cal. Pen. Code Ann. § 1508b (West 1970).

31. Los Angeles County records were searched for filings by prisoners from that county. Although those prisoners accounted for 40% of all prisoners in our sample by our cut off date of June 30, 1972 only 1% had filed a collateral attack in the county superior court and most had also filed in the county of imprisonment as well.

32. In People v. Tenerio, 3 Cal.3d 89, 89 Cal. Rptr. 249, 473 P.2d 993 (1970) Health and Safety Code § 11718 was unconstitutional. Under this section, trial judges in narcotics cases were prohibited from dismissing a prior offense charged in the accusatory pleading without the consent of the district attorney. The effect of dismissing a prior conviction was to shorten the minimum and maximum sentences. In Tenorio, the trial court dismissed a prior conviction without the consent of the district attorney. The People appealed and the Supreme Court held that § 11718 constituted an invasion of judicial power and was violative of constitutional separation of powers.

Following the decision many prisoners, who had been convicted of narcotics offenses and whose prior convictions had not been dismissed because the district attorney would not agree to it filed petitions for habeas corpus alleging that but for § 11718 their sentences would have been shorter. In re Crow, 4 Cal.3d 613, 94 Cal. Rptr. 254, 483 P.2d 1206 (1971) the Supreme Court recommended that when a petition for

habeas corpus challenges the procedures underlying his sentence, the petition should be transferred to the sentencing court for consideration. The court distilled this procedure from three cases: In re Caffey, 68 Cal.2d 762, 69 Cal. Rptr. 93, 441 P.2d 933 (1968); In re Haro, 71 Cal.2d 1021, 80 Cal. Rptr. 588, 458 P.2d 500 (1969); In re Tenorio, 3 Cal.3d 89, 89 Cal. Rptr. 249, 473 P.2d 993 (1970). Many "Tenorio" petitions were transferred in accordance with the procedure. See also Inre Tahl, 1 Cal.3d 122, 81 Cal. Rptr. 577, 460 P.2d 449 (1969), in which the petition was transferred when it alleged improper selection of the jury at the sentencing phase of the trial. Habeas corpus petitions grounded in the retroactivity of Barber v. Page, 390 U.S. 719 (1968), which set forth the right to confrontation and cross examination of witnesses at trial, must also be transferred to the court of conviction if not filed there. In re Montgomery, 2 Cal.3d 863, 87 Cal. Rptr. 695, 471 P.2d 15 (1970).

33. The major correctional facilities operated by the Department of Corrections and the counties in which they are located are as follows: California Correctional Center, Kern County; California Conservation Center, Lassen County; San Quentin, Marin County; Correctional Training Facility, Monterey County; California Rehabilitation Center, Riverside County; Folsom State Prison, Sacramento County; The California Institution for Men, the Southern Conservation Center, and the California Institution for Women, San Bernardino County; Duval Vocational Institution, San Joachin County California Men's Colony, San Luis Obsipo County; California Medical Facility, Solano County; Sierra Conservation Center, Tuolomne County.

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34. The body of the form is as follows:

INSTRUCTIONS--READ CAREFULLY

Set forth in concise form the answere to each applicable question. If you do not know the answer to any question, you should so state. If necessary, you may finish the answer to a particular question on an additional blank page, but make it clear to which question any such continued answer refers.

You should exercise care to assure that all answers are true and correct. Since the petition contains a verification, the making of a statement which you know is false may result in a conviction for perjury.

When the petition is filed with the Superior Court or judge thereof, only the original must be filed unless additional copies are required by local court rules.

When the petition is filed with the District Court of Appeal or justice thereof, an original and three copies must be filed.

When the petition is filed with the Supreme Court or justice thereof, an original and ten copies must be filed.

In addition, the law requires the service of a copy of the petition on the district attorney, city attorney or city prosecutor in certain cases (Pen. Code § 1475, Gov. Code § 72193).

Petitioner should attach all relevant records or documents supporting his claims.

1. _____ in whose behalf the writ is applied
(Name of person in custody)

for is confined or restrained of his liberty at _____
(Place of detention)

by _____
(Name of person or persons having custody--if names not known

_____
describe such person or persons)

2. Name and location of court under whose process person is confined:

_____

_____

_____

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3. Nature of court proceeding (e.g., criminal case, commitment for narcotics addiction, insanity, or mental disordered or abnormal sex offender) and the case number, if known, resulting in the confinement: _____

_____

_____

4. The date of the judgment, order or decree for confinement and its terms: _____

_____

_____

5. What plea was entered in the above proceeding? (E.g., guilty, not guilty, not guilty by reason of insanity, nolo contendere, etc.)

_____

_____

6. Check whether trial or hearing was by

(a) ☐ A jury

(b) ☐ A judge without a jury

7. Was an appeal taken?

8. If you answered "yes" to (7), list

(a) The name of each court to which an appeal was taken:

i _____

ii _____

iii _____

(b) The result in each such court:

i _____

ii _____

iii _____

(c) The date of each such result and, if known, citations of any written opinions or orders entered:

i _____

ii _____

iii _____

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9. If the answer to (7) was "no" state the reasons for not so appealing:

_____

_____

10. State concisely the grounds on which you base your allegation that the imprisonment or detention is illegal:

(a) _____

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) _____

(b) _____

(c) _____

12. Have any other applications, petitions or motions been filed or made in regard to the same detention or restraint? _____

_____

13. If you answered "yes" to (12), list with respect to each petition, motion or application:

(a) The specific nature thereof:

i _____

ii _____

iii _____

iv _____

(b) The name and location of the court in which each was filed:

i _____

ii _____

iii _____

iv _____

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(c) The disposition thereof:

i _____

ii _____

iii _____

iv _____

(d) The date of each such disposition:

i _____

ii _____

iii _____

iv _____

(e) If known, citations of any written opirions or orders entered pursuant to each such disposition:

i _____

ii _____

iii _____

iv _____

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application? _____

15. If you answered "yes" to (14), identify:

(a) Which grounds have been previously presented:

i _____

ii _____

iii _____

(b) The proceedings in which each ground was raised:

i _____

ii _____

iii _____

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16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

_____

(b) _____

_____

(c) _____

_____

17. In the proceeding resulting in the confinement of, was there representation by an attorney at any time during the course of:

(a) The proceedings prior to trial? _____

(b) The trial or hearing? _____

(c) The sentencing or commitment? _____

(d) An appeal? _____

(e) The preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? _____

_____

18. If you answered "yes" to one or more parts of (17), list the name and address of each such attorney and the proceeding in which he appeared:

(a) _____

_____

(b) _____

_____

(c) _____

_____

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19. Is the person in custody presently represented by an attorney in any matter relating to this confinement? _____

If so, state the attorney's name and address: _____

_____

20. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

_____

_____

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on _____ at _____, California

I declare under penalty of perjury that the foregoing is true and correct.

_____

(Signature)

Chapter I

Texas Footnotes

38. 418 S.W. 2d 824 (Tex. Crim. App. 1967).

39. Tex. Const. art. 5, §5.

40. Ex Parte Young, 418 S.W.2d 824, 830 (Tex. Crim. App. 1967).

Colorado Footnotes

41. Colo. Sup. Ct. R. Crim. P.35.

42. See Whitmann v. People, 170 Colo. 189, 406 P2d 764 (1969); Gallegos v. People, 175 Colo. 553 488 P.2d 887 (1971).

43. See Henson v. People, 163 Colo. 302, 430 P.2d 475 (1967).

44. See Breckenridge v. Patterson, 375 F.2d 857 (10th Cir. 1967).

45. See Valdez v. District Court for County of Pueblo, 171 Colo. 436, 467 P.2d 825 (1970).

46. Approved Draft 1968.

47. Colo. Rev. Stat. Ann. tit. 18-1-105 (1973).

48. 182 Colo. 302, 512 P.2d 1160 (1973).

49. See People v. Jones, 489 P.2d 596 (1971). In Maiiel v. People, 172 Colo. 8, 469 P.2d 135 (1970) the court held that Colorado would follow the rule that it is conclusively presumed that credit had been given if the actual sentence plus jail time did not exceed the statutory maximum.

50. Colo. Rev. Stat. Ann. tit 16 §11-206.

51. 182 Colo. 1, 510 P.2d 441 (1973).

Chapter II - The incidence and timing of filing a collateral attack.

INTRODUCTION

In each of the four states under study, the burden of the numerous post conviction motions was continuously stressed upon us. Indeed, we were led to believe that "everyone" files* and does so repeatedly. Those were the impressions of the various prison and court officials we spoke to with a somewhat more relaxed atmosphere on the subject in the state of Texas. It should be stated at the outset that nowhere did we encounter a level of filing that even approached the believed intensity, and one does not need more than a quick glance at the crudest of the following measures in order to satisfy himself to that effect.

Psychologists no doubt can explain this major discrepancy between the facts and the myths and we shall leave that subject to their expert analysis, noting only the following observations. While the statements were forceful and sometimes emotional they were invariably accompanied by a complete inability to quantify these statements. Beyond "many" or similar adjectives of various degrees of intensity, there were no answers regarding any possible quantification to the "how many" or"how many times" questions not to mention the lack of even a "hunch" as to the "who," "when" and "why" questions. It is perhaps understandable that people who deal with these problems are overwhelmed by the sheer absolute numbers involved and humanly but unduly impressed by certain recent or recurrent filings by one or other individuals. Moreover, lacking the necessary figures one cannot be expected to link his impressions with such other determinants as the time spent in prison.

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* In Illinois where we drew our first sample, we designed and implemented it upon the belief that the percent filers is in the vicinity of 90% of the prisoners. It quickly became apparent that the situation is different in reality and we had to resample and add twice as many prison files to be checked in the courts for a post conviction motion in order to end up with a reasonable sample size of filers. The same happened in California. This lesson was then applied to the states which we sampled later.

Policies cannot be based on myths--the decision maker requires as much quantification as possible in order to first correctly define and then realistically solve the problem.

In this chapter we shall first analyze the intensity of filing using various measures each one designed to express the phenomenon from a different perspective and then discuss these results in view of the time frame in which the filing and other related major events occur.

We first present in Table 1 the absolute figures for the five years 1967-1971* for which the study was done. In each of the states the sample was a systematic one that utilized the order of admission for selection (i.e. the sequentially ordered prisoner admission number with every n-th prisoner falling into the sample). The weights that appear in the table apply uniformly over the whole period and no correction is necessary for the varying numbers of admittees in different years. These weights are used whenever figures pertaining to the population of prisoners as a whole are given, in order to correct for the different sampling fractions of filers and nonfilers. (See explanation of the sampling procedure in general and in Colorado, in particular in Chapter 1).

* Except Colorado where we took the years 1968-1972.

TABLE I--Major figures of reference for the study

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO		
				Canon City	Buena Vista	All
Number of Admissions	11,785	26,952	30,526	2,516	2,330	4,846
Estimated number of non-filers	10,868	24,720	29,700	1,692	2,208	3,900
Estimated number of filers	917	2,232	826	824	122	946
Number of non-filers in the sample	988	1,030	495	423	276	
Number of filers in the sample	250	279	413	412	102	
Ratio of non-filers in the population to non-filers in the sample	11:1	24:1	60:1	4:1	8:1	
Ratio of filers in the population to filers in the sample	11:3	8:1	2:1	2:1	1:1	
Weights applied to the ratio of filers to non-filers in the sample to estimate the general parameters of the population	1:3	1:3	1:30	1:2	1:8	
Mean number of filings	1.3	2.0	1.8			1.7
% filers with more than one filing	21.7	52.6	41.4			42.4
Mean number of filings for filers with more than one filing	2.1	3.1	2.9			2.7
Estimated total number of filings	1,200	4,500	1,500			1,500

We begin by presenting the respective number of prison admissions during the five year period, numbers that differ widely between states and may have a bearing on the very nature of the post conviction question and the attempts to deal with it in the different states. In the abstract each admission represents a potential filer. Table 1 also presents the absolute number of filers and non-filers upon which the various estimates are based. These numbers vary because of the fact that we were unable to predict even in gross figures the relatively low phenomenon of filing. Thus, in California, for example, we drew an initial sample of 1100 prisoners expecting to find between 40-70% of them to be filers, when no more than 95 had filed. We were forced to resample prisoners, in order to increase the number of filers.

The number of admissions given is a precise figure upon which the individual samples were designed. By definition and uniformly among the states, this number includes all new admittees and parole violators returning with a new conviction within the time period of the sample, but excludes parole violators returned for continuation of a sentence begun before the time period. The <u>total</u> number of filers and non-filers for the whole period of 66 months are estimates based upon the ratios found in the sample of prisoners all of whose court records were checked for collateral attack filings. As explained later, because of the varying amount of time different prisoners were imprisoned it would be incorrect to derive from these figures a measure of intensity of filing. What these figures do show, however, is the fact that: (1) the filing phenomenon varies widely among the states and (2) it is nowhere as intense as it is believed to be.

Just as it would be incorrect to predict from these numbers the total number of eventual filers, it would also be incorrect to see in the estimated number of filers the total number of different filers that the courts in each of the states dealt with during the time period because it does not include those filers that entered prison before the date our sample begins yet filed during the time period. We shall return to discuss and estimate these figures in the next section.

Although the same reservations apply to the mean number of filings, these figures do show that, on the average, no more than two filings per filer were found during our follow-up period. Clearly those figures do not support the belief that prisoners tend to file endlessly and indiscriminately. This fact seems to imply that, independent of the legal requirements in the different states, the number of filings per individual tends to stabilize, quite possibly because of the time required to file. Thus, the relationship between various waiting times in the system and the length of incarceration combine to limit the number of filings. An average prisoner may well be on parole or even discharged before his filings would start to pile up. The same pattern is apparent in terms of the percent of filers with more than one filing, and the average number of filings per individual with two or more filings. Similarly, the full distributions of the number of filings do not support the claim that numerous individuals file many motions, although they show that such cases rare as they are, do indeed occur.

Finally, the figures representing the estimated total number of filers and of filings during the period, once more show the great variability among the states. While in the absolute these figures do not tell the true story of how many filers there are, the fact that they are derived for each of the states in the same manner and for the same length of time (and, with the minor difference in Colorado, also for the same years) enables us to compare the intensity of filings among states. This is done in Table 2 by taking Texas, the state with the lowest rate of filings as the base state with an intensity of 1 and then presenting the respective figures for the other states. These figures then are calculated by dividing the proportion of filers in each state by the proportion of filers in Texas and similarly for the number of filings. Thus, the figures 2.9 and 2.1 for the comparative number of filers and filings in Illinois means that if Illinois would have the same number of prisoners as Texas, the 2.9= number of filers would be 2.9 times as many as in Texas with 2.1 times as many

filings than Texas. Stated differently, Illinois would have 2.9 times the number of filers and 2.1 times the number of filings than Texas for each (say) thousand prisoners.

Table 2 -- State Comparative Intensity of Filings

	ILL.	CAL.	TEXAS	COLO.
Comparative number of filers	2.9	3.1	1	7.2
Comparative number of filings	2.1	3.4	1	6.7

Colorado stands out as the state with the highest relative number of filers and filings, followed by California and Illinois. The comparisons are remarkably similar with respect to each of the two measures.

We resisted the temptation to present the "percent filers" figures in Table 1 for the simple reason that they would be meaningless.* By our definition, a filer is one that filed at any time since entering prison up to the cut-off point of our search on June 30th 1972.** Thus a person entering prison at the earliest possible moment with respect to our sample, namely January 1, 1967 could file during 66 months while a person entering the sample at the latest possible point on December 31, 1971*** would have had only 6 months to file. For this reason, counting the number of filers in the sample will not be satisfactory, and the resulting percent, not informative. The five year span was, however, necessary in order to be able to estimate the intensity of filing while allowing at least to some part of the sample a longer period at risk.

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* Our sample includes a period of five years which we chose to look upon as composed of 5 "generations" of prisoners according to their year of entry. There is no magic in the figure five and one could choose, for example, 10 consecutive "generations" half year apart, by time of entry. We stayed with the yearly span and whenever possible the half year span because they provide a common basis of reference and consist of sufficient number of cases to enable statistical analysis.

** June 30th 1973 in Colorado.

*** January 1, 1968 and December 31, 1972 for Colorado.

2. The Probability of Filing

A raw count of the number of filers in the sample is misleading since the later an individual entered the prison the less likely is he to become a filer and be counted as one by the cut-off date of the court records search. Thus, the count is by necessity an undercount and a serious one as such. Indeed, if the filing were uniform in time over the five years, one would have to double the number of filers actually found in order to have an estimate of the eventual number. However, the process is not a uniform one in time and such an estimate would be wrong. It is thus important to define in very precise terms the meaning of the probability of becoming a filer and then calculate it accordingly.

Our goal is to estimate the probability of ever filing a post conviction motion. Since, however, the time span between the time the last prisoner of the first year of admission entered the sample to the time of cut-off is 54 months, we do not have direct information about the probability of filing beyond this length of time. For this reason we shall proceed to estimate the probability of filing within the first 54 months of entry and then derive from it the required probability of ever filing.

The first and simplest estimate of this probability would be to calculate it upon the 1967 generation, which is the only one in the sample that actually had a full 54 month period to file. This estimate, however, is not the best possible for two reasons: (1) It would by necessity be based upon a relatively small number of cases and would not utilize the total information available in the sample; (2) It would be highly dependent upon the specific situation and behavior of the 1967 generation which may or may not be typical. There is, however, some information that only this generation can provide, namely, the probability of filing within 43-54 months of incarceration. Similarly, the probability of filing within 31-42 months of incarceration will be based upon the information contained in both the 1967 and the 1968 generations, and so on

down to the probability of filing within 6 months or less which will be based upon the full information of the five year sample. In this way, at every single step the estimator will be derived from all available information with respect to that specific period of time. Furthermore, the possibility of a certain year unduly affecting the overall estimate is thus eliminated. The inevitable "price" to be paid in taking this approach is the fact that the resulting estimate will represent the average probability of filing for the whole period. This perspective will be investigated further in section 3 which deals with yearly variations.

The method of calculation here and elsewhere is illustrated in detail for the state of Illinois as an example. We first present in Table 3 the gross figures by year of entry for our sample in the state.

TABLE 3

NUMBER OF FILERS, NON-FILERS AND ADMISSIONS
BY YEAR IN ILLINOIS

Year of Entry	No. of Filers	No. of Non-Filers	No. of Corresponding Admissions
1967	49	178	583
1968	61	191	634
1969	67	214	709
1970	42	199	639
1971	25	188	589
1967-1971	244	970	3154

The number of filers and non-filers in the table represents the number of cases for which we have a record on file. The number of "corresponding admissions" is derived from the prior two numbers using the sampling ratios of 3:1 filers to non-filers. Thus, for example, the 49 filers in the sample of the 1967 generation of entry come out of the 49x1+178x3=583 corresponding number of admittees.

That is not to say that whatever calculations we present for either the filers or the non-filers will be based on 244 or 970 cases respectively since some records have missing information for various variables or combination of variables. As a result not all cases can be utilized for all calculations.

The corresponding tables for the other states are presented in Appendix B: Tables 1, 2 for California and Texas, Tables 3 and 4 for each of the two samples in Colorado, the first from the Buena Vista prison and the second from the Canon City prison and Table 5 presents the unified, properly weighted sample for the whole state.

Returning now to the estimation of the probability of filing in Illinois, we present Table 4 and its explanation below.

TABLE 4

PROBABILITY OF FILING IN ILLINOIS

Filing Period in Months	Number of Filers	Number of People at Risk	Probability of Filing	Error Term
6 or under	73	3154	.023	.005
7--12*	48	2565	.019	.005
13--18	36	2565	.014	.005
19--24	16	1926	.008	.004
25--30	14	1926	.007	.004
31--36	13	1217	.011	.006
37--42	9	1217	.007	.005
43--54**	2	583	.003	.005
54 or Under	211	----	.093	.014

* A period of 7-12 months means the period of filing a motion any time greater than 6 months and less than but including 12 months and similarly for the other periods, here and everywhere else.

**Because of too few cases, two periods of 6 months each were pooled in this category.

First, we developed for each individual who filed a petition the time span between his admission date and the time he filed his first petition.*1 We then grouped them according to the filing periods in the table, provided they came from the corresponding population at risk. Thus, for the "6 or under" period there were 73 filers counted in the sample which came from the total population of 3154 people in the sample each of whom had the ability to file within this period until the cut-off date of the court record search. For the 7-12 months period (and the same for the 13-18 months period), the population at risk consists of the corresponding number of all prisoners admitted by the end of 1970 and excludes the 589 prisoners admitted in 1971 since not all of them were at risk for the whole period. The 48 filers in the period are those counted out of the 3154-589=2565 prisoners at risk. Similarly, as we go down the table, the respective number of prisoners are excluded, ending up with only the 583 prisoners admitted in 1967, and the 2 filers found among them for the period.

The probability of filing for each period is then calculated by dividing the number of filers by the number of people at risk. The overall probability of filing within 54 months of admission is the sum of these individual probabilities,*2 namely .093 for Illinois. The error term which accompanies each estimated probability represents an approximate 95% confidence interval for that probability.

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*1 The date the petition was filed was defined to be the actual date on the petition which was preferred over the date petition was officially filed in court. In this way possible discrepancies due to intervening delays in the system between the preparation of the document and the actual legal act of filing were avoided. In order to utilize most information available, the average difference between these two dates was calculated to be .61 months a figure which was used to derive the date filed for those few cases in which we had the date filed in court but not the original date on the petition, by subtracting this amount from the later date. Even so we were still left with cases of missing information, the treatment of which appears later in the section.

*2 This is so according to the formula $P(A)=\sum P(Ai)$ provided $Ai \cap Aj=\emptyset$. This means that the probability of an event A can be calculated as the sum of individual probabilities of events Ai that occur within A provided the events are mutually exclusive--no two events can occur simultaneously, and exhaustive--together they cover all possibilities in A. That this is so can be seen from the fact that the probabilities were so derived as to count each filer only once within his respective time span, that is to say simply that the probability of filing at all is the sum of the probabilities of filing within the first 6 months, the next six months and so on up to the last period of filing.

CONTINUED

1 OF 2

Thus, we can be 95% confident that the probability of filing within the 6 months or under period is between .023-.005 and .023+.005 or .018 and .028. An interval of the form .003± .005 should, of course, be interpreted to mean 0-.008.

In order to derive the probability of ever filing from the probability of filing within the first 54 months, the following method was utilized. We hypothesized that the distribution of ever filing is an exponential distribution of which we are witnessing only the truncated distribution which stops in the sample at the 54 months point. The parameter θ of this distribution was then estimated from the sample* which then permitted us to calculate the probabilities of filing within each period according to this fitted distribution, as they appear in column 3 of Table 5 below. The expected number of filers according to the fitted distribution is calculated in column 5 by multiplying the number of people at risk by the

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* The exponential distribution function is $f(t)=\theta e^{-\theta t}$ where θ is the only parameter that determines the distribution and t represents the time of filing in months. The probability of filing within any period t is given by the formula $1-e^{-\theta t}$. In particular the probability of filing within 54 months is given by $1-e^{-\theta .54}$ and therefore the probability of filing after 54 months is given by $e^{-\theta .54}$. Thus, if we could estimate θ and prove that the exponential distribution is a good fit to our data we would then be able to estimate the probability of filing after 54 months and consequently the probability of ever filing a motion. We proceed therefore in this order.

For the exponential distribution $f(t)=\theta e^{-\theta t}$, the corresponding truncated distribution at 54 months is $f(t)=\frac{\theta e^{-\theta t}}{1-e^{-\theta .54}}$. Assuming then a straight random sample of this distribution the maximum likelihood estimator for θ was developed and evaluated through an iterative process utilizing the average time to filing as calculated from the sample. The solution of the equation $\frac{1}{\theta} - \bar{t} = \frac{54.e^{-\theta .54}}{1-e^{-\theta .54}}$ in Illinois was found at $\theta = .0435$ for the mean time to filing of $\bar{t} = 17.3$ months.

Using this estimate for θ we then get for the probability of filing after 54 months $.0929\frac{e^{-\theta .54}}{1-e^{-\theta .54}} = .0098$ and the probility of ever filing .0929 + .0098= .1027.

TABLE 5

FITTING an EXPONENTIAL DISTRIBUTION to the FILING DATA for ILLINOIS (1)

Filing Period in Months	Probability of Filing in Sample	Probability of Filing According to the Fitted Distribution	Number of People at Risk	Expected Number of Filers	Observed Number of Filers	X^2
6 or under	.0231	.0236	3154	74.4	73	.03
7--12	.0187	.0182	2565	46.7	48	.04
13--18	.0140	.0140	2565	35.9	36	.00
19--24	.0083	.0108	1926	20.8	16	1.11
25--30	.0073	.0083	1926	16.0	14	.25
31--36	.0107	.0064	1217	7.8	13	3.47
37--42	.0074	.0049	1217	9.9 (2)	11	.12
43--54	.0034	.0068	583			
54 or under	.0929	.0929	----	211.5	211	5.02 (3)

(1) For an estimated 0 = .0435

(2) The two periods are combined into one in order for the expected number of cases to be greater than 5 to assure validity of the X^2 test.

(3) The 5.02 figure is not significant at the .05 level when compared with the X^2 with 5 degrees of freedom for this level which equals 11.07. One can thus conclude that this exponential distribution adequately fits the data.

probability of filing in the period as given by this distribution. The last column gives the X^2 figure which evaluates the discrepancy between the two preceeding columns according to the standard formula of $\frac{(\text{observed-expected})^2}{\text{expected}}$. The sum of the figures in the last column is the statistic upon which the goodness of fit test is performed. In this case we find that 5.02 is smaller than the 11.07 figure that corresponds to a X^2 distribution with 5 degrees of freedom at the .05 level and therefore there is no significant difference between the sample distribution and the fitted exponential distribution. Utilizing the fitted exponential distribution we can then estimate the probability of filing after 54 months (see last footnote) to be .0098 and the probability of ever filing in Illinois to be .1027.

A final correction is needed. For 8 filers out of the total of 244 (Table 3) the time to filing could not be calculated due to missing information in either the date of filing or the admission date. Since the probability was calculated upon the remaining 236 filers from which came the 211 actually used in Table 4*, the resulting probability has to be inflated by the corresponding factor or $\frac{244}{236} \times .1027 = .1062$.

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cont.) The probability of filing in each category is calculated by the formula $.1027(e^{-\theta t_1}-e^{-\theta t_2})$ where t_1 and t_2 are the two ends of the interval. Thus, for example, the probability of filing in the 7-12 months period is

$$.1027\left(e^{-.0435.6}-e^{-.0435.12}\right)= .0182$$

*One could refine the method used to utilize the full 236 cases by tediously identifying within each generation of admissions those individuals who were at risk for the corresponding six months period, adding them to the population at risk and adding to the count of filers those amongst them who filed in the period. This accounts for the 236-211=25 individuals not used in the calculation. The difference between this refinement and the method used is entirely inconsequential.

Carrying through the corresponding evaluation of the error term brings us finally to the estimated probability of ever filing in Illinois of .11±.02.

If we compare the last figure , or better, the corresponding one for the probability of filing within 54 months which is .10±.02 with the probability of filing for the 1967 generation for which we have 49 filers attributed to 583 prisoners we get a probability of $\frac{49}{583}$ =.08 with a margin of error of ±.02. The two figures are within the margin of error of each other. The difference indicates the fact that the 1967 generation was slightly below the others in the probability of filing and therefore, does not represent all generations well. It is also interesting to note the irregularity in the sequence of probabilities in Table 4 for the 31-36 months period which indicates the lack of uniformity of behavior among the various generations. We shall return to these points later.

Having exemplified the process in full detail for Illinois, we present the calculations for the probability of filing in California, Texas and Colorado in Tables 6-8 of Appendix B which correspond to Table 4 of the text for Illinois. The fitting of the exponential distribution to the filing data for California and Texas is presented in Tables 9 and 10 of the Appendix. The exponential distribution does not fit the filing data for Colorado because of the irregular pattern of renewed activity evident in the last row of Table 8 of the Appendix. This fact prevents any attempt to estimate the probability of <u>ever</u> filing in Colorado while at the same time serves as an early warning of the unusual behavior of filing over time as will become evident in section 5.

We now proceed to summarize the data presented in Tables 6-10 of the Appendix into Table 6 while adding the necessary final corrections.

TABLE 6

THE PROBABILITY OF FILING IN EACH OF THE FOUR STATES

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO
(1) Number of filers used in the calculations	211	256	332	673
(2) Equivalent number of filers used above	236	271	350	702
(3) Number of filers including those with missing data for present calculations	244	278	367	765
(4) Probability of filing in 54 months	.093±.014	.104±.014	.029±.004	.208±.017
(5) Probability of ever filing	.103±.016	.112±.015	.030±.004	--------
(6) Correction factor	1.03	1.03	1.05	1.09
(7) Corrected probability of filing in 54 months	.10±.02	.11±.02	.03±.01	.23±.02
(8) Corrected probability of ever filing	.11±.02	.12±.02	.03±.01	--------

The first line presents the actual number of filers used in the probability calculations in Tables 6-10 of the appendix and the preceeding Tables 4 and 5. The second line shows the equivalent number of filers to those actually used as explained on page 14 while the total number of filers is given in the third line from Tables 1, 2 and 5 of the appendix and Table 3 of the text. The ratio of line 3 to line 2 which appears in line 6 is the correction factor discussed earlier and utilized in deriving the corrected figures of the last two rows. The probability of ever filing is calculated according to the method described earlier in the text and in the accompanying footnote. The final probabilities of filing are presented with their corresponding margin of errors only to the two digit precision deemed adequate under the circumstances.

Table 6 shows but a minor difference between the probability of filing in 54 months and the probability of ever filing, a comparison that might suggest that the whole process of fitting the exponential distribution was unnecessary or purely academic. This conclusion would be unjustified for the following reasons: first, the actual figure is needed before such a statement can be made; second, the differences, minor as they may seem are of the order of magnitude of a 10% increase in the expected number of filers over the full imprisonment period, not an inconsequential figure; third, and more importantly, is the interpretation that a fit to an exponential distribution (among whose mathematical characteristics is the fact that the "failure rate" for this distribution is constant)permits. This property, expressed in the present context translates into the following statement: the probability of a given individual filing at any given moment provided he did not do so before is constant. This implies that in the three states where the exponential distribution is an adequate representation of the process of filing, this process is "regular" in precisely this sense. It also means that the longer the person is in prison the more likely it becomes that he will eventually file and this eventuality persists with the same probability; namely, prisoners do not "give up" but neither do they become more aggressive in that tendency at any given moment.

Of course, this actual conditional probability varies from state to state as evident also from other figures presented. All this,of course, applies to the "average" prisoner as he responds to the specific system over the five years pooled for this analysis. Colorado differs from the other states in this respect indicating perhaps that no equilibrium yet exists in the system; the conditional probability of filing if not filed before increases with time,a mathematical reflection of the fact that new legislation was introduced around 1971 which did affect the filing process.

Finally, the 10% difference between the two probabilities may be far more significant than it looks. Obviously these additional filings occur late and can come only from prisoners with long prison sentences. The additional fact that the number of these prisoners is relatively small presents us at long last with the explanation of the statement that "every one files"--these prisoners do indeed file eventually.

Drawing from Table 6, we now return to the state comparisons utilizing for this purpose only the probability of filing within 54 months. The figures derived for this purpose are presented in Table 7 below. Similar figures based upon the probability of ever filing for the states of Illinois, California and Texas are presented in Table 11 of Appendix B.

TABLE 7

STATE COMPARISONS OF NUMBER OF NEW FILERS

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO
Probability of filing	.10±.02	.11±.02	.03±.01	.23±.02
Expected number of new filers per 1000 admittees	100±20	110±20	30±10	230±20
Total number of admissions in the five years (to the nearest thousand)	12,000	27,000	31,000	5,000
Expected total number of new filers	1,200	2,970	930	1,150
Expected number of new filers per year	240±48	594±108	186±62	230±20
Number of new filers per 1000 relative to Texas	3.3	3.7	1	7.7

In the table we multiply the estimated probability of filing by 1,000 to find the expected number of new filers per 1,000 and by the number of admissions to find the expected total number of different filers on line 4. When we divide this last figure by 5 we get the expected number of new filers per year in each of the states. Thus, for example, California can expect 594±108 new filers during one year which is to say that with a 95% confidence one can predict the actual number to be between 486 and 702 while the corresponding figures for Texas would be 124 and 248 and for Colorado 210 and 250. It is important,of course, in using these figures to recall that they represent the number of new filers, or stated differently, the number of distinct individuals with at least one filing. Furthermore, it should be clear that despite (or because) of the way these figures were derived, they do not apply to new admittees but rather to the existent(mixed in terms of time of entry) prison population. For example when we say that that the rate of filing is 110 per thousand in California, it would be incorrect to state that out of the next 1,000 admittees, 110 will become filers within the next 54 months; but rather, since the system is in equilibrum (because it consists of the full range of admittees by time of entry) 110 new filers are expected per 1,000 current prisoners in the next 54 months. This distinction, as well as the benefit of the probability calculations is evident from the discrepancies between the figures in line 4 of table 7 and the raw figures presented in line 3 of Table 1, which were, of course, incorrect.

These estimates are only slightly sensitive to changes in the number of prisoners admitted (by virtue of a change in the mixture of prisoners with respect to time of entry) and then mainly so for the first year or two of such changes. They are, however, vulnerable to changes in reasons for filing should such occur because of a sudden change in the laws governing the process, but that is no more than saying that one cannot predict the unpredictable.

Summarizing the state comparison from this perspective we find Colorado with a very high rate of 230 filers per thousand, Texas on the lower extreme with 30,

and Illinois and California in between with comparable rates of 100 and 110 respectively.* The relative (to Texas) figures on the last line are a refinement of the figures presented on the first line of Table 2 in the fact that these are accurate figures. Furthermore, the similarity between the two sets confirms the underlying assumption in that calculation; namely that the patterns of the time to filing in the four states, do not differ substantially when viewed from the perspective of filing over a period of several years.

In absolute terms, it should be of interest to planners and administrators alike to notice the fact that California with prison population similar to Texas has to cope with three times as many filers, while Illinois with more than double the Colorado prison population has a similar number of filers.

3. The intensity of filing

The previous section discussed the broadness of the filing process by focusing on the number of distinct individuals that file at least one motion. While this analysis is important in itself and in particular in showing that the number of individuals that generate filings represent a small minority of the prison population in three states and less than a quarter in Colorado, it is also essential for the calculations to follow in the present section. Here we turn our attention to the intensity of filing as expressed by the total number of filings reaching the courts, a measure of the actual burden facing each of the systems.

In coming to estimate the total number of filings we face essentially the same problems we faced in estimating the probability of filing, namely the differential time in the prison between generations sampled and the reluctance to use only part of the data (the 1967 generation of entry) for the purpose of finding the required estimates. The problem is even more acute here because the time to filing a second or nigher order motion is obviously longer and thus tends to diminish even further the time exposure to such an occurrence of the sample of prisoners.

*For the last three states, the corresponding figures presented in Table 11 of the Appendix should be utilized whenever absolute rather than comparative figures are needed.

The approach taken is that of estimating the mean number of filings per individual and then multiplying it by the number of filers found in the previous section. The mean number of filings per individual should--apart from random variations and variations generated from real differentials in filing patterns across the five years--increase with exposure and reach a peak for the 1967 generation. Because of these variations, however, and the limited exposure time, the following procedure as exemplified for Illinois was utilized.

First we calculated the mean number of filings per filer for each year of en ry. These figures were 1.07, 1.25, 1.27, 1.21 and 1.37 for the corresponding years of entry of 1971 down to 1967. To these figures we then fitted an exponential curve of the form $y= a\, e^{b(1972-X)}$ where y represents the mean number of filings for the corresponding year of entry, X. The transformation 1972-X expresses the average time allowed for filing which was 1 year for the 1971 generation, up to 5 years for the 1967 one. For Illinois the fitted curve was found to be the one with a=1.07 and b=.05, namely $y=1.07\, e^{.05(1972-X)}$ with a coefficient of determination of $r^2=.65$, a measure of the goodness of the fit with 1 indicating a perfect fit. From this curve, the extrapolated mean number of filings at a distance of 6 years (1972-X=6) was calculated. The reason the 6 years distance was adopted was in order to allow for some possible additional undetected filing, even at the risk of slightly overestimating* this number. We thus finally estimate the mean number of filings per filer in Illinois to be 1.4. The full information for each of the states is presented in Table 12 of Appendix B from which the figures in the first line of the following Table 8 are taken.

Before contrasting the states with respect to their respective intensity of filing, a few words regarding the nature of multiple filings are in order: In Illinois, with 1.4 filings per filer, the additional 40% "repetitive" filings consist mostly of appeals to the Supreme Court with relatively few such filings in the

* The figures, as expected, do not vary much; for a distance of 5,6, and 7 years, the respective figures are 1.35, 1.41 and 1.48--a good indication of the usefulness of the exponential fit.

TABLE 8

AN ANALYSIS OF MULTIPLE FILINGS

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO
Mean number of filings per filer	1.4	2.4	2.5	2.0
Proportion of filers with more than one filing	.24	.53	.55	.50
Mean number of filings per filer with more than one filing	2.1	4.0	4.2	3.0
Proportion of filings generated by multiple filers	.40	.82	.84	.75

original court of jurisdiction, (the actual figure is 25%) where such filings are basically impossible since the doctrines of waiver and res judicata are strictly applied in Illinois. This fact no doubt accounts for the lowest rate of multiple filings in Illinois found among the states. By contrast, in California and Texas with 2.4 and 2.5 filings per filer respectively, no appeal is possible and all repetitive filings are basically new filings, rather than reviews of prior petitions. In California successive petitions of habeas corpus may be filed in higher courts since these higher courts also have original jurisdiction in habeas corp s petitions. The successive petition in a higher court,however,is an original proceeding, not a review. In Texas,habeas corpus petitions must be filed initially with the district court (trial level). This court makes findings of fact and recommendations of law, and then automatically sends the findings to the Court of Criminal Appeals, the highest appellate court in Texas for criminal cases. It is a two step process in the court system, but only one filing by the petitioner. There is no appeal involved. Colorado, with 2.0 filings per filer falls somewhat in between with a relatively small part of multiple filings presented as appeals, and the rest being actually repetitive petitions presented to the same courts although with various degrees of formality. It thus comes as no surprise that the Illinois system which on the one hand permits an appeal of the post conviction motion while on the other hand restricts multiple filings appears the most efficient in terms of the low number of multiple filings as well as in the overall number of filings per 1000 among all the other states.

The mean number of filings per filer in each of the states represents rather well the distribution of the number of filings. The corresponding medians are slightly lower reflecting the sensitivity of the mean as a measure of centrality towards extreme values. The notion that <u>every</u> filer sooner or later generates endless numbers of filings is no more than a myth. This , of course, is not to say that one cannot find in our sample occasional filers with more than 5 or 6 filings or even the legendary one with 11 filings. These occurrences , however,

are very rare as evident first of all from the means themselves. A quick look at the proportion of filers with more than one filing on the second line of Table 8 (figures based for this purpose upon the 1967* generation of entry and for Colorado--the 1968 one) reinforces this conclusion. This proportion is lowest in Illinois for reasons explained above and is remarkably similar for the other three states where close to one half of the filers do not ever file again. Given the time it takes to file, the high proportion of prisoners with relatively short sentences and the parole system which obviously operates towards an even earlier release of these very same individuals, these figures should not come as a surprise to anyone.

Finally in order to get an additional descriptive measure of the distribution of the number of filers, the mean number of filings per filer for those individuals with more than one filing is presented in line 3. These figures show that in Illinois the filer with more than two filings is a rarity**, whereas in California and Texas the average multiple filer has 4.0 and 4.2 filings and in Colorado 3.0. Viewed from this perspective the notion of large numbers of multiple filers seems indeed justifiable provided of course the condition is not dropped from the statement, namely, once a filer files his second (but not first!) petition, he is likely to continue to file more--he becomes a "habitual" filer so to speak. Still one should not lose sight of the fact that in these three states no more than approximately half the filers pass that stage, and then they represent no more than half of the 11%, 3% and 23% of the prisoners for California, Texas and Colorado respectively.

From the perspective of the courts, the preoccupation with the notion of multiple filers is , however, more than justifiable since these filers (who contrary to common perceptions come in small numbers both in the absolute and the relative sense) account for a large proportion of filings in the three states with the exception of Illinois, as seen from the last line of Table 8: In California, Texas and

* Except for Illinois where the 1967 figure was out of line with the others and consequently the mean for the 1967 and 1968 generations was taken.

** Indeed in the whole sample only 9 individuals had three filings and only one had four. None had five or more.

Colorado approximately four out of every five petitions bear potentially familiar names!

The similarity in the pattern of multiple filings between California and Texas clearly evident in the table is remarkable when one adds to it the fact that the probability of becoming a filer in California is 3.3 times that in Texas. One is then tempted to recall that sentences are longer in Texas and indeterminate in California and argue that each of the two elements operate in the direction of increased pressure and thus may result in more multiple filings. But then, Colorado, with neither of these two characteristics is by the same measures uncomfortably close to the same pattern while Illinois stands distinctly apart from the three for the reasons given above. Given these facts it seems far more plausible to attribute the high activity of multiple filings to the differences between the three systems on one side and Illinois on the other, with respect to the latter permitting an appeal while otherwise essentially restricting multiple filings. None of the other three states resemble Illinois in this respect.

The inevitable conclusion from this last comparison is clear: every effort should be made towards a system that would demand the consolidation of the potential multiple filings into only one such filing or, absent this possibility, move towards an improved system like the one in Illinois that would permit no more than one initial petition followed by the right to appeal the decision of the lower court into only one superior court with final jurisdiction over the matter.

We now turn to the last stage of the process of estimating the intensity of filings and summarize the results in Table 9 which follows. Texas, despite having the highest activity of multiple filings (as measured by any and all of the figures presented in Table 8) retains its position of having the lowest rate of filings on top of the lowest rate of filers. The explanation may rest in part in what appeared to be a well organized prison system with an available work program that permits as much as three days of credit for one day of work and an efficiently run parole system. However, Texas is different from the other states to such a large degree

TABLE 9

THE INTENSITY OF FILINGS IN THE FOUR STATES

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO
Mean number of filings per filer	1.4	2.4	2.5	2.0
Rate of filers per 1000	100	110	30	230
Rate of filings per 1000	140	264	75	460
Number of admittees per year	2400	5400	6200	1000
Expected number of filers per year	240	594	186	230
Expected number of filings per year	336	1426	465	460
Filers relative to Texas	3.3	3 7	1	7.7
Filings relative to Texas	1.9	3.5	1	6.1

that one is forced to attribute this fact to an entirely different perception of the right to file a post conviction motion on the part of the prisoners in Texas, whether or not this fact has any bearing in the corresponding laws which does not seem to be the case.

Colorado stands out as the state with an overwhelming rate of filings, a luxury that perhaps only such a small state can afford. Everything contributes to this high rate--a relatively large mean number of filings per filer as well as other indicators of multiple filing activity, all coming on top of a very high initial probability of filing. There is no question that the legal system as described in Chapter--encourages this filing activity which many times consists of informal communications or short letters that would not be filed and treated as petitions in any of the other states.

California and Illinois with virtually identical probabilities of filing a first petition differ largely in their respective rates of filings. As stated repeatedly, it is the state of Illinois that is outstanding in this respect and prevents the high intensity of filing that exists in California due to the multiple filing activity coming on top of what should be regarded as a moderate probability of filing.

In absolute terms it is interesting to note that the expected number of filings per year is the same for such otherwise extremely situated states as Texas and Colorado and is more than four times higher for California than for Illinois.

4. The length of time to filing

In this section we shall analyze the length of time it takes to file the first and to the extent possible the second post conviction motion and contrast three states along those lines.

Here, as before, the approach will be the one of utilizing to the extent possible the complete information of the 5 years of sampling. For the length of time to filing variable, the notion of the system being in equilibrium around which variations (random or otherwise) are possible is more critical than for others in coming to estimate the overall situation in a certain state. From this perspective the state of Colorado was already identified to be different as it was also so detected to be by the fact that the exponential distribution does not fit the data. The next section will throw additional light on the subject. For this section, however, because of the heavy reliance in the analysis on the exponential distribution as explained below, coupled with the different behavior in time of the filing process in Colorado (as evidenced also by the fact that new legislation concerning the post conviction topic was introduced in 1971*), the discussion will be limited to the other three states only.

In coming to estimate the length of time to filing the differential time at risk between prisoners of different generation is again a major factor to account for. Obviously, the mean time to filing is increasing with the time at risk since more later filings can occur. Fortunately, the exponential distribution (upon being proved to fit the data for each of the three states) can be further exploited to provide the basic necessary information with the knowledge that it already accounts for these differentials; indeed, it was designed to do precisely that.

The mean of the exponential distribution is mathematically equal to the reciprocal of the parameter of the distribution - θ. Recalling the corresponding

* See Chapter , page .

parameters for the states from section 2, we thus get for Illinois $\frac{1}{.0435} = 23$ months, for California $\frac{1}{.050} = 20$ months and for Texas $\frac{1}{.071} = 14$ months as the estimated mean times to filing the first petition. The mean however is not a good representative of an exponential distribution in general. Better statistics will be presented below. For the moment these figures are presented for the interested reader who might find these figures useful in comparing them with other measures at hand for which only means may be available.

Before proceeding further to derive the other measures we stop briefly to use the above figures in order to reassure ourselves that they, as well as those to come which rely rather heavily upon the exponential fit, bear a close relationship to more intuitively acceptable figures. We achieve this by the same technique utilized in estimating the mean number of filings in the preceeding section, this time applied to the length of time from admission to prison to the filing the first post conviction motion. Specifically, we fit an exponential curve to the mean length of time to filing for the five generations of entry in each of the states. We then read off the fitted curve the estimated mean time to filing for each of the states. The detailed figures are presented in Table 13 of the Appendix from which the figures are taken and contrasted with the above figures in the following Table 10.

Table 10 -- Comparison of the Mean Time to Filing by Different Methods of Estimation

	Illinois	California	Texas
Mean time to filing based on the exponential distribution (months)	23	20	14
Mean time to filing based upon the exponential curve (months)	23	21	16

It should be noted that other than the fact that both methods are applied to the same set of data and have the word "exponential" in common, they are

completely different and independent from each other, which is of course the reason why one can serve as a check of the other. The results are indeed mutually reassuring to the point that no explanation of divergences seems necessary, and we thus proceed to further utilize the exponential distribution.

We present in Table 11 two different sets of descriptive statistics of the corresponding distribution for each of the states. The first three lines show the proportion of filers that file within the first 6, 12 and 24 months of entry into the prison. This is calculated by substituting t = 6; 12; 24 in the formula for the probability of filing within time t which for the exponential distribution is $P_r \{T \leq t\} = 1 - e^{-\theta t}$. We then reverse the formula and ask for the value of t (that is to say what is the required time) for which a certain proportion p of the total filers would have had filed. This is achieved by solving the equation $1 - e^{-\theta t} = p$ each time for a certain value of p given in the table. In particular the estimated times for p = .25, .50 and .75 respectively represent the first, second and third quartiles of the distribution (the second quartile is of course the median).

Table 11 -- Descriptive Statistics of the Distribution of the Length of Time to Filing the First Petition.

	Illinois	California	Texas
Proportion filers within first 6 months of entry	.23	.25	.35
Proportion filers within first 12 months of entry	.41	.45	.57
Proportion filers within first 24 months of entry	.65	.70	.82
Value of p for which the time t is given			
.10	2	2	1 (1.5)
.20	5	4	3
.25	7	6	4
.50	16	14	10
.75	32	28	20
.80	37	32	23
.90	53	46	32

The length of time it takes to file the first petition in Illinois is only slightly longer than California, as the first three proportions show. Thus, for example in Illinois 65% of the filers file within the first 24 months as opposed to 70% in California. Similarly, from the second part of the table it follows that, for example, half the filers would have had filed within 16 months in Illinois while the same would have occured in California within only 14 months of entry into the prison.

Texas with a much smaller probability of filing than the other two states also has a much shorter time to filing. 90% of the filers file within the first 32 months; a period in which only 75% would have filed in Illinois, and 80% in California. Perhaps even more significant is the fact that 25% of the filers file within the first four months and 50% within the first 10 months. This is in part explained, no doubt, by the fact that Texas is the only state among the four in which a relatively respectable number (62, or 17%) file before admission to prison*, a rare occurrence in the other states. The early filing coupled with a high intensity of filing coming on top of a very small probability of filing lend credibility to the hypothesis that in Texas the whole phenomenon of the post conviction activity is centered around a very small minority of "fighters." This possibility is further substantiated by huge differences in all measures of length of sentence and length of stay in prison between filers and non-filers in the state.

Finally, tempting as it might be, the hypothesis that the length of time to filing increases with the probability of filing (i.e. the more filers there are, the longer it takes them to file) cannot be supported from these data. While this is so for Texas as compared to the other two states, it does not hold for Illinois, with a slightly smaller probability of filing, but also a slightly longer time to filing than California.

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* These petitions are filed after sentencing to prison but before a mittimus to state prison. For example, the petitioner may be in county jail awaiting appeal, or awaiting trial in another county, or even possibly on appeal bond.

In an attempt to evaluate the length of time it takes to file a second petition we shall refrain from an elaborate analysis unjustified by the scarce data at hand for this purpose, and simply present the mean length of time it takes to file the second petition after filing the first for the 1967 generation of entry in Illinois and California. In Texas because of irregularities in the data we shall utilize the mean of the two respective means for the 1967 and 1968 generations of entry. For comparison we present the corresponding means for the first filing in Table 12 below. The third line of the table is simply the sum of the first two.

Table 12 -- Mean Length of Time to Filing First and Second Petition in Months

	Illinois	California	Texas
Mean time to first petition	23	20	14
Mean time between first and second petition	24	7	11
Mean time to second petition	47	27	25

The different nature of the second petition in Illinois is again evident. It is, as stated before, mainly an appeal of the first petition, a process that by necessity takes much longer than filing a new petition (since before appealing the disposition of the petition, one must await the initial decision of the trial court) as is the rule in the other two states. The length of time involved also acts as a barrier against a multitude of such filings simply because filers may be released in the mean time. This is indeed evidenced in the relatively small proportion of filers with more than one filing as we have seen. That even in the other states this proportion is only in the vicinity of 50% is certainly due to the same factor operating to a lesser degree (because of the relatively shorter time it takes to file the second petition) in these states.

The advantage of an earlier filing that Texas filers might have upon the California filers is lost by the time the second filing is underway; which is another indication of the lack of any relationship between the probability of

filing and the time it takes to file among states (this may not necessarily be so within each of the states). The time it takes to file a second petition must be strongly related to the reaction time of each state's courts to the original petition; indeed that may be the main message conveyed by these figures.

Finally, desirable as it might be, the relatively short time span of the sample coming on top of the ever decreasing probability of filing as we move from the second filing to the third, and on, prevents us from presenting reliable figures on the times involved in those filings.

5. The pattern of filing over time

The five generations of filers followed enable us to take a closer look into the pattern of filing within the time period under study in each of the four states. Colorado in particular will be of interest in this section because of the irregularities already observed in the behavior of the averages for the state that were presented before.

Before coming to describe the measures and analysis, however, it is important to discuss what is meant by the "pattern of filing", what can be expected from the information at hand and why we adopted the approach described further on. The two aspects of the pattern of filing that are of interest consist of changes over time in the amount of filings and in the time it takes to file. Both will be investigated from the perspective of the first filing utilizing the concept developed earlier of the probability of becoming a filer since this representation of the data contains most of the information available in the sample. In this way we are also able to account for, and effectively utilize, the differential time at risk between the generations of entry. The way in which this variable will be used and to what end requires , however, some further explanation.

The sequential generations of prisoners do not differ drastically in their convictions, length of sentence or stay in prison. There are differences in the absolute number of new admittees from year to year, but these differences are accounted for continuously in our analysis. Beyond that there is very little

yearly variation in the background characteristics of the population of potential filers that would cause fluctuations other than random in the probability of filing. On the other hand outside changes can be major in nature and can have sudden or at least fast impacts on the tendency to file. Whether these changes are of legal nature, such as new legislation, or increased availability of defense attorneys for filing or prison related ones, such as increased access to the courts by a change of policy or by an improved legal library, or simply a change in parole or release procedures, they will all tend to affect the filing of all prior generations and not solely of the last one. For these reasons, an analysis of the possible changes in the probability of filing by the generation of entry will not be warranted and might actually obscure real changes since, for example, an increase in the probability of filing of the 1969 generation of entry might be caused by an overall change in 1970 or later. In an attempt to further sustain such an approach one could attempt to control simultaneously for changes in average time to filing among generations. Yet, these very changes in time to filing may themselves be a result of some later occurrence since, for example, a longer time to filing for a certain generation may be a result of some late filings drawn from that generation at a later time, late enough so that it could not possibly affect generations prior to it in the same way (most left prison by then).

For these reasons, the approach taken is to analyze changes in the probability of filing by the year the filings occurred, irrespective of the generation of entry while correcting, of course, for the respective time at risk for each generation. Upon this analysis and further realizing the strong interdependency, the question of the pattern of the time to filing is then investigated.

Using Illinois as an example, we start by counting for each generation of entry the number of filers that filed within the first 6 months of entry, within more than 6 months but less than or equal to 18 months ans so on as far away as that generation could have filed within the cut-off date. These figures are given in the respective "observed" columns of Table 13. In each row we then have the

TABLE 13

OBSERVED AND EXPECTED NUMBER OF FILERS BY GENERATION OF ENTRY AND YEAR OF FILING IN ILLINOIS

Year of Filing	Total		YEAR OF ENTRY 1967		1968		1969		1970		1971	
	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.
1967	6	13.5	6	13.5								
1968	30	33.7	16	19.1	14	14.6						
1969	55	46.2	12	9.1	22	20.7	21	16.4				
1970	72	58.5	12	10.6	7	9.9	32	23.2	21	14.8		
1971	48	59.1	2	2.0	10	11.5	11	11.1	14	20.9	11	13.6
1967-1971	211	211.0	48	54.3	53	56.7	64	50.7	35	35.7	11	13.6

number of filers from all generations that filed within a certain time period. Thus, for example,the filers from the 1969 generation that filed within the first 6 months filed on the average by December 31, 1969, as did the filers from the 1968 generation that filed within 7-18 months and so on. For each observed number of filers, the corresponding expected number of filers was calculated by multiplying the probability of filing in period (from Table 4) by the number of prisoners at risk for the respective year (from Table 3). Similar calculations for the other states are presented in Tables 14-16 of the appendix.

Upon these data, the hypotheses of no difference in total filing and in filing within the first 6 months among the five years were tested as detailed in the following Table 14. These hypotheses are tested with the Chi-Square test by

TABLE 14

TESTING THE HOMOGENEITY OF FILINGS AMONG YEARS IN ILLINOIS

	Total Filers			6 Months Filers		
Year of Filing	obs.	exp.	X^2	obs.	exp.	X^2
1967	6	13.5	4.17	6	13.5	4.17
1968	30	33.7	.41	14	14.6	.02
1969	55	46.2	1.67	21	16.4	1.29
1970	72	58.5	3.11	21	14.8	2.60
1971	48	59.1	2.08	11	13.6	.50
1967-1971	211	211.0	11.44	73	72.9	8.58

comparing the X^2 found in the table to the value of the Chi-Square distribution with the corresponding number of degrees of freedom at the 5% level of significance. For the total number of filers the number of degrees of freedom is 15 (number of cells in Table 13)minus 5 (number of parameters estimated from the table--the five probabilities utilized in the computation) minus 5 (number of restrictions since the sums of the observed--and expected--number of filers in each time period is predetermined)

to a total of 5. Similarly, for the filers within the 6 months period, the number of degrees of freedom is 5-1-1=3. We thus find for the total number of filers X^2=11.44 greater than $X^2_{.05}(5)$=11.07 and for the filers within the 6 month period X^2=8.58 greater than $X^2_{.05}(3)$=7.81, both significant, and conclude that there were indeed fifferences in filings over time according to each of the two measures.

Tables 17-19 of the appendix present the corresponding figures for the other states. In California and Texas no such differences are detected in either measures, whereas in Colorado* we find the largest differences in both, as indicated by the high significance level at which the hypotheses of homogeneity are rejected. The results for the four states are summarized in Table 15.

TABLE 15

PATTERNS OF FILING OVER TIME IN THE FOUR STATES

		ILLINOIS	CALIFORNIA	TEXAS	COLORADO
X^2 for the total number of filers		11.44	.85	2.31	30.35
P Value		.05	.975	>.50	<.001
X^2 for the 6 months filers only		8.58	4.19	3.64	31.43
P Value		.05	.25	>.25	<.001
	YEARS OF FILING				
Ratios of observed to expected values of number of total filers	1967	.44	1.00	.77	
	1968	.89	1.09	1.06	.49
	1969	1.19	.92	1.03	92
	1970	1.23	.97	1.07	1.27
	1971	.81	1.01	1.04	.94
	1972				1.30

* The calculations for Colorado exclude the 1970 generation of entry and consequently the degrees of freedom are different for the Chi-Square test: compared to the other states, they are 5-3=2 for the total filers because there are 3 less cells in Table 16 of the appendix than in the other corresponding tables. Similarly there are only 3-1=2 degrees of freedom for the 6 months filers. Apart from these differences, it should also be noted that the figures for X^2, unlike all other cases do not conform to the formula $\frac{(\text{observed-expected})^2}{\text{expected}}$. This is so because, in Colorado, the presented figures are neither the actually observed nor the expected ones, due to the weighting of the true figures in Buena-Vista and Canon City to achieve the correct figures for the whole state. We still refer to these figures, for uniformity, as the "observed" and "expected" ones, but do correct the X^2 figures accordingly.

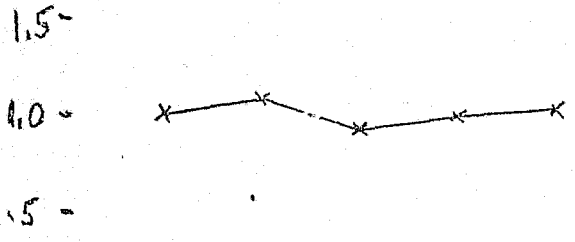
The X^2 figures alone enable comparisons between the three states with the exception of Colorado where the degrees of freedom are different deeming the X^2 not compatible. For this reason, the P value--the point at which the X^2 would be significant--is given in each case. Since the significance test is helpful only in determining which fluctuations are larger than those expected from random variations, an index of yearly filing departure from the average is also presented. Since the expected number of filers represents the picture as it would have been were there no changes over the years, dividing the actually observed number of filers by the corresponding expected number provides an opportunity to derive such an index. This index is also graphically presented in Figure 1 where the solid lines represent the departure from the average--the figures presented in the table--and the interrupted lines represent the departure from the initial, first year of filing in the sample (for California the two are identical since 1967 also happens to have the average filing rate).

California stands out as the state with virtually no differences in the probability of filing over time, and for all purposes it appears to be in equilibrum due to a rather stable behavior. Texas is in a very similar situation after conceivably having under gone a change from 1967 to 1968 the nature of which does not warrant speculation because the information for filing in 1967 also happens to be the weakest of all the years in the comparison.* The two states , however, are in equilibrium for quite different reasons: in Texas, the stability is consistent with the picture discussed earlier of a state in which only a few, possibly the absolute minimum number of prisoners file. In California by contrast, the equilibrium might have been achieved already by the time of the sampling since it is known to have been the leader with respect to legislation in the post conviction field. The possibility, however, that we are only observing the results of balancing forces con-continuously operating cannot be reputed from the present analysis.

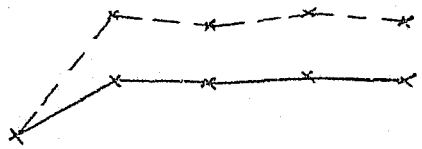
* This is a fact in each of the four states with regard to the first year of filing since only the first generation of entry could contribute to it. For this reason the discussion focuses mainly on the later years for which the contrasts are more reliable. Similarly, looking at Figure 1 with and without the first year may be helpful in understanding it. However, because of the consistency across states this does not preclude the conclusion that the first year had indeed a lower probability of filing.

Figure 1 – Index of filing over time.
——— compared to the mean
– – – – compared to 1967 (1968 for Colorado)

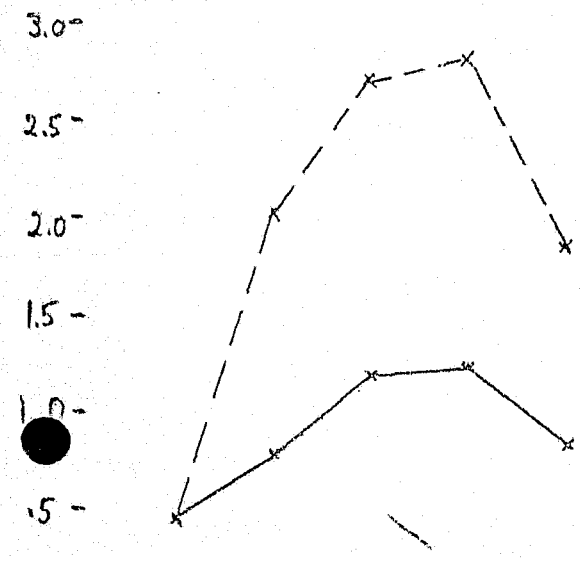
CALIFORNIA



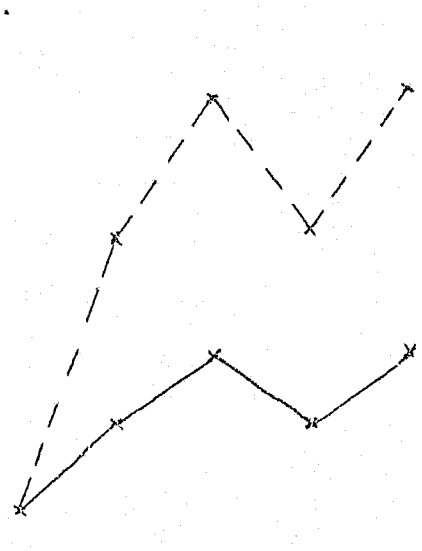
TEXAS



ILLINOIS



COLORADO



The state of Illinois exhibits the pattern of returning in 1971 to the point it was in 1968 after an outburst of filing in 1969 and 1970. These also happen to be the years when defense counsels were made more readily available to indigent prisoners.

In Colorado we witness the most severe fluctuations evident in all our measures, which, coupled with the renewed increase in filing activity in the last year prohibited us from performing some of the analyses done in the other states. For the same reasons the predictive value of the figures for Colorado is lower than in the other states and should be treated accordingly. Here too we witness an increase in filing in 1969-1970 followed by a decrease in 1971. The renewed increased activity in 1972 is undoubtedly due to the new legislation enacted in 1971, referred to before. This is reflected in the 249 filers in 1972 when only about 192 were expected according to the averages (already very high) and reinforced by the 162 to 109 respective comparison for the filers within the first six months only for the year.

Finally, recalling the 1968-1970 turmoil years, the following comment is inescapable when looking at the charts: the increased preoccupation with prisoners rights at the time affected Illinois, bypassed Texas, occurred earlier in California and still preoccupies Colorado.

Returning now to the time to filing question and its changes over time, we first note that were we to analyze these changes by, say, measuring the average time to filing for each year of admission (while correcting, of course, for the differential time at risk), and in the absence of other contributing factors, we would have found--with the possible exception of California--a continually decreasing time to filing from 1967 to 1970 in Texas and Illinois and from 1968 to 1971 in Colorado. Now, these would have been real, correctly measured, decreases that can be predicted from the behavior over time of the probability of filing as it appears in the charts of Figure 1 and for this very reason such measures would not have been providing any information with regard to the trend of the time to filing over time.

Changes over time in the probability of filing, coming as they mostly do in reaction to an outside change would normally tend to affect the early filers since

they are relatively new ones that are more attuned to such changes. Indeed, the corresponding measures in Table 15 and others for the filers within the first 6 months of entry show a remarkable consistency with the measures for the whole population of filers. They also show detectable higher fluctuations than the others, consistent with the notion that these are affected more--or earlier--than the others. Table 16 below shows this fact for the two states in which significant changes over time were found. The index of filing in six months is derived in the same way as the other, by dividing the observed numbers by the corresponding expected ones. Apart from the fact that the two indices are highly correlated, their ratio shows persistent relative higher activity in the 6 months period, which would tend to indicate a switch towards overall earlier time to filing. Beyond this observation, we have to fall back on the average time to filing developed earlier since no further analysis would bear fruitful results concerning this issue.

TABLE 16

CHANGES OVER TIME OF THE TIME TO FILING IN TWO STATES

Year of Filing	Index of Total Filing	Index of Filing in 6 Months	Ratio of the Second to First	Index of Total Filing	Index of Filing in 6 Months	Ratio of the Second to First
1967	.44	.44	------			
1968	.89	.96	1.08	.49	.49	------
1969	1.19	1.28	1.08	.92	1.07	1.16
1970	1.23	1.42	1.15			
1971	.81	.81	1.00	.94	.97	1.03
1972				1.31	1.48	1.13

APPENDIX B

TABLE 1

NUMBER OF FILERS, NON-FILERS AND ADMISSIONS
BY YEAR IN CALIFORNIA

Year of Entry	No. of Filers	No. of Non-Filers	No. of Corresponding Admissions
1967	69	209	696
1968	74	198	668
1969	64	195	649
1970	42	195	627
1971	29	204	641
1967-1971	278	1001	3281

APPENDIX B

TABLE 2

NUMBER OF FILERS, NON-FILERS AND ADMISSIONS
BY YEAR IN TEXAS

Year of Entry	No. of Filers	No. of Non-Filers	No. of Corresponding Admissions
1967	75	82	2535
1968	70	82	2530
1969	76	86	2656
1970	87	111	3417
1971	59	124	3779
1967-1971	367	485	14917

APPENDIX B

TABLE 3

NUMBER OF FILERS, NON-FILERS AND ADMISSIONS
BY YEAR IN BUENA VISTA COLORADO

Year of Entry	No. of Filers	No. of Non-Filers	No. of Corresponding Admissions
1968	14	56	462
1969	14	53	438
1970*	--	--	--
1971	36	62	532
1972	35	59	507
1968-1972*	99	230	1939

*The filers information for the year of 1970 in Buena Vista is not available.

APPENDIX B

TABLE 4

NUMBER OF FILERS, NON-FILERS AND ADMISSIONS
BY YEAR IN CANON CITY, COLORADO

Year of Entry	No. of Filers	No. of Non-Filers	No. of Corresponding Admission
1968	80	118	316
1969	105	84	273
1970	64	81	226
1971	67	80	227
1972	81	98	277
1968-1972	397	461	1319

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TABLE 5

NUMBER OF FILERS, NON-FILERS AND ADMISSIONS
BY YEAR IN COLORADO*

Year of Entry	No. of Filers	No. of Non-Filers	No. of Corresponding Admissions
1968	174	230	1094
1969	224	190	984
1971	170	204	986
1972	197	216	1061
1968-1972*	765	840	4125

*Unlike the other tables of the kind, the figures in this table do not represent actual number of cases on file, rather, and in order for them to present the picture for the whole state of Colorado due to the stratification in sampling, they are weighted. The number of filers is achieved by weighting the corresponding number for Buena Vista and Canon City by a ratio of 1:2, the number of non-filers by a ratio of 2:1 and the number of corresponding admissions by a ratio of 1:2. The figures for 1970 are excluded.

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TABLE 6

PROBABILITY OF FILING IN CALIFORNIA

Filing Period in Months	No. of Filers	No. of People At Risk	Probability of Filing	Error Term
6 or under	113	3281	.034	.006
7-12*	48	2640	.018	.005
13-18	35	2640	.013	.004
19-24	25	2013	.012	.004
25-30	14	2013	.007	.004
31-36	10	1364	.007	.005
37-42	6	1364	.004	.004
43-54**	5	696	.007	.006
54 or under	256	--	.104	.014

*A period of 7-12 months means the period of filing a motion any time greater than 6 months and less than but including 12 months and similarly for the other periods.

**Because of too few cases, two periods of 6 months each were pooled in this category.

APPENDIX B

TABLE 7

PROBABILITY OF FILING IN TEXAS

Filing Period in Months	No. of Filers	No. of People At Risk	Probability of Filing	Error Term
6 or under	175	14917	.012	.002
7-12*	68	11138	.006	.001
13-18	47	11138	.004	.001
19-24	17	7721	.002	.001
25-30	13	7721	.002	.001
31-36	4	5065	.001	.001
37-42	4	5065	.001	.001
43-54**	4	2535	.002	.002
54 or under	332	--	.029	.004

*A period of 7-12 months means the period of filing a motion any time greater than 6 months and less than but including 12 months and similarly for the other periods.

**Because of too few cases, two periods of 6 months each were pooled in this category.

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TABLE 8

PROBABILITY OF FILING IN COLORADO (1)

Filing Period in Months	No. of Filers	No. of People At Risk	Probability of Filing	Error Term
6 or under	425	4125	.103	.009
7-12*	102	3064	.033	.006
13-18	52	3064	.017	.005
19-24	27	2078	.013	.005
25-30	24	2078	.012	.005
31-36	7	2078	.003	.002
37-42	13	2078	.006	.003
43-54*	23	1094	.021	.009
54 or under	673	--	.208	.017

(1) Based upon the years 1968-9 and 1971-2.

* A period of 7-12 months means the period of filing a motion any time greater than 6 months and less than but including 12 months and similarly for the other periods.

** Because of too few cases, two periods of 6 months each were pooled in this category.

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TABLE 9

FITTING AN EXPONENTIAL DISTRIBUTION TO THE FILING DATA FOR CALIFORNIA[1]

Filing Period in Months	Probability of Filing in Sample	Probability of Filing According to the Fitted Distribution	Number of People at Risk	Expected No. of Filers	Observed No. of Filers	X^2
6 or under	.0344	.0290	3281	95.2	113	3.33
7-12	.0182	.0214	2640	56.5	48	1.28
13-18	.0133	.0159	2640	42.0	35	1.17
19-24	.0124	.0118	2013	23.8	25	.06
25-30	.0070	.0087	2013	17.5	14	.70
31-36	.0073	.0065	1364	8.9	10	.14
37-42	.0044	.0048	1364	10.8[2]	11	.00
43-54	.0072	.0061	696			
54 or under	.1117	.1117	--	--	256	6.68[3]

[1]For an estimated $\hat{\theta} = .050$.

[2]The two periods are combined into one in order for the expected number of cases to be greater than 5 to assure validity of the X^2 test.

[3]The 6.68 figure is not significant at the .05 level when compared with the X^2 with 5 degrees of freedom for this level which is 11.07. One can thus conclude that this exponential distribution adequately fits the data.

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TABLE 10

FITTING AN EXPONENTIAL DISTRIBUTION TO THE FILING DATA FOR TEXAS[1]

Filing Period in Months	Probability of Filing in Sample	Probability of Filing According to the Fitted Distribution	Number of People at Risk	Expected No. of Filers	Observed No. of Filers	X^2
6 or under	.0117	.0103	14917	153.6	175	2.98
7-12	.0061	.0067	11138	74.6	68	.58
13-18	.0042	.0044	11138	49.0	47	.08
19-24	.0022	.0029	7721	22.4	17	1.30
25-30	.0017	.0019	7721	14.7	13	.20
31-36	.0008	.0012	5065	6.1	4	.72
37-42	.0008	.0008	5065	6.3[2]	8	.46
43-54	.0016	.0009	2535			
54 or under	.0291	.0291	--	--	332	6.32[3]

[1] For an estimated $\hat{\theta} = .071$.

[2] The two periods are combined into one in order for the expected number of cases to be greater than 5 to assure validity of the X^2 test.

[3] The 6.32 figure is not significant at the .05 level when compared with the X^2 with 5 degrees of freedom for this level which is 11.07. One can thus conclude that this exponential distribution adequately fits the data.

APPENDIX B

TABLE 11

STATE COMPARISONS OF NUMBER OF NEW FILERS USING THE PROBABILITY OF EVER FILING

	ILLINOIS	CALIFORNIA	TEXAS
Probability of ever filing	.11±.02	.12±.02	.03±.01
Expected number of new filers per 1000 admittees	110±20	120±20	30±10
Total number of admissions in the five years (to the nearest thousand)	12,000	27,000	31,000
Expected number of new filers	1,320	3,240	930
Expected number of new filers per year	264±48	648±108	186±62
Number of new filers per 1000 relative to Texas	3.7	4.0	1

APPENDIX B

TABLE 12

ESTIMATING THE MEAN NUMBER OF FILINGS PER FILER

		Illinois	California	Texas	Colorado
Mean number of filings per filer by year of entry	1972	--	--	--	1.46
	1971	1.07	1.55	1.48	1.75
	1970	1.25	1.83	1.46	--
	1969	1.27	1.77	1.57	1.91
	1968	1.21	2.24	1.91	1.83
	1967	1.37	2.10	2.40	--
a =		1.07	1.48	1.20	1.47
b =		.05	.08	.12	.05
r^2 =		.65	.78	.85	.70
Estimated overall mean number of filings per filer		1.4	2.4	2.5	2.0

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TABLE 13

ESTIMATING THE MEAN TIME LENGTH TO FILING FIRST PETITION

		Illinois	California	Texas
Mean length of time to filing first petition by year of entry	1971	6.1	2.2	- 1.1*
	1970	9.4	6.5	3.9
	1969	11.8	11.8	8.8
	1968	17.6	13.8	11.1
	1967	22.5	16.1	14.9
a =		4.61	1.99	1.96
b =		.32	.47	.43
r^2 =		.99	.85	.91
Estimated overall mean length of time to filing first petition		23.3	21.2	16.4

* Not used in the fitting of the curve.

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TABLE 14

OBSERVED AND EXPECTED NUMBER OF FILERS BY GENERATION OF ENTRY AND YEAR OF FILING IN CALIFORNIA

			YEAR OF ENTRY									
Year of Filing	Total		1967		1968		1969		1970		1971	
	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.
1967	24	23.9	24	23.9								
1968	51	46.9	20	21.9	31	23.0						
1969	52	56.8	12	13.5	18	21.0	22	22.3				
1970	61	63.1	7	8.1	12	13.0	25	20.4	17	21.6		
1971	68	67.3	5	5.0	9	7.8	15	12.6	20	19.8	19	22.1
1967-1971	256	256.0	68	72.4	70	64.8	62	55.3	37	41.4	19	22.1

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TABLE 15

OBSERVED AND EXPECTED NUMBER OF FILERS BY GENERATION OF ENTRY AND YEAR OF FILING IN TEXAS

			YEAR OF ENTRY									
Year of Filing	Total		1967		1968		1969		1970		1971	
	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.
1967	23	29.7	23	29.7								
1968	59	55.7	32	26.1	27	29.6						
1969	69	67.1	10	9.9	25	26.1	34	31.1				
1970	87	81.4	5	4.1	10	9.9	24	27.4	48	40.0		
1971	94	97.9	4	4.1	3	4.0	10	10.4	34	35.2	43	44.2
1967-1971	332	331.8	174	73.9	65	69.6	68	68.9	82	75.2	43	44.2

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TABLE 16

OBSERVED AND EXPECTED NUMBER OF FILERS BY GENERATION OF ENTRY AND YEAR OF FILING IN COLORADO (1)

			YEAR OF ENTRY									
Year of Filing	Total		1968		1969		1971		1972	
	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.	obs.	exp.
1968	55	112.7	55	112.7						
1969	144	156.4	35	55.0	109	101.4				
1970	97	76.3	30	26.8	67	49.5				
1971	128	136.3	8	10.5	21	24.2	99	101.6		
1972	249	191.8	23	23.0	12	9.5	52	50.0	162	109.3
1968-1972	673	673.5	151	228.0	209	184.6	151	151.6	162	109.3

(1) Excluding the 1970 generation of entry

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TABLE 17

TESTING THE HOMOGENEITY OF FILINGS AMONG YEARS IN CALIFORNIA

	Total Filers			6 Months Filers		
Year of Filing	obs.	exp.	X^2	obs.	exp.	X^2
1967	24	23.9	.00	24	23.9	.00
1968	51	46.9	.36	31	23.0	2.78
1969	52	56.8	.41	22	22.3	.00
1970	61	63.1	.07	17	21.6	.98
1971	68	67.3	.01	19	22.1	.43
1967-1971	256	256.0	.85(1)	113	112.9	4.19(2)

(1) The .85 figure is not significant at the .05 level when compared with the 11.07 figure from the Chi-Square distribution with 5 degrees of freedom.

(2) The 4.19 figure is not significant at the .05 level when compared with the 7.81 figure from the Chi-Square distribution with 3 degrees of freedom.

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TABLE 18

TESTING THE HOMOGENEITY OF FILINGS AMONG YEARS IN TEXAS

	Total Filers			6 Months Filers		
Year of Filing	obs.	exp.	X^2	obs.	exp.	X^2
1967	23	29.7	1.51	23	29.7	1.51
1968	59	55.7	.20	27	29.6	.23
1969	69	67.1	.05	34	31.1	.27
1970	87	81.4	.39	48	40.0	1.60
1971	94	97.9	.16	43	44.2	.03
1967-1971	332	331.8	2.31(1)	175	174.6	3.64(2)

(1) The 2.31 figure is not significant at the .05 level when compared with the 11.07 figure from the Chi-Square distribution with 5 degrees of freedom.

(2) The 3.64 figure is not significant at the .05 level when compared with the 7.81 figure from the Chi-Square distribution with 3 degrees of freedom.

APPENDIX B

TABLE 19

TESTING THE HOMOGENEITY OF FILINGS AMONG YEARS IN COLORADO(1)

	Total Filers			6 Months Filers		
Year of Filing	obs.	exp.	X^2	obs.	exp.	X^2
1968	55	112.7	16.69	55	112.7	16.69
1969	144	156.4	.56	109	101.4	.32
1970	97	76.3	3.17	---	-----	-----
1971	128	136.3	.29	99	101.6	.04
1972	249	191.8	9.64	162	109.3	14.36
1968-1972	673	673.5	30.35(2)	425	425.0	31.41(3)

(1) Excluding the 1970 generation of entry

(2) The 30.35 figure is significant at the .05 level when compared with the 5.99 figure for the Chi-Square distribution with 2 degrees of freedom. It remains significant even at the .001 level.

(3) The 31.41 figure is significant at the .05 level when compared with the 5.99 figure for the Chi-Square distribution with 2 degrees of freedom. It too remains significant at the .001 level.

Chapter III - Filer and Non-Filer Characteristics:

A Comparison and an Evaluation of Their Deterministic Value

INTRODUCTION

In this chapter we present and contrast the characteristics of each of the two groups of filers and non-filers in the four states. Apart from the comparison between themselves and among the states, we are focusing our analysis on identifying and utilizing those characteristics that might be of value in understanding the decision to file a post conviction motion on the part of what has been shown to be a relatively small proportion of the prison population.

To be sure, any such analysis involves--explicitly or implicitly--a selective process of what variables are to be used for this purpose. As is normally the case in studies of human characteristics, most variables are pairwise correlated to a lesser or greater degree and, given a large enough sample, in most comparisons subgroups are found to be "significantly different", meaning nothing more than the fact that they are not precisely identical.* On the other hand non-significant differences or uncorrelated variables may sometimes be of major importance to the subject under study. For these reasons it is imperative to state as clearly as possible at the outset the criteria for the selection that had been applied in performing the forthcoming analysis. These were: (1) No variables that were judged to be only remotely related** to the act of filing a post conviction motion were utilized when in addition to that they were found to presumably affect filing in different directions or in vastly different degrees across the four states under study.

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* Many of the differences of this kind tend to disappear when the test for identity is replaced by a test of the magnitude of such differences, even when very modest differences are hypothesized. Similarly, a "significant correlation coefficient" normally means that it is significatnly different from 0, but should one hypothesize a correlation of say .1, the significance may well disappear.

**Either intuitirely or statistically or both.

Examples in this category are age, education and marital status. (2) Variables that were unreliable by virtue of the nature of the information in the source documents were not used. Unfortunately, the prominent example in this case is the type of counsel variable for which very little reliable information was found in the records. (3) When more than one variable could be used containing essentially the same information with regard to its impact on filing, only the one (and occasionally two) judged most informative were used. Such examples are: the minimum sentence preferred upon the maximum sentence; prior record in terms of the prior number of felonies and the total prior minimum sentence chosen among several other ways to measure the prior record; first parole hearing only and many others. (4) Only variables with at least compatible if not identical counterpart in all states were used.

Sections 1 and 2 of this chapter present the comparisons in terms of the individual variables deemed to be of interest along the preceding lines. the first for characteristics that are unrelated to the prison itself and the second for those that are.

1. Background Characteristics

The characteristics considered here are those that are determined before entering prison or very shortly thereafter. As such, they present the opportunity to distinguish between non-filers and filers-to-be in terms of their criminal background (prior record), their former tendency to make a stand (mode of adjudication and the presence of a filing for an appeal) and the severity of their present sentence that might predispose them to file. Whether or not causation can be inferred when a correlation is found between filing and any of these variables, one thing is nevertheless certain: the filing, when it occurs, comes after the full impact that such characteristics might have by the sheer fact that they precede the act of filing.

The prior record is measured in terms of the number of felonies and the minimum sentence in months accumulated by the prisoner until, but excluding, the present

conviction for which he entered our sample. The present sentence is measured in terms of the minimum sentence given and in the case of multiple counts and/or multiple indictments the maximum minimum sentence when concurrent and the sum of the minimum sentences when consecutive sentences are imposed.*

The "short time" is a term borrowed from its use in Illinois to express the minimum time in which a prisoner can expect to completely discharge a sentence. It is predetermined at the moment of entry into the prison according to a formula based upon the length of the sentence. The statutory good time is figured in and therefore any "good time" lost while incarcerated will prolong the time to discharge. While the short time is highly correlated with the actual time spent in prison, it does not numerically represent it since a prisoner may be paroled (even several times) prior to his discharge. In Texas and Colorado, the corresponding term is "Minimum Expiration Date" expressing the same notion although the way it is calculated differs in the way the good time is figured in. In California, the situation is somewhat different in that such a time is not automatically determined upon entry and has a technically different interpretation: the "term fixed at" is the length of stay in prison fixed by the Adult Authority within the range of sentence set by the court. This term can be later revoked or changed. Recently the term is fixed at a much earlier time than the practice used to be and comes to resemble the short time much closer than the case used to be.

The recent tendency of the prisoner to fight the current conviction may be reflected in the way he responds when charged with the present offense(s) by choosing to plead guilty or by insisting on a trial by court or jury. In the case of more than one indictment this variable was determined upon the mode of adjudication of the first indictment coded, a fact that was statistically shown to have but a minor influence on the results since in the overwhelming number of cases the same mode of adjudication applies to all indictments. Another indicator of the same tendency might be found in the fact that a prisoner files for an appeal of the conviction, an action that comes very shortly after conviction.

* In the case of sentences that are a mixture of the two, the corresponding figure is calculated according to the same rules, applied sequentially.

Table 1 presents the summary statistics for filers and non-filers of the variables described above in terms of the mean (and when deemed necessary the median) for the quantitative variables among them and the percent figures for the qualitative ones. For each comparison of filers and non-filers, a test of the hypothesis of no difference between the means or, when applicable, the proportions was performed and the corresponding level of significance given when the differences were found statistically significant at least at the 5% level. In each case the level of significance is smaller than or equal to the one presented in the table. For each variable the corresponding number of cases upon which the statistics are calculated is also presented, figures which along with the overall sample size for the state shown on the last line enable to determine the number of cases in each instance where the respective information was not available. As can be seen at a glance, apart from the few exceptions discussed below, there were no large numbers of cases of missing data for these variables.

The figures for the prior minimum sentence in Colorado are not presented because they do not in the absolute represent the situation correctly due to the fact that indefinite prior sentences were coded as "0" causing all figures to be lower than they are to be. Comparatively speaking they nevertheless are fully consistent with the picture as represented by the other measure of prior record--the number of prior felonies. Furthermore, the difference between filers and non-filers is in this case also significant at the high level of less than .001.

The number of cases for the "short time" in California is much smaller because the "term fixed at" was, in many cases, not yet determined at the time of the sampling. The number of cases for the present minimum sentence and the short time in Colorado is much lower because they represent the situation in the Canon City prison mainly since at the Buena Vista Reformatory the majority of prisoners have indefinite sentences. In Illinois, the number of cases for the prior minimum sentence is lower than usual because this information was not always existent in the files. Finally, the only other exception to the normally "high response" rate is present in the

TABLE 1 -- BACKGROUND C[illegible]ILERS AND NON-FILERS

		ILLINOIS			CALIFORNIA			TEXAS			COLORADO		
		Filers	Non-Filers	Significance	Filers	Non-Filers	Significance	Filers	Non-Filers	Significance	Filers	Non-Filers	Significance
Number of Prior Felonies	$\bar{X}$ =	1.4	1.1	.04	1.4	1.1	.03	1.8	1.0	.001	1.5	.8	.001
	N =	219	904		279	973		366	483		431	578	
Prior Minimum Sentence (Months)	$\bar{X}$ =	40	34	N.S.	35	31	N.S.	84	34	.001	---	---	----
	M =	12.3	12.0		11.7	7.7		36.5	.4		---	---	
	N =	204	865		281	971		363	483		---	---	
Not Pleading Guilty	P =	29	18	.001	60	33	.001	62	8	.001	14	9	.02
	N =	238	942		283	988		360	483		390	564	
Filing for Appeal	P =	49	17	.001	55	20	.001	48	3	.001	13	7	.002
	N =	244	970		289	1001		367	485		432	579	
Present Minimum Sentence (Months)	$\bar{X}$ =	98	61	.001	34	20	.001	307	68	.001	70	53	.01
	M =	41	24		13	6		180	48		48	36	
	N =	244	960		270	983		287	480		328	335	
Short Time	$\bar{X}$ =	87	56	.001	78	66	.001	292	45	.001	48	32	.001
	M =	60	39		74	60		142	26		36	27	
	N =	231	926		178	702		360	481		326	338	
Sample Size		244	970		289	1001		367	485		432	579	

$\bar{X}$ = Mean
M = Median
P = Percent
N = Number of cases for respective variable
N.S. = Not Significant

number of cases for the present minimum sentence for the filers in Texas and is of an entirely different nature: the 80 filers (22%) not represented in the averages had a minimum sentence of "life"--an additional and powerful indicator of the overwhelming discrepancy between filers and non-filers in this state. By contrast, among non-filers, only 5 (1%) had such a sentence.

Turning now to the discussion of the figures shown in Table 1, it should be said at the outset that it presents an extremely powerful, indeed remarkable picture of the difference inherent in those characteristics between filers and non-filers. Each single comparison reflects the acute conditions of the filers when contrasted to the non-filers. There is not a single exception to this fact in any of the figures in the table. The size of the discrepancies is well evidenced in the very high significance level that dominates the table. Even in the two cases where the differences were not found to be significant, the figures nevertheless follow the established direction. The trend is overwhelming and uniform across states.

In terms of the two measures of prior record, the filers are found to have a clearly established higher prior criminal activity in each of the states, although at different levels. Nevertheless, the differences here are relatively smaller than those encountered in the other two sets of measures. Keeping in mind in addition that much of these differences are already reflected in the current sentences, one would have to attribute to the prior record a relatively minor impact on filing despite the increased experience with the legal system that prisoners with higher prior record have.

That filers are fighting their way out continuously is evident in their much higher rate of "not guilty" pleas and their very high appeal rate. The differences here are of such a magnitude that they ought to attract the serious attention of the policy makers, a fact which is certainly far from being recognized. The figures certainly suggest that serious consideration should be given to the notion that certain prisoners would continue to fight if only given yet another chance, raising the question as to where the limit ought to be. Lacking reliable information on

counsel in the sample, one can only surmise that those very prisoners that on the average would have to have more--and possibly better--representation when demanding a trial and appealing the conviction would also use the same resource to file a post conviction motion.

Longer sentences and longer expected stay in prison clearly and strongly affect filing if for no other reason than that prisoners with shorter sentences may not see much value in filing because of the time element or simply because they lack the pressure that is associated with a longer sentence.

While in the absolute the figures for the four states are different by virtue of the differing legal systems and sentencing patterns, the differences between filers and non-filers in each of the states reinforce the findings in the prior chapter pertaining to the probability of filing. The most severe differences are found in Texas with the lowest probability of filing (.03), fully consistent with the contention that in this state the filers consist of a small but active minority of fighters who might indeed be desperate or so at least do the figures suggest. Colorado is found on the other end of the spectrum with relatively smaller differences based on relatively shorter sentences suggesting again the different nature of the filing process in this state with the highest (.23) probability of filing. Illinois and California preserve both their similarity and middle of the road position in terms of the differences found in these states, again consistent with respective probabilities of filing in these states of .10 and .11.

Given the large differences encountered in the preceding analysis, the question of the predictive power of these background characteristics has to be raised: to what extent do any of these variables determine the decision to file? While this question calls for one or another type of multivariate analysis on the combined effect of such variables on filing, we shall briefly discuss it here in terms of the impact of the individual variable. While any measure of the correlation between filing and the variables discussed will show them to be highly correlated it is important to distinguish between this fact and the ability to predict on a one to

one basis the filers among the total prison population. An example will best illustrate this point.

In Texas, for example, we find that among filers 48% also file an appeal while in contrast to that only 3% among non-filers appeal--a huge difference indeed. Furthermore, out of a total of 657 appealers, 177 are filers who thus represent 27% of the total. Among the non-appealers, on the other hand, out of a total of 14,260 non-appealers only 190 are filers--a proportion of only 1.3%. Nevertheless, in both cases the non-filers represent a large majority which thus preclude the possibility of an efficient predictive method. The situation is essentially the same everywhere because the filing phenomenon is a rare occurrence one. This is not to say that prediction is impossible but rather that it cannot be expected to be accurate. The ratio of the two percentages $\frac{27}{1.3} = 20.7$ can serve as a relative measure of the predictive or deterministic value of the appeal variable.

Table 2 presents figures similar to those discussed above for each of the states for the appeal and plea characteristics. The percent filers in each category do not, however, represent the correct probability of filing among prisoners in the respective category because of an amount of filing not yet materialized among the non-filers. This is so because of the decreasing exposure time of the sequential generations of prisoners in the sample analyzed and discussed in the prior chapter. We know , however, from there what the approximate correction factor for the probability of filing should be for each of the states.* This factor is used in calculating the probability of filing in the table from the percent filers.

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* The following table sets out the precise figures from which this approximation is derived:

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO
Probability of filing in 54 months period	.093	.104	.029	.208
Proportion of filers in the sample	.077	.088	.025	.191
Ratio of the two	1.21	1.18	1.16	1.09

Table 2 - Probability of filing among certain subgroups and their predictive values

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO
Correction factor	1.21	1.18	1.16	1.09
Proportion filers given appeal	.195	.214	.269	.313
Probability of filing given appeal	.24	.25	.31	.34
Proportion filers given no appeal	.049	.051	.013	.181
Probability of filing given no appeal	.06	.06	.02	.20
Predictive Value	4.0	4.2	20.7	1.7
Proportion filers given plea	.119	.147	.153	.249
Probability of filing given plea	.14	.17	.18	.27
Proportion filers given no plea	.068	.054	.010	.172
Probability of filing given no plea	.08	.06	.01	.19
Predictive Value	1.8	2.7	15.3	1.4
Overall probability of filing	.09	.10	.03	.21

The predictive value shown in the table represent the increased likelihood of a prisoner to become a filer when he has an appeal compared to the case when he does not. In the same way, a prisoner who pleaded not-guilty in Texas is 15(!) times more likely to become a filer than a prisoner who pleaded guilty. Once more the extreme positions of Texas and Colorado are noticeable as well as the Illinois-California similarities. The uniformly very high probability of becoming a filer given an appeal is important as clear evidence of a factor cutting across states despite the fact that they differ in so many ways and in the overall probability of filing in particular. The superior predictive value of the appeal variable is also worth noting.

2. Concurrent Characteristics

This section examines certain characteristics that are determined during the stay in prison either by the prisoner himself as represented by the three measures related to discipline in prison or by external decisions represented by the parole and release variables. While every single one of those measures are themselves correlated with the background characteristics discussed in the prior section, that by itself does not preclude them from having an independent impact on filing. Those variables , however, that exhibited a very strong such correlation were not included here.

Three measures of relief are presented in the search for a possible contribution to the incentive to file due to the pressures that might be created in their absence. These are: the disposition of the first parole hearing in terms of parole being granted or refused; the dichotomy of having or not having been released from prison prior to discharge and until the time the sample was taken; and the time in months it took until such a release if one was granted. The release variable supplements the first parole disposition one in the sense that it includes in it all the decisions made in all the parole hearings that an individual might have had, although lack of release might also mean that no such hearing was yet held.

The filer's and non-filer's behavior in prison is analyzed from the perspective of having or not having a disciplinary record; and in particular, whether or not he incurred isolation days during his stay and their number.

The variables in this section differ from those in the prior one for yet another very important reason: they are by their very definition time dependent, and as such are affected in their value by the sampling procedure in the same direction as the probability figures were, but in an unknown amount. Thus, the diciplinary record by any of the three measures would tend to increase with time and the corresponding figures would be higher than those presented were all the prisoners in the sample followed for a full 5 years. Similarly, the proportion of prisoners not released would become smaller and the mean time to release would increase because proportionally more would be released later. Even the proportion refused parole on the first hearing would increase because proportionally more difficult cases would appear before the parole board since the very time of the first parole hearing is dependent on the length of sentence and therefore, on the severity of the case.

For these reasons the absolute figures for these variables should not be used as such as they might be misleading in the information contained in them. However, because both samples of filers and non-filers are identical in the way they were drawn across time, the assumption that whatever correction is necessary for each variable would apply equally well to both groups is justified. Thus, their comparative use for the purpose of contrasting the filers and the non-filers is possible.

Table 3 presents the summary statistics for these variables for each of the two groups of filers and non-filers. It is presented along the same lines and with the same methodology as the one utilized in table 1 of section 1. The picture, however, is entirely different.

Reliable figures for the number of isolation days and the time to release in Colorado were not available. Total numbers of cases for the parole information are smaller because only part of the prisoners had a first parole hearing in the sample. Similarly the N's for the time to release are based only upon the respective number

TABLE 3 -- CONCURRENT CHARACTERISTICS OF FILERS AND NON-FILERS

		ILLINOIS			CALIFORNIA			TEXAS			COLORADO		
		Filers	Non-Filers	Signi-cance	Filers	Non-Filers	Signi-cance	Filers	Non-Filers	Signi-cance	Filers	Non-Filers	Signi-cance
Parole refused at first Hearing	P=	58	51	N.S.	84	80	N.S.	94	84	.001	40	44	N.S.
	N=	140	634		246	883		168	424		287	484	
Not Released	P=	52	34	.001	46	40	N.S.	90	68	.001	34	20	.001
	N=	231	901		283	970		366	485		432	578	
Time to Release (months)	$\bar{X}$=	26	20	.001	35	28	.001	29	15	.001	---	---	----
	M=	25	18		36	26		26	12		---	---	----
	N=	61	460		149	570		34	154		---	---	----
Disciplinary Action Taken	P=	91	83	.004	70	62	.004	48	40	.02	26	21	N.S.
	N=	216	872		216	676		367	479		429	574	
Had Isolation Days	P=	63	57	N.S.	30	26	N.S.	17	6	.001	16	9	.001
	N=	234	868		218	684		272	373		420	554	
Number of of Isolation Days	$\bar{X}$=	15.1	10.8	.04	8.2	3.8	.002	4.4	.8	.001	---	---	----
	N=	234	868		218	684		272	373		---	---	----
Sample Size		244	970		289	1001		367	485		432	579	

$\bar{X}$ = Mean
M = Median
P = Percent
N = Number of cases for respective variable
N.S. = Not Significant

Table 4 - Probability of filing among certain subgroups and their predictive values

	ILLINOIS	CALIFORNIA	TEXAS	COLORADO
Correction factor	1.21	1.18	1.16	1.09
Proportion filers given refused Parole	.074	.089	.015	.145
Probability of filing given refused parole	.09	.11	.02	.16
Proportion filers given parole granted	.063	.070	.005	.169
Probability of filers given parole granted	.08	.08	.01	.18
Predictive Value	1.2	1.3	3.0	.9
Proportion filers given disciplinary record	.083	.107	.030	.224
Probability of filing given disciplinary record	.10	.13	.03	.24
Proportion filers given no disciplinary record	.041	.079	.022	.183
Probability of filing given no disciplinary record	.05	.09	.03	.20
Predictive Value	2.0	1.4	1.4	1.2
Proportion filers given isolation days	.090	.132	.063	.330
Probability of filing given isolation days	.11	.16	.07	.36
Proportion filers given no isolation days	.072	.086	.021	.179
Probability of filing given no isolation days	.09	.10	.02	.20
Predictive Value	1.3	1.5	3.0	1.8
Overall probability of filing	.09	.10	.03	.21

of prisoners that had a release. In some instances the number of cases for the disciplinary variables are smaller because that information was not always available in the prisoner's file.

In contrast to the background variables, the concurrent ones present a much weaker relationship to filing. There are more differences found to be not significant and the significance levels are somewhat smaller. There is even a reversal of order in the upper right corner of the table. More important , however, is the fact that the overall differences are much smaller than the ones encountered in the background characteristics.

Among states, Texas stands out as the one state in which the differences are largest confirming once more the extremity of the filers in the state. The filers are closest to the non-filers in Colorado.

The conditional probabilities of filing for the first parole decision, the disciplinary record and the existence of isolation days are presented in Table 4. The predictive values of those variables is also given, in full conformity with the method used in Table 3 of the prior section. The results, however, differ drastically: the relative importance of these variables is very minor as seen in their corresponding predictive values. None stands out as a major contributor to the decision to file.

CHAPTER IV

Thus far we have been concerned with filing a collateral attack and the filers themselves. In this chapter we will focus on the various procedural characteristics such as, assistance of counsel, supporting evidence, type of hearing, and disposition, as well as the allegations raised. For these purposes the filer is the basic unit of analysis rather than a particular filing. Moreover, the data are for the entire 66 month period rather than a particular point in time, series of time spans or in a particular sequence. Thus when we say that 10 per cent raised a particular allegation or had the assistance of counsel in filing it means that of all the filers, however many filings they had, and over a time span from 6 to 66 months one in ten raised that allegation at least once. Similarly for the assistance of counsel variable it means that one in ten had the assistance of counsel in one or more proceedings. As a result, our findings given here represent summations averaged across the time period unless otherwise noted.

A. Procedural Characteristics

Tables 1 through 6 summarize our data with respect to the procedural characteristics of the process. Table 1 presents for each state the percentage of filers whose proceedings possessed the characteristic. Table 2 through Table 6 relates the various characteristics to achieving relief or not for each of the states as discussed in section 6 below.

1. Counsel

At present the provision of counsel for collateral attack is not universally mandated as in the original proceedings leading to conviction or direct appeal.[1] Our data clearly show the wide variation in practice

Table 1

PERCENT OF FILERS WITH PROCEDURAL VARIABLE

	Illinois	California	Texas	Colorado
Original Conviction by Plea	68.9	39.5	38.1	87.5
Appeal of Conviction	49.2	55.4	48.2	13.1
Attorney on Petition	93.4	15.6	16.9	49.5
Supporting Evidence Submitted	38.5	36.3	40.0	12.0
Written Answer by State	71.7	11.8	--	--
Answer by State Supported by Written Evidence	18.4	4.8	--	--
Full Hearing Held	36.9	8.3	19.3	31.8
Prisoner Present at Hearing	16.0	2.4	--	25.6
Relief Granted	9.0	11.1	1.9	29.8
Reason for Decision	22.1	51.6	61.3	54.1
Form Used	--	75.4	39.8	--
N =	244	289	367	765

among the states studied. First of all, in all states studied filings are pro se in the vast majority of cases. For example, the first filing is pro se in 93% of the cases in Illinois; 89% in California; 74.9% in Colorado; and 94.8% in Texas. Once the petition is filed counsel may be appointed in each of the states. However, appointment of counsel is not routine except in Illinois. In Illinois which does mandate counsel upon application, 93.4% of the filers obtain the assistance of counsel. On the other hand, California and Texas, which follow the general rule that counsel may be provided if a hearing is had, only 15.6% and 16.9% of filers respectively have had the assistance of counsel. Colorado with 49.5% of filers leaving the assistance of counsel is between the extremes.

2. Supporting Evidence

Although each of the procedures contemplates that supporting evidence will accompany the application, in most instances none is submitted. Texas with 40% of the filers submitting a transcript, affidavit, or other evidence leads the states followed by Illinois, 38.5%; California, 36.3%; and Colorado, 12%. The low figure in Colorado is somewhat surprising were it not for the fact that sentencing and jail time issues, almost always presented without supporting evidence, are the dominant issues in that state. Apparently the provision of counsel in Illinois does not result in a significant increase in the filing supporting evidence. However, in Illinois, affidavits constitute the supporting evidence in 77.7% of the cases. Only 40% of the petitioners in California and 12% in Texas provide such evidence which is outside the existing record of the case. Counsel, then, may have more of an impact on the nature of the supporting evidence

rather than whether or not it is submitted. The finding is not surprising considering the difficulty a prisoner faces in obtaining affidavits while behind prison walls.

3. Answer by State

Only in Illinois is the petition routinely answered by the state in writing. There almost 72% of the petitioners receive a written answer. In California, Texas, and Colorado, the state, if held to respond at all, usually files an oral motion to dismiss. If the court does not dismiss the petition sua sponte the motion to dismiss serves to initate the determination of whether or not a hearing will be held. California, however, had an unusual practice during most of the study period, a practice overturned by the California Court of Appeal, Third District in Reaves v. Superior Court for County of San Joaquin.[2] The court described the procedure as follows:

> After the filing of the petitions for a writ, it is reviewed by the judge presiding in the criminal department and is then forwarded to the district attorney's office so that any factual information can be verified, or if any additional factual information is necessary, that information can be obtained. The district attorney's office is then requested to prepare a proposed order based upon the factual information contained in the petition or obtained as a result of their inquiries. This is done in a majority of the cases. If the petition presents an unusual factual situation, these matters are brought to the attention of the presiding judge of the criminal department who reviews the entire matter, and then directs the district attorney's office to prepare a specified order. In those matters where the district attorney's office submits a proposed order, the judge reviews such order and the order is either signed as submitted or signed as modified. In some instances the court will prepare the order itself. The assigned district attorney usually discusses the results of his investigation with the judge at the time of submitting the file unless the proposed order is a routine matter where the information in the prepared order is self-explanatory.

The court ruled that such a procedure is an unconstitutional delegation of judicial function and recommended that the court direct its clerk to secure

the necessary information or issue an order to show cause why a hearing should not be held.[4] Given the fact that the vast majority of the petitioners are not represented by counsel the in camera proceedings with the district attorney are surely objectionable.

4. Supporting Evidence for Answer

The answer of the state seldom is supported by evidence in any of the states. For example, in Illinois only 18.4% and in California, 4.8% of the petitioners had their petitions controverted by the state with the submission of supporting evidence.

5. Hearing

A plenary hearing on the petition is not typical in any of the states studied. In Illinois a full hearing is achieved by only 36.9% of all petitioners. Colorado is next with 31.8% followed by Texas 19.3% and California, 8.3%. It should be emphasized that those figures represent the overall success of petitioners achieving a formal airing of their contentions at least once. Illinois with the highest rate of participation by counsel also has the highest proportion of hearings followed by Colorado, California and Texas.

Since California and Texas practice allows appointment of counsel if a hearing is ordered, the association of counsel and a hearing is to be expected. However, the fact that both Colorado and Illinois have significantly higher proportions of both counsel and hearings suggests that a hearing is more likely if the petitioner has the assistance of counsel.

6. Presence of the Prisoner

An often heard and written "reason" for filing a collateral attack

is that at any rate the prisoner will be able to enjoy a change in scenery when he is returned to court on the petition.[6] In reality the likelihood of such a sojurn are rather slim: In Illinois about 1 in 6 prisoners ever achieve that trip, Colorado 1 in 4 and in California only 1 in 40. Thus the "vacation theory" of filing cannot be given much creedence in fact.

7. Relief

Despite the occasional highly publicized case, petitioners seldom succeed in obtaining any relief and, as measured by discharge or reduction of sentence, relief is rare indeed.

In Illinois, for example, our sample included 244 filers. Of that number 22 or 9% had their petition granted. Of the 22, two were granted a sentence reduction without a new trial, 4 received a sentence reduction after a new trial. All six continued to serve their sentences. Ten petitioners were ordered discharged either because their sentence was reduced to time served (3 cases) or a new trial was not ordered. Seven petitioners received new trials and were once again convicted and sentenced as before. Thus over a five year period 16 prisoners in our Illinois sample of filers were discharged or had their sentence reduced as a result of a collateral attack. Stated in another way, of the some 11,700 prisoners admitted during the study period we would estimate only 59 prisoners or 0.5% were released or had their sentence reduced as the result of a collateral attack during our study period. The comparable figures for Texas and California are 0.04% and 0.01% respectively. By any measure collateral attacks are not unlocking the prison gates in those three states.

Once again Colorado is in startling contrast to the other states.

Fully 29.8% of the filers did receive some relief during our study period. However, as we saw in Chapter II, collateral attacks in Colorado during our study period were principally utilized to; (1) obtain re-sentencing after the criminal code had been revised to provide generally lesser penalties; and (2) to obtain credit for jail time which was not automatically credited towards the sentence as in the other states. Excluding those whose eventual relief was simply credit for jail time or the application of the new and lower penalties of the revised penal code, Colorado falls more in line with the other states although it remains the most likely to grant relief. Of an estimated 946 filers during the five year period, 8 had a sentence reduction after a new trial, 15 were discharged outright, and 14 were discharged because their sentence had been reduced sufficiently to merit discharge. An additional 29 petitioners were granted probation as a result of their filing. In Colorado, then, 66 of the ordinary collateral attack filers received significant relief or 1.7% of all prisoners.

Although the number of petitioners who merit relief is quite small, and thus does not allow for rigourous analysis a number of observations can be made.

First of all, in terms of multiple petitions a significant proportion of filers obtain relief on the second or subsequent filing. Of the filers with relief 35% of the Illinois, 50% of the California; 43% of the Texas; and 41% of the Colorado filers had more than one petition. The mean number of petitions per successful filer was also higher than the mean number of filings for all filers:

MEAN NUMBER OF FILINGS

Petitioners	Illinois	California	Texas	Colorado
All	1.3	2.0	1.8	1.7
Successful	1.45	2.3	2.1	1.8

Thus persistence in terms of multiple filings does pay off, or at least is not doomed to failure.

Tables 2 to 5 show the characteristic among those with relief and those without relief. Thus, in Illinois, 22 filers obtained relief. Of those with relief 19 had plead guilty or 86%. Of the total of 222 who had not obtained relief, 149 plead guilty or 67%.

A plea of guilty has a somewhat mixed association with relief among the states. In Illinois the filer is moderately more likely to obtain relief; in California and Colorado only slightly more likely and in Texas moderately less likely to obtain relief. However, the few cases of relief in Texas means that association is not significant. If only one more successful filer had plead guilty there would have been almost no difference found.

Appeal of the conviction makes it more likely that relief will be granted in every state except Illinois. Given the general rule that issues once litigated may not be raised again, that finding is somewhat surprising. It appears that only in Illinois is a waiver rule after direct appeal applied with any rigor.

When supporting evidence for the petition is offered the chance of relief is enhanced slightly in Illinois and Colorado, moderately in California, and strongly in Texas.

Table 2

ILLINOIS

	No Relief		Relief	
	Number	Percent	Number	Percent
Guilty Plea	149	67	19	86
Appeal of Conviction	118	53	7	32
Attorney on Petition	207	93	21	95
Supporting Evidence	85	38	9	41
Written Answer by State	157	71	18	81
Supporting Evidence for Answer	42	19	3	14
Plenary Hearing Held	74	33	16	73
Prisoner Present at Hearing	33	15	6	27
Reason Given for Decision	42	19	12	55
N =	222		22	

Table 3

CALIFORNIA

	No Relief		Relief	
	Number	Percent	Number	Percent
Guilty Plea	95	37	13	41
Appeal of Conviction	140	54	20	63
Attorney on Petition	24	09	21	66
Supporting Evidence	87	34	18	56
Written Answer by State	13	05	21	66
Supporting Evidence for Answer	2	01	12	38
Plenary Hearing Held	2	01	22	69
Prisoner Present at Hearing	0	0	7	22
Reason Given for Decision	128	50	21	66
Form Used	197	77	21	66
N =	257		32	

Table 4

COLORADO

	No Relief		Relief	
	Number	Percent	Number	Percent
Guilty Plea	467	87	202	89
Appeal of Conviction	69	13	31	14
Attorney on Petition	240	45	139	61
Supporting Evidence	65	12	27	12
Plenary Hearing Held	124	23	119	52
Prisoner Present at Hearing	99	18	97	43
Reason Given for Decision	329	61	85	37
N =	537		228	

Table 5

TEXAS

	No Relief		Relief	
	Number	Percent	Number	Percent
Guilty Plea	138	38	2	29
Appeal of Conviction	172	48	5	71
Attorney on Petition	59	16	3	43
Supporting Evidence	137	38	6	86
Plenary Hearing Held	64	18	7	100
Reason for Decision	219	61		86
Form Used	141	39	5	71
N =	360		7	

In all states if a plenary hearing is held the chance of success is greatly increased with California leading and Texas, Illinois and Colorado following.

The prisoners presence at the hearing assures relief in California and makes it significantly more likely in Illinois and Colorado. The court giving a reason for its decision is strongly related to relief in Illinois, California and Texas but is not related to relief in Colorado. Thus the unsuccessful petitioner is not routinely advised of why his petition was denied.

Table 6 summarizes the findings as between the successful and unsuccessful petitioners for each state. The number presented is the proportion of those with relief with the characteristic compared to those without relief with the characteristic. Thus for the Illinois filers, the ratio of guilty pleas among successful filers is 1.22 times that among the unsuccessful as

Ratio $= \frac{\%\ \text{Unsuccessful}}{\%\ \text{Successful}} = \frac{86\%}{67\%} = 1.22$. A number less than one indicates of course that the presence of that characteristic is less likely in the successful petition.

To summarize for each state the successful petitioner will in Illinois; have plead guilty, not appealed his conviction; have submitted supporting evidence; a written answer by the state will have been filed with supporting evidence; a plenary hearing will have been held with the prisoner present and a written opinion will be given. In California he will: have plead guilty; appealed his conviction; not used the form; had the assistance of counsel; filed supporting evidence; the state will have made a return with supporting evidence; a plenary hearing will have been

Table 6

	Illinois	California	Texas	Colorado
Guilty Plea	1.22	1.08	.75	1.15
Appeal of Conviction	.67	1.08	1.48	1.18
Attorney on Petition	1.00	4.24	2.54	1.40
Supporting Evidence	1.11		2.2	1.12
Written Answer by State	1.11	5.60	--	--
Supporting Evidence for Answer	6.65	7.76	--	--
Plenary Hearing Held	2.00	8.30	5.17	1.86
Prisoner Persent at Hearing	1.66	9.03	--	1.88
Reason for Decision	2.44	1.26	1.40	.78
Form Used	--	.90	1.80	--

held with the prisoner in attendance and a reason for the decision will have been given by the court.

In Texas the successful petitioner will not have plead guilty; will have appealed his conviction; will have used the form; will have had the assistance of counsel; will have offered supporting evidence; a plenary hearing will have been held and a reason for the decision given by the court.

In Colorado the successful petitioner will have plead guilty; appealed his conviction; had the assistance of counsel; offered supporting evidence; a plenary hearing will have been held with the prisoner present; and no reason for the decision will be given.

8. Allegations

With the exception of Illinois where counsel is routinely provided, the vast majority of petitions were pro se. As such they represent not so much what the law is but what it is hoped to be. In large measure this is true because even if the prisoner had the capacity and ability, and the demographics discussed in Chapter III indicate that almost all do not, the resources necessary to research the law are almost totally lacking. Prison libraries we visited during the study period typically did not contain current statutory materials much less case law reports. Legal assistance where it existed at all was uneven and experimental with little real capacity to handle any significant volume of cases.[6] As a result the typical prisoner must look to his fellow inmates for guidance just as they themselves do. Given these circumstances the surprising aspe is that many of the petitions are well done.

Because the petitions are so uneven in content, clarity, and cogency our coding of the allegations was essentially open. That is, the system for classifying allegations had to accommodate the unexpected even outlandish as well as the expected and "standard." Appendix C details the system which we feel is both unique and effective. Each allegation was assigned a six digit number which identified the allegation as part of the original or supplemental filing, the specific defect complained of, the stage of the process in which it occurred, the parties involved, whether it was supported by facts, and the response of the state to that allegation.

For the purpose of this exposition we have grouped allegations into categories of alleged error as follows:

1. Arrest: not informed of rights; not informed of right to counsel; not informed of right to provided counsel; the arrest was unlawful; no probable cause for arrest; arrest based on defective warrant; and Excessive force was used on arrest.

2. Search and Seizure: Unlawful search and seizure; search based on defective warrant; search and seizure beyond the scope of warrant; search and seizure without warrant or arrest; search and seizure based on defective arrest; search and seizure beyond lawful scope; unusual personal search; and unlawful search and seizure while defendant is in jail.

3. Abuse and Coercion: physical abuse during pre-conviction incarceration; physical or psychological coercion applied; and denial of medical attention.

4. Lineup: illegal lineups or identifications; pre-lineup coaching of witness; manipulation of composition of lineup; counsel not present at lineup.

5. Indictment or information: indictment or information unlawful; fails to charge a specific crime; is uncomplete or in error; proceeds from defective grand jury proceedings; was never obtained; and indictment was not waived.

6. Preliminary hearing and bond: preliminary hearing or arraignment unlawful, never held or unduly delayed; not represented by counsel; counsel's representation ineffective or incompetent: inadmissible evidence or perjured testimony introduced; bond unduly delayed, never set or excessive.

7. Pretrial motions and suppression of evidence: pretrial motions improperly denied, motion to suppress unproperly denied; counsel failed to suppress evidence or witnesses; failure to grant process for production of evidence or witnesses; counsel failed to obtain process; and competency hearing improperly denied.

8. Plea bargaining and guilty plea: plea bargaining unlawful; plea based upon coercion, unfulfilled promises, or misinformation; plea at time defendant incompetent to stand trial; not informed of nature of the charges or consequences of a guilty plea; factual basis of plea not determined; denied right to confront accusers or present a valid defense; counsel not present; plea induced by improper use of prior record; plea bargain not accepted by judge; and guilty plea entered by judge instead of defendant.

9. Trial defect: inadequate time for petitioner or counsel to prepare for trial; no jurisdiction to try; improper venue; defendant not present; double jeopardy; denial of fair, speedy, public trial; prejudicial pretrial publicity; denied a jury trial; defect in jury selection or deliberation; improper instructions, verdict or judgment; knowing use of perjured testimony; leading or coaching of witnesses by prosecution; withholding evidence or preventing witness from appearing; error in excluding or admitting evidence; failure to provide expert testimony, denied right to cross examine witnesses; basing judgment, argument, or comment on facts outside the record; improper prejudicial evidence given to jury; evidence insufficient to convict; and discovery of new evidence not available at trial.

10. Sentencing: sentencing unlawful, sentence exceeds statutory limit; is excessive, arbitrary, cruel or unusual; not advised of right to hearing in aggravation and mitigation; improper use of prior record for enhancement of sentence; prior convictions invalid; no waiver of pre-sentence report; no or failure to consider no pre-sentence report; no or improper hearing in mitigation: evidence improperly excluded or newly discovered evidence; counsel not present or given inadequate time to prepare, probation unlawfully withheld, inadmissible evidence presented, counsel not present, or improperly revoked; consecutive sentence unlawful; prior illegal time served should be applied to current sentence, new crime code sentences should be retroactive; sentence does not provide opportunity for rehabilitation; personal or family circumstances, or change in law justify modification of sentence.

11. Jail time credit: not given credit for jail time on minimum, maximum or both; without jail time credit sentence exceeds statutory limit.

12. Appeal: not informed of right to appeal, transcript and counsel; denied right to appeal, transcript and counsel; forced to waive appeal, trial record in error; and excessive appeal bond set or none set.

13. Prior collateral attack improperly denied: hearing and relief should have been granted; failure of court to properly dispose of prior petition; res judicata does not apply; issues not previously appealed; only collateral remedy is available; defendant not present at prior hearing.

14 Denial of rights while imprisoned: denied participation in programs, educational or rehabilitative; improper transfer, working conditions or assignments, racial discrimination, denial of privileges, personal property, or legal materials, and interference with personal hygiene and medical treatment.

15. Parole and discharge: parole determination unlawful; no parole hearing, no counsel provided; arbitrary denial; failure to release under parole order; improper revocation of parole; denial of counsel at parole revocation; improper computation of sentence; failure to discharge from parole or prison on completion of sentence; and abuse of discretion or improper procedure in fixing term.

16. Incompetent counsel: any allegation which questioned any act or omission of counsel at any stage of the process.

17. Denied assistance of counsel: any allegation that assistance of counsel was not available because of the act or omission of another party.

18. Not informed of rights: any allegation claiming that proper explanation of rights was not given at any stage of the process.

19. Forced to testify: any allegation claiming that the defendant was forced to testify or make self-incriminating statements or admissions at any stage of the process.

20. Defect in law or procedure: any allegation which claims only that the law or procedure itself is defective or was improperly applied.

The first 16 categories are designed to be mutually exclusive, that is, an allegation will fit only one category. The final four categories contain at least some allegations already counted in the other 16. Of course a particular petitioner could raise issues in all the categories.

Tables 7 to 10 present the data for each state in several dimensions. First, the per cent of all petitioners who ever raised at least one allegation of the category is given. Next the per cent of successful petitioners, petitioners who had plead guilty; had a trial; appealed and not appealed who ever raised at least one allegation of the category is given.

Table 7

ILLINOIS

Percent of Filers with Allegation

	All	Relief	Plea	Trial	Appeal	No Appeal
Arrest	24.4	18.2	23.1	27.2	28.0	20.9
Search and Seizure	11.4	22.7	10.4	13.6	13.6	9.3
Abuse	3.9	4.5	4.0	3.7	3.2	4.7
Lineup	9.4	4.5	6.4	16.0	12.8	6.2
Indictment and Information	17.7	31.8	17.3	18.5	20.0	15.5
Preliminary Hearing and Bond	10.6	18.2	9.8	12.3	12.8	8.5
Pretrial Motions and Suppression of Evidence	7.5	4.5	6.9	8.6	8.8	6.2
Plea Bargaining and Guilty Pleas	46.9	59.1	62.4	13.6	44.0	49.6
Trial Defect	42.1	36.4	30.6	66.7	51.2	33.3
Sentencing	26.4	31.8	27.7	23.5	25.6	27.1
Jail Time Credit	0	0	0	0	0	0
Appeal	9.4	4.5	8.7	11.1	10.4	8.5
Incompetent Counsel	52.4	59.1	52.6	51.9	56.0	48.8
Prior Collateral Attack	3.9	4.5	3.5	4.9	4.0	3.9
Denial of Rights While Imprisoned	3.5	0	2.9	4.9	4.8	2.3
Parole and Discharge	0.4	0	0	1.2	.8	0
Right to Attorney	26.0	18.2	26.6	24.7	28.8	23.3
Not Informed of Rights	28.3	31.8	30.6	23.5	31.2	25.6
Forced to Testify	5.9	9.0	5.8	6.2	5.6	6.2
Defect in Law or Procedure	3.5	18.2	3.5	3.7	4.8	2.3
	N=254	N=22	N=173	N=81	N-125	N=129

Table 8

CALIFORNIA

Percent of Filers with Allegation

	All	Relief	Plea	Trial	Appeal	No Appeal
Arrest	21.5	12.5	15.8	25.1	24.3	17.8
Search and Seizure	9.6	6.3	7.9	10.9	9.4	10.1
Abuse	2.1	3.1	1.8	2.3	2.5	1.6
Lineup	3.8	3.1	2.6	4.6	5.0	2.3
Indictment and Information	7.6	6.3	7.0	8.0	8.1	7.0
Preliminary Hearing and Bond	7.6	3.1	7.0	8.0	6.3	9.3
Pretrial Motions and Suppression of Evidence	5.1	9.4	3.5	6.3	6.3	3.9
Plea Bargaining and Guilty Pleas	23.9	28.1	41.2	12.6	18.1	31.0
Trial Defect	47.1	50.0	33.3	56.0	56.3	35.7
Sentencing	21.5	34.4	24.6	19.4	19.4	24.0
Jail Time Credit	0	0	0	0	0	0
Appeal	11.8	12.5	12.2	11.4	14.4	8.5
Incompetent Counsel	39.8	34.4	46.5	35.4	40.0	39.5
Prior Collateral Attack	9.3	6.3	5.3	12.0	13.8	3.9
Denial of Rights While Imprisoned	16.3	18.8	17.5	15.4	16.3	16.3
Parole and Discharge	5.9	6.3	7.9	4.6	3.1	9.3
Right to Attorney	19.4	28.1	20.2	18.9	21.9	16.3
Not Informed of Rights	16.3	15.6	15.8	16.6	17.5	14.7
Forced to Testify	5.2	6.3	2.6	6.9	7.5	2.3
Defect in Law or Procedure	8.3	15.6	7.0	9.1	10.6	5.4
	N=289	N=32	N=114	N=175	N=160	N=129

Table 9

TEXAS

Percent of Filers with Allegation

	All	Relief *	Plea	Trial	Appeal	No Appeal
Arrest	27.6	1	25.7	29.1	28.2	27.4
Search and Seizure	24.1	0	23.6	24.7	24.3	24.2
Abuse	1.9	0	2.1	1.8	2.8	1.1
Lineup	9.7	1	6.4	11.9	10.7	8.9
Indictment and Information	13.5	1	12.1	14.5	12.4	14.7
Preliminary Hearing and Bond	17.8	1	20.0	16.7	16.4	19.5
Pretrial Motions and Suppression of Evidence	4.6	0	3.6	5.3	5.6	3.7
Plea Bargaining and Guilty Pleas	28.9	0	48.6	17.2	17.5	40.0
Trial Defect	50.3	3	34.3	60.0	58.8	42.1
Sentencing	25.7	4	21.4	28.2	31.1	20.5
Jail Time Credit	0	0	0	0	0	0
Appeal	18.1	0	19.3	17.2	16.9	18.9
Incompetent Counsel	54.9	4	59.3	52.4	50.8	58.9
Prior Collateral Attack	2.4	0	0.7	3.1	4.0	0.5
Denial of Rights While Imprisoned	3.8	0	5.0	3.1	2.8	4.7
Parole and Discharge	6.5	0	4.3	7.9	7.9	5.3
Right to Attorney	20.8	2	18.6	22.0	19.8	21.6
Not Informed of Rights	18.1	3	20.7	16.7	11.9	24.2
Forced to Testify	10.3	1	13.6	8.4	8.5	12.1
Defect in Law or Procedure	4.9	3	3.6	5.7	5.6	4.2
	N=367	N=7	N=140	N=227	N=177	N=190

*Actual number of Filers

Table 10

COLORADO

Percent of Filers with Allegation

	All	Relief	Plea	Trial	Appeal	No Appeal
Arrest	1.7	0	1.7	2.0	4.0	1.4
Search and Seizure	1.3	0	1.5	0	0	1.5
Abuse	.5	1.8	.6	0	0	.6
Lineup	.5	0.8	.6	0	2.0	.3
Indictment and Information	2.1	0.8	2.4	0	0	2.4
Preliminary Hearing and Bond	3.4	3.9	3.3	4.0	2.0	3.6
Pretrial Motions and Suppression of Evidence	.4	0	0.4	0	0	.4
Plea Bargaining and Guilty Pleas	17.5	18.9	19.5	4.0	10.0	18.6
Trial Defect	13.7	7.5	13.1	18.2	24.0	12.2
Sentencing	59.9	63.2	59.5	62.6	65.0	59.1
Jail Time Credit	54.6	58.3	52.5	62.6	54.0	52.0
Appeal	1.3	0	1.2	2.0	4.0	.9
Incompetent Counsel	14.0	10.1	14.0	14.1	14.0	14.0
Prior Collateral Attack	6.1	4.4	5.5	10.1	8.9	5.9
Denial of Rights While Imprisoned	2.7	3.9	2.7	3.0	2.0	2.9
Parole and Discharge	1.8	0.8	2.0	1.0	1.0	2.0
Right to Attorney	4.5	4.8	5.0	2.0	4.0	4.7
Not Informed of Rights	3.0	1.8	3.5	0	2.0	3.1
Forced to Testify	14.5	10.7	14.6	14.1	14.0	14.6
Defect in Law or Procedure	5.2	3.1	5.4	4.0	4.0	5.4
	N=765	N=228	N=669	N=96	N=100	N=665

Among the five most common allegations in each state, four categories of allegations appear: incompetent counsel; trial defects; plea bargaining; and guilty pleas and sentencing. All four are of course interrelated and essentially deal with trial errors. Further, such errors can normally be raised on appeal and in fact most filers have appealed their conviction. However the relationship between direct appeal and collateral attack tends to encourage such a result in some states. For example, in Illinois there is no prohibition from pursuing both a direct appeal and a collateral attack simultaneously.[7] In fact in many cases such a tactic is the preferred approach. Under Illinois law if a direct appeal is not pursued all errors of a non-constitutional nature are waived,[8] and the Post-Conviction Hearing Act is limited in application to cases where there is a "substantial denial of . . . rights under the Constitution. . . ."[9] While constitutional error is of course subject to direct appellate review that is so only if it appears in the record. A hearing under the Act may provide the necessary reviewable record. Utilization of direct appeal and post-conviction proceedings simultaneously thus enables a defendant to obtain review of non-constitutional errors supported by the trial record and at the same time through a collateral attack to augment the record as necessary to support his constitutional claims. Subsequent to the 1969 Decision in Moore[10] our data shows that the practice of filing a collateral attack after the appeal was decided, shifted to one of filing the collateral attack while the appeal was still pending. No doubt the fact that in Illinois the average time to disposition of an appeal is over two years also contributes to the tendency to pursue both avenues of review simultaneously.

California adheres to the general rule that habeas corpus cannot serve as a substitute for direct appeal. Thus, the writ will not lie

where the claimed errors were, or could have been raised on a timely appeal. A major exception is the rule in Domingo[11] where if federal habeas corpus would be available, state habeas corpus is appropriate. By this rule the California courts are assured an opportunity to review alleged constitutional errors without bypass even if an appeal is not taken. For the prisoner there is nothing to lose in raising allegations which may be barred, even though he seldom succeeds.

Table 11 compares the proportion of filers with a category of allegation to the proportion in Illinois. The comparison is made with Illinois because counsel has assisted in preparing the petition or its supplement and thus the allegations raised have at least some expert backing. In a rough way the table indicates what areas the prisoners have problems with as compared with Illinois. In California the prisoners are much more concerned with parole and rights while imprisoned followed by alleged defects in law or procedure, appeal and trial defects. In all other categories they are less "concerned."

For Texas, parole and discharge, rights while imprisoned, prior collateral attack errors, defects in law and procedure, appeal errors, and trial defects are more frequent.

For Colorado jail time credit, parole and discharge, being forced to testify, sentencing, prior collateral attack problems, and alleged defects in law and procedure are more common. Overall the more "popular" categories reflect the scope of the procedure. For example, in Illinois parole issues are beyond the scope of the Illinois remedy unless the prisoner was in custody. The issues are within the scope of the remedy in the other states. Similarily jail time credit was an issue only in Colorado.

Table 11

COMPARATIVE PROPORTIONS OF FILER ALLEGATIONS

	Illinois	California	Texas	Colorado
Arrest	1	.88	1.13	.09
Search and Seizure	1	.84	2.11	.10
Abuse	1	.54	.48	.01
Lineup	1	.40	1.03	.04
Indictment and Information	1	.43	.76	.14
Preliminary Hearing and Bond	1	.72	1.67	.34
Pretrial Motions and Suppression of Evidence	1	.68	.61	.01
Plea Bargaining and Guilty Pleas	1	.51	.62	.38
Trial Defect	1	1.12	1.19	.30
Sentencing	1	.81	.97	2.26
Jail Time Credit	0	0	0	54.80
Appeal	1	1.26	1.93	.14
Incompetent Counsel	1	.76	1.05	.25
Prior Collateral Attack	1	2.38	.62	1.64
Denial of Rights While Imprisoned	1	4.66	1.09	.69
Parole and Discharge	1	14.75	16.25	4.50
Right to Attorney	1	.75	.80	.17
Not Informed of Rights	1	.58	.64	.11
Forced to Testify	1	.88	1.75	2.29
Defect in Law or Procedure	1	2.37	1.40	1.34

In the other states an automatic crediting of jail time was afforded.

The most striking aspect of the data is the relative constancy of the majority of allegations across the types of filers. With few exceptions it appears to make little difference whether the conviction was by trial or plea, whether the case was appealed or not appealed. Even those who obtained relief, in general, allege with similar frequency similar errors. In this respect the data tend to show that successful petitions are not simply copied. Such behavior does occur and we have examples, but it is rare. In most instances, in all the states, the allegations of successful petitions are somewhat more frequent than overall. If they were being copied in appreciable numbers, one would expect to find those allegations much more frequently urged overall. In fact, many are more frequently raised among the successful petitioners and only a few are substantially less frequently raised. Thus, it appears that, in general, allegations by successful petitioners are not routinely urged by all or most petitioners whether or not they can be justified. What does appear to be happening is that petitioners as a group tend to urge certain allegations with much greater frequency than others. Successful petitioners do the same. What appears to differentiate them is a rather randomly distributed factor or set of factors. Such an explanation is consistent with saying that, at least as far as this analysis goes, it is likely that particular demonstrable facts determine the outcome; seldom are those facts present; and whether or not they are present, the petitioner will still raise them. Not very surprisingly, the petitioner, at least, does not pre-judge his case. Of course, there may be other plausible explanations or perhaps even an X-factor or combination of factors which may be operating. We,

however, have not detected them among the variables we have analyzed.

It should be stated here that in the above we have compared all petitioners with successful petitioners and not some other measure. The reason is that the individual petitioner interacts with other individual petitioners and is most likely interested in the successful rather than the unsuccessful petition. Thus how all petitioners compare to successful petitioners is more meaningful. On the other hand the courts receive numerous petitions with similar allegations from prisoners. Comparing the ratio of prisoners with allegations to prisoners that achieve relief with those allegations provides a measure of allegations which the "likes."

Table 12 presents those ratios. Clearly what the court "likes" is a relative concept. The fact that so few in general are granted relief indicates that the courts can and/or do give little credence to most types of allegations.

It should also be noted that the high frequency allegations are typically low relief allegations. Perhaps the finding a needle in a haystack analogy alluded to in the introduction does hold at least to some extent.

Table 12

PERCENT OF FILERS WITH ALLEGATION

	Illinois		California		Texas		Colorado	
	N/R / N/A	%	N/R / N/A	%	N/R / N/A	%	N/R / N/A	%
Arrest	4/62	6	4/6	6	1/102	1	0/13	0
Search & Seizure	5/29	17	2/28	7	0/89	0	0/10	0
Abuse	1/10	10	1/6	17	0/7	0	4/4	100
Lineup	1/24	4	1/11	9	1/36	3	2/4	50
Indictment & Information	7/45	16	2/22	9	1/50	2	2/16	12
Preliminary Hearing & Bond	4/27	15	1/22	5	1/66	2	9/26	35
Pretrial Motions & Suppression of Evidence	1/19	5	3/15	3	0/17	0	0/3	0
Plea Bargaining & Guilty Pleas	13/119	11	9/69	13	0/107	0	43/134	32
Trial Defect	8/107	7	16/136	12	3/184	2	17/105	16
Sentencing	7/67	10	11/62	18	4/94	4	144/458	3
Jail Time Credit	0/0	0	0/0	0	0/0	0	133/418	32
Appeal	1/24	4	4/34	12	0/66	0	0/10	0
Incompetent Counsel	13/133	10	11/115	10	4/202	2	23/107	21
Prior Collateral Attack	1/10	10	2/27	7	0/8	0	10/47	21
Denial of Rights While Imprisoned	0/9	0	6/47	13	0/14	0	9/21	43
Parole & Discharge	0/1	0	2/17	12	0/24	0	2/14	14
Right to Attorney	4/66	6	9/56	16	2/76	3	11/35	31
Not Informed of Rights	7/72	10	5/47	11	3/67	4	4/23	17
Forced to Testify	2/15	13	3/15	20	1/38	3	25/111	23
Defect in Law or Procedure	4/9	44	5/24	21	3/18	17	7/40	17

N/R is Number with Relief N/A is Number of All

END