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Correctional Services Special Report

Prepared for the Corrections and Institutional Confinement Committee

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National Association of Attorneys General / **COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL**

March 1980

FINALITY OF JUDGMENTS IN PRISON SUITS

national institute of corrections

U.S. Department of Justice
Bureau of Prisons

A grant from the National Institute of Corrections has financed this study. The fact that NIC has furnished financial support does not necessarily indicate its concurrence with the statements herein.

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1. INTRODUCTION

There are costs involved in the protracted litigation attendant to attacks upon state court criminal judgments which necessitate the development of procedures and mechanisms to expedite finality in judgments. There is the time spent, not only by state and court-appointed attorneys, but also by members of the judiciary. There is a financial burden involved in payment of persons directing the litigation and in payment of court expenses. Most importantly, there is a cost to society in that prison officials are unable to adequately maintain or even begin rehabilitation of offenders since current law affords convicted persons the ability to appeal the judgments and procedures of state courts, and the prisoners have recurring hopes of release.

Finality in criminal convictions is not a new problem. Over the past few years, the problem has been recognized and addressed by some of our nation's most imminent legal figures. In 1971, Justice William H. Rehnquist, then Assistant U.S. Attorney General, in a comments to the Senate Subcommittee on Constitutional Rights, stated:

> First, the total lack of finality to any judgment of a criminal conviction, so long as the prisoner may conceive some new claim of violation of his constitutional rights which occurred at his trial, is itself an affront ... to a system which promptly administers criminal justice. Under present practice, either a state or federal prisoner may relitigate again and again the validity of the procedures used to convict him, so long as he can think of some new constitutional argument which has not been directly disposed of adversely to him in the ruling on his past petitions. Such procedures detract from public confidence in the system of justice, and detract likewise from the possibility of effectively rehabilitating a convicted defendant.... Our concern for the rights of the criminal defendant requires that we leave open to him the right of federal habeas corpus if he can show that he was denied such fairness. But existing practice by no means limits the writ to such use....[1]

The President's Commission on Law Enforcement and Administration of Justice in its study of post-conviction proceedings also noted:

> There has been a rapid growth in the number of petitions for habeas corpus and similar relief filed in the Federal Courts between the 1940's, when a few hundred petitions were filed each year, and 1965, when 5,786 reached the courts. Our system is unique in the extent to which a person convicted at trial can continue to challenge his conviction in a series

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1. Statement of Assistant Attorney General, William H. Rehnquist, Office of Legal Counsel, U.S. Deptartment of Justice, speaking on the Speedy Trial Act of 1971 (S. 895) to the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, September 14, 1971.

of appeals and collateral attacks in the nature of habeas corpus in the state and federal courts...

The vast increase in the number of petitions ...; public exasperation about cases in which punishment is postponed, sometimes for many years, because of successive hearings; the resulting sense of friction between the state and federal courts-- all have reinforced the need for re-evaluation of the use and administration of the writ.[2]

The National Association of Attorneys General has, for many years, been concerned with the problem of finality in judgments. The 1971 Winter Meeting of the National Association of Attorneys General adopted a resolution calling for appointment of a committee to study amending the laws governing habeas corpus to provide that a federal judge shall entertain a petition for habeas corpus on behalf of a state prisoner:

only on a ground which presents a substantial federal constitutional question (a) which was not therefore raised and determined, (b) which there was no fair and adequate opportunity theretofore to raise and have determined, and (c) which cannot thereafter be raised and determined in a proceeding in the state court; or, in the alternative, a consideration of other proposed amendments limiting the jurisdiction of federal district courts on habeas corpus petitions from prisoners incarcerated under state court judgments.[3]

In 1976, the Committee noted that the National Association of Attorneys General had consistently called for thorough review and reform of federal habeas corpus law and of the jurisdiction of the federal district courts in this area. These calls have been founded on the Association's belief that:

existing federal habeas law causes: (1) strain in federal-state relations occasioned by the lowest federal courts sitting in review of the decisions of the highest state courts implying a distrust of either the ability or good faith of those courts; (2) the lengthy, sometimes virtually permanent, delay in the finality of state judgments to the detriment of principles basic to effective administration of criminal justice; and (3) an immense, but to judge by the rate of successful applications, pointless, workload imposed on the federal courts and state Attorneys General by the sheer volume of habeas applications.[4]

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2. The President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 139 (1967).

3. National Association of Attorneys General, REPORT ON THE OFFICE OF ATTORNEY GENERAL, 158 (1971).

4. National Association of Attorneys General, Report of the Committee on Habeas Corpus, The Rules Governing Section 2254 cases in United States District Courts, 70th Annual Meeting, at ii (June 3-6, 1976).

Although there have been several proposals which might have alleviated the problems, none have been adopted and finality is still an issue which needs to be recognized by our society and fully addressed by our courts. In a speech to the American Bar Association, Chief Justice Warren E. Burger recently commented:

> The message we have failed to send -- the message society must send -- is that the consequences of criminal conduct are swift and certain. No such message is getting through today. The criminal process should not extend over a span of three, five or seven years, with repeated appeals and repeated collateral attacks on convictions. At some point there must be finality. Without finality, deterrence is a myth.[5]

The Chief Justice's concern for finality has been reflected in the Burger Court's tendency to construe narrowly federal habeas corpus jurisdiction. Its rationale in landmark cases, such as Stone v. Powell,[6] has emphasized its concern that the tremendous expansion of federal habeas corpus relief cannot be justified in light of the writ's original purpose.[7] Furthermore, the Court's opinions have demonstrated its concern that repeated collateral attacks in federal court upon state convictions will have an adverse impact on the criminal justice system as it now exists.[8] Therefore, the Court, in an effort to give meaning to the principle of finality, has begun to limited the availability of federal habeas corpus relief for state prisoners. This has been accomplished by emphasizing that federal habeas corpus relief should be based on the reliability of the petitioner's claim of innocence rather than on the validity of the original conviction.[9]

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5. Warren E. Burger, Chief Justice of the United States Supreme Court, "The Annual Report on the State of the Judiciary," presented at the Midyear Meeting of the American Bar Association, February 3, 1980, in Chicago, Illinois.

6. 428 U.S. 465 (1976).

7. Id. at 478-479, 487, 492 n. 31.

8. Mills, Collateral Attacks on Convictions: A Survey of Federal Remedies, 12 J. MARSHALL 33 J. of Practice and Procedure (1979).

9. The Scope of Federal Habeas Corpus Relief for State Prisoners, 32 U. MIAMI L. REV. 417, 430-431 (1977).

Even though the recent decisions of Stone v. Powell, Estelle v. Williams,[10] Francis v. Henderson,[11] and Wainwright v. Sykes[12] indicate that the Court is in the process of limiting the availability of habeas corpus relief, the increasing number of petitions filed and the delay resulting from those petitions indicates that further reform measures are appropriate and should be considered. The purpose of this report is to focus upon finality in criminal convictions and problems caused by the availability of virtually unlimited collateral attacks on those convictions. It will discuss the problems caused by such attacks, delineate the ways in which 28 U.S.C. § 2254 is currently being used to delay finality, and discuss proposals to change habeas corpus proceedings and, thereby, give criminal convictions a greater degree of finality.

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10. 425 U.S. 501 (1976).

11. 425 U.S. 536 (1976).

12. 433 U.S. 72 (1977).

2. HISTORICAL PERSPECTIVE

Historically, the writ of habeas corpus has been considered an extraordinary civil proceeding which could be used to contest the legality of a person's continued confinement. The writ frequently has been given a rather broad interpretation, however, which has allowed it to be used to challenge any kind of wrongful restraint on liberty. That interpretation has been applied to modern federal statutes which govern habeas corpus relief.

Regarding the development of habeas corpus, the writ of habeas corpus ad subjiciendum was used in England to challenge criminal confinement. After reviewing the legality of the continued detainment, common law courts were empowered by the "great writ" to release persons who had been arbitrarily arrested by the King. The writ's traditional function in England was incorporated into this country's Judicial Act of 1789, which authorized the federal courts to hear a challenge to the confinement of a federal prisoner ordered by a court without proper jurisdiction. The powers of the writ were later expanded to allow federal courts to hear petitions from state prisoners.[13] However, the court was still limited to hearing petitions which alleged that the sentencing court lacked competent jurisdiction.

The first major expansion of the federal court's authority to hear habeas corpus petitions came in 1942 when the Supreme Court, in Waley v. Jackson,[14] decided that the federal courts could consider allegations of constitutional magnitude, other than jurisdictional claims, in a habeas petition brought to challenge detention pursuant to a federal conviction. This decision was expanded in 1953 by the decision in Brown v. Allen,[15] which allowed state prisoners to challenge their detention in federal courts if there had been no adequate and independent state procedural ground for precluding direct review by the U.S. Supreme Court.[16]

Another major expansion came in 1948 when the statutes governing federal habeas corpus were revised to separate the remedy available to attack state convictions from the remedy to attack federal convictions. Section 28 U.S.C. § 2254 currently provides that:

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13. Circo, Habeas Corpus Practice and Procedure: A Proposal for the Management of Section 2254 Cases in Federal District Courts, 31 OKLA. L. REV. 914, 914-915 (1978).

14. 316 U.S. 101 (1942).

15. 344 U.S. 443 (1953).

16. Id. at 487.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

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

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding in which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for here inafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

It is further provided by the current 28 U.S.C. § 2255 that:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, 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 not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Then, in 1963, three major cases were decided by the Supreme Court which substantially broadened the type of habeas corpus cases the federal courts could hear. In Fay v. Noia,[17] the Court held that the exhaustion requirement of § 2254(c) referred "only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court,"[18] and that the principle of res judicata was inapplicable in habeas corpus proceedings. With Townsend v. Sain,[19] the scope of habeas proceedings was expanded by compelling federal courts to conduct evidentiary hearings under certain circumstances.[20]

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17. 372 U.S. 391 (1963).

18. Id. at 399.

19. 372 U.S. 293 (1963).

20. Id. at 302. "[A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances. If: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

Finally, the Supreme Court, in Sanders v. U.S.,[21] held that a petitioner could reapply for relief unless the grounds were the same as the grounds stated in the previous petition, the previous petition denial was on the merits, or the ends of justice would not be served by reaching the merits a second time.[22]

Expansion of the applicability of § 2254 was halted when the Supreme Court, in Stone v. Powell[23] and Wainwright v.Sykes,[24] adopted its "guilt related" distinction. In Stone, the Court found that once the state "has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief."[25] That decision was largely based upon the Court's reasoning that since the exclusionary rule of the Fourth Amendment is a devise for curbing police misconduct, application of the rule should be limited to lower court proceedings where its remedial objectives can be most effectively used.[26]

In Wainwright v. Sykes, a decision in which the Court extended its previous ruling in Francis v. Henderson[27] and which held that the defendant's failure to object to the composition of the grand jury precluded raising that issue in an § 2254 appeal, previous rulings were expanded so to include the admission of allegedly involuntary confessions. The Court held that unless the defendant made a timely objection, review was "barred on habeas, as on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation."[28] The Court, however, failed to define the terms "cause" and "prejudice" in its opinion and lower courts have experienced difficulty in applying this subjective standard.[29]

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21. 373 U.S. 1 (1963).

22. Id. at 15.

23. Supra note 5.

24. Supra note 12.

25. Supra note 5, at 495.

26. Id. at 486, citing U.S. v. Calandra, 414 U.S. 338, 348 (1974).

27. Supra note 11.

28. Supra note 12, at 84.

29. Id. at 87-88.

Notwithstanding the Court's attempt to limit the scope of § 2254 on a case-by-case basis, there is still a need for some measure or standard which will limit the use of § 2254 and give criminal judgments a greater degree of finality since the statute, in its current application, creates a second, collateral means of appealing any state conviction. The statute allows any prisoner who has exhausted all the direct appeals available, including petition of certiorari before the Supreme Court, to go into federal district court and petition for relief under § 2254 by alleging the denial of any constitutional right. If relief is denied at the district court level, that prisoner may then appeal to the appropriate circuit court of appeals; and if relief is again denied, he may once again petition the Supreme Court. This procedure may be repeated for each separate constitutional violation the petitioner can allege.

Section 2254 clarifies the procedure for filing petitions and simplifies the procedure for allowing prisoners to file their own petitions. This simplification has also contributed to the abuse of the the statute by encouraging repetitious pro se petitions. The current procedure forces the courts to hear any petition, no matter how groundless and repetitive, if there is a remote possibility the allegations may entitle the petitioner to relief.

Although the courts have the authority to limit frivolous and repetitious petitions under Rule 9 regarding federal practice and procedure, the courts generally interpret Rule 9 to apply only to gross abuses and are extremely reluctant to dismiss summarily petitions on the Rule's authority. Essentially, there is no express limitation on the number of petitions a prisoner may file; and there is no practical limitation on the number of constitutional grounds for collateral attack that a petitioner may devise. Thus, there is the potential of use by state prisoners of § 2254 as a means to delay the finality of a judgment.

Many objections have been made to the continued use of § 2254 in this manner, many of which were stated in the Supreme Court's Stone v. Powell decision. In Stone, the Court noted that use of habeas corpus as a delay tactic impairs: (1) the most effective utilization of judicial resources; (2) finality in criminal trials; (3) minimization of friction between the federal and state justice systems; and (4) maintenance of the constitutional balance upon which the doctrine of federalism is founded.[30]

Unless steps are taken to modify the existing federal habeas corpus proceedings and allow state criminal convictions to have a greater degree of finality, there may be injury to the principle that the states are semi-sovereign entities with the authority to administer justice. Although the Court's statement and description of the problem in its recent decisions are persuasive, § 2254 abuses may best be illustrated by specific case examples.

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30. Supra note 5, at 491 n. 31.

3. CASE EXAMPLES

Jurek v. Estelle[31] is a current example of the use habeas corpus proceedings to delay the execution of a criminal judgment. The evidence produced at the trial conclusively demonstrated the defendant, a 22-year-old male, had abducted, attempted to rape, and murdered a 10-year-old female. The evidence at the trial consisted of incriminating statements made by the defendant, the testimony of several people who saw the defendant and the deceased during the day she was killed, and certain technical evidence. The testimony established that the defendant was under the influence of alcohol during commission of the crime and had expressed, prior to the incident, the desire to have sexual relations with a young girl. The jury found the defendant guilty of first degree murder. Thereafter, at a separate hearing, it was found that the death sentence should be imposed because the defendant's actions had not been provoked by the victim, the defendant would probably commit violent acts in the future, and the defendant would be a continuing threat to society.[32]

The defendant was given a mandatory appeal and the Texas Court of Criminal Appeals affirmed the trial court's verdict and sentence.[33] The defendant then sought and was granted certiorari by the U.S. Supreme Court. In an opinion affirming the decisions of the lower courts, Justice Stevens held that the imposition of the death penalty under the Texas procedure was not per se cruel and unusual punishment.[34] Further, he noted that the Texas system, which required the jury to consider five categories of aggravating circumstances and which permitted the jury to consider mitigating factors, was constitutional. Since the system focused upon the particular offense, the individual offender, and the circumstances surrounding the offense, the system did not lead to arbitrary imposition of the death penalty.[35]

The defendant, following denial of habeas corpus relief by the federal district court, appealed the denial to the Fifth Circuit.[36] In April 1979, the Fifth Circuit found that since the written confessions introduced

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31. 593 F.2d 672 (5th Cir. 1979).

32. Id. at 686. The opinion of the Texas Court of Criminal Appeals is reported as an appendix to the circuit court's opinion.

33. 522 S.W.2d 934 (1975).

34. 428 U.S. 226 (1976).

35. Id. at 270-276.

36. Supra note 31.

at the trial were involuntarily obtained, these involuntary confessions had been instrumental in the jury's verdict, and the confessions had been used in their sentencing deliberation, the defendant must be granted a new trial.[37] Further, the court found that the defendant's failure to object to the jury selection process did not bar him from raising that issue in the habeas corpus petition because the failure to raise did not amount to a waiver under the ruling in Wainwright v. Sykes.[38] Specifically, the court found that when the failure to object was due to attorney malfeasance and abdication of the duty to make informed tactical choices at trial, the defendant has sufficient "cause" for failing to object and the wrongful exclusion of even one juror was prejudicial.[39] Therefore, the case fell within the "cause" and "prejudice" exception delineated in Wainwright.

In June 1979, the Texas Attorney General's office filed a petition for rehearing en banc of the Fifth Circuit's decision in the case.[40] As a result of that petition, one of the judges requested a poll of the court to determine if the petition should be granted. A majority of the judges voted for rehearing, and oral argument was heard in January 1980.

According to Texas Assistant Attorney General Anita Ashton, the state is confident that the en banc decision of the Fifth Circuit will uphold the defendant's original conviction; but because it takes a substantial amount of time for twenty-four judges to write an en banc decision, that decision may not be issued for several months.

Even if the original conviction is upheld, however, the judgment is far from final. After the decision en banc has been issued, the defendant has 90 days to petition for certiorari before the U.S. Supreme Court. Assuming that the Court will again deny certiorari, that decision could not be issued until late 1980. In the event an adverse decision to the defendant's petition is given by the Supreme Court, the defendant may then petition the Texas Board of Pardons and Paroles for clemency. This process could delay the execution of the sentence another 3 to 4 months. Further, the defendant always has the option of filing successive petitions for habeas corpus relief; and aside from use of Rule 9,[41] the court has no means of dismissing or preventing these repetitious petitions. Considering all these factors, the sentence, at the earliest possible date, can not be carried out until 1981 or later, according to Assistant Attorney General Ashton.[42]

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37. Id. at 684-685.

38. Supra note 12.

39. Supra note 31, at 683-685.

40. 597 F.2d 590 (1979).

41. 28 U.S.C. § 2072 (1970) at Rule 9.

42. Telephone interview with Assistant Attorney General Anita Ashton.

The result of this process is that the defendant will have, at the least, delayed execution of a 1974 sentence until 1981. This case helps to demonstrate that our criminal justice system cannot be effective if a system of collateral attack exists which allows a defendant to delay the execution of a sentence for a long period of time. As was recently noted by the Utah Attorney General's office, 5 state cases, in which the death sentence has been imposed, have been collaterally challenged by habeas corpus proceedings. Similarly, the Nebraska Attorney General's office, in consideration of recent state capital cases, stated that mandatory appeals in these cases took from 2 years to 5 years; and the Utah office noted that from the time a sentence is imposed to the time mandatory appeals have been exhausted and a death warrant issued, 8 years may transpire.

This problem is not unique to capital cases. An example is the case of Greene v. Massey.[43] Defendant Greene and a co-defendant were indicted and convicted of murder in 1965. The original jury sentenced both defendants to death. In an appeal to the Florida Supreme Court, the conviction and the original sentence were set aside, and a new trial ordered.[44] The defendants were convicted a second time and given life sentences in January 1972. The defendants exhausted all avenues of appeal without success, including petition for certiorari before the U.S. Supreme Court.[45]

Having exhausted all avenues of direct relief, the defendant Greene then applied for a writ of habeas corpus in the federal district court, arguing again that his second trial had violated the Double Jeopardy Clause. The petition for habeas corpus relief was denied by the district court and that denial was affirmed by the court of appeals. Again the defendant petitioned the Supreme Court and was granted certiorari.[46] The Supreme Court, reversing the court of appeals decision and granting habeas corpus relief, stated:

> Given the varying interpretations that can be placed on the actions of the several Florida appellate courts, we conclude that this case should be remanded for reconsideration ... The Court of Appeals will be free to direct further proceedings in the district court ... to certify unresolved questions of state law to the Florida Supreme Court.[47]

On remand, the Fifth Circuit certified specific issues for the Florida Supreme Court and further postponded the final determination of the

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43. 437 U.S. 19 (1978).

44. Id. at 20.

45. Id. at 23.

46. Id. at 23-24.

47. Id. at 26-27.

case.[48] Fifteen years following the original conviction, and 8 years following the second conviction, collateral litigation in this case is continuing. An end of the litigation may be some years in the future.

The impact of this type of delay may best be summarized by a portion of the opinion in Harris v. Estelle.[49] After review of the case's nine hearings before the district and appellate courts in which five separate counsel had been involved, the Fifth Circuit stated:

> Cases like this one involving too many lawyers and too many courts carry the seeds of their own defeat. More important, they bode ill for the Great Writ ... through ridiculous-looking spurts and stops of seemingly never-ending litigation, and they sap the valuable time of overtaxed judicial systems.[50]

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48. 595 F.2d 221 (5th Cir. 1979).

49. 487 F.2d 1293 (5th Cir. 1974).

50. Id. at 1299.

4. DECISIONAL TRENDS

Throughout the history of federal habeas corpus relief for state prisoners, the relationship between the states and the federal government has been complicated and, at times, strained. Most of this conflict has arisen from concerns by the states of a system which sometimes allows a federal civil remedy to invalidate state criminal convictions and delay the finality of those convictions without regard to the guilt of the defendant and the finality a state court's judgment should enjoy. The complicated rules which govern this system often further intensify the conflict.

In 1963, the Supreme Court in the Fay v. Noia[51] appeared to attempt a simplification of the relationship by defining the circumstances under which a state procedural rule could bar habeas corpus relief. In that case, the Court found a state procedural forfeit rule may not bar federal habeas corpus review of a constitutional claim unless a defendant had "deliberately bypassed" the opportunity to raise the claim.[52] The term "deliberately bypassed" was defined by the Court as a defendant's intentional and voluntary relinquishment of a known right.[53] Thus, a defendant can only waive his right to object by personally making a voluntary decision not to object. The Court also held that the exhaustion requirement of § 2254 only applies to state remedies which were available at the time a defendant filed his habeas petition.[54]

Since Fay, the Court has retreated from this expansive position and has attempted to limit the federal judiciary's discretionary review of state decisions by enacting more restrictive rules governing habeas corpus review. The new rules were promulgated by the Court on April 26, 1976 under the authority of the Rules Enabling Act.[55] These rules specify the form of the petition and set forth the procedures to be followed upon the submission of a petition to the court.[56] They establish the procedure and provide guidelines for summary dismissal of petitions at each stage of a habeas proceeding.[57] The new rules also make it possible to dismiss

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51. Supra note 17.

52. Id. at 399.

53. Id. at 438-40.

54. Id. at 440.

55. 28 U.S.C. § 2072 (1970).

56. Id. at Rules 3-8.

57. Id. at Rules 8-9.

petitions which are successive or have been unduly delayed.[58] The rules were enacted to codify the principle that the petitioner may be precluded from obtaining habeas corpus relief if his conduct causes undue detriment to the respondent.

The Court has also retreated from its position in Fay through opinions in four recent cases. In Stone v. Powell,[59] the Burger Court took a less restrictive view of its discretionary powers and found that habeas corpus should be governed by traditional concepts of equity. The court also implied that questions of fundamental fairness are necessarily involved in those concepts. Therefore, even where the petitioner, in exhausting state remedies, has preserved the constitutional issue on which the habeas petition is based, the federal court may, in its discretion, refuse to hear the petition. The decision did not make the appropriate standard for limiting courts' discretion clear, but it is evident the Court was advocating the end of a period of expansion of the federal habeas jurisdiction. The decision in Powell suggests that the premise essential to determining whether constitutional claims should be cognizable under habeas review is whether the particular right will be advanced by review. The Court also reaffirmed its authority to review any constitutional violation by habeas corpus. The majority noted that the scope of habeas corpus review was an open question and then decided the specific question involving Fourth Amendment review on the basis of whether the petitioner had been given at the original trial a complete and fair hearing.[60]

The Court continued its retreat from Fay by its decision in Estelle v. Williams.[61] This decision held that, although a state may not compel an accused to attend his own jury trial in prison garb because of Fourteenth Amendment considerations, the defendant, by failing to make a comtemporaneous objection, may effectively waive his right to raise the issue

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58. Id. at Rule 9. As to delayed and successive petitions, the Rule provides that:

> (a) A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have knowledge by the exercise of reasonable diligence before the circumstances prejudical to the state occurred.
>
> (b) A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was made on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

59. Supra note 5.

60. Id. at 539.

61. Supra note 10.

not only on appeal but also in a habeas proceeding. The Court stressed the importance of participation of counsel and stated that this type of tactical choice or procedural default operates as a bar to raising the issue in a habeas petition.[62]

In Francis v. Henderson,[63] the Court extended its ruling in Davis v. U.S.[64] for prisoners proceeding under § 2254 and imposed a cause and actual prejudice standard on the defendant, a standard based on what the Court referred to as "considerations of comity and concerns for the orderly administration of criminal justice."[65] The Court held, as it did in Davis, that the right to question the composition of the grand jury on constitutional grounds must be asserted during the original litigation to allow it to serve as the basis of a habeas petition.

The defendant in Francis had been convicted in state court and had not brought a direct appeal. Instead, he initiated a collateral attack pursuant to § 2254, alleging that the state, by excluding daily wage earners from the grand jury, had excluded a disproportionate number of blacks; thus, a prejudicial grand jury was created. The Court's ruling diverged from its position in Fay, which would have allowed the issue to be heard absent a showing of deliberate bypass. In applying the actual prejudice standard of Davis, the Court emphasized the valid interest of the state in requiring that the objection be made before a retrial became too difficult. The decision in Francis, however, neither attempted to distinguish the Fay decision nor to establish a standard for applying the actual cause and prejudice rule outside the scope of the grand jury discrimination context.

The decision in Francis was extended to include claims other than grand jury claims in the decision issued in Wainwright v. Sykes.[66] The defendant in Wainwright failed to object to several inculpatory statements which were introduced at trial. The trial counsel's failure to assert an objection to the introduction of the statements precluded the issue being raised on appeal in accordance with Florida's contemporaneous objection rule. The defendant, however, raised the issue in a habeas petition, and the federal district court granted habeas relief. The state appealed, relying upon the rationale of Davis. The Fifth Circuit found that Davis was not controlling because that case had involved a non-prejudicial claim, and that the applicable standard was the deliberate bypass rule of Fay. The court of appeals, based on the record, also found that the failure to object was not a trial tactic, and therefore, the failure to object

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62. Id. at 94.

63. Supra note 11.

64. 411 U.S. 233 (1973).

65. Supra note 11, at 539.

66. Supra note 12.

did not bar the issue from being raised in a habeas petition.[67] The court noted that unlike Francis v. Henderson, where prejudice was in doubt, prejudice is inherent in a case involving the admission of incriminating statements.

The Supreme Court reversed and held that the prisoners failure to comply with the state's contemporaneous objection rule barred raising the issue in a habeas petition, and that the case should not be governed by the deliberate bypass rule of Fay but by the cause and actual prejudice rule established in Davis and Francis. The Court's holding was based in part on the fear that the continued use of the deliberate by-pass rule might encourage defense attorneys to fail to timely object with the intention of raising constitutional claims in federal habeas corpus proceedings.[68] The Court also stated that the state's contemporaneous objection rule "deserves greater respect than Fay gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right."[69]

Therefore, the Court did not overrule its decision in Fay that an adequate and independent state procedural ground does not deprive a federal court of the power to entertain a habeas petition; but the Court's decision did include some strong dicta which rejected the deliberate bypass rule as an "all-inclusive waiver standard applicable whenever a state prisoner had committed a procedural default."[70] The court left "open for resolution in future decisions the precised definition of the cause and prejudice standard,"[71] and stated:

> Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial, and as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.[72]

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67. 528 F.2d 522, 526-27 (5th Cir. 1976).

68. Supra note 12, at 89.

69. Id. at 88.

70. Id. at 90.

71. Id. at 87.

72. Id. at 91.

5. PROPOSALS TO AID IN FINALITY OF JUDGMENTS

As illustrated by the decision in Stone v. Powell,[73] the Burger Court appears to be moving towards a narrower construction of federal habeas corpus jurisdiction, demonstrating the Court's concern with: (1) the expanded use of federal habeas corpus relief in contrast to its original limited use; (2) the concept of comity; (3) the reliability of evidence that may be involved in an action requesting relief; and (4) the increasingly burdensome caseload of the federal judicial system.[74] In consideration of Green v. Massey,[75] a case which declined to extend the Stone decision to claims of double jeopardy and which distinguished Stone upon the basis that the prohibition of double jeopardy is specifically enuminated by the U.S. Constitution, while the exclusionary rule is only judicially created, it has been proffered:

> ... that where a claim is based on a violation of a judicially-created rule, Stone v. Powell would appear to be directly controlling. Read literally, § 2254 habeas relief does not extend to ... violation of judicially-created rights. This would seem to include claims of entrapment, random violations and invalid pretrial identification procedures.[76]

Moreover, the current trend of the Court is one of limiting the avenues available to state prisoners for federal habeas corpus relief.

Though the Supreme Court has begun in its decisions to correct existing problems in the present system of appeals which prevent effective and efficient finality in judgments, various commentators have suggested solutions to the problems caused by current decisional law and the statutes pertaining to federal review of states judgments. One partial solution to the problems caused by § 2254 is for all states to adopt Rule 11 of the Federal Rules of Criminal Procedure as it pertains to acceptance of guilty pleas. These adoptions would aid the federal judiciary in dismissal of a substantial number of meritless habeas corpus petitions.[77]

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73. Supra note 5.

74. Supra note 9, at 430-431.

75. Supra note 43.

76. Supra note 74, at 431.

77. Hooper, Habeas Corpus Under 28 U.S.C. Section 2254--Bane or Blessing, CUM. L. REV. Rev. 391, 392 (1978).

Rule 11 states the necessary constitutional requirements that must be met in the acceptance of guilty pleas. There are, however, questions as to the application and binding effect of the Rule upon state court judges since the Rule does not expressly apply to the states. Adoption of the Rule and its related provisions and proper administration of the Rule by state courts, however, would aid in expedient dismissal of habeas attacks based upon improper acceptance of guilty pleas.[78] In consideration of McCarthy v. U.S.,[79] it has been noted that "the more meticulously [Rule 11] is adhered to, the more it tends to discourage, or at least to enable, more expeditious disposition of the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas."[80]

Under Rule 11, a trial judge is required to keep a complete record during his consideration of the acceptance of a guilty plea. The Rule states a record should be maintained which details the advice given by the court to a defendant and the investigation by the court into the plea's accuracy. Adoption by the states of the Rule would foreclose much protracted litigation by collateral attacks since many § 2254 cases have been remanded to state courts because of failure to maintain a complete record.[81] As was noted Blackledge v. Allison,[82] a case reviewed by the Supreme Court 5 years following a conviction and reviews by a state's courts, a federal district and a federal court of appeals: "[i]f all the participants in the process at the plea stage [had been] mindful of the importance of adhering carefully to prescribed procedures and of preserving a full record thereof, the causes of justice in finality [would have been] served."[83] Moreover, further habeas corpus attacks could have been discharged at an early stage of the litigation.[84]

Adherence to Rule 11 would also prevent protracted litigation involving other claims of habeas corpus relief since Rule 11 requires that a defendant be addressed in open court to inform him of the mandatory and minimum penalties of the applicable law and to determine his understanding of the penalties. The Rule, which specifies constitutional rights that a defendant waives by a guilty plea or a plea of nolo contendre, contains provisions to assure adherence to the requirements of an "understanding waiver," as enunicated in Boykin v. Alabama.[85] The Rule also states that

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78. Id. at 396.

79. 394 U.S. 459 (1968).

80. Supra note 77, at 396.

81. Id. at 396-397.

82. 431 U.S. 63 (1976).

83. Id. at 84.

84. Supra note 77, at 397.

85. 395 U.S. 238 (1965).

when a plea of guilty or nolo contendre is tendered, a court may question the defendant under oath and his answers in a subsequent habeas corpus proceeding may be used against him in a perjury or false statement prosecution.[86]

This Rule requires that a court, before acceptance of a plea of guilty, address the defendant in open court to determine the plea is voluntary and to inquire as to whether the defendant, or his counsel, has had prior discussions with the government so to provide a basis for rejection of an improper plea agreement if it has been induced by unallowable methods. Moreover, the Rule states that a properly conducted plea bargaining procedure is permissible. If Rule 11 requirements were followed by state court judges, this adherence these to rule's specific procedures would greatly aid in decreasing the number of habeas corpus attacks upon guilty pleas and provide a basis for expedient dismissal of frivolous petitions.[87]

Attempts to formulate legislation which would help correct problems in this area have been made. In 1971, the National Association of Attorneys General Committee on Habeas Corpus directed substantial attention to the question of permissable constitutional limits of curtailing federal habeas corpus jurisdiction. The Committee eventually determined to support a bill that dealt with the judicial system's failure to recognize that the state courts are an appropriate forum for the final resolution of both factual and constitutional issues.

The proposal required state prisoners to present all challenges to the causes and conditions of their imprisonment in the appropriate state courts, subject only to review by the U.S. Supreme Court, so to afford finality to those courts' determinations, whether on factual or constitutional issues. At the same time, the proposal required that the prisoner be afforded access to the courts in the event the correctional processes afforded no fair and adequate opportunity to raise and determine federal constitutional issues. The proposal was designed to eliminate the tensions between the state and federal courts by preserving their respective functions. The bill also provided that subject to U.S. Supreme Court review by certiorari, state court determination of factual and constitutional questions were final, thus enabling state penal institutions, as well as state prisoners themselves, to direct their efforts toward rehabilitation and treatment rather than to the contest over whether punishment was properly imposed by the trial court. The bill would have preserved full and fair post conviction remedies in the state courts; and by narrowing federal court jurisdiction to entertain state prisoner applications when such remedies exist, the proposal would have had the effect of decreasing the number of filings in the federal courts by reducing the number of prisoners expecting relief from the federal courts.[88]

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86. Supra note 77, at 399.

87. Id. at 400-402.

88. National Association of Attorneys General, Report of the Committee on Habeas Corpus (1971).

An amendment to the Omnibus Crime Control and Safe Street Act of 1966[89] was proposed which would have limited federal habeas corpus; however, because of concern over the constitutionality of this amendment, this legislation was defeated. Another attempt at corrective legislation was Senate Bill 567,[90] a proposal formulated to respond to claims that then-current habeas corpus procedures allowed the filing of numerous frivolous petitions which overburdened state and federal courts, extended litigation, provided a detriment to rehabilitation of prisoners, and created tension between the state and federal courts.

This bill provided: (1) a state court's determination of a constitutional claim was conclusive and could be reviewed only by the United States Supreme Court; (2) federal habeas corpus relief was available only if a state determination of an alleged violation of constitutional rights could not be obtained and the inability of adjudication was brought about by no fault of the prisoner; and (3) the violation alleged involved a right whose primary purpose was protection of a reliable state court fact-finding process which, without the violation, would have resulted in a different determination.[91] Further, Senate Bill 567 would have not allowed federal habeas review of a substantial consitutional question if this question had already been determined, had the possibility of determination but was not determined, or could still be determined by the courts of the state. Though not reported out of the committee, the U.S. Supreme Court has developed, on its own initiative, similar guidelines.

Although the Supreme Court has begun a retreat from the expansive review offered by the decision in Fay, much confusion still remains because of: (1) the lack of specificity regarding objectives and values; and (2) conflicts created by the expanded use of the habeas corpus writ. In Stone, the Court suggested that a "pragmatic" method be employed in consideration of procedural issues attacked by habeas corpus proceedings. Use of a "cost-benefit analysis"[92] lends itself to a definition of competing interests which arise in habeas corpus review. Such an analysis may be used for development of a framework for decision-making regarding habeas corpus matters.

Since alternatives to use of this framework exist, such as U.S. Supreme Court decisions limiting habeas corpus relief, a method of review which seeks optimal rather than maximum review could be employed; however, optimality must be defined if such a process is to be useful, and a goal of deciding when review costs exceed gains must be developed. As noted by one commentator, the question may be phrased in the context of

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89. S. 917, 19th CONG., 2d Sess., 114 Cong. Record 11, 189 (1968).

90. S. 567, 93rd CONG., 1st Sess., 119 Cong. Record 2220 (1973).

91. Cobb, The Search for a New Equilibrium in Habeas Corpus Review: Resolution of Conflicting Values, 32 U. MIAMI L. REV. 637, 647 (1978).

92. Id. at 660.

"at what point do the protections afforded by a particular procedural rule reach the point of diminishing returns. The answer lies somewhere on a continuum...."[93] As to the social costs of enforcing of procedural rules and the point at which diminishing returns are reached in protection of rights, the following items may be considered: (1) exclusion of illegally obtained evidence; (2) brief delay of trial; (3) illegally constituted grand jury; (4) presumption of innocence; (5) right to trial by jury; (6) invalid indentification procedures; (7) double jeopardy; (8) right of confrontation; (9) total use of hearsay; (10) excessive delay; (11) fraudulently-induced plea/coerced confession; (12) lack of effective assistance of counsel.[94]

The proposer of this method of review comments as follows on its use:

> If a "balancing test" is employed and it is assumed that the value of a procedural rule is determined by its utility in assuring the reliability of the fact-finding process, a model continuum can be constructed going from the continuous position of prophylactic deterrent procedure, to the firmly protected procedures deemed fundamental to the preservation of a fair trial. On the lower end of the scale would be, for example, failure to give Miranda warnings, claims for illegally constituted grand jury, and brief deviations from respected delay of trial. These issues, similar in nature to the exclusionary rule issues, would in most instances pose few difficulties under the Burger court approach. Absent egregious circumstances, institutional or governmental interests would prevail.

Using this frameword, procedural issues involving presumption of innocence, right to trial by jury, and invalid identification procedures would need greater analysis by the courts because of philsophical adherence to these rights' concepts and even though the rights may have little hearing upon fact accuracy. In such cases, courts would probably use an ad hoc approach rather than a rule favoring governmental or institutional interests.

> Next, there might be rules designed to protect rights such as freedom from double jeopardy and the right to confrontation at trial. These rules are potentially vulnerable to categorical treatment if judgment is based solely upon utility and assuring reliability of the fact-finding process. The rights involved, however, are conceivably so intertwined with concerns for protecting the individual from majoritarian oppression, as to almost certainly be protected ... Towards the [remaining] end of the continuum, there are cases where procedural deficiencies cast serious doubt upon the basis for determination of guilt ... these latter rights are worthy of stricter scrutiny.[95]

It must also be considered that use of such a balancing test is dependent not only upon the underlying values involved in the review, but also de-

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93. Id. at 661.

94. Id.

95. Id. at 662-663.

pendent upon assumptions and varying weights different judges may give to the values of a right.

Though this value system would not provide a clear definition for finality in judgements in its initial implementation, the system, if employed by the courts, would eventually, in conjunction with the current decisional trend of the Supreme Court, allow a clearer body of law to be developed within the review framework. Of course, this process, based upon factors regarding prisoners' interests, the values of those interests, the functioning of the procedures designed to protect those interests and the constraint of judicial resources available, does not provide a complete solution to the problem of expansive review. However, this process of review could aid in minimizing the cost of review to society, which must ultimately bear judicial, legal, administrative, and rehabilitative costs.[96]

Changes in methods of review by the courts would not offer a complete solution to the problems in of finality in judgments. Federal review could aid in assuring the uniformity of application of federal constitutional rights in the state courts. Because of the increasing delay of federal decisions, the inconsistency in the federal circuit courts of appeals in the application of federal law to the states, and the inability the overburdened U.S. Supreme Court to provide adequate review of cases which would aid in ending the confusion concerning rights attendant to cases involving habeas corpus challenges,[97] however, the current judicial process may be deemed inadequate. It has been noted:

> The problem of national uniformity derives from a weakness in the federal appellate heirarchy. The weakness is a result of overgrowth: the hegemony of the Supreme Court of the United States is too attentuated to be effective as a unifying arch of the structure. By combined force of numbers of cases and complexity, the national law has outgrown the court's supervisory capacities. The Court is forced to scant many of the matters for which it bears the ultimate responsibility.[98]

With the interpretations of the various circuits, the use of panels by the circuits, the presence of visiting judges on these panels, and the multiplicity of federal district courts, it is inevitable that varying interpretations of law will be given. Such varying interpretations can become particularly confusing in the area of habeas relief. Arguably, this confusion may be a primary reason for the inability of the federal judiciary to effectively deal with collateral attacks upon state court judgments. With the increased use of federal magistrates in the review of state court decisions, the problem may be increased.[99]

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96. Id. at 663-664.

97. Cameron, National Court of Appeals: A View from the States, 65 ABA J. 709, 709-710 (1979).

98. Id. at 711.

99. Id.

The Study Group on the Caseload of the Supreme Court was the first to propose that a national court of appeals be created to deal only with criminal cases and to act as a screening court for the Supreme Court. Following that proposal, several commentators have suggested the creation of such a national court. One proposal would allow the President, pursuant to Article III of the Constitution, to appoint nine justices to this special court. It would have exclusive, original appellate jurisdiction to review all state court decisions for both civil and criminal proceedings in which there were federal questions. By this proposal, the court could consider not only direct appeals from a state's highest court, but it would have exclusive, original jurisdiction of collateral attacks on state court decisions. This discretionary court would be the "court of entry" to the Surpeme Court. Since appeal could be made from this national court of appeals, it would be necessary if such a court is to be effective that its docket be manageable, that the Supreme Court remain the final court of decision for the federal judicial system, that the federal judiciary not be unnecessarily expanded and that competent justices be appointed to the court.[100]

In the year ending on June 30, 1978, federal district courts reviewed 7,033 habeas corpus petitions from state prisoners and the circuit courts of appeals handled 676 appeals from denial of petitions for writs of habeas corpus by state prisoners.[101] The creation of a national court of appeals would not only lessen the burden on the federal judiciary, but would also expedite finality of judgments of state court decisions and would help provide a more consistent body of federal precedent, which would also provide a less confused decisional framework for state courts.

As to criminal appeals, for a criminal defendant to appeal to this newly-created court: (1) the defendant should have been given all due process under state and federal law that could be given by a state court; (2) he must have been found guilty by jury or have pleaded guilty; and (3) the case must have been reviewed by state appellate procedures and the conviction affirmed. Once the federal district courts are unavailable for habeas corpus collateral attack, there would be less recourse to the federal courts since petitions to the new appellate court would be decreased by these requirements. If this new court is given an adequate central staff of experienced counsel to decide which cases are to be heard and which are to be dismissed, this staff could also eliminate meritless claims that do not need closer scrutiny by judges.[102]

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100. Id.

101. Id.

102. Id.

For the Supreme Court to retain its supremacy over the federal judiciary, especially if a national court of appeals is created, the Court must be provided avenues for review of cases. This review must, however, be balanced with the concept of allowing the new court to dispose of many of the cases presented for federal review. It has been suggested that appeal from the newly-created court be allowed only when one or more judges of this court dissents from the court's decision. Another procedure would allow the parties or the chief justice of this court to petition for transfer to the Supreme Court once briefs are filed and the matter is prepared for submission. It would also be required that the parties show "extraordinary reasons for the transfer."[103]

These procedures would establish a method of appeal to the Supreme Court; moreover, the procedures would provide an opportunity for review of the newly-created court's decision by the Supreme Court without requiring the Court to review all cases. As Justice Haynsworth of the Fourth Judicial Circuit, advocator of a plan to create a national court of appeals, has stated:

> Relief to the Supreme Court is only one of the collateral consequences that would flow from the adoption of [the proposal to create a new national court of state appeals. The] primary purpose is to improve the quality of justice to persons charged with crime through the creation of a new court that can decide federal claims more expeditiously and uniformly than we can now and with much less cost in time and money to the litigants and the judicial system.[104]

It has also been proposed, as a solution to the problems caused by growing number of habeas corpus appeals, that § 2254 be repealed and, as in the previous proposal, a national court of appeals be created. By this proposal, an appellate court would be created which would handle criminal appeals or habeas corpus cases, involving federal constitutional questions, that had received review by a state's highest court. This court would be organized so that following review of a timely claim for a constitutional violation made before a state's highest court, the national court of appeals would appoint counsel to study the record of the former proceeding and the claims made by the petitioner. This counsel would then report findings to the court.

If no further fact-findings were needed, the national court of appeals would make judgment on the appeal. More importantly, if a later appeal based upon claims not made in the prior appeal were presented, it would be presumed by law that the new claims were deliberately bypassed in the initial appeal and, hence, would not be subject to review by the court. Further, if new claims involved issues of fact, the court could appoint a special master to report findings to the court or discretionally remand the case to the state's highest court with the burden of proof upon the petitioner to show, "by the most convincing proof," a sufficient legal reason

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103. Id. at 712.

104. Id.

for the failure to state the claim in his first appeal.[105]

Another solution to the problems created by current methods of review would be amendment of the federal statutes governing federal review. Assistant Attorneys General Raymond L. Marke and Charles Stampelos of the Florida Attorney General's office have formulated proposed amendments to various statutes governing matters pertaining to habeas corpus review. By these proposals: (1) the expanding use of federal magistrates in § 2254 evidentiary hearings and in challenges to conditions of confinement would be halted; (2) repeated and unnecessary § 2254 constitutional challenges for federal court determination would be ended; (3) time limitations for allowable constitutional claims under an amended § 2254 would be provided; (4) state court determination of factual issues pertinent to a § 2254 proceeding would not be redetermined or relitigated by a federal court; and (5) standards for review of a state court determination of factual issues in a § 2254 proceeding would be altered so that federal courts would give greater weight to those determinations and would be able to redetermine such issues only in limited circumstances. As adoption of these proposals would reduce or eliminate many of the problems attendant to the use of § 2254 as it is currently interpreted, and as these proposals could be effected through legislative enactment, their adoption is a viable and workable alternative to forthcoming definitional decisions, case analysis and creation of a new court. These proposals are contained in the appendix to this report.

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105. Supra note 77, at 408-409.

6. CONCLUSION

There is a need for finality in state court judgments because protracted litigation of often frivolous § 2254 constitutional claims drains state and societal resources and prevents effective rehabilitation of state prisoners. The current system of direct and collateral challenges to state judgments often offends the constitutional concept of federalism. Moreover, it is detrimental to the sovereignty of the states and their courts.

In its inception, the writ of habeas corpus was an extraordinary writ which could be invoked for only particular abuses of the judicial system. Now, with it expansion by legislation and decisional interpretations, it has become a means of repeatedly challenging judgments so to delay their executions. Although the recent Supreme Court decisions in Stone v. Powell, Estelle v. Williams, Francis v. Henderson and Wainwright v. Sykes have begun a retreat from this expansion, the retreat is incomplete and the interpretations create confusion for state and federal courts.

If there is to be finality in state court judgments, action by the Congress appears necessary. Although various programs could be implemented to correct the problem, legislation amending § 2254 and its related provisions would clarify the rights of state prisoners to challenge state court judgments in the federal courts and the procedures that are to be followed. Be it through legislation, restructuring of the federal judiciary or clarifying and restrictive decisions by the Supreme Court, action must be taken to protect state sovereignty and provide a manageable system allowing finality in judgments.

APPENDIX

PROPOSAL I*

An amendment to
28 U.S.C. § 636(b) to provide:

(B) A judge may also designate a magistrate to conduct hearings, including evidentiary hearings, except evidentiary hearings in cases brought pursuant to 28 U.S.C. § 2254, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of ~~in~~ in a United States District Court.

and, Rules Governing Section 2254 Cases in the United States District Courts:

Rule 8 (b) Function of the Magistrate

(1) When designated to do so in accordance with 28 U.S.C. § 636 (b), a magistrate may conduct hearings, ~~on~~ on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

*For all proposals, additions are underlined and deletions are crossed out.

PROPOSAL II

An amendment to 28 U.S.C. § 2244 by adding a new section:

(D) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a state court, if the federal question presented was not properly presented under state law in the state court proceedings both at trial and on direct appeal, the claim may not be considered or determined by a judge or court of the United States, unless the petitioner establishes:

(a) The federal right asserted did not exist at the time of the trial and that right has been determined to be retroactive in its application; or

(b) The state court procedures precluded the petitioner from asserting the right sought to be litigated; or

(c) The prosecutorial authorities or a judicial officer suppressed evidence from the petitioner or his attorney which prevented the claim from being raised and disposed of; or

(d) Material and controlling facts upon which the claim is predicated were not known to petitioner or his attorney and could not have been ascertained by the exercise of reasonable diligence.

PROPOSAL III

An amendment to § 2244 by adding a new section

(E) No petition filed in behalf of a person in custody pursuant to the the judgment of a state court shall be considered or determined by a judge or court of the United States if it is not filed within three years from the date the state court judgment and sentence became final under state law, unless the federal right asserted did not exist and that right has been determined to be retroactive, in which case the petition may be entertained within three years from the date said right was determined to exist.

PROPOSAL IV

An amendment to 28 U.S.C. § 2254 (d)

(d) In any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall not be redetermined or relitigated by a judge or court of the United States, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the state court hearing;

(2) that the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing;

(3) that the material facts could not be developed at the state court hearing;

(4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding;

(5) that the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;

(6) or unless that part of the record of the state court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that there is no evidence to support such finding.

No evidentiary hearing may be conducted in the federal court when the state court records demonstrate the factual issue was litigated and determined, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (6), inclusive, is shown by the applicant.

END