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FEDERAL HABEAS CORPUS: POSTCONVICTION REMEDY FOR STATE PRISONERS

CURTIS R. REITZ †

Of all the many dark corners of the law, few are so dimly lit as is the federal habeas corpus jurisdiction under which federal courts pass upon the constitutional validity of state criminal prosecutions.¹ Here many important developments are occurring, with all the hazards of walking in the dark. For several years there has been almost constant pressure from state judges and prosecuting officials for the abolition

† Assistant Professor of Law, University of Pennsylvania. A.B. 1951, LL.B. 1956, University of Pennsylvania. The author collaborated with Professor Caleb Foote of the University of Pennsylvania Law School in an unpublished memorandum dated March 5, 1959, treating some aspects of the subject of this Article.

¹ The statutory basis is 28 U.S.C. § 2241 (1958). The particular reference here is to § 2241(c) (3). The federal habeas corpus power extends, of course, beyond litigation involving state prisoners. While most federal prisoners will use the procedures outlined in 28 U.S.C. § 2255 (1958), in lieu of habeas corpus, the federal writ may be sought by persons in varying forms of detention, principally aliens in federal custody, *e.g.*, Rowoldt v. Perfetto, 355 U.S. 115 (1957), and prisoners sentenced by a court-martial, *e.g.*, Reid v. Covert, 354 U.S. 1 (1957). This Article is concerned exclusively with the state prisoner cases, which provide the overwhelming bulk of federal habeas corpus cases. See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 431 (1949).

The jurisdiction to issue the federal writ on application of state prisoners dates from the Act of February 5, 1867, ch. 28, 14 Stat. 385. For the history of the jurisdictional statutes, see HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236-37 (1953).

Under § 2241(a), the federal writ of habeas corpus can be granted by "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." The most important courts excluded are the courts of appeals. This Article is concerned almost entirely with federal habeas corpus proceedings initiated in the district courts. The appellate courts and judges have seldom exercised their power to entertain an original application. See HART & WECHSLER, *op. cit. supra* 1243-47 (1953).

or severe curtailment of the federal habeas corpus jurisdiction.² Congress is about to pass a statute making important modifications in the present system.³ These developments open fundamental questions of the necessity for and significance of the federal jurisdiction in the administration of state criminal laws. Necessarily they question also the manner and effect of the exercise of the jurisdiction by the federal courts.

The pervading atmosphere is of entire lack of understanding. The pages of the *Congressional Record* evidence it.⁴ State and federal judges of long experience have expressed open incredulity toward the most elementary aspects of federal habeas corpus.⁵ A recent Sixth Circuit decision, *Wooten v. Bomar*,⁶ exemplifies the confusion.

Affirming denial of the writ sought by a Tennessee prisoner, that court's per curiam opinion rests on a completely erroneous statement of three well-established, fundamental principles of habeas corpus practice. The Sixth Circuit said: (1) that the issue of admissibility of a coerced confession cannot be the subject of collateral attack by writ of habeas corpus in a federal court;⁷ (2) that the petitioner had had a determination of the voluntariness of his confession in the Tennessee courts and "it is, therefore, not a proper question to be raised in a habeas corpus proceeding";⁸ (3) that petitioner was not entitled to federal habeas corpus because, although he had "exhausted his remedy on appeal in the State courts of Tennessee, . . . he did not exhaust the alternative remedy of habeas corpus in those courts."⁹

The first proposition is preposterous on its face. Federal habeas corpus proceedings dealing with state convictions are necessarily in the form of collateral attack on the prior state judgment. To deny that so basic a deprivation of due process as conviction by the use of a coerced confession can be made the subject of a collateral attack is in effect to destroy the federal habeas corpus jurisdiction. The scope of that jurisdiction, as declared by Congress, extends to any state prisoner "in custody in violation of the Constitution or laws or treaties of the United States."¹⁰ The Sixth Circuit did not cite this statute.

² See notes 31, 307-09, 314 *infra* and accompanying texts.

³ This proposed statute is discussed in text accompanying notes 307-46 *infra*.

⁴ 105 CONG. REC. 13358-65 (daily ed. July 29, 1959); 104 CONG. REC. 4147-54 (daily ed. March 18, 1958); 102 CONG. REC. 935-40 (1956).

⁵ *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 6, at 4, 12 (1955).

⁶ 267 F.2d 900 (6th Cir. 1959) (per curiam).

⁷ *Id.* at 901.

⁸ *Ibid.*

⁹ *Ibid.* This last point was nominated as a "further objection to this action in the federal courts" and should not be classed as a holding.

¹⁰ 28 U.S.C. § 2241(c) (3) (1958).

Nor, apparently, was it aware of the Supreme Court decision in *Leyra v. Denno*,¹¹ a federal habeas corpus case which held precisely that a coerced confession is the proper subject of collateral attack in federal habeas corpus.¹²

The Sixth Circuit's second proposition is as wrong as its first. It is a fundamental principle of the federal practice, now codified in section 2254 of the Judicial Code,¹³ that constitutional issues arising out of state criminal prosecutions should be presented first to state courts.¹⁴ It is equally fundamental that the state courts cannot, under the present statute, have the last word. This is the teaching of the Supreme Court in the leading case in federal habeas corpus practice, *Brown v. Allen*.¹⁵ It is exemplified by the holding in *Leyra v. Denno*, where the Court made its independent evaluation of the issue of coercion, even though that issue had been litigated in the state courts.

The third proposition (the court obviously missed the incongruity in asserting simultaneously that a state prisoner must exhaust state remedies before coming to the federal court and that review in a state court precludes review by the federal court) is completely in error on the application of the exhaustion rule. It has long been settled that a prisoner need not make repeated applications to the state courts on the same question. Once the state court decides against the prisoner on the merits of his contention, the exhaustion rule is satisfied.¹⁶ This is a square holding of *Brown v. Allen*.

The exact converse of the three propositions of the Sixth Circuit opinion would serve to sum up the basic procedural precepts of federal habeas corpus jurisdiction.¹⁷ The "substance" concerns the protections

¹¹ 347 U.S. 556 (1954).

¹² See also *United States ex rel. Wade v. Jackson*, 256 F.2d 7 (2d Cir.), *cert. denied*, 357 U.S. 908 (1958); *Cranor v. Gonzales*, 226 F.2d 83 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956), *affirming* *Giron v. Cranor*, 116 F. Supp. 92 (E.D. Wash. 1953); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955).

¹³ 28 U.S.C. § 2254 (1958). This provision was enacted in the 1948 revision of the Judicial Code as the culmination of a study instituted by the Judicial Conference of the United States in 1942. 1 MOORE, FEDERAL PRACTICE ¶ 0.230[2], at 2707 (2d ed. 1959).

¹⁴ The history of the doctrine is described in *Darr v. Burford*, 339 U.S. 200, 204-14 (1950).

¹⁵ 344 U.S. 443 (1953). See particularly the separate opinion of Justice Frankfurter. *Id.* at 488, 497-502.

¹⁶ The possibility of the state court changing its decision is too remote to require what could be an infinite series of applications. At common law, the doctrine of *res judicata* was not applicable to habeas corpus judgments. See *Salinger v. Loisel*, 265 U.S. 224, 230-31 (1924). See also *Darr v. Burford*, 339 U.S. 200, 214 (1950); 2 FREEMAN, JUDGMENTS § 827 (5th ed. 1925).

¹⁷ A partial explanation for the quality of this Sixth Circuit opinion may lie in the absence of counsel on behalf of the petitioner. The report indicates that he moved *pro se*. With a few rare exceptions, prisoners are abjectly ignorant on the law of

embodied in the due process and equal protection clauses as applicable to the administration of state criminal law. The rapid development of the fourteenth amendment by the Supreme Court in the past twenty years is familiar knowledge to many.¹⁸ Far less generally appreciated is the impact which this development has had on the processes for implementing the guarantees defined by the Court.

The natural tendency of thought is to relate the constitutional rights of criminal defendants to the prosecution stage and immediate appellate proceedings to which these rights pertain. It might seem obvious that this is the setting in which the federal issues would be raised and determined. State courts are bound under the Constitution to follow "the supreme Law of the Land."¹⁹ And where such a federal question arises in a state proceeding, the opportunity is presented to the defendant to seek review of the state judgment in the Supreme Court of the United States.²⁰

The image of this process for vindication of fourteenth amendment rights gives the impression of being complete and satisfactory. The federal habeas corpus jurisdiction accordingly appears an unnecessary overlap and duplication. There are two fundamental reasons why this is not true.

First, the ultimate right of a state criminal defendant to have a federal court and federal judges pass upon his federal contentions²¹ cannot be secured solely by the Supreme Court's power to review state judgments. The sheer volume of cases is enough to preclude it.

Second, it is not true that the original conviction proceedings provide a forum for the vindication of all federal constitutional rights. For many state prisoners, the only avenue to raise their contentions is by way of collateral attack on a prior conviction. Because of the gross inadequacy of the postconviction procedures in most states, the federal habeas corpus remedy is the only possible forum for adjudication of these rights.

habeas corpus. The pastime of self-education in the law is becoming increasingly common in penal institutions (Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 17 (1956)), but the handicaps under which the prisoners work would be intolerable to even an experienced lawyer.

¹⁸ See Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213 (1959); Schaefer, *supra* note 17.

¹⁹ U.S. CONST. art. VI.

²⁰ 28 U.S.C. § 1257 (1958). Most of the cases will come under the certiorari provision, § 1257(3). The right of appeal is limited to cases in which a state statute is challenged as unconstitutional and the decision in the state court upholds the statute. Section 1257(2). *E.g.*, *Lambert v. California*, 355 U.S. 225 (1957).

²¹ This right is derived from the federal statute conferring upon the federal courts habeas corpus jurisdiction over prisoners in state custody. 28 U.S.C. § 2241(c)(3) (1958). Congress presumably is not obligated to establish this jurisdiction; it dates back only to 1867. See note 1 *supra*.

It is not difficult to understand why so many of these cases necessarily involve collateral attack. In some instances, the facts to support the claim are not and cannot be known at the time of the original trial. This is true, for example, when the prosecution has suppressed evidence favorable to the defendant²² or knowingly used perjured testimony.²³ Errors of this kind, if they are discovered at all, usually come to light after conviction. But the one factor which contributes most to the necessity for collateral attack is the lack of counsel to represent the accused. The Supreme Court has not yet declared that the states must provide counsel for indigents in all serious cases.²⁴ The absence of counsel is in itself the most frequently found constitutional defect in state prosecutions.²⁵ At the same time, it contributes to the understandable failure of unrepresented defendants to know and to raise constitutional claims in the proceedings leading to conviction, whether on plea of guilty or full trial. Even where counsel is appointed by the trial court, frequently there is a failure to pursue state appellate remedies because the appointment is believed to lapse.²⁶

Nor is it difficult to explain the ineffectiveness of postconviction remedies in the state systems. The narrow common-law writ of habeas corpus, which the states incorporated into their jurisprudence, is totally incapable of encompassing the modern issues of due process and equal protection. The writ tested only the jurisdiction of the authority imposing restraint, and the concept of jurisdiction for this purpose was

²² See, e.g., *Alcorta v. Texas*, 355 U.S. 28 (1957).

²³ See, e.g., *Mooney v. Holohan*, 294 U.S. 103 (1935).

²⁴ No case has yet posed the question under the equal protection clause, propelled into prominence by *Griffin v. Illinois*, 351 U.S. 12 (1956). The possible application of the *Griffin* rule to appointment of counsel in criminal cases is discussed by Judge Hamley in *The Impact of Griffin v. Illinois on State Court-Federal Court Relationships*, 24 F.R.D. 75, 79 (1959).

²⁵ See note 119 *infra* and accompanying text.

²⁶ This practical difficulty in the established system for appointment of counsel came to the fore in recent litigation in the District of Columbia. Memorandum in Support of Petition for Leave To Appeal In Forma Pauperis, *Campbell v. United States*, Misc. No. 1048, D.C. Cir., Sept. 1958. See Note, *Legal Aid to Indigent Criminal Defendants in Philadelphia and New Jersey*, 107 U. PA. L. REV. 812, 829-32 (1959). (N.J. RULE 1:12-9(b) provides that duties of assigned counsel end after sentencing); D.C. BAR ASS'N, REPORT OF THE COMMISSION ON LEGAL AID 106-07 (1958); Kadish & Kimball, *Legal Representation of the Indigent in Criminal Cases in Utah*, 4 UTAH L. REV. 198, 217 (1954). See also *Rhea v. Edwards*, 136 F. Supp. 671 (M.D. Tenn. 1955), *aff'd*, 238 F.2d 850 (6th Cir. 1956).

Another factor contributing to the use of postconviction remedies is the retroactive operation of constitutional decisions. State prisoners may have spent many years in jail before any precedent is established that their convictions were obtained in violation of the Constitution. See, e.g., *Moore v. Michigan*, 355 U.S. 155 (1957) (1938 conviction—state habeas corpus); *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill. 1949) (1924 conviction—federal habeas corpus). Compare the incredible logic of *United States ex rel. Reck v. Ragen*, 172 F. Supp. 734 (N.D. Ill. 1959) (1936 conviction). The difficulty of retroactive effect of constitutional decisions was discussed by Justice Frankfurter, concurring, in *Griffin v. Illinois*, 351 U.S. 12, 25-26 (1956).

extremely limited.²⁷ It would not reach the elements of procedural fairness found in the fourteenth amendment. In addition to this restricted scope, the writ was available only for defects which appeared on the face of the record.²⁸ Collateral inquiry into questions of fact—almost indispensable to establish the truth or falsity of claimed denials of due process or equal protection—could not be accomplished under this writ. And other common-law remedies, particularly the writ of error coram nobis, are equally unavailing, in their traditional limitations, to provide a means for vindication of modern constitutional rights.²⁹ Some of the most difficult and painful litigation in federal habeas corpus has involved the tension between the requirement of exhaustion of state remedies and the doubts and confusion which surround the collateral attack procedures of the states.³⁰

I. PROCEDURES IN THE STATE COURTS

The major objection to the present habeas corpus jurisdiction of the lower federal courts is summed up in a 1952 resolution of the Conference of State Chief Justices: "orderly Federal procedure under our dual system of government should require that a final judgment of a State's highest court be subject to review or reversal only by the Supreme Court of the United States."³¹ The expressed intention was to preclude lower federal tribunals from engaging in "review or re-

²⁷ 1 BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES §§ 29-33 (1913); CHURCH, THE WRIT OF HABEAS CORPUS §§ 362-76, especially § 368 (2d ed. 1893); 4 ENCYC. SOC. SCI. 233-36 (1937); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660-62 (1948).

²⁸ 1 BAILEY, *op. cit. supra* note 27, at § 34; CHURCH, *op. cit. supra* note 27, at § 379.

²⁹ See the brief but excellent description of the historical scope of this extraordinary writ in the opinion of Judge Joseph Sloane, quoted in *Commonwealth ex rel. Spader v. Myers*, 190 Pa. Super. 62, 152 A.2d 787 (1959). See also FRANK, *CORAM NOBIS* ch. 1 (1953).

³⁰ Undoubtedly the outstanding single series of cases is the famous *Hawk* litigation. For over twelve years Hawk tried without success to get a hearing in state and federal courts. The former refused habeas corpus and coram nobis relief while the latter relied upon failure to exhaust state remedies. When Hawk finally was accorded a hearing in a federal habeas corpus proceeding, he was freed from custody. *Hawk v. Hann*, 103 F. Supp. 138 (D. Neb. 1952), *vacated and remanded for dismissal*, 205 F.2d 839 (8th Cir. 1953) (on appeal by the state, Hawk's death, after argument but before decision on the merits, held to render case moot requiring vacation of judgment and dismissal of case). See the history of this case recounted in HART & WECHSLER, *op. cit. supra* note 1, at 1297-98. The state which was most frequently involved in the tangle of confusion over the existence and scope of postconviction remedies was Illinois. Highlights of that period are found in United States *ex rel. Bongiorno v. Ragen*, 54 F. Supp. 973 (N.D. Ill. 1944), *aff'd*, 146 F.2d 349 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945); *White v. Ragen*, 324 U.S. 760 (1945); *Woods v. Nierstheimer*, 328 U.S. 211 (1946); *Marino v. Ragen*, 332 U.S. 561 (1947); *Loftus v. Illinois*, 334 U.S. 804 (1948); *Young v. Ragen*, 337 U.S. 235 (1949); *Willis v. Ragen*, 338 U.S. 944 (1950).

³¹ Quoted in Report of the Committee on Habeas Corpus of the Conference of Chief Justices, Aug. 14, 1954, printed in H.R. REP. No. 1293, 85th Cong., 2d Sess. 7 (1958).

versal" of state judgments in criminal cases. This purpose would be carried out by narrowing the scope of the federal habeas corpus jurisdiction.

A proposal to limit federal scrutiny of constitutional issues arising in state criminal prosecutions to Supreme Court review of state judgments demands consideration of the quality of the state processes. To the extent that state procedures are inadequate—or worse, nonexistent—the power of Supreme Court review is frustrated. Curtailment of the federal habeas corpus jurisdiction under such circumstances would seriously diminish the meaningfulness of federal guarantees for state prisoners.

Where a state provides no remedy at all for the constitutional claim, the Court has never required that the state modify its procedural structure to create one.³² This has particular significance for the kind of issue which can be posed only in the form of a collateral attack upon a prior conviction. But even where a procedure for raising the federal claim apparently exists in a state's jurisprudence, the capacity of the Supreme Court to review state judgments is totally dependent upon the building of a full, fair and accurate record in the lower courts.³³ This is true not only in collateral attack situations but also for those federal claims litigated in the course of the original prosecution.

The Conference of Chief Justices explicitly recognized this close interrelationship between the quality of state procedures and the habeas corpus jurisdiction of the lower federal courts. Before any change in the federal jurisdiction could be justified, "certain corrections in exist-

³² See the pattern of Illinois cases in note 30 *supra*. The Illinois Post-Conviction Hearing Act was an indirect result of the pressure of possible federal habeas corpus proceedings which motivated the state legislature to adopt a state procedure. See ABA Section of Judicial Administration, *Effective State Post-Conviction Procedures—Their Nature and Essentialities*, Aug. 1958 draft.

³³ The dependency of the Supreme Court on the record compiled in the state courts is dramatically illustrated in *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, *vacated and remanded*, 350 U.S. 891 (1955), *prior decision reaffirmed*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed for want of a properly presented federal question*, 350 U.S. 985 (1956). For an interesting excursion by the Supreme Court in an attempt by correspondence to gather together a record, see the discussion of the *Dick* case in note 293 *infra*. See also *Sheffield v. Louisiana*, 348 U.S. 850 (1954), in which the Court obtained directly from the Louisiana Bar Association a copy of a committee study and report criticizing the conduct of Sheffield's trial. The Court denied certiorari without prejudice to an application for federal habeas corpus in both the *Dick* and *Sheffield* cases. The significance of this unusual order is discussed in text at notes 256-306 *infra*.

Where the state court has summarily denied an application for postconviction review, the Supreme Court may be able to pass upon the sufficiency of the allegations, on the assumption for this purpose that they are true, to make out a denial of constitutional rights. See *Cash v. Culver*, 358 U.S. 633 (1959); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1951); *Jennings v. Illinois*, 342 U.S. 104 (1951); *Rice v. Olsen*, 324 U.S. 786 (1945); *Tomkins v. Missouri*, 323 U.S. 485 (1945); *Williams v. Kaiser*, 323 U.S. 471 (1945); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Cochran v. Kansas*, 316 U.S. 255 (1942); *Smith v. O'Grady*, 312 U.S. 329 (1941).

ing State court procedures”³⁴ should be made. The 1953 Conference unanimously adopted that part of a committee report which called for sweeping state improvements.³⁵ Many of the “more efficient state procedures”³⁶ it advanced related to improvement of the original trial process in order to make direct appellate review an adequate remedy for the determination of most federal constitutional issues. Proposals focused on the necessity of counsel if voluntariness of a confession were at issue, the inadvisability of receiving a plea of guilty “until a defendant has had legal counsel,” and the desirability of stenographically recorded court inquiries to insure that waivers of constitutional rights are made knowingly.³⁷ The report added that provision of counsel in all felony cases, not merely when constitutionally required, would go far to “check the flow of groundless petitions.”³⁸

In addition to these basic trial level reforms, the Conference proposed major revamping of procedures for collateral attack. They recommended a “postconviction process which is at least as broad in scope as the procedure whereby claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under the Federal habeas corpus statute.”³⁹ Great emphasis was placed upon the need to simplify the tangled formalities characterizing the structure of postconviction procedures to eliminate the technical confusion among several different remedies. Although no specific reference was made for provision of counsel in postconviction cases, it can be assumed that the state jurists were aware of the fundamental importance of legal assistance at this stage.

Measured against the standards set down by the State Chief Justices, the existing practices of most states are wholly inadequate. In

³⁴ Report of the Committee on Habeas Corpus of the Conference of Chief Justices, *supra* note 31.

³⁵ The resolution was adopted at the Conference of Chief Justices, Boston, Mass., Aug. 22, 1953. The report appears in H.R. REP. No. 1293, *supra* note 31, at 11. See also the Report of the Habeas Corpus Comm. of the Conference of Chief Justices, *supra* note 31.

³⁶ Report of the Committee on Habeas Corpus of the Conference of Chief Justices, June 1953, printed in H.R. REP. No. 1293, *supra* note 31, at 11. The appendix to the report noted that while earlier action of the Conference “was chiefly addressed to alleged defects” in federal law, “more mature consideration has led to the belief that much of the difficulty and delay in the Federal courts can only be eliminated by the adoption of more efficient state procedures.” *Id.* at 26. This appendix was incorporated by reference in the body of the report; the committee noted that its proposals “. . . are set forth briefly without argument in this report. They should be considered in the light of the material set forth at length in the appendix to the report.” *Id.* at 11.

³⁷ *Id.* at 22-24. For an example of the results which follow from lack of counsel, see Banmiller, *A Lawyer's Responsibility to the Offender*, 31 TEMP. L.Q. 111, 112 (1958).

³⁸ *Id.* at 23.

³⁹ *Id.* at 11.

postconviction processes the only progress has come through judicial decisions liberalizing the scope of or practices under the common-law writ of habeas corpus, or in cases reviving and revitalizing the writ of error coram nobis.⁴⁰ While these are significant developments, judicial expansion or distortion of a traditional form of action is probably not a satisfactory response to the general problem. It does not help to untangle confusion caused by a multiplicity of remedies. More fundamentally, it does not insure the basic requisites of a modern postconviction proceeding: a right to counsel for indigents, a full and fair hearing on issues of fact, a complete and accurate record of the proceedings, and a reasoned decision embodied in a written opinion.

Only a handful of states have taken a broader approach to the need for an effective postconviction procedure. The pioneer is the well known Illinois Post-Conviction Hearing Act,⁴¹ adopted in 1949 under the severe pressure of a series of Supreme Court cases involving Illinois prisoners.⁴² The Illinois measure was enacted in North Carolina two years later.⁴³ These two states were the only ones to have acted when the Conference of State Chief Justices resolution was adopted in 1953.

That resolution led immediately to the establishment of a special committee on the problem by the National Conference of Commissioners on Uniform State Laws.⁴⁴ Two years later, in 1955, the Commissioners adopted a Uniform Post-Conviction Procedure Act,⁴⁵ which draws on, but substantially modifies, the earlier Illinois legislation.⁴⁶ It provides an exclusive remedy to replace the confusing multiplicity of procedures which exists in many states. More important, it requires appointment of counsel for indigents, provides for appellate review in meritorious cases for indigents without cost and with pay-

⁴⁰ State *ex rel.* McManamon v. Blackford Circuit Court, 229 Ind. 3, 95 N.E.2d 556 (1950); Sewell v. Lainson, 244 Iowa 555, 57 N.W.2d 556 (1953); Petition of O'Leary, 325 Mass. 179, 89 N.E.2d 769 (1950); Huffman v. Alexander, 197 Ore. 283, 251 P.2d 87 (1953); *Ex parte* Bush, 313 S.W.2d 287 (Texas Ct. Crim. App. 1958); *In re* Horner, 19 Wash. 2d 51, 141 P.2d 151 (1943).

⁴¹ ILL. ANN. STAT. ch. 38, §§ 826-32 (Smith-Hurd Supp. 1958).

⁴² See note 30 *supra*.

⁴³ N.C. GEN. STAT. §§ 15-217 to -222 (Supp. 1959). See Comment, 29 N.C.L. REV. 390 (1951).

⁴⁴ COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE 95 (1953).

⁴⁵ COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE 122-23 (1955). The text of the act and the committee's prefatory statement appear in *id.* at 202-15.

⁴⁶ The scope of the remedy may differ. The uniform act follows the federal habeas corpus statute in providing relief for anyone sentenced "in violation of the Constitution of the United States" (§1), while the Illinois provision requires that the petitioner show "a substantial denial of his rights under the Constitution." ILL. ANN. STAT. ch. 38, § 826 (Smith-Hurd Supp. 1958). See Jennings v. Illinois, 342 U.S. 104 (1951). In addition, the Illinois provision contains a five-year statute of limitations. Section 826.

ment to be made for legal services, and requires that the courts state the grounds upon which the case was determined. The uniform act has not experienced widespread favorable response as yet. Only three states have taken action upon it: Maryland, which passed it with some serious modifications;⁴⁷ Arkansas, which adopted it in 1957⁴⁸ and repealed it in 1959;⁴⁹ and Oregon, whose 1959 legislature enacted a substantial reworking of it.⁵⁰

These developments are a notable start toward reform in a few states,⁵¹ although it is probably too early to evaluate the effectiveness in operation of the new legislation.⁵² Particular attention should be given to practices that develop with respect to several basic and difficult problems which have not been satisfactorily resolved in the terms of the statutes themselves.

None of them adequately meets the need of indigents for counsel above the trial level of postconviction proceedings.⁵³ An untutored

⁴⁷ MD. ANN. CODE art. 27, §§ 645A-J (Supp. 1959). The principal change is the Maryland provision making appellate review of the judgment discretionary. Section 645I. The Maryland statute was amended in 1959 expressly to permit summary denials, without appointment of counsel, of second or repeater applications. Section 645H. Unlike the uniform act, Maryland provides that the postconviction proceedings shall not be conducted before the same judge who presided at the original trial unless the petitioner consents. Section 645G.

⁴⁸ Ark. Stat. Ann. §§ 43-3101 to -3110 (Supp. 1959).

⁴⁹ Ark. Acts 1959, No. 227, § 1. The reason for the sudden repeal is not known, but the *Bailey* case, raising questions of jury discrimination against Negroes, may be the explanation. *Bailey v. State*, 313 S.W.2d 388 (Ark. 1958), cert. denied without prejudice to an application for federal habeas corpus, 358 U.S. 869 (1958).

⁵⁰ Ore. Laws 1959, ch. 636. A major change introduced in the Oregon law is the provision that the venue for postconviction proceedings ordinarily shall be in the county where the petitioner is imprisoned (§ 6); the uniform act specifies that the court of conviction is the place for the collateral proceeding as well. UNIFORM POST-CONVICTION PROCEDURE ACT § 3. The Oregon solution reduces the expense and custodial difficulties in bringing the prisoner to court for a hearing and reduces the possibility that the original trial judge, or one of his immediate colleagues, will pass upon the postconviction petition. Cf. MD. ANN. CODE art. 27, § 645G (Supp. 1959). Related to the venue point is the provision in the Oregon statute which makes it mandatory that the prisoner be brought to court for a hearing on his application unless the decision turns solely on a matter of law (§ 12). Oregon has expanded considerably on the effect to be given to prior judicial proceedings (§ 15). The Oregon law also contains the novel provision that, in the event a new trial is ordered, the transcript of the first trial can be used for the testimony of witnesses who have died or are unavailable (§ 20).

⁵¹ In addition to the legislative reform described in the text, mention should be made of the adoption of a postconviction procedure in Delaware by rule of court. It takes the form of a motion to correct or vacate sentence and permits review of sentences challenged as having been imposed in violation of the United States Constitution. DEL. SUPER. CT. (CRIM.) R. 35.

⁵² But see ABA Section of Judicial Administration, *Effective State Post-Conviction Procedures—Their Nature and Essentialities* 25-37, Aug. 1958 draft, for an appraisal of the Illinois act.

⁵³ The appointing power is the trial court, a provision which raises the same difficulty as to appeals or other subsequent proceedings found generally when counsel are provided by court appointment. None of the statutes has the provision in the uniform act (§ 5) that compensation shall be paid for legal services in a state appellate court. Even this provision does not cover certiorari to the Supreme Court. See note 26 *supra* and accompanying text.

layman is particularly out of his element in an appellate court. Moreover, it is open to question whether the new statutes properly handle the assignment of counsel at the trial level. The statutes imply that at least the first petition from every indigent prisoner will be transmitted to court-appointed counsel.⁵⁴ This could entail a severe, and perhaps unnecessary, burden upon the bar. While it is an improvement over the current federal practice which throws the burden of sifting the petitions upon the federal judges or their law clerks, there are alternatives which deserve exploration. A public or voluntary defender could be charged to represent prisoners in cases of possible merit.⁵⁵ A branch of a legal aid society at the prison might advise inmates on this as well as other legal problems.⁵⁶ An even more radical approach would be to permit law students, under appropriate supervision, to represent indigent prisoners.⁵⁷ These solutions would achieve continuity of counsel at all levels of proceeding while minimizing the burden on lawyers, inexperienced in matters of criminal law, who might be appointed under an assignment system.⁵⁸

⁵⁴ All the statutes tie the appointment of counsel to the fact of indigency, which must be pleaded by the prisoner in the first instance. Failure to allege that the petitioner is without funds and desires assignment of counsel may result in disposition of the case on the petition drawn by the prisoner.

The extent to which the lower federal courts in habeas corpus proceedings appoint counsel for the pleading, as distinguished from the hearing stage, is unknown. A study of the docket of the Supreme Court indicates that on petitions for certiorari there is a significantly higher percentage of cases with attorneys of record coming from the federal habeas corpus courts than in cases coming from state collateral proceedings. See note 75 *infra* and accompanying text. This data is, of course, only indirect evidence of the practices of the respective courts as to assignment of counsel at the various stages of the proceedings. One district judge indicated recently that in proceedings under 28 U.S.C. § 2255 (1958) it was his practice to scrutinize petitions filed *pro se* very carefully, while petitions filed by counsel were automatically set down for hearing. *United States v. Von der Heide*, 169 F. Supp. 560, 562 (D.D.C. 1959).

⁵⁵ This possibility has been totally overlooked in two important recent developments concerning public defenders. The National Conference of Commissioners on Uniform State Laws adopted a Model Defender Act at their August 1959 meeting. The act limits the defender to representation of indigents under arrest or charged with a crime. UNIFORM MODEL DEFENDER ACT § 2. A bill before Congress to establish a defender system for the federal courts is also blind to the needs of indigent prisoners seeking collateral relief. S. 895, 86th Cong., 1st Sess., adopted by the Senate, 105 CONG. REC. 7705 (daily ed. May 20, 1959).

⁵⁶ *E.g.*, the Legal Aid Bureau at Lincoln, Nebraska, operated by the College of Law of the University of Nebraska, processed 172 cases during the year ending September 1, 1957, including 28 "penitentiary cases." *Proceedings of the House of Delegates of the Nebraska Bar Association 1957*, 37 NEB. L. REV. 1, 39 (1958).

⁵⁷ *E.g.*, the Legal Aid Clinic of the Southwestern Legal Foundation at Southern Methodist Law School appeared on behalf of a Texas prisoner in petitioning for certiorari. *Massey v. Moore*, 338 U.S. 837 (1949), *denying cert. to* 173 F.2d 980 (5th Cir. 1949). Since the director was not a member of the bar of the Court, the official report indicates that Massey moved *pro se*.

⁵⁸ *But see* the enthusiastic response of one attorney to his experience as court-appointed counsel for an indigent prisoner who won his freedom in federal habeas corpus. Roemer, *Court Appointed Counsel for the Indigent Appellant*, 3 Colum. L. Alumni Bull., Oct. 1958, p. 1.

Another problem left unresolved by the new statutes is the standard by which a petition drafted by a prisoner is to be evaluated. These acts contain extraordinarily strict pleading requirements which are well beyond the capacities of most prisoners.⁵⁹ Even if the first petition is virtually automatically assigned to an attorney appointed by the court, there will be many instances of more than one application from the same prisoner. Some of these will have merit.⁶⁰ Yet certainly not all repeater applications can be sent to a lawyer for rewriting. It remains to be seen what techniques the state courts will evolve to deal with this difficult situation.⁶¹

Despite their defects, the new postconviction acts represent a striking advance. By comparison, the situation which obtains in many states is deplorable. Professor Austin Scott, Jr., has recently published a criticism of the conditions in Colorado.⁶² A state-by-state study of the quality of postconviction procedures would undoubtedly show that Colorado is not atypical. There is not only indifference to reform but outright hostility toward development of postconviction remedies. The latter attitude is perhaps illustrated by a statement of the Chief Justice of the Ohio Supreme Court⁶³ in testimony before a congressional committee: "Our penitentiary has as many curbstone lawyers as any other state penitentiary, but we at least have a consistent record in Ohio that we have never allowed one of these writs of habeas corpus."⁶⁴ If it is a matter of pride that no prisoner has ever obtained relief, the state postconviction process is worthless.

⁵⁹ UNIFORM POST-CONVICTION PROCEDURE ACT § 4.

⁶⁰ All of these statutes have a provision that all claims must be presented in the first application for relief, on penalty of waiver of omitted claims. UNIFORM POST-CONVICTION PROCEDURE ACT § 8; ILL. ANN. STAT. ch. 38, § 828 (Smith-Hurd Supp. 1958); MD. ANN. CODE art. 27, § 645H (Supp. 1959); N.C. GEN. STAT. § 15-218 (Supp. 1959); Ore. Laws 1959, ch. 636, § 15. The uniform act, Maryland and Oregon recognize expressly that such a waiver rule cannot, without injustice, be made absolute. For application of the Illinois provision, see *People v. Orr*, 10 Ill. 2d 95, 139 N.E.2d 212 (1957); *People v. Lewis*, 2 Ill. 2d 328, 118 N.E.2d 259 (1954); cf. *People v. Dale*, 406 Ill. 238, 92 N.E.2d 761 (1950). A recent case arising under the Maryland statute is *Roberts v. Warden*, 156 A.2d 891 (Md. Ct. App. 1959).

⁶¹ Maryland amended its statute to provide that a second application for relief from the same prisoner can be dismissed without the appointment of counsel. See note 47 *supra*. Cf. *Plummer v. United States*, 260 F.2d 729 (D.C. Cir. 1958).

⁶² Scott, *Post-Conviction Remedies in Colorado Criminal Cases*, 31 ROCKY MT. L. REV. 249 (1959).

⁶³ The statement of Chief Justice Weygandt is especially significant in light of the important role he has played in the Conference of Chief Justices. At the time of his testimony, Chief Justice Weygandt informed the committee that he was appearing as chairman of that group. *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess., ser. 6, at 12 (1955).

⁶⁴ *Id.* at 13.

II. THE ROLE OF THE SUPREME COURT

The Supreme Court of the United States occupies a dual position on matters of state criminal law. It is the highest federal court and all cases arising under the federal habeas corpus jurisdiction can theoretically reach it. The remarkable fact is that very few such cases have ever been decided on the merits by the Court.⁶⁵ Most of the Court's opinions in state criminal cases have been written in the exercise of its power to review federal questions involved in state judgments which either affirmed the original conviction or denied collateral relief within the state system.⁶⁶

The requirement that a state prisoner exhaust his state remedies before seeking federal habeas corpus insures that most cases will be presented to the Supreme Court for review of a state judgment before any federal habeas corpus proceedings can be instituted.⁶⁷ Not only must the state prisoner pursue his own state's processes to the highest court of the state but, under the rule of *Darr v. Burford*,⁶⁸ ordinarily he must also seek certiorari to the state court prior to application for federal habeas corpus. The Supreme Court has accepted the principle that it, rather than the lower federal courts, has the responsibility to review state judgments in criminal matters wherever necessary.⁶⁹

⁶⁵ Since October 1949, there have been 15 federal habeas corpus cases in which the Court has published an opinion. *Irvin v. Dowd*, 359 U.S. 394 (1959); *United States ex rel. Jennings v. Ragen*, 358 U.S. 276 (1959); *Cicenia v. Lagay*, 357 U.S. 504 (1958); *Thomas v. Arizona*, 356 U.S. 390 (1958); *Chessman v. Teets*, 354 U.S. 156 (1957); *United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956); *Chessman v. Teets*, 350 U.S. 3 (1955); *Massey v. Moore*, 348 U.S. 105 (1954); *Leyra v. Denno*, 347 U.S. 556 (1954); *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953); *Brown v. Allen*, 344 U.S. 443 (1953); *Sweeney v. Woodall*, 344 U.S. 86 (1952); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951); *Darr v. Burford*, 339 U.S. 200 (1950). During the same period there have been several times this number of Supreme Court opinions in state criminal cases on review of a state court judgment.

⁶⁶ It is this channel of review which, in the opinion of many state judges, is the only proper method of federal court supervision of federal questions arising out of the administration of state criminal law. See text at note 31 *supra*. The chief justices of the states do not approve of the Supreme Court's practice of independent evaluation of the factual issues underlying constitutional questions. In their view, the Court should be bound by the facts as found by the state trial court, subject to the normal rule of limited appellate review of fact questions. See the criticism of Moore v. Michigan, 355 U.S. 155 (1957) in CONFERENCE OF CHIEF JUSTICES, REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS 19-21 (1958).

⁶⁷ 28 U.S.C. § 2254 (1958).

⁶⁸ 339 U.S. 200 (1950). "It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court [for certiorari] to avoid unseemly interference by federal district courts with state criminal administration." *Id.* at 217.

⁶⁹ *Id.* at 216-17.

The proposal to abolish or curtail the federal habeas corpus jurisdiction would radically alter the position of the Supreme Court. Today it stands institutionally in a pivotal role at the end of state court litigation and at the beginning of litigation in the federal courts.⁷⁰ To the extent that the federal habeas corpus jurisdiction is diminished, the Supreme Court would become the terminus rather than the pivot in this litigation. Many cases are now reaching the federal habeas corpus stage after having been denied review by the Court. In a considerable number of these, the claim of the state prisoner is found to have merit.⁷¹ A scheme that would shift to the Court the exclusive responsibility for federal scrutiny in these cases accordingly raises the question whether that Court has the ability to exercise a greater supervision over state criminal judgments than it currently provides.

The Number and Character of the Petitions

The best answer to the question is found in an examination of the number and quality of the applications for relief filed by state prisoners in the Supreme Court and of the practices followed in handling and disposing of them. No one knows how many state judgments in criminal cases are rendered each year with potential grist for Supreme Court action in the form of a constitutional or federal question. Until a short time ago there was not even any reliable information on the number of these cases actually presented to the Court. But a recent study compiled in the Office of the Clerk of the Supreme Court shows that, during a two and one-half year period, the Court disposed of 1,234 cases involving state prisoners seeking review of state judgments.⁷² Only some 18 per cent of these were cases coming directly from the state appellate court's affirmance of conviction. The great bulk sought review of a state judgment in a state collateral attack proceeding.⁷³

⁷⁰ In *Wade v. Mayo*, 334 U.S. 672 (1948), the Supreme Court indicated that the petition for certiorari was not part of the state procedure. *Id.* at 680. Two years later, in *Darr v. Burford*, 339 U.S. 200, 212 (1950), the Court said: "It is immaterial whether as a matter of terminology it is said that review in this Court of a state judgment declining relief from state restraint is a part of the state judicial process which must be exhausted, or whether it is said to be part of federal procedure. The issue cannot be settled by use of the proper words."

⁷¹ See text accompanying note 225 *infra*.

⁷² This study, made by Michael Rodak, Jr., Assistant Clerk of the Supreme Court of the United States, and Joseph F. Spaniol, Jr., of the Administrative Office of the United States Courts, is as yet unpublished. It covered the 1956 and 1957 Terms of the Supreme Court and the 1958 Term through February 1959. Rodak & Spaniol, Preliminary Report of a Study of the Dockets of the Supreme Court of the United States in Relation to Federal Habeas Corpus Jurisdiction, March 1959 (unpublished).

⁷³ The 1,234 cases were broken down as follows: direct review of the conviction—220; state collateral attack—1,014. During the same period 318 federal habeas corpus cases involving state prisoners were disposed of: 116 petitions for certiorari to lower federal courts and 202 applications for original writ in the Supreme Court.

It is generally known that the legal and literary quality of most of these petitions is exceedingly poor. They are usually typewritten and frequently are written by hand, sometimes in pencil. Justice Frankfurter has described them in these terms:

“These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court’s work. The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field. Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking.”⁷⁴

Indeed, in the Clerk’s study an attorney appeared of record in only eight per cent of the cases of collateral attack originating in a state court. There was something in the nature of a record, the adequacy of which was not checked, in only 18 per cent of these cases. A combination of the two factors was found in only six per cent of the petitions.⁷⁵

The Court’s Handling of the Petitions

Little is known about the processing which these petitions receive inside the Court. Biographies of two recent Chief Justices reveal something of past practices. Pusey credits Chief Justice Hughes with an individual effort to promote the interest of the Court in petitions from prisoners.⁷⁶ He is said to have read them all personally and brought those he deemed meritorious to the attention of his brethren. During his tenure, there were not many petitions filed and this was not a serious burden of work. Mason reports that Hughes’ successor, Chief Justice Stone, continued the practice of personal attention to these applications although the steadily rising volume began to drain his energies:⁷⁷ in his first term as Chief Justice, Stone is said to have read 178 petitions. By contrast there were 797 petitions disposed of in the 1957 Term of Court.⁷⁸

Recent articles by present members of the Court indicate that the screening of these cases is no longer a strictly personal matter for the Chief Justice. Justice Clark wrote that each member of the Court

⁷⁴ *Brown v. Allen*, 344 U.S. 443, 493 (1953).

⁷⁵ By way of comparison, in the habeas corpus cases coming from lower federal courts, there were attorneys of record in 31% of the cases, a record available in 61% of the cases and a combination of the two in 29% of the cases.

⁷⁶ 2 PUSEY, CHARLES EVANS HUGHES 727-28 (1951).

⁷⁷ MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 639, 788 (1956).

⁷⁸ [1958] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 144.

is responsible for the decision in all of them.⁷⁹ Justice Harlan described the procedure in these terms:

"The 'Miscellaneous' petitions . . . are not in printed form, normally only one typed or handwritten copy being filed, the office of the Chief Justice as a matter of convenience first prepares outlines of the issues in each case for distribution to the other Justices. These are then followed by a circulation among the Justices of the papers filed in all capital cases and in cases presenting questions of possible significance, the papers in all other cases being of course available to any member of the Court desiring to examine them."⁸⁰

The Court's Disposition of the Petitions

Most petitions for review of state court judgments filed by state prisoners are summarily denied by the Supreme Court. Except for petitions filed by the Solicitor General of the United States, the same could be said about any class of petitioners. Each year the Court agrees to hear on the merits some 13-17 per cent of the cases on the Appellate Docket and 1-4 per cent of the applications on the Miscellaneous Docket.⁸¹

Of the 1,234 such cases acted on by the Court during the period of the Clerk's study, only 127 were on the Appellate Docket.⁸² State prisoners who were able to afford the expense of placing a case on that docket fared very well in the Supreme Court. The Court rendered a decision on the merits in 22 per cent of the cases: 12.6 per cent reversed or vacated and 9.4 per cent affirmed. Most of this group came to the Court on direct review of a judgment of conviction.⁸³

Applications for review of a state judgment on the Miscellaneous Docket were, for the most part, denied or dismissed without consideration of the merits. Twenty-five cases, representing 2.3 per cent of the total dispositions on this docket, were noted in the Clerk's study as set

⁷⁹ Clark, *The Supreme Court Conference*, 37 TEXAS L. REV. 273, 276 (1959).

⁸⁰ Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541, 555 (1958).

⁸¹ [1958] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN REP. 146. The Miscellaneous Docket was established at the 1945 Term to cover extraordinary writs and other special types of applications. It was enlarged at the 1947 Term to include all petitions for certiorari and appeals in forma pauperis. Petitioners proceeding in forma pauperis are excused from paying the docket fee and any necessary costs. 28 U.S.C. § 1915 (1958); SUP. CT. R. 53. The application can be filed in one copy, rather than forty, and is usually typewritten. The Appellate Docket comprises the regular business of the Supreme Court. The Court also has an Original Docket, on which are cases under the Court's original jurisdiction other than those in forma pauperis, which are placed on the Miscellaneous Docket.

⁸² Of the 116 petitions for certiorari to a lower federal court, 12 were on the Appellate Docket.

⁸³ Of the 127, 108 were on direct review of the affirmance of the state conviction.

down for argument but no further indication is given of their outcome.⁸⁴ Counting these with the few cases summarily affirmed or reversed, the Court passed upon the merits of 2.8 per cent of the cases.⁸⁵ Almost 90 per cent of this group arose in a collateral attack proceeding in the state courts.⁸⁶

It is not difficult to suggest at least one reason for the substantial difference in the percentage of cases which the Court decided on the merits as between the two dockets. In all but two cases on the Appellate Docket there was an attorney representing the state prisoner and a record filed of the proceedings in the state courts. The combination of a printed petition, prepared by a lawyer, filed on the Court's regular docket, with a supporting record attached, means that the cases are more clearly and effectively presented to the Court than the great bulk of in forma pauperis petitions. The relatively high percentage of cases reviewed is in line with the principle set forth in *Darr v. Burford*⁸⁷ and indicates that, where circumstances reasonably permit the exercise of judicial review, the Supreme Court has been diligent to pass upon state criminal judgments. This conclusion is reinforced by the relatively large number of Supreme Court opinions reviewing state decisions in criminal matters during the past decade. There is no reason to believe that the Court, under existing handicaps, is not playing as great a role in this area as is possible.

III. THE EXTENT OF CURRENT HABEAS CORPUS PRACTICE IN THE LOWER FEDERAL COURTS

The information available on current federal habeas corpus practices is appallingly scant: what is known has been accumulated largely in the wake of the agitation for legislative change during the past few years. The principal source of such data has been the statistics of the Administrative Office of the United States Courts.⁸⁸

⁸⁴ When the Supreme Court grants certiorari in a case placed on the Miscellaneous Docket, it is transferred to the Appellate Docket unless summarily disposed of. SUP. CT. R. 53(6).

⁸⁵ There were, in addition, eight cases in which the Court denied certiorari without prejudice to an application for federal habeas corpus; seven of these were on the Miscellaneous Docket. For a discussion of the qualified denial of certiorari, see text accompanying notes 256-306 *infra*.

⁸⁶ Of the total of 1,107, 995 arose in collateral attack proceedings in the state courts.

The federal habeas corpus cases were disposed of as follows: On certiorari to a lower federal court, five were reversed or vacated, two were affirmed, six were transferred from the Miscellaneous Docket to the Appellate Docket and 103 were denied or dismissed. All of the applications for original writ of habeas corpus were denied.

⁸⁷ See text accompanying note 69 *supra*.

⁸⁸ The Annual Report of the Director of the Administrative Office of the United States Courts contains in tabular form the number of habeas corpus cases commenced and disposed of in all the federal district courts, and the number and length of hear-

The District Court Practice

During the past ten years some 6,000 petitions for habeas corpus have been filed in the federal district courts.⁸⁹ There has been a slight upward trend in the number of applications each year.⁹⁰ On the strength of these facts, many persons have declared that the habeas corpus jurisdiction is a severe burden on the federal judges.⁹¹ This overlooks the significant fact that most of these petitions are patently frivolous and are dismissed upon first reading. An average of only 31 cases a year are given a hearing by the district courts.⁹² These are defined as cases in which there was "evidence introduced."⁹³ In the past eight years the number has never been as high as 30; ⁹⁴ during the fiscal year ending June 30, 1958, there were 28. By comparison, in the same year, the district courts conducted and disposed of 4,500 civil cases and 3,600 criminal cases after trial.⁹⁵

The few hearings which are held, according to the best available evidence, are extremely short. The study reported by Justice Frankfurter in *Brown v. Allen* showed that 16 of 24 cases were concluded in one hour or less.⁹⁶ Only one of the remaining eight extended beyond four hours.⁹⁷

ings conducted. The office reports other data for selected individual district courts and records the number of appeals commenced in the courts of appeals. See, e.g., [1958] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 156, 163, 171, 191. Similar data has been sent to Congress in connection with pending legislation. See H.R. REP. No. 548, 86th Cong., 1st Sess. 36-42 (1959). This data does not differentiate state prisoners from other petitioners for habeas corpus under the federal question jurisdiction, but the Administrative Office indicates that the "great majority" are applications by state prisoners.

⁸⁹ H.R. REP. No. 548, *supra* note 88, at 38.

⁹⁰ The total by fiscal years was: 1949—584, 1950—560, 1951—482, 1952—541, 1953—548, 1954—597, 1955—660, 1956—734, 1957—778, 1958—755. *Ibid.*

⁹¹ *Id.* at 3; 105 CONG. REC. 13358-65 (daily ed. July 29, 1959); 102 CONG. REC. 939 (1956); *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess., ser. 6, 4, 22, 96, 100 (1955). Compare District Judge Foley denying relief in *United States ex rel. Wade v. Jackson*, 144 F. Supp. 458, 460 (N.D.N.Y. 1956), *rev'd*, 256 F.2d 7 (2d Cir.), *cert. denied*, 357 U.S. 908 (1958): "any judge worth his salt can always find the time to read and consider them [habeas corpus applications from state prisoners] no matter how crudely presented. . . ." *But see* Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 54-55 (1956).

⁹² H.R. REP. No. 548, *supra* note 88, at 39.

⁹³ *Ibid.* This is an ambiguous and awkward classification of cases in habeas corpus. If it encompasses only those cases in which the federal court hears testimonial evidence in open court, it would not adequately reflect the number of cases given thorough consideration by the district courts on the basis of the record compiled in state proceedings or other documentary evidence submitted to the court.

⁹⁴ The figures reported are: 1951—29, 1952—25, 1953—29, 1954—20, 1955—25, 1956—19, 1957—28, 1958—28.

⁹⁵ [1958] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 170, 208-09.

⁹⁶ 344 U.S. 443, 529 (1953).

⁹⁷ The same general pattern is suggested by the Administrative Office statistics. [1958] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 191.

The reports of the Administrative Office indicate that 98 petitioners were successful in the district courts from 1946 through 1957.⁹⁸ The definition of "successful" is not given, but it almost certainly means a final judgment granting habeas corpus relief, rather than simply a favorable ruling on an interlocutory question. Apparently this figure includes some judgments which have been reversed by a court of appeals; the Administrative Office footnotes two instances.⁹⁹ This is only a partial list of court of appeals reversals,¹⁰⁰ however, and leaves in doubt the exact number of unreversed district court decisions granting relief. Likewise, it is fair to assume that the figure does not take into account reversals in the courts of appeals whereby petitioners obtain relief.¹⁰¹

Habeas Corpus in the Courts of Appeals

The Administrative Office reports contain almost nothing on the habeas corpus practice in the federal courts of appeals. These courts do

⁹⁸ H.R. REP. No. 548, *supra* note 88, at 37. The Administrative Office then discounts the figure, stating that "in only a small number of these 98 cases were the petitioners actually released." What is meant by "actual release" is not immediately apparent. A practice has developed whereby the federal writ is not ordered to take effect until a period of time has elapsed during which the state can institute new proceedings against the prisoner. See note 110 *infra*. Perhaps this procedure underlies all or part of the Administrative Office's discount.

Confusion is compounded by the further implication that less than half of the 98 successful petitioners were prisoners. "[O]f 60 petitions granted, there were only 26 petitioners who were in the custody of wardens of State penitentiaries." H.R. REP. No. 548, *supra* note 88, at 37. The purpose served in separating wardens of state prisons from other state officials who are custodians of penal institutions is not clear. Such a division may have the unfortunate tendency to lead to a conclusion that the number of successful federal habeas corpus petitioners has been "exceedingly small." *Ibid.*

⁹⁹ United States *ex rel.* Touhy v. Ragen, 224 F.2d 611 (7th Cir.), *cert. denied*, 348 U.S. 945 (1955); United States *ex rel.* Mascio v. Ragen, 179 F.2d 930 (7th Cir. 1950). H.R. REP. No. 548, *supra* note 88, at 37.

¹⁰⁰ See, in addition, United States *ex rel.* Marcial v. Fay, 267 F.2d 507 (2d Cir. 1959); United States *ex rel.* Rogers v. Richmond, 252 F.2d 807 (2d Cir.), *cert. denied with statement as to meaning of opinion of court of appeals*, 357 U.S. 220 (1958); Mayo v. Blackburn, 250 F.2d 645 (5th Cir. 1957), *cert. denied*, 356 U.S. 938 (1958); Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957); Dickson v. Castle, 244 F.2d 665 (9th Cir. 1957); Utah v. Sullivan, 227 F.2d 511 (10th Cir. 1955), *cert. denied*, 350 U.S. 973 (1956); Cranor v. Cooper, 203 F.2d 833 (9th Cir.), *cert. denied*, 346 U.S. 839 (1953); Duffy v. Wells, 201 F.2d 503 (9th Cir. 1952), *cert. denied*, 346 U.S. 861 (1953); Ross v. Middlebrooks, 188 F.2d 308 (9th Cir.), *cert. denied*, 342 U.S. 862 (1951); United States *ex rel.* Parker v. Ragen, 167 F.2d 792 (7th Cir. 1948), *cert. denied*, 336 U.S. 920 (1949); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); United States *ex rel.* Hanson v. Ragen, 166 F.2d 608 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948).

¹⁰¹ In seven cases, the court of appeals ordered the prisoner discharged. United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 838, 850 (1959); Daugharty v. Gladden, 257 F.2d 750 (9th Cir. 1958); United States *ex rel.* Wade v. Jackson, 256 F.2d 7 (2d Cir.), *cert. denied*, 357 U.S. 908 (1958); United States *ex rel.* DeVita v. McCorkle, 248 F.2d 1 (3d Cir.), *cert. denied*, 355 U.S. 873 (1957); United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955); United States *ex rel.* Collins v. Claudy, 204 F.2d 624 (3d Cir. 1953).

not have original jurisdiction,¹⁰² to entertain petitions for habeas corpus,¹⁰² but they have occasion with relative frequency to reverse district courts and to order prisoners discharged.¹⁰³ The reports, however, show only the number of appeals commenced: an average of 60 per year during the past decade, varying from 40 in 1951 to 91 in 1957.¹⁰⁴ They do not reveal how many were decided nor, more important, how they were decided.

A supplement to this sparse data on habeas corpus in the courts of appeals is found in the number of reported opinions by these courts. Over the past ten years, some 500 opinions and orders have been published.¹⁰⁵ The majority of these, as expected, were dispositions in favor of the states, including some reversals of district court judgments in favor of the petitioner.¹⁰⁶ But there were also a substantial number of rulings favorable to the prisoner.¹⁰⁷ Seven of the decisions ordered the writ granted despite denial of relief by the lower court.¹⁰⁸ Frequently the courts of appeals reversed and remanded a case for a hearing when the district court had summarily dismissed the petition.¹⁰⁹ The importance of this first step to a prisoner is enormous for it means that a court has recognized possible merit in his claims and set his case apart from the flood of frivolous applications. It probably also means that he can now get counsel appointed to assist him in the presentation of his case, a matter of almost crucial consequence.

The available statistics reveal in crude outline the dimensions of the federal habeas corpus practice. And, reasonably interpreted, they give an approximation of the burden of work placed upon the federal courts. They cannot, however, even begin to describe the intricate and interdependent relationships of state and federal procedural systems comprising the structure within which state criminal law is administered.

¹⁰² 28 U.S.C. § 2241(a) (1958). See note 1 *supra*.

¹⁰³ See note 101 *supra*.

¹⁰⁴ H.R. REP. No. 548, *supra* note 88, at 42. This figure is broken down by judicial circuit in the Annual Report of the Director of the Administrative Office of the United States Courts. See, e.g., [1958] *id.* at 156.

¹⁰⁵ This based upon a survey covering the *Federal Reporter, Second Series*, volumes 163 through 267. During the same period, there were over 200 opinions published by the district courts in the *Federal Supplement*, volumes 73 through 173.

¹⁰⁶ See notes 99, 100 *supra*.

¹⁰⁷ Some forty cases are reported in the past decade in which the courts of appeals reversed the district courts on intermediate questions. See note 109 *infra*.

¹⁰⁸ See note 101 *supra*.

¹⁰⁹ E.g., *United States ex rel. Marcial v. Fay*, 247 F.2d 662 (2d Cir. 1957), *cert. denied*, 355 U.S. 915 (1958); *United States ex rel. Alvarez v. Murphy*, 246 F.2d 871 (2d Cir. 1957); *Bales v. Lainson*, 244 F.2d 495 (8th Cir. 1957); *Atkins v. Moore*, 218 F.2d 637 (5th Cir. 1955); *Henley v. Moore*, 218 F.2d 589 (5th Cir. 1955); *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953); *Melanson v. O'Brien*, 191 F.2d 963 (1st Cir. 1951); *Brown v. Frisbie*, 178 F.2d 271 (6th Cir. 1949).

IV. A CASE STUDY OF SUCCESSFUL FEDERAL HABEAS CORPUS PETITIONERS

Only a detailed case study can fully reveal the actual workings of the complex system of courts for the litigation of federal questions in state criminal cases. In preparation for this Article, such a study was made of a number of cases in which a federal court ultimately granted a writ of habeas corpus. These are cases in which a state prisoner successfully attacked the judgment under which he was confined. By this, it is not meant that the prisoners immediately received their freedom, for it frequently happens that a retrial is not foreclosed to the state.¹¹⁰ While in a few instances, the subsequent developments of these cases have been traced,¹¹¹ the central theme has been their history prior to the federal court judgment.

The cases which form the basis for this examination were drawn from the reported opinions of the federal courts over a period of approximately ten years.¹¹² Thirty-five cases,¹¹³ involving thirty-nine persons,¹¹⁴ were discovered. It must be emphasized that they do not represent *all* petitioners who were accorded a remedy in federal habeas corpus during this period. It is not known for certain what the exact number is.¹¹⁵ Nor are these cases presented as typical examples of state administration of criminal law. They were chosen because, hav-

¹¹⁰ There has been an interesting practice in the nature of the remedy given in federal habeas corpus where the defect in the prior proceedings does not preclude a retrial. The order to give the prisoner freedom is frequently conditioned to permit the state to institute new proceedings or correct the error in the former case. See, e.g., *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 838, 850 (1959); *United States ex rel. Westbrook v. Randolph*, 259 F.2d 215 (7th Cir. 1958); *Robbins v. Green*, 218 F.2d 192 (1st Cir. 1954); *Garton v. Tinsley*, 171 F. Supp. 387 (D. Colo. 1959); *White v. Dowd*, 164 F. Supp. 266 (N.D. Ind. 1958); *United States ex rel. Sheffield v. Waller*, 126 F. Supp. 537 (W.D. La. 1954), *certificate of prob. cause denied*, 224 F.2d 280 (5th Cir.), *cert. under 28 U.S.C. §1651(a) (1958) denied*, 350 U.S. 922 (1955); cf. *United States ex rel. Collins v. Claudy*, 204 F.2d 624 (3d Cir. 1953).

¹¹¹ Mullreed was retried and convicted, but there are no reported state opinions. An original petition for habeas corpus in the Supreme Court was denied. *Mullreed v. Michigan*, 355 U.S. 807 (1957). Sheffield's second conviction was affirmed in *State v. Sheffield*, 232 La. 53, 93 So. 2d 691 (1957), *cert. denied*, 354 U.S. 915 (1957). In the *Todd* case the conviction was reversed and a third trial ordered. *Todd v. State*, 230 Ind. 85, 101 N.E.2d 922 (1951). The New York Court of Appeals eventually ruled that the indictment against Leyra had to be dismissed. *People v. Leyra*, 1 N.Y.2d 199, 134 N.E.2d 475, 151 N.Y.S.2d 658 (1956). At the second trial in the *Grandsinger* case, the defendant was found not guilty by jury verdict. *Lincoln Star* (Neb.), Nov. 27, 1958, p. 1, col. 1.

¹¹² The cases were obtained from a study of the *United States Reports*, volumes 338 through 360, the *Federal Reporter, Second Series*, volumes 163 through 267, and the *Federal Supplement*, volumes 73 through 173.

¹¹³ In the discussion that follows, the cases will be referred to in text and footnote by the name of the state prisoner only. The history of the cases, with full citation to known published opinions, is given in Appendix, p. 525 *infra*.

¹¹⁴ There were three cases in which more than one state prisoner was seeking federal relief. Curran (3 petitioners), DeVita (2 petitioners), Lunce (2 petitioners).

¹¹⁵ See note 98 *supra* and accompanying text.

ing run the gamut of state and federal courts, they demonstrate case by case the acute significance of federal habeas corpus.

Every case began, of course, with a prosecution and judgment of conviction. There may have followed immediate state appellate review. There may have been one or more collateral attack proceedings in the state courts, and one or more unsuccessful federal habeas corpus proceedings. Any or all of these phases of litigation may have been capped by petitions for certiorari, although in only one of the cases did the Supreme Court grant a writ of certiorari at some preliminary stage in the development of the litigation.¹¹⁶ Finally the stage was reached in which relief was granted—most frequently by the district courts, not infrequently by the courts of appeals, and once by the Supreme Court.¹¹⁷ Where a remedy awarded in a lower court judgment was reversed on appeal, the case was excluded from the study.¹¹⁸

The discussion of the cases which follows treats each major phase of the litigation separately. After a preliminary description of the cases and the constitutional issues presented in them, the processes in the state courts involving those constitutional or federal questions are surveyed. This is followed by examination of the developments which transpired in the Supreme Court on petition for certiorari to the state courts. The discussion concludes with the federal habeas corpus proceedings in which relief was granted.

¹¹⁶ *Massey v. Moore*, 348 U.S. 105 (1954). The Court held that the prisoner was entitled to a hearing on the question of insanity as that related to the competence of the prisoner to stand trial without counsel. When the case was decided in the district court on remand, however, the court held that Massey's conviction was void because he was insane at the time of trial, without direct reference to the question of counsel. 133 F. Supp. 31 (S.D. Tex. 1955). In two other cases, prior to the petitioner's prevailing in a lower federal court, the Supreme Court had denied certiorari to a state court without prejudice to an application for federal habeas corpus. *Carmen v. Dickson*, 355 U.S. 924 (1958); *Sheffield v. Louisiana*, 348 U.S. 850 (1954). This type of order is discussed in text at notes 256-306 *infra*.

¹¹⁷ This is not to imply that the same procedure was followed in every case. In many instances, the separate stages were so numerous that it was impossible to unravel them completely.

¹¹⁸ There were a considerable number of court of appeals reversals of district court decisions in favor of the state prisoner. See notes 99, 100 *supra*.

Particular mention should be made of *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951), in which the Supreme Court agreed with the lower federal courts that a deprivation of due process had occurred, but vacated a judgment in favor of the prisoner in order to permit the state courts to reconsider the case. The Indiana Supreme Court promptly allowed a delayed appeal and granted the prisoner relief. *Cook v. State*, 231 Ind. 695, 97 N.E.2d 625 (1951).

In *Johnson v. Dye*, 175 F.2d 250 (3d Cir. 1949), the Third Circuit granted habeas corpus relief to a petitioner held in Pennsylvania custody to be extradited to Georgia. The petitioner established that the conditions of the Georgia chain gang from which he had escaped violated due process of law. This decision was reversed by the Supreme Court, 338 U.S. 864 (1949) (*per curiam*), solely on the ground of failure to exhaust state remedies. In the course of the subsequent litigation, Johnson died and the case became moot. Letter From Hymen Schlesinger, Esq., Attorney for Johnson, to the Author, Aug. 18, 1959.

The Cases and the Constitutional Issues

A most striking fact discovered from the 35 cases studied is the dominance of the issue of right to counsel as the contention most likely to succeed in federal habeas corpus. In roughly half of the cases, the state judgment fell on this ground.¹¹⁹ As only four of these cases involved a capital offense, the largest stumbling block in the administration of state criminal law is revealed as the nonabsolute right to counsel for indigents in noncapital cases.

Five cases rested on a claim of the introduction into evidence of a coerced confession.¹²⁰ Three involved prosecution suppression of evidence favorable to the accused.¹²¹ There are several somewhat novel decisions. One case held that deliberate perjury by a member of the police, even without the knowledge of anyone on the prosecution legal staff, constituted a deprivation of due process of law.¹²² Another determined that the conduct of a juror, in failing to disclose that he had recently been the victim of a crime similar to the one charged, vitiated the conviction.¹²³ Also among the 35 cases is the well-publicized *Goldsby* case from Mississippi¹²⁴ in which the Court of Appeals for the Fifth Circuit held that a white defense attorney's intentional failure, in the state prosecution proceedings, to charge racial discrimination in the selection of the petit jury would not bar a Negro defendant from

¹¹⁹ *Capital cases*: Berry, Ellisor, Grandsinger, Sheffield. All except Berry had been sentenced to death. *Non-capital cases*: Bland, Bowers, Garton, Green, Johns, Lunce, Mills, Mullreed, Savini, Stoner, Todd, Woods. Some of these cases raised other constitutional issues as well, but the counsel question seems basic. In addition to the above, mention should be made of two Missouri cases, *Houston* and *Montgomery (Mo.)*, in which a state county court granted habeas corpus on the ground of lack of counsel. See also the *Massey* case in which the Supreme Court, but not the district court on remand, saw the controlling issue as lack of counsel. See note 116 *supra*.

¹²⁰ Caminito, Gonzales, Leyra, Wade, White. The *White* case is rather difficult to classify as to the constitutional issue present. White's confession was an adoption of portions of a confession made by his accomplice. This contained matters with which White could have had no personal knowledge. This, plus the fact that White's confession came after long hours of interrogation, suggest that the district court's rationale may have centered on coercion. But the opinion refers at length to cases dealing with the right of confrontation and cross-examination. Perhaps the court viewed it a denial of due process to introduce into evidence a voluntary confession which was an adoption of the statement of another. In *Mills*, petitioner asserted a coerced plea of guilty as well as lack of counsel as the basis for relief.

¹²¹ Almeida, *Montgomery (Ill.)*, Thompson.

¹²² Curran. The federal courts relied upon *Pyle v. Kansas*, 317 U.S. 213 (1942), as standing for the proposition that complicity of the prosecutor is not a necessary condition to the finding of unconstitutionality.

¹²³ DeVita. The decision in this case seems to make the action of the juror the action of a state for purposes of the fourteenth amendment.

¹²⁴ This case has been linked as a motive to the lynching of Mack Parker in Mississippi last year. See *N.Y. Times*, Jan. 4, 1960, p. 1, col. 5, p. 8, col. 4. The court of appeals decision was announced on January 16, 1959. Parker was lynched on April 25, 1959.

raising the issue in federal habeas corpus.¹²⁵ These cases illustrate the role that lower federal courts are playing in exploring the frontiers of constitutional law.

Only one of the cases was decided on a nonconstitutional ground:¹²⁶ the California conviction of an Indian was upset on the claim that the offense was triable only in a federal court by virtue of a statute in which Congress had pre-empted jurisdiction over certain offenses by Indians.¹²⁷

A second extraordinarily significant element revealed in these 35 cases is the extremely serious crimes for which the successful petitioners had been convicted. Fourteen of the group had been found guilty of murder.¹²⁸ There were altogether 17 capital cases.¹²⁹ In nine, the sentence imposed was death.¹³⁰ Fifteen of the successful petitioners were serving sentences of life imprisonment.¹³¹ In the 11 remaining cases, the penalties were heavy: the mean maximum sentence was 24.8 years; the median, 25 years.¹³²

The most likely explanation for the absence of lesser convictions from the group is the time factor. There is no reason to believe that constitutional guarantees are more rigorously followed in prosecution of minor crimes. Except perhaps where the public outcry for retribution is great, it is natural, rather, to believe that procedural rights would be more scrupulously observed in the handling of the more serious offenses. But evidently it takes so long to mature a case for federal habeas corpus that the lighter sentences are completed before reaching that stage. This is borne out by the time lapse between con-

¹²⁵ The court of appeals took judicial notice of the fact that lawyers residing in most southern jurisdictions rarely, almost never, raise the issue of systematic exclusion of Negroes from juries. It concluded that failure to challenge the petit jury in the state court did not operate as a waiver of the defendant's constitutional rights. 263 F.2d at 82-83.

¹²⁶ Carmen. The basic statute, it will be recalled, provides that federal habeas corpus lies for state prisoners "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1958). (Emphasis added.)

¹²⁷ The statute was the Ten Major Crimes Act, 18 U.S.C. §§ 1151, 1153, 3242 (1958). The California Supreme Court finally concluded that its state habeas corpus procedure did not extend to cases not presenting a constitutional question and requiring determination of factual issues outside the record. Application of Carmen, 48 Cal. 2d 851, 313 P.2d 817 (1957).

¹²⁸ Almeida, Caminito, Carmen, DeVita, Ellisor, Goldsby, Gonzales, Grandsinger, Houston, Leyra, Sheffield, Thompson, Wade, White.

¹²⁹ Almeida, Berry, Caminito, Carmen, Curran, DeVita, Ellisor, Grandsinger, Goldsby, Gonzales, Houston, Leyra, Montgomery (Mo.), Sheffield, Thompson, Wade, White.

¹³⁰ Almeida, Carmen, DeVita, Ellisor, Goldsby, Grandsinger, Leyra, Sheffield, Thompson.

¹³¹ Berry, Bland, Bowers, Caminito, Curran, Gonzales, Houston, Massey, Mills, Montgomery (Ill.), Montgomery (Mo.), Rhea, Stoner, Wade, White.

¹³² Collins, Daugharty, Garton, Green, Johns, Lunce (2 petitioners), Mullreed, Savini, Todd, Westbrook, Woods. The figures in text were computed on the basis of persons, rather than cases.

viction and the obtaining of relief in the group of successful cases. The longest period was 26 years.¹³³ There were 13 cases in which the time span was 10 years or more,¹³⁴ 24 in which it was five years or more.¹³⁵

A third interesting fact about the 35 cases is their geographical origin. Nineteen states are represented. The largest delegation came from Pennsylvania, which contributed five cases.¹³⁶ Illinois and Indiana had four each.¹³⁷ There were three apiece from New York and Texas,¹³⁸ while Michigan and Missouri each had two.¹³⁹ It is not surprising to find the industrial states, with large urban centers, so heavily represented, simply as a reflection of population statistics. Yet, except for Pennsylvania and New York, the Middle Atlantic and New England region is the source of relatively few cases.¹⁴⁰ So, too, the Far West shows only one case from each of the coastal states, including heavily populated California.¹⁴¹ It is surprising to find so few cases from the South,¹⁴² particularly in light of the constitutional ramifications of the racial problem, not only involving discrimination in jury

¹³³ Montgomery (Ill.). Petitioner was convicted of rape in 1923 and released on federal habeas corpus in 1949. There is no record of his seeking any relief prior to 1947 or 1948, however.

¹³⁴ Caminito, Collins, Garton, Houston, Massey, Mills, Montgomery (Ill.), Montgomery (Mo.), Stoner, Wade, Westbrook, White, Woods. Not all of these can be attributed to a failure of the prisoner to seek relief. See especially Garton, Massey, Westbrook.

¹³⁵ In addition to the cases in note 134 *supra*, these were Bland, Carmen, Curran, Daugharty, DeVita, Goldsby, Green, Johns, Lunce, Rhea, Thompson.

¹³⁶ Almeida, Bowers (when the Pennsylvania conviction was used in a multiple offender proceeding in New York), Collins, Thompson, Woods.

¹³⁷ Illinois: Mills, Montgomery, Stoner, Westbrook. Indiana: Johns, Lunce, Todd, White. Special mention should be made of the prominent place which Indiana has in the roster of successful federal habeas corpus cases. There is much reason to suppose that the quality of the administration of criminal law in Indiana is at least as good, if not better, than in most states. The fact that several Indiana prisoners prevailed in a federal habeas corpus proceeding seems rather a reflection of the work of the Public Defender in that state. Not only does the Defender take an active part in state collateral proceedings, itself an unusual occurrence, but he also represents state prisoners in the Supreme Court of the United States on certiorari from the state court judgments and in federal habeas corpus proceedings.

¹³⁸ New York: Caminito, Leyra, Wade. All were coerced confession cases. Texas: Bland, Ellisor, Massey. Two other cases arose in New York when that state took into account prior invalid convictions in other states for purposes of its multiple offender statute. See notes 161-63 *infra* and accompanying text.

¹³⁹ Michigan: Mullreed, Savini (when the Michigan conviction was used in a New York multiple offender proceeding). Missouri: Houston, Montgomery (Mo.). Both the Missouri courts followed the same pattern. A state trial court, in habeas corpus proceedings, held their convictions void. No appeal lies in Missouri from such an order. A second state court of similar rank, in which the convictions had been obtained, ordered the prisoners "remanded" to prison. Thereupon, the petitioners sought habeas corpus in the Missouri Supreme Court where it was denied.

¹⁴⁰ From New England, there was one case, Green (Maine); in the Middle Atlantic area, DeVita (New Jersey) and Curran (Delaware).

¹⁴¹ California: Carmen; Oregon: Daugharty; Washington: Gonzales.

¹⁴² There were no cases from the southeastern region. In Mississippi there was Goldsby and in Louisiana, Sheffield. The border states of Kentucky and Tennessee each had one case, Berry and Rhea, respectively.

selection, but also the greater need for legal representation among the poorly educated.¹⁴³

The "silent" areas present intriguing questions. Does the silence indicate higher standards for administration of the law and a lower incidence of variation from constitutional norms? Or that the states' collateral remedies are completely adequate to provide relief to any prisoner with a valid grievance? Or does it mean that the pastime of legal activity has not become popular in prisons in these localities?¹⁴⁴ Or does it reflect the relative capacities of the prison populations to understand the nature of their rights and the first steps they must take alone to initiate judicial proceedings? Or does it imply that there are perhaps prison regulations in these areas which forbid, or at least impede, access to a court?¹⁴⁵

Some explanation for the regional lacunae of successful federal habeas corpus petitions may lie in the varying attitudes of federal judges toward postconviction claims. The court that completely misstated the law on the basic principles of habeas corpus in *Wooten v. Bomar*¹⁴⁶ is not a forum where one is likely to find cases in which state prisoners have prevailed. In fact, the only connection between the Court of Appeals for the Sixth Circuit and the 35 successful federal habeas corpus applications studied is one per curiam affirmance of a district court decision in favor of the prisoner.¹⁴⁷

The attitude of inhospitality, while it will reflect openly in some decisions like *Wooten v. Bomar*, has more hidden but immensely more pervading impact in the sphere of summary treatment accorded to the great bulk of applications drawn by state prisoners. Unless the court passing upon these applications reads them sympathetically and with a thorough understanding of the operation of the due process and equal protection clauses through the federal habeas corpus procedures, the possibility of an application receiving more than a glance is negligible.

¹⁴³ The remaining two cases were Grandsinger (Nebraska) and Garton (Colorado).

¹⁴⁴ See Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 17 (1956).

During the fiscal year ending June 30, 1958, the number of federal habeas corpus cases commenced, by circuit, was as follows: first—12; second—132; third—77; fourth—64; fifth—64; sixth—101; seventh—126; eighth—26; ninth—109; tenth—44. [1958] ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 164-69. This table is further broken down by states and federal districts within states. The figures do not, of course, reflect the volume of activity in the state courts.

¹⁴⁵ See *Bailleaux v. Holmes*, 177 F. Supp. 361 (D. Ore. 1959); *United States ex rel. Bongiorno v. Ragen*, 54 F. Supp. 973 (N.D. Ill. 1944), *aff'd*, 146 F.2d 349 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945).

¹⁴⁶ See discussion of this case in text accompanying notes 6-17 *supra*.

¹⁴⁷ *Edwards v. Rhea*, 238 F.2d 850 (6th Cir. 1956), *affirming* 136 F. Supp. 671 (M.D. Tenn. 1955).

It is apparent that some federal courts lack either the sympathy or the knowledge or both.¹⁴⁸

How the Constitutional Issues Were Handled in the State Courts

The state procedures for the litigation of constitutional claims of criminal defendants or prisoners in the 35 cases studied were extremely poor.¹⁴⁹ Their development in the state courts is difficult to summarize because of the many varied factual patterns found. One useful classification, however, can be made on the basis of the disposition of the federal claim in the highest appellate courts of the states.¹⁵⁰ *First*, there were 11 cases which were decided by the highest state appellate court without reaching the substance of the federal claim.¹⁵¹ The disposition expressly rested on some ground other than the merit or lack of merit in the constitutional contentions. *Second*, there were six cases in which the federal claim was presented to the state's highest court, but decision was rendered unfathomable by the absence of any opinion announcing its basis or reasoning.¹⁵² There was a great likelihood that some or all of these had actually been decided entirely on a matter of state law. *Third*, there were eight cases in which the federal claim was never before the highest appellate court of the state.¹⁵³ In a few instances, this was attributable in part to the failure of the petitioner to present his case, though always there was some justification for bypassing the state process. The remaining cases in this group are explained by various procedural hurdles blocking state supreme court review. *Fourth*, and last, there were ten cases in which the state supreme court treated the merits of the petitioner's case¹⁵⁴ or at least apparently did so.¹⁵⁵

¹⁴⁸ Cf. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 54 (1956): "Indeed, the probability that the proportion of meritorious cases is significantly greater than the statistics indicate suggests that what is needed is to provide more rigorous federal judicial scrutiny rather than to confront the prisoner with new obstacles to relief."

¹⁴⁹ Admittedly these cases were selected on the ground that they reached a federal court and were there decided in favor of petitioners. This would exclude from consideration cases in which the state courts, having perceived the merit to a prisoner's contention, granted relief.

¹⁵⁰ The phrase, "highest state appellate court," does not necessarily mean the state supreme court. In this context it refers to the highest court in the state to which a given class of cases can be appealed. See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 46-56 (2d ed. Wolfson & Kurland 1951), for a discussion of the "highest state court" in connection with Supreme Court review.

¹⁵¹ Berry, Bland, Bowers, Carmen, Garton, Goldsby, Houston, Johns, Montgomery (Mo.), Savini, Todd.

¹⁵² Almeida, Ellisor, Grandsinger, Mills, Sheffield, Thompson.

¹⁵³ Daugharty, Gonzales, Green, Montgomery (Ill.), Mullreed, Rhea, White, Woods.

¹⁵⁴ Caminito, Collins, Curran, DeVita, Leyra, Lunce, Massey, Stoner, Wade, Westbrook.

¹⁵⁵ The qualification is added because in some of these cases there was no state court opinion announcing the basis for decision. See note 196 *infra*.

In only two or three of these, however, did the quality of the state procedure approach the minimal standards of disposition on a complete factual record, with counsel representing the prisoner, and full appellate review with a reasoned decision embodied in a written opinion.

One rather significant fact is that where the dispositive federal issue was presented to the state courts, it was usually in the form of a collateral proceeding rather than as a part of the original prosecution and appellate review. In only five cases was that issue raised in proceedings leading to conviction.¹⁵⁶ All the other constitutional litigation in the state courts came in some type of collateral attack, including delayed appeals or delayed motions for new trial.¹⁵⁷

State Court Decisions Not on the Merits of the Federal Claim

The 11 cases in this group comprise most of the written opinions of state courts discovered among the 35 cases. It is a rather significant commentary, perhaps, that this effort was expended on avoiding the constitutional issues rather than deciding them directly.

There were several reasons given for the failure to reach the ultimate merits. Eight of the group were disposed of on the ground that the state had no collateral remedy for the kind of issue sought to be raised.¹⁵⁸ A good example is the *Todd* case. Todd was convicted after a jury trial at which he was not represented by counsel. The prisoner contended on appeal, and the federal court subsequently found, that he had sought appointment of counsel or a postponement to permit him to retain his own counsel.¹⁵⁹ The common-law record in the trial court recited that the defendant had elected to serve as his own counsel and had announced he was ready for trial. The Indiana Supreme Court refused to consider that the record might be wrong. Their holding is summed up in the statement: "On matters of record proper courts speak only through the record."¹⁶⁰

Another situation in which the state courts have experienced difficulty in finding a procedure arises out of multiple offender statutes. Under these a defendant's sentence is often determined with reference

¹⁵⁶ Bland, Caminito, Leyra, Todd, Wade. In addition to these, Gonzales may have raised his contention of a coerced confession at the original trial, but there was no appeal. Mention should also be made of *Almeida* and *Carmen* in which the federal question arose initially in the prosecution stage, although it was effectively presented only in a subsequent collateral attack proceeding. See notes 165, 174 *infra*.

¹⁵⁷ DeVita, Grandsinger, Lunce, Mills.

¹⁵⁸ Berry, Bowers, Carmen, Garton, Houston, Montgomery (Mo.), Savini, Todd.

¹⁵⁹ Lack of counsel was the constitutional basis of attack for nine of the 11 cases in this category. The two cases in which this was not true were *Carmen* and *Goldsby*. See note 119 *supra*.

¹⁶⁰ *Todd v. State*, 226 Ind. at 502, 81 N.E.2d at 532; dissenting opinions are found at 81 N.E.2d at 784, and 82 N.E.2d at 407.

to a prior conviction in another state. Should the defendant challenge that prior conviction at this point, an awkward problem is posed. Two of the 11 cases arose in this way,¹⁶¹ and the sentencing courts in New York declined to review the validity of the prior convictions by sister states.¹⁶² At the same time, the courts of the states of the prior judgments refused to hear petitions for writs of error coram nobis.¹⁶³ Habeas corpus was not available in those states since the petitioners were not in custody there under the challenged sentence.

An unusual situation arose in the *Carmen* case—the only case among the 35 which turns on a federal statute rather than on the Constitution.¹⁶⁴ The distinction was crucial to the litigation in the California Supreme Court, where it was held that the state habeas corpus remedy was not sufficiently broad to encompass a contention not constitutional in origin requiring determination of factual issues outside the record. The particular question was whether Congress had pre-empted jurisdiction over the offense for which petitioner had been tried; even though the California court realized that state jurisdiction had been ousted, and though a death sentence was involved, the court could not find a state remedy.¹⁶⁵

Three of the 11 cases in which the states' highest courts based their decision on a rule of state law were not instances of a lack of any state procedure for litigation of the federal claim.¹⁶⁶ They were, rather, instances of abortion of the state procedures which, so far as the state courts were concerned, forfeited any right to state consideration of the merits.

Goldsby, a Negro, was tried for murder in Mississippi. His white lawyers, one court-appointed, chose not to challenge the grand or petit juries on racial discrimination grounds.¹⁶⁷ That issue was

¹⁶¹ Bowers, Savini.

¹⁶² In *Savini* there was apparently no attempt to present the issue to any New York court, but the Second Circuit indicated that New York would not entertain such an assertion. 205 F.2d at 351.

¹⁶³ In *Savini*, the Michigan Supreme Court ruled that the petitioner might receive a hearing on a coram nobis application when he found it possible to appear before a Michigan court. This decision is not reported but is mentioned in the Second Circuit opinion, note 162 *supra*, at 351.

¹⁶⁴ See notes 126, 127 *supra* and accompanying text.

¹⁶⁵ On direct appeal from the conviction, the California Supreme Court reversed on the ground of federal pre-emption. *People v. Carmen*, 36 Cal. 2d 768, 265 P.2d 900 (1954). On rehearing, the court held that the record was inadequate for such a conclusion and the conviction was affirmed. 43 Cal. 2d 342, 273 P.2d 521 (1954). Thereupon, a habeas corpus proceeding was initiated in the California Supreme Court, and the case was referred to a master who found that the case did in fact come within the exclusive federal jurisdiction. Nonetheless, the state court denied relief. 48 Cal. 2d 851, 313 P.2d 817 (1957). *Certiorari* was denied without prejudice to an application for federal habeas corpus. 355 U.S. 924 (1958).

¹⁶⁶ Bland, Goldsby, Johns.

¹⁶⁷ An attorney from Chicago, who had prepared to challenge the grand and petit juries on this ground, withdrew from the case and turned the papers he had drawn for this purpose over to Goldsby's trial attorneys.

first presented to the state courts in a post-trial application in the state supreme court for habeas corpus and coram nobis. The Mississippi court, relying on a state requirement that challenges to juries must be presented in the preliminary stages of trial, held that the question had come too late. In *Johns*, the petitioner sought coram nobis and obtained a hearing in an Indiana state trial court. From a denial of relief, an appeal was taken to the state supreme court, but when the petitioner's attorney filed the transcript of the lower court proceedings eleven days late the appeal was dismissed, the majority of the court viewing the time requirement as jurisdictional. In the *Bland* case, after the Texas Court of Criminal Appeals had affirmed his conviction, and while a petition for rehearing was pending, the prisoner escaped and remained at large for three weeks. Thereafter, the court set aside its affirmance and dismissed the appeal on the ground of the escape.¹⁶⁸

The problem posed by these cases is one of the most vexing questions found in federal habeas corpus law today. A state prisoner, in the process of litigating a federal claim, has forfeited his opportunity for final state court determination of that claim. Has he also forfeited his federal right? More precisely, what effect should the state forfeiture have in the United States Supreme Court on certiorari from the state judgment?¹⁶⁹ Or in a subsequent federal habeas corpus proceeding? The answer to the latter question can be found only after the recent Supreme Court decision in *Irvin v. Dowd*¹⁷⁰ is analyzed and reconciled with the Court's earlier decision in *Daniels v. Allen*.¹⁷¹ This

¹⁶⁸ *Bland* also raised the same federal question in an application for habeas corpus in the Texas Court of Criminal Appeals. This application was denied by the court on the ground that the petitioner had had his day in court.

¹⁶⁹ The question would focus in terms of the established rule that the Supreme Court lacks jurisdiction to review the decision of a state court which rests upon an independent and adequate nonfederal ground. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 421-443 (1953); *ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* §§ 89-103 (2d ed. Wolfson & Kurland 1951).

¹⁷⁰ 359 U.S. 394 (1959). The facts of the *Irvin* case are very similar to those in the *Bland* case. Irvin's escape from custody came while a motion for new trial was pending before the state trial court following conviction. On grounds of his absconding, the motion was denied. The Indiana Supreme Court affirmed on the basis of the escape rule but went on to say that, even though it was unnecessary for the decision, the court had examined the constitutional issues raised by Irvin and found them without merit. *Irvin v. State*, 236 Ind. 384, 139 N.E.2d 898 (1957). The Supreme Court denied certiorari without prejudice to an application for federal habeas corpus after exhausting state remedies. 353 U.S. 948 (1957). The federal district court and the court of appeals denied relief because the state proceedings had aborted. *Irvin v. Dowd*, 153 F. Supp. 531 (N.D. Ind. 1957), *aff'd*, 251 F.2d 548 (7th Cir. 1958). The Supreme Court held that Irvin was entitled to a federal habeas corpus hearing on the merits of his claims and remanded the case.

¹⁷¹ *Daniels* was decided *sub nom.* *Brown v. Allen*, 344 U.S. 443 (1953). The issue in *Daniels* arose when the attorney for the defendant was one day late in filing the appeal from the conviction in the North Carolina Supreme Court. That court accordingly declined to entertain the appeal. The Supreme Court held that this failure to use a state channel, which was adequate and easily availed of, foreclosed federal habeas corpus relief.

is a major undertaking, since the rationale of neither case is clear, and lies beyond the scope of this Article.¹⁷² Suffice it to say here that none of the efforts to build a rational principle or system for this aspect of federal-state relations has been satisfactory.¹⁷³

Unfathomable State Court Decisions

Not a great deal can be said about those six cases in which the state courts' decisions are shrouded in silence. In the absence of a written opinion, it is impossible to know with certainty what was decided or why. It is quite conceivable, and indeed likely, that some or all of them were disposed of on a nonfederal ground.

All were original or extraordinary applications for relief in the highest state court.¹⁷⁴ Although each of the prisoners was facing a death sentence, in not one of the cases did the court make or authorize a factual inquiry into the contentions advanced. The decisions apparently rested entirely upon the papers filed and the arguments, if any, of counsel. Yet the constitutional questions in these cases could

¹⁷² The analysis would necessarily extend to three major sets of doctrine. First is the requirement of exhaustion of state remedies as a condition precedent to federal habeas corpus proceedings; where the state litigation has been aborted through a failure to comply with state procedures it may be questioned whether the exhaustion requirement has been met. Second, there are the well-established rules on waiver of constitutional rights which could operate in this context to extinguish the rights asserted in the state proceedings. See, e.g., *Parker v. Illinois*, 333 U.S. 571 (1948). The third doctrinal complex to be considered is centered in the rule that the Supreme Court lacks jurisdiction to review a state judgment which rests upon an independent and adequate nonfederal ground; the same principles could be applied, perhaps, to determine the scope of federal habeas corpus jurisdiction. This latter was the position of the dissenters in *Irvin v. Dowd*, 359 U.S. 394, 407, 412 (1959). The majority decided the case in terms of the exhaustion requirement. Full treatment of the problem would entail not only analysis of each of these three areas independently, but also their interrelationship.

¹⁷³ Apart from the opinions in the Supreme Court and the lower federal court decisions, the principal effort in this area is the recent article by Professor Henry Hart in which he advances the thesis that the independent-and-adequate-nonfederal-ground rule should be incorporated as a standard for determining the scope of federal habeas corpus jurisdiction. Hart, *Foreword to The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959). This follows the position taken by the four dissenting Justices in the *Irvin* case. 359 U.S. at 412, 416-17.

¹⁷⁴ *Almeida*, *Ellisor*, and *Thompson* were applications for habeas corpus filed in the state supreme court. In an earlier motion for new trial, Almeida had suggested the possibility that evidence had been suppressed, but the allegation of willful suppression was not made until the habeas corpus application. Prior to the application in the Texas Court of Criminal Appeals, Ellisor sought habeas corpus in a Texas trial court without avail. In Sheffield's case, the federal issues were presented to the Louisiana Supreme Court in an extraordinary petition for certiorari, mandamus or prohibition. The petition was summarily denied. Mills took a delayed appeal on the common-law record to the Illinois Supreme Court some eleven years after conviction. That court affirmed without opinion. Thereafter, an application for habeas corpus in a county court was also denied. Grandsinger's constitutional claims were presented to the Nebraska Supreme Court in an amended and supplemental petition for rehearing of the judgment affirming conviction. The state court granted a motion for leave to file the petition and summarily denied the petition without opinion.

not be fairly decided in so summary a fashion. Two involved serious allegations of wilful prosecution suppression of evidence favorable to the accused.¹⁷⁵ The others presented difficult questions of right to counsel.¹⁷⁶ The cavalier disposition without explanation lends support to the view that the courts did not decide the merits of the claims, but rather found they were not properly presented for decision.

This was the inference drawn by the Court of Appeals for the Third Circuit in the *Almeida* case.¹⁷⁷ The Pennsylvania Supreme Court had rejected summarily a petition for habeas corpus alleging wilful suppression of evidence by the prosecution. Chief Judge Biggs spoke for the court of appeals:

“We cannot determine with absolute certainty the reason for the refusal of the writ. Our difficulty in determining why the Supreme Court of Pennsylvania refused the writ is enhanced because the Court took no testimony and made no findings. . . . We cannot assume that the Supreme Court of Pennsylvania was ignorant of the law as laid down by the Supreme Court of the United States”¹⁷⁸

The Third Circuit found a “comparatively simple” explanation in the Pennsylvania rule that the consideration of an application for habeas corpus, under the original jurisdiction of the state supreme court, is discretionary with that court. “It follows therefore, and we think the conclusion is almost irresistible, that the Supreme Court of Pennsylvania denied the writ in the exercise of its discretion and did not pass upon the merits of Almeida’s application.”¹⁷⁹

Federal Claims Never Presented to the Highest State Appellate Courts

The category of cases in which the federal claim never reached the highest appellate court of a state is actually made up of several distinct and separate branches. In one of these eight, an application

¹⁷⁵ *Almeida*, Thompson.

¹⁷⁶ The *Sheffield* case actually involved a multitude of constitutional errors which together revealed that the trial was virtually a sham. The counsel issue (a battery of five lawyers had been appointed to represent the defendant with no time to prepare a defense) was probably the outstanding factor in indicating the lack of a fair trial. In addition to the counsel issue, Mills also alleged a coerced guilty plea.

¹⁷⁷ 195 F.2d 815 (3d Cir. 1952). The legal relevance of this fact to the case before the court is not at all clear.

¹⁷⁸ *Id.* at 822.

¹⁷⁹ *Id.* at 823. The Third Circuit met the argument that Almeida still had a state remedy which he had not exhausted, namely an application for habeas corpus to a county court in Pennsylvania, by finding that “no lower Pennsylvania Court could be reasonably expected, in view of the action of the Supreme Court of Pennsylvania . . . , to grant the writ to Almeida.” *Id.* at 824. Compare *Medberry v. Patterson*, 174 F. Supp. 720 (D. Colo. 1959), holding that there had not been exhaustion of state remedies in a similar situation.

for state habeas corpus decided by a trial level court,¹⁸⁰ the state followed the common-law rule, still vital in many jurisdictions, which did not permit appeal of a decision in habeas corpus.¹⁸¹ Even where appellate jurisdiction had been conferred within the hierarchy of state courts, in four cases the prisoner was unable to take advantage of an appeal in a habeas corpus proceeding and the final judgment was that of a lower tribunal.¹⁸² In three of these, the obstacle was financial: docketing fees,¹⁸³ appeal bonds,¹⁸⁴ or the cost of a printed record and briefs.¹⁸⁵ The state courts, regarding the proceedings as civil, found no in forma pauperis procedure for indigents whereby these monetary prerequisites could be waived.

The federal claim in another of the eight cases was never presented to any state court, high or low.¹⁸⁶ The exact dimensions of the constitutional problem, involving the use of the confession of an accomplice against the petitioner, are hardly clear in the federal court's opinion;¹⁸⁷ but the district judge excused petitioner's failure to secure a state determination on the ground that there was no remedy available.

The *Gonzales* case also involves a confession ultimately found to have been coerced. At the original trial, the issue of coercion¹⁸⁸ was submitted to the jury simultaneously with the issue of guilt or innocence, and the jury's actual determination on coercion was concealed in the general verdict of guilty. An appeal from this conviction was never perfected.¹⁸⁹ This terminated the only state court litigation of the dispositive constitutional question.¹⁹⁰

¹⁸⁰ *Montgomery (Ill.)*. This case arose prior to the adoption of the Illinois Post-Conviction Hearing Act. That statute did not supersede the habeas corpus remedy, and the same pattern of a final state habeas corpus adjudication in a trial court can still occur. See, e.g., Westbrook.

¹⁸¹ CHURCH, *THE WRIT OF HABEAS CORPUS* §§ 389*b-e* (2d ed. 1893).

¹⁸² Green, Mullreed, Rhea, Woods.

¹⁸³ Woods.

¹⁸⁴ Rhea.

¹⁸⁵ Green was denied relief by a single judge of the Maine Supreme Judicial Court, but the lack of an in forma pauperis procedure to waive the costs of printed briefs and record precluded an appeal to the court en banc. A federal district court held recently that failure to seek certiorari to the lower state court, when appeal is precluded by a financial barrier, is a violation of the rule of *Darr v. Burford*, United States *ex rel.* Carrono v. Richmond, 177 F. Supp. 504 (D. Conn. 1959).

¹⁸⁶ White.

¹⁸⁷ See note 120 *supra*.

¹⁸⁸ It is not clear whether the objection to the confession was put in constitutional terms or simply as a matter of admissibility under common-law rules of evidence.

¹⁸⁹ This may have been an instance of court-appointed counsel withdrawing from the case at the conclusion of the trial court proceeding. In any event, the federal courts did not discuss the failure to appeal under the requirement of exhaustion of state remedies.

¹⁹⁰ A subsequent petition for habeas corpus in the Washington Supreme Court did not raise the issue of a coerced confession. Both the district court and the court of appeals in the federal habeas corpus proceeding cited the state habeas corpus phase as indicating that state remedies had been exhausted.

Finally there is one case in which it is fairly clear that the federal claim, as such, was never raised in the state courts.¹⁹¹ The dispositive issue concerned a free transcript of the proceedings in a state habeas corpus hearing.¹⁹² The prisoner was doggedly pursuing other constitutional claims¹⁹³ and merely sought the transcript in order to take an appeal. The Ninth Circuit, subsequently granting relief, alluded to the absence of clear presentation of the controlling issue to the state courts (as well as to the federal district court),¹⁹⁴ but stated simply that a prisoner need not "cite to the state court book and verse on the federal constitution."¹⁹⁵ The court added that the long delay in the prisoner's fight for relief, unaided along the way by counsel, justified the court of appeals in ordering immediate remedy without further proceedings.

State Court Decisions on the Merits of the Federal Claims

There were ten cases among the 35 studied in which the highest state courts decided, or apparently decided, the federal issues on their merits.¹⁹⁶ Even in this category, however, the quality of the state court handling of the cases was largely inadequate. Three prisoners struggled through several successive stages of their respective states' collateral attack procedures without the assistance of counsel.¹⁹⁷ One of them in addition had to face the paradox that his constitutional contention concerned denial of counsel at his original trial. This put him in the position of attempting to prove by his own wits that he lacked the wit to stand trial initially. The Texas Court of Criminal Appeals found his performance in the habeas corpus proceeding so good that it satisfied them he did not need counsel during the trial of his guilt or innocence.¹⁹⁸

Five other cases received full processing in the state courts with one major omission: the highest state courts wrote no opinions at all

¹⁹¹ Daugharty.

¹⁹² The constitutional claims were similar to those in *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁹³ His principle contention was that the forgery statute, under which he had been convicted, was repealed when Oregon joined the Union.

¹⁹⁴ 257 F.2d at 758.

¹⁹⁵ *Ibid.*

¹⁹⁶ In some cases, where the state courts published no opinions, it is not known what the exact grounds for decision were. Since the issues were presented to the courts and there is no reason to believe that their decisions rested on matters of state law or procedure, it is fair to conclude that the federal questions were decided. See *Williams v. Kaiser*, 323 U.S. 471 (1945). This group has been classified separately from the other cases in which the state courts wrote no opinions on the basis of the presence in those others of a possible state basis for the decision. See the discussion of *Almeida* in text at notes 177-79 *supra*.

¹⁹⁷ *Collins, Massey, Westbrook*.

¹⁹⁸ *Ex parte Massey*, 157 Tex. Crim. 491, 249 S.W.2d 599 (1952).

or wrote opinions which failed to treat the federal question.¹⁹⁹ Since that issue was presented to the court in each case, it is fairly safe to assume that it was decided on the merits. Two were New York murder cases, arising at approximately the same time in the early 1940's, both involving confessions later found to have been coerced.²⁰⁰ At the trial, the factual issue of coercion was submitted to the jury encompassed within the larger question of guilt or innocence. In both, the appellate division and the court of appeals affirmed convictions in brief memorandum opinions.²⁰¹ Also among these five is the famous *Leyra* case, another New York murder prosecution in which a coerced confession was used. On appeal from conviction the court of appeals wrote two opinions, but neither the majority nor the dissent discussed the issue of coercion in federal constitutional terms.²⁰² That the issue was raised in that dimension is assured by the summary of arguments of counsel published in the New York reports.²⁰³

Another of the five cases in which the state court's opinions did not openly consider the role of the federal constitution and the *United States Reports* is the *DeVita* case in New Jersey. The constitutional claim, raised in a delayed motion for new trial,²⁰⁴ was based upon the fact that one of the jurors had failed to reveal that he had been the victim of a robbery similar to the one underlying the murder prosecution of DeVita. The New Jersey Supreme Court analyzed the problem within the framework of state law and procedure, although the opinion of the court states that the motion for new trial asserted a denial of due process of law.²⁰⁵ In explanation of the state court's action, it should

¹⁹⁹ Caminito, DeVita, Leyra, Stoner, Wade. See also Westbrook. The Illinois Circuit Court entered an order denying Stoner's writ of error in a postconviction proceeding on the ground that he had failed to establish that his constitutional rights had been violated. This conclusion was not amplified or supported.

²⁰⁰ Caminito, Wade.

²⁰¹ Although not revealed in opinions of the state courts, the Second Circuit indicated that the federal question was properly raised at the original prosecution and appeal in both of these cases. Caminito, 222 F.2d at 699; Wade, 256 F.2d at 8-9.

In subsequent state proceedings, Caminito sought twice without success to have reargument of his appeal in the New York Court of Appeals. Wade made one futile attempt to secure reargument; he also instituted a coram nobis proceeding which did not raise the confession question. For a discussion of the latter phases of the *Wade* case by the counsel who represented the prisoner, see Roemer, *Court Appointed Counsel for the Indigent Appellant*, 3 Colum. L. Alumni Bull., Oct. 1958, p. 1.

²⁰² 304 N.Y. 468, 108 N.E.2d 673 (1952).

²⁰³ 304 N.Y. at 469.

²⁰⁴ The ultimately dispositive federal question was not presented either on appeal from the conviction or in a prior state habeas corpus proceeding, but it appears that the facts were not known to the prisoners or their counsel at those stages.

²⁰⁵ *State v. Grillo*, 16 N.J. 103, 106, 106 A.2d 294, 295 (1954). The court did cite one Supreme Court decision, but this was in dictum on whether the contention had been waived because not diligently raised.

be noted that the later finding by the federal courts of a constitutional violation marked a distinct advance in the law of due process.²⁰⁶

Finally, there were two cases in which the treatment accorded by the states was plenary. In *Lunce*, the issue was lack of counsel. The facts showed that an Indiana defendant had been represented at his trial by a lawyer, apparently of his own choosing, who was a member of the Ohio bar only. The case was very poorly tried. When the initial steps toward appeal were also mishandled, the Indiana Supreme Court asked the Public Defender to take the case and, at this stage, the Defender made the charge of lack of effective counsel. The Indiana court held that the errors of counsel did not rise to a violation of constitutional guarantees.²⁰⁷ The federal courts disagreed.

In *Curran*, the issue was perjury by a police officer without the knowledge of the prosecutor. The Delaware court held that "the federal rule appears to be that perjury by a witness is not a denial of due process unless brought home to the prosecuting officer."²⁰⁸ Thereafter, the federal courts, relying on a little known interpretation of *Pyle v. Kansas*,²⁰⁹ ruled that perjury by a state official afforded in itself sufficient basis for upsetting the conviction.

These 35 cases demonstrate the urgent necessity for the present federal habeas corpus jurisdiction. The significance of the constitutional rights involved goes beyond a simple technical requirement of compliance with procedural rules. The purpose of the guarantees of due process and equal protection in the ultimate is to prevent conviction of the innocent. In two cases, that fundamental truth is brought home in the most dramatic fashion. Both Leyra and Grandsinger were sentenced to death for state crimes. The New York Court of Appeals brushed Leyra's claim of a coerced confession aside without expressing any views on its merit.²¹⁰ The Nebraska Supreme Court summarily dismissed Grandsinger's serious contention of lack of effective assistance of counsel.²¹¹ After these convictions had been set aside in federal

²⁰⁶ The conclusion that nondisclosure of a past experience by a juror on *voir dire* examination constitutes state action within the meaning of the fourteenth amendment is certainly not a self-evident proposition. This issue is not discussed in the federal court opinions.

²⁰⁷ It should be noted that several years prior to this case the Indiana Supreme Court had held that a conviction must be reversed under the federal and state constitutions where counsel for the defendant had mishandled the case. *Wilson v. State*, 222 Ind. 63, 51 N.E.2d 848 (1943). In the *Lunce* case, the Indiana court found that *Wilson* was distinguishable.

²⁰⁸ 49 Del. at 595, 122 A.2d at 130.

²⁰⁹ 317 U.S. 213 (1942).

²¹⁰ 304 N.Y. 468, 108 N.E.2d 673 (1952).

²¹¹ The order of the state court is unreported. Certiorari was denied in *Grandsinger v. Nebraska*, 352 U.S. 880 (1956).

habeas corpus, both were retried. Leyra was prosecuted without the coerced confession and the New York Court of Appeals held that there was insufficient evidence to support a conviction and ordered the indictment dismissed.²¹² Grandsinger was retried with new counsel and found not guilty.²¹³ But for federal habeas corpus, these two men would have gone to their deaths for crimes of which they were found not guilty.

Petitions for Certiorari to the State Courts

As each of the 35 cases surveyed presented a question of federal law,²¹⁴ each came within the Supreme Court's jurisdiction to review state judgments and might have been reversed by the Court on certiorari to the state court.²¹⁵ Indeed, the rule of *Darr v. Burford*,²¹⁶ requiring that ordinarily a state prisoner seek certiorari as a prerequisite to initiating a federal habeas corpus proceeding, should have operated to actualize this possibility. But the previous discussion of developments within the state court systems makes it eminently clear that in virtually

²¹² *People v. Leyra*, 1 N.Y.2d 199, 134 N.E.2d 475, 151 N.Y.S.2d 658 (1956).

²¹³ *Lincoln Star* (Neb.), Nov. 27, 1958, p. 1, col. 1.

²¹⁴ Perhaps a *de facto* exception must be made for the *White* case. See note 120 *supra*.

²¹⁵ Under 28 U.S.C. § 1257 (1958), final judgments of state courts in cases which present a federal question may be reviewed by appeal (as of right) or by writ of certiorari (in the discretion of the Court). The right of appeal is narrowly limited to two classes of cases. Under § 1257(1), an appeal lies if a state court holds a federal statute or treaty invalid. In the only one of the 35 cases involving a federal statute, *Carmen*, the state court decided the case on questions of state procedure. Under § 1257(2), an appeal lies if a state court upholds a state statute against a challenge that it is repugnant to the Constitution, treaties, or laws of the United States. Virtually none of the cases considered concerned attacks upon state statutes, although there were two cases, *Collins* and *Rhea*, which raised the issue of lack of notice to the defendant that an habitual offender statute would be invoked in fixing sentence. While this question might have been framed so as to permit an appeal, *Collins* sought certiorari and *Rhea* never attempted to get Supreme Court review.

²¹⁶ 339 U.S. 200 (1950). The sanction applied in *Darr v. Burford* for failure to seek certiorari after the state judgment was foreclosure of the federal habeas corpus remedy. If the state court should entertain the claim on the merits again and an application for certiorari were made and denied, then federal habeas corpus would then be available. See *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953). Even where the state court refused on *res judicata* grounds to decide the merits again, an application for certiorari has been held to reopen federal habeas corpus procedures. *United States ex rel. Collins v. Claudy*, 204 F.2d 624 (3d Cir. 1953). But the Supreme Court has said that where a state judgment rests upon an adequate state ground, and *res judicata* is probably such, it is unnecessary to petition for certiorari. *White v. Ragen*, 324 U.S. 760 (1945).

There is plainly a need to rethink the problem posed by failure to seek certiorari from a state judgment—if such a requirement is to be retained—particularly with respect to the penalty attached. One seeks in vain in *Darr v. Burford* for any realization on the part of either the Court or the dissent that the decision probably meant a total forfeiture of the constitutional rights of the state prisoner; and again in *Collins* for any understanding that the certiorari petition was a useless gesture. See also the admittedly "harsh" ruling in *United States ex rel. Carrono v. Richmond*, 177 F. Supp. 504 (D. Conn. 1959).

none of these 35 cases could the power of the Supreme Court have been employed.

Plainly enough, where the federal question had never been presented to the state courts, there was no state judgment to be brought to the United States Supreme Court. Likewise, where the state litigation terminated below the highest court of the state system, the Supreme Court may not have been in a favorable position to grant review.²¹⁷ Even where the states' highest courts passed upon the cases, the bases for their decisions or the generally poor quality of the procedures followed effectively precluded, in almost every instance, review of the judgment by the Supreme Court of the United States.

When the state court rested its judgment on the unassailability of the common-law record or the narrow scope of the state's habeas corpus jurisdiction, that court was holding, in short, that there was no state remedy available for the type of federal claim asserted. Unless the Supreme Court were to say that the Constitution requires a state to create a remedy where none has heretofore existed, the judgment of the state court stands on an adequate and independent nonfederal ground. On well established principles of Supreme Court jurisdiction, such a judgment will not be reviewed.²¹⁸

There is a practical, if not jurisdictional, bar to Supreme Court review where the proceedings in the state courts have been procedurally inadequate, and particularly where the lack of a written opinion in the state court leaves in doubt whether the basis for the decision is a matter of federal or state law.²¹⁹ Even where there is fair assurance that the federal question was decided, there is little point for Supreme Court consideration if the basic record is incompletely or inexpertly compiled. And where the state judges have not prepared reasoned opinions on the issues, the Supreme Court lacks the considered guidance which might have been provided through lower court analysis of the dimensions and depth of the problem.

A thorough study of the petitions for certiorari and related papers which were in fact submitted to the Supreme Court in those of the 35 cases in which review was sought reinforces the conclusion that the Court probably could not have taken more than one or two of them. In

²¹⁷ Particularly lacking in many such instances is the critical and informed analysis of a problem which comes from one or two stages of appellate review of a case by state courts. There may be the additional problem of unresolved doubt on a matter of state law which has not been passed on by the state supreme court.

²¹⁸ See note 169 *supra*.

²¹⁹ The Supreme Court has held that it lacks jurisdiction to review a state judgment if the question of a state ground to support the judgment is even debatable. *Durley v. Mayo*, 351 U.S. 277 (1956); *Stembridge v. Georgia*, 343 U.S. 541 (1952); *Bachtel v. Wilson*, 204 U.S. 36 (1907); *cf. Williams v. Kaiser*, 323 U.S. 471 (1945).

13 cases the Court had no opportunity even to consider the matter, for no petition for certiorari raising the dispositive federal question was filed.²²⁰ Included among the 13 are five of the eight cases in which the ultimately dispositive federal question was never presented to the highest state court either.²²¹ The remainder are comprised of four in which the states' highest courts invoked a rule of state law as a basis for their judgments,²²² two in which the basis of the state judgment was unfathomable,²²³ and two in which the state courts decided the federal issue adversely to the prisoners.²²⁴

Petitions for certiorari raising the dispositive federal question were filed in 22 of the 35 cases.²²⁵ All were denied. In several instances, however, the denial was supplemented or explained. The Court expressly noted in one order that the petition for certiorari had been filed out of time.²²⁶ On another occasion, Justices Black and Douglas noted a dissent.²²⁷ Two others were set apart by the increasingly seen qualification that the denial was without prejudice to an application for habeas corpus in an appropriate federal district court.²²⁸ One of these was the case in which the California Supreme Court, after considerable struggle, was unable to find a state remedy.²²⁹ The other arose in Louisiana, the order below having denied without written opinion an original application for an extraordinary writ.²³⁰

²²⁰ Daugharty, DeVita, Ellisor, Gonzales, Green, Johns, Massey, Montgomery (Mo.), Rhea, Savini, Thompson, Todd, White. In five of these cases, there was a petition for certiorari, but at some stage of the case prior to the raising of the dispositive federal question. Daugharty, DeVita, Gonzales, Massey, Thompson. The first certiorari petition filed by Westbrook comes within this class.

²²¹ Daugharty, Gonzales, Green, Rhea, White.

²²² Johns, Montgomery (Mo.), Savini, Todd.

²²³ Ellisor, Thompson.

²²⁴ DeVita, Massey. These two cases raise difficult questions in light of the rule of *Darr v. Burford*, 339 U.S. 200 (1950), that a certiorari application must be filed from the state judgment. All of the other petitioners might have invoked the excuse that the state judgment had not rested upon the merits of the federal claim. *White v. Ragen*, 324 U.S. 760 (1945). In *Massey*, the federal courts never considered the problem. In *DeVita*, where death sentences were involved, the Third Circuit held that the lack of a petition for certiorari was excused because the district court had granted a stay of execution after three Supreme Court Justices had denied requests for a stay. 216 F.2d 743 (3d Cir. 1954). The court of appeals overlooked the possibility that the petition for certiorari could have been filed while the stay issued by the district court was in effect, even though they cited a case in which exactly that procedure had been followed. *Thomas v. Teets*, 205 F.2d 236 (9th Cir. 1953).

²²⁵ Almeida, Berry, Bland, Bowers, Caminito, Carmen, Collins, Curran, Garton, Goldsby, Grandsinger, Houston, Leyra, Lunce, Mills, Montgomery (Ill.), Mullreed, Sheffield, Stoner, Wade, Westbrook, Woods. There were two petitions for certiorari in four of these cases, Almeida, Bland, Mills, Wade; and three petitions in Westbrook.

²²⁶ Houston.

²²⁷ Caminito.

²²⁸ This order is discussed in text accompanying notes 256-306 *infra*.

²²⁹ Carmen.

²³⁰ Sheffield.

The quality of the petitions in these 22 cases was substantially better than the general run of cases on the Miscellaneous Docket of the Supreme Court.²³¹ There were nine cases, for example, in which the petitions were prepared by lawyers.²³² In each, a record was filed with the petition.²³³ And, in six of the nine cases, the state filed a response by way of opposition;²³⁴ such responses by states are rare on the Miscellaneous Docket.

Although we have it on good authority that speculation on the reasons for denial of certiorari is not likely to be profitable, the rationale of *Darr v. Burford* perhaps justifies closer examination of that group of cases in which the state courts decided the federal question on its merits.²³⁵ These were the most likely grist for Supreme Court review. Yet, despite the Court's clear assumption in *Darr v. Burford* of a special obligation to consider this kind of judgment of state courts, certiorari was not granted in any of them.

It will be recalled that there were ten cases in this category. As stated earlier, in two of them the Supreme Court had no opportunity to review the state judgment since no petition for certiorari raising the dispositive federal question was filed.²³⁶ In two more cases,²³⁷ Supreme Court review was impossible at the time when the certiorari application was filed, the prisoner having sought certiorari not from the state court's judgment on the merits, but rather after a later state proceeding in which the state court rested its judgment on principles of state law.²³⁸ Thus, as concerned the judgment which was the subject

²³¹ See text accompanying notes 74-75 *supra*.

²³² Almeida (both petitions), Carmen, Curran, Garton, Goldsby, Grandsinger, Leyra, Lunce, Sheffield. Almeida is officially reported as moving *pro se*, because his attorneys were not members of the bar of the Supreme Court. In two other cases, the high quality of the petition and the capacity of the prisoner are so inconsistent that one must conclude that the petitions were actually drafted by a skilled attorney: Collins and Montgomery (Ill.).

²³³ There were records filed in six other cases as well. Berry, Bland (first petition), Mills (partial), Montgomery (Ill.), Mullreed, Wade (first petition).

²³⁴ Almeida (first petition), Curran, Garton, Goldsby, Grandsinger, Leyra. Responses were also filed in two other cases: Wade (first petition), and Westbrook (second petition).

²³⁵ The emphasis in this discussion is on the feasibility of Supreme Court review of state judgments, on the assumption that the Court is consciously following the policy of wide review of those judgments.

²³⁶ See note 224 *supra* and accompanying text.

²³⁷ Caminito, Collins.

²³⁸ In *Caminito*, the only petition for certiorari was filed after the New York Court of Appeals had denied without opinion a second motion for reargument. This motion, coming some eleven years after the original judgment of affirmance, was clearly addressed to the discretion of the state court. Collins had the misfortune to be impaled on the rule of *Darr v. Burford*. He had sought state habeas corpus and gone through several stages of federal habeas corpus litigation when that case was announced. The lower federal courts promptly terminated Collins' federal habeas corpus case because he had never applied for certiorari from the state habeas corpus judgment. Thereupon Collins started a new state habeas corpus case, was denied on grounds of *res judicata*, and then applied for certiorari.

of the certiorari petition, there probably was an independent and adequate nonfederal ground.²³⁹

Of the remaining six cases, in four there were no opinions of the state courts dealing with the federal question.²⁴⁰ Such lower court opinions are important to the work of the Supreme Court, as they not only tend to bring out and focus the precise issues, but assist the Supreme Court in analyzing the problems presented. Take, for example, the *Leyra* case. Within a span of one year, the case was twice presented to the Supreme Court for review: first on application for review of the New York Court of Appeals' affirmance of Leyra's conviction; then on application for review from the lower federal courts' denial of habeas corpus. All the factual evidence was part of the original trial transcript and was before the Court on both applications. The one difference in the record was that, whereas the New York courts had provided no written opinions on the constitutional issue,²⁴¹ the lower federal courts published three opinions, including the sharply clashing views of Judges Clark and Frank in the Second Circuit.²⁴² The Supreme Court granted certiorari in the habeas corpus case and ultimately ordered the New York conviction set aside.²⁴³

In the final two cases, the possibility of Supreme Court review was not reduced by the quality of the proceedings in the state courts. The Delaware courts in the *Curran* case and the Indiana courts in the *Lunce* case had given plenary consideration to the asserted federal questions. The reason, or reasons, why these cases did not win the votes of four of the Justices to grant certiorari cannot, of course, be known.

These 35 cases, in the Supreme Court, reveal the lack of merit in the proposition that federal constitutional rights of state prisoners can be protected adequately by Supreme Court review of the judgments of state courts, the proposition put forward by those who favor abolition or sharp delimitation of the federal habeas corpus jurisdiction.²⁴⁴ The fact of the matter is that, with very minor exception, the Supreme Court was powerless to review the state judgments. Nevertheless, the state prisoners obtained relief in a subsequent federal habeas corpus proceeding.

²³⁹ See note 169 *supra*.

²⁴⁰ *Leyra*, Stoner, Wade, Westbrook.

²⁴¹ 304 N.Y. 468, 108 N.E.2d 673 (1952).

²⁴² 208 F.2d 605 (2d Cir. 1953).

²⁴³ 347 U.S. 556 (1954). For a recent case holding that the absence of findings of fact and opinions in the state courts necessitates independent scrutiny in federal habeas corpus see *United States ex rel. Sileo v. Martin*, 269 F.2d 586 (2d Cir. 1959).

²⁴⁴ See note 31 *supra* and accompanying text.

The Federal Habeas Corpus Proceeding

Little need be said here about the federal habeas corpus stage of the cases studied. But it is significant to note the sharply rising frequency of these successful petitions for federal habeas corpus relief. The 35 cases spread across a twelve-year span, with 80 per cent of the cases in the second six years and 40 per cent in the last two complete years.²⁴⁵ Whether this trend will continue in the future is a matter of conjecture, of course, but the developments do indicate that federal habeas corpus practice will play an ever increasing role in the application of the Constitution within the administration of state criminal law.

The bulk of these cases—27—were decided in favor of the state prisoner in the district courts. In seven instances, the petitioner won his case on the merits in a court of appeals after having been denied relief by a district court.²⁴⁶ There was only one case in which a prisoner lost in both of the lower federal courts but prevailed in the Supreme Court of the United States.²⁴⁷

It was somewhat surprising to find a relative absence of appeals by the states from district court judgments in favor of state prisoners.²⁴⁸ There was no such appeal in 14 of the 27 cases,²⁴⁹ including eight of the 11 in which the state courts had decided the cases on a nonfederal ground.²⁵⁰ Similarly, of 19 court of appeals judgments in favor of a state prisoner,²⁵¹ the states petitioned for certiorari in the Supreme Court in only nine.²⁵² The Supreme Court refused to grant review of any of them, even though some of the decisions below broke new and

²⁴⁵ The date selected for this purpose was the date of the court of appeals judgment or Supreme Court decision in those cases in which the state prisoner first prevailed at an appellate stage. Otherwise the date is that of the district court decision. The pattern by year is as follows: 1959—2; 1958—8; 1957—6; 1956—2; 1955—5; 1954—5; 1953—3; 1952—0; 1951—1; 1950—0; 1949—2; 1948—1.

²⁴⁶ Caminito, Collins, Daugharty, DeVita, Goldsby, Thompson, Wade.

²⁴⁷ Leyra.

²⁴⁸ In light of the strong feeling among state officials that a federal district court should not "reverse" the judgments of state courts, it is difficult to understand why no effort was made to obtain a decision from a higher federal court. See text accompanying note 314 *infra*.

²⁴⁹ Berry, Bland, Carmen, Garton, Houston, Johns, Massey, Montgomery (III.), Montgomery (Mo.), Mills, Mullreed, Stoner, Todd, White. In addition to these, Louisiana tried to appeal in the *Sheffield* case and was denied a certificate of probable cause. See 28 U.S.C. § 2253 (1958). The state thereupon sought common-law certiorari in the Supreme Court under 28 U.S.C. § 1651(a) (1958), without success.

²⁵⁰ Berry, Bland, Carmen, Garton, Houston, Johns, Montgomery (Mo.), Todd.

²⁵¹ These include the seven cases decided in favor of the state prisoner for the first time in the court of appeals and 12 affirmances of district court decisions. The figure 19 does not include the *Sheffield* case in which the court of appeals refused to give the state a certificate of probable cause to appeal. See note 249 *supra*.

²⁵² Almeida, Caminito, Curran, DeVita, Goldsby, Gonzales, Grandsinger, Thompson, Wade. This does not include the Louisiana common-law certiorari petition in the *Sheffield* case. See note 249 *supra*.

important ground in the matter of constitutional law²⁵³ or evolved novel and questionable theories of what constitutes exhaustion of state remedies.²⁵⁴

This "hands off" policy²⁵⁵ with respect to federal habeas corpus litigation is not entirely consistent with the principle, adopted in *Darr v. Burford*, that the Supreme Court has a special responsibility to review state criminal judgments. The Court was there speaking in the context of certiorari to the state courts, but the principle would appear to have as much, if not more, applicability in the federal habeas corpus stage. Where the lower federal courts have granted relief to a state prisoner, they have singled out a case as worthy of Supreme Court consideration. Congress might amend the chapter of the Judicial Code to permit appeal to the Supreme Court as of right, rather than the current pattern of review by certiorari, in such instances. The same effect could be achieved without legislative action if the Supreme Court modified its practice to afford more frequent review of federal habeas corpus cases on petition for certiorari by a state. Either of these changes would remove much of the onus now falling on the lower federal courts for upsetting state judgments. An entirely different perspective would be given to the attacks which have been made on the federal habeas corpus jurisdiction by associating it solely with the lower federal courts.

V. DENIAL OF CERTIORARI "WITHOUT PREJUDICE . . ."

One of the most puzzling aspects in the relationships between state and federal courts in state criminal cases regards an unusual practice which is being followed by the Supreme Court. With ever increasing regularity, the Court's order list has contained denials of certiorari qualified by the phrase, "without prejudice to an application for habeas corpus in an appropriate United States District Court."²⁵⁶ Two such orders appear in the histories of the 35 cases discussed above.²⁵⁷

A survey of the *United States Reports* has brought to light a total of 19 of these curious orders since 1950, of which eight were in the 1958 Term.²⁵⁸ This qualified denial is invariably used in cases coming

²⁵³ *E.g.*, Curran, DeVita, Grandsinger.

²⁵⁴ *E.g.*, DeVita, Goldsby.

²⁵⁵ The Supreme Court has not denied every application for certiorari filed by a state. See, *e.g.*, Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Dye v. Johnson, 338 U.S. 864 (1949).

²⁵⁶ The order has not always appeared in these exact words.

²⁵⁷ Carmen, Sheffield.

²⁵⁸ *Burke v. Georgia*, 338 U.S. 941 (1950); *Chessman v. California*, 348 U.S. 864 (1954); *Sheffield v. Louisiana*, 348 U.S. 850 (1954); *Scalf v. Skeen*, 348 U.S. 903 (1954); *Landeros v. New Jersey*, 351 U.S. 966 (1956); *Reck v. Illinois*, 351 U.S.

from a state court²⁵⁹ and is a visible manifestation of the pivotal position of the Supreme Court in such litigation. A better understanding of the Court's role can be obtained through analysis of the meaning and purpose of these odd denials of certiorari.

The form of the order is, to say the least, perplexing. To say that a denial of certiorari is without prejudice seems to infer that a denial not so qualified is or might be with prejudice. Yet the Supreme Court has consistently maintained that a denial of certiorari cannot be interpreted to have any meaning on the merits of the questions presented.²⁶⁰ With particular reference to federal habeas corpus proceedings, the issue was closed beyond all doubt in *Brown v. Allen*.²⁶¹

Professor Henry Hart recently questioned this type of order from a different aspect:

"[T]he Court manifestly has no jurisdiction to deny such petitions with prejudice to filing for federal habeas corpus after exhausting state remedies. . . . To accomplish such a result it would be necessary, at least, for the Court to grant the writ, modify the state court's judgment so as to attach the condition of prejudice, and affirm it as so modified. The power to do this without a plenary hearing, or even with it, may be doubted."²⁶²

942 (1956); *Bramble v. Heinze*, 351 U.S. 989 (1956); *Irvin v. Indiana*, 353 U.S. 948 (1957); *Dick v. Moore*, 355 U.S. 850 (1957); *Davis v. Peppersack*, 354 U.S. 941 (1957); *Carmen v. Dickson*, 355 U.S. 924 (1958); *Tuscano v. Texas*, 358 U.S. 857 (1958); *Bailey v. Arkansas*, 358 U.S. 869 (1958); *Horn v. Washington*, 358 U.S. 900 (1958); *Jackson v. Banmiller*, 358 U.S. 923 (1958); *Burman v. Florida*, 358 U.S. 937 (1959); *Deese v. Culver*, 359 U.S. 920 (1959); *Grace v. California*, 360 U.S. 940 (1959); *Powell v. Ohio*, 359 U.S. 964 (1959). [Hereinafter these cases will be cited by the name of the petitioner only.]

²⁵⁹ Prior to 1950, the Court occasionally used the "without prejudice" formula in disposing of motions for leave to file for original habeas corpus in the Supreme Court. See, e.g., *Francis v. Resweber*, 331 U.S. 786 (1947); *Ex parte Hawk*, 318 U.S. 746 (1943). During the same period, the Court used a similar order in returning cases to state courts for further proceedings when some development in state law seemed to open up a postconviction remedy. See *Franklin v. Maxwell*, 340 U.S. 956 (1951); *Marks v. Ragen*, 339 U.S. 926 (1950); *Willis v. Ragen*, 338 U.S. 944 (1950); *Pippin v. Nierstheimer*, 337 U.S. 942 (1949); cf. *Cato v. California*, 348 U.S. 850 (1954); see also *Hurley v. Ragen*, 356 U.S. 42 (1958). The Supreme Court's earliest use of the "without prejudice" order in a state custody situation appears to be *Miller v. Dowd*, 322 U.S. 759 (1944). See also ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 316 n.28 (2d ed. Wolfson & Kurland 1951).

²⁶⁰ The case most frequently cited for this proposition is *United States v. Carver*, 260 U.S. 482 (1923).

²⁶¹ 344 U.S. 443 (1953). Justice Frankfurter's view, *id.* at 488-97, was accepted by a majority of the Court. See *id.* at 487-88 (Justice Burton and Justice Clark); *id.* at 513 (Justice Black and Justice Douglas). Attached to Justice Frankfurter's opinion was a report of a case study which showed that there are insurmountable difficulties in a rule which would attribute any significance to a denial of certiorari. *Id.* at 514-32.

²⁶² Hart, *Foreword to The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 114 n.88 (1959). Professor Hart believes that the practice is "explicable only as a bit of gratuitous legal aid to prisoners combined with extracurricular communications of Delphic encouragement to federal district judges." *Ibid.* Compare the even more

The qualified denial of certiorari has met with mixed reaction in lower federal court opinions in those nine cases in which proceedings were reported subsequent to a denial without prejudice.²⁶³ Most of the federal judges have ignored the order except, perhaps, to note its existence in stating the history of the case. One judge held that the order constrained him to decide the merits of the prisoner's claim despite the judge's conclusion that the prisoner had not yet exhausted his state remedies.²⁶⁴ In the *Chessman* case, the district court described the without-prejudice order as an "invitation" to Chessman to apply for federal habeas corpus,²⁶⁵ and later Chief Judge Denman deemed the qualification "highly significant" as an indication of the Supreme Court's belief that the case presented a "justiciable question."²⁶⁶ Another district judge conjectured that the Court's denial of certiorari indicated its belief that the petitioner should be refused relief, even though he had been convicted in violation of the Constitution!²⁶⁷

The most likely key to the riddle of the order's meaning appears in the opinions of the Supreme Court itself. In *White v. Ragen*,²⁶⁸ the Court said:

strange denial of certiorari in *Rogers v. Richmond*, 357 U.S. 220 (1958). See Comment, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98 (1958).

²⁶³ *Dick v. Moore*, 261 F.2d 233 (5th Cir. 1958) (per curiam); *United States ex rel. Reck v. Ragen*, 172 F. Supp. 734 (N.D. Ill. 1959); *Bailey v. Henslee*, 168 F. Supp. 314 (E.D. Ark. 1958), *aff'd*, 264 F.2d 744 (8th Cir. 1959); *Petition of Carmen*, 165 F. Supp. 942 (N.D. Cal. 1958); *Davis v. Peppersack*, 155 F. Supp. 550 (D. Md. 1957), *aff'd in part, dismissed in part*, 255 F.2d 29 (4th Cir. 1958); *Application of Landeros*, 154 F. Supp. 183 (D.N.J. 1957); *Irvin v. Dowd*, 153 F. Supp. 531 (N.D. Ind. 1957), *aff'd*, 251 F.2d 548 (7th Cir. 1958), *rev'd and remanded*, 359 U.S. 394 (1959); *Application of Chessman*, 128 F. Supp. 600 (N.D. Cal.), *certificate of prob. cause granted*, 219 F.2d 162 (9th Cir.), *aff'd*, 221 F.2d 276 (9th Cir.), *rev'd and remanded*, 350 U.S. 3 (1955) (per curiam); *United States ex rel. Sheffield v. Waller*, 126 F. Supp. 537 (W.D. La. 1954), *certificate of prob. cause denied*, 224 F.2d 280 (5th Cir.), *cert. under 28 U.S.C. § 1651(a) (1958) denied*, 350 U.S. 922 (1955).

The only one of these cases in which the Supreme Court wrote an opinion was *Irvin v. Dowd*, *supra*. The Court referred to its previous "without prejudice" order in stating the history of the case, but attributed no significance to that fact in its analysis.

²⁶⁴ *Application of Landeros*, *supra* note 263.

²⁶⁵ 128 F. Supp. at 601.

²⁶⁶ 219 F.2d at 164.

²⁶⁷ *United States ex rel. Reck v. Ragen*, 172 F. Supp. 734 (N.D. Ill. 1959). Even though the only evidence of guilt was a confession brutally coerced from the defendant, the district judge believed that the prisoner was a dangerous person whom the state would have difficulty convicting again because the passage of time would make gathering evidence almost impossible. In conjecturing that this rationale may have influenced the Supreme Court when certiorari was denied, the district court did not mention that the denial of certiorari had been qualified by the "without prejudice" phrase, *id.* at 747, although the court had noted that fact in its recital of the history of the case. *Id.* at 735.

²⁶⁸ 324 U.S. 760, 765 (1945).

"[W]hen this Court denies or dismisses certiorari . . . without passing on the merits, it may, as in the present case, be of importance to the administration of justice in the federal district courts, that we indicate authoritatively for their guidance the view we take of the availability of the state remedies, and the reasons for our decision."

The Court went on to explain that whenever a state court judgment might rest on an adequate nonfederal ground, even though there are federal questions presented, it is unnecessary to apply for certiorari. "A denial of certiorari by this Court in such circumstances does not bar an application to a federal district court for the relief, grounded on federal rights, which the [state court] . . . has denied."²⁶⁹

The Supreme Court, in *Darr v. Burford*,²⁷⁰ commented directly upon a "without prejudice" order which had been issued earlier that same term in *Burke v. Georgia*.²⁷¹ The majority said that the order is used where the Court has doubts concerning the basis of the state court judgment. Such doubts may arise, said the Court, from the intermixing of issues of state procedure, questions of fact regarding the alleged violations of constitutional rights, and issues of law regarding the scope of constitutional rights.²⁷² The dissent agreed: the order "merely demonstrates how frequently in this situation preliminary questions of State procedure and State court jurisdiction are involved."²⁷³

As in *White v. Ragen*, the Court was again referring to the familiar doctrine that it lacks jurisdiction to review a state judgment which rests upon an independent and adequate nonfederal ground. Under this doctrine, the Court has said it lacks jurisdiction even if the basis for the state judgment is a matter of doubt.²⁷⁴ Such doubts can easily arise where issues of state procedure are intertwined with federal questions. The Court in *Darr v. Burford* also cited a practical impediment to Supreme Court review as a cause for using the "without prejudice" formula. Unresolved questions of fact in the record serve to frustrate meaningful appellate review. The existence of such doubts might lead the Court to refuse the writ of certiorari.

It is not unreasonable to conclude, even from this rather sparse evidence, that the "without prejudice" order is a shorthand expression

²⁶⁹ *Id.* at 767. See note 169 *supra*.

²⁷⁰ 339 U.S. 200 (1950).

²⁷¹ 338 U.S. 941 (1950).

²⁷² 339 U.S. at 215.

²⁷³ *Id.* at 232.

²⁷⁴ See note 219 *supra*.

of the Court signifying the basis for denial of certiorari in these cases. But this does not solve the riddle entirely. Over the course of the past ten years, there must have been many more than 19 cases in which certiorari was denied on the bases described in the Court's opinions. The state postconviction procedures alone, because of their very poor quality, have produced innumerable state judgments outside the scope of Supreme Court review. Some additional factor must be operating to set these cases apart from the others.

One possibility is that the "without prejudice" order has some effect upon the requirement of exhaustion of state remedies.²⁷⁵ While the exhaustion requirement is not directly relevant to the Court's jurisdiction to review the judgments of state courts, the Court does stand at the end of the state review system in its pivotal position between state proceedings and federal habeas corpus.²⁷⁶ It is difficult to imagine what the order might mean in terms of the exhaustion rule, however, or why it might be deemed necessary.

A far more likely explanation of the strange order is linked with the Supreme Court's impression of the merits of the cases. The Court said in *Darr v. Burford* that the "without prejudice" order is used where there is an impediment to certiorari review of a state judgment.²⁷⁷ In the same case, the Court accepted the principle that it, rather than the lower federal courts, should reverse state judgments in criminal cases where the state courts had made erroneous decisions on matters of federal law. The special obligation to grant certiorari in these cases, taken together with an obstacle preventing the Court from fulfilling its responsibility, makes it reasonable to suppose that the "without prejudice" order means that, but for the impediment in the case, certiorari would have been granted.

The hypothesis that the "without prejudice" order is used to indicate a case in which the Supreme Court would have exercised its review power if some impediment had not existed receives substantial support from a study made of the 19 cases in which the order has appeared. An examination of the papers available to the Court when it entered the qualified denial showed that most of the cases fall relatively neatly into two categories: either there was a nonfederal ground to support the state judgment or the factual record in the case was cloudy.

²⁷⁵ 28 U.S.C. § 2254 (1958).

²⁷⁶ In one of the 19 orders, the Court added a further proviso to its order, saying that the denial was without prejudice to a federal habeas corpus application "after exhausting state remedies." *Irvin*. This logically indicates that the meaning of the simple "without prejudice" order does not concern the exhaustion rule.

²⁷⁷ See notes 270-73 *supra* and accompanying text.

Twelve of the 19 cases can be classified in the former group.²⁷⁸ In nine of these, the highest state court wrote an opinion²⁷⁹—one at the request of the Supreme Court²⁸⁰—which indicated that the state court believed its judgment rested on a state ground. The *Burke* case²⁸¹ is illustrative. The proceedings in the state courts were by way of an extraordinary motion for new trial on the ground that the conviction had been obtained through the knowing use of perjured testimony by the prosecution. Attached to the motion was the affidavit of the alleged perjurer. The Supreme Court of Georgia assumed the alleged facts to be true but denied relief, relying on a state statute which forbade setting aside judgments on the ground of perjury unless the perjurer had been convicted for his offense. The state court declared that the statute “is but the exercise of the sovereign right of the State to fix rules of evidence. . . . [T]he only evidence which will prove the allegations of the movant is a judgment convicting the witness of perjury.”²⁸²

Several of these cases rest upon a state ruling that the federal claims were barred under the doctrine of *res judicata*.²⁸³ The now famous *Chessman* case was one of these. Chessman filed a petition for habeas corpus in the California Supreme Court, alleging that the transcript of his trial had been fraudulently prepared. He filed this petition immediately after learning, among other things, that the person hired by the prosecutor to transcribe the shorthand notes of the deceased reporter was the uncle of the prosecutor’s wife. The state court denied the petition summarily and without opinion. While an application for certiorari was pending in the Supreme Court of the United States, the California court, in a collateral proceeding, filed a lengthy opinion explaining its previous dismissal.²⁸⁴ The court said that Chessman had charged fraud in the preparation of the record in a prior

²⁷⁸ *Bailey, Bramble, Burke, Carmen, Chessman, Davis, Deese, Grace, Irvin, Reck, Scaff, Sheffield.*

²⁷⁹ *Bailey v. State*, 313 S.W.2d 388 (Ark. 1958); *In re Bramble*, unpublished opinion of California Supreme Court, Feb. 21, 1956; *Application of Carmen*, 48 Cal. 2d 851, 313 P.2d 817 (1957); *In re Chessman*, 43 Cal. 2d 391, 408, 274 P.2d 645 (1954); *People v. Grace*, 166 Cal. App. 2d 68, 332 P.2d 811 (2d Dist. Ct. App. 1958), *leave to appeal denied*, 166 Cal. App. 2d 79 (1959); *Burke v. State*, 205 Ga. 656, 54 S.E.2d 350 (1949); *Davis v. Warden*, 211 Md. 606, 125 A.2d 841 (1956); *Irvin v. State*, 236 Ind. 384, 139 N.E.2d 898 (1957); *Reck v. People*, 7 Ill. 2d 261, 130 N.E.2d 200 (1955).

²⁸⁰ *Bramble v. Heinze*, 350 U.S. 899 (1955).

²⁸¹ *Burke v. State*, 205 Ga. 656, 54 S.E.2d 350 (1949).

²⁸² *Id.* at 659-60, 54 S.E.2d at 353.

²⁸³ *In re Bramble*, unpublished opinion of the California Supreme Court, Feb. 21, 1956; *Application of Carmen*, 48 Cal. 2d 851, 313 P.2d 817 (1957); *Application of Chessman*, 43 Cal. 2d 391, 408, 274 P.2d 645 (1954); *Davis v. Warden*, 211 Md. 606, 125 A.2d 841 (1956).

²⁸⁴ *Application of Chessman*, *supra* note 283. This proceeding was technically on motion to vacate a stay of execution entered by one member of the California Supreme Court. *Ex parte Chessman*, 43 Cal. 2d 296, 273 P.2d 263 (1954).

application for habeas corpus. Chessman's new discoveries constituted merely new "evidence" and not "ultimate facts." Therefore, the cause of action being the same, the application had been denied.²⁸⁵

In three more of the state-ground cases, the state courts wrote no opinions.²⁸⁶ All three were applications for discretionary relief in the state courts, leaving in doubt the exact basis for their decision.²⁸⁷ There was a brief in opposition from the state attorney general in two of these, urging the Court that the state judgment rested on a state ground or grounds.²⁸⁸

There were six cases in which there was no state ground immediately apparent.²⁸⁹ Rather the state court judgment was based upon a factual record which left something to be desired. In one state habeas corpus case, the court based its decision on certificates of the original trial judge and defense counsel, but those certificates were not before the Supreme Court.²⁹⁰ Another state habeas corpus case, involving, in part, a charge that the trial judge had been prejudiced, was heard by the same judge who had presided at the original trial.²⁹¹ In the remaining four cases there were other doubts on the soundness of the factual record.²⁹²

²⁸⁵ Other nonfederal grounds found to support the state judgment included forfeiture of post-trial procedure by an escapee (Irvin), failure to raise an issue in timely fashion (Bailey), and two holdings that whether a confession is coerced is a question for the jury (Grace, Reck).

²⁸⁶ Deese, Scalf, Sheffield.

²⁸⁷ Deese applied for habeas corpus in the Florida Supreme Court. Scalf made a similar application in the West Virginia Supreme Court of Appeals. Sheffield petitioned the Louisiana Supreme Court for an extraordinary writ of certiorari, mandamus or prohibition. Since all of these were denied without opinion, it cannot be known whether the state court refused to entertain the application or, having considered it, found it without merit.

²⁸⁸ In *Deese*, the Brief in Opposition stated that the petition for certiorari contained detailed allegations which had never been presented to the state court. Opposing the *Scalf* petition, the state said that the allegations had not been adequately raised, with supporting affidavits, in the state court or were outside the scope of the state habeas corpus remedy.

²⁸⁹ *Burman*, *Horn*, *Jackson*, *Landeros*, *Powell*, *Tuscano*. In *Burman and Jackson*, there were no opinions in the state courts. The Texas Court of Criminal Appeals filed an unpublished opinion in the *Tuscano* case. There were state court opinions published in the remaining three cases. *Horn v. Washington*, 52 Wash. 2d 613, 328 P.2d 159 (1958) (per curiam); *State v. Landeros*, 20 N.J. 76, 118 A.2d 524 (1955); *State v. Powell*, 105 Ohio App. 529, 148 N.E.2d 230 (1957), *appeal dismissed*, 167 Ohio St. 319, 148 N.E.2d 232 (1958).

²⁹⁰ *Tuscano*.

²⁹¹ *Jackson*.

²⁹² In *Horn*, the state supreme court had appointed a master to conduct an inquiry into the facts, but it was not clear how much of the master's findings were adopted by the court. *Horn v. Washington*, 52 Wash. 2d 613, 328 P.2d 159 (1958) (per curiam). In *Landeros*, the state supreme court, on appeal from the conviction, agreed to look at certain documents not actually part of the record, containing information which the prosecution was asserted to have suppressed at the trial. The status of this material was rather unclear. *State v. Landeros*, 20 N.J. 76, 118 A.2d 524 (1955). There is some doubt in *Burman* and *Powell* as to the federal questions involved. Each certiorari petition suggested that there may have been a problem of denial of appeal similar to *Griffin v. Illinois*, but the exact factual history on this point was not clear in either case.

One case is difficult to catalogue. The Supreme Court went to elaborate lengths over a period of several years to find out the basis of a state court's judgment summarily denying an application for habeas corpus.²⁹³ When it was finally discovered that the state decision probably went to the merits, the Court tried to find the record of the original trial. This effort proved futile and the Court finally denied certiorari without prejudice.

This covers the 19 cases from the perspective of possible reasons why the Court did not grant certiorari. But the hypothesis was that these were cases which the Court, but for the difficulties discussed, would or might have agreed to hear. Can any evidence be adduced on this score?

This is more difficult, naturally, but there are some relevant points. Unlike the mine run of prisoner applications, these cases, with minor exception, clearly point to specific constitutional rights allegedly denied to the petitioners. The petitions were also reasonably clear on the factual history of the cases giving rise to the federal questions. In 12 of the 19 cases, the state court had summarily denied relief so that the case stood on the allegations.²⁹⁴

²⁹³ Dick's petition was a simple, brief, neatly handwritten document alleging facts, which if true, would constitute a clear violation of the constitutional right to counsel. A habeas corpus petition in the same tenor had been summarily dismissed without explanation by the Texas Court of Criminal Appeals. The Supreme Court files show the following developments:

First, the state attorney general was asked to respond. An answer was received one year after the petition for certiorari had been filed. The Texas official informed the Court that the petitioner had two separate convictions and was not then serving the one complained of. Attached to this memorandum was a copy of the prison record totally refuting the statement in the memorandum and revealing rather that the earlier sentence had expired prior to the petition for habeas corpus in the state court.

A second response was sought from the attorney general. This one brought two replies, received by the Court three days apart. One was a memorandum answering three questions about Texas habeas corpus practice. The attorney general informed the court that habeas corpus was an available remedy in Texas, that the Court of Criminal Appeals was an appropriate forum in which to petition for such relief, and that the Court of Criminal Appeals always stated expressly the ground for denial of the petition if not on the merits. The second, styled an "Answer," announced to the Court that the prisoner had not shown any special circumstances for the need of counsel in a non-capital case. The petition alleged not only a refusal to appoint counsel for a young defendant facing a possible sentence of life imprisonment if convicted, but further alleged a refusal of a continuance to allow time to obtain his own lawyer.

At this juncture, the Clerk of the Supreme Court undertook to find the transcript of the original trial. A letter to the County Attorney of the place of trial brought a reply that there was no copy of the transcript available, none having been made since the defendant had not appealed. The reporter at the trial, he added, was believed to be somewhere in New Mexico. Another letter to the District Clerk of the county court brought the same response on the situs of the reporter plus the additional erroneous statement that petitioner had pleaded guilty. The Court apparently did not try to find the reporter in New Mexico. It denied certiorari without prejudice.

²⁹⁴ Bailey, Bramble, Burke, Burman, Carmen, Chessman, Davis, Deese, Dick, Powell, Scalf, Sheffield.

Where a record did exist, it supported the contentions of the state prisoner. In the *Reck* case, the opinion of the Illinois Supreme Court describes, as undisputed facts, evidence of one of the most brutally coerced confessions in the annals of constitutional law.²⁹⁵ And in *Horn*, the state court found that, in the course of obtaining a confession, the police had taken their prisoner without cause to a cemetery, although the court did not credit that the police had threatened to throw him into an open grave unless he confessed.²⁹⁶

The evidence at hand tends to bear out the hypothesis that the Supreme Court would probably have granted certiorari in these 19 cases had there not been an impediment to their effectively reaching the merits of the case. But why make an announcement of that fact, especially one so cryptic as this one is? Why not a simple denial of certiorari?

The answer to this question is pure speculation, but several possibilities suggest themselves. Professor Hart thought the order might be in the nature of legal aid for the prisoner, telling him his next procedural step.²⁹⁷ This is hardly consistent with the fact that half of these petitioners already had lawyers,²⁹⁸ although it is not beyond reason to suppose that lawyers could use some advice, too. Professor Hart also suggested that the order might be an extracurricular communication of Delphic encouragement to the federal district court. But encouragement to do what? Grant relief? This is unacceptable, especially since most of the cases rested on pleadings at the Supreme Court stage.

A more reasonable interpretation is that the Supreme Court is encouraging, or even ordering,²⁹⁹ the district courts to make an independent inquiry into the case. The Court in *White v. Ragen* said that its reason for making known the basis for its refusal of certiorari was to provide guidance for federal district courts.³⁰⁰ Earlier in the same paragraph of that opinion, the Court said: "If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal district court will not usually reexamine on habeas corpus the questions thus adjudicated."³⁰¹ The importance of the announcement apparently is to inform the federal courts that this is a case which should be reexamined.

²⁹⁵ *Reck v. People*, 7 Ill. 2d 261, 130 N.E.2d 200 (1955).

²⁹⁶ *Horn v. Washington*, 52 Wash. 2d 613, 328 P.2d 159 (1958) (per curiam).

²⁹⁷ See note 262 *supra*.

²⁹⁸ *Burke*, *Carmen*, *Landeros*, *Reck* and *Sheffield* had counsel of record. *Bailey* and *Irvin* had attorneys who were not members of the Supreme Court bar so that, officially, the prisoners petitioned *pro se*. There is reason to believe, from the quality of the petitions, that *Horn* and *Jackson* were represented by lawyers.

²⁹⁹ See *Application of Landeros*, 154 F. Supp. 183 (D.N.J. 1957).

³⁰⁰ *White v. Ragen*, 324 U.S. 760, 765 (1945).

³⁰¹ *Id.* at 764-65.

Fundamental to this reasoning is the premise that the impediment preventing the Supreme Court from reviewing the state judgment would not also bar federal habeas corpus. This is certainly true when the reason for denial of certiorari is an uncertainty on questions of fact which may cloud the record compiled in the state court proceedings. Federal habeas corpus provides a method for further inquiry into the issues of fact. It must also be true where the state judgment rests upon an adequate state ground.³⁰² Otherwise it would make no sense to transfer the case out of the state proceedings into federal habeas corpus. The whole purpose is to get potentially meritorious cases away from the impediments which foreclose review by the Supreme Court by directing them into a proceeding in which these impediments will not apply.

If the analysis suggested here correctly interprets the meaning of the "without prejudice" orders, the Court's practice can be regretted on two scores. In the first place, it is not being understood. There is no point at all in making an announcement which does not communicate, or worse yet, is misconstrued. The little evidence now existing tends to show that the order is usually ignored.

The second level of doubt concerns the effect which the order has on the cases which fail to win the "flag." Particularly if the trend toward increasing use of the order continues, a simple denial will become more and more a badge of no-merit. No amount of protestation will overcome the negative inference that such an explanation, in the eyes of the Supreme Court, lacks any substance.

There is, to be sure, another side to the issue. Most of these cases were collateral attacks in the state courts.³⁰³ Without a doubt, the most difficult hurdle for a state prisoner seeking collateral relief to overcome is to get a hearing on the merits of his constitutional assertions. The great bulk of such applications are summarily denied on the papers filed. This is true, not only in the state courts, but in the federal courts as well. Accordingly, when the Supreme Court believes that a case does present a serious question worth a hearing, there is a good reason for not throwing it back into relative oblivion.

³⁰² This proposition is directly contrary to the position taken by Professor Henry Hart in *Foreword to The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959). Professor Hart elaborated upon the argument advanced by Justice Frankfurter and Justice Harlan in their dissenting opinions in *Irvin v. Dowd*, 359 U.S. 394, 407, 412 (1959). The majority of the Court in the *Irvin* case did not agree that the adequate-state-ground rule is applicable to determine the scope of federal habeas corpus; at no time has the Court ever accepted the Frankfurter-Harlan-Hart position. Even though lacking in precedent, however, the views of such eminent lawyers deserve greater attention than can be devoted to them in this Article. It is hoped that they can be treated more fully in a future essay.

³⁰³ Only Grace, Irvin, Landeros and Powell sought certiorari to a state judgment affirming their convictions.

At the Supreme Court stage, the choice is a difficult one. Where the state court has relied on a procedural issue, the only way in which the Court itself could reach the underlying merits would require holding that the state ground is not "adequate." The Court would then be in a position to demand that the courts of the state afford the prisoner a hearing before a decision on his federal claims. However, this would manifestly compound the irritation to federal-state relations. Not only would there be a federal question in the validity of the original conviction, but now there would be the additional federal intrusion in the state procedures for litigating that question. Some state-styled rules of pleading and evidence³⁰⁴ would fall before a federal holding that they are "inadequate."

The alternative choice of federal habeas corpus is, by comparison, far more attractive. And, indeed, if the state judgment rests on a cloudy factual record, the federal habeas corpus hearing may be indispensable.³⁰⁵ The pivot from the state proceedings to the federal habeas corpus stage could technically be accomplished by a simple denial of certiorari. But the effect of denial without a flag might be to return the case to obscurity.

Despite these factors, it seems that this risk should nonetheless be taken. The same qualities which made the case stand out in the Supreme Court will probably have the same effect in a federal district court. If the Court were so inclined, they might keep an internal record of these cases so that, if the case did subsequently go up the federal habeas corpus ladder without being given a hearing, the case could then be remanded openly and directly to the district court. While this method has risks,³⁰⁶ it does not entail the great possibility of serious prejudice to other petitioners. Already the district courts are inclined to construe a simple denial of certiorari as prejudicial. If a qualified denial means what has been suggested, and that meaning becomes generally known and understood, aggravation of this condition seems inevitable.

VI. PROPOSED LEGISLATION TO CHANGE THE FEDERAL HABEAS CORPUS JURISDICTION

During the present session of Congress, we may witness the extraordinary event of the passage of a bill which no one seems really to

³⁰⁴ See, e.g., *Burke v. State*, 205 Ga. 656, 54 S.E.2d 350 (1949), *supra* notes 281-82 and accompanying text. *Application of Chessman*, 43 Cal. 2d 391, 408, 274 P.2d 645 (1954), *supra* notes 283-85 and accompanying text.

³⁰⁵ See, e.g., *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, *vacated and remanded*, 350 U.S. 891 (1955), *prior decision re-affirmed*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed for want of a properly presented federal question*, 350 U.S. 985 (1956).

³⁰⁶ E.g., the state prisoner may be nearing the end of his sentence and fail to seek further remedy, particularly if he believes that to do so might jeopardize his chance for parole.

want.³⁰⁷ It has already been passed in the House of Representatives³⁰⁸ and may be approved in the Senate this year, perhaps without hearings in the Senate Judiciary Committee.³⁰⁹ The bill, if enacted, would make three substantial changes in the law concerning federal habeas corpus:

First, it provides that no relief can be granted except by a three-judge federal district court, although single district judges would continue to screen applications and would retain the power to deny relief.³¹⁰

Second, the courts of appeals would be eliminated from the channel of appellate review of any case decided by a three-judge district court: regardless of whether the ruling is in favor of the petitioner or in favor of the state, the case could be taken only to the Supreme Court.³¹¹ Moreover, unlike every other three-judge court proceeding, review in the Supreme Court would be a matter of discretion, sought by way of a petition for certiorari.³¹²

Third, the proposed statute would incorporate some concepts of *res judicata* into habeas corpus practice.³¹³ Its provisions contain some ambiguous matters, but quite apart from technical or drafting problems, the suggestion to apply *res judicata* to federal habeas corpus proceedings is, in itself, extremely disturbing.

³⁰⁷ H.R. 3216, 86th Cong., 1st Sess. (1959). The proponents of legislative change have been principally the state chief justices and attorneys general. The latter group implicitly repudiated the current bill by reaffirming its support of the very different legislation passed by the House of Representatives in the 84th and 85th Congresses. National Association of Attorneys General, Resolution XI, Habeas Corpus, May 7, 1959. The Chairman of the Committee on Habeas Corpus of the Conference of Chief Justices informed Congress that he was "vigorously opposed" to the current bill. 105 CONG. REC. 13364 (daily ed. July 29, 1959). The Conference disapproved of the bill in its present form and reasserted its support of the prior proposed legislation. Conference of Chief Justices, Resolution on Habeas Corpus, Miami Beach, Fla., Aug. 18-23, 1959. For a history of the legislation see H.R. REP. No. 548, 86th Cong., 1st Sess. 4-5 (1959).

³⁰⁸ 105 CONG. REC. 13365 (daily ed. July 29, 1959).

³⁰⁹ In the 85th Congress, after the House had passed H.R. 8361, the Senate Judiciary Committee reported the bill favorably without having conducted any hearings. S. REP. No. 2280, 85th Cong., 2d Sess. (1958). See *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 2, at 41-42 (1959).

³¹⁰ H.R. 3216, 86th Cong., 1st Sess. § 3 (1959). This part of the bill would be an addition to 28 U.S.C. § 2254 (1958).

³¹¹ H.R. 3216, 86th Cong., 1st Sess. § 2 (1959). This would be an amendment to 28 U.S.C. § 2253 (1958). Where relief is denied by a single district judge, the channel of appellate review to the court of appeals would not be changed by the new legislation. The provisions of § 2253 would remain applicable.

³¹² H.R. 3216, 86th Cong., 1st Sess. § 2 (1959). Supreme Court review by appeal in other cases is provided for in 28 U.S.C. § 1253 (1958).

³¹³ H.R. 3216, 86th Cong., 1st Sess. § 1 (1959). This would amend 28 U.S.C. § 2244 (1958). Separate sections would provide different rules of finality for judgments of the Supreme Court and decisions of lower federal courts.

Three-Judge District Courts

Underlying the three-judge court proposal are probably two ends sought to be served. One is reduction of delay in the enforcement of a state judgment by telescoping the district court and court of appeals functions into a single court. The other is amelioration of the affront to the state courts which some people find present in federal habeas corpus practice today, the assertedly doubtful "utility for dignified or effective law enforcement of review and overturn by any federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals."³¹⁴

Undoubtedly the idea for the three-judge court was drawn from section 2281 of the Judicial Code which requires such courts when an injunction is sought to restrain the enforcement of a state statute on the ground that the statute is unconstitutional.³¹⁵ That provision was, to a large extent, motivated by "the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded, perhaps frustrated, by the interlocutory fiat of a single judge. . . ." ³¹⁶ In the habeas corpus situation, the parallel is to the solemn judicial acts, and the efforts of state officers to enforce them, which are being impeded, or perhaps frustrated.

The analogy, while verbally apposite, is not a true one. Where a state legislative program is suspended or thwarted, the consequences in total effect upon the state government transcend the immediate case. The particular mischief is not the assault on a state statute, but the use of the injunctive remedy. The original provision required the special court only for the issuance of an interlocutory injunction.³¹⁷ Later it was amended to include cases seeking permanent injunctions as well.³¹⁸ But it has never been expanded to include *all* cases attack-

³¹⁴ Judge Clark in *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 706 (2d Cir.) (concurring opinion), *cert. denied*, 350 U.S. 896 (1955). For the evident annoyance of state judges, see, e.g., Conference of Chief Justices, Resolution on Habeas Corpus, Philadelphia, Pa., Aug. 20, 1955: "At each of its meetings, beginning in 1952, the Conference of Chief Justices has adopted resolutions to restrain the improper use of writs of habeas corpus by prisoners who have been convicted in state courts and who seek to have the action of state courts reviewed and reversed by lower federal courts."

³¹⁵ 28 U.S.C. § 2281 (1958). This same proposal was previously recommended to Congress by the Judicial Conference of the United States. [1943] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 23; [1944] *id.* at 22. The proposal was opposed by a considerable number of the federal district and circuit judges and was withdrawn by the Judicial Conference. [1947] *id.* at 17-18.

³¹⁶ Hutcherson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 804 (1934). See also *id.* at 805.

³¹⁷ Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557.

³¹⁸ Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938.

ing a state statute as unconstitutional. A particular state prisoner seeking discharge from custody on the ground that he was deprived of constitutional rights is not seriously threatening the operation of state government.

A further, less obvious defect in any analogy between the proposed habeas corpus legislation and section 2281 lies in the assumption that solemn judicial acts are being overturned. As the present survey of cases in which federal relief was granted indicates, it is hardly accurate to say that reasoned conclusions of a whole hierarchy of state tribunals are being reversed. Only three of the cases might have satisfied that statement. In the great majority of instances, the state courts had given short shrift to the asserted constitutional claims or had refused to decide the federal issues at all. Perhaps this indicates that where the state proceedings are really solemn judicial acts, the federal courts do not often reach contrary conclusions.³¹⁹

There is reason to believe that the basic source of personal antagonism goes deeper than the simple comparison of the statures of courts. Many state judges and officials have been disgruntled by the extent to which the operation of the federal constitution has progressively expanded in the administration of state criminal law.³²⁰ Under the aegis of the Supreme Court the list of constitutional "don'ts" has grown rapidly in the last quarter of a century, a development which has been received with hostility in some state judicial systems. When these constitutional norms are applied by lower federal courts, the sense of outrage may be partially deflected from the norm to the court that applies it.

The aim of reducing delay in enforcement of state judgments is likewise not persuasive of the need for legislation. From the point of view of the states, the factor of delay can be a grievance only where the death penalty has been imposed. A sentence of imprisonment is being enforced while the litigation proceeds. And in the class of death cases, reasonable men may perhaps differ on whether haste and shortcuts are appropriate when the subject is the taking of human life. Beyond this,

³¹⁹ See, e.g., *United States ex rel. Sileo v. Martin*, 269 F.2d 586 (2d Cir. 1959), holding that the absence of findings of fact and opinions in the state collateral proceedings made it imperative for the federal district court to determine and evaluate the facts.

³²⁰ E.g., this statement filed on behalf of the National Association of Attorneys General: "Thus we have now reached the place where the 14th amendment as well as all other nebulous, general, abstruse, and abstract Federal constitutional provisions applicable to the States have [*sic*] become jurisdictional. . . . We cannot know how many more [jurisdictional defects] will be invoked or conjured up out of that limitless, uncharted sea, the 14th amendment; we fold our arms and wait for the new crop of 5-to-4 decisions." *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 6, at 39, 41 (1955).

it has never been demonstrated that the federal courts of appeals do cause substantial delay in the execution of death sentences. Usually such cases are given priority at all levels of the federal system. The amount of time which would be saved by eliminating the intermediate appellate level may, in fact, be completely offset by the time lost in convening the three-judge district court. Finally, since death cases are the only affected group, there seems no reason to change the procedures of all cases in order to speed up one component group.

Apart from weakness in the arguments supporting the proposal, there are important considerations which weigh against it. Perhaps the strongest, at least the most obvious, is the need to avoid waste of judicial manpower. The existing shortage of judges would be aggravated by creating a new category of cases triable solely before a three-judge district court; even though only a small number of cases of this kind arose each year, the time lost would not be inconsequential.³²¹

A more speculative harm may be the lessening of the protection currently afforded state prisoners in federal habeas corpus. The bill would allow a single district judge to conduct a preliminary examination, in his discretion, before deciding what disposition shall be made of the application, but presumably he would be precluded at that stage from holding a hearing to receive testimony.³²² A decision to look beyond documentary matters triggers the three-judge court clause. It seems that this would lead, subtly or consciously, to some reticence to go behind the documents. Whereas a single judge, under existing practice, might conclude that he will invest some of his time in a preliminary exploration of a "hunch" that a prisoner-drafted petition may have merit, he may be less willing to do so if it necessitates the formal convening of a three-judge court.

The reduction of the litigation time in federal habeas corpus in non-death cases would appear to be of benefit to state prisoners seeking relief. The time involved in successfully bringing a case through the maze of federal and state courts is a matter of grave concern. But the saving possibly made by elimination of the intermediate appellate courts is more than offset by the prospective detrimental effects upon

³²¹ See *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934): "The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended."

³²² The bill provides that the single judge's examination "may be made upon the allegations of the application only, or upon the allegations of the application, the return to the order to show cause if such an order was issued, and any admissions of fact, original or certified copies of State court records, and other pertinent documentary matter." H.R. 3216, 86th Cong., 1st Sess. §3 (1959). While not overtly stated, it is strongly implied that the single judge would not be authorized to obtain information in any other way.

the prisoners' chances of a hearing and relief. On balance, the suggestion to set up a three-judge court procedure seems unwise.

Elimination of the Courts of Appeals

To the extent that there may be validity in the objection to the unseemliness of a federal trial judge "reversing" a state supreme court, the new legislation is a step in the wrong direction. Heretofore, a state could almost invariably appeal the decision of a district court to a court of appeals,³²³ and from that judgment could seek certiorari in the Supreme Court. Under the pending bill, a case worthy of a hearing would go before a three-judge district court, with possible certiorari to the Supreme Court. A district court, even of three judges, is not the equivalent in prestige or stature of a court of appeals.

From a different standpoint, the new legislation would undoubtedly increase to some extent the burden upon the Supreme Court. When a three-judge court has granted relief, the pressure to have at least one stage of appellate review would be rather strong;³²⁴ when it has refused relief after a hearing, the Supreme Court would be the only agency to insure that the decision was correct.

Res Judicata Provisions

The most dubious parts of the proposed statute would incorporate some aspects of res judicata into the law of federal habeas corpus.³²⁵

³²³ Under 28 U.S.C. § 2253 (1958), an appeal may not be taken unless either the district court or a circuit judge issues a certificate of probable cause. It is not to be expected that a state would frequently be denied such a certificate. *But see* Waller v. United States *ex rel.* Sheffield, 224 F.2d 280 (5th Cir.) (per curiam), *cert. under 28 U.S.C. § 1651(a)* (1958) *denied*, 350 U.S. 922 (1955).

³²⁴ The Supreme Court has not frequently granted petitions for certiorari filed by the states in federal habeas corpus proceedings heretofore. See notes 251-55 *supra* and accompanying text.

³²⁵ The federal proposal follows, in general, the approach taken to res judicata in the state postconviction procedure acts. Illinois and North Carolina provide that any claim not raised in the original petition is waived. ILL. ANN. STAT. ch. 38, § 828 (Smith-Hurd Supp. 1958); N.C. GEN. STAT. § 15-218 (Supp. 1959). The Uniform Post-Conviction Procedure Act, Maryland and Oregon, also impose the sanction of waiver as to claims not raised in the first petition, but these acts provide an exception where the grounds asserted in a later petition could not reasonably have been raised in an earlier one. UNIFORM POST-CONVICTION PROCEDURE ACT § 8; MD. CODE ANN. art. 27, § 645H (Supp. 1959); Ore. Laws 1959, ch. 636, § 15(3). Oregon alone specifies the collateral effect of prior judgments on direct review of the conviction and sentence. *Id.* at § 15(2). In all of these statutes, unlike the proposed federal legislation, an indigent prisoner presumably has the right to the assistance of counsel in preparing his first application for relief.

Several states have abrogated the common-law rule and created by statute res judicata rules for habeas corpus judgments. An Indiana statute declares: "The common law rules of res adjudicata shall apply to proceedings for writs of habeas corpus in criminal matters." IND. ANN. STAT. § 9-3304 (1956). Arizona provides for finality only if the prisoner has had a hearing. ARIZ. REV. STAT. ANN. § 13-2003 (1956). Four other states declare that habeas corpus judgments are conclusive unless reversed. ALASKA COMP. LAWS ANN., § 66-26-46 (1949); MISS. CODE ANN., § 2836 (1956); ORE. REV. STAT. § 34.710 (Supp. 1955); VA. CODE ANN. § 8-605 (1957).

No change would be made in the effect given to prior judgments of state courts.³²⁶ One section would establish rules of estoppel for decisions rendered by the Supreme Court in review of state judgments.³²⁷ Another describes the finality of federal habeas corpus judgments insofar as subsequent applications for relief are made.³²⁸

The provision concerning Supreme Court review of state court decisions declares that the "judgment of the Supreme Court . . . shall be conclusive as to all rights, questions and facts actually adjudicated by the Supreme Court."³²⁹ Apparently the draftsmen intend to accord an effect like that of collateral estoppel to determinations of the Supreme Court, while divorcing that Court's judgment from the judgment of the state court from which the case comes and to which it returns. If the Supreme Court reverses the state court disposition, the rule would not be especially difficult of operation.³³⁰ Complications in determining what was "actually adjudicated" may arise, however, when the Supreme Court affirms.³³¹ Perhaps all that is meant is that, where rights, questions or facts are discussed and determined in an opinion of the Court, this determination is binding.

The purpose and necessity for this provision are not clear. Under present law, the lower federal courts are theoretically free to reexamine any question decided by the Supreme Court on direct review of a state judgment. The Supreme Court's decision is no more binding than the state judgment, if the two can be separated for this purpose. But as a matter of practicality, lower federal courts are not likely to disagree with a positive expression by the Supreme Court.

Perhaps the purpose of this provision is to make clear that anything less than an actual adjudication by the Supreme Court, particularly denial of certiorari, has no binding effect upon the federal habeas corpus proceeding. Since denials of certiorari do not now operate to foreclose the habeas corpus inquiry, there would be no change

Several states require that an application for habeas corpus must disclose prior proceedings seeking relief, with no prescribed effect to follow from the prior judgment, so that the matter presumably is left in the discretion of the judge. HAWAII REV. LAWS § 239-5 (1955); IOWA CODE ANN. § 663.1 (1950); N.Y. CIV. PRAC. ACT § 1234; TENN. CODE ANN. § 23-1807 (1955); TEXAS CODE CRIM. PROC. ANN. art. 171 (1954); UTAH R. CIV. P. 65B(f) (1); WYO. STAT. ANN. § 1-810 (1957).

³²⁶ The standards laid down in *Brown v. Allen*, 344 U.S. 443 (1953), would continue to be applicable.

³²⁷ H.R. 3216, 86th Cong., 1st Sess. § 1, adding § 2244(c) to the Judicial Code.

³²⁸ *Ibid.*, adding § 2244(b) to the Code.

³²⁹ There would be an exception to the rule where the applicant pleads and proves the existence of a material and controlling fact which did not appear in the record in the Supreme Court and which the applicant could not have caused to appear by the exercise of reasonable diligence.

³³⁰ Cf. RESTATEMENT, JUDGMENTS § 69 (1942).

³³¹ This would require inquiry into the issues necessary to support the judgment and within the constitutional jurisdiction of the Court, as limited by the questions presented to the Court and, further, by the questions which the Court agreed to decide.

in the present law,³³² but conceivably the intendment is to correct the practice of some lower federal courts. If so, perhaps a more direct statement would be appropriate.

The provision giving conclusive effect to prior federal habeas corpus proceedings is far more stringent in its terms. It provides that a subsequent application "shall not be entertained . . . except on a factual or other ground not presented at the hearing on the earlier application for the writ and then only on a showing of a reasonable excuse for failure to present such factual or other ground at the hearing on the earlier application."³³³ This represents the full sweep of *res judicata*, taking in all issues which were *or might have been* presented in an earlier proceeding, although the rigor of the conventional rule would be modified to let the prisoner show "reasonable excuse."³³⁴

A serious defect in this section is the ambiguity on what judgments would be given *res judicata* effect. By its terms, the section applies whenever a state prisoner "has been denied . . . release from custody or other remedy on an application for a writ of habeas corpus." Every time a federal judge summarily dismisses an application, he has denied the prisoner release from custody. Regardless of the extent of consideration given, the statutory standard would be met. Under the new one-judge, three-judge court arrangement, this section would therefore apply not only to decisions by a three-judge court but also to decisions of a single judge.

This would have the unfortunate consequence of making the prisoner's fate turn on how well or poorly he drafted his first application. After the first one is denied, he would have not only to overcome the obstacle of writing a legal document by himself, but would face the further barrier of *res judicata*. The weakest point in the entire system of postconviction remedies for state prisoners is the burden placed upon them to perform legal tasks without legal counsel, legal skills or adequate legal materials. To add further strain at that point of weakness seems undesirable.³³⁵

There is some reason to believe that this was not the intention of the draftsmen. In the exception clause, defining matters which might

³³² *Brown v. Allen*, 344 U.S. 443 (1953).

³³³ H.R. 3216, 86th Cong., 1st Sess. § 1, adding § 2244(b) to the Code.

³³⁴ Compare the state statutes discussed in note 325 *supra*.

³³⁵ It is conceivable but not at all certain that the bill, if enacted, would be interpreted to limit the operation of the *res judicata* provision to cases in which the prisoner was represented by an attorney. If this is the intention, it would seem far better to provide directly that indigent petitioners seeking habeas corpus shall be provided with counsel. This is the approach of the UNIFORM POST-CONVICTION PROCEDURE Act § 5. See ILL. ANN. STAT. ch. 38, § 829 (Smith-Hurd Supp. 1958); MD. CODE ANN. art. 27, § 645E (Supp. 1959); N.C. GEN. STAT. § 15-219 (1933); Ore. Laws 1959, ch. 636, § 9.

be entertained, the bill twice refers to a prior "hearing."³³⁶ In the sections dealing with the three-judge courts, it is provided that the single judge may hold a "preliminary examination" but it is for the three-judge court "to hear and determine the issue." Conceivably, therefore, the new proposal is meant to apply only to judgments of the three-judge courts.³³⁷ If so, the bill surely ought to be changed to remove the ambiguity.

Regardless of the extent to which it operates, any provision which forbids consideration of an issue which might have been but which was not raised at some earlier stage is open to question. The effect is to preclude a decision on the actual merits of a controversy. The purpose apparently is to reduce the number of repetitive applications for federal habeas corpus relief.

It is yet to be demonstrated that this problem is substantial in federal habeas corpus.³³⁸ Even if such a problem does exist, it is not altogether clear how the application of *res judicata* rules is expected to stem the flow of repetitive petitions. Perhaps it is assumed that there are petitioners who deliberately withhold their constitutional claims, using them one at a time to make a series of applications for relief. Such a person, assuming knowledge of the statute, would perhaps be influenced to offer all his claims in one petition. But this image of the application process seems unreal. One would rather suppose that a prisoner would aggregate all his claims together in the hope that the totality of asserted errors would bulk larger than the sum of the parts.

The rule may be intended not to cut down the number of applications filed but to make it easier to dispose of them after they are filed. It might be assumed, for example, that a second or third application from the same man has no likelihood of merit. On discovering the fact of earlier application, a later petition could be dismissed without

³³⁶ See text at note 333 *supra*.

³³⁷ Some evidence that it was not the intention of the draftsmen to restrict the application of *res judicata* to cases heard by a three-judge court is seen in the proposed amendment of the present § 2244 of the Judicial Code to eliminate its applicability in all cases involving state prisoners, not simply those decided by a three-judge court. For the present effect of that section see notes 340-41 *infra*.

³³⁸ The Administrative Office of the United States Courts made a statistical study of several selected federal judicial districts for the fiscal years 1943 to 1945. Speck, *Statistics on Federal Habeas Corpus*, 10 *ОЮ* Sr. L.J. 337, 352-353 (1949). Apparently no more recent study has ever been made, since this data is part of the most recent reports of the Administrative Office to Congress. H.R. REP. No. 548, 86th Cong., 1st Sess. 41 (1959). While this study indicates a relatively high percentage of repeater petitions, the statistics are not a reliable indication of current practice. These were the years of extraordinary legal activity by the inmates of Illinois jails. More than two-thirds of the petitions included in the study came from Illinois federal courts. Of the 366 repeater petitions reported to have been filed, 238 were in Illinois. Ten of the 13 petitioners who filed more than two petitions were in Illinois. Since the data reflect an extraordinary condition, the study cannot possibly be representative of the present situation.

reading. The statute, however, does not set up such an automatic bar to subsequent applications. It first has to be ascertained whether the current petition is on grounds different from those of previous petitions and, if different, whether there is a "reasonable excuse." By the time that this kind of searching comparison is made, more time may have been spent than would have been required to make an independent evaluation of the worth of the petition in itself.

An even more fundamental question than whether the statute would serve its purpose is whether *res judicata* doctrines might not work a gross injustice. If it is correct that the statute would have no substantial effect upon the applications of petitioners, then any gain in the efficiency with which second applications might be disposed of by the district courts is offset by the harsh penalty imposed on those who fail to raise a possibly meritorious claim in their first application. Admittedly the statute says that the way is open to consider the claim if there is a reasonable excuse for the failure to raise it earlier. But if the basic facts were known, and only their legal significance or a better alternative constitutional characterization was not seen,³³⁹ the chance that ignorance would be "reasonable" seems questionable. The cost of at best a minimal gain in efficiency may turn out to be rather high in human terms.

The legislative history does not indicate what "mischief" in the present law necessitates a change. Under section 2244 of the Code, a federal judge is not required to entertain a repeater's application if it presents no ground not theretofore presented and determined and the judge is satisfied that the ends of justice will not be served by further inquiry.³⁴⁰ The result is a rather general grant of discretion to refuse to entertain an application. This permits the judge to take into account the nature and extent of the former proceedings as a discretionary factor to be considered with the apparent merit or lack of merit in the current application.

The mandatory language of the proposed statute declares that a second application "shall not be entertained" unless an exception to the *res judicata* rule can be shown. Obviously this would narrow the discretion now exercised by a district court to determine the effect of prior proceedings. One might suppose that such a change would result

³³⁹ For example, in the *Massey* case the element of insanity affected the competence of the defendant to stand trial without counsel as well as the question whether he could be tried at all. *Massey v. Moore*, 348 U.S. 105 (1954). See also *Cicenia v. Lagay*, 357 U.S. 504 (1958).

³⁴⁰ 28 U.S.C. § 2244 (1958). This section, incorporated into the Judicial Code in 1948, was said by the revisers to make no material change in prior practice. Revisers Note following 28 U.S.C. § 2244 (1958). The leading federal case is *Salinger v. Loisel*, 265 U.S. 224 (1924). See also *Price v. Johnston*, 334 U.S. 266 (1948).

from a conclusion that the present Code provision or its application is unsatisfactory.³⁴¹ If that is not true, the proposal to rigidify the rules is unnecessary and, since it creates the likelihood of grave injustice, ought to be disapproved.

With all its defects, the presently proposed statute is incomparably superior to the bill which was passed by the House of Representatives in the 84th and 85th Congresses.³⁴² That bill was designed to curtail sharply the scope of the federal habeas corpus jurisdiction.³⁴³ Its principal sponsors believed that the federal courts had distorted the Great Writ by expanding its use and that there was need for legislation to return it to its historic, and much narrower, scope.³⁴⁴ One vestige of that attitude was retained in a provision of the current bill as approved by the Judicial Conference of the United States,³⁴⁵ but the chairman of the Conference committee on habeas corpus suggested elimination of the provision in his testimony before the House subcommittee which held hearings on the bill.³⁴⁶ His suggestion was

³⁴¹ For the practice of federal judges in cases involving state prisoners, see *United States ex rel. Goodchild v. Burke*, 245 F.2d 88 (7th Cir. 1957), *cert. denied*, 355 U.S. 915 (1958); *Chapman v. Teets*, 241 F.2d 186 (9th Cir. 1957); *United States ex rel. Farnsworth v. Murphy*, 207 F.2d 885 (2d Cir. 1953); *Ex parte Farrell*, 189 F.2d 540 (1st Cir.), *cert. denied*, 342 U.S. 839 (1951); *Pagett v. McCauley*, 95 F.2d 839 (9th Cir. 1938); *Lee v. Burford*, 156 F. Supp. 480 (N.D. Ala. 1957); *Wheeler v. Kaiser*, 45 F. Supp. 937 (W.D. Mo. 1942). In 28 U.S.C. § 2255 (1958), the principal postconviction remedy for federal prisoners, it is provided that: "The sentencing court shall not be required to entertain a second or successive motions for similar relief on behalf of the same prisoner." See *Smith v. United States*, 267 F.2d 691 (D.C. Cir. 1959).

³⁴² In the 84th Congress, the House of Representatives passed H.R. 5649, 84th Cong., 1st Sess., 102 CONG. REC. 940 (1956). In the 85th Congress, the House of Representatives passed H.R. 8361, 85th Cong., 2d Sess., 104 CONG. REC. 4154 (daily ed. March 18, 1958). In the 86th Congress, an identical bill was introduced as H.R. 3216, 86th Cong., 1st Sess. (1959). As reported by the House Judiciary Committee, however, the former provisions were replaced by the language of the present bill. H.R. REP. No. 548, 86th Cong., 1st Sess. 4 (1959).

³⁴³ The former proposal would have eliminated federal habeas corpus jurisdiction in any case in which the questions presented could still be raised in a state proceeding or previously had been raised and determined in a state court or could have been, but were not, presented at some past time to a state court, where there had been a fair and adequate opportunity to do so.

³⁴⁴ See, e.g., the testimony of Judge Parker. *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 6, at 20 (1955). See also *id.* at 77; 102 CONG. REC. 939 (1956); 104 CONG. REC. 4151-53 (daily ed. March 18, 1958).

³⁴⁵ See H.R. REP. No. 548, *supra* note 342, at 12-13. The Judicial Conference recommended that § 2254 of the Judicial Code be amended to provide that an application for federal habeas corpus by a state prisoner should be entertained "only on a ground which presents a substantial Federal constitutional question." H.R. 6742, 86th Cong., 1st Sess. (1959). The same provision had appeared in the earlier bills.

³⁴⁶ Judge Orrie L. Phillips recommended that this be eliminated and the following substituted: "the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Hearings on H.R. 6742, H.R. 4958, H.R. 3216, H.R. 2269 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 2, at 12 (1959).

adopted and the bill, as passed by the House, is in no way an attack upon the Freedom Writ. It represents rather an effort to improve the practices of the courts within the existing jurisdiction. For the reasons discussed above, however, it is believed that even this bill should not be enacted into law.

CONCLUSION

The purpose of this Article has been to demonstrate something of the meaning of the federal habeas corpus jurisdiction in the administration of state criminal law. No one will deny that the jurisdiction has been an irritant to federal-state relations. But since the evidence indicates that virtually all successful petitioners for federal habeas corpus have never received a fair hearing in their state courts, the treatment for that condition should be directed primarily toward the state systems. This is not to say that there is no need for improvement in the administration of the federal writ. Some of the serious problems have been discussed. Others remain for consideration. The vital point is that there be recognition of the present indispensability of a federal remedy to vindicate the constitutional rights of state prisoners.

APPENDIX

There follows a chronological history of the 35 cases discussed in this Article in which a state prisoner successfully attacked his conviction. The cases are listed alphabetically. For each case, the history may be divided into three components: original prosecution and direct appellate proceedings including any certiorari applications, state collateral proceedings, and federal habeas corpus litigation. Citations to reported opinions or orders of the courts, where known, are given. A brief reference is made in each case to the ultimately controlling federal question and the manner in which it was raised in the state courts.

ALMEIDA*Pennsylvania*

State direct: Convicted of murder after jury trial and sentenced to death; motion for new trial denied, *Commonwealth v. Almeida*, 66 Pa. D. & C. 351 (1948), *aff'd*, 362 Pa. 596, 68 A.2d 595 (1949), *cert. denied*, 339 U.S. 924 (1950).

State collateral: Petition for habeas corpus in state supreme court denied without hearing or opinion, May 26, 1950; certiorari denied, *Pennsylvania ex rel. Almeida v. Baldi*, 340 U.S. 867 (1950).

Federal habeas corpus: Granted, *United States ex rel. Almeida v. Baldi*, 104 F. Supp. 321 (E.D. Pa. 1951), *aff'd*, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953).

Dispositive federal question: Suppression of evidence by the prosecution. Suggested in motion for new trial but not alleged as wilful action by the prosecution until state habeas corpus petition.

BERRY*Kentucky*

State direct: Pleaded guilty to rape and received life sentence in 1954. No appeal.

State collateral: Petition for habeas corpus in county court denied; affirmed, *Berry v. Gray*, 299 S.W.2d 124 (Ky. Ct. App.), *cert. denied*, 353 U.S. 986 (1957).

Federal habeas corpus: Granted, *Berry v. Gray*, 155 F. Supp. 494 (W.D. Ky. 1957).

Dispositive federal question: Lack of counsel. Issue raised in state habeas corpus proceeding.

BLAND*Texas*

State direct: Convicted after jury trial of burglary and being an habitual criminal and sentenced to life imprisonment. After the Texas Court of Criminal Appeals had affirmed, and while a petition for rehearing was pending, the prisoner escaped from custody. The affirmance was set aside and the appeal dismissed, *Bland v. State*, 154 Tex. Crim. 3, 224 S.W.2d 479 (1949), *cert. denied*, 338 U.S. 938 (1950).

State collateral: Petition for habeas corpus denied, *Ex parte Bland*, 154 Tex. Crim. 511, 228 S.W.2d 170 (1950), *cert. denied*, 339 U.S. 988 (1950).

Federal habeas corpus: The first application was denied in 1952 without opinion. The second was granted, *Petition of Bland*, 139 F. Supp. 900 (S.D. Tex. 1955).

Dispositive federal question: Lack of counsel. At the original trial, the defendant asked for a continuance in order to get counsel, but the matter was probably not framed in constitutional terms. The federal question was raised on appeal from the conviction and in the state habeas corpus petition.

BOWERS*Pennsylvania*

State direct: Pleaded guilty in 1934 in Pennsylvania to charges of receiving stolen goods and in 1938 to abduction of female child. These convictions were considered subsequently in New York under an habitual criminal statute when Bowers, after conviction in 1941 of attempted burglary, was deemed a fourth offender and sentenced to a prison term of from 15 years to life. No appeal.

State collateral: Applications to the New York trial court for writ of error coram nobis and resentencing were denied. In the Pennsylvania courts, a petition for writ of error coram nobis was denied; the Pennsylvania Superior and Supreme Courts denied leave to appeal; certiorari denied, *Bowers v. Pennsylvania*, 353 U.S. 967 (1957).

Federal habeas corpus: Hearing ordered, New York *ex rel.* Bowers v. Fay, 157 F. Supp. 701 (S.D.N.Y. 1957), *granted*, 171 F. Supp. 558 (S.D.N.Y. 1958), *aff'd sub nom.* United States *ex rel.* Bowers v. Fay, 266 F.2d 824 (2d Cir. 1959).

Dispositive federal question: Lack of counsel in Pennsylvania cases. First raised after New York sentence in collateral proceedings in New York and Pennsylvania.

CAMINITO

New York

State direct: Convicted of murder after jury trial and sentenced to life imprisonment; affirmed, *People v. Caminito*, 265 App. Div. 960, 38 N.Y.S.2d 1019 (1942), *aff'd*, 291 N.Y. 541, 50 N.E.2d 654 (1943). No petition for certiorari.

State collateral: Motion for reargument of appeal denied, 297 N.Y. 882, 79 N.E.2d 277 (1948). No petition for certiorari. Second motion for reargument denied, 307 N.Y. 686, 120 N.E.2d 857 (1954), *cert. denied*, 348 U.S. 839 (1954).

Federal habeas corpus: Denied, *United States ex rel. Caminito v. Murphy*, 127 F. Supp. 689 (N.D.N.Y.), *rev'd*, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955).

Dispositive federal question: Coerced confession. Coercion litigated in original prosecution and raised in motion for reargument.

CARMEN

California

State direct: Convicted of murder and sentenced to death; on appeal, reversed, *People v. Carmen*, 36 Cal. 2d 768, 265 P.2d 900, *rehearing granted and conviction aff'd*, 43 Cal. 2d 342, 273 P.2d 521 (1954). No petition for certiorari.

State collateral: Petition for habeas corpus in state supreme court denied, *Application of Carmen*, 48 Cal. 2d 851, 313 P.2d 817 (1957), *cert. denied without prejudice to an application for federal habeas corpus*, 355 U.S. 924 (1958).

Federal habeas corpus: Granted, *Petition of Carmen*, 165 F. Supp. 942 (N.D. Cal. 1958).

Dispositive federal question: Exclusive federal jurisdiction of the offense under the Ten Major Crimes Act. The issue was raised in the state direct and collateral proceedings.

COLLINS

Pennsylvania

State direct: Convicted in 1931 as a burglar and habitual criminal upon a guilty plea, and sentenced to prison for from 5 to 20 years. No appeal.

State collateral: Petition for habeas corpus in county court denied; affirmed, *Commonwealth ex rel. Collins v. Ashe*, 159 Pa. Super. 553, 49 A.2d 265 (1946). No petition for certiorari.

Federal habeas corpus: Denied, *United States ex rel. Collins v. Ashe*, 74 F. Supp. 987 (W.D. Pa.), *vacated and remanded*, 175 F.2d 555 (3d Cir.), *denied*, 80 F. Supp. 914 (W.D. Pa. 1948), *vacated and remanded*, 176 F.2d 606 (3d Cir. 1949), *denied*, 90 F. Supp. 463 (W.D. Pa. 1950).

State collateral: Petition for habeas corpus in county court denied; affirmed, *Commonwealth ex rel. Collins v. Claudy*, 170 Pa. Super. 199, 85 A.2d 663 (1952), *cert. denied*, 343 U.S. 954 (1952).

Federal habeas corpus: Denied, *United States ex rel. Collins v. Claudy*, 106 F. Supp. 367 (W.D. Pa. 1952), *rev'd*, 204 F.2d 624 (3d Cir. 1953).

Dispositive federal question: Failure to give notice of the applicability of the state habitual criminal act. First raised in 1946 state habeas corpus proceedings.

CURRAN (MAGUIRE and JONES)

Delaware

State direct: Conviction of rape after jury trial in 1948 with sentence of life imprisonment. No appeal.

State collateral: Petition for habeas corpus in Superior Court denied, *Curran v. Wooley*, 48 Del. 214, 101 A.2d 303 (1953), *aff'd*, 48 Del. 382, 104 A.2d 771 (1954). No petition for certiorari. Motion to vacate sentence in Superior Court denied, *State v. Curran*, 49 Del. 350, 116 A.2d 782 (1955), *aff'd*, 49 Del. 587, 122 A.2d 126, *cert. denied*, 352 U.S. 913 (1956).

Federal habeas corpus: Granted, *Curran v. Delaware*, 154 F. Supp. 27 (D. Del. 1957), *aff'd*, 259 F.2d 707 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959).

Dispositive federal question: Perjury by police officer. First raised in state habeas corpus proceeding.

DAUGHARTY

Oregon

State direct: Convicted in jury trial of uttering forged check and sentenced to 15 years in 1951. No appeal.

State collateral: Several petitions for habeas corpus were denied, all without opinion. The last of these was denied by a trial-level court on July 11, 1956. The state supreme court granted leave to appeal in forma pauperis but denied a request for a transcript of the original trial at state expense and ultimately dismissed the appeal. A petition for certiorari, filed prior to the dismissal of the appeal, was denied, *Daugharty v. Gladden*, 352 U.S. 1009 (1957).

Federal habeas corpus: Several applications, interspersed with state habeas corpus petitions, were denied. Only one was reported, *Daugharty v. Gladden*, 128 F. Supp. 95 (D. Ore. 1953). The final application was denied in the district court, *Daugharty v. Gladden*, 150 F. Supp. 887 (D. Ore. 1957), *rev'd*, 257 F.2d 750 (9th Cir. 1958).

Dispositive federal question: Denial of appeal in state postconviction proceeding. Never raised in constitutional terms in the state courts.

DeVITA (and GRILLO)

New Jersey

State direct: Convicted of murder in jury trial and sentenced to death; affirmed, *State v. Grillo*, 11 N.J. 173, 93 A.2d 328 (1952), *cert. denied*, 345 U.S. 976 (1953).

State collateral: Petition for habeas corpus in trial level court denied; affirmed, In the Matter of DeVita, 27 N.J. Super. 101, 98 A.2d 716, *aff'd*, 13 N.J. 341, 99 A.2d 589 (1953), *cert. denied*, 346 U.S. 923 (1954). Motion for new trial denied; affirmed, *State v. Grillo*, 16 N.J. 103, 106 A.2d 294 (1954). No petition for certiorari.

Federal habeas corpus: Denied by district court without opinion; reversed and remanded, *United States ex rel. DeVita v. McCorkle*, 216 F.2d 743 (3d Cir. 1954), *denied*, 133 F. Supp. 169 (D.N.J. 1955), *rev'd*, 248 F.2d 1 (3d Cir.), *cert. denied*, 355 U.S. 873 (1957).

Dispositive federal question: Failure of petit juror to reveal that he had recently been the victim of an offense similar to the one in this case. First raised in motion for new trial in 1954.

ELLISOR

Texas

State direct: Convicted of murder after jury trial and sentenced to death; affirmed, *Ellisor v. Texas*, 282 S.W.2d 393 (Tex. Ct. Crim. App. 1955). No petition for certiorari.

State collateral: Petitions for habeas corpus were denied by a trial-level court and the Court of Criminal Appeals without reported opinions.

Federal habeas corpus: Granted, *Petition of Ellisor*, 140 F. Supp. 720 (S.D. Tex.), *aff'd*, 239 F.2d 175 (5th Cir. 1956).

Dispositive federal question: Lack of counsel at sentencing. First raised in state collateral proceedings.

GARTON (and FREEMAN)

Colorado

State direct: Pleaded guilty to kidnapping in 1945 and sentenced to from 25 to 29 years in prison. No appeal.

State collateral: Motion to vacate sentence (treated as petition for writ of error coram nobis) denied; affirmed, *Freeman v. Colorado*, 128 Colo. 99, 260 P.2d 603 (1953), *cert. denied*, 346 U.S. 911 (1953).

Petition for habeas corpus, filed by Freeman alone, denied by county court; affirmed, *Freeman v. Tinsley*, 135 Colo. 62, 308 P.2d 220, *cert. denied*, 355 U.S. 843 (1957).

Federal habeas corpus: Filed by Garton alone (Freeman having been granted executive clemency); granted, *Garton v. Tinsley*, 171 F. Supp. 387 (D. Colo. 1959).

Dispositive federal question: Lack of counsel. First raised in state collateral proceedings.

GOLDSBY

Mississippi

State direct: Convicted of murder in jury trial and sentenced to death; affirmed, *Goldsby v. State*, 226 Miss. 1, 78 So. 2d 762, *cert. denied*, 350 U.S. 925 (1955).

State collateral: Petition for writ of error coram nobis or habeas corpus in state supreme court denied, *Goldsby v. State*, 226 Miss. 20, 86 So. 2d 27, *cert. denied*, 352 U.S. 944 (1956).

Federal habeas corpus: Denied without hearing in the district court; reversed and remanded, United States *ex rel.* Goldsby v. Harpole, 249 F.2d 417 (5th Cir. 1957); denied with oral opinion of the district court unpublished; reversed, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 838, 850 (1959).

Dispositive federal question: Racial discrimination in selection of the petit jury. First raised in petition for certiorari following conviction and appeal.

GONZALES

Washington

State direct: Convicted of murder after jury trial in 1950 and sentenced to life imprisonment. Appeal noted but not perfected.

State collateral: Petition for habeas corpus in Washington Supreme Court denied without opinion; certiorari denied, Giron v. Cranor, 344 U.S. 847 (1952).

Federal habeas corpus: Granted, Giron v. Cranor, 116 F. Supp. 92 (E.D. Wash. 1953), *aff'd sub nom.* Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956).

Dispositive federal question: Coerced confession. Coercion was litigated in the original trial, but possibly not in constitutional dimension. The coerced confession was not among the contentions in the state habeas corpus petition.

GRANDSINGER

Nebraska

State direct: Convicted of murder after jury trial and sentenced to death; affirmed, Grandsinger v. State, 161 Neb. 419, 73 N.W.2d 632 (1955); petition for rehearing denied; motion for leave to file an amended and supplemental petition for rehearing granted but petition for rehearing denied without opinion; certiorari denied, 352 U.S. 880 (1956).

Federal habeas corpus: Granted, Grandsinger v. Bovey, 153 F. Supp. 201 (D. Neb. 1957), *aff'd*, 253 F.2d 917 (8th Cir.), *cert. denied*, 357 U.S. 929 (1958).

Dispositive federal question: Lack of effective assistance of counsel. First raised in amended and supplemental petition for rehearing.

GREEN

Maine

State direct: Convicted after jury trial of uttering forged instrument and sentenced to from 5 to 10 years in prison. No appeal.

State collateral: Repeated applications are not traceable since no opinions were ever published. Finally, a reasonably clear petition for habeas corpus was presented to a single judge of the Maine Supreme Judicial Court. An appeal from denial of this petition to the court en banc was prevented by the lack of an in forma pauperis procedure.

Federal habeas corpus: The first seven applications were denied, some with instructions to the prisoner on exhaustion of state remedies. Published opinions appear in Green v. Maine, 110 F. Supp. 240 (D. Me. 1952), 113 F. Supp. 253 (D. Me. 1953). The eighth application was granted, Green v. Robbins, 120 F. Supp. 61 (D. Me.), *aff'd*, 218 F.2d 192 (1st Cir. 1954).

Dispositive federal question: Lack of counsel at sentencing. First raised in state collateral proceedings.

HOUSTON

Missouri

State direct: Convicted of murder in 1940 and sentenced to life imprisonment. No appeal.

State collateral: Petition for habeas corpus in Cole County Court granted in 1946. On motion of the prosecutor, the Mississippi County Court, in which the judgment of conviction had been entered, "remanded" the petitioner to jail. Petition for habeas corpus in the state supreme court; writ quashed in 1952; certiorari denied, Houston v. Missouri, 345 U.S. 1003 (1953) (out of time).

Federal habeas corpus: Granted, Houston v. Eidson, 119 F. Supp. 778 (W.D. Mo. 1954).

Dispositive federal question: Continued incarceration after state court had granted habeas corpus relief. (The state court relied upon lack of effective assistance of counsel.) Question probably raised in habeas corpus petition in the state supreme court.

JOHNS

Indiana

State direct: Pleaded guilty to charges of burglary and auto theft in 1946 and sentenced to 25 years in prison. No appeal.

State collateral: Petition for coram nobis denied; appeal dismissed as out of time, Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949). No petition for certiorari.

Federal habeas corpus: Petition dismissed in 1950 because prisoner not then serving challenged sentence. Granted, *Johns v. Overlade*, 122 F. Supp. 921 (N.D. Ind. 1953).

Dispositive federal question: Lack of counsel. First raised in coram nobis proceedings.

LEYRA

New York

State direct: Convicted of murder after jury trial and sentenced to death; affirmed, *Leyra v. People*, 304 N.Y. 468, 108 N.E.2d 673 (1952), *cert. denied*, 345 U.S. 918 (1953).

Federal habeas corpus: Denied, *Leyra v. Denno*, 113 F. Supp. 556 (S.D.N.Y.), *aff'd*, 208 F.2d 605 (2d Cir. 1953), *rev'd*, 347 U.S. 556 (1954).

Dispositive federal question: Coerced confession. Raised in the original trial and appellate proceedings.

LUNCE (and REYNOLDS)

Indiana

State direct: Convicted of robbery after jury trial in 1952 and sentenced to from 10 to 25 years in prison.

State collateral: Delayed appeal allowed and conviction affirmed, *Lunce v. State*, 233 Ind. 685, 122 N.E.2d 5 (1954), *cert. denied*, 349 U.S. 960 (1955).

Federal habeas corpus: Denied by the district court without opinion; reversed and remanded, *Lunce v. Overlade*, 244 F.2d 108 (7th Cir. 1957); writ granted without published opinion in the district court; affirmed, *Lunce v. Dowd*, 261 F.2d 351 (7th Cir. 1958).

Dispositive federal question: Lack of effective assistance of counsel. First raised in delayed appeal.

MASSEY

Texas

State direct: Convicted after trial by jury of robbery and assault in 1951 and received mandatory sentence of life imprisonment as an habitual criminal. No appeal.

State collateral: Two petitions for habeas corpus were denied by a county court; the former was not appealed while the latter was affirmed, *Ex parte Massey*, 149 Tex. Crim. 172, 191 S.W.2d 877, *cert. denied*, 329 U.S. 674 (1946).

Federal habeas corpus: A motion for leave to file a petition for habeas corpus in the Supreme Court was denied, *In re Massey*, 327 U.S. 770 (1946); denial of a subsequent application by the district court was affirmed, *Massey v. Moore*, 173 F.2d 980 (5th Cir.), *cert. denied*, 338 U.S. 837 (1949).

State collateral: Petition for habeas corpus in Court of Criminal Appeals denied, although lower court to which case had been referred recommended relief, *Ex parte Massey*, 157 Tex. Crim. 491, 249 S.W.2d 599 (1952). No petition for certiorari.

Federal habeas corpus: Denied by the district court without opinion; affirmed, *Massey v. Moore*, 205 F.2d 665 (5th Cir. 1953), *rev'd and remanded*, 348 U.S. 105 (1954), *granted*, 133 F. Supp. 31 (S.D. Tex. 1955).

Dispositive federal question: Lack of counsel to represent a defendant insane at time of trial. Counsel issue raised repeatedly in state collateral proceedings.

MILLS

Illinois

State direct: Pleaded guilty to burglary in 1935 and sentenced, as an habitual criminal, to life imprisonment.

State collateral: Delayed appeal allowed by the Illinois Supreme Court and the conviction affirmed without opinion in 1946; certiorari denied, *Mills v. Ragen*, 328 U.S. 846 (1946). Petition for habeas corpus in county court denied without opinion; certiorari denied, *Mills v. Ragen*, 329 U.S. 770 (1946).

Federal habeas corpus: Granted, *United States ex rel. Mills v. Ragen*, 77 F. Supp. 15 (N.D. Ill. 1948).

Dispositive federal question: Lack of counsel and coerced guilty plea. First raised in delayed appeal.

MONTGOMERY (Ill.)

Illinois

State direct: Convicted after a jury trial in 1924 of rape and sentenced to life imprisonment. No appeal.

State collateral: Petition for habeas corpus in county court denied without opinion; certiorari denied, *Montgomery v. Ragen*, 335 U.S. 836 (1948).

Federal habeas corpus: Granted, United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949).

Dispositive federal question: Suppression of evidence by the prosecution. First raised in state habeas corpus proceeding.

MONTGOMERY (Mo.)

Missouri

State direct: Pled guilty in 1941 to charges of robbery, kidnapping and auto theft and received a sentence of life imprisonment. No appeal.

State collateral: Petition for habeas corpus in Cole County granted in 1945. Petitioner "remanded" to prison by order of the court of St. Francois County, the court of the original conviction. Petition for habeas corpus in the state supreme court denied, Montgomery v. Parker, 355 Mo. 245, 195 S.W.2d 745 (1946). No petition for certiorari.

Federal habeas corpus: Granted, Montgomery v. Eidson, 123 F. Supp. 292 (W.D. Mo. 1954).

Dispositive federal question: Continued incarceration after state court had granted habeas corpus relief. (The Cole County Court held that the prisoner had been denied counsel.) Question probably raised in habeas corpus proceeding in state supreme court.

MULLREED

Michigan

State direct: Pled guilty in 1954 to unarmed robbery and received a sentence of from 10 to 15 years. No appeal.

State collateral: Petition for habeas corpus in county court denied with opinion, unpublished; the Michigan Supreme Court denied leave to appeal; certiorari denied, Mullreed v. Michigan, 348 U.S. 975 (1955).

Federal habeas corpus: Granted, Mullreed v. Bannan, 137 F. Supp. 533 (E.D. Mich. 1956).

Dispositive federal question: Lack of counsel. First raised in state habeas corpus proceeding.

RHEA

Tennessee

State direct: Convicted of habitual criminality, after offense of armed robbery, and sentenced in 1950 to life imprisonment; appeal dismissed for want of a bill of exceptions when court-appointed counsel in the trial court took no steps to perfect an appeal.

State collateral: After two applications apparently submitted to the wrong courts, a petition for habeas corpus was denied by a county criminal court; appeal to the state supreme court was not perfected for lack of an appeal bond.

Federal habeas corpus: Granted, Rhea v. Edwards, 136 F. Supp. 671 (M.D. Tenn. 1955), *aff'd*, 238 F.2d 850 (6th Cir. 1956).

Dispositive federal question: Absence of formal notice of applicability of habitual criminal act. First raised in state collateral proceedings.

SAVINI

Michigan

State direct: Pled guilty in 1943 in Michigan to charge of rape and sentenced to from 7½ to 15 years in prison. This conviction used in New York, after plea of guilty to robbery offense in 1954, to sentence defendant as multiple offender to prison for from 7½ to 8 years. No appeal.

State collateral: Petition for writ of error coram nobis in Michigan Circuit Court denied in 1955. No appeal.

Federal habeas corpus: Denied by the district court without opinion. No appeal.

State collateral: Petition for writ of error coram nobis in Michigan Circuit Court denied; affirmed by Michigan Supreme Court in 1956. No petition for certiorari.

Federal habeas corpus: Granted, unpublished memorandum in district court; affirmed, United States *ex rel.* Savini v. Jackson, 250 F.2d 349 (2d Cir. 1957).

Dispositive federal question: Lack of counsel at arraignment in Michigan rape case. Raised in coram nobis proceedings in Michigan.

SHEFFIELD

Louisiana

State direct: Convicted of murder after jury trial and sentenced to death in 1953. No appeal.

State collateral: Delayed motion for new trial returned as filed too late in 1954. Petition for writs of certiorari, mandamus and prohibition denied by state supreme

court in 1954; certiorari denied without prejudice to application for federal habeas corpus, *Sheffield v. Louisiana*, 348 U.S. 850 (1954).

Federal habeas corpus: Granted, United States *ex rel.* *Sheffield v. Waller*, 126 F. Supp. 537 (W.D. La. 1954), *certificate of prob. cause denied*, 224 F.2d 280 (5th Cir.), *cert. under 28 U.S.C. § 1651(a) (1958) denied*, 350 U.S. 922 (1955).

Dispositive federal question: Numerous issues were involved, including primarily lack of effective assistance of counsel, undue haste in holding the trial, and the prejudicial effects of inflamed community emotions.

STONER

Illinois

State direct: Pleaded guilty to burglary and larceny in 1943 and received a sentence of life imprisonment. No appeal.

State collateral: Proceeding under Illinois Post-Conviction Hearing Act denied by trial court; affirmed without opinion by state supreme court; certiorari denied, *Stoner v. Randolph*, 348 U.S. 849 (1954).

Federal habeas corpus: Granted, United States *ex rel.* *Stoner v. Randolph*, 165 F. Supp. 284 (E.D. Ill. 1958).

Dispositive federal question: Lack of counsel. Raised in state postconviction proceeding.

THOMPSON

Pennsylvania

State direct: Convicted of murder after jury trial and sentenced to death; affirmed, *Commonwealth v. Thompson*, 367 Pa. 102, 79 A.2d 401, *cert. denied* 342 U.S. 835 (1951).

Federal habeas corpus: Denied, United States *ex rel.* *Thompson v. Dye*, 103 F. Supp. 776 (W.D. Pa. 1952), *aff'd*, 203 F.2d 429 (3d Cir.), *cert. denied*, 345 U.S. 960 (1953).

State collateral: Petition for habeas corpus in state supreme court denied without opinion in 1953. No petition for certiorari.

Federal habeas corpus: Denied, United States *ex rel.* *Thompson v. Dye*, 113 F. Supp. 807 (W.D. Pa.), *vacated and remanded*, 208 F.2d 565 (3d Cir. 1953), *denied*, 123 F. Supp. 759 (W.D. Pa. 1954), *rev'd*, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955).

Dispositive federal question: Suppression of evidence by the prosecution. First raised in petition for habeas corpus in state supreme court.

TODD

Indiana

State direct: Convicted after jury trial of auto theft and forgery and sentenced to 10 years in prison on the former and from 2 to 14 years on the latter; affirmed, *Todd v. State*, 226 Ind. 496, 81 N.E.2d 530, 784, 82 N.E.2d 407 (1948). No petition for certiorari.

Federal habeas corpus: Granted, *Todd v. Dowd*, 100 F. Supp. 485 (N.D. Ind. 1949).

Dispositive federal question: Lack of counsel. First raised in motion for new trial following conviction.

WADE

New York

State direct: Convicted of murder after a jury trial and sentenced to death; affirmed, *People v. Wade*, 265 App. Div. 867, 38 N.Y.S.2d 369 (1942), *aff'd*, 291 N.Y. 574, 50 N.E.2d 660, *cert. denied*, 320 U.S. 789 (1943), *motion for reargument of appeal denied*, 292 N.Y. 577, 54 N.E.2d 693 (1944).

State collateral: Petition for writ of error coram nobis denied in 1955; leave to appeal in forma pauperis denied by the Appellate Division; leave to appeal to the Court of Appeals denied; appeal dismissed by the Appellate Division in 1956; certiorari denied, *Wade v. New York*, 352 U.S. 974 (1957) (out of time).

Federal habeas corpus: Denied, United States *ex rel.* *Wade v. Jackson*, 144 F. Supp. 458 (N.D.N.Y. 1956), *rev'd*, 256 F.2d 7 (2d Cir.), *cert. denied*, 357 U.S. 908 (1958). See also 153 F. Supp. 781 (N.D.N.Y. 1957), *appeal dismissed*, 256 F.2d 7 (2d Cir. 1958).

Dispositive federal question: Coerced confession. The issue of coercion was litigated in the original prosecution, but not in the coram nobis proceeding or the 1957 petition for federal habeas corpus.

WESTBROOK

Illinois

State direct: Convicted after jury trial of armed robbery, sentenced to life imprisonment in 1948, resentenced to 30-50 years' imprisonment in 1952. No appeal.

State collateral: Petition for habeas corpus in county court denied in 1949; certiorari denied, *Westbrook v. Ragen*, 337 U.S. 960 (1949). Request for copy of transcript and record of prosecution proceedings denied by trial court in 1950. On writ of error to state supreme court, remanded for correction of sentence, *People v. Westbrook*, 411 Ill. 301, 103 N.E.2d 494 (1952). At resentencing, request for transcript again refused. Motion for new trial on ground of lack of transcript denied in 1952. Petition under Illinois Post-Conviction Hearing Act dismissed; affirmed by the state supreme court without opinion; certiorari denied, *Westbrook v. Illinois*, 349 U.S. 957 (1955). Petition for habeas corpus in county court denied; certiorari denied, *Westbrook v. Randolph*, 352 U.S. 973 (1957).

Federal habeas corpus: Granted by the district court; modified, *United States ex rel. Westbrook v. Randolph*, 259 F.2d 215 (7th Cir. 1958). (The court of appeals affirmed on the finding of denial of due process, but reversed the district court's order and directed that the prisoner be remanded to state custody for six months pending possible retrial.)

Dispositive federal question: Denial of transcript for appeal, reporter having contracted multiple sclerosis before transcribing notes which have since been lost or destroyed. The lack of a transcript was raised at several points in the state proceedings, particularly the Post-Conviction Procedure Act proceeding and the subsequent habeas corpus petition.

WHITE

Indiana

State direct: Convicted of murder after jury trial and sentenced to life imprisonment; affirmed, *White v. State*, 219 Ind. 290, 37 N.E.2d 937 (1941). No petition for certiorari.

Federal habeas corpus: Granted, *White v. Dowd*, 164 F. Supp. 266 (N.D. Ind. 1958).

Dispositive federal question: Use of confession made by accomplice referring to matters outside of the defendant's personal knowledge. Most likely classification is coerced confession, although the only authorities cited by the district court concern the right of confrontation and cross-examination. The federal question was never raised in the state courts.

WOODS

Pennsylvania

State direct: Pleaded guilty to armed robbery in 1947 and received a sentence of from 20 to 40 years imprisonment. No appeal.

State collateral: Petition for habeas corpus denied by county court in 1953. No appeal. Petition for habeas corpus denied by county court in 1956; appeal prevented by lack of filing fee; certiorari denied, *Woods v. Cavell*, 354 U.S. 911 (1957).

Federal habeas corpus: Granted, *Pennsylvania ex rel. Woods v. Cavell*, 157 F. Supp. 272 (W.D. Pa. 1957), *aff'd*, 254 F.2d 816 (3d Cir. 1958).

Dispositive federal question: Lack of counsel. First raised in state habeas corpus proceedings.