State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts

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I. INTRODUCTION

It is more difficult today than it was a decade ago for a state prisoner to persuade a federal court to review the propriety of his state court conviction or sentence. Even when a state prisoner does persuade a federal court to consider the merits of his habeas corpus petition, he is less likely than he was in the past to obtain the relief requested.

This change in the role of federal courts reflects a number of factors. First, state courts today are more willing to apply federal constitutional requirements in state cases, thereby lessening the necessity for federal court review of the propriety of state court convictions and sentences. Whether this willingness will continue if there is little possibility of subsequent federal court review is an important question to which no clear answer is readily apparent.

Second, federal judges are increasingly convinced that the state courts, rather than the federal courts, ought to have the major responsibility for deciding important criminal justice policy questions. This conviction results from the belief of some federal judges that federal courts attempted too much in trying to run the nation's schools, prisons, and mental hospitals and that there should be less rather than more federal court involvement.[1] Increased reliance on state courts is reflected in proposals to limit federal habeas corpus to cases in which the petitioner had no opportunity for a full and fair hearing in state court.[2]

Third, some of the rules imposed by federal courts, such as the exclusionary rule, have been criticized because they cost more by interfering with effective law enforcement than they provide in protecting against abuse of law enforcement authority. This view is reflected in assertions that federal court relief should be limited to situations in which the error concerns the integrity of the fact-finding process and the petitioner demonstrates a colorable claim of innocence.[3]

Federal courts—the United States Supreme Court in particular—have adopted a number of procedural requirements that a state prisoner must meet

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1. *See* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557.

2. *See infra* notes 29 & 30 and accompanying text.

3. Letter from William H. Rehnquist to Warren E. Burger (Sept. 23, 1971) (on file at the Administrative Office of United States Courts, Washington, D.C.).

to persuade a federal court to even consider the merits of his claim. These include, most notably, a demonstration that the petitioner has complied with state procedural requirements—usually a proper objection to the evidence, the jury instruction, or the guilty plea procedure;[4] a demonstration that all state remedies have been exhausted for all claims contained in the petition for habeas corpus;[5] and a demonstration that the factual conclusions of the state court not only are in error, but also are so obviously wrong that they have no support in the record, or that they have been decided without a full and fair hearing in the state court.[6]

Federal courts have also imposed limitations on the kinds of substantive issues that a state prisoner can raise. The most notable limitation is that of *Stone v. Powell*,[7] which precludes access to federal court for state prisoners claiming a violation of the fourth amendment unless the petitioner can show a lack of a full and fair hearing in state court. At the same time, however, several Supreme Court decisions have permitted a state prisoner to raise some new types of issues. Most notable are *Jackson v. Virginia*[8] and *Sandstrom v. Montana*,[9] the former allowing a petitioner to question the sufficiency of the evidence, the latter allowing a petitioner to challenge the propriety of the jury instructions. In the past federal habeas corpus relief had been unavailable for claims of insufficient evidence or improper jury instructions, both of which could be raised only in state court and only by means of a timely appeal.[10]

As a consequence of recent changes, a new relationship is developing between federal and state courts that reflects not only the increase in the kinds of substantive issues that a petitioner can raise through federal habeas corpus, but also the increase in the procedural requirements that a petitioner must meet to gain meaningful access to the federal court.

These changes are likely to create an increasingly important role for the state courts in reviewing the propriety of the conviction and sentence of state prisoners. Although the symbolic significance of United States Supreme

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4. Engle v. Isaac, 456 U.S. 107 (1982); *see* Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036, 1038–41 (1982); Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981 (1982).

5. Rose v. Lundy, 455 U.S. 509 (1982).

6. Sumner v. Mata, 449 U.S. 539 (1981); 455 U.S. 591 (1982). In 449 U.S. 539 (1981) (*Sumner I*), the Court directed the Ninth Circuit to reexamine its decision in light of the holding that federal courts must presume that state court findings of fact are correct. The Ninth Circuit reinstated its original decision, stating that the principles of *Sumner I* did not apply to its mixed finding of law and fact. In 455 U.S. 591 (1982) (*Sumner II*), the Court again remanded, holding that the Ninth Circuit had disagreed with the state court on the facts. Thus, the Ninth Circuit was required under *Sumner I* to either uphold the state court's decision or show that the state court's finding of fact with which it disagreed was not supported by the record.

7. 428 U.S. 465 (1976).

8. 443 U.S. 307 (1979).

9. 442 U.S. 510 (1979).

10. Young v. Alabama, 443 F.2d 854 (5th Cir.), *cert. denied*, 405 U.S. 976 (1971) (suffiency of the evidence not reviewable by habeas corpus); Higgins v. Wainwright, 424 F.2d 177 (5th Cir.), *cert. denied*, 400 U.S. 905, *reh'g denied*, 400 U.S. 1002 (1970) (improper jury instructions must amount to clear denial of due process to be reviewable by habeas corpus).

Court decisions like *Jackson v. Virginia* and *Sandstrom v. Montana* remains great, the practical impact of these cases is an unwarranted rise in state prisoner expectations. In reality the likelihood of a favorable decision in behalf of the state prisoner in federal court is increasingly remote, particularly because of the difficulty of meeting the procedural prerequisites for federal habeas corpus review and, when review is gained, the reluctance of federal courts to reverse the state court conviction on the merits.

II. THE REASONS FOR DISSATISFACTION WITH STATE PRISONER ACCESS TO FEDERAL COURT BY A PETITION FOR HABEAS CORPUS

The 1960s generated considerable criticism of federal court review of state court convictions. Most of the criticism came from outside the federal judiciary. In part it reflected opposition to some of the Warren Court's decisions.[11] Much of the criticism came from state court judges who were offended by the thought that a single federal district court judge could reverse a conviction considered proper by the state trial court, the intermediate court of appeals, and the state supreme court.[12] The availability of federal habeas review was also criticized for preventing finality of convictions and thus lessening the chance that the inmate would devote his time to rehabilitative efforts.[13]

In the 1970s the criticism by state judges subsided, and a much more harmonious relationship developed between the state and federal judiciaries.[14] This may reflect the work of the state-federal committees formed to discuss points of tension between state and federal courts.[15] It may also evidence the change in the expansive attitude of the United States Supreme Court. But, for the most part, it seemed to demonstrate the increased willingness of state courts to deal with important federal constitutional questions or to recognize that their failure to do so would result in federal court involvement. In a recent interview the very thoughtful Robert Sheran, then Chief Justice of the Minnesota Supreme Court, responded to the question whether too much federal court "judicial activism" had occurred:

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11. *See* Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740, 743–48 (1972).

12. LaFrance, *Federal Habeas Corpus and State Prisoners: Who's Responsible?*, 58 A.B.A. J. 610 (1972).

13. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963). Regarding the effect on rehabilitation, see Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Presumed*, 21 DE PAUL L. REV. 701, 710–12 (1972). Judge Lay says, "It seems unrealistic to say that channeling the quest for freedom away from the courtroom door will necessarily turn the prisoner's attention toward the process of rehabilitation." *Id.* at 711. Today rehabilitation is no longer a priority of correctional treatment.

14. Some state officials still criticize federal court review of state court convictions. See Florida Attorney General Jim Smith's argument that United States magistrates should not be allowed to make recommended findings of fact contrary to the factual conclusions reached by the state courts. Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036 (1982).

15. *See* Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740, 755 (1972).

> My response is that this criticism is exaggerated for two reasons. The first is that courts, whether they be the United States Supreme Court or the supreme courts of the states, do not deal with difficult interpretations of the Constitution unless a problem has been permitted to develop that is so aggravated and so extensive that resolution is demanded by the strongest kinds of public policy. Even then, the courts will take on those problems with the greatest reluctance and always subject to being overridden by constitutional amendment or, in the case of a legislative interpretation, by reenactment or rephrasing by the legislature.
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> The second reason is that the charge of excessive activisim on the part of the federal court system vis-à-vis state court systems comes about because state court systems are not, or at least in the past were not, as attentive as they should have been to their responsibilities to recognize the Constitution of the United States and the laws passed pursuant thereto as the supreme law of the land. The reason the United States Supreme Court entered into the series of decisions, which began in 1963, dealing with the trial of criminal cases in state courts is that in many instances over a period of two decades state courts had not dealt in effective and aggressive ways with clear violations of federal constitutional rights occurring in the cases before them.
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> The point is that justice abhors a vacuum. In the relationship between the federal courts and the state courts, the most effective way of avoiding reluctant federal action to correct problems occurring in the states is for state courts to take the initiative and deal with those problems in aggressive and constructive ways.[16]

Instead of continuing the earlier criticism of the federal judiciary, the Conference of State Court Chief Justices has more recently turned its attention to improving the capacity of the state courts to apply appropriate constitutional standards, thus limiting, if not eliminating, the necessity for federal court involvement. The proposed State Justice Institute Act[17] reflects this effort. As a consequence of the Conference's activities, federal habeas corpus no longer is the irritant to state court judges that it once was. Therefore, one would assume that the agitation for limiting federal habeas review of state court convictions would lessen and that habeas corpus would no longer be a major issue in federal-state relations.

Actually, although outside criticism has lessened during the past decade, members of the federal judiciary have become increasingly dissatisfied with the scope of federal review of state convictions. This dissatisfaction has been evident in a number of decisions that have restricted the scope of federal habeas corpus review;[18] it reflects a feeling by federal judges that federal

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16. 13 THE THIRD BRANCH 1 (March 1981) (interview with Chief Justice Robert Sheran, Chairman of the Conference of Chief Justices).

17. S. 2387, 96th Cong., 2d Sess., 126 CONG. REC. S9, 443–46 (daily ed. July 21, 1980). Senate Bill 2387 passed the Senate on July 21, 1980, but the House took no action on it. It has been reintroduced in the current session. A major purpose of the State Justice Institute is to improve the capacity of state courts to handle, in an informed way, claims of violations of federal constitutional rights.

For a discussion of the adequacy of the state courts' response to federal constitutional claims, see Freund, *Remarks at Symposium on Federal Habeas Corpus*, 9 UTAH L. REV. 27, 30 (1964); Note, *The Burden of Federal Habeas Corpus Petitions from State Prisoners*, 52 VA. L. REV. 486, 501 (1966).

18. McKeldin v. Rose, 631 F.2d 458 (6th Cir. 1980), *cert. denied*, 450 U.S. 969 (1980) (absence of counsel at preliminary hearing was harmless error not warranting habeas corpus relief); United States *ex rel.* Little v.

courts attempted too much in their effort to run the nation's schools, prisons, mental hospitals, and other programs that had traditionally been the sole responsibility of the states.[19] Federal judges have also been concerned about the dramatic growth in the number of prisoner conditions-of-confinement cases during the past decade. An illustration of this attitude appears in the following quotation from a dissenting opinion by Circuit Court of Appeals Judge Posner:

> Perhaps this apocalypse is already upon us. Our criminal prosecutions are becoming—to use an ugly but apt word—multiphasic. The familiar first phase comprises the criminal trial itself and any direct appeal from it. After the conviction has been affirmed, the phase of postconviction proceedings begins—first the state postconviction proceedings (I am speaking of state prosecutions, since the present case involves a state prisoner), then federal habeas corpus and maybe, after the sentence has been served, coram nobis as well. The third phase will meanwhile be getting under way. It consists of the section 1983 lawsuits, often numerous, complaining about mistreatment or neglect by prison officials and employees. When the prisoner is released from jail or has exhausted his imagination in devising section 1983 claims, the fourth phase begins, consisting of lawsuits against the prisoner's lawyers and the judges in the earlier phases complaining that by failing to secure his civil rights they violated those rights. When all this futile litigation has finally ended, the criminal is conscious not of the wrong he did but of his own multitudinous claims to justice whose vindication an unjust legal system kept always just outside his reach. He emerges not chastened, but full of passionate resentment.[20]

Judge Posner makes several important assumptions about prisoner litigation. First, prisoner claims are usually without merit. What few have merit can be dealt with by the market place: "If it is a meritorious claim there will be money in it for a lawyer; if it is not it ought not to be forced on some hapless unpaid lawyer."[21] Second, federal habeas corpus review, along with conditions-of-confinement litigation, is part of the "apocalypse" rather than a needed and healthy assurance that federal constitutional requirements will be observed. Third, the victims of all of this are the lawyers and judges, including federal judges, who, according to state prisoners, have failed to secure the prisoners' civil rights.

Ciuros, 452 F. Supp. 388 (S.D.N.Y. 1978) (petitioner must show extraordinary circumstances to warrant habeas corpus relief); Guerrero v. Harris, 461 F. Supp. 583 (S.D.N.Y. 1978) (absence of interpreter at stage at which petitioner pleaded guilty was harmless error not warranting habeas corpus relief).

19. *See supra* note 1.

20. McKeever v. Israel, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting). It is understandable that federal judges perceive prisoners as overly litigious. They know of only those state prisoners who attempt litigation in federal court. Some of these prisoners bring repeated, clearly frivolous, and therefore annoying petitions. But not all prisoners are litigious and not all petitions are frivolous. During the summer of 1982 the students in the University of Wisconsin Law School Legal Assistance to Institutionalized Persons Program interviewed all male prisoners entering the Wisconsin prison system between June 15 and August 15, 1982. A total of 270 were interviewed. Less than half expressed any concern whatsoever over the propriety of their conviction, and of those who were concerned only a fraction stated that they were not guilty of the crime of which they were convicted. Ongoing study (working papers available at Legal Assistance to Institutionalized Persons Program, 913 University Ave., Madison, Wisconsin 53715).

21. McKeever v. Israel, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting).

To the extent that other members of the federal judiciary share Judge Posner's perception, it is not surprising that they support limiting the availability of federal court review of state convictions. What is somewhat surprising is that most of the current limitations are being imposed on 28 U.S.C. § 2254 habeas corpus actions rather than on 42 U.S.C. § 1983 conditions-of-confinement litigation. Although state prisoner litigation in the federal courts has greatly increased, the increase has been attributable largely to section 1983 conditions-of-confinement litigation rather than to section 2254 challenges to state court convictions.[22]

If the federal-state issue were primarily the annoyance that state court judges feel when overruled by a single federal judge, as it was in the 1960s, then limitations on federal habeas corpus should limit the irritation. But if the federal-state issue is the usurpation by federal judges of decision-making responsibility that would better be left to the states, then the major problem lies not with section 2254 litigation but rather with section 1983 litigation. Section 1983 cases bypass state administrative and judicial procedures completely while section 2254 cases require that the petitioner exhaust state remedies and that the federal court grant at least some deference to the decisions of the state courts. For reasons that are not entirely apparent, federal courts have been willing to impose limitations on the availability of section 2254 habeas corpus review, but have been unwilling to impose limitations on the availability of section 1983 suits for prisoners complaining about the conditions of their confinement. Indeed, congressional action was needed to empower the district judge hearing a section 1983 suit to require state prisoners to exhaust readily available and adequate administrative grievance procedures prior to bringing action in federal court, a requirement that federal courts have declined to adopt.[23]

III. LEGISLATIVE PROPOSALS FOR LIMITATIONS ON FEDERAL HABEAS CORPUS REVIEW

During the past decade Congress has considered repeated proposals to restrict the availability of federal habeas corpus review for state prisoners. It has not yet adopted any of these proposals, but the executive branch continues to urge that Congress impose restrictions, and one such proposal is presently pending.[24]

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22. See FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 8 (1980), for a discussion of the growth of 42 U.S.C. § 1983 cases. The number of cases grew from 3,348 in 1972 to 11,195 in 1979. *Id.* In contrast, during the same period the number of state prisoner habeas cases (28 U.S.C. § 2254) declined from 7,949 to 7,123. AD. OFF. U.S. CTS., 1979 ANN. REP. 61.

23. *See* Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 330–31 (1979).

24. See Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036 (1982), which discusses various legislative proposals made to Congress.

The judicial and legislative branches have also acted, through the exercise of the rule-making power. The Court approved a set of rules to govern section 2254 proceedings; these were adopted, with several amendments, by Congress effective February 1, 1977.[25] Among the rules adopted is Rule 9, which attempts to deal with the problem of delayed or successive petitions.

Finally, the Supreme Court, in a series of recent cases, has adopted additional procedural requirements that a state prisoner must meet before federal habeas corpus review will be available. It has also, to some extent, reduced the scope of substantive issues that can be raised by federal habeas corpus, although it has allowed some new issues to be raised.[26]

Following is a brief discussion of some of the United States Department of Justice proposals to limit the scope of federal habeas corpus review. Although Congress has not adopted these proposals, they continue to be made. Many of the limitations imposed by the Supreme Court appeared in earlier legislative proposals advanced by several members of the Department of Justice, one of whom, William H. Rehnquist, is now a member of the Court and author of a number of the opinions limiting the availability of federal habeas corpus review.

In 1971 Assistant Attorney General William H. Rehnquist wrote to the Chief Justice of the United States Supreme Court asking that the Judicial Conference of the United States consider certain legislative proposals of the Department of Justice designed to modify the scope of the writ of habeas corpus.[27] In his letter Mr. Rehnquist discussed three legislative proposals: first, to limit habeas corpus to claims that "affect the reliability of the fact finding process"; second, to require, in addition, that the petitioner show that the constitutional violation (which affected the reliability of the fact-finding process) resulted in his conviction despite a "colorable showing of innocence"; and third, and most far-reaching, to provide that a state court decision on the merits would preclude federal court review.

Mr. Rehnquist favored the first and second suggestions, that the error must "affect the reliability of the fact finding process" and that petitioner must demonstrate a "colorable showing of innocence." His support of the third proposal, that state action on the merits preclude federal review, was weaker: "A primary deficiency in a statutory overruling of *Brown* is that it would break sharply with the current decisions of the court, and severely limit the rights of prisoners to seek federal relief. Therefore the opposition to such a proposal might be considerable."[28]

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25. 28 U.S.C.A. Foll. § 2254, Rule 9 (1976).

26. *See supra* notes 4–10 and accompanying text.

27. Letter from William H. Rehnquist to Warren E. Burger (September 23, 1971) (on file at the Administrative Office of United States Courts, Washington, D.C.).

28. Letter to Chief Judge J. Edward Lumbard, then Chairman of the Advisory Committee on the Rules of Criminal Procedure (Aug. 20, 1971) (attached to the Sept. 23 letter to the Chief Justice; *see supra* note 27).

In a letter to Congressman Celler of June 21, 1972,[29] Attorney General Kleindienst recommended legislation that would limit federal habeas corpus to claims "(1) which were not theretofore raised and determined in a State court, *and* (2) which there was no fair and adequate opportunity theretofore to have raised and determined in a State court, *and* (3) which could not thereafter be raised and determined in a State court."[30] In addition, claims that were not and could not be raised in state court could be raised on federal habeas corpus review only if they met the additional requirement that the constitutional right allegedly violated "has as its primary purpose the protection of the reliability of . . . the fact finding process at the trial."[31] Finally, petitioner could gain relief only if he could also show that "a different result would probably have obtained if the violation of the constitutional right had not occurred."[32]

Proposed legislation incorporating the views of the Department of Justice was drafted and introduced, but was not enacted by the Congress.[33] Proponents said that the proposed legislation would reduce the work of the federal courts, the district courts in particular; that it would promote finality of convictions and thus rehabilitation; and that it would minimize the irritant to federal-state relations.[34] Opponents urged that the proposal would effectively deny a federal forum and habeas corpus relief to most state prisoners alleging a violation of constitutional rights, a result not justified by concern over case load, offender rehabilitation, or tensions between federal and state courts.[35]

A special committee on habeas corpus of the Judicial Conference of the United States, although it acknowledged that a revision of the habeas corpus statutes was desirable, recommended that the legislation proposed by the Department of Justice be disapproved.[36] The committee suggested that it would be better to enact legislation that would encourage state courts to review all alleged errors in a single postconviction procedure; to notify the defendant, after the state postconviction procedure, that state remedies had been exhausted; to furnish counsel to decide whether federal review is feasible and desirable; and then to limit to 120 days the period within which a petition for habeas corpus would have to be filed. The committee provided exceptions to the time limit for newly discovered evidence and changes in the

29. 119 CONG. REC. 2,222–26 (1973).

30. *Id.* at 2224.

31. *Id.*

32. *Id.* at 2224–25.

33. S. 567, 93d Cong., 1st Sess., 119 CONG. REC. 2221–22 (1976).

34. *See* Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221, 1245–52 (1973).

35. *Id.* at 1245.

36. W. Hoffman, Chairman's Report to the Judicial Conference of the United States (Sept. 1973) (on file at the Administrative Office of the United States Courts, Washington, D.C.). See a similar proposal in Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740, 750–55 (1972).

law.[37] These proposals were concerned primarily with finality and with the great time delay in some habeas corpus actions. They were not intended to lessen the role of federal courts nor to limit habeas corpus reviews to claims relating to the integrity of the fact-finding process in which petitioner brought a colorable claim of innocence. To date these proposals have not received favorable congressional action.

In the past decade discussion of legislative limitations on the availability of federal habeas corpus relief for state prisoners has continued. Most recently the Reagan administration has urged the adoption of S. 2903, the Federal Intervention Reform Act of 1982.[38] This proposed legislation would bring about essentially four changes. First, 28 U.S.C. § 2244 would be amended to make clear that federal issues would have to be raised in state court as required by state procedure, unless the failure to raise them resulted from state action that had violated the Constitution or laws of the United States; or unless the federal right were newly recognized by the Supreme Court subsequent to the procedural default and would be applied retroactively; or unless the factual predicate could not have been discovered through the exercise of reasonable diligence prior to the procedural default. Second, 28 U.S.C. § 2244 would also be amended to provide for a one-year period of limitation that would run from the time state remedies were exhausted, the impediment to filing in federal court has been removed, the right asserted has been recognized by the Supreme Court, or the factual predicate upon which the claim is based was undiscoverable by the exercise of reasonable diligence. Third, 28 U.S.C. § 2254 would be amended to preclude raising any claim that had been fully and fairly adjudicated in state proceedings. Fourth, on any issues that could still be raised in federal court, the state court findings of fact would be considered correct unless the presumption were rebutted by clear and convincing evidence.[39]

The most recent proposals differ from earlier proposals in at least two respects. First, they drop all reference to the integrity of the fact-finding process and the requirement of a colorable showing of innocence. Rather, they emphasize the finality of state court proceedings. Second, the one-year period of limitations starts to run at the time state remedies are exhausted whether or not the state prisoner is informed of this fact and whether or not he has the assistance of counsel in determining whether a basis exists for bringing a petition for habeas corpus in federal court.[40]

The recent proposals are similar to earlier proposals of the Department of Justice that would effectively preclude federal review and would limit the

37. W. Hoffman, Chairman's Report to the Judicial Conference of the United States (Sept. 1973) (on file at the Administrative Office of the United States Courts, Washington, D.C.).

38. S. 2903, 97th Cong., 2d Sess. (1982).

39. *Id.*

40. *Id.*

opportunity to raise federal constitutional issues to those few cases in which the Supreme Court grants certiorari. Should the current proposals of the Department of Justice be adopted by Congress, access to federal habeas corpus would effectively be closed to state prisoners who claim that their convictions or sentences resulted from state processes that violated the Constitution.

IV. The Rules Governing Section 2254 Cases in the United States District Courts

The habeas rules that became effective in 1977 make no effort to limit federal court review except in the provisions of Rule 9 dealing with delayed or successive petitions.[41] Rule 9 provides that a petition may be dismissed if the state is prejudiced by a delay in the filing of the petition and the petitioner fails to demonstrate that the petition is based on grounds that could not have been discovered earlier by the exercise of reasonable diligence. The rule also provides for the dismissal of a successive petition if the issue raised was previously decided on the merits or if the failure to include an issue in a prior petition constitutes an abuse of the writ. The advisory committee note emphasizes that the rule grants discretion to the trial judge to consider or reject the petition if it is filed late without reason or if it is an abuse of the writ because the issue was deliberately withheld from a prior petition.[42] The successive petition issue has taken on new significance because of the decision in *Rose v. Lundy*,[43] which requires a petition containing exhausted and unexhausted claims to be dismissed. The question that remains after *Lundy* is whether a petitioner who redrafts his petition to eliminate the unexhausted claims will thereby be precluded under Rule 9(b) from later asserting those claims after he has exhausted available state remedies. Also, the Chief Justice has asked the Advisory Committee on Criminal Rules to give further attention to the scope of Rule 9.[44]

V. Decisions of the Supreme Court Imposing Procedural Requirements for Habeas Corpus Petitions

Three relatively recent cases have had a significant impact on habeas corpus procedure. *Engle v. Isaac*[45] raised the greatest procedural hurdle for the petitioner to surmount. In *Engle* the Court held that a petitioner's proce-

41. Rules Governing Section 2254 Cases in the United States District Courts 9.

42. An important difference does exist between the approach of the rules, which is to give the United States District Court judge the authority to deal with individual cases when an abuse of the writ occurs, and the approach of proposed legislation and recent cases that are designed to prevent the judge from considering cases that may have merit.

43. 455 U.S. 509 (1982).

44. *See* letter from Walter Hoffman to the members of the Advisory Committee on Criminal Rules (Apr. 25, 1983) and attached opinion of the Chief Justice in Spalding v. Aiken, No. 82-665 (Apr. 18, 1983), denying certiorari. This material is on file at the Administrative Office of the United States Courts, Washington, D.C.

45. 456 U.S. 107 (1982).

dural default precluded him from raising the claim that the burden of persuasion for self-defense had been placed on him contrary to the holding of *In re Winship*.[46] The Court reasoned that the precedential basis for requiring an at-trial objection existed because *In re Winship* had been decided before the trial. The Court acknowledged that an able defense lawyer may not have recognized at the time of the trial the possibility of an objection to imposing on the defendant the burden of persuasion for an affirmative defense.[47] The Court concluded, however, that the Constitution "guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every conceivable constitutional claim."[48] The Court rejected the argument that the procedural default should not constitute a bar to federal habeas corpus relief when the constitutional error affects "the truth finding function of the trial."[49] In his dissent in *Engle v. Isaac* Justice Brennan wrote, "In so holding, the Court ignores the manifest differences between claims that affect the truth finding function of the trial and claims that do not."[50]

The obvious conclusion regarding both the proposed legislation and *Engle v. Isaac* is that they emphasize state court procedures but no longer give attention to whether the alleged error casts doubt on the state prisoner's actual guilt of the crime for which he was convicted. It is evident after *Engle v. Isaac* that Professor Seidman was right:

> This unwillingness [to substitute the judgment of a federal judge for that of a state judge] stems not from Judge Friendly's reluctance to use judicial resources for the benefit of a guilty defendant, but rather from Professor Bator's view that ultimate truths such as guilt and innocence can never be authoritatively established and that federal oversight must therefore be limited to the assurance of fair procedures.[51]

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46. 397 U.S. 358 (1970).

47. 456 U.S. 107, 133 (1982). Allowing a defense attorney to raise later an objection that he did not recognize at the trial creates a practical difficulty: it encourages defense counsel to make formal objections to everything the trial judge does. The resulting complexity and delay probably cause a greater burden on state court procedures than may be justified by subsequent federal court enforcement of state court procedural requirements. Put another way, a serious question arises whether *Engle v. Isaac* is designed to help state courts or rather to help federal courts by limiting the opportunity of state prisoners to bring petitions for habeas corpus in the federal court.

48. *Id.* at 134.

49. *Id.* at 129. *See* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 467 (1980): "*Wainwright* seemingly mandates the continued incarceration of factually innocent defendants in order to deter defense attorney misconduct." In his thoughtful article Seidman concludes that the Burger court has not stressed the issue of individual guilt or innocence. Rather, it has focused on the need for convictions to achieve broad social objectives, such as deterrence.

50. 456 U.S. 107, 149 (1982) (Brennan, J., dissenting).

51. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 459 (1980). The Friendly position that habeas corpus relief should be reserved for cases in which a colorable claim of innocence exists is set forth in Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). The Bator position that habeas corpus relief should be limited to situations in which state procedures have been inadequate is set forth in Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

In the second of the recent cases, *Rose v. Lundy*,[52] the Court held that a habeas corpus petition containing both exhausted and unexhausted claims must be dismissed. The petitioner may resubmit the petition without the unexhausted claims, but in doing so he risks the possibility that the Court will subsequently preclude, under Rule 9(b), his raising those issues in a later action: "Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions."[53]

In the majority opinion Justice O'Connor stressed that the decision will increase the opportunity for state courts "to review all claims of unconstitutional error" and will aid federal courts because "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review."[54]

In dissent, Justice Stevens urged that "the availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim."[55] The claims that should be afforded federal review are

> those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained. . . . Errors of this kind justify collateral relief no matter how long a judgment may have been final and even though they may not have been preserved properly in the original trial.[56]

The majority emphasized the need to utilize the appropriate state procedures; the minority, the need to open the doors of the federal courts to claimants who raise serious doubt about their guilt of the crime for which they were convicted, doubt created by state court failure to conform to federal constitutional requirements.

In *Sumner v. Mata*[57] the Court had held that state court findings of fact are binding on the federal court unless the latter can properly conclude that the factual findings are not supported by the record. Again it seemed clear that the Supreme Court's emphasis was on the adequacy of the state procedures rather than the nature of the petitioner's claim, whether or not it contained a colorable claim of innocence. Subsequent to *Mata*, however, the Supreme Court decided *Marshall v. Lonberger*,[58] the third important case. In *Marshall* the Court sustained the trial court's conclusion that a guilty plea had been voluntarily and intelligently made even though (a) a guilty plea entered in the state of Illinois in a previous conviction for intent to kill left doubt whether

52. 455 U.S. 509 (1982).
53. *Id.* at 521.
54. *Id.* at 518–19.
55. *Id.* at 547–48 (Stevens, J., dissenting).
56. *Id.* at 543–44 (Stevens, J., dissenting).
57. 449 U.S. 539 (1981); 455 U.S. 591 (1982). *See supra* note 6.
58. 51 U.S.L.W. 4113 (U.S. Feb. 22, 1983).

the petitioner knew he was pleading guilty to attempted murder, and (b) the Ohio trial judge, when asked to admit the Illinois guilty plea as evidence that the petitioner had previously been guilty of an offense requiring proof of a purpose to kill, made no explicit finding on this factual issue. Justice Rehnquist, speaking for the five-Justice majority, said that the trial court's conclusion that the plea had been voluntary required a finding that the petitioner knew he was charged with attempted murder and knew he was pleading guilty to attempted murder. Further, the Court presumed that this probable factual conclusion by the Ohio trial judge was correct.[59] Thus the Court deferred to the Illinois court, which had failed to make an adequate record that the petitioner was charged with attempted murder and knew he was pleading guilty to attempted murder, and to the Ohio trial court, which had admitted the guilty plea into evidence without making any explicit factual finding that the petitioner knew he was pleading guilty to attempted murder (a fact petitioner denied in his testimony in the Ohio trial court).

It would be difficult to explain *Marshall* by referring to the Court's desire to encourage state procedures that are reliable enough to obviate relitigation of the claim on federal habeas corpus review. Neither the Illinois guilty plea nor the Ohio trial court decision admitting the plea represented desirable and adequate state court procedure.

VI. What Are the Principles Upon Which Decisions Regarding the Availability of Federal Habeas Corpus Are Now Based?

Neither the current legislative proposals nor recent Supreme Court decisions emphasize the possibility that an innocent person has been found guilty as the result of a constitutional violation by a state court. Nor do they emphasize ensuring that the federal habeas claim is pursued without unreasonable delay. Until recently it seemed clear that the important issue was rather the adequacy of the state court procedure. It was assumed that adequate state court procedures could fairly assess defendants' claims of federal constitutional violations and, therefore, that increased reliance on the state courts would substantially reduce the habeas corpus burden placed on the federal courts.

This assumption seemed to explain *Engle v. Isaac*, which requires resort to state court procedural requirements, and *Rose v. Lundy*, which, according to Justice O'Connor, gives maximum opportunity for state courts to consider claims of constitutional violations and to make adequate factual records that would facilitate federal court review should that occur. More recently, however, in *Marshall* the Supreme Court sustained a conviction in which the Illinois state court guilty plea procedures had clearly been inadequate and the Ohio trial judge had failed to make explicit findings of fact. The Supreme

59. *Id.* at 4117.

Court is now denying federal habeas corpus relief even when a colorable claim of innocence does exist and when the state court procedures were inadequate. The Court's actions are consistent with the oft rejected proposal to Congress that federal habeas corpus review be denied whenever the validity of the claim has been adjudicated in state court.[60]

Under *Marshall* the state court adjudication of a constitutional claim has been adequate if the state judge rejects the claim and if this rejection can logically be based only on facts that would indicate no constitutional violation occurred. This assumed factual "conclusion" binds the federal court even when the state court has recorded no actual findings of fact.

VII. WHAT IS THE SIGNIFICANCE OF ALL THIS? *SANDSTROM V. MONTANA* AND ITS AFTERMATH—A CURRENT ILLUSTRATION

In *Sandstrom v. Montana*[61] the Supreme Court reversed a conviction because the jury instruction had created an impermissibly great risk that the jury would not understand that the prosecution had to prove the existence of the required mental state, intent to kill, beyond a reasonable doubt. The risk of confusion arose from the instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts."[62]

The decision appeared to be significant at the time because it affirmed that the principle of *In re Winship*—that the prosecution must prove the elements of the crime beyond a reasonable doubt—was so important that a conviction would be reversed if the jury instruction created a possibility that the jury would misunderstand the principle. It seemed clear that any error caused by such an instruction affected the integrity of the fact-finding process and, therefore, the decision would have to be applied retroactively.[63] Furthermore, the error was so significant that it could not be considered harmless.[64] Because many state convictions had been based on instructions similar to that given in *Sandstrom*, state prisoners came to expect successful federal habeas corpus challenges to their convictions. Actually, such challenges were successful in only a few cases. *Engle v. Isaac* prevented the need to reverse convictions by holding that counsel should have objected to the instructions (although most lawyers thought it would be futile to object to an instruction that had been given routinely throughout the country for many years). *Engle* was not the only answer to the question of erroneous jury instructions on the burden of proof. Many state appellate courts confronted the issue on the merits even though defense counsel had not objected to the instruction when

60. S. 2903, 97th Cong., 2d Sess. § 305(b) (1982).
61. 442 U.S. 510 (1979).
62. *Id.* at 515.
63. Hankerson v. North Carolina, 432 U.S. 233 (1977).
64. Connecticut v. Johnson, 51 U.S.L.W. 4175 (U.S. Feb. 23, 1983).

it was given.[65] In these cases *Engle v. Isaac* would not preclude federal court review. How state and federal courts have reacted to these cases is illustrated by the experiences of Wisconsin and of the Seventh Circuit.

After *Sandstrom*, Wisconsin trial and intermediate appellate courts reached differing results on the constitutionality of Wisconsin's "natural and probable consequence" instruction. The instruction, which differed somewhat from the instruction given in *Sandstrom*, told the jury: "When there are no circumstances to prevent or rebut the presumption the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his deliberate acts."[66]

Some courts held that the jury would understand the instruction as a permissive inference;[67] others thought an impermissible risk existed that the jury would believe the burden of persuasion rested on the defendant.[68] In *Muller v. State*[69] the Wisconsin Supreme Court held that "the jury instruction in this case states a rebuttable presumption . . . . It does not require the defendant to come forward with an amount of proof greater than 'some' evidence."[70] The court, however, did not make explicit whether its holding was based on Wisconsin law or on what the Wisconsin jury believed the instruction meant.[71]

In the Seventh Circuit the petitioner in *Pigee v. Israel*[72] argued that the Wisconsin court's conclusion in *Muller* that the instruction stated a rebuttable presumption was a decision on state law that bound the federal court. On that

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65. *See, e.g.*, State v. Giwosky, 109 Wis. 2d 446, 451 n.3, 326 N.W.2d 232, 235 n.3 (1982); State v. Kemp, 106 Wis. 2d 697, 703–04, 318 N.W.2d 13, 17 (1982); State v. Schulz, 102 Wis. 2d 423, 435, 307 N.W.2d 151, 158 (1981); Muller v. State, 94 Wis. 2d 450, 468, 289 N.W.2d 570, 579 (1980); Bergeron v. State, 85 Wis. 2d 595, 604–05, 271 N.W.2d 386, 389 (1978).

66. Muller v. State, 94 Wis. 2d 450, 469, 289 N.W.2d 570, 580 (1980).

67. *See, e.g.*, Genova v. State, 91 Wis. 2d 595, 283 N.W.2d 483 (Ct. App. 1979).

68. *See, e.g.*, Adams v. State, 92 Wis. 2d 875, 289 N.W.2d 318 (Ct. App. 1979), *rev'd*, 95 Wis. 2d 529, 290 N.W.2d 872 (1980). *Adams* was reversed on the basis of *Muller v. State*. *See infra* note 70 and accompanying text.

69. 94 Wis. 2d 450, 289 N.W.2d 570 (1980).

70. *Id.* at 477, 289 N.W.2d at 584.

71. *Id.* at 479 n.2, 289 N.W.2d at 584 n.2 (Abrahamson, J., dissenting). Following the *Muller* decision, the impediments to the availability of federal habeas corpus to review the decision of the Wisconsin court include the following.

First, federal review would have been precluded in *Muller* had the Wisconsin court held that the defendant's failure to object to the instruction constituted procedural default. *See* Engle v. Isaac, 456 U.S. 107 (1982). The Wisconsin courts, however, considered the merits of the issue despite the absence of a defense objection in the trial court.

Second, were the United States Department of Justice legislative proposals to be adopted, habeas corpus would be unavailable because the issue would have been fully and fairly adjudicated in state court. Thus the Wisconsin court's conclusion that the instruction stated a rebuttable presumption could be challenged only on certiorari in the Supreme Court.

Third, the Wisconsin decision in *Muller* required the court to make findings of fact, presumed to be correct in federal court as required by *Sumner v. Mata*, and conclusions of law properly reviewable by a federal court unless the conclusion was one of state law.

72. 670 F.2d 690 (7th Cir. 1982). *Pigee* was the first Wisconsin habeas case to reach the Seventh Circuit after *Sandstrom*. The petitioner was represented by the University of Wisconsin Law School Legal Assistance to Institutionalized Persons Program, a fact to be kept in mind in evaluating the critical analysis of the *Pigee* decision.

assumption he challenged the constitutionality of imposing a production burden on the defendant when a finding that the requisite mental element was present could only be based on the defendant's failure to produce evidence to the contrary.[73]

The Seventh Circuit rejected the argument that the Wisconsin state court decision was binding, stating that it is "a federal question as to which we are not bound by the Wisconsin Supreme Court's determinations in *Muller*."[74] The court then held: "We think the instruction given in this case would be interpreted by a reasonable jury as stating no more than a permissive inference . . . ."[75]

Both the Wisconsin Supreme Court in *Muller* and the Seventh Circuit court in *Pigee* concluded that the jury instruction created no impermissibly great risk that a jury would understand that the burden of persuasion rested on the defendant. The factual predicate of the *Muller* decision, however, is apparently that the jury would understand that the instruction placed on the defendant a burden merely of producing some contrary evidence. The factual predicate of the *Pigee* decision is that the jury would understand the instruction to allow the jury merely to infer the ultimate fact, the intent to kill, from the basic facts.

This result certainly does not indicate federal court deference to the factual conclusions of the state court, and it produces an awkward situation that appears in a subsequent Seventh Circuit case, *Zelenka v. Israel*.[76] In *Zelenka* the petitioner argued that the trial judge erred in giving the natural and probable consequence instruction in a case in which the acts may have been committed not by the defendant, but by his two confederates. Thus, the defendant argued that the jury may have interpreted the instruction to permit the jury to infer the defendant's intent to kill from the acts of others.[77] The court acknowledged that if this had occurred, "the question arises whether there exists a rational connection between the facts proved . . . and the ultimate fact presumed,"[78] citing *Ulster County Court v. Allen*.[79] The court held, however, that the issue had not been exhausted in state court; it therefore ordered the petition dismissed without prejudice, so that the petitioner could later raise the issue again when state remedies had been exhausted.[80]

To exhaust state remedies the petitioner in *Zelenka* must now bring a state postconviction motion in the state trial court.[81] There the trial judge will face the unenviable task of deciding whether the "rational connection" re-

73. *Id.* at 692.
74. *Id.* at 694.
75. *Id.* at 695.
76. 699 F.2d 421 (7th Cir. 1983).
77. *Id.* at 422.
78. *Id.* at 423 n.2.
79. 442 U.S. 140 (1979).
80. Zelenka v. Israel, 699 F.2d 421, 424 (7th Cir. 1983).
81. WIS. STAT. § 974.06 (1982–83).

quirement for an *Ulster County* permissive inference has been met when the Supreme Court of Wisconsin has held that the instruction does not permit inference of guilt and would not be so understood by a Wisconsin jury. One can imagine ways of reconciling the inconsistent conclusions of the Wisconsin Supreme Court and the Seventh Circuit on the meaning of the presumptive intent instruction—for example, by reasoning that the rational connection requirement of the Seventh Circuit holding (that the instruction permits inference) is also a requirement of the Wisconsin Supreme Court's decision (that it places a production burden on the defendant). But the mere statement of the issue demonstrates the great confusion that currently exists.

The experience in Wisconsin and in the Seventh Circuit after the decision in *Sandstrom v. Montana* illustrates the current unsatisfactory relationship between federal and state courts regarding postconviction review of state prisoner convictions. The difficulty is created by the Supreme Court's desire to reaffirm important principles of federal constitutional law, such as the requirement that guilt be proved beyond a reasonable doubt, and to make those decisions apply retroactively when they affect the integrity of the fact-finding process, on the one hand, and, on the other hand, the increasing desire of the federal courts to play only a limited role in the postconviction review of state prisoner convictions. These somewhat inconsistent objectives can be fully achieved only if state courts willingly assume the responsibility for implementing decisions such as *Sandstrom* by reversing the large number of convictions that must be reversed if the decisions are to be applied retroactively. If state courts are unwilling to take this responsibility, as they understandably tend to be, then the alternatives become more limited.

Engle v. Isaac invites state courts to invoke procedural rules that require the defense to object at the appropriate time in the state trial court. If the state courts enforce their procedural default rules, neither they nor the federal courts will have to apply decisions such as *Sandstrom* retroactively except in the rare case in which defense counsel had the foresight to make the objection. To date, however, state courts have been reluctant to rely on defense counsel's failure to object as a basis for avoiding the merits of a claim that, if true, casts serious doubt on the integrity of the fact-finding process.

A second possibility is for state courts to consider the merits, but to distinguish the cases that come before them by finding minor differences in the jury instruction's language that prevent the risk of jury confusion condemned in *Sandstrom*. This is Wisconsin's solution. Despite the conflicting court decisions on how a jury would interpret the instruction, the Wisconsin Supreme Court found that it places on the defendant only the burden of producing some evidence. The court apparently concluded that the jury understood that was what the instruction meant. Deciding the issue on the merits does not preclude the possibility of federal habeas corpus review, but does allow the federal court to limit its review by granting deference to the state court findings of fact. The difficulty in Wisconsin is that this approach would have required the Seventh Circuit to decide the constitutionality of the

so-called production burden, an issue left open in *Ulster County Court v. Allen*. This probably explains why the Seventh Circuit made its own factual finding that the Wisconsin jury understood the instruction to permit an inference of guilt and thus that the instruction was proper under *Ulster County Court v. Allen*.

The cost of this latter approach is substantial. The important principle of *Sandstrom v. Montana*, that the beyond a reasonable doubt requirement must be clearly communicated to the jury, is reduced to a decision that only the precise words used in *Sandstrom* create a risk of confusion.[82] After the Wisconsin Supreme Court sustained the presumptive intent instruction, apparently on the ground that the jury would know that it placed only a small production-of-evidence burden on the defendant, and after the Seventh Circuit sustained it on the ground that the jury would know that it was a permissive inference, a Wisconsin trial judge gave the same instruction in another case.[83] The Wisconsin Attorney General has asked the Wisconsin Court of Appeals to reverse that conviction in the interest of justice, stating that although he had argued that the instruction was not unconstitutional, he had also promised the federal courts that it would never be used in the future.[84] This is an obviously innovative way to avoid applying *Sandstrom* retroactively by deciding that it was proper when given in the past but should never be given in the future.

VIII. CONCLUSION

Better methods clearly suggest themselves. The Supreme Court could rethink the rule on retroactivity and apply important decisions like *Sandstrom* prospectively. This would mean that the principle can be properly implemented in the future[85] and that courts—state and federal—can be saved the trauma of having to acknowledge the principle but find ways to avoid reversing the convictions that must be reversed if the decision is applied retroactively. This alternative has the obvious advantage of candor, a quality currently

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82. *See* Remington, *Foreword*, 1981 WIS. L. REV. 513, 516:

> The issue for the future is aptly put by Erica Eisinger in the conclusion to her Note where she states: "Lower courts have to decide for themselves whether *Sandstrom* deals with semantics or whether it signifies a concern with substantive issues of guilt or innocence." It is evident throughout her Note that she believes there are important issues of guilt or innocence or of the seriousness of the offense committed by the defendant and that the matter is not merely one of semantics.
>
> If the reaction to *Sandstrom* is a new set of abstractions—probably styled as inferences—that gain the blessing of a new generation of appellate courts, an opportunity will have been lost. Aided by such research as there is ongoing with respect to jury comprehension of instructions, we ought to try for the future to communicate to the jury in ways that clarify rather than confuse and aid rather than complicate its task. Surely we have the capacity to do a great deal better than we have done in the past.

83. State v. Steien, No. 82-901-CR (Wis. Ct. App. Dist. III filed Feb. 15, 1983) (unpublished summary reversal order).

84. The court of appeals apparently refused the confession of error and later reversed the conviction in a yet-to-be-reported decision that does not clearly address the reason for reversing when the instruction has been held proper by both the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals.

85. *See* Pigee v. Israel, 670 F.2d 690, 696 n.16 (7th Cir. 1982).

lacking. It has the obvious disadvantage of denying the possibility of relief to those who can make out a colorable claim that their conviction improperly resulted from a constitutional violation affecting the integrity of the fact finding process.

A second option is for the federal courts to apply principles like those of *Sandstrom* retroactively and insist that state courts follow the decision, even if that requires the reversal of a large number of state convictions. If state courts refuse, the responsibility for applying constitutional principles should be shared by the federal courts through habeas corpus review. This approach has the obvious advantage of keeping the doors of the federal courts open to those with meritorious claims that their convictions were obtained by means that cast doubt on the integrity of the fact-finding process. Its disadvantage lies in the continued active role of the federal courts at a time when both internal and external critics prefer a reduction of that role.

The temptation is to adopt neither of these straightforward alternatives, but rather for the Supreme Court to assert the constitutional principle, to hold it retroactive, and then to avoid its impact by imposing increased procedural obstacles that prevent state prisoners from asking for the relief that decisions like *Sandstrom* apparently promise. This approach demeans the principle and is no favor either to state courts that are asked to assume the entire burden of giving retroactive effect to the constitutional principle or to state prisoners whose expectations are raised, only to be disappointed. And it is no favor to the development of federal habeas corpus law, which grows ever more complex.