

The Habeas Corpus Certificate of Probable Cause

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I. INTRODUCTION

At a recent Judiciary Committee hearing, Senator Lawton Chiles of Florida epitomized the current storm of congressional and judicial criticism concerning the use by state prisoners of the writ of habeas corpus when he said: “[A]ll too often the State trial is more like a tryout on the road, and you do not get to Broadway until you start filing appeals in the Federal court.”¹ Although the “Great Writ”² indisputably holds a revered position in our jurisprudential history, claiming a place in article I of the Constitution, and has acted as a safeguard against convictions that violate “fundamental fairness,”³ habeas corpus has maintained its share of criticism.⁴ In response to a steady increase in the number of habeas petitions filed by state prisoners in the last twenty-five years,⁵ combined with rising nationwide anger toward the increase in violent crime, the opponents of habeas corpus have become much more active.⁶ They view habeas corpus as a legal remedy that, on balance,

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1. *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 12 (1981) (statement of Senator Lawton Chiles of Florida); see also 114 CONG. REC. 14,028-32 (1968) (statements of Senator Samuel Ervin of North Carolina and Senator Russell Long of Louisiana on S. 917, 90th Cong., 1st Sess. (1967), a bill that, *inter alia*, would have eliminated federal habeas corpus review of state court judgments).

2. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.).

3. See, e.g., *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973); *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969); *Price v. Johnston*, 334 U.S. 266, 269 (1948); see also *infra* notes 172-75 and accompanying text.

4. The attempts essentially to limit habeas corpus by legislative fiat have a long history. See generally L. YACKLE, *POSTCONVICTION REMEDIES* 90-92 (1981).

5.

Year	Number of Habeas Petitions Filed by State Prisoners in U.S. District Court
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1941	127
1953	548
1961	906
1965	4,664
1975	7,843
1981	7,790

DIRECTOR AD. OFF. U.S. CTS. ANN. REP. (tabular information for the years 1953 (at 106), 1961 (at 165), 1965 (at 118), 1981 (at 211)). See generally *Federal Habeas Corpus: Hearing on S. 1314 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978).

6. The most recent proposed legislative restrictions on the use of habeas corpus are found in S. 2216, 97th Cong., 2d Sess. (1982), introduced by Senator Thurmond, Chairman of the Judiciary Committee, on March 16, 1982; in S. 2838, 97th Cong., 2d Sess. (1982), introduced by Senator Thurmond on August 16, 1982; and in S. 2903, 97th Cong., 2d Sess. (1982), introduced by Senator Thurmond on September 8, 1982. See *infra* text accompanying notes 144-60.

The most recent severe restrictions imposed by the Court occurred in the 1981-1982 Term. See *United States v. Frady*, 456 U.S. 152 (1982) (very restrictive reading, for federal prisoners, of standard of cause for

has done more to harm the concept of finality in state criminal justice systems and to burden the workload of the federal courts with frivolous claims than it has done to uphold the liberty of prisoners who have been unconstitutionally convicted.⁷ Yet, because habeas corpus has been able to survive its opponents' attacks with its scope relatively intact, Justice Rehnquist has recently aimed his legal arrow at the heel of habeas corpus that was not dipped into the protecting waters, the certificate of probable cause.

II. THE STEVENS-REHNQUIST DEBATE

Justice Rehnquist's attack emerged in an exchange on the use and extent of the habeas corpus remedy contained in a recent series of opinions in which the United States Supreme Court denied writs of certiorari to petitioners appealing lower court habeas corpus decisions. In both *Jeffries v. Barksdale*⁸ and *Davis v. Jacobs*⁹ the Court was faced with appeals by petitioners convicted in state courts who had been denied habeas relief and who had never received certificates of probable cause at any stage of the process.¹⁰

A state prisoner's right to appeal a denial of habeas corpus relief is qualified by the third paragraph of 28 U.S.C. section 2253, which provides:

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.¹¹

noncompliance with federal rule of procedure); *Engle v. Isaac*, 456 U.S. 107 (1982) (very restrictive reading, for state prisoners, of standard of cause for and actual prejudice resulting from noncompliance with state rule of procedure); *Sumner v. Mata*, 455 U.S. 591 (1982) (facts that underlie the ultimate question whether pretrial procedures are constitutional are governed by a presumption of correctness on habeas review); *Rose v. Lundy*, 455 U.S. 509 (1982) (habeas review not available when petition contains any claims not yet exhausted in state court). The *Sumner* restrictions were reaffirmed in 1983. See *Marshall v. Lonberger*, 103 S. Ct. 843 (1983).

7. In the words of Justice Harlan:

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). Compare *Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970), and *Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963), with *Peller, In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

8. 453 U.S. 914 (1981). The petitioner was a state prisoner who had successfully obtained a reversal of his conviction and an order for a new trial. After a delay caused by several continuances, the petitioner sought habeas corpus relief in federal district court, alleging that his constitutional right to a speedy trial had been violated. *Id.* at 914. The district court dismissed the action, holding that the petitioner had not exhausted remedies at the state level. *Id.* On appeal the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision. *Id.* The circuit court issued an order specifically denying petitioner's application for a certificate of probable cause. *Id.*

9. 454 U.S. 911 (1981). The petitioners, 17 state prisoners from 7 federal circuits, had sought habeas corpus relief in federal district court, where their petitions had been either dismissed or denied. All of the petitioners had been unsuccessful in appealing these decisions and in obtaining certificates of probable cause. *Id.* at 912.

10. *Id.* at 912; 453 U.S. 914, 914 (1981).

11. 28 U.S.C. § 2253 (1976).

Rule 22(b) of the Federal Rules of Appellate Procedure sets forth the procedure for obtaining a certificate of probable cause:

In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.¹²

In both *Jeffries* and *Davis* the Court denied petitioners' requests for writs of certiorari,¹³ thereby leaving intact the lower courts' denials of relief on the petitions for habeas corpus. At first glance the unusual opinions stemming from the denials, by Justice Stevens¹⁴ and by Justice Rehnquist in dissent, may seem merely to contain a theoretical dispute over judicial procedure at best, or semantic quibbling at worst. Actually, however, these opinions articulate the fundamental division of the Court between those who seek to retain the habeas corpus remedy, at least as it exists today, and those who seek, if not to abolish the remedy, then certainly to narrow further its scope and utility. The untempered language used by both Justices¹⁵ underlines the cognizance by both of the importance of the decision.

Justice Rehnquist filed dissenting opinions¹⁶ to both denials of certiorari not because he sympathized with the petitioners' desires to have their denials of habeas corpus relief reversed by the highest court of the land, but rather because he felt that a "dismissal," and not a "denial," was appropriate.¹⁷

12. FED. R. APP. P. 22(b).

13. *Davis v. Jacobs*, 454 U.S. 911, 911 (1981); *Jeffries v. Barksdale*, 453 U.S. 914, 914 (1981).

14. The Stevens opinion in *Davis* was neither a concurrence nor a dissent, but rather was termed an "[o]pinion . . . respecting the denial of the petitions for writs of certiorari." 454 U.S. 911, 911 (1981).

15. See, e.g., *infra* text accompanying notes 18-19.

16. *Davis v. Jacobs*, 454 U.S. 911, 915 (1981); *Jeffries v. Barksdale*, 453 U.S. 914, 914 (1981). In both *Jeffries* and *Davis* the Chief Justice and Justice Powell joined in Justice Rehnquist's dissents. Both *Jeffries* and *Davis* were decided before Justice O'Connor was appointed to the Court. Since her ascent to the Court, she has voted actively to restrict the use of habeas corpus by state prisoners. See, e.g., *Engle v. Isaac*, 456 U.S. 107 (1982); *Rose v. Lundy*, 455 U.S. 509 (1982); see also *United States v. Frady*, 456 U.S. 152 (1982). There is thus good reason to believe that she will join Justice Rehnquist in voting on this issue of the certificate when it is again before the Court. See *infra* note 170 and accompanying text. See generally O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

17. In *Davis* Justice Rehnquist wrote: "In *Jeffries v. Barksdale*, . . . the Chief Justice, Justice Powell, and I dissented from a simple denial of the writ of certiorari, contending that the writ should instead be *dismissed* because we had no jurisdiction to consider it." 454 U.S. 911, 915-16 (1981) (citation omitted). See also *McCarthy v. Harper*, 449 U.S. 1309 (1981) (Rehnquist, J., in chambers).

While the characterization of the decision made no difference to the petitioners, Justice Rehnquist's dissent was so vehement in language and tone that it caused Justice Stevens to write that "the argument made in the dissent merits a response because it creates the impression that the Court's answer . . . demonstrates that the Court is discharging its responsibilities in a lawless manner."¹⁸ In fact, Justice Rehnquist was so distressed at the Court's decision to deny rather than to dismiss one petition that he wrote of the consequences of the decision:

[T]he disregard of congressional provisions as to our jurisdiction [tends] to weaken the authority of this Court when it can demonstrate in a principled manner that it has either the constitutional or statutory authority to decide a particular issue. The necessary concomitant of our tripartite system of government that the other two branches of government obey judgments rendered within our jurisdiction is sapped whenever we decline for any reason other than the exercise of our own constitutional duties to similarly follow the mandates of Congress and the Executive within their spheres of authority.¹⁹

Consequently, the difference of opinion between Justice Rehnquist and Justice Stevens concerns not merely an arcane inquiry but rather a discussion of theory and procedure that, as Justice Holmes once commented, goes to the bottom of the subject²⁰—in this instance, the effective existence of the writ of habeas corpus.

Justice Stevens, who in a string of post-*Jeffries* and *-Davis* Court decisions on habeas corpus clearly advocated his opposition to procedural obstacles hurled in the path of a habeas petitioner seeking a decision on the merits,²¹ agreed to deny the petitions in *Jeffries* and *Davis* for two reasons.

18. 454 U.S. 911, 912 (1981).

19. *Id.* at 919 (Rehnquist, J., dissenting).

20. "Theory . . . is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

21. Justice Stevens' point of view is apparent in the following quotations:

In recent years federal judges at times have lost sight of the true office of the great writ of habeas corpus. . . . The writ of habeas corpus is a fundamental guarantee of liberty.

The fact that federal judges have at times construed their power to issue writs of habeas corpus as though it were tantamount to the authority of an appellate court considering a direct appeal from a trial court judgment has had two unfortunate consequences. First, it has encouraged prisoners to file an ever increasing volume of federal applications that often amount to little more than a request for further review of asserted grounds for reversal that already have been adequately considered and rejected on direct review. *Second, it has led this Court into the business of creating special procedural rules for dealing with this flood of litigation. The doctrine of nonretroactivity, the emerging "cause and prejudice" doctrine, and today's "total exhaustion" rule are examples of judicial lawmaking that might well have been avoided. . . .*

Rose v. Lundy, 455 U.S. 509, 547 (1982) (Stevens, J., dissenting) (emphasis added).

The Court nevertheless embarks on an exposition of the procedural hurdles that must be surmounted before confronting the merits of an allegation that "states at least a plausible constitutional claim."

In my opinion, the Court's preoccupation with procedural hurdles is more likely to complicate than to simplify the processing of habeas corpus petitions by federal judges.

Engle v. Isaac, 456 U.S. 107, 136 (1982) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

Once again the Court's preoccupation with procedural niceties has needlessly complicated the disposition of a federal habeas corpus petition.

. . . [I]t merely delays, for the sake of a procedural nicety, either the habeas corpus relief to which the Court of Appeals has held the respondent is entitled or a consideration of the merits of the only significant question that the petitioner has raised.

Sumner v. Mata, 455 U.S. 591, 600, 602 (1982) (Stevens, J., dissenting).

First, he emphasized that none of the petitioners' claims had any merit.²² Second, he noted that because the petitioners had not obtained certificates of probable cause the appeals were not properly "in" the courts of appeals²³ and, therefore, the Supreme Court did not have jurisdiction.²⁴ Justice Stevens significantly amended this second reason, however, by indicating that, even though the petitioners certainly had not obtained certificates of probable cause pursuant to the appropriate federal statute and rule of appellate procedure, "it is perfectly clear . . . that if there were merit to the petitions, the Court would have ample authority to review them in either of two ways."²⁵ The Court could, if it wished, discount the absence of a certificate of probable cause by invoking jurisdiction under 28 U.S.C. section 1651,²⁶ the All Writs Act.²⁷ Furthermore, as conceded by the dissent,²⁸ the Court itself has the statutory authority to issue a certificate of probable cause if it determines that the

22. 454 U.S. 911, 912 (1981).

23. The jurisdiction of the United States Supreme Court to consider decisions of the courts of appeals is limited to "[c]ases in the courts of appeals." 28 U.S.C. § 1254 (1976).

24. 454 U.S. 911, 912 (1981).

25. *Id.*; see also *Jeffries v. Barksdale*, 453 U.S. 914, 914 (1981).

26. 28 U.S.C. § 1651 (1976).

27. Justice Stevens supported this claim by citing the controlling power of the Court's decision in *House v. Mayo*, 324 U.S. 42 (1945). In *House* the Court lacked certiorari jurisdiction under the predecessor to 28 U.S.C. § 1254 to determine the merits of the habeas petition and whether the court of appeals had abused its discretion by denying the petitioner a certificate of probable cause to appeal. *Id.* at 44-45. Relying on prior Court decisions defining the scope of the common-law writ of certiorari under the All Writs Act, presently codified as 28 U.S.C. § 1651 (1976), the Court in *House* authorized the granting of a writ of certiorari to review the action of the court of appeals. 324 U.S. 42, 44-45 (1945).

Justice Rehnquist, in his dissent in *Davis*, argued that *House* was later limited by the Court's decisions in *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945), and *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945). He read those cases to stand for the proposition that, when Congress has specifically withheld appellate review, the All Writs Act could not be used as a substitute for an authorized appeal; review by common-law writ is not permissible in the face of a legislative purpose to foreclose review in a particular set of circumstances. 454 U.S. 911, 917 (1981) (Rehnquist, J., dissenting). In *Jeffries* and *Davis* the relevant statute would be 28 U.S.C. § 2253 (1976), which requires a certificate of probable cause to appeal a habeas corpus denial.

Justice Stevens responded by indicating that, while the language of *Alkali* was appealing for the dissenters' position, the Court in both *Alkali* and *DeBeers* had ruled that countervailing interests so outweighed the interests in avoiding piecemeal litigation that review by certiorari was appropriate. 454 U.S. 911, 913 n.1 (1981). By analogy, Justice Stevens reasoned, the interest in granting habeas corpus relief in a deserving case "clearly outweighs the interest in terminating frivolous appeals." *Id.*

Justice Rehnquist countered by arguing that, while the Court in *Alkali* granted review, it used the common-law writ only to determine whether the district court's assumption of jurisdiction to issue an interlocutory order conflicted with Congress' intent to foreclose temporarily such jurisdiction in this area. *Id.* at 918 n.1 (Rehnquist, J., dissenting). The dissent claimed that, had *Alkali* dealt with the review of uncertificated petitions, as in the instant case, the Court would not have used the substitute. As the dissent noted:

In contrast, use of the common-law writ to review uncertificated petitions does not operate to ensure that a lower court is exercising its jurisdiction in accord with congressional intent. It has precisely the opposite effect of providing uncertificated petitioners with certiorari review in the teeth of a congressional mandate that such review should not be available.

Id.

Justice Stevens, however, cited the Court's decisions in *Burwell v. Teets*, 350 U.S. 808 (1955), and *Rogers v. Teets*, 350 U.S. 809 (1955), to show that the Court had never considered *House v. Mayo* with the limited scope attributed to it by the dissent. 454 U.S. 911, 913 n.1 (1981). In *Burwell* and *Rogers* the Court did, in fact, grant writs of certiorari even though the lower courts had refused to issue certificates of probable cause to the petitioners. Furthermore, the Court also has denied rather than dismissed a petition for a writ of certiorari even though, once again, the lower courts had denied the issuance of a certificate of probable cause. See *In re Adamson*, 334 U.S. 834 (1948).

28. 454 U.S. 911, 918 (1981) (Rehnquist, J., dissenting).

claims are meritorious.²⁹ Consequently, in his opinion respecting the denial of certiorari, Justice Stevens began the process that he continued in later cases³⁰ in the term: holding the line against erosion of the habeas corpus remedy by technical and procedural pitfalls. While Justice Stevens recognized the presence of a requirement of a certificate of probable cause in appealing the denial of a habeas petition, he clearly ruled that the absence of the certificate in the appellate procedure is not a fatal defect. If a claim is meritorious in the view of the courts, a petitioner can appeal despite the procedural defect.

Justice Rehnquist, a regular and vocal opponent of the remedy of habeas corpus,³¹ saw the Stevens opinion as a clear message to the lower federal courts: if an appeal of the denial of a habeas corpus petition seemingly has merit, then a lower court, emulating the example of the Supreme Court, should not feel constrained by the procedural language of either section 2253 or rule 22(b) when deciding whether to hear the appeal.³² Certainly, the argument goes, Justice Stevens' view would broaden the flexibility and discretion that lower federal courts now enjoy when reviewing petitions for writs of habeas corpus. This greater discretion would probably increase the use of the writ by state prisoners, who would be faced with one less obstacle to review of their convictions.

Undoubtedly, both Justices struggled for position on this point because they recognized that the statutory requirement of a certificate of probable cause is a monumental hurdle that the opponents of habeas corpus can interpose for all petitioners. To Justice Rehnquist, the intent of the often-ignored statute is that "a certificate of probable cause [be] an indispensable prerequisite to an appeal from the District Court to the appropriate Court of Appeals."³³ If a certificate were in fact a condition precedent to an appeal, a court, in the absence of a certificate, would not be faced with even a cursory review of the merits of a petitioner's claims. The appeal could be dismissed immediately if the prisoner had not obtained a certificate of probable cause. If the prisoner were to seek a certificate, however, Justice Rehnquist could rest comfortably knowing that a predominant majority of the courts, as discussed below,³⁴ have established a rigorous standard for its issuance.

29. The dissent admitted that Justice Harlan's interpretation of the language in § 2253 and his view that pursuant to the section a circuit judge or Supreme Court justice may issue a certificate of probable cause were dispositive. *Id.* See *Rosoto v. Warden, Cal. State Prison*, 83 S. Ct. 1788 (1963) (Harlan, J., in chambers).

30. See *United States v. Frady*, 456 U.S. 152, 175 (1982) (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 136 (1982) (Stevens, J., concurring in part and dissenting in part); *Sumner v. Mata*, 455 U.S. 591, 600 (1982) (Stevens, J., dissenting); *Rose v. Lundy*, 455 U.S. 509, 543 (1982) (Stevens, J., dissenting); *Duckworth v. Serrano*, 454 U.S. 1, 4 (1982); see also *supra* note 21.

31. See, e.g., *Smith v. Phillips*, 455 U.S. 209 (1982); *Sumner v. Mata*, 449 U.S. 539 (1981); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Hensley v. Municipal Court*, 411 U.S. 345, 354 (1973) (Rehnquist, J., dissenting); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 502 (1973) (Rehnquist, J., dissenting); see also *Marshall v. Lonberger*, 103 S. Ct. 843 (1983); cf. *Ross v. Moffitt*, 417 U.S. 600 (1974); *Davis v. United States*, 411 U.S. 233 (1973).

32. *Davis v. Jacobs*, 454 U.S. 911, 917 (1981).

33. *Id.* at 916 (Rehnquist, J., dissenting); see also 453 U.S. 914, 915 (1981) (Rehnquist, J., dissenting).

34. See *infra* notes 57-58 and accompanying text.

III. CONGRESSIONAL INTENT AND THE HISTORY OF THE CERTIFICATE

Until 1908 the judicially recognized right to an appeal from a denial of a habeas corpus petition by a district court was absolute.³⁵ In fact, since the federal circuit courts of appeals did not have jurisdiction over habeas petitions until the enactment of the Judiciary Act of 1925, any appeal from a district judge's denial of a habeas petition could be taken for appellate review directly to the Supreme Court.³⁶ During the Sixtieth Congress, in 1908, Congress expressed concern over various examples of state prisoners convicted of capital offenses and sentenced to death by state courts who were delaying execution by filing petitions for habeas corpus relief.³⁷ Many in Congress viewed almost all of these petitions as lacking any merit.³⁸ As a result, Congress enacted the forerunner of section 2253 and fashioned a limitation to a state prisoner's absolute right to appeal from a denial of habeas corpus relief.

The Act of March 10, 1908, known as H.R. 4777, required that either the court denying habeas relief or a Supreme Court Justice certify probable cause before a petitioner could perfect his appeal to the Supreme Court.³⁹ Because this statute is not significantly different from section 2253, the congressional intent for its enactment sheds light on the intent behind the present statute that requires a certificate of probable cause.

The history of the Act of March 10, 1908, indicates that Justice Rehnquist was not correct in his assessment articulated in *Jeffries* and *Davis* that Con-

35. Prior to 1908, the relevant statutes provided:

Sec. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

Sec. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section.

REVISED STATUTES OF THE UNITED STATES, Title XIII, ch. 13, §§ 763-764 (2d ed. 1878) (as amended by the Act of Mar. 3, 1885, ch. 353, 23 Stat. 437). This statute has been subject to numerous modifications, *see infra* notes 36 & 39, and was ultimately consolidated into what is now 28 U.S.C. § 2253 (1976).

36. The Act of Feb. 13, 1925, ch. 229, §§ 6, 13, 43 Stat. 940, 942, modified the Act of Mar. 10, 1908, ch. 76, 35 Stat. 40, by replacing the words "Supreme Court" and "justice of the Supreme Court" with the words "circuit court of appeals" and "judge of the circuit court of appeals." *See infra* note 39.

37. H.R. REP. NO. 23, 60th Cong., 1st Sess. 1 (1908).

38. *Id.* at 2.

39. The statute read:

From a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a state court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of the opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or judge shall certify that there is probable cause for such allowance.

Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. The Act was codified as 28 U.S.C. § 466 (1940), after incorporating the modification contained in the Act of Feb. 13, 1925, ch. 229, §§ 6, 13, 43 Stat. 940, 942; *see supra* note 36.

gress intended the requirement for a certificate of probable cause to be a far-reaching limitation on the employment of habeas corpus by state prisoners. The brief, but illuminating, House Judiciary Committee Report that recommended passage of the 1908 statute quite clearly demonstrates that Congress did view habeas corpus as a vital remedy for prisoners whose liberty was legitimately at stake and who were unjustly hindered in their attempts for redress.⁴⁰ The Report reveals that Congress sought this new procedural obstacle to the right of an appeal from a denial of habeas to stem a perceived tide of state prisoners, already sentenced to death, who were evading execution with frivolous appeals. As the Report states:

The purpose of the bill is to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals taken therein just before the day set for execution

. . . The respondents in capital cases have been in the habit of prosecuting an appeal from adverse decisions in habeas corpus cases to the Supreme Court. The prosecution of an appeal under these circumstances results in a delay of anything like a year or two years. The appeals are prosecuted without reference to the question as to whether there is any merit to the appeal and as the statutes now stand the right of appeal is absolute.

. . . The attention of the committee was called to a condition existing in one of our States where petition for habeas corpus after petition and successive appeals from adverse decisions therein in the same case had been prosecuted involving a purely factious delay of three or four or more years. This statute makes it impossible to continue this vicious practice, as under it no appeal can be prosecuted unless either the United States court making the final decision or a justice of the Supreme Court shall be of the opinion that there exists probable cause for such an appeal. That the delay of execution and punishment in criminal cases is the most potent cause in inducing local dissatisfaction, not infrequently developing into lynching, is obvious, and it is certainly the duty of Congress to eliminate so far as possible all unnecessary and factious delay, and this will be accomplished by the passage of this bill.⁴¹

Congress did not fashion the forerunner to section 2253 because of an overall displeasure with the existing absolute right to appeal by all state prisoners from a denial of their habeas corpus petitions. Rather, the statute was enacted specifically to address a perceived frivolous delay in cases involving the death penalty. Although Justice Rehnquist wrote in *Jeffries* and *Davis* that Congress intended to mandate a certificate as a jurisdictional requirement for all appeals by state prisoners from denials of habeas,⁴² the legislative history simply does not support his conclusion.

Even though the specific intent of Congress for the certificate requirement is clear from the language of its Report, the Supreme Court⁴³ and

40. The House Judiciary Report is very clear that the purpose of the legislation was to restrict the use of habeas corpus by state prisoners "in certain cases." H.R. REP. NO. 23, 60th Cong., 1st Sess. 1 (1908).

41. *Id.* at 1-2.

42. 453 U.S. 914, 915 (1981); 454 U.S. 911, 916 (1981).

43. See *Bilik v. Strassheim*, 212 U.S. 551 (1908) (Applying the Act of Mar. 10, 1908, ch. 76, 35 Stat. 40, in a one sentence per curiam opinion, the Court dismissed for lack of jurisdiction the petition of a state prisoner who was appealing a denial of habeas relief by the lower court but who had never been issued a certificate of probable cause.); *Ex parte Patrick*, 212 U.S. 555 (1908) (a companion case to *Bilik* with the same result).

various federal courts of appeals⁴⁴ subsequently interpreted the statute in a manner similar to Justice Rehnquist's interpretation. These courts read the statute, then codified as 28 U.S.C. section 466,⁴⁵ as a jurisdictional requirement for all state prisoners who wished to perfect appeals from denials of habeas petitions. They articulated the view that the statute requiring a certificate was jurisdictional because it was an attempt by Congress to trim all undue interference with the state criminal process caused by protracted federal appellate proceedings in habeas corpus.⁴⁶ That a court would take this position is curious, given the absence of any support—other than a clear result orientation—for a broad reading of the statute in the legislative history and the prominent position of habeas in our jurisprudential system.⁴⁷

IV. PROBLEMS WITH CERTIFICATE PRACTICE

A. *The Standard for Issuance of the Certificate*

Although both section 2253⁴⁸ and rule 22(b)⁴⁹ outline the necessity for a certificate of probable cause prior to an appeal by a state prisoner from a denial of a petition for habeas corpus relief, there is no accepted standard for determining when a court should issue the certificate. While the legislative history envisioned the certificate as a deterrent to "frivolous" petitions for habeas corpus flooding the federal courts,⁵⁰ the term "frivolous," being subjective, has been open to extensive interpretation.⁵¹ The statute and the rule speak only of "probable cause," another ambiguous term that certainly does not aid a court in determining whether the petition before it merits the issuance of the certificate. Most courts that issue or deny certificates do not articulate in their opinions exactly what standard they have employed. Of the courts that have addressed the issue, the majority have considered "probable cause" to be something more than a petition that has absolutely no merit in the claims presented.⁵² Most courts, in fact, have recognized that the test for issuance of a certificate of probable cause is a rigorous one.

The only Supreme Court precedent on the standard for issuing a certificate of probable cause is found in a memorandum written by Justice Harlan in

44. *Comerford v. Hogsett*, 79 F.2d 486 (1st Cir. 1935); *Wilson v. Lanagan*, 79 F.2d 702 (1st Cir. 1935); *In re Graves*, 270 F. 181 (1st Cir. 1920); *Genna v. Frazier*, 24 F.2d 706 (5th Cir. 1928); *United States ex rel. Koeuter v. Baldwin*, 49 F.2d 262 (7th Cir. 1931); *Schenk v. Plummer*, 113 F.2d 726, 727 (9th Cir. 1940) ("[A]n appeal is 'permitted by law' when, and only when, a certificate of probable cause is obtained from the United States court which rendered the decision or from a judge of the circuit court of appeals."); *Gebhart v. Armine*, 117 F.2d 995 (10th Cir. 1941).

45. 28 U.S.C. § 466 (1940).

46. *See, e.g.*, cases cited *supra* note 44.

47. *See infra* notes 172-75 and accompanying text.

48. 28 U.S.C. § 2253 (1976).

49. FED. R. APP. P. 22(b).

50. *See supra* text accompanying notes 37-41; *see also Ex parte Farrell*, 189 F.2d 540, 543 (1st Cir.) (congressional rationale for requiring state prisoners to obtain certificates of probable cause was "to eliminate the abuse of the writ of habeas corpus in the federal courts by the undue interference with state processes incident to protracted appellate proceedings in frivolous cases"), *cert. denied*, 342 U.S. 839 (1951).

51. *See L. YACKLE, POSTCONVICTION REMEDIES* 585 (1981).

52. *Id.*

1963, in *Rosoto v. Warden, California State Prison*.⁵³ *Rosoto* involved the application by a state prisoner for the issuance of a certificate of probable cause that had previously been denied by a federal district court and by a judge of the circuit court of appeals.⁵⁴ Justice Harlan denied the issuance of the certificate on the ground that the issues did not give rise to a "substantial constitutional question."⁵⁵ He did not elaborate, either in the text of the opinion or in the footnotes, on what constitutes a substantial constitutional question. Nor did he convey the legal sources, if any, from which he formulated the standard. A strong advocate of limited federal interference into state activities,⁵⁶ Justice Harlan probably did not want to issue a certificate that would prolong federal interference into the state judicial process. He therefore formulated a standard to achieve his goal. No precedential support for a substantial constitutional question test exists, however.

Lower federal courts have articulated the standard for the issuance of a certificate of probable cause in various ways. Two common threads emerge from the majority of the cases in which the court has stated a standard. First, the lower courts, like Justice Harlan, follow a strict standard of probable cause for issuance of the certificate.⁵⁷ Second, these courts invariably use

53. 83 S. Ct. 1788 (1963) (Harlan, J., in chambers).

54. *Id.* at 1789. The petitioners were appealing for a stay of execution as their primary objective. *Id.*

55. *Id.* It is difficult, in any event, to determine why Justice Harlan held that the facts of the case did not qualify under the "substantial constitutional question" standard. The claims by the petitioners were based on the validity under the Constitution of electronic recordings that had been used to convict them at trial. Some recordings were of conversations between a petitioner and his half brother who, unbeknownst to the petitioner, was being used by police. *Id.* n.3. Another tape was between a petitioner and his cellmate, who had been placed in the cell by prearrangement with the police and equipped with an electronic recording device. *Id.* The recordings were used as evidence at trial to convict the petitioners. *Id.* Especially considering that the Court had accepted on petition for certiorari that term *Massiah v. United States*, 377 U.S. 201 (1964)—a case that, Harlan noted, would hold those facts to be unconstitutional—one has difficulty understanding what set of facts would satisfy the Harlan test. Consequently, the "substantial constitutional question" standard for the issuance of a certificate is even higher than the strict words convey.

56. *See, e.g., Fay v. Noia*, 372 U.S. 391, 448-76 (1963) (Harlan, J., dissenting).

57. *See Gardner v. Pogue*, 558 F.2d 548 (9th Cir. 1977) (substantial question; question of some substance); *Madison v. Tahash*, 359 F.2d 60 (8th Cir. 1966) (application for certificate denied when nothing in the record indicated that petitioner was deprived of any constitutional right); *Player v. Steiner*, 292 F.2d 1 (4th Cir. 1961) (substantial constitutional question), *cert. denied*, 368 U.S. 959 (1962); *Larch v. Sacks*, 290 F.2d 548 (6th Cir. 1961) (certificate denied when no basis for appeal existed); *Burgess v. Warden, Md. House of Correction*, 284 F.2d 486 (4th Cir. 1960) (certificate denied when record and application disclosed that petition was entirely devoid of merit), *cert. denied*, 365 U.S. 837 (1961); *Dye v. Sacks*, 279 F.2d 834 (6th Cir. 1960) (substantial federal question); *McCoy v. Tucker*, 259 F.2d 714 (4th Cir. 1958) (sufficient likelihood of merit in the case); *United States ex rel. Jones v. Richmond*, 245 F.2d 234 (2d Cir.) (federal questions adequate to deserve encouragement to proceed further), *cert. denied*, 355 U.S. 846 (1957); *United States ex rel. Stewart v. Ragen*, 231 F.2d 312 (7th Cir. 1956) (substantial question worthy of consideration); *Ex parte Farrell*, 189 F.2d 540 (1st Cir.) (district court should not hesitate to deny application for certificate when constitutional point was unsubstantial or clearly without merit or when writ was discharged after issuance pursuant to findings of fact), *cert. denied*, 342 U.S. 839 (1951); *Vera v. Beto*, 332 F. Supp. 1197 (S.D. Tex. 1971) (no certificate when appeal was without substantial merit); *United States ex rel. Siegal v. Follette*, 290 F. Supp. 636 (S.D.N.Y. 1968) (requirement of certificate intended to eliminate frivolous appeals; certificate would not issue when no substantial question for appellate review existed); *Martin v. Henderson*, 289 F. Supp. 411 (E.D. Tenn. 1968) (no certificate when petition was entirely devoid of merit); *Matzner v. Davenport*, 288 F. Supp. 636 (D.N.J. 1968) (no certificate when court cannot conceive of any meritorious ground for appeal), *aff'd per curiam*, 410 F.2d 1376 (3d Cir. 1969), *cert. denied*, 396 U.S. 1015 (1970); *United States ex rel. Rivera v. Reeves*, 246 F. Supp. 599 (S.D.N.Y. 1965) (something more than a frivolous assertion necessary even though no substantial differences of opinion may exist under 28 U.S.C. § 1292(b)).

their exacting standard to deny issuance of the certificate.⁵⁸ In the few cases in which a lower court has issued a certificate of probable cause while stating the standard under which it made the decision, the articulated standard merely required the presence of some claim, no matter how weak the rationale or legal basis might be.⁵⁹ As a result, the standard has become largely a matter of judicial discretion.⁶⁰ Courts that do not look favorably on the use of habeas corpus by state prisoners set an onerous test for issuance of the certificate. Courts that are concerned that the merits of any claim by those allegedly incarcerated in violation of the Constitution be reviewed in court have articulated a lower, more attainable, threshold for the issuance of the certificate.

Many practical problems arise from a subjective standard of probable cause. Since habeas corpus deals with the fundamental liberty of people in custody, should the same petition of a state prisoner be allowed to proceed on appeal in one jurisdiction but not in another?⁶¹ Furthermore, the ambiguity of the standard arguably only increases the number of petitioners who seek a certificate, since a petitioner cannot predict whether his petition will satisfy the vaguely articulated standard. For example, the Ninth Circuit has set standards for issuing the certificate that have ranged from the most arduous⁶² to the least arduous.⁶³ A state prisoner in the Ninth Circuit obviously will be inclined to press for a certificate upon denial of his habeas petition, hoping that a panel of the court will apply the more lenient standard.

One possible way to regularize the standard and to remove it from the complete discretion of the courts draws by analogy from the standard for permission to proceed with an appeal in forma pauperis.⁶⁴ Because most state prisoners who challenge state convictions are indigent and must pursue their appeals of habeas in forma pauperis,⁶⁵ coordination of the two standards, the

58. See cases cited *supra* note 57.

59. See, e.g., *Alexander v. Harris*, 595 F.2d 87, 91 (2d Cir. 1979) ("If the petitioner's claims are frivolous and summary dismissal is appropriate, a certificate of probable cause is not; if the claims are not frivolous, summary dismissal is not appropriate."); *United States ex rel. Pihakis v. Thomas*, 488 F. Supp. 462, 467 (S.D.N.Y. 1980) (certificate issued because question was one of "first impression upon which the Court of Appeals should rule"); *United States ex rel. Jones v. Rundle*, 329 F. Supp. 381 (E.D. Pa. 1971) (certificate issued for claim other than frivolous); cf. *Kemph v. Estelle*, 660 F.2d 1027 (5th Cir. 1979).

The most far-reaching of the standards was employed by the district court in *Dillingham v. Wainwright*, 422 F. Supp. 259 (S.D. Fla. 1976), *aff'd*, 555 F.2d 1389 (5th Cir. 1977). The court granted the issuance of a certificate, stating that, even if a state prisoner presents a "very weak" case but makes a "rational argument on the law and/or facts in support of his claim," a certificate should be issued. *Id.* at 261. Only if the petitioner can make "no rational argument" on the law or facts in support of his claim for relief would a petition be considered "frivolous." *Id.* See also *Blair v. California*, 340 F.2d 741, 742 (9th Cir. 1965).

60. "[I]n deciding whether to grant or deny a certificate of probable cause . . . it can only be said that such a motion is addressed to the sound discretion [of the judge]." *Dillingham v. Wainwright*, 422 F. Supp. 259, 261 (S.D. Fla. 1976), *aff'd*, 555 F.2d 1389 (5th Cir. 1977).

61. Cf. *Hyman v. Rickman*, 446 U.S. 989, 992 (1980) (Blackmun, J., dissenting from denial of certiorari).

62. See, e.g., *Thomas v. Duffy*, 191 F.2d 360, 362 (9th Cir. 1951) ("substantial question").

63. See, e.g., *Blair v. California*, 340 F.2d 741, 742 (9th Cir. 1965) ("frivolous only if the applicant can make no rational argument on the law or facts in support of his claim for relief"); *Poe v. Gladden*, 287 F.2d 249, 251 (9th Cir. 1961) ("not plainly frivolous").

64. Under 28 U.S.C. § 1915, any court of the United States may authorize an indigent person to commence a suit or an appeal without the prepayment of fees and costs. 28 U.S.C. § 1915 (1976).

65. See generally L. YACKLE, *POSTCONVICTION REMEDIES* 589 (1981); Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 159 n.2 (1972).

certificate and in forma pauperis, is appropriate for the appeal of a habeas denial. Echoing the congressional discussion surrounding the predecessor to section 2253,⁶⁶ the courts dealing with in forma pauperis similarly have sought to ensure that appellate courts do not review frivolous issues.⁶⁷

Under 28 U.S.C. section 1915(a), "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."⁶⁸ The Supreme Court has ruled that "a defendant's good faith in this type of case is demonstrated when he seeks appellate review of any issue not frivolous."⁶⁹ The Court elaborated on the issue of frivolousness by ruling that "[u]nless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent . . . the request of an indigent for leave to appeal in forma pauperis must be allowed."⁷⁰ Moreover, the Supreme Court has also shown that, much like the procedure for the issuance of a certificate, in forma pauperis contains the ingredient of allowing a circuit court to issue the leave even if the district court has denied it.⁷¹

After a district court denies habeas relief for an in forma pauperis petitioner, the question of granting in forma pauperis for appeal is before the court. The district court must determine whether the claim presents even the possibility of a rational argument or instead is so frivolous that review in the circuit court should be denied.⁷² If the district court certifies that the appeal is frivolous, the circuit court must also make a preliminary inquiry into the merits to determine the threshold frivolousness issue.⁷³ The purpose of this dual inquiry required by the Supreme Court⁷⁴ has been analogized directly to the certificate as an opportunity to screen worthless cases out of the appellate process.⁷⁵

As the law presently stands in a majority of jurisdictions, the standard for a certificate of probable cause is concededly higher than the mere nonfrivolousness required to obtain leave to proceed in forma pauperis.⁷⁶ This difference in standards, of course, leads to the perplexing situation of a court granting leave to proceed in forma pauperis that is made effectively worthless

66. See *supra* notes 39-44 and accompanying text.

67. See generally *Coppedge v. United States*, 369 U.S. 438 (1962); *Ellis v. United States*, 356 U.S. 674 (1958).

68. 28 U.S.C. § 1915(a) (1976).

69. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

70. *Id.* at 447 (quoting *Ellis v. United States*, 356 U.S. 674 (1958)); see also 28 U.S.C. § 1915(d) (1976).

71. *Coppedge v. United States*, 369 U.S. 438, 446 (1962).

72. See Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 347 (1967). See generally I. ROBBINS, *THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES: CASES AND MATERIALS* ch. 3 (1982).

73. See authorities cited *supra* note 72.

74. *Coppedge v. United States*, 369 U.S. 438, 445-46 (1962).

75. See generally L. YACKLE, *POSTCONVICTION REMEDIES* 591 (1981).

76. See *Nowakowski v. Maroney*, 386 U.S. 542 (1967) (when a district court issues certificate of probable cause circuit court must permit eligible petitioner to appeal in forma pauperis); see also *Carafas v. LaVallee*, 391 U.S. 234 (1968). But see *Lara v. Nelson*, 449 F.2d 323 (9th Cir. 1971) (two prior district court orders on the in forma pauperis issue were equivalent to the issuance of certificates of probable cause).

As Justice (then Judge) Blackmun wrote:

My own reaction is that the cases, taken as a whole, do indicate that the standard of probable cause requires something more than the absence of frivolity and that the standard is a higher one than the "good faith" requirement of § 1915. Undoubtedly, this conclusion is not shared in all quarters. Yet,

by the lack of a certificate.⁷⁷ As noted above,⁷⁸ there is no precedential support for the substantial constitutional question test, but the Court has extensively discussed the test for the granting of in forma pauperis relief.⁷⁹ If the purpose of the in forma pauperis requirement is to deny access to the appellate courts for petitioners with frivolous claims, then once a petitioner has been granted in forma pauperis relief, why should a certificate, which has the same purpose,⁸⁰ keep the petitioner out of court?

B. Limited Certificates

The seemingly theoretical discussion between Justice Stevens and Justice Rehnquist in *Davis* actually transmits the fundamental differences among jurists concerning the use of habeas corpus relief. To the same extent, this difference is manifest in the procedural debate between the United States Courts of Appeals for the Second and Third Circuits regarding the notion of a limited certificate of probable cause. A certificate of probable cause limited to those claims in a petition that a court deems meritorious for appellate review solves the problem faced by a court with a petition that has some nonfrivolous claims. Is a court, under section 2253⁸¹ or rule 22(b),⁸² to apply the appropriate standard for issuance to the petition as a whole or to the individual claims presented in the petition? The statute and rule do not clearly address this problem.

Several federal circuits have issued certificates of probable cause limited to only a few of the claims presented in the petition for habeas corpus relief without any discussion of the propriety of the procedure.⁸³ The most extensive discussion of the issue is contained in decisions rendered by the Third Circuit in *United States ex rel. Hickey v. Jeffes*⁸⁴ and the Second Circuit in *Vicaretti v. Henderson*.⁸⁵

the decision in *Nowakowski* itself, I think, suggests that this is inherently so when it requires full dress treatment by the court of appeals once the district court has issued a certificate of probable cause. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 352-53 (1967).

77. See, e.g., *Kemph v. Estelle*, 660 F.2d 1027, 1029 (5th Cir. 1979); *Gardner v. Pogue*, 558 F.2d 548 (9th Cir. 1977); *Burgess v. Warden, Md. House of Correction*, 284 F.2d 486 (4th Cir. 1960), cert. denied, 365 U.S. 837 (1961); *McCoy v. Tucker*, 259 F.2d 714 (4th Cir. 1958).

78. See *supra* text accompanying notes 56-57.

79. See *Coppedge v. United States*, 369 U.S. 438, 446 (1962).

80. See *supra* note 70 and accompanying text.

81. 28 U.S.C. § 2253 (1976).

82. FED. R. APP. P. 22(b).

83. See *Nelson v. Moore*, 470 F.2d 1192, 1194 n.1 (1st Cir. 1972) (no real discussion of limited certificate; appeal not affected by its issuance), cert. denied, 412 U.S. 951 (1973); *United States ex rel. Nunes v. Nelson*, 467 F.2d 1380 (9th Cir. 1972) (reference made to a limited certificate of probable cause issued by the district judge); *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969) (no real discussion of limited certificate; appeal not affected by its issuance); *Johnson v. Bennett*, 386 F.2d 677, 678 (8th Cir. 1967), vacated on other grounds, 393 U.S. 253 (1968); *Choate v. Wilson*, 363 F.2d 543 (9th Cir. 1966); *United States ex rel. Sadowy v. Fay*, 284 F.2d 426, 427 (2d Cir. 1960).

84. 571 F.2d 762 (3d Cir. 1978). In *Hickey* a state prisoner's petition for habeas corpus relief had been denied by a federal district judge. The petition was based on three issues, but an appeals panel had issued a certificate of probable cause "as to the limited issue of the burden of proof in the firearm conviction." *Id.* at 765.

85. 645 F.2d 100 (2d Cir. 1980). In *Vicaretti* a federal district court had denied a state prisoner's *pro se* petition for habeas corpus relief. A panel of the appeals court had issued a certificate of probable cause limited to

In *Hickey* the Third Circuit rejected the idea of a limited certificate.⁸⁶ First, the court noted the absence of any explicit authority in section 2253 for resort to this course of action. Referring to section 2253, the court wrote: "There is no suggestion that it was intended to confer upon a single judge or justice the power to control what issues could be considered . . . in support of or in opposition to a judgment denying habeas corpus relief."⁸⁷ Second, the court reasoned that, since the statute empowers any district court judge or circuit judge to issue a certificate of probable cause, a single judge should not concurrently have the authority to select the individual claims that the full panel of judges will entertain upon appellate review.⁸⁸ Third, the Third Circuit expressed skepticism regarding the operation of a limited certificate option.⁸⁹

In *Vicaretti* the Second Circuit did authorize the limitation of issues certified for appeal from a denial of habeas corpus relief.⁹⁰ The court carefully structured its opinion to respond to the view and the rationale articulated by the Third Circuit in *Hickey*. First, the Second Circuit did not find the absence of explicit authority for a limited certificate in section 2253 to be dispositive.⁹¹ It noted that the United States Supreme Court, in the absence of explicit statutory language permitting the limiting of issues and employing only the authority to review any question certified to it by the courts, of appeals, routinely issues writs of certiorari that are limited to one or more specific issues.⁹²

the issue whether the petitioner's constitutional rights had been violated as a result of comments made by the prosecutor during summation at trial. *Id.* at 101.

86. 571 F.2d 762, 766 (3d Cir. 1978).

87. *Id.* at 765. The court argued that only the exhaustion of state remedies requirement in 28 U.S.C. § 2254(b)-(c) (1976) could be a legitimate legal basis for selecting single issues from an appeal of a denial of habeas. Except on the basis of opposition to the habeas remedy, it is not clear why the court was not able to analogize from exhaustion of remedies to legitimate a limited certificate of probable cause.

88. 571 F.2d 762, 766 (3d Cir. 1978). The court expanded on its concern by writing:

It might be, for example, that the application of a settled principle of constitutional law would justify the reversal of a denial of habeas corpus relief, but the pro se applicant in applying for a certificate of probable cause did not articulate the settled ground with sufficient clarity. If a limited certificate could preclude consideration of the settled ground, it could force a panel of necessity to decide a novel or unsettled issue of constitutional law unnecessary to its decision.

Id.

89. The court wrote:

[A]s a practical matter it is difficult to imagine how any limited certificate practice could operate. We have held that the filing of the notice of appeal within thirty days of the judgment is the critical event and that the grant of a certificate of probable cause can take place thereafter. . . . Since a single circuit judge may issue a certificate of probable cause, any member of the panel to whom the appeal is referred would appear to have power to issue an unlimited certificate any time after a notice of appeal is filed.

Id. (citations omitted).

90. 645 F.2d 100, 101 (2d Cir. 1980).

91. *Id.*

92. *Id.* District Judge Goettel of the Southern District of New York, sitting by designation, added a concurring and dissenting opinion. While he concurred in the majority's ultimate decision to authorize a panel to limit a certificate of probable cause on appeal, he did so "without much confidence in the legal precedent cited" by the court. *Id.* at 102 (Goettel, J., concurring in part and dissenting in part). Among several criticisms of the court's reasoning, Judge Goettel wrote that the analogy to the Supreme Court's certiorari practice was not strong, since "it is not clear where the Supreme Court obtains that power." *Id.*

The majority supported its use of the analogy to the Supreme Court practice and the inexplicit authority for it in 28 U.S.C. § 1257(3) (1976) by reasoning: "Though the standards for the exercise of the Supreme Court's

Second, the court explained that it certainly “share[d] the Third Circuit’s concern”⁹³ that one judge or justice, authorized under section 2253 to issue a certificate of probable cause, should not be able to prevent the panel of judges from considering certain individual issues raised by the petition. Rather than accept the concern as a justification for rejecting the notion of limited certificates, however, as the Third Circuit did, the Second Circuit contended that it merely provided a reason to expand the power of limiting issues to the concurrence of the entire panel.⁹⁴ In other words, one judge would have the authority to issue a certificate for appeal on those issues of the petition that satisfied the appropriate standard, subject to review by the entire panel. Furthermore, if the panel deciding the merits of the appeal from the denial of the habeas petition desired, it would always have the power to broaden the appeal if it were persuaded that further consideration would be “just under the circumstances.”⁹⁵

The problem addressed by these two circuits, whether control by a single judge or justice over the issues for appellate review is both fair and efficient, is, once again, not merely a formalistic procedural debate. If a court finds the holding and rationale of the Second Circuit to be persuasive, then a petitioner who has been denied habeas corpus relief in district court would not have to convince the district judge or a circuit judge or justice that all of the claims, either individually or in their totality, satisfied the appropriate standard for a certificate and merited review on appeal. The petitioner could ask the court to recognize only one issue for appeal, clearly more than enough for habeas relief. Moreover, a judge or justice who is sympathetic to the idea that a habeas petitioner should have every conceivable opportunity to have his claims of unconstitutional custody reviewed by the courts would not have to subject the entire set of issues in the petition to the test for issuance of the certificate.

The approach of the Third Circuit, on the other hand, is more akin to the approach advocated by Justice Rehnquist in *Jeffries* and *Davis*. The message is that the congressional intent behind section 2253 was to trim down the amount of frivolous petitions for appellate review. Selective review of each claim made in the petition, apart from the totality of the claims made, would emasculate the entire procedure for the issuance of a certificate.

certiorari authority differ from those applicable to issuance of a certificate of probable cause. . . . both practices involve a court’s sensible attempt to focus the attention of the litigants on the issues that merit review under the relevant standard.” 645 F.2d 100, 101-02 (2d Cir. 1980) (citations omitted).

93. 645 F.2d 100, 102 (2d Cir. 1980).

94. “[O]ur response to that concern is not to prohibit limited certificates of probable cause, but to recognize their authoritativeness in limiting issues only when acted upon by a three-judge panel.” *Id.*

95. *Id.* (citing 28 U.S.C. § 2106 (1976)). Section 2106 provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The real intent of the Third Circuit, like that of Justice Rehnquist, apparently was to foreclose the use of habeas corpus relief by state prisoners through an inflexible procedural obstacle. The Second Circuit's position is a more moderate and balanced one that takes into account both the right to habeas relief and the purpose of section 2253. Using the Second Circuit approach, an appeals panel could limit the issues in a certificate for review to assure that the court would consider only meritorious claims. This result complies with the intent of section 2253 that frivolous claims neither take up the time of the court nor delay the punishment given by the state court. Simultaneously, this approach preserves access to the federal courts for petitioners who have some valid claims of unconstitutional state custody. Admittedly, the *Vicaretti* court's use of legal precedent and some of its reasoning are not examples of the best in legal craftsmanship. The court's result, however—allowing a limited certificate of probable cause and thus balancing the purposes of the habeas remedy and section 2253—is the direction that any meaningful reform of habeas should take—namely, preserving the strengths of habeas and eliminating its weaknesses.

C. *The State and the Certificate*

An interesting difference in language between section 2253⁹⁶ and rule 22(b)⁹⁷ contributes to the difficulty one has in understanding the true intent of and necessity for the certificate. Is the certificate's purpose to trim the number of frivolous appeals from habeas corpus denials or, rather, to defeat the ability of many state prisoners to seek postconviction relief? The current practice appears to embrace the latter interpretation.

Section 2253 requires a certificate of probable cause as a condition precedent to an appeal from a lower court denial of a petition for habeas corpus. In pertinent part, the statute states:

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.⁹⁸

This statutory language is impartial and appears to apply to both parties, the petitioner and the state, equally.⁹⁹ Rule 22(b), however, provides that “[i]f an appeal is taken by a state or its representative, a certificate of probable cause is not required.”¹⁰⁰ As a result, if a lower court grants a state prisoner habeas

96. 28 U.S.C. § 2253 (1976).

97. FED. R. APP. P. 22(b).

98. 28 U.S.C. § 2253 (1976).

99. See *Federal Habeas Corpus: Hearing on S. 1314 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 114 (1978) (statement of Bennett H. Brummer, Public Defender, Miami, Florida).

100. FED. R. APP. P. 22(b).

corpus relief, then the state does not need to apply for, and satisfy the standard for issuance of, a certificate of probable cause as a condition of appeal. Yet, if the justification for the certificate of probable cause lies in the need to protect the courts of appeals from an inundation of frivolous requests for review,¹⁰¹ then why should not the requirement of a certificate also apply to the states, which certainly are just as capable of pursuing frivolous appeals?¹⁰²

Before rule 22(b) was enacted, four of the five circuits that had faced the question whether section 2253 required states to have a certificate for appeal had decided that they did not.¹⁰³ The leading case on the issue once again came from the Third Circuit; the only circuit to oppose that position was, once again, the Second Circuit. In *United States ex rel. Tillery v. Cavell*¹⁰⁴ the Third Circuit, which later was so concerned with the language of the statute when it invalidated the use of limited certificates,¹⁰⁵ granted "that the plain meaning of § 2253 seems to require that no appeal either by the petitioner or by the state or its representative may be taken without a certificate of probable cause."¹⁰⁶ The court proceeded, however, to rule to the contrary. Although it cited the legislative history, which clearly stated that when state convicts were the petitioners in these cases the purpose of the bill was to "eliminate so far as possible all unnecessary and factious delay,"¹⁰⁷ the Third Circuit interpreted this history to mean that "petitions to the federal courts

101. In *Jeffries* Justice Rehnquist, citing to the House Report on § 2253 and *United States ex rel. Tillery v. Cavell*, 294 F.2d 12 (3d Cir. 1961), wrote: "The legislative history of 28 U.S.C. § 2253 and its predecessors demonstrates the clear congressional purpose to impose the certificate-of-probable-cause requirement as a means of terminating frivolous appeals in certain habeas corpus cases." *Jeffries v. Barksdale*, 453 U.S. 914, 916 (1981) (Rehnquist, J., dissenting) (emphasis removed); see also *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1193 (1970) ("The justification for the certificate of probable cause requirement lies in the need to protect the courts of appeals from an inundation of habeas corpus cases.").

102. In my judgment, fairness requires that, if an obstacle to appellate review is to be created, both parties should be subject to the same conditions. This is especially true with regard to the requirement of a certificate of probable cause because an attorney who represents the state does not thereby become more circumspect, professional, or virtuous. Such an attorney should be held to the same standards and subject to the same safeguards as attorneys who do not represent the state. My experience indicates that the Attorney General of the State of Florida will appeal every adverse habeas corpus decision, regardless of whether his case has merit.

Federal Habeas Corpus: Hearing on S. 1314 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 114 (1978) (statement of Bennett H. Brummer, Public Defender, Miami, Florida); see also *Smith v. Digmon*, 434 U.S. 332, 333 n.2. (1978); *Kemph v. Estelle*, 660 F.2d 1027, 1029 (5th Cir. 1979) ("It appears . . . that the attorneys general in some states in this Circuit are . . . abusing [a local rule regarding frivolousness of appeals]."); cf. *Smith, Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036 (1982) (article by Florida Attorney General).

103. The other three circuits, aside from the Third in *Tillery*, were the Fifth, Sixth, and Seventh Circuits. See *Texas v. Graves*, 352 F.2d 514 (5th Cir. 1965) (No necessity exists for state or its representative to obtain a certificate of probable cause to take an appeal to the court of appeals from a final order granting a writ of habeas corpus to a prisoner detained under process issued by a state court.); *United States ex rel. Calhoun v. Pate*, 341 F.2d 885 (7th Cir. 1965); *Buder v. Bell*, 306 F.2d 71 (6th Cir. 1962).

The Advisory Committee's note to rule 22(b) indicates that the drafters of the rule relied heavily on the decisions of these circuits in fashioning the explicit rule. See FED. R. APP. P. 22(b) advisory committee note.

104. 294 F.2d 12 (3d Cir. 1961).

105. *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1978); see *supra* notes 84–95 and accompanying text.

106. 294 F.2d 12, 15 (3d Cir. 1961).

107. H.R. REP. NO. 23, 60th Cong., 1st Sess. 1, 2 (1908) (emphasis added).

filed by persons in state custody resulting in unnecessary delay in state proceedings was the evil that was sought to be remedied."¹⁰⁸ The court's conclusion—that section 2253 did not apply to the state and did not preclude appeal by the warden of the state penitentiary even in the absence of a certificate of probable cause¹⁰⁹—is difficult to understand, except, as in many habeas corpus cases, on the basis of ideology.¹¹⁰

In contrast, the Second Circuit in *United States ex rel. Carrol v. LaVallee*¹¹¹ opted for a less partial approach to the problem. The court assumed the role of strict constructionist,¹¹² holding that the language of section 2253, which did not differentiate between prisoners and the state in requiring a certificate, was unambiguous, but also held that the courts should look favorably on delayed state-filed petitions.¹¹³

Since the legislative history and the language of section 2253 point to requiring the certificate for all parties to prevent frivolous habeas appeals from flooding the appellate courts, little justification exists for rule 22(b)'s requirement that attaches only to the state prisoner. Allowing some frivolous appeals to reach the appellate courts unhindered not only is inefficient but also reflects an absence of fairness. This result is attributable to those who wish to tie up the remedy of habeas corpus with as many procedural obstacles as possible, to discourage its use by state prisoners.

D. Procedure

If a district court denies a petitioner habeas corpus relief, most circuits¹¹⁴ and Federal Rule of Appellate Procedure 22(b),¹¹⁵ in their attempts to protect appellate courts, require that an application for a certificate of probable cause first be directed to the district judge who denied the relief. If the judge issues the certificate, it is to be forwarded to the appellate court with the notice of appeal and the record from the district court.¹¹⁶ The appellate court is then obliged to consider the appeal on the merits.¹¹⁷ If, however, the district judge

108. 294 F.2d 12, 15 (3d Cir. 1961).

109. *Id.*

110. See *infra* note 171 and accompanying text.

111. 342 F.2d 641 (2d Cir. 1965); see also *United States ex rel. Rogers v. Richmond*, 252 F.2d 807, 808 (2d Cir.), *cert. denied*, 357 U.S. 220 (1958).

112. The court's strict construction of 28 U.S.C. § 2253 (1976) is especially interesting given its later holding in *Vicaretti v. Henderson*, 645 F.2d 100, 101 (2d Cir. 1980), that the language of the statute was not dispositive on the issue of a limited certificate of probable cause. See *supra* notes 84-95 and accompanying text.

113. 342 F.2d 641, 642 (2d Cir. 1965); see also *United States ex rel. Sadness v. Wilkins*, 312 F.2d 559 (2d Cir. 1963).

114. See *Fitzsimmons v. Yeager*, 391 F.2d 849 (3d Cir.), *cert. denied*, 393 U.S. 868 (1968); *Sagaser v. Sigler*, 374 F.2d 509 (8th Cir. 1967); *Simpson v. Teets*, 248 F.2d 465 (9th Cir. 1957); *United States ex rel. Geach v. Ragen*, 231 F.2d 455 (7th Cir. 1956); *Loper v. Ellis*, 224 F.2d 901 (5th Cir. 1955).

115. The pertinent part of rule 22(b) reads: "If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge." FED. R. APP. P. 22(b).

116. *Id.*

117. *Nowakowski v. Maroney*, 386 U.S. 542 (1967); see also *Garrison v. Patterson*, 391 U.S. 464 (1968). This issue is particularly important for petitioners sentenced to death who receive certificates of probable cause for the appeal. See *Brooks v. Estelle*, 103 S. Ct. 1490 (1982); *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir.), *cert. granted*, 103 S. Ct. 841 (1983); *infra* note 170.

denies the application for the certificate, then the petitioner may address a new application for a certificate to a circuit justice or judge.¹¹⁸ Furthermore, upon denial of the application, rule 22(b) requires the district court to issue its reasons why the certificate was not issued.¹¹⁹

The ambiguity of the language in section 2253 creates several procedural problems that have important ramifications. It is well settled, for example, that habeas corpus is a civil proceeding.¹²⁰ Under Federal Rule of Appellate Procedure 4(a)¹²¹ and 28 U.S.C. section 2107,¹²² a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or issuance of the order from which the appeal is taken. This 30-day time restriction is mandatory and jurisdictional.¹²³ Neither the language of section 2253 nor rule 22(b), however, makes clear whether the certificate must be applied for and issued during the jurisdictional 30-day time limit required for appeals in civil proceedings.

Section 2253 prescribes no time limit within which a petitioner must seek or obtain a certificate of probable cause. Furthermore, the language of the statute does not require a certificate as a condition precedent to the filing of a notice of appeal. Courts have interpreted the statutory requirement that an

118. See 28 U.S.C. § 2253 (1976). Compare *Gardner v. Pogue*, 558 F.2d 548 (9th Cir. 1977) (court was unwilling to permit even one of its judges to entertain an application for a certificate prior to action by the district judge), with *Lara v. Nelson*, 449 F.2d 323 (9th Cir. 1971) (another Ninth Circuit decision in which the court took the silence of a district judge for 90 days on an application for a certificate as a rejection and permitted a circuit judge to consider the application).

119. The pertinent part of rule 22(b) reads: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue." FED. R. APP. P. 22(b).

120. See *Harris v. Nelson*, 394 U.S. 286, 289 n.1, 293-94 (1969); *Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959); *Fisher v. Baker*, 203 U.S. 174, 181 (1906); *Ex parte Tom Tong*, 108 U.S. 556 (1883); FED. R. CIV. P. 81(a)(2).

121. FED. R. APP. P. 4(a). The rule provides in pertinent part:

(a) Appeals in Civil Cases

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

Id.

122. 28 U.S.C. § 2107 (1976):

Time for appeal to court of appeals.

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

....

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

123. *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). In *Browder* the Court noted: The purpose of this rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands."

Id. (quoting *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943)).

appeal may not be taken in habeas actions by state prisoners unless a certificate of probable cause is issued in two ways. Some courts have interpreted the statute to mean simply that the appeal may not *proceed* until the certificate of probable cause has been issued, rather than that a notice of appeal may not *be filed* until the certificate has been issued.¹²⁴ Since section 2253 does not establish any time limit for obtaining a certificate, the argument is that none should be read into the statute.¹²⁵ This interpretation is also consistent with the language and intent of Federal Rule of Appellate Procedure 3(a), concerning the filing of a notice of appeal.¹²⁶ Consequently, provided that the notice is timely, the appeal can always proceed to a review of the merits as soon as the petitioner obtains a certificate of probable cause, even if the petitioner obtains it more than 30 days after the judgment.

Other courts have interpreted section 2253 quite differently on this issue. They have read the statute as jurisdictional and have pointed to its language that "an appeal may not be *taken* to the court of appeals"¹²⁷ from a district court's order denying habeas corpus relief unless a certificate of probable cause is obtained from the district judge or a circuit justice or judge.¹²⁸ These courts have reasoned that, if section 2253 incorporates the normal civil rules regarding timely notice of appeal, then it undoubtedly also adopts for the certificate of probable cause a similar 30-day time limitation.¹²⁹ Because Congress created section 2253 and the certificate to give jurisdiction for the appeal, a failure to obtain the certificate would be as jurisdictionally fatal to the appeal as a notice filed beyond the 30-day limit. The result of this interpretation is that, when a district judge denies an application for a certificate of probable cause, the appellate court cannot review the merits of the case unless the petitioner makes another attempt to obtain a certificate from a circuit justice or judge and the certificate is granted within 30 days of the judgment.

Rule 22(b) does not clarify the timeliness problem in section 2253. The rule merely states that "if an appeal is taken by the applicant" the district judge must either issue or refuse to issue the certificate.¹³⁰ The implication of

124. See *Fitzsimmons v. Yeager*, 391 F.2d 849 (3d Cir.), *cert. denied*, 393 U.S. 868 (1968), for the best discussion of this view.

125. See L. YACKLE, *POSTCONVICTION REMEDIES* 587 (1981).

126. FED. R. APP. P. 3(a). The rule provides in pertinent part:

(a) Filing the Notice of Appeal.

An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

Id.

127. 28 U.S.C. § 2253 (1976) (emphasis added).

128. See, e.g., *Sagaser v. Sigler*, 374 F.2d 509 (8th Cir. 1967); *United States ex rel. Geach v. Ragen*, 231 F.2d 455 (7th Cir. 1956); *Ex parte Farrell*, 189 F.2d 540, 544 (1st Cir.) (certificate of probable cause must be sought within 30 days from denial of habeas relief), *cert. denied*, 342 U.S. 839 (1951); see also *Fitzsimmons v. Yeager*, 391 F.2d 849, 861 (3d Cir.) (Kalodner, J., dissenting), *cert. denied*, 393 U.S. 868 (1968).

129. See L. YACKLE, *POSTCONVICTION REMEDIES* 587 (1981).

130. FED. R. APP. P. 22(b).

the rule may be that, since an appeal is "taken" by the filing of a notice of appeal, a petitioner may obtain the certificate at any time so that the appeal may "proceed."¹³¹ Whether under this interpretation, which comports with the first view discussed above, a petitioner would have to apply for the certificate during the 30-day time restriction, even though issuance could come after that time, is unclear. Courts that have addressed the issue have decided it both ways.¹³²

Clearly, the stricter of the two interpretations is an example of the position that Justice Stevens challenged in *Davis*: "procedural niceties" that accomplish nothing but to hinder those who would legitimately employ the habeas corpus remedy.¹³³ To hold the habeas petitioner to a rigid and technical reading of section 2253, as does the second interpretation, is unfair and adverse to the intent of the certificate. Since a petitioner cannot apply to a circuit judge or justice for a certificate until the district judge has rendered a decision,¹³⁴ and since a federal judge likely will not be able to address the application for a certificate within a 30-day period,¹³⁵ a petitioner would lose the right to appeal the denial of habeas through no fault of his own. Moreover, such a situation would not satisfy the requirements for an extension of time under Federal Rule of Appellate Procedure 3(a).¹³⁶ Furthermore, it would contravene the most basic objective of the certificate by foreclosing appellate review of a potentially meritorious petition. A claim may very well be meritorious and receive a certificate for appeal, which satisfies the purpose of section 2253, but the petition may never be reviewed because of difficulty in obtaining court action in so short a time. Therefore, the better approach is to require that the application for a certificate—or some document that can be construed as such¹³⁷—be filed within the 30-day period, but that the certificate itself need not be issued within that period.

Even with this interpretation, however, the danger exists that a state prisoner, thinking that an appeal may not proceed without a certificate,¹³⁸ will

131. Zeigler & Hermann. *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 221 (1972). The authors mention that, while in theory filing the notice of appeal might deprive the district court of jurisdiction, thereby barring consideration of a later application for a certificate, in practice courts ignore the difficulties. *Id.* n.271.

132. For decisions that require the filing of an application for a certificate within 30 days, see, e.g., *Buder v. Bell*, 306 F.2d 71 (6th Cir. 1962); *United States ex rel. Geach v. Ragen*, 231 F.2d 455 (7th Cir. 1956); *Boyden v. Webb*, 208 F.2d 201 (9th Cir. 1953).

For decisions that do not require the filing for a certificate within 30 days, see, e.g., *Fitzsimmons v. Yeager*, 391 F.2d 849, 853-54 (3d Cir.), *cert. denied*, 393 U.S. 868 (1968); *United States ex rel. Carrol v. LaVallee*, 342 F.2d 641 (2d Cir. 1965).

133. *Sumner v. Mata*, 455 U.S. 591, 600 (1982) (Stevens, J., dissenting); see *supra* note 21.

134. FED. R. APP. P. 22(b); see *supra* note 115.

135. See, e.g., *Lara v. Nelson*, 449 F.2d 323 (9th Cir. 1971) (district court did not act on the petitioner's application for a certificate for 90 days).

136. FED. R. APP. P. 3(a). The rule permits an extension of time, not to exceed an additional 30 days, only if the petitioner makes a showing of excusable neglect "based on failure of a party to learn of the entry of the judgment, order or decree." See *supra* note 122.

137. See *infra* note 139.

138. On *pro se* litigants and their problems, see generally I. ROBBINS, *THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES: CASES AND MATERIALS* ch. 4 (1982); Flannery & Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOKLYN L. REV. 769 (1975); Robbins & Herman,

not even consider filing a notice of appeal until the certificate has been granted. If the request for the certificate is made after the 30-day time limit for the filing of the notice of appeal, there is no document that can be characterized as a notice of appeal.¹³⁹ Again, therefore, the prisoner is effectively barred from taking an appeal.¹⁴⁰

Another pragmatic point, with extremely serious consequences, is that a district judge who grants a certificate of probable cause normally does so simply by an endorsement on the application. If the prisoner has been informed that the certificate has been granted, he may assume that further instructions, if not the appointment of counsel,¹⁴¹ will be forthcoming from either the district court or the court of appeals. But this rarely is the case. With the burden on the litigant to shepherd his case through the courts, the *pro se* prisoner will often sit for many months without any procedural progress in his case. This is especially egregious when the appeal turns out to be meritorious, but it also causes unnecessary delay in the determination of claims that are without merit.

To remedy this problem, the clerk's office of the United States Court of Appeals for the Second Circuit in 1974 formalized a document—to be completed by the district judge who granted the certificate—that sought the following information: Petitioner's name and address; the date that the certificate was granted; whether the district court had obtained state records; if so, which records and whether they were still in the possession of the district court; whether petitioner was represented by counsel; if so, counsel's name and address; whether counsel would continue on appeal; whether counsel should be appointed under the Criminal Justice Act;¹⁴² and additional comments. The form indicated that the district judge should sign it and send it to the *pro se* law clerks' office of the Second Circuit.

Litigating Without Counsel: Faretta or for Worse, 42 BROOKLYN L. REV. 629 (1976); Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157 (1972).

139. The Supreme Court, in *Haines v. Kerner*, 404 U.S. 519 (1972), held that *pro se* papers should be held "to less stringent standards than formal pleadings drafted by lawyers." *Id.* at 520; *see also Estelle v. Gamble*, 429 U.S. 97, 108 (1976) (Stevens, J., dissenting); *Brown v. Allen*, 344 U.S. 433, 502 (1953) (separate opinion of Frankfurter, J.); *Eisen v. Eastman*, 421 F.2d 560, 562 (2d Cir. 1969) (per Friendly, J.). As a result, recharacterization of *pro se* papers is a frequent occurrence.

140. To deal partially with this problem, many circuits have taken the position that submission to the district court of any informal document "evidencing an intention to appeal" will fulfill the time limitations of rule 4(a). *See, e.g., Pasquale v. Finch*, 418 F.2d 627, 629 (1st Cir. 1969) (motion for extension of time within which to file notice of appeal treated as notice of appeal); *Fitzsimmons v. Yeager*, 391 F.2d 849, 853 (3d Cir.), *cert. denied*, 393 U.S. 868 (1968); *Poe v. Gladden*, 287 F.2d 249, 251 (9th Cir. 1961) (application for certificate of probable cause treated as notice of appeal); 3D CIR. R. 8(1); *cf. Riffle v. United States*, 299 F.2d 802 (5th Cir. 1962) (letter to circuit judge treated as notice of appeal). Rule 22(b) implies that a timely notice of appeal also may serve as an application for a certificate, since the rule requires the district judge either to issue or to refuse to issue a certificate when an appeal is taken by the applicant. This reading is supported by the explicit authorization in rule 22(b) for the court of appeals to consider the notice of appeal as a request for a certificate if no express request is filed. Nevertheless, it is critical to recognize that if no paper is filed by the prisoner within the 30-day time limit, there can be no appeal from the lower court's habeas denial.

141. *See Zeigler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 242 (1972).

142. 18 U.S.C. § 3006A(g) (1976).

Despite the obvious value of the form, the circuit court never formally required its completion by the district judges, and it is no longer in regular use—primarily because of the laxity of the district judges in completing it.¹⁴³

V. CURRENT LEGISLATIVE REFORM OF THE CERTIFICATE REQUIREMENT

While the courts have struggled with the certificate of probable cause as a limitation on state prisoners' use of the habeas remedy, evidenced by the discussion between Justice Stevens and Justice Rehnquist in *Jeffries* and *Davis*, legislators in Congress have moved to change both the certificate requirement and the entire habeas proceeding. Three recent examples of the legislative effort are draft bills originating in the Senate Judiciary Committee labeled S. 2216,¹⁴⁴ S. 2838,¹⁴⁵ and S. 2903.¹⁴⁶ As they pertain to the certificate, the three bills are identical in language.

The most obvious and significant modification of the certificate of probable cause requirement in each of these bills is a restriction on the issuance of a certificate to a circuit justice or judge. The proposed language indicates that the district judge who denied habeas relief cannot receive an application for a certificate of probable cause. The text of section 2253 presently reads: "An appeal may not be taken . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."¹⁴⁷ The language offered in the legislation reads, in pertinent part: "An appeal may not be taken . . . unless a circuit justice or judge issues a certificate of probable cause."¹⁴⁸ This new language is tracked by a proposed modification of Federal Rule of Appellate Procedure 22(b). The existing rule provides:

If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge.¹⁴⁹

The drafters of the proposed rule have excised all of this language—as well as the words "unless a district . . . judge issues a certificate of probable cause"—leaving the wording to be "unless a circuit judge issues a certificate of probable cause."¹⁵⁰

143. Telephone interview with *pro se* law clerk, United States Court of Appeals for the Second Circuit; cf. *Robinson v. Smith*, 530 F. Supp. 1386, 1391 (W.D.N.Y. 1982) (After denying habeas relief, court assisted petitioner by giving address of court of appeals to apply for certificate of probable cause and permission to prosecute an appeal in forma pauperis.).

144. S. 2216, 97th Cong., 2d Sess. (1982).

145. S. 2838, 97th Cong., 2d Sess. (1982).

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

147. 28 U.S.C. § 2253 (1976).

148. S. 2216, *supra* note 144, at 3; S. 2838, *supra* note 145, at 4; S. 2903, *supra* note 146, at 31.

149. FED. R. APP. P. 22(b).

150. S. 2216, *supra* note 144, at 4; S. 2838, *supra* note 145, at 4; S. 2903, *supra* note 146, at 32.

The effect of these modifications is to take the power to issue a certificate of probable cause out of the hands of the district judge, and thus eliminate one level of review for the certificate now open to the state prisoner. Since legislative discussion on this draft is absent, one can only speculate about the reasons behind the changes. Several probably exist. First, the proposed statute and rule reduce the opportunities of a state prisoner who appeals the denial of habeas corpus to obtain the certificate of probable cause needed to pursue his appeal. A state prisoner effectively would be left with only one level at which to obtain the certificate, since a circuit justice seldom will grant one, and since the Supreme Court will deny or dismiss most petitions seeking a writ of certiorari to issue a certificate.¹⁵¹ The legislators may have felt that a district judge who has just denied habeas relief might issue the prisoner a certificate to pursue the appeal even though the claims lack merit because the judge has already formulated support for the appellate court to use to deny the certificate and the judge does not have to deal with the case again.¹⁵² The anomaly is that the certificate was designed to free the appellate courts from reviewing frivolous habeas petitions, but the language of the bills places them at the center of the decision regarding frivolousness and requires them to delve into the merits of the claims.¹⁵³ With the existing language, when a district judge denies a certificate, some prisoners may not proceed, or in some circuits cannot proceed, because of time limitations for appeal.¹⁵⁴ The proposed language would funnel all certificate requests through the appellate courts.

A second consequence of the proposed language is that rule 22(b) would no longer require any court to state the reasons for its denial of a certificate. The present text requires a district judge who denies a certificate to state the reasons for the decision.¹⁵⁵ The newly offered language does not require the circuit judge to do so. This change clearly undercuts the ability of a state prisoner to get additional review of his claims, since he cannot know either what standard the judge applied or what was wrong with his claims and, therefore, cannot adjust his arguments for appeal to clarify the claims that one

151. See, e.g., *Davis v. Jacobs*, 454 U.S. 911 (1981); *Jeffries v. Barksdale*, 453 U.S. 914 (1981); *Rosoto v. Warden, Cal. State Prison*, 83 S. Ct. 1788 (1963) (Harlan, J., in chambers).

152. The proposed language follows a recommendation that, since the certification requirement probably has not significantly reduced the workload of the circuit courts, either the district judge's decision should be final or it should be dispensed with entirely. See generally P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 34-36 (1979).

153. The language, however, to one extent does alleviate the problem argued by some that review by the district judge and then the circuit judge has developed into two time-consuming quasi-appeals before an official appeal of the merits can be conducted. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1193-94 (1970). A sensible response to this argument might be to allow state prisoners, like federal prisoners, to appeal the denial of postconviction relief as of right, with the appellate courts instituting summary procedures if the burden of petitions becomes too great. See Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243, 282-83 (1967).

154. See *supra* note 132 and cases cited therein.

155. FED. R. APP. P. 22(b). Nevertheless, reasons rarely are given. *But see Herrera v. Payne*, 673 F.2d 307, 308 (10th Cir. 1982) (granting writ of mandamus to order district court to provide statement of reasons when denying certificate of probable cause).

judge deemed to be frivolous. If a judge were not required even to minimally justify his decisions, a circuit judge who is opposed to the use of habeas by state prisoners very easily could simply deny the certificate. The decision effectively would be insulated from review.¹⁵⁶

One aspect of the certificate that has not been stressed thus far in this Article is that the entire procedural maze that is associated with the requirement of the certificate of probable cause applies only to habeas proceedings arising "out of process issued by a State court."¹⁵⁷ A *federal* prisoner's right to appeal from a denial of postconviction relief has never been affected by the requirements of section 2253 or rule 22(b). This makes a great deal of sense, for the federal courts are already somewhat protected from an inundation of frivolous postconviction petitions by federal prisoners without the certificate requirement,¹⁵⁸ and, more important, concerns of federalism and the concomitant arguments of federal intervention in the state criminal process are absent. Thus it is critical—although perhaps not surprising, given the many other postconviction avenues that have been closed to prisoners—to observe that the proposed bills would impose the same certificate requirement on federal prisoners as they do on state prisoners.¹⁵⁹ To tamper with this hitherto untouched feature of the hitherto untouched certificate requirement reveals the true purpose of the proposed legislation.

The bills do not attempt to clarify any of the problems of certificate theory and practice. They make no effort to define a regular standard of probable cause. Nor do they attempt to deal with any of the procedural pitfalls. These omissions did not result from oversight. Rather, they manifest the intent of Senator Thurmond, the chief sponsor of the drafts and an ardent

156. On the importance of explained decisions to the legal system generally, see Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969):

We should be reluctant to encourage the making of unexplained decisions. The same reasons which require that the decision be based on stable legal principle argue very strongly that the principle be stated, as a demonstration to litigants and the public that the court has done its job properly, as an aid to the future organic growth of the law, and as a means of self discipline for the . . . judge.

Id. at 559. A similar problem arises with in forma pauperis applications. Compare *Collins v. Cundy*, 603 F.2d 825, 828 (10th Cir. 1979) (apparently requiring a statement explaining dismissals under 28 U.S.C. § 1915(d)), with *Crisaft v. Holland*, 655 F.2d 1305, 1310 (D.C. Cir. 1981) (encouraging a statement of reasons, but not requiring it "at this time" because of "the heavy workload of the district court"). Another interesting reference is *Tatem v. United States*, 275 F.2d 894 (D.C. Cir. 1960), in which Circuit Judge (now Chief Justice) Burger wrote:

To deny the right to file a petition for a writ of habeas corpus is an exercise of power so great in its impact on a petitioner that an appellate court must be able to ascertain the grounds for denial in order to fulfill its responsibility of review. It is therefore imperative that denial either of leave to file the petition, or denial of the writ itself, be accompanied by an expression of the reasons for the denial either by informal memorandum, by recitals in an order, or by findings.

Id. at 896. It is not at all clear that his view is unchanged.

157. 28 U.S.C. § 2253 (1976); FED. R. APP. P. 22(b).

158. See 28 U.S.C. § 2255 (1976); *Hill v. United States*, 368 U.S. 424 (1962); *Sunal v. Large*, 332 U.S. 174 (1947). See generally L. YACKLE, *POSTCONVICTION REMEDIES* 151-75 (1981).

159. See S. 2216, *supra* note 144, at 3, 4; S. 2838, *supra* note 145, at 3; S. 2903, *supra* note 146, at 31. It is noteworthy that title III of S. 2903—that portion of the bill that deals with habeas corpus—is entitled "Federal Intervention in State Criminal Proceedings." S. 2903, *supra* note 146, at 29 (emphasis added). Yet it goes on to create this major obstacle for federal prisoners, as well as for state prisoners.

opponent of habeas corpus relief,¹⁶⁰ to keep the certificate an opaque obstacle ready to trip up those who wish to appeal denials of habeas petitions, and more generally to restrict all prisoners' access to the federal courts.

VI. CONCLUSION AND RECOMMENDATIONS

The Supreme Court's decisions to deny certiorari in *Jeffries* and *Davis* and particularly the opinion issued by Justice Stevens in *Davis* provide the best approach to the requirement of a certificate of probable cause, and to the habeas system in general. As Justice Stevens pointed out,¹⁶¹ we must make sure that the writ of habeas corpus is not abused, but our concern should be the merit of claims for liberty rather than procedures to which we strictly adhere for no sound reason. For the most part, state prisoners have not abused the writ of habeas corpus by flaunting the judgments of state courts and by inundating the federal courts with frivolous appeals. In the year ending June 30, 1981, state courts of general jurisdiction disposed of well over 2.25 million criminal cases, and state courts of limited jurisdiction decided at least the same number.¹⁶² In all, state prisoners filed only 7,790 petitions for habeas corpus relief in federal courts challenging the finality of state court judgments.¹⁶³ All federal courts during the same time period disposed of a total of 180,576 civil cases.¹⁶⁴ Consequently, the petitions by state prisoners for habeas corpus relief represented only about 4 percent of the federal civil caseload.¹⁶⁵ Only 165 cases—representing about 1.3 percent of the total trials in all civil actions in the federal courts—received evidentiary hearings.¹⁶⁶ More than 95 percent of those hearings lasted one day or less.¹⁶⁷ Therefore, the actual situation in the federal courts today does not mandate a strict jurisdictional reading of section 2253 that may foreclose access for meritorious petitions.

If the congressional intent in fashioning a requirement for a certificate of probable cause was to trim from the system all state petitions for habeas corpus relief that are frivolous and cause unnecessary delay,¹⁶⁸ then this objective has virtually been obtained. The following recommendations would help judges to use the certificate requirement more effectively both to fulfill further

160. See, e.g., *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 2 (1981) (statement of Senator Strom Thurmond of South Carolina).

161. *Davis v. Jacobs*, 454 U.S. 911, 914 (1981).

162. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 404-07 (1982).

163. 1981 DIRECTOR AD. OFF. U.S. CTS. ANN. REP. 211, table 21.

164. *Id.* table 20.

165. See *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 154 (1981) (statement of Richard J. Wilson, Director, Defender Division, National Legal Aid and Defender Association).

166. *Id.*

167. *Id.* at 120 (statement of Stephen Gillers, Associate Professor of Law, New York University).

168. See *supra* notes 37-41 and accompanying text.

the congressional intent behind the requirement and to conform to the purpose of habeas corpus relief:

A definition of "probable cause" should be included in the statute. The standard should be the "nonfrivolous issue" test. Since most state prisoners who seek to appeal from the denial of habeas corpus relief request both a certificate of probable cause and leave to appeal in forma pauperis, use of the same standard would avoid apparently inconsistent decisions.

A district judge, circuit judge, and circuit justice should explicitly be permitted to issue limited certificates of probable cause. This would foster appellate review of legitimate claims of unconstitutional custody. The appellate courts could focus only on nonfrivolous claims. To ensure proper application, the entire appellate panel should decide which claims are legitimate.

States and their representatives should be required to obtain a certificate of probable cause to appeal from an order granting habeas corpus relief. A state's appeal can be as frivolous as a state prisoner's appeal. If the intent of section 2253 is to save the federal courts of appeals from having to review frivolous claims, then the certificate requirement should apply equally to both parties to the litigation.

The right to receive a decision on an application for a certificate of probable cause beyond the 30-day time limit for the filing of a notice of appeal should explicitly be authorized. The acceptance or denial of appellate review should be based on the merits of the claims, rather than on the inability of a court to render a decision in such a restricted time period.

When a court denies a petition for habeas corpus relief, it should instruct the litigant on the relevant procedures and time periods for appeal. Potentially meritorious claims should not be jurisdictionally barred simply because of the ignorance of those who are untutored in the law.

A form for the certificate of probable cause should be developed. When a district judge grants a certificate, the judge should be required to complete the form and forward it to the court of appeals. Pro se litigants, as legal neophytes, should not bear the burden of overcoming arcane procedures, particularly when a court has found a nonfrivolous claim.¹⁶⁹

The proposed Senate bills, as they pertain to the certificate of probable cause requirement, should be rejected in their entirety. District judges should retain the power to issue certificates. Judges who deny

169. An alternative resolution of this problem is to allow the appointment of counsel as of right in post-conviction proceedings. Such a discussion, however, is beyond the scope of this Article. See generally I. ROBBINS, *THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES: CASES AND MATERIALS* 82-87 (1982).

applications for certificates should be required to explain the reasons for their decisions. And the certificate requirement should not apply to federal prisoners.

If dissents from denials of certiorari are indicative of the future directions of the Supreme Court, then the habeas corpus certificate of probable cause requirement is ripe for Supreme Court attention.¹⁷⁰ The present legislative and judicial activity regarding the certificate requirement should, therefore, be recognized for what it is: an attempt by opponents of any federal habeas corpus review to get all that they can while the prevailing criminal justice

170. A not unlikely candidate for this attention is *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir.), *cert. granted*, 103 S. Ct. 841 (1983), in which the questions accepted for review include the appropriate standard for granting or denying a stay of execution pending disposition of an appeal in a federal court of appeals by a federal habeas corpus petitioner sentenced to death. Four Justices' views on the appropriate Supreme Court procedures for review of capital cases are presaged in *Coleman v. Balkcom*, 451 U.S. 949 (1981). Justice Rehnquist, dissenting from the denial of certiorari, inveighed against the increasing tendency in this country to postpone or delay the enforcement of capital punishment statutes. He would promptly grant certiorari and decide the merits of capital cases coming from state courts, thus precluding the federal courts from granting writs of habeas corpus in those cases on any ground presented to and rejected by the Supreme Court. Referring to a "stalemate in the administration of federal constitutional law," *id.* at 957, a "mockery of our criminal justice system," *id.* at 958, a "state of savagery," *id.* at 962, and Justice Jackson's statement in *Stein v. New York*, 346 U.S. 156, 197 (1953), that "[t]he people of the State are also entitled to due process of law," 451 U.S. 949, 960 (1981), Justice Rehnquist concluded:

[T]he jurisdiction of the federal courts over [sentences] of death [should be ended], and unless the appropriate state officials commuted [a] petitioner's sentence, it would presumably be carried out. In any event, the decision would then be in the hands of the State which had initially imposed the death penalty, not in the hands of the federal courts.

Id. at 964 (Rehnquist, J., dissenting from denial of certiorari); see also *Estelle v. Jurek*, 450 U.S. 1014 (1981) (Rehnquist, J., dissenting from denial of certiorari). (For a similar view expressed by Justice Powell, see Address by Justice Powell, Eleventh Circuit Conference (May 9, 1983).)

Justice Marshall, joined by Justice Brennan, also dissented from the denial of certiorari in *Coleman*, stating, *inter alia*: "Certainly no Member of this Court would countenance a conviction obtained in violation of the Constitution. Because of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review." 451 U.S. 949, 955 (1981) (Marshall, J., dissenting from denial of certiorari). Justice Stevens' conclusion was that:

We must . . . be as sure as possible that novel procedural shortcuts have not permitted error of a constitutional magnitude to occur. For after all, death cases are indeed different in kind from all other litigation. The penalty, once imposed, is irrevocable. In balance, therefore, I think the Court wisely declines to select this group of cases in which to experiment with accelerated procedures.

Id. at 953 (Stevens, J., concurring in denial of certiorari).

This same point was made very eloquently in *Bass v. Estelle*, 969 F.2d 1154 (5th Cir. 1983):

When the criminal justice system exacts the ultimate penalty, and an individual is executed, no constitutional wrong can ever be rectified. The penalty is irrevocable and inexorable. Therefore we must be certain, and I would underscore *deadly certain*, that no germ of constitutional error has infected the prosecutorial treatment. Two things must be indisputable: that the accused is in fact guilty, and that no facts or factors militate against putting the accused to death. There are no writs of habeas corpus from a casket.

. . . .

. . . It saddens me to admit that there is rarely any escape from the executioner's activities under the lethal blows rained upon the Great Writ, which seems to become less great as the years pass. Were I musician rather than judge, I would compose a dirge; . . . I pray that, for all its recent modifications and exceptions, [the Great Writ] shall never die.

. . . Yes, there must be an end to criminal litigation. Our duty as judges, a duty we may not shirk, is to ensure that the ending is a *constitutional* one. Some things go beyond time.

Id. at 1161-62 (Goldberg, J., specially concurring).

On the relationship between a certificate of probable cause and an application for stay, see also *Brooks v. Estelle*, 103 S. Ct. 1490 (1982).

climate appears to be receptive—to further restrict and encumber the procedures for obtaining the writ and to bar from review as many prisoner petitions as possible, both frivolous and nonfrivolous.¹⁷¹

The certificate of probable cause requirement—if, indeed, the requirement is to be preserved at all—could help to prevent abuses of the postconviction process. But it should not be used as the key to lock the doors of the federal courts to state prisoners with legitimate claims. Abstruse procedural requirements traditionally have not stood in the way of merited relief. The Supreme Court historically has emphasized the scope and adaptability of the writ, and, therefore, that “it be administered with the initiative and flexibility essential to insure that miscarriages of justice . . . are surfaced and corrected.”¹⁷² In protecting the effectiveness of the writ from becoming lost in a “procedural morass,”¹⁷³ the Court has stated that the writ of habeas corpus “is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”¹⁷⁴ It has also been said that “habeas corpus cuts through all forms and goes to the very tissue of the structure.”¹⁷⁵ Thus, to the extent that a broad writ has symbolic value,¹⁷⁶ any severe limitations on habeas corpus procedure drastically curtail both justice and the appearance of justice.¹⁷⁷

Regarding the debate concerning the certificate of probable cause requirement, as with the debate concerning other aspects of the habeas corpus remedy, the choice is ours to make.¹⁷⁸ How we make it will determine what

171. Justice Brennan articulated this point well in a related context:

It is cruelly ironic that the Court would hold the constitutionality of pretrial identification procedures to be a question of law when the effect is to reverse a decision in favor of a prisoner whose incarceration had been held unconstitutional by lower courts, but would reject the same conclusion when the effect would be to vindicate such a prisoner's constitutional rights.

Sumner v. Mata, 449 U.S. 539, 558 (1981) (Brennan, J., dissenting).

172. Harris v. Nelson, 394 U.S. 286, 291 (1969).

173. Price v. Johnston, 334 U.S. 266, 269 (1948).

174. Jones v. Cunningham, 371 U.S. 236, 243 (1963); see also Bowen v. Johnston, 306 U.S. 19, 26 (1939): “It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.”

175. Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). I realize that the historical views of habeas corpus stated in this paragraph are not universally accepted. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042–46 (1970). Certainly the different perceptions of the function of the writ are balanced at different points in time, but it must be recognized that the balance is a critically delicate one. The Rehnquist-Thurmond view seeks to eliminate any balance at all, no less one that is appropriate.

176. See, e.g., W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); D. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY (1966); see also Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

177. “Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it.” 2 J. ATLAY, THE VICTORIAN CHANCELLORS 460 (1908) (Lord Herschell's remark to Sir George Jessel).

178. The problem, at its base, is an attitudinal one concerning the proper point of repose for the criminal process. This issue deals with two fundamental questions: whether we can determine adequately, with our present state of knowledge, (1) that those acts which we define as criminal and, therefore, punish, should be so defined and punished; and (2) that our criminal process is a rational and fair one.

we, as a people, wish to stand for—pessimism and the acceptance of a passive legal system, or optimism and the vision of a dynamic one. Through its illustrious history, habeas corpus has played a crucial role in the protection of human freedom. That symbol of the Great Writ is worth preserving.