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FEDERAL HABEAS CORPUS FOR STATE PRISONERS: THE ALLOCATION OF FACT-FINDING RESPONSIBILITY

J. SKELLY WRIGHT*
ABRAHAM D. SOFAER†

THE broad scope of federal habeas corpus as a remedy for state prisoners[1] established in *Fay v. Noia*[2] and *Townsend v. Sain*[3] has aggravated the tension in federal-state relations. These cases radically increase the tasks, if not the power, of federal courts in handling post-conviction applications, and similarly affect the tasks of state courts which seek to minimize federal collateral review. We wish to make clear at the outset our agreement with the principles enunciated in *Noia* and *Townsend*. The rules and practices which govern the writ's present use have evolved[4] as the necessary procedural complement to the expanding pro-

* Judge, United States Court of Appeals for the District of Columbia Circuit.
† Law clerk to Judge Wright; member, New York Bar.

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1. The increasing number of habeas corpus and other post-conviction applications by state and federal prisoners is undoubtedly at the heart of this tension. There was a steady increase in the number of federal habeas corpus petitions by state prisoners between the years 1941 (127 petitions) and 1961 (984 petitions). Since then the number has increased dramatically: 1962 (1,115 petitions); 1963 (1,903 petitions); 1964 (3,531 petitions); and 1965 (4,664 petitions). ANN. REP. DIR. ADMIN. OFFICE U.S. COURTS 155-56 (1964); *id.* at II-26 (1965 prelim. draft). See generally Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945 (1964); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 101-21 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. REV. 78 (1964).

2. 372 U.S. 391 (1963).

3. 372 U.S. 293 (1963).

4. Professor Paul Bator has taken the position that there was a sudden change in the law. He has asserted "there can be no doubt that when *Brown v. Allen* reached the Court in 1952, the central thrust of the law was as Judge Learned Hand described it"

tection the Constitution has been read to provide,[5] and there appears to be ample authority in the Act of 1867 to support their adoption.[6] Moreover, the many indispensable functions served by the writ in assuring vindication of federal rights cannot, we feel, acceptably be served through alternative means. A great deal can be done, however, to accommodate the writ's use to the needs of the federal system without diluting its role in protecting fundamental rights. With this aim in mind, it is our intention here, after a brief discussion of the writ's present use and of the lack of acceptable alternatives, to explore and suggest guidelines for the suitable exercise of the power of federal courts to find the facts underlying the federal claims of state prisoners.

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in Schectman v. Foster, 172 F.2d 339 (2d Cir. 1949), *cert. denied*, 339 U.S. 924 (1950). Bator, *supra* note 1, at 499. In *Schectman*, Judge Hand said that a federal district court has no power to issue the writ "if the state courts have honestly applied the pertinent doctrines to the best of their ability," no matter how erroneous the federal judge may think the state judge's conclusions to be. 172 F.2d at 341.

Actually, there is serious doubt about this assertion, to the extent *Schectman* is supposed to represent the view generally held by lower courts prior to *Brown v. Allen*. In Collingsworth v. Mayo, 173 F.2d 695 (5th Cir. 1949), decided only months after *Schectman*, the district judge denied habeas corpus to a state prisoner on the ground that the state court had fully considered his allegations. The Fifth Circuit held that, while the state court decision demonstrated an exhaustion of state remedies, it settled nothing else: "[I]t remains the duty of the federal court to examine for itself whether in fact and law the due process clause of the Federal Constitution has been violated." *Id.* at 697. The issue to be answered was whether "in truth" the applicant was being deprived of liberty without due process of law. *Ibid.* The court ordered a hearing to determine the validity of the allegations. Even more conclusive is Coggins v. O'Brien, 188 F.2d 130 (1st Cir. 1951), a pre-*Brown v. Allen* case, where Judge Magruder (referred to "as an exemplar . . . for judges as well as others who are called upon to play a statesman-like role in the troubled conflicts of authority that beset a federal union," Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204, 1224 (1959)), in a concurring opinion, and Judge Ford, dissenting, both explicitly agreed that Judge Hand's dictum in *Schectman* was an incorrect statement of the law. 188 F.2d at 140, 150.

5. Fay v. Noia, 372 U.S. 391, 410 (1963); Note, 39 N.Y.U.L. REV. 78, 79-80, 96 (1964); see Sunal v. Large, 332 U.S. 174 (1947); Hawk v. Olson, 326 U.S. 271 (1945), and the cases cited therein.

6. See generally Brown v. Allen, 344 U.S. 443 (1953); Fay v. Noia, *supra* note 5; Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 819-25 (1965). This is not to say there are not powerful arguments *contra*. *E.g.*, Fay v. Noia, 372 U.S. at 452-53 (dissenting opinion of Harlan, J.); Bator, *supra* note 1; Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965). But surely the test cannot be, as Professor Bator demands, that "overwhelming evidence" show "it was the purpose of the legislative to tear habeas corpus entirely out of the context of its historical meaning and scope . . ." 76 HARV. L. REV. at 475. Legislative history seldom provides "overwhelming evidence" of anything.

I. INTRODUCTION

Federal district courts, in the exercise of their habeas corpus jurisdiction, have been called upon to perform significant institutional functions. They have virtually become the Supreme Court's "delegates or masters,"[7] providing full and complete records to make Supreme Court review more meaningful.[8] Moreover, the district courts are far more able than the Supreme Court to perform the role of supervising state court dispositions of federal claims because of their number,[9] their ability as trial courts to make findings,[10] and their freedom from the strictures of the Supreme Court's jurisdiction on direct review.[11] Their

7. Geagan v. Gavin, 181 F. Supp. 466, 469 (D. Mass. 1960) (Wyzanski, J.), *affirmed*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962).

8. Fay v. Noia, 372 U.S. 391, 438 (1963). A striking example of this is Chessman v. Teets, 354 U.S. 156 (1957), where the Court found a violation of Chessman's rights after denying certiorari in five earlier applications. The Court stated: "[I]t was not until the present proceedings in the District Court that the facts surrounding the settlement of the state court record were fully developed." *Id.* at 164 n.13.

9. "Experience has shown that the Supreme Court does not now have the time to consider all the many certiorari petitions filed with it . . ." Letter of Judge Frank to Congressman Celler, Chairman of the House Judiciary Committee, in Hearings on H.R. 5649 before Subcommittee No. 3 of the House Committee on the Judiciary, 84th Cong., 1st Sess. ser. 6, at 16 (1955); Fay v. Noia, 372 U.S. at 437. See generally Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 85 (1960).

10. Consideration of a claim on the merits in habeas corpus therefore will not depend, as it does on direct review, upon the state of the record. Thus, in a case where it was unclear whether the federal question had been properly presented in the state courts, the Supreme Court dismissed certiorari as improvidently granted, Newson v. Smyth, 365 U.S. 604, 605 (1961), but the district court was able to grant a hearing, ascertain that no waiver had occurred, and therefore that relief could be afforded on the claim asserted, Newson v. Peyton, 341 F.2d 904 (4th Cir. 1965). In addition, federal questions not raised on direct review will often be uncovered in habeas corpus fact-finding hearings. *E.g.*, Chase v. Page, 343 F.2d 167 (10th Cir. 1965).

District courts have been able to develop facts in cases such as Sas v. Maryland, 334 F.2d 506, 509 (4th Cir. 1964), where a hearing was ordered to determine, among other things, whether the proposed objectives of the Maryland Defective Delinquent Act were "sufficiently implemented in its actual administration to support its categorization as a civil procedure and justify the elimination of conventional criminal safeguards . . . ." In a number of cases, *e.g.*, Mitchell v. Stephens, 232 F. Supp. 497, 507-09 (E.D. Ark. 1964), district courts have developed statistics to determine whether statutes providing the death penalty for rape are unconstitutional as applied because the punishment is imposed only upon Negroes.

11. Habeas corpus lies even if direct review would be unavailable because of the presence of an adequate non-federal ground. Fay v. Noia, 372 U.S. 391 (1963). The principal limitations on direct review, however, stem from the nature of the certiorari jurisdiction. See Darr v. Burford, 339 U.S. 200, 227 (1950) (dissenting opinion of Frankfurter, J.). Professor Henry Hart had suggested before *Noia* that the habeas corpus jurisdiction might be justified by the principle that all state prisoners should have an equal opportunity to have

utilization has made possible a thoroughgoing implementation of the Court's apparent decision to establish, through the fourteenth amendment, uniform constitutional standards for criminal trials in the state and federal courts. It is undoubtedly one of the roles of constitutional courts to be the "architects and guarantors of the integrity of the legal system,"[12] and, as in the area of civil litigation, while "the Supreme Court is the ultimate judicial exponent of federal rights; the lower federal courts are their vindicators."[13] It seems clear that the exercise of this function is necessary, even if it were not required, because state courts have not adequately performed their role.[14] The

their federal claims passed upon by a federal constitutional court, rather than be subject to the limitations of the certiorari jurisdiction. Hart, *supra* note 1, at 106-07. The Court in *Noia* assumed such a role for habeas corpus courts when it said: "The goal of prompt and fair criminal justice has been impeded because in the overwhelming number of cases the applications for certiorari have been denied for failure to meet the ['special and important reasons'] standard of Rule 19." 372 U.S. at 437. The "appeal as of right" has a restrictive character virtually equal to that of certiorari. See Hart, *supra* at 89. The Court in *Noia* overruled the *Darr v. Burford* requirement that state prisoners ordinarily seek certiorari before applying for habeas corpus. 372 U.S. at 435.

12. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 274 (1955).

13. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 170 (1953). Rulings of the Supreme Court bind all lower courts in all federal matters, but to be "practically meaningful," FRANK, LAW AND THE MODERN MIND at xviii (1949), statements of uniform applicability must lead to similar results in particular cases. "The abstraction performs an effectual function in the operating machinery of law, but the ultimate consumer of the product will always be some quite concrete individual." CAHN, THE SENSE OF INJUSTICE 2 (1949).

14. Professor Bator's thoughtful comment on why federal judges may be better suited to pass on federal issues is worth quoting at length:

> Important values may be served by having federal judges pass on federal issues. Even in a very general sense a federal judge, operating within a different system and with a differently defined set of institutional responsibilities, may bring to bear on such issues an objectivity, a freshness and insight which may have been denied to the state judge, no matter how conscientious, whose perspective will be subtly shaped by implicit assumptions derived from his responsibilities within the state institutional framework, who stands within *that* system. More particular considerations may be mentioned too. The federal judge is independent by constitutional guarantee; the state judge may not be. The difference surely does bear on conditions necessary for principled judging; it is, at least, a common assumption—perhaps implicit in the Constitution itself—that state courts may be more responsive to local pressures, local prejudices, local politics, than federal judges. And there is, too, the fear that state officials, including judges, will somehow be less sympathetic or generous with respect to federal claims raised by state prisoners than federal judges.

Bator, *supra* note 1, at 510. Professor Anthony Amsterdam takes a stronger position against the quality of state judges, at least in the area of civil rights litigation. Amsterdam, *supra* note 6, at 800-02, 834.

The inadequacy of state court handling of federal claims in criminal cases is largely atributable to the narrow scope of state post-conviction remedies, rather than to the bias or insensitivity of state court judges. See generally Case v. Nebraska, 381 U.S. 336

number of times federal courts have released prisoners for blatant denials of their federal rights, uncorrected by the state courts, is surprisingly high;[15] and the number of cases in which release is ordered has increased strikingly in the last few years.[16]

Despite these important functions, the very existence of habeas corpus, a constant reminder to the states of the supremacy of federal law, and its increasing scope, have created tension and have evoked a number of suggested alternatives. An acceptable alternative to habeas corpus, as we see it, must both serve the interest in maximizing state autonomy and state participation in the adjudication of federal rights, and at the same time assure the same degree of protection for federal rights habeas corpus presently affords. The two most widely publicized of the alternatives offered, however, would either destroy state autonomy as the price for state court participation by replacing habeas corpus with a comprehensive body of federal substantive law,[17] or would establish standards to govern the scope and availability of the writ which are at odds with fundamental assumptions of present-day constitutional

(1965); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Bator, *supra* note 1, at 521-22; Notes, *State Post-conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U.L. REV. 154 (1965).

15. Some recent examples include: United States *ex rel.* Conroy v. Pate, 240 F. Supp. 237 (N.D. Ill. 1965) (held 36 hours in abandoned police station; 15-day delay after confession before taking accused to magistrate and doctor); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964) (counsel given one evening to prepare for trial); United States *ex rel.* Simon v. Maroney, 228 F. Supp. 800 (W.D. Pa. 1964) (18-year-old moron tried without counsel); Holland v. Gladden, 226 F. Supp. 654 (D. Ore. 1963) (intensive interrogation); United States *ex rel.* Walker v. LaVallee, 224 F. Supp. 661 (N.D.N.Y. 1963) (intensive interrogation and brutality). See also the cases collected in Note, 39 N.Y.U.L. REV. 78, 132 n.322 (1964), and the cases discussed in Reitz, *supra* note 14.

16. In 1955, for example, only 5 of 668 petitions resulted in release. H.R. REP. No. 548, 86th Cong., 1st Sess. 39-40 (1959). Recent statistics obtained from the Administrative Office reveal that in fiscal 1963, 42 of 1,662 petitions in which action was taken resulted in judgments for plaintiff; in 1964, 125 of 3,220; and in 1965, 154 of 4,186. *Federal Question Habeas Corpus Terminations* (1963-1965) (charts available from Admin. Office U.S. Courts, Supreme Court Bldg., Washington, D.C.).

17. It is indeed doubtful whether the interests of federalism would be served by adoption of Chief Judge Desmond's recommendation that federal habeas corpus for state prisoners

> be abolished, and that there be enacted comprehensive, detailed federal legislation imposing on the states minimum but precise requirements applicable to state police, prosecutors and courts, as to procedure and postconviction remedies, so that we may have something to rely on other than the vagueness and vagaries of "due process" and its *ad hoc* application.

Desmond, *Federal and State Habeas Corpus: How to Make Two Parallel Judicial Lines Meet*, 49 A.B.A.J. 1166, 1168 (1963). Earlier proposals to limit the writ's use are discussed and rejected in the still useful article by Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 65 YALE L.J. 50 (1956).

adjudication, and which would drastically reduce the protection presently afforded.[18]

One suggestion, which would augment rather than replace habeas corpus, is that the states be compelled to provide post-conviction remedies to hear all federal claims.[19] This would lessen state autonomy, since it would make mandatory some form of post-conviction remedy;[20]

18. Professor Bator made a number of suggestions prior to *Noia* and *Townsend* which appear inconsistent with the Court's most basic assumptions. His most elaborate is that habeas lie only to hear claims that the state court lacked "jurisdiction" in the traditional sense, Bator, *supra* note 1, at 460-62, or failed to provide "corrective process," a term defined to mean "the conditions and tools of inquiry . . . assure a reasoned probability that the facts were correctly found and the law correctly applied," *id.* at 455. Compare Mishkin, *Foreword: The High Court, The Great Writ, and The Due Process of Time and Law, The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56 (1965). Some constitutional allegations would be heard, under this view, and apparently some non-constitutional allegations as well. The distinction, argues Bator, between constitutional and non-constitutional rights in determining what is fundamental is "wooden." Bator, *supra* note 1, at 508-09. Perhaps it is, but it is principled and workable, while the "corrective process" approach would leave relief largely in the discretion of individual judges. *Cf.* Patton v. United States, 281 U.S. 276, 292 (1930): "It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation if, in our opinion, it is not, relatively, as bad as it might have been."

The suggestion that a time limit be placed on the writ's availability so that a "prisoner" is not "free" to raise claims "at his pleasure," Bator, *supra* note 1, at 460, runs afoul of Mr. Justice Harlan's eloquent reminder "that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist," Chessman v. Teets, 354 U.S. 156, 165 (1957). See United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308, 313 (2d Cir. 1963), and cases cited therein. *Compare* Hysler v. Florida, 315 U.S. 411, 422 (1942). Finally, Bator suggests that the habeas jurisdiction be used as "a roving extraordinary commission to undo injustice . . . ," Bator, *supra* note 1, at 527, which leads to the conclusion that release should be granted when constitutional error exists only if the district judge feels "justice will be served . . . , taking into account in the largest sense all the relevant factors, including his conscientious appraisal of the guilt or innocence of the accused on the basis of the full record before him," *id.* at 528. The Court has often repeated that the requirements of the Constitution must be respected, no matter how guilty the accused. *E.g.*, Chessman v. Teets, *supra*.

19. There appears to be authority under either the due process or equal protection clauses for such a step. See Case v. Nebraska, 381 U.S. 336 (1965), and authorities cited therein. In *Case*, the Court vacated its grant of certiorari to consider this specific question and remanded to the Nebraska courts for reconsideration in light of a state statute passed after certiorari was granted which, on its face, extended to all federal claims. The gist of two concurring opinions is that the states lag far behind in this area and should catch up soon, the implication being that if they do not voluntarily provide remedies they will be required to do so. The issue is discussed in Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 210-15.

20. The extent to which state autonomy is lessened will depend upon whether due process or equal protection is used to impose the requirement, and upon the minimum scope which the remedies will be required to have. If due process is used, the Court will have to establish controlling standards for what constitutes an adequate procedure.

but it would serve numerous useful purposes by increasing state court participation, by involving state judges in the enforcement of all federal rights, and by relieving the federal courts to some extent of the significant burden placed upon them by habeas corpus petitions.[21] Of course, it would be preferable for the states voluntarily to provide adequate remedies, both because this would avoid an extension of federal control, and because if states are required to do so their failure to comply in itself becomes a violation of federal law, entitling prisoners to release. Presently, the failure of a state to provide adequate post-conviction review of an alleged violation of a federal right gives the prisoner no more than an opportunity in federal court to prove the claim the state failed properly to adjudicate. But the greater likelihood of releasing state prisoners should not prevent the Court from imposing the constitutional requirement if the states do not act voluntarily. Once the requirement is imposed, with noncompliance a ground for release, states will probably comply with more than deliberate speed. The Court in recent years has established a number of procedural protections the violation of which has provided grounds for release;[22] although prisoners as a consequence have often managed to prove violations of these rights, the states have complied, and avoided releases, in the vast majority of cases.

If the states are required to provide adequate post-conviction remedies, it is arguable that federal collateral review should be eliminated

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If equal protection is used, each state will have to afford equal opportunities to all prisoners to prove all federal claims that they afford any prisoner asserting a federal or non-federal claim. The Court's occasionally exercised supervision of state post-conviction remedies which have voluntarily been provided has been quite broad. See, *e.g.*, Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956) (requiring a hearing). On what authority this supervision is based is unclear.

21. If states provide remedies, prisoners may be satisfied with the disposition of their claims and forego application for federal habeas corpus. Some evidence, admittedly meager, supports the proposition that, if a remedy is provided, federal applications will decrease. See Note, 39 N.Y.U.L. REV. 78, 132 n.321 (1964). In any event, once the state has disposed of a claim on the merits, after a full and fair proceeding, the job of the federal court becomes far easier. "[I]t would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that non-meritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further." Case v. Nebraska, 381 U.S. 336, 345 (1965) (concurring opinion of Brennan, J.).

22. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (equally adequate and effective appellate review), and the other equal protection cases relating to appellate and post-conviction procedures; Rogers v. Richmond, 365 U.S. 534 (1961) (application of erroneous constitutional standard in deciding federal question); Carnley v. Corcoran, 369 U.S. 506 (1962) (inadequate record to prove waiver of right to counsel); Jackson v. Denno, 378 U.S. 368 (1964) (submission to jury of question whether confession voluntary in fact).

or severely curtailed. But requiring the states to grant collateral review will not assure fulfillment of the most important functions federal habeas corpus courts now perform. The state courts presently are expected to provide the Supreme Court with adequate records on direct review, and all of them have undertaken to provide some form of post-conviction relief. Despite this, the Court has had to turn to the district courts for preparation of records to make meaningful its own review, and for vindication of federal claims even in cases where the states have provided post-conviction remedies. While it would be wholly inconsistent with maintenance of a federal system to deny state courts the power, and indeed to hesitate to impose upon them the duty, to enforce federal rights, it seems equally inconsistent with such a system, in light of the limited supervision the Supreme Court has time to exercise, to allocate to fifty different court systems, many of which have arguably demonstrated their unfitness for the responsibility, the ultimate power—the "final say"—in the application of federal law.[23]

Attempts to limit the tension generated by federal collateral review should therefore be directed primarily toward emphasizing and exploiting those doctrines and practices governing habeas corpus which provide potential predicates for accommodating the writ's use to the needs of the federal system. There are numerous doctrines and requirements surrounding the use of habeas corpus which serve to soften its impact upon state rules and procedures, and otherwise to decrease tension. The prisoner must, of course, allege, in a non-frivolous petition,[24] facts which, if true, would prove a ground for relief. The custody requirement in effect places a time limit on the writ's availability; once a person is released, the writ does not lie.[25] The doctrine of *McNally v. Hill*[26] prevents federal courts from hearing claims which, even if

23. Brown v. Allen, 344 U.S. 443, 500 (1953) (concurring opinion of Frankfurter, J.).

24. An application "is frivolous only if the applicant can make no rational argument on the law or facts in support of his claim for relief." Blair v. California, 340 F.2d 741, 742 (9th Cir. 1965). Petitions should be liberally construed, Darr v. Burford, 339 U.S. 200 (1950), and if the court is in doubt the petitioner should be called upon to amend or clarify, Price v. Johnston, 334 U.S. 266, 291 (1948), with the help of counsel if necessary. For a detailed discussion of the steps through which a district court must go in handling petitions, see SOKOL, HANDBOOK OF FEDERAL HABEAS CORPUS (1965).

25. See Jones v. Cunningham, 371 U.S. 236 (1963) (parole is custody); Benson v. California, 328 F.2d 159 (9th Cir. 1964) (probation is custody); see generally SOKOL, *op. cit. supra* note 24, at 19-30. For a discussion of some of the pernicious effects of this doctrine, see DRAFT REPORT, COMM. ON POST-CONVICTION REMEDIES, ABA Comm. on Minimum Standards for Criminal Justice (1965).

26. 293 U.S. 131 (1934). This doctrine has been rejected by one state as a rule governing the writ's availability in its own courts. Stevens v. Myers, 34 U.S.L. WEEK 2188 (Pa. Sept. 29, 1965).

true, would not result in the applicant's release, as when he is detained on an adequate ground independent of the one challenged. The exhaustion doctrine requires federal courts to defer jurisdiction when the prisoner still has an available state remedy and encourages federal courts to give state courts the opportunity to pass on federal claims when a reasonable chance exists that the claim will be heard on the merits.[27] Even if the exhaustion doctrine has been technically satisfied, the district court may, because of special circumstances, refuse to entertain the prisoner's application on grounds of comity.[28] For example, the state courts, between the time the exhaustion requirement was satisfied and the time the habeas corpus proceedings are concluded, may have adapted its post-conviction remedies so as to have increased significantly the likelihood of the prisoner's obtaining an adjudication of his federal claim.[29] Comity would appear to demand a similar course when, during the same time interval, an authoritative decision in the federal courts has established some new rule or fact-finding standard. In such cases the state courts should have an opportunity to apply the new federal ruling or to adapt their fact-finding procedures to the new federal standard in order to avoid a federal hearing. The federal courts may also refuse to grant relief when the prisoner has waived his federal claim, or has forfeited his right to assert it in the state courts by a tactical or other move amounting to a deliberate bypassing of state procedures.[30] Furthermore, while the doctrine of res judicata is not applicable in habeas corpus, a modified form of the doctrine allows habeas courts to dismiss repeat applications presenting no new "ground" for relief.[31]

These rules and doctrines enable the federal courts to deny or to defer jurisdiction, often allowing states the first opportunity to pass on their prisoners' federal claims. Other techniques enable the federal

27. 28 U.S.C. § 2254 (1964); see generally Note, 39 N.Y.U.L. REV. 78, 96-103 (1964); Comment, 13 U. PA. L. REV. 1303 (1965). It is often sensible and proper to dispose of a claim on the merits, where the question is clearly presented and easy to settle, rather than to defer jurisdiction. *E.g.*, United States *ex rel.* Drew v. Myers, 327 F.2d 174, 183 (3d Cir. 1964); United States *ex rel.* Whiting v. Myers, 230 F. Supp. 868 (E.D. Pa. 1964). Exercise of jurisdiction in these cases operates to ease federal-state tension.

28. Note, 39 N.Y.U.L. REV. 78, 102 (1964), and authorities cited therein; *cf.* Case v. Nebraska, 381 U.S. 336 (1965).

29. A state with a remedy of limited scope may have expanded the remedy's scope or created a new remedy to encompass the claim raised. Or a state which had heard such claims in the past may have decided to avoid federal hearings by raising its fact-finding standards to meet those established in *Townsend v. Sain.*

30. Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391, 439 (1963).

31. Sanders v. United States, 373 U.S. 1, 16 (1963); Hurt v. Page, 355 F.2d 169 (10th Cir. 1966).

courts to minimize tension in cases where state prisoners prove federal claims entitling them to habeas corpus relief. While release has thus far been the only proper remedy once a federal claim is proved, this relief almost invariably[32] is conditioned by an order that the prisoner be held for a reasonable time[33] so that the state can retry him.[34] Moreover, states may sometimes be allowed to correct constitutional defects without granting new trials. For example, if a prisoner proves he was denied equal protection because he was not afforded an equal opportunity to appeal, the state should be able to correct this violation by allowing an appeal,[35] so long as the appeal would be roughly equivalent to one immediately after trial.[36] *Jackson v. Denno*[37] carries this even further and allows state

32. Under exceptional circumstances the federal habeas court will order release outright. In Wilson v. Reagan, 354 F.2d 45 (9th Cir. 1965), the court upheld the district court's order that the prisoner be released immediately upon proving he had been denied the right to effective assistance of counsel in the state courts. At the time of his trial, the prisoner was a juvenile and had special rights under California law. "These have gone with the passage of time and are irretrievable." While the disposition is appealing, under what theory is a prisoner entitled to greater relief in habeas because of the loss of non-federal rights? Is the prisoner denied equal protection of state laws if he loses rights conferred by state law because the state imprisoned him under a constitutionally invalid conviction?

33. The federal court may, of course, set a specific time within which corrective action must be taken. *E.g.*, Cobb v. Balkcom, 339 F.2d 95, 102 (5th Cir. 1964).

34. *E.g.*, Rogers v. Richmond, 365 U.S. 534, 549 (1961). Authority for conditioning orders for release is found in 28 U.S.C. § 2243 (1964), which requires the habeas corpus court to "dispose of the matter as law and justice require."

35. Dowd v. United States *ex rel.* Cook, 340 U.S. 206, 210 (1951); Bland v. Alabama, 356 F.2d 8, 16 (5th Cir. 1965) (inadequate appellate review because of failure to provide counsel at motion for new trial); Chase v. Page, 343 F.2d 167 (10th Cir. 1965); Newsom v. Peyton, 341 F.2d 904 (4th Cir. 1965). An interesting issue is posed in United States *ex rel.* Mitchell v. Follette, 358 F.2d 922 (2d Cir. 1966) (Friendly, J.), where the court reversed and remanded for a hearing on whether the petitioner's failure to appeal was caused by "culpable silence" of the trial judge. The court raised the question whether the district court should determine, even if petitioner proved he was deprived of his appeal, whether any appeal "would be so plainly without arguable basis that it would have been dismissed as frivolous." *Id.* at 929. This sort of decision should not be made by a federal court. The right involved is to an appeal on state as well as federal issues. It seems inappropriate and unauthorized for federal courts to determine whether state prisoners could raise non-frivolous state law issues. Even as to federal issues, state courts are always free to afford more protection than the Constitution requires.

36. Thus a new trial may be necessary where too much time has passed since the original trial for the court to assume safely that the state will be able to provide a meaningful appeal. See Pate v. Holman, 341 F.2d 764, 777 (5th Cir. 1965). In Coffman v. Bomar, 220 F. Supp. 343, 349 (M.D. Tenn. 1963), the district court decided not to condition its order of release on the state's granting an appeal because there appeared to be no provision under which the state courts could grant an appeal, and the district court feared that an order of release so conditioned would necessarily result in the prisoner's release. The court therefore ordered the prisoner released if he was not tried within a reasonable time. Rather than speculate as to the ability of the state courts to

courts, at least in some circumstances, to correct constitutional defects in limited hearings rather than at new trials. *Jackson* declared invalid a procedure which had been upheld by the Court in *Stein v. New York*,[38] whereby the voluntariness of a confession was given to the jury, along with the issue of guilt or innocence, without a preliminary finding of voluntariness by the trial judge. The Court pointed out that, if Jackson's confession is determined to have been voluntary at a hearing limited to that issue, then he was not prejudiced even if the jury considered it; if, on the other hand, his confession is found involuntary, he would be entitled to a new trial. The Court also said there was no reason to assume the state would fail to grant Jackson a hearing consistent with due process; in fact, the state courts which followed *Stein* had justifiably assumed they were complying with due process.[39]

It would appear, therefore, that federal courts may condition release upon limited hearings when the possibility of prejudice created by a constitutionally defective procedure can be negated. This device should be especially useful in cushioning resentment caused by retroactive rulings, though it should not be limited to such situations. It may not be resorted to, however, where a *nunc pro tunc* hearing would be inadequate because of the nature of the issue involved,[40] or where the issue is so related to guilt or innocence that a limited hearing would deprive the prisoner of his right to a trial by jury.[41]

There are a number of ways, therefore, in which federal courts must or may avoid or minimize federal-state tension, by refusing or deferring jurisdiction, and by making it easier for the states to take corrective action when constitutional deprivations are proved. This article, however, deals primarily with the obligation of federal habeas courts, once

provide an appeal or other limited corrective action, it would appear proper for the federal court to condition its order on the state's taking appropriate limited corrective action or in the alternative granting a new trial. See Jackson v. Denno, 378 U.S. 368, 395-96 (1964).

37. *Supra* note 36.

38. 346 U.S. 156 (1953).

39. 378 U.S. at 394-95. Rogers v. Richmond, 365 U.S. 534 (1961), where a new trial was ordered, was distinguished on the ground that the possibility of a disposition allowing a limited hearing in the state courts was neither argued nor considered. 378 U.S. at 394 n.22. *But see* Justice Frankfurter's language, 365 U.S. at 548. *Rogers* falls squarely within the *Jackson* rationale for limited hearings.

40. Pate v. Robinson, 383 U.S. 375, 387 (1966) (competency to stand trial).

41. A possible claim which might require a new trial is the prisoner's sanity at the time of the acts charged. See Brief for Respondent, pp. 74-76, Pate v. Robinson, *supra* note 40. It has long been Justice Black's position that limited hearings of the sort allowed in *Jackson* are improper. *E.g.*, Henry v. Mississippi, 379 U.S. 443, 453 (1965) (dissenting opinion).

they assume jurisdiction, to assure all state prisoners a full and fair hearing of their federal claims, and the steps they may take consistent with this obligation to preserve a meaningful role for state courts in the adjudication of federal rights and to minimize tension. With respect to questions of law, the federal courts have no discretion; their duty is to redetermine all questions of federal law, and to order appropriate relief if it appears the state court incorrectly concluded that no federal right was violated.[42] With respect to disputes concerning the facts underlying federal claims, however, while the federal courts have power to redetermine the facts in all cases, it is their duty to do so only when the state has failed to find the facts after a "full and fair" hearing as defined in *Townsend v. Sain.* In discharging this duty, the federal courts may resort to two alternative corrective devices. We intend here to elaborate these devices and to suggest standards to determine, first, which alternative should be followed once some corrective action is deemed necessary, and, second, the circumstances under which corrective action is necessary or appropriate.

II. Alternative Corrective Devices

A hypothetical case will serve to illustrate the alternatives. A state prisoner alleges in a federal habeas corpus application that he was denied due process because a confession introduced at his trial was involuntary. The state's reply contests the prisoner's factual allegations. One particular factual dispute arises from the prisoner's allegation that he was held for six hours before being arraigned; the state claims he was held for only three hours. The federal district court concludes, on the basis of other uncontested facts in the case, that if petitioner's version of the disputed fact is accepted his confession was involuntary. The record reveals no explicit resolution of the factual dispute by any state court. This lack of a finding was caused by the procedure followed in the state courts under which the confession was admitted into evidence and the jury was asked to pass upon its voluntariness in determining the defendant's guilt or innocence without a preliminary finding of voluntariness by the trial judge. The district court concludes that it would be improper under the circumstances to find implied in the jury's general verdict of guilt a resolution of the dispute in the state's favor. The failure in this case of the state courts to provide an explicit resolution of the factual dispute upon which a federal claim rests, or to provide a basis from which a resolution could properly be

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

inferred, is a defect in the state's fact-finding processes which the federal court must correct.

To correct this fact-finding defect, the federal court might grant a hearing, resolve the factual dispute underlying the claim of involuntariness, and then decide whether the confession was involuntary. But the presence in a state adjudication of a federal right of a defect substantial enough to require correction does not automatically call for the grant of a federal hearing to find the facts. The defective adjudication could be corrected in the state courts instead. The advantages in such a course for the federal system are patent. The state courts, in effect, are given the responsibility of correcting their own fact-finding deficiencies. Moreover, since the state courts can afford protections to defendants which are not required by the federal constitution, allowing the state courts to correct their errors in some situations may benefit the habeas applicant as well; states may go beyond what the Constitution requires. This course of action, however, is available only after the federal court, once having assumed jurisdiction, finds a violation of federal law in the defective adjudication which entitles the prisoner to an order of release on habeas corpus, appropriately conditioned.[43] If no constitutional violation is found, the only corrective device open to the federal courts is a hearing to find the facts underlying the claim, and then to decide that claim.

These observations can be exemplified by returning to our hypothetical. Once having assumed jurisdiction, the habeas court would nor-

43. The writ of habeas corpus extends to state prisoners held "in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3) (1958). On its face this seems to mean that proof of any constitutional claim entitles a prisoner to habeas relief. Able arguments have been made to the contrary. Professor Bator apparently would limit relief to failures of the state courts to afford "corrective process," or at least would condition release upon a showing that justice will be served in the particular case. Bator, *op. cit. supra* note 1, at 455, 527-28, discussed *supra* note 18. Professor Mishkin would limit relief to claims which affect the "guilt determining process"; this would enable the Supreme Court to apply some decisions prospectively simply by denying habeas review, and would avoid declarations of prospective application which do harm "to the symbolically based commitments to the High Court . . . ." Mishkin, *op. cit. supra* note 18, at 102. But Mishkin's alternative would do more than harm the "symbolic value of the Great Writ . . . ." It would limit the writ's scope to claims serving the interest of protecting the innocent (arguably not the most fundamental interest served by enforcement of constitutional claims), and would substitute an approach of some uncertainty for the unequivocal command of the statute. *Compare* Mishkin's analysis of Griffin v. California, 380 U.S. 609 (1965), with the Court's in Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966). See Amsterdam, *op. cit. supra* note 6, at 839 n.191: "[T]he overriding purpose of the Act of Feb. 5, 1867 . . . [was] to give all state prisoners both a federal trial forum and access to the Supreme Court for litigation of their federal claims, whatever those claims might be." Fay v. Noia, 372 U.S. 391, 409 (1963), should have put this issue to rest.

mally grant a hearing to resolve the disputed issue of fact and then determine whether the prisoner was held in violation of the Constitution of the United States because his confession was involuntary. This would not be the case, however, if the federal courts (usually the Supreme Court) concluded that either the failure of the state courts acceptably to resolve disputed issues of fact underlying the issue of voluntariness, or the use of the particular procedure which caused this failure, should in itself be deemed a constitutional violation. If the first rule were adopted, our prisoner would prove he was being held in violation of the Constitution as soon as he demonstrated that the state courts had failed to provide him with a resolution of the factual dispute underlying his claim of involuntariness; if the second rule were adopted he would have to prove that the failure to render findings of fact was caused by use of the improper procedure. The role of the federal courts would be restricted to determining in the first case whether a finding of fact was provided, and in the second case whether the improper procedure had been utilized. Of course, even after a finding of constitutional invalidity is made, the state courts may fail in some other way to afford a full and fair hearing. If so, the habeas court must once again on reapplication face the question of which corrective device is appropriate.

Declarations of constitutional invalidity, as a device for securing state instead of federal corrective action, are probably far more effective than the threat of a federal hearing. The state courts are more likely to respond to the command of a constitutional rule than to the pressure placed upon them "voluntarily" to meet federal standards. This is true partly because the state's failure to correct a constitutionally defective adjudication will inevitably result in the prisoner's release, while their failure to respond to the suggestion (often inherent in an order telling the prisoner to exhaust state remedies) that state corrective action will make federal action unnecessary results only in a federal hearing free of the defect. In our hypothetical case, if the failure to resolve the factual dispute is deemed a violation of due process, prisoners who are not afforded a procedure which provides the necessary finding will go free, regardless of whether their confessions were in fact voluntary or involuntary. Absent such a declaration, all the federal courts can do if the state courts fail to provide the necessary finding is grant a hearing, resolve the dispute, and release the prisoner only when he proves his confession was in fact involuntary. A state is more likely, therefore, to correct defects of constitutional dimension in all pending cases, and to avoid creating such defects in all future cases, than it is to avoid defects which result only in federal hearings.

There will be times, however, when the interests in obtaining corrective action in the state courts through a declaration of constitutional invalidity will be outweighed by considerations which operate against the establishment of a constitutional rule and in favor of corrective action in the federal courts through habeas corpus fact-finding hearings. The Constitution, obviously, is meant to avoid fundamental unfairness; it is not a device for compelling the state courts to comply with each and every fact-finding standard the Court thinks desirable. At times, however, the goals of avoiding unfairness and of upgrading state fact-finding standards will both operate in favor of a constitutional rule in the same case. We do not even faintly suggest that the interest in getting the state courts to correct their own fact-finding defects should control the determination in particular cases as to whether the defect should or should not be deemed one of constitutional dimension. But the flexibility of due process is a fact of life, and reliability inevitably is an element of fairness.[44] So we do suggest that the interest in obtaining maximum reliable state court participation in adjudication of federal issues is a relevant consideration in determining how a fact-finding defect should be corrected.

The Court's ruling in *Jackson v. Denno*,[45] upon which our hypothetical case is based, illustrates the problem of choosing between the alternatives of constitutional rule and habeas corpus hearing to correct defects in state court adjudications of constitutional rights and the considerations which should be taken into account in handling it.

The basic proposition of constitutional law which led to the ruling in *Jackson* is that admission of an involuntary confession in a criminal trial violates due process. In *Stein v. New York*[46] the Court had held it consistent with this basic proposition for a state to allocate to the jury rather than to the judge responsibility for determining the voluntariness of confessions. Use of this procedure, however, caused a number of defects which raised the possibility that federal habeas corpus hearings would be necessary to correct them. One of these defects was that, when the *Stein* procedure was followed, the defendant was not provided with explicit resolutions of factual disputes underlying the voluntariness issue.[47] Instead of directing the federal habeas corpus court to adjudi-

44. See Jackson v. Denno, 378 U.S. 368, 380 (1964): "A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are *actually* and *reliably* determined." (Emphasis added.)

45. *Ibid.*

46. 346 U.S. 156 (1953).

47. *Compare* Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956) (district judge may reopen issue if justice requires), *with* United States *ex rel.*

cate the claim of involuntariness, the Court in *Jackson* established a new constitutional rule. It held that states must provide an adequate adjudication of voluntariness made by the trial judge before the confession goes to the jury. This, the Court said, would guarantee that the voluntariness issue was "actually and reliably" determined;[48] it was impossible, the Court found, to presume such a determination from a jury's general verdict of guilt.

An application of the considerations affecting the decision whether to establish a new rule or order a hearing to assure correction of the defects caused by the *Stein* procedure demonstrates the correctness of the Court's choice in *Jackson*. Although there is undoubtedly substantial flexibility in applying the due process clause, declarations of constitutional invalidity are never proper simply as a means of compelling the states to achieve high fact-finding standards. A high degree of unfairness must be caused by the defect before a constitutional ruling becomes appropriate. The degree of unfairness caused by the defective adjudication should be measured both by the effect of any resulting fact-finding defect upon vindication of the basic constitutional proposition involved, and by other possibly unacceptable consequences. The fact-finding defect in *Jackson* was the failure to provide resolutions of all disputed issues of fact underlying the claim of involuntariness. In itself, this was not so fundamental a defect that the Constitution should have been resorted to for its correction. While the process of finding the facts underlying an issue does probably increase the reliability of resolutions of the issue, it is often safe to assume a judge went through this process, despite his failure to make express findings. Thus, under *Townsend*, the absence of explicit findings may not even be a defect requiring a corrective hearing, since findings can often be inferred from the state court's expression of the correct standard of law governing voluntariness, or even from the mere admission into evidence of a confession, upon the assumption that the court was aware of the correct standard.[49] In *Jackson*, however, the Court concluded that,

Kulikauskas v. Murphy, 293 F.2d 563 (2d Cir. 1961) (factual conflict must be treated as resolved). A federal hearing could likewise have corrected another possible deficiency in the *Stein* procedure. The defendant would be able to take the stand and testify in the federal proceeding without the fear of being impeached in the jury's presence. A district court recently found that holding a motion to suppress hearing during trial violated the privilege against self-incrimination where defendant is compelled to take the stand. United States v. Blalock, 34 U.S.L. WEEK 2653 (E.D. Pa. May 13, 1966).

48. 378 U.S. at 380.

49. There will be times, however, when reconstruction of the facts will be improper either from a ruling or even from a statement of the correct standard. The absence of fact findings in such cases is a defect under *Townsend*, and the Court has decided that,

because of the highly charged and complex issue involved, the jury could not be relied upon to make findings and to determine the issue of voluntariness, even under the proper instructions. Moreover, the Court felt that, even if the jury could properly be assumed to have found the facts and decided the voluntariness issue, there was substantial danger that they would allow a reliable but involuntary confession to affect their verdict. Trial judges, the Court apparently felt, were both more reliable and less subject to prejudice than juries, and could more safely be trusted with the voluntariness issue. Thus the *Stein* procedure made intolerably unsafe any assumption that the facts had been reliably found. In addition, the procedure exposed defendants who had involuntarily confessed to a high degree of danger from jury prejudice. The unfairness caused by these two factors made the *Stein* procedure one which the Court could reasonably deem fundamentally unfair, enabling it to utilize the device of a declaration of constitutional invalidity rather than a federal hearing to correct the fact-finding defect involved.

Other relevant factors supported the Court's choice. Thus, in determining whether to correct a defect in the federal courts or to deem it the product of an unconstitutional procedure the effect of a declaration of constitutional invalidity upon state autonomy should be considered. A major advantage in using habeas corpus hearings to correct defects is that the procedure or rule which caused the defect is not declared invalid, but is left to operate where it does not prejudice federal rights, thereby leaving the states with greater flexibility.[50] This advantage is non-existent, however, when the procedure involved causes error affecting federal rights every time it is followed. Every time the *Stein* rule was used, it caused serious deficiencies. It would have been anomalous to tell the states that the *Stein* rule was constitutional and at the same time to require federal hearings every time it was used. Of course, any constitutional ruling necessarily limits the procedural alternatives available to the states in adjudicating federal rights. The effect of

absent other circumstances, it should be corrected through the grant of federal hearings. This question will be taken up at a later point. See notes 133-62 *infra* and accompanying text.

50. See Note, 39 N.Y.U.L. REV. 78, 94 (1964):

> For example, by refusing to accept the state's forfeiture ruling in *Noia*, the Court did not invalidate New York's requirement that appeals be filed within a certain time after judgment. On the contrary, the rule will still work an absolute forfeiture in cases where no federal claim is presented and a forfeiture of state remedies and direct review in the Supreme Court in all cases presenting federal questions. And an absolute forfeiture may be imposed in all cases where a habeas petitioner deliberately bypassed state remedies.

Jackson, however, is not overly constricting. States may still, with the exception of the procedure followed in *Stein*, "allocate functions between judge and jury as they see fit."[51] The interests of federalism, moreover, are advanced when new constitutional rules are created and federal hearings avoided in that, although state autonomy may be diminished, state court participation in adjudication of federal rights is increased. By making the defect in *Stein* one of constitutional scope, the Court has compelled the states to adjudicate the question of voluntariness in a manner which at least may result in fact findings acceptable by the federal courts.

Also relevant in determining whether to establish a new constitutional rule is the effect of such a decision upon the role of the federal courts. Admittedly, *Jackson* increased the role of the federal courts by creating a new right for them to vindicate. But the effect of *Jackson* on the role of federal habeas courts must be judged not only by the new responsibilities created, but also by the responsibilities avoided. Assuming the *Stein* procedure's unreliability, habeas courts would have been required to resolve disputed issues of fact underlying every claim of involuntariness presented them by state prisoners convicted in states which followed *Stein*. Some states might have stopped using the *Stein* procedure to avoid this review, but it seems clear that the responsibilities of the federal courts would have been far more burdensome had *Stein* been left on the books.

Finally, in resolving this question it seems essential to consider the effect of a constitutional rule, with resulting corrective action in the state courts, on the defendant. First, although federal habeas courts can ignore non-constitutional deficiencies in vindicating federal rights, they are often unable to provide advantages which the states may be willing to provide. For example, a state which formerly applied *Stein* might decide after *Jackson*, either from beneficence or to be on the safe side of the constitutional line, to allow the jury to pass on voluntariness after the judge has found the confession voluntary. This so-called "Massachusetts" procedure gives the defendant an additional opportunity, at no additional risk, to prove his confession was coerced. The federal court is unable to supply this additional protection, and it seems doubtful that the Supreme Court will ever deem it essential, or that the grant of federal hearings to correct in individual cases the fact-finding defects caused by *Stein* would be as effective in causing state courts to reappraise their procedures as a decision prohibiting

51. 378 U.S. at 391 n.19.

Stein's use. Furthermore, a constitutional rule has the additional advantage of assuring state defendants adequate adjudications of their federal claims at the time of their original trials. State courts may often fail to reform their procedures voluntarily to avoid federal hearings. Prisoners in such states would have to remain in jail until they had exhausted state remedies before obtaining a federal hearing. Moreover, because of this time lapse, prisoners may find it more difficult at federal hearings than at their original trials to prove their version of the facts underlying their federal claims. Finally, even operating at their theoretical best, federal adjudications of the voluntariness issue could only provide a basis for determining whether the individuals who actually apply for habeas corpus were subjected to the possibility of jury prejudice from an involuntary confession. A constitutional rule avoided the possibility of this prejudice in all cases arising after *Jackson.*

Rogers v. Richmond[52] is another case where the Court declared constitutionally invalid the manner in which a federal claim was adjudicated and, as a result, left to the state rather than the federal courts the task of making adequate findings of fact. In *Rogers* the Court held that the state court had applied an erroneous standard of law in determining the admissibility of a confession: instead of testing the confession's admissibility by its voluntariness, the state trial court applied the standard of reliability.[53] Application of the erroneous standard made it possible that a reliable but involuntary confession had been introduced before the jury at Rogers' trial, in violation of his constitutional rights. The Court felt it would be improper, moreover, for it or for a federal district court "to make an independent appraisal of the legal significance of facts gleaned from the record after such a conviction."[54] Having the wrong standard in mind "may well have distorted, by putting in improper perspective, even . . . [the state court's] findings of historical fact."[55] Even so, doubt over whether an involuntary con-

52. 365 U.S. 534 (1961).

53. Although the state trial judge ruled the confessions were "freely and voluntarily made," the criterion he applied was whether police behavior had a "tendency to produce a confession that was not in accord with the truth." *Id.* at 541-42.

54. *Id.* at 545.

55. *Ibid.* Justice Frankfurter's observation has been criticized as "employing a psychological insight that calls in question accepted notions of evidentiary reliability." The critic suggests that "the development of law and the findings of facts are not entirely consistent goals, and . . . the Anglo-American legal tradition has preferred the former," presumably because "the very sophistication of the theory of tendentious fact-finding might make its application treacherously difficult . . . ." *The Supreme Court, 1960 Term,* 75 HARV. L. REV. 40, 176 (1961). That our legal tradition has preferred the development

fession had been introduced could have been resolved by ordering the district court to find the facts anew with the correct standard in mind. Instead, the Court held the state adjudication of voluntariness constitutionally deficient and ordered Rogers released unless the state courts granted him a new trial within a reasonable time.

Although *Rogers* involves an error with respect to "substantive" law, the error is, as in *Jackson*, one which concerns the manner of adjudicating a federal issue, and one which results in unacceptable findings of fact. That findings made under an erroneous standard are unacceptable, however, does not cause a sufficient degree of unfairness to warrant a constitutional ruling. A hearing could be held to determine voluntariness, and those persons actually prejudiced by the admission of an involuntary confession could be ordered released or retried. But the *Rogers* deficiency presents an additional consideration, as did the *Stein* rule, which made due process treatment appropriate, if not necessary. It would appear to be a primary obligation of federal courts to make sure that constitutional claims are decided in accordance with proper constitutional standards of law. When a state court applies an erroneous standard of law in deciding a constitutional claim it seems necessary for the federal courts, not merely to reject findings of fact made under that standard and to hope thereby that the state court will correct itself, but to instruct the state with respect to the proper standard and to require its application. There was an adequate basis, therefore, to justify a ruling of constitutional dimension in the *Rogers* situation, one effect of which was to pass to the states the job of making adequate findings.

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of "law" means, apparently, that it has ignored the more difficult and pervasive problem of fact finding; it does not follow, however, that we should continue to ignore this fundamental problem.

The need for new findings in the *Rogers* situation stems from the "exquisitely complicated" interaction of rules and fact which takes place in a trial judge's mental processes. A rule serves as the "attention guide" for a trial judge, who "will focus his attention sharply on the testimony and demeanor of those witnesses who testify with respect to matters specifically germane to his version of that rule." FRANK, COURTS ON TRIAL 180-81 (1963 ed.). Consequently, it seems impossible that a federal district judge could determine, as one writer has suggested, whether "the verbalization of the improper rule was harmless error." Note, 76 HARV. L. REV. 1253, 1265 (1963). Even the trial judge will often be unable to determine whether his error was harmless. Because of these considerations, findings of fact induced by an erroneous view of the law do not bind appellate courts. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948). *Compare* United States v. Aviles, 337 F.2d 552, 557 (2d Cir. 1964). If they did, it would be impossible for reviewing courts to make meaningful dispositions in light of the limited scope of review normally exercised over fact finding. See McGowan v. United States, 296 F.2d 252 (5th Cir. 1961).

Moreover, just as in *Jackson*, the other relevant considerations support the Court in its *Rogers* disposition. The effect of *Rogers* upon state autonomy is minimal. The defective procedure in *Rogers* arguably was not even a chosen alternative, as in *Jackson*, but a blunder.[56] No state interest in continuing to utilize a procedure would have been served by avoiding a constitutional declaration, since corrective action is necessary every time an erroneous standard is applied in resolving factual disputes. To the extent that state courts do apply erroneous constitutional standards, moreover, *Rogers* increases state participation in the adjudication of federal rights and the finality of their judgments by requiring state courts in the first instance to apply the correct standard, thereby at least making it possible that findings will be made which are acceptable as a basis for habeas review. The role of the federal courts is increased by *Rogers*, since a new right is created for them to vindicate, but the burden of finding the facts whenever state courts apply erroneous constitutional standards is avoided. Finally, the Court in *Rogers* recognized the advantage a declaration of constitutional invalidity might confer upon habeas applicants, in that it gives them the benefit of having the state court pass on "the admission of evidence at the borderline of constitutional permissibility . . . ,"[57] and of possible procedural advantages (such as the Massachusetts procedure for determining voluntariness) which are unavailable in federal courts, but which state courts might voluntarily provide.

There obviously is a limit to the procedural protections the Court should establish under the Constitution to assure the proper adjudication of established constitutional rights. *Rogers* comes close to the line. The procedural effect of *Rogers* is potentially drastic. It places defendants against whom confessions have been introduced under an erroneous standard in potentially the same position as defendants who have demonstrated that confessions introduced against them were involuntary. There are some differences. Defendants whose confessions were involuntary are ordered released on habeas, subject to the state's providing a new trial at which the confession would be inadmissible. On the other hand, while persons in Rogers' position also are ordered released, the state probably can avoid this consequence either by holding a hearing limited to the confession's voluntariness[58] or certainly by

56. The Court had often ruled, prior to *Rogers*, that reliable but involuntary confessions were improperly admitted into evidence at trials. See 365 U.S. at 541. Moreover, the state's courts apparently had followed the proper practice in some other cases. See *id.* at 543 n.1.

57. *Id.* at 458.

58. See note 39 *supra*.

granting a new trial at which the confession would be admissible if it is determined to have been voluntarily made. But even so, if the state fails to act, a person in Rogers' position must be released, for he has proved he is being held in violation of federal law once he demonstrates an erroneous constitutional standard was applied at his trial.[59] The risk of this consequence is not worth accepting simply because fact finding under an erroneous standard is inevitably worthless. Federal fact-finding hearings could correct this deficiency. Rather, the decision in *Rogers* is justifiable on the additional basis of the obligation of federal courts to forbid state courts from applying erroneous constitutional standards, and the other consequences favorable to the interests

59. There is language in Jackson v. Denno, 378 U.S. 368 (1964), however, implying that federal courts in some circumstances may take the corrective action appropriate after finding a violation of federal law, instead of ordering the prisoner released subject to corrective action in the state courts. If it is true that, once a violation of federal law is proved the prisoner is entitled to release and that any corrective action must be taken in the state courts, then the Court's order in *Jackson* that the prisoner be held for corrective state action, and that he be released if appropriate action was not taken within a reasonable time, would seem to have been required by the Court's decision that the use of *Stein* in itself violated due process. But after deciding in *Jackson* that the use of the *Stein* procedure "falls short of satisfying . . . constitutional requirements," 378 U.S. at 391, the Court went on to discuss whether the hearing to which the habeas applicant was entitled should be held in the federal district court or in the state courts, implying therefore that the Court could have ordered a hearing in the district court although the applicant had already proved a constitutional violation.

The Court's reasoning, however, appears to have been caused by a misreading of Rogers v. Richmond, 365 U.S. 534 (1961), upon which the Court relied heavily. *Rogers* held that the mere use by the state trial judge of an erroneous constitutional standard in passing on the voluntariness of a confession violated the Constitution and entitled the habeas applicant to release. The confusion stems from the discussion by Justice Frankfurter after this holding of the propriety of ordering a hearing on voluntariness in the federal courts as opposed to a new trial in the state courts. This discussion was addressed, however, to the argument made in that case that Rogers was not actually deprived of his constitutional rights unless application of the erroneous standard led to the introduction at his trial of a confession which was in fact involuntary. The district court could determine, it was argued, the "fact" whether his confession was involuntary, and could release him if it so found. 365 U.S. at 545-46. Justice Frankfurter rejected this argument for the same basic reasons given by Justice White in *Jackson*: the interest in letting the state courts correct their own defects, and the possible advantages of state corrective action to the petitioner. Once the decision was made that the error in *Rogers* violated the Constitution, it followed that the applicant was entitled to a trial "under appropriate state procedures which conform to the requirements of the Fourteenth Amendment." *Id.* at 547-48.

The advantages in having state courts correct the defects caused by their use of the *Stein* procedure was a relevant consideration in *Jackson*. But since it seems clear under the language of the Act of 1867 that corrective action must take place in the state courts once a defect has been deemed one of constitutional dimension, the advantages in state court correction of their own defects was relevant only to the issue whether the defect itself should be so characterized.

of federalism and of defendants which flow from the result. Consequently, where it is unclear that an erroneous standard was applied a declaration of constitutional invalidity is never appropriate, no matter how worthless the state court's fact finding may be. The Court stated in *Townsend* that, because of "the co-equal responsibilities of state and federal judges in the administration of federal constitutional law," district courts may "in the ordinary case in which there has been no articulation," assume the correct standard was applied, and reconstruct the facts from the assumed standard.[60] But even where there is evidence creating a doubt as to whether the correct standard was applied, or where, because of the difficulty or novelty of the question, it is improper to assume the correct standard was applied, the district court must grant a hearing. A constitutional declaration is only proper where it is clear that an erroneous standard was applied,[61] giving rise to the additional considerations outlined above.

The same point can be made with respect to the decision in *Jackson*. The conditional order of release authorized in *Jackson* for prisoners whose confessions are submitted to juries without a prior finding of voluntariness is justifiable, not solely because the jury's verdict is an unreliable basis in which to find implied resolutions of factual disputes underlying the issue of voluntariness, but also because of the possibility of jury prejudice from a reliable but involuntary confession and the other consequences beneficial to the interests of federalism and defendants which flowed from the decision. The possibility of prejudice is not nearly so strong, however, where it is unclear whether *Stein* was followed. Consequently, prisoners should become entitled to release only after a federal court finds that the impermissible procedure was followed, a matter which will depend upon what the state court said and did, and whether the state involved normally followed the *Stein* procedure or some other procedure or combination of procedures.[62]

60. 372 U.S. 293, 314-15 (1963).

61. *Id.* at 315 n.10. *Accord*, Paige v. Potts, 354 F.2d 212 (5th Cir. 1965) (unclear whether proper standard of probable cause applied). Presumably, if it becomes clear during the hearing that an erroneous standard was applied, the applicant would be entitled to release.

62. Where the state normally followed *Stein*, there will be a strong basis for a finding that it did so in a particular case where the procedure followed is unclear. It may be equally legitimate in some instances to find the incorrect practice was followed where the state involved normally followed a correct practice. Any indication of a departure from normal practice in such a case might provide a basis for inferring that the incorrect practice was followed in that case. It would be highly questionable to infer the incorrect practice from an unclear record where the state left it within the discretion of trial judges whether to follow *Stein* or some correct practice. In precisely this last situation,

A recent decision provides a striking example of this problem of taking the appropriate corrective action with respect to adjudications which result in fact-finding defects. The Court held in *Pate v. Robinson*[63] that due process requires that no person be tried while he is incompetent to stand trial. The Court decided, moreover, that states must provide a procedure of some sort to determine competency. It can readily be seen that failure to provide a procedure would be a defect at least requiring a federal fact-finding hearing. But the Court chose to establish a constitutional rule requiring the states to provide a procedure. Certainly the degree of unfairness caused by this defect would be substantial. Its impact upon vindication of the right of incompetent persons not to be tried would undoubtedly be adverse. Without a hearing on this technical issue, a finding would be meaningless. State autonomy is not seriously limited, since the Court does not require any specific type of procedure. State court participation, on the other hand, is clearly increased. Most significant, however, is the fact that a constitutional rule requiring the states to hold competency hearings will often enable the federal courts to avoid holding such hearings. Finally, it is possible that states will provide greater protection for defendants at competency hearings than the Constitution demands.

Pate v. Robinson goes even further. The Court held that the state's competency procedure must be invoked once some evidence of incompetency is introduced, and emphasized the importance of affording defendants an opportunity, at such a hearing, to introduce expert testimony.[64] In effect, the state procedure must be meaningful

a district court granted a hearing, heard evidence (including testimony of the state trial judge), and concluded that a preliminary finding of voluntariness had been made which met *Jackson*. Smith v. Texas, 236 F. Supp. 857 (S.D. Tex. 1965).

Under this analysis, however, it is never proper to assume *Stein* was followed where that fact is unclear. A finding must be made by the district court. The Supreme Court's holding in Boles v. Stevenson, 379 U.S. 43 (1964), seems to the contrary. Defense counsel in *Stevenson* moved at trial to strike a police officer's testimony that the defendant confessed to the crime. The motion was overruled without comment and without a hearing on voluntariness. The Supreme Court held that this procedure was not "fully adequate to insure a reliable and clear cut determination" of voluntariness in accordance with *Jackson*, and ordered the prisoner released. Actually, it was unclear in *Stevenson* whether the requirement in *Jackson* of a preliminary finding of voluntariness had been satisfied, since it was possible that, in overruling the motion, the state court had made a finding of voluntariness. The state had followed the practice of holding hearings as to voluntariness outside the presence of the jury. Apparently the Court felt the departure from this normal practice provided a sufficient basis for assuming the improper practice had been followed.

63. 383 U.S. 375 (1966).

64. *Id.* at 385 & n.7.

in its availability and in the opportunity it gives the parties to develop the facts. It would make little sense not to go this far once a procedure of some sort is required.[65] All the considerations which operate to require a procedure operate to require a meaningful procedure. Inadequacies peculiar to particular cases, however, should not lead to constitutional declarations. Habeas corpus hearings are available to correct such defects, which generally have little certain adverse effect upon vindication of established constitutional rights. Probably a sufficiently accurate guide as to what protections and procedures should be constitutionally required at competency hearings is the set of rules governing the protection which must be afforded at trials. Some modification may be necessary, however, because of the special nature of the competency issue.[66]

The question whether a hearing to correct unacceptable fact-finding caused by deficient adjudications of federal rights or a constitutional rule invalidating the deficiency is appropriate in a given case is difficult and not settled mechanically. The mere presence of unacceptable findings of fact is not enough to justify a constitutional rule. The federal courts should consider, among other things, the unfairness involved, as measured both by the possible impact of the defective adjudication upon vindication of the right at stake and by other possible prejudice, any special responsibility of federal courts with respect to the defect, such as the duty to require application of correct constitutional standards, the extent to which a constitutional rule would limit state autonomy, the interest in having state courts find the facts in the first instance, the duties which a constitutional rule would impose on the federal courts and the tasks such a rule would enable federal courts to avoid, and the possible disadvantages and advantages to habeas corpus applicants and to defendants in future cases. The proper course hopefully should be somewhat more clear once these factors are considered.

III. Criteria for Granting Fact-Finding Hearings

Unquestionably, the limitation on habeas corpus which if properly exploited would serve more than anything else to assure the states a

65. Justice Harlan's dissenting opinion, joined in by Justice Black, agrees with the majority in principle, but disagrees on the relevance to the issue of incompetency of the evidence presented.

66. Thus the need for expert testimony may be greater on the issue of competency than on most other issues. *Cf.* Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964) (state must provide psychiatric examination for indigent defendant when sanity in reasonable doubt). On the other hand, the rules of evidence required at trials to avoid prejudice on the issue of guilt may be unnecessary at a hearing on competency before a judge or a special jury.

meaningful role in the process of constitutional adjudication is the ruling in *Townsend v. Sain* that state court findings of fact, arrived at after "full and fair" hearings, should normally be accepted by the federal courts.[67] The significance of the power to find the facts is great. "[T]he trial of an issue of fact may be as important a factor in the *vindication* of a federal right as the determination of the legal content of that right."[68] So crucial is this role that reserving it for the states involves substantial risk. "Distortion or biased handling of evidence, whether the result of deliberate plan or unconscious leaning, can frustrate the effectiveness of national law quite as fully as a misconstruction of that law or an absolute refusal to recognize claims stemming from it."[69] But if the federal courts find the facts anew in all cases, there would be little purpose in having an original adjudication of federal rights in the state courts. So long as the state courts are left with the role of fact-finding, habeas corpus will remain a review, rather than an original proceeding. Moreover, the practice of accepting state resolutions of factual disputes made after full and fair hearings appears on a pragmatic basis to be a proper allocation of fact-finding responsibility, since difficulties inherent in fact-finding are compounded in habeas corpus by the passage of time and its effect upon memories and physical evidence, the increased difficulty of proving perjury, and the

67. Professor Bator has argued that, "if meaningful process serves as an adequate guarantee of the probability of the correctness of fact finding, we are entitled to some explanation why it does not satisfy us with respect to legal conclusions." Bator, *supra* note 1, at 502. There are substantial reasons for the different treatment accorded state findings of fact and state pronouncements of federal law. A court entrusted with the power and responsibility to speak with greater authority on questions of law than some other court can arrive at a "correct" decision. The standard of correctness for questions of law is no more than the pronouncement of a more authoritative tribunal. The standard of correctness for issues of historical fact, on the other hand, must ultimately be what really happened, not what the court said happened. Of course, what the court with greater authority says are the facts become the facts for the purpose of that case. But courts recognize that fact findings are efforts to ascertain what actually happened, in the difference in the scope of appellate review of law and fact; fact finders are deferred to because they are closer to the truth. Sheer practicability is another basis for the difference in treatment accorded conclusions of law and findings of fact. A reviewing court is as able to form a judgment on a question of law as the trial court. But because of the uncertainties of fact-finding, often compounded in habeas corpus by delay, it simply is not practicable to review the facts as broadly as the law. "[M]ost decisions by a trial judge, in cases where the testimony is conflicting, are beyond criticism because the means of adequate criticism are not available." FRANK, IF MEN WERE ANGELS 271 (1942). See also Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

68. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 171 (1953).

69. *Id.* at 172; see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 841 n.193 (1965).

problem of bringing available witnesses, evidence and records to the district within which the prisoner is confined.[70]

In *Brown v. Allen*, the Court recognized the importance of allocating primary fact-finding responsibility to the state courts, and established vague standards to guide district courts in exercising a broad discretion as to whether to grant fact-finding hearings.[71] A hearing was deemed necessary in "unusual circumstances"[72] or when a "vital flaw" was found.[73] In *Townsend* the Court continued to recognize the validity of this distribution of responsibility, but attempted to correct the confusion caused in the lower courts by the vague standards in *Brown*[74] by establishing more concrete criteria, and to check the tendency of district judges to deny hearings[75] by limiting the broad discretion *Brown* afforded them. Evidentiary hearings are now mandatory when:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.[76]

The *Townsend* criteria are as specific as could be expected from an opinion, in an area with very little established doctrine; increased particularity and more examples, however, will hopefully provide even greater guidance. Moreover, while the Court has apparently succeeded in checking any tendency in district judges improperly to deny hearings, the opposite tendency may well have set in.[77] It is not enough, if state

70. Habeas corpus is a civil proceeding, so the subpoena power extends only to district lines. See United States *ex rel.* Ricco v. LaVallee, 225 F. Supp. 278, 279 (N.D.N.Y. 1964), for a discussion of this and other weaknesses.

71. 344 U.S. 443, 463-64, 500-13 (1953).

72. *Id.* at 463.

73. *Id.* at 506.

74. See 372 U.S. at 310 n.8; Note, 76 HARV. L. REV. 1253 (1963); Comment, 53 NW. U.L. REV. 765 (1959); Comment, 68 YALE L.J. 98 (1958).

75. See Note, 39 N.Y.U.L. REV. 78, 122 n.259 (1964).

76. 372 U.S. at 313.

77. The percentage of cases disposed of after hearing has increased from 6.7% in the 1964 fiscal year to 11% in 1965. ANN. REP. OF THE DIR. OF THE ADMIN. OFFICE U.S. COURTS (1964 & 1965) (table C-4). The number of hearings went from 218 in 1964 to 468 in 1965. *Ibid.* The increased number and percentage of hearings does not, of course, prove that hearings are being held too often; nor even does it disprove that hearings are not being held often enough. The point is that, unless district courts state their reasons for granting hearings, there is no way for anyone to know whether they are applying *Townsend* properly.

fact-finding is to have its proper significance, to grant federal habeas corpus hearings simply because of "the seriousness of the charges."[78] If cooperation from the states is expected, they are entitled to reasons, and to good reasons, every time their records or findings are deemed inadequate.[79] The hopelessness often expressed as to the future of state court post-conviction review is, in general, still unfounded. Federal courts often take pains to give weight to state court cooperation. But the tendency to grant hearings simply to avoid reversal and to "get the matter settled once and for all" is very real, and jeopardizes the present distribution of decision-making functions.

The federal district court's task under *Townsend* is to determine whether state courts have made findings of fact upon which the federal claims of state prisoners can properly be reviewed. In handling this task, the court's inquiry should not be whether the state court findings are "correct" in some absolute sense. The district courts should, and *Townsend* requires generally that they must, direct their attention principally to the question whether the conditions under which a challenged finding was made were sufficiently reliable to warrant acceptance of the finding regardless of its correctness in the absolute sense.[80]

In effect, district courts should search for discernible indicia of unreliability, rather than engage in the treacherous process of evidence evaluation. The most significant possible exception to this approach in *Townsend* is the requirement that a hearing be held when the facts found by the state court are not "fairly supported" by the record. This requirement, if broadly interpreted, would entail a full-scale evaluation and weighing of evidence, tending to relegate state court decision-making to a substantially meaningless role. As discussed below, the requirement should therefore be read with a full appreciation of the complexities and uncertainties inherent in reviewing findings of fact, and of the need to preserve a meaningful role for the state courts.

We turn now to a detailed discussion of the *Townsend* standards.

78. Lee v. Walker, 232 F. Supp. 369 (E.D. La. 1964). After the hearing the court found the prisoner's allegations "completely false." *Id.* at 370.

79. Some courts simply order hearings without giving their reasons for doing so. *E.g.*, Louisiana *ex rel.* Jacquillon v. Allgood, 243 F. Supp. 833 (E.D. La. 1965); United States *ex rel.* O'Neill v. Rundle, 230 F. Supp. 323 (E.D. Pa. 1964).

80. See Bator, *supra* note 1, at 455: "[I]t is always an appropriate inquiry whether previous process was meaningful process, that is, *whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied.*" (Emphasis in original.) Our basis for distinguishing questions of law from questions of fact is in note 67, *supra*.

A. *The State Court Record*

When a state prisoner alleges a constitutional deprivation, and resolution of his claim turns on the underlying facts, the district judge must either obtain the state court record or grant a hearing.[81] The state court record may reveal that the disputed issues of fact have been adequately resolved or that the claim otherwise lacks merit, so a hearing should not normally be granted without calling for and examining the record. But the district judge has discretion to grant a hearing without calling for a record in order to save time and expense, as where the issues presented are relatively simple and no record has been prepared.[82] Once obtained, the record may be used as the basis for the prisoner's release, or for denying the writ; but the writ cannot be denied on the basis of a physically incomplete record, or on the basis of a record which does not dispose of the claim presented.

1. *When Is the Record Incomplete?* The state court record was held, in *Townsend,* to include "the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents . . . ."[83] The requirement of a transcript has raised a number of questions. It does not mean that complete transcripts of all the state court proceedings need be provided. In some cases, excerpts may be sufficient to dispose of the claim properly.[84] Moreover, as the Court indicated, if a transcript is unavailable, some adequate substitute will suffice. *Draper v. Washington* held that the Constitution does not require the states to provide stenographer's transcripts for appeals in every case where a defendant cannot buy one. "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise."[85] The alternatives mentioned by the Court are: a statement of

81. See Townsend v. Sain, 359 U.S. 64 (1959) (per curiam); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964).

82. See Brown v. Allen, 344 U.S. 443, 504 (1953) (Frankfurter, J. for the Court on this point).

83. 372 U.S. at 319; United States *ex rel.* McDonald v. Pennsylvania, 343 F.2d 447 (3d Cir. 1965). Congress has provided by statute for admissibility in habeas corpus proceedings of "documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner . . . ." 28 U.S.C. § 2247 (1964). In addition, the respondent must file "certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition . . . ." 28 U.S.C. § 2249 (1964).

84. See Comment, 68 YALE L.J. 98, 105 n.30 (1958).

85. 372 U.S. 487, 495 (1963).

facts agreed to by both sides; a full narrative statement;[86] and a bystander's bill of exceptions.[87] There is no reason to suppose these methods are the only acceptable ones. If a state uses electronic sound recording, the tapes or a transcription of the recording should normally be adequate substitutes for a stenographic transcript.[88] Nor should the fact that the state court record is not an official reporter's transcript be controlling. A statement prepared and signed by a clerk on the day of the proceeding should be acceptable when it "appears to be, and was obviously intended to be, a complete chronological recital of the events which occurred . . . ."[89] It seems essential, however, in light of the fallibility of human memory, that any alternative to a stenographer's transcript be based upon some sort of contemporaneous transcription of the state court proceeding. Thus a full narrative statement is an adequate alternative under *Draper* when based "on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes. . . ."[90]

86. 28 U.S.C. § 2245 (1964) provides for admission into evidence at habeas corpus hearings of "the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial . . . ."

87. *Compare* Randel v. Beto, 354 F.2d 496, 499 (5th Cir. 1965) (qualified bills of exceptions not adequate to resolve issue).

88. Electronic sound recording is increasingly being utilized. There are advantages in such recording, especially its lower cost, and the fact that it enables a reviewing court to hear the tone of voice of witnesses. OLNEY, REPORT ON ELECTRONIC SOUND RECORDING IN THE TRIAL COURTS OF THE STATE OF ALASKA (1961), is an exhaustive treatment in favor of electronic recording. *Compare* FRANK, COURTS ON TRIAL 23, 224 (1963). There are, however, some disadvantages, including the difficulty of recording statements spoken simultaneously, the need for someone to operate the machine, and the need to transcribe the recordings, since listening takes much longer than scanning a record. For critical treatments, see generally PROGRESS REPORT OF THE STANDING COMMITTEE ON REPORTING AND RECORDING COURT PROCEEDINGS, 22d Ann. Jud. Conf. D.C. Cir., May 11, 1961; Rodebaugh, *Sound Recording in Courts: Echoes from Anchorage and Washington*, 50 A.B.A.J. 552 (1964); Rodebaugh, *Sound Recording in the Courtroom: A Reappraisal*, 47 A.B.A.J. 1185 (1961); Hunt, *Electronic Necklaces vs. Court Reporters*, 24 ALA. LAWYER 104 (1963); Yandell, *A Recording Experiment*, 124 JUSTICE OF THE PEACE 266 (1960). Congress, after balancing these considerations, see S. REP. NO. 618, 89th Cong., 1st Sess. (1965); H.R. REP. NO. 281, 89th Cong., 1st Sess. (1965), passed a bill which provides for verbatim recording of proceedings—including "all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases . . ."—"by shorthand or by mechanical means *which may be augmented by electronic sound recording* subject to regulations promulgated by the Judicial Conference . . . ." Pub. Law 89-168, 89th Cong., H.R. 3997, Sept. 2, 1965, 79 STAT. 619, amending 28 U.S.C. § 753(b). (Emphasis added.) The value of sound recording increases in technical areas. See Nissley, *Are Hearing Transcripts Adequate for Technical Arbitrations?*, 52 A.B.A.J. 52 (1966).

89. Carroll v. Boles, 347 F.2d 96 (4th Cir. 1965). Nor need the clerk have certified the transcript even though required by state law, where other evidence establishes its authenticity. See Walton v. Peyton, 360 F.2d 935 (4th Cir. 1966).

90. 372 U.S. at 495; see Allison v. Holman, 326 F.2d 294 (5th Cir. 1963), *cert. denied*, 376 U.S. 957 (1964); Premier Poultry Co. v. Wm. Bornstein & Sons, 61 A.2d 632, 633

The standard set out in *Draper* governs the issue whether a state has violated a prisoner's constitutional right to an adequate record. The *Townsend* requirement of a complete record, on the other hand, is not a constitutional rule, but a standard governing the federal courts in deciding whether to hold fact-finding hearings. When a prisoner proves under *Draper* that he was denied his constitutional right to a full record because of an inadequate transcript substitute, the habeas court must order him released; when a prisoner who has no constitutional right to a record nevertheless shows that the state court record purporting to resolve his federal claim is incomplete because of an inadequate transcript substitute, the habeas court must hold a hearing and must order the prisoner released only if he proves his underlying federal claim. The standard enunciated in *Draper* for adequacy of a transcript substitute does not necessarily govern the habeas corpus situation, but the following hypothetical case should illustrate the propriety of adopting the *Draper* standard.

A state prisoner asserts on appeal from his conviction that he was denied equal protection by the state's failure to provide him with a complete record on appeal, including a transcript of his trial. The state appellate court affirms without opinion and certiorari is denied by the Supreme Court. Later the prisoner applies for state post-conviction relief. He claims that, instead of a transcript, the state provided him with a statement of the evidence and proceedings which was based only on the trial judge's recollection of the trial. The state argues, however, that, while a transcript was not prepared, an adequate substitute was provided—namely, a narrative statement based upon notes of the trial judge taken during the trial. If the state's version of the facts is true, the prisoner has no valid claim. After a full hearing the state court rules against the prisoner, who then applies for federal habeas corpus. The state files the record of the state post-conviction proceeding, which itself contains a narrative statement of the post-conviction proceeding rather than a transcript; it is uncontested, however, that the narrative statement of the post-conviction hearing is based upon notes taken during the hearing, and would satisfy any equal protection claim to an adequate transcript substitute on appeal from a conviction or from a post-conviction proceeding.

It is one of the federal court's duties at this point to determine whether the record of the state court resolution of the prisoner's claim is complete enough to use as the basis for disposing of the claim without a hearing. The purpose of the hypothetical case is to make clear

(D.C. Munic. Ct. App. 1948) (commenting on disadvantages of narrative statement based on memory of proceedings and evidence).

that the federal court has the power to grant a hearing to determine whether the state trial court had based its narrative statement on notes taken during the trial, because the record of the state post-conviction proceeding is based on a narrative statement rather than a full transcript. It can do this despite the fact that the same narrative statement would meet the constitutional standard of completeness governing the issue whether a complete record had been provided on appeal. In fact, this observation applies generally: the standards by which the adequacy of state court records are judged when the issue is whether the prisoner was denied his constitutional right to an adequate record do not bind the district court on habeas when the issue is whether the record should be accepted as a reliable basis for disposing of a federal claim. There is a difference between granting a hearing and ordering a prisoner released, and this difference in consequence may sometimes justify a higher standard of completeness when only a hearing is at stake.

Exercise of this power to deem a constitutionally adequate trial court record incomplete and to grant a hearing on the factual issues that record purports to resolve is inappropriate, however, when the issue is whether a transcript substitute is adequate. *Draper* in effect tells the states they may constitutionally use certain transcript substitutes, and the states will undoubtedly rely upon this statement of the law. It would be incongruous, therefore, for the habeas courts to impose some higher standard in deciding whether the transcript substitute is sufficiently reliable to make a hearing unnecessary. Moreover, the standard enunciated in *Draper* is as high as the Court could go without precluding use of transcript substitutes. *Draper* requires that the substitute "place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise."[91] The habeas court should demand no more. For even in the special case when a claim turns on whether certain words were said, if the transcript substitute does not resolve the dispute, the habeas court would be justified, if the issue were presented, in finding the substitute constitutionally inadequate, since such a narrative statement would not be the "equivalent" of a transcript in that particular case. If, therefore, a prisoner who has no constitutional right to be given an adequate transcript (for example, if he is not indigent) asserts he is entitled to a hearing on some other federal claim because the state court record resolving his claim contains an inadequate substitute, the district court should grant a hearing only if the transcript substitute fails to meet the *Draper* standard.

91. 372 U.S. at 495.

There are several fairly common situations in which the state court record is incomplete, but in which the *Draper* standard should not limit the federal habeas court. A transcript may be unavailable because the court reporter has died or cannot be found and his notes cannot be transcribed. The transcript or some other necessary part of the record may have been destroyed pursuant to regular state practice.[92] Finally, a part of the transcript or record may be missing. The fact that these deficiencies do not amount to a constitutional violation in themselves[93] should not prevent the federal courts from granting hearings to negate to the extent possible any prejudice caused to the applicant's other claims.[94]

The absence of part or all of a transcript or record is different from the matter of adequate transcript substitutes. On the issue of adequacy, *Draper* establishes guidelines upon which state courts will rely. Incompleteness caused by the death of a stenographer, or by loss or destruction of the record, however, is seldom the result of reliance upon a federal standard. Consequently, in these and similar cases, the federal habeas courts should not be limited in deciding whether to grant fact-finding hearings by the standards governing the issue whether a person has been denied his equal protection right to an adequate record. Indeed, the only reason these sorts of defects may not always result in constitutional deprivations is that they are not caused by conscious acts. The trial record of a rich man is as likely as that of an indigent to be rendered inadequate by the death of a stenographer, loss, or destruction. And although this factor may not be controlling in all cases, it does provide a basis for finding no violation of equal protection.[95] Even so, however, it does not provide any basis for denying state prisoners, rich or poor, the opportunity to convince the federal courts of their versions of the facts.

92. Most states destroy their records after a few years. See *Report of the Special Committee on Habeas Corpus to the Conference of Chief Justices*, June 1953, in H.R. REP. No. 548, 86th Cong., 1st Sess. 21, 33 (1959). The federal courts are implicitly authorized to do so as well. See H.R. 3997, 89th Cong., Sept. 2, 1965, 79 STAT. 619, amending 28 U.S.C. § 753(b), which requires preservation of shorthand notes and other original records for not less than ten years.

93. Norvell v. Illinois, 373 U.S. 420 (1963), held that neither equal protection nor due process is violated where an indigent, presumed to have had counsel willing to take an appeal and failing to do so, could not obtain on motion 15 years after his conviction a transcript of his trial because the reporter had died and no one could read his notes. *Compare* Pate v. Holman, 341 F.2d 764 (5th Cir. 1965) (petition alleged that attorney refused to represent defendant on appeal).

94. Thomaston v. Gladden, 326 F.2d 305, 307 (9th Cir. 1964). *But see* United States *ex rel.* Kimble v. Keenan, 316 F.2d 264 (3d Cir. 1963), discussed in Note, 39 N.Y.U.L. REV. 78, 108 n.172 (1964).

95. See Norvell v. Illinois, 373 U.S. 420 (1963).

In light of the above discussion, the states can take a number of steps to avoid federal habeas corpus hearings because the state record is physically incomplete. A transcript or some adequate substitute (concerning which the states are left with a great deal of flexibility) should be prepared; the problems created when a stenographer dies and his notes cannot be transcribed could be minimized by requiring stenographers to use stenographic machines which make readable symbols, and by using electronic sound recording; records should be preserved for longer periods of time—the burden of preserving records must be balanced against the burden of reconstructing them, and against the risk that prisoners may become entitled to release where there is some substance to their claims and no record to disprove them exists;[96] finally, care should be taken to keep records intact and complete by safe storage and strict control over circulation.

States occasionally refuse to provide the federal courts with a complete record. Often this is simply because insufficient funds have been allocated for the purpose. If federal courts could order the record completed at the expense of the federal government, fact-finding hearings might often be avoided, perhaps with a considerable saving of resources. The Comptroller General of the United States, however, refused to make funds available for this purpose even for federal prisoners.[97] Criticism of this position[98] caused Congress to provide for payment of transcript fees furnished in proceedings by indigent federal prisoners under 28 U.S.C. § 2255.[99] The danger of extending this practice to state prisoners, however, is the possibility of enormous long-run expense if the states let the federal courts pay the costs of preparing records in all cases. It seems safe to assume that the states can afford to prepare those parts of the records of indigent prisoners relevant to their federal claims. Perhaps the best way to solve this problem, therefore, would be to require the states under the equal protection clause to prepare records, to the extent they are able to do so on the basis of available notes and materials, for indigent prisoners who raise substantial questions in federal habeas corpus petitions.

96. See discussion in Note, 40 N.Y.U.L. REV. 154, 184-87 (1965).

97. See Decision B-154383, August 3, 1964.

98. See United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964); Poe v. United States, 229 F. Supp. 6 (D.C. 1964); *cf.* Taylor v. Pegelow, 335 F.2d 147 (4th Cir. 1964). See generally Sokol, *Availability of Transcripts for Federal Prisoners*, 2 AM. CRIM. L.Q. 63 (1964).

99. Pub. Law 89-167, 79 STAT. 647, 28 U.S.C. § 753(f), Sept. 2, 1965. Indigent habeas corpus applicants are entitled without cost from "the clerk of any court of the United States" to "certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending." 28 U.S.C. § 2250 (1964).

2. *Finality of the Record.* The degree of finality federal courts should accord a physically complete record is important. A state which compiles such a record has a substantial interest in its acceptance as conclusive of the issues it resolves. Moreover, fact-finding hearings are a burden on the federal courts and should be avoided where no substantial issue is presented. One type of claim especially open to scrutiny is that a state court record complete on its face does not accurately represent what occurred.[100] Great weight is given contemporaneous documents when they conflict with oral testimony,[101] especially when the document is a certified court record. Moreover, federal courts should be reluctant to require states to defend the authenticity of their records. To the extent such challenges are allowed, states will undoubtedly feel compliance with *Townsend* is meaningless. Therefore, the wholly unsupported assertion of a prisoner that a physically complete record inaccurately recites what occurred should not result in a hearing.[102]

Generally, the record cannot be treated as final on claims based on facts outside of it. But a hearing is not always necessary when facts outside the record are alleged. It is proper for the federal courts to decide whether the facts alleged are insufficient to warrant a hearing because

100. The inaccuracy may itself be advanced as a due process violation. See Chessman v. Teets, 350 U.S. 3 (1955) (per curiam), where an applicant alleged that his transcript on appeal was prepared fraudulently by an uncle by marriage of the prosecuting attorney after the original reporter died. A hearing was required to determine whether fraud had occurred. The facts are more fully developed in Chessman v. Teets, 354 U.S. 156, 161-62 (1957).

101. *Cf.* United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948): "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."

102. United States *ex rel.* Combs v. Denno, 357 F.2d 809 (2d Cir. 1966). In United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963), applicant alleged his guilty plea was involuntary because of certain actions and promises of the trial judge at a conference in chambers, which did not appear in the certified minutes of the conference. The applicant claimed, however, that no minutes were taken at the conference, and that if minutes were taken they were not transcribed until six years later by a stenographer who might have been different from the original reporter, thus perhaps accounting for errors and inconsistencies. The applicant's version of the conference was sworn to by his trial attorney. The court ordered a hearing.

While the circumstances alleged are all legitimate considerations in determining whether a hearing is appropriate, the court's decision is open to question. The minutes themselves conclusively refuted the claim that no minutes were made, absent specific allegations of fraud. The identity of the court reporter certainly could have been ascertained without a hearing. The attorney's affidavit was a seven-line form, generally used to verify pleadings, and in this case was of doubtful significance since there was serious doubt whether trial counsel had seen the verified state transcript at the time he signed the affidavit. *Id.* at 317 (opinion of Friendly, J.). *Compare* Randel v. Beto, 354 F.2d 496 (5th Cir. 1965) (inadequate transcript substitute).

inferences drawn from the content or from the very existence of a state court record render the prisoner's allegations frivolous. The Supreme Court has allowed very little latitude for drawing inferences of frivolity in post-conviction cases involving federal prisoners, and there is no reason to suppose the Court would adopt a contrary view in cases involving state prisoners.[103] In the leading case of *Machibroda v. United States*,[104] a hearing was held necessary when a federal prisoner asserted in a proceeding under 28 U.S.C. § 2255 that he pleaded guilty because of promises on three separate occasions of an Assistant United States Attorney, "said to have been made upon the authority of the United States Attorney and to be agreeable to the District Judge,"[105] and that, when the petitioner threatened to advise his lawyer and the court of what had transpired, the prosecutor assured him the sentence would not exceed the agreed-upon maximum, and threatened him with adding two unsettled robberies to his difficulties. Petitioner claimed to have written two letters each to the sentencing court and to the Attorney General concerning the prosecutor's misrepresentations. The district court dismissed the application without hearing on the basis of the prosecutor's affidavit in which he admitted speaking to petitioner once and explaining the possibility of stricter treatment by the judge if petitioner failed to talk, but in which he denied any promises or coercion, noting that the court had never received either of the letters referred to by the petitioner and that the petitioner had not complained for two and a half years.

103. It seems safe to assume that the criteria for granting hearings in § 2255 proceedings for federal prisoners will be the same as those applied in federal habeas corpus proceedings for state prisoners. Section 2255 provides in part that, "unless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255 (1964). (Emphasis added.) On the other hand, § 2243 provides that, when disposing of applications for habeas corpus, "the court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243 (1964). This command seems just as imperative as that contained in § 2255. The interests of federalism present in cases involving state prisoners operate to limit the granting of hearings in habeas corpus, but it seems inconceivable that the Court will attempt to develop two sets of criteria to handle these difficult issues because of this single factor which, though important, hardly carries any discernible guides for decision making. In Sanders v. United States, 373 U.S. 1, 16-17 (1963), a case under § 2255, the Court held that the *Townsend* criteria applied to federal prisoners as one factor in deciding whether the ends of justice require a redetermination of their claims on successive applications. See *id.* at 18, where the waiver standard enunciated in *Noia* was applied.

104. 368 U.S. 487 (1962)

105. *Id.* at 489.

In requiring a hearing the Court pointed out that the factual disputes "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light."[106] Moreover, the circumstances alleged were not of a kind that the district judge could resolve completely on the basis of his knowledge or recollection. Finally, this was not a case which simply involved the prosecutor's word against the petitioner's:

> The petitioner's motion and affidavit contain charges which are detailed and specific. It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and other such sources.[107]

Another important case is *Sanders v. United States*,[108] where one issue before the Court was whether, on an earlier § 2255 motion by petitioner, the district court had resolved the claim that counsel had not effectively been waived and therefore that a plea of guilty had been involuntary. The earlier § 2255 petition "stated only bald legal conclusions with no supporting factual allegations."[109] In denying the application the district judge reviewed the entire record. But the Court pointed out:

> The crucial allegation of the second motion was that petitioner's alleged mental incompetency was the result of administration of narcotic drugs during the period petitioner was held in the Sacramento County Jail pending trial in the instant case. However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights. . . . For the facts on which petitioner's claim in his second application is predicated are outside the record.[110]

Undoubtedly *Machibroda* and *Sanders* require a hearing in almost

106. *Id.* at 494-95.

107. *Id.* at 495.

108. 373 U.S. 1 (1963).

109. *Id.* at 19.

110. *Id.* at 20-21. There were indications, in addition, which supported petitioner's claim. He had requested, before sentence, that the judge send him to a hospital "for addiction cure," and the probation officer's report revealed petitioner had received medical treatment for withdrawal symptoms while in jail prior to sentencing. *Id.* at 20.

For a case in which the court concluded, on the basis of facts outside the record, that a guilty plea was involuntary, see Kelly v. Warden, 230 F. Supp. 551, 555-57 (D. Md. 1964) (counsel testified he would not have recommended plea had he known facts of illegal arrest and detention).

any case where the petition asserts facts outside the record. But these two cases do not establish the proposition that "if charges of deprivation of constitutional rights in obtaining the conviction are made which cannot be conclusively established to be false from the record (and this can rarely be done), a hearing must be held on such charges, no matter how unbelievable or incredible the charges may appear on their face."[111] In the first place, charges incredible on their face may be dismissed without hearing.[112] Secondly, the Court does recognize certain relevant factors which post-conviction judges may consider in denying relief without a hearing, such as whether the record throws any light on the issues,[113] the trial court's recollection of the facts,[114] and whether the petitioner's word is supported by other evidence.[115] Moreover, there are other factors, such as whether the allegations are hearsay, the constitutional issue to which they are related, and the amount of time the prisoner waited before making them, which courts have considered relevant in determining frivolity.[116] Some of these factors may

111. Jones v. Montana, 232 F. Supp. 771, 779 (D. Mont. 1964).

112. Townsend v. Sain, 372 U.S. 293, 317 (1963).

113. Where the record is not necessarily inconsistent with the claim this factor cannot be considered. See Holly v. Smyth, 280 F.2d 536, 542 (4th Cir. 1960), where a state court order revealed that counsel was present at petitioner's trial and appeared and argued in behalf of petitioner and his co-defendants. The court pointed out that the notation may mean only that an attorney defending the co-defendants afforded some assistance to petitioner, which may or may not have been enough to satisfy his constitutional right to counsel. See also Edgerton v. North Carolina, 315 F.2d 676, 678 (4th Cir. 1963) (an affidavit assumed to be a proper part of the record which alleged that petitioner submitted a list of witnesses to the sheriff did not prove he knew the nature of the crimes with which he was charged).

114. *But see* Pate v. Robinson, 383 U.S. 375, 386 (1966), ("While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."); Sanders v. United States, 373 U.S. 1, 20 (1963) (trial court's recollection not "conclusive" on issue whether petitioner had been incompetent because under the influence of narcotics).

115. Of course if the record reveals some support for the claim a hearing will probably be necessary. *E.g.*, Pearce v. Cox, 354 F.2d 884, 893-94 (10th Cir. 1965). In Perez v. New York, 223 F. Supp. 336 (S.D.N.Y. 1963), petitioner challenged a conviction upon which his sentence as a recidivist was based on the ground that his plea to a lesser offense was coerced because he was promised he would be allowed to go into the Army if he pleaded guilty. The record revealed that all petitioner wanted was to go into the Army, and that the court attendant said this to the judge.

116. See generally the admirable treatment in Note, *Processing a Motion Attacking Sentence Under Section 2255 of the Judicial Code*, 111 U. PA. L. REV. 788 (1963). A useful discussion is found in United States *ex rel.* Weiss v. Fay, 232 F. Supp. 912 (S.D.N.Y. 1964) (Weinfeld, J.), where a hearing was denied. The only circumstance which supported petitioner's claim that the testimony of his accomplice, called by the prosecution, was false was the fact that the accomplice was later allowed to plead guilty to a lesser charge. This fact was not enough, the court held, to support the inference that perjured

be illegitimate considerations; the point here is only that there are cases in which charges may be deemed frivolous.

Despite the relevancy of these factors, however, and despite the fact that *Machibroda* may be a "marginal case,"[117] district courts are left little discretion for denying hearings in cases alleging facts outside the record on the basis of inferences drawn from the contents or existence of a record. On the one hand, this practice avoids injustice in particular cases; very little is left to speculation and probability. District courts have, in fact, uncovered constitutional deprivations after being ordered by circuit courts to resolve factual disputes raised in prisoners' petitions.[118] On the other hand, the practice involves a substantial expenditure of judicial resources, and undoubtedly tends to increase federal-state tension. Even if the practice is necessary, therefore, it seems proper to consider possible steps to streamline the procedure without significantly limiting protection. It should be emphasized, in this respect, that giving substantial weight to state court records often operates to the advantage of applicants, as where the respondent asserts facts outside the record.[119]

One method by which false claims might be deterred is for district courts to punish prisoners for perjury after a hearing reveals their claims were willfully false.[120] This device suffers not only from the general uncertainty concerning deterrence through criminal prosecution but also from the fact that long-term prisoners might be especially unaffected by the threat of a little more time in jail. A more effective device would be to require the petitioner to obtain an affidavit from his state court attorney, and to prosecute or discipline the attorney if the allegations are proved false.[121] Attorneys are more likely to re-

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testimony was used at the trial to the knowledge of the prosecution. In this case, two other accomplices, who testified *for* petitioner, were also allowed to plead to a lesser charge. In United States *ex rel.* Rambert v. New York, 358 F.2d 715 (2d Cir. 1966), petitioner's claim that he was not represented by counsel was refuted by his own earlier claim that counsel had been ineffective.

117. 368 U.S. 487, 496 (1962).

118. Pugh v. North Carolina, 238 F. Supp. 721 (E.D.N.C. 1965); Ward v. Page, 238 F. Supp. 431 (D. Okla. 1965); see Keene v. Holman, 232 F. Supp. 359 (M.D. Ala. 1964).

119. *E.g.*, Carroll v. Boles, 347 F.2d 96 (4th Cir. 1965); Daniel v. United States, 274 F.2d 768 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 970 (1961). But a state should not be denied a hearing "with respect to possibly decisive facts not admitted by it nor incontrovertibly proved by the record," where the state in effect moves to dismiss for failure to state a claim upon which relief can be granted. United States *ex rel.* Mitchell v. Follette, 358 F.2d 922 (2d Cir. 1966).

120. See United States v. Roe, 213 F. Supp. 444 (W.D. Mo. 1963); Burleson v. United States, 209 F. Supp. 464 (W.D. Mo. 1962).

121. In United States *ex rel.* Kenney v. Fay, 232 F. Supp. 899 (S.D.N.Y. 1964) (Wein-

spond to the threat of punishment than prisoners, but the difficulty of proving willful falsity, and of overcoming the reluctance of courts to be strict with attorneys, limits the potential value of this remedy. Of course, the more effectively either of these devices is used, the greater will become the possibility that valid claims may be deterred. Attorneys, especially, will be reluctant to take chances.

The most promising possibility for saving time and expense and for avoiding the tension caused by full-dress hearings is to make the pretrial hearing a regular discovery device in habeas corpus proceedings. There appears to be sufficient authority for some sort of pretrial discovery hearing in habeas corpus proceedings, and the advantages of such a practice for determining whether a claim is substantial enough to warrant a full hearing seem patent.[122] At present, however, few cases are disposed of after pretrial proceedings.[123] It may well be necessary for Congress or the Court to take action making clear to district courts the authority to use this device.

Ultimately, of course, the states could avoid all federal hearings when facts outside the record are alleged by airing the factual allegations made and resolving the disputes. The states can safely use pretrial hearings to dispose of petitions presenting no substantial question; for although the federal courts may feel bound to grant full-dress hearings once any colorable claim is raised, there is no reason to suppose they will reject findings of fact made after pretrial discovery which other-

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feld, J.), the applicant asserted that his plea of guilty was given because of a broken agreement between the court and his counsel that he would receive the same sentence as two co-defendants. Counsel's affidavit in this case corroborated this allegation, and the specific claim that, upon pronouncement of sentence, counsel protested that the agreement was broken. The minutes of the sentencing contained no such objection, but the court ordered a hearing on this and other grounds. If the claim were later shown to have been false, some form of disciplinary action would be appropriate. See FED. R. CIV. P. 11: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay . . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."

122. See generally DRAFT REPORT, COMMITTEE ON POST-CONVICTION REMEDIES, ABA Comm. on Minimum Standards for Criminal Justice, pp. 68-78 (1965); Carter, *Pre-Trial Suggestions for Section 2255 Cases Under Title 28 United States Code*, 32 F.R.D. 391 (1963); Copenhaver v. Bennett, 355 F.2d 417, 421 (8th Cir. 1966).

123. Of 1,662 federal question habeas corpus cases terminated in fiscal 1963, only 4 were disposed of after pretrial; 1,581 were disposed of before pretrial, and 77 after trial. ANN. REP. DIR. ADMIN. OFFICE U.S. COURTS (1963) (table C-4). In fiscal 1964, 15 such applications were disposed of after pretrial; 218 went to trial. *Id.* (1964). In fiscal 1965, 13 applications were disposed of after pretrial; 468 went to trial. *Id.* (1965). The same tables reveal a similar ratio in disposition after pretrial of federal prisoner applications under 28 U.S.C. § 2255 (1964).

wise comply with the *Townsend* criteria. The pretrial hearing, however, should be used only to determine whether the petition presents a substantial question. It should not be used to resolve substantial questions, for the state fact-finding which results might then be deficient because the prisoner was not given an opportunity to be present, or for some other reason.

B. *Resolution of Factual Disputes*

Having once determined that the record is physically complete and accurate, the district court must apply the *Townsend* standards if some non-frivolous factual dispute has been raised. The first standard requires a hearing if the record fails to show either expressly or by implication that the state court has "actually reached and decided the issues of fact tendered by the defendant."[124] The practice of making findings of facts, at least in civil cases, has by now been widely accepted.[125] Findings make possible meaningful review by the habeas court,[126] and are relatively easy for state courts to provide. But probably the most significant service the requirement of making findings of fact performs is in the check it places upon the trial judge's subjective reactions by compelling him carefully to examine and rationalize his decision.[127] Thus the position that meaningful process has not been accorded by a state if no findings have been made or are reasonably discernible does not rest solely or even primarily upon the need for a meaningful federal review, but upon the interest in securing reliable state court decisions.

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124. 372 U.S. at 313-14.

125. See 5 MOORE, FEDERAL PRACTICE ¶ 52.01-52.03[1], at 2604-15 (2d ed. 1964).

126. See Edwards v. Holman, 342 F.2d 679, 680 (5th Cir. 1965); FRANK, IF MEN WERE ANGELS 269 (1942):

> If a trial judge, who tries a case without a jury, makes a *finding of facts* supported by *substantial evidence*, you then have *some* basis for determining whether his decision is correct. If there are legal rules which, applied to those facts, logically lead to his decision, then his decision is legally proper; otherwise it is erroneous. (Emphasis in original.)

The same reasoning and the same rule applies when federal court decisions are reviewed. See Minnesota *ex rel.* Holscher v. Tahash, 346 F.2d 556 (8th Cir. 1965). *Cf.* Kent v. United States, 34 U.S.L. WEEK 4228, 4233 (U.S. Mar. 21, 1966): "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions."

127. Wright, *The Nonjury Trial—Findings of Fact, Conclusions of Law and Opinions*, in PROCEEDINGS OF THE SEMINARS FOR NEWLY APPOINTED DISTRICT JUDGES (1963):

> [T]his is the primary purpose of findings of fact and conclusions of law. It makes you analyze the evidence; it makes you put down your findings, and when you get to this analysis, and when you get to writing out your findings, you may come to different conclusions on certain facts than the impression that you first entertained when you heard the evidence . . . .

See FRANK, COURTS ON TRIAL 183 (1963); Frank, *Say It With Music*, 61 HARV. L. REV. 921 (1948); Note, 61 HARV. L. REV. 1434, 1437-38 (1948).

If express findings have been provided, no hearing is required under this *Townsend* standard. But all too often the federal courts are compelled to ascertain whether findings can reasonably be implied. A constitutional rule requiring express findings of fact would virtually obviate this problem, but although the absence of express findings is a shortcoming, sometimes even a defect requiring corrective action, it is hardly serious enough to warrant constitutional correction. In many cases findings can readily and safely be implied. When there is doubt about whether a finding was made or what fact was found, there is no firm basis on which the federal court can review the constitutional claim, and there is also a chance that vindication of the claim involved was adversely affected, since it is uncertain whether the state finder of fact went through the process of analyzing the evidence. But unless some additional element of unfairness is present, a habeas corpus hearing at which the federal judge would go through this process and also provide himself with a firm basis for deciding the constitutional claim seems an adequate remedy. Federal courts should not, however, indulge in speculation. If significant doubt exists over whether the state court made a finding or over what its finding was, a hearing should be held. A constitutional rule requiring express findings in all cases may be inappropriate, but the liberal grant of hearings on this ground seems proper for the additional reason that the states can readily remove all doubts.

The first step in the process of implying findings is to determine whether the state court actually passed on the merits of the claim asserted, or merely dismissed it on the basis of some procedural rule. If the decision was not on the merits, no findings could have been made. As an example of a situation in which it is normally proper to assume the ruling was not on the merits, the Court in *Townsend* cited denial of relief in a collateral proceeding after a hearing but without opinion.[128] The fact that a state court judge *may have* decided a ques-

128. 372 U.S. at 314. In Jones v. Montana, 232 F. Supp. 771 (D. Mont. 1964), the district court refused to reconstruct the facts and ordered a hearing where the state court had denied by minute entry order a petition for collateral relief filed subsequent to denial of petitioner's earlier application for federal habeas corpus on the ground of failure to exhaust state remedies. In this respect, the decision was correct, especially since the state court denial without findings or opinion came almost one year after *Noia* and *Townsend* were decided.

Of course if there is some affirmative indication that the decision in a post-conviction proceeding was not on the merits, the need for a hearing is even more conclusively demonstrated. See United States *ex rel.* Thomas v. Pate, 351 F.2d 910 (7th Cir. 1965) (prior federal habeas corpus hearing apparently denied for "lack of jurisdiction").

tion on the merits is not enough in such a context.[129] As an example of a situation in which it is normally proper to assume the ruling was on the merits, the Court in *Townsend* cited the state hearing which occurs "in the course of the original trial—for example, on a motion to suppress allegedly unlawful evidence . . . ."[130] An in-between situation is the motion for new trial. Here the trial is over, but often only just over. Trial courts have wide discretion to deny new trials, and it seems proper to assume that on such motions the state court did pass on the merits, absent some evidence to the contrary. Sufficient doubt about this assumption would seem to be raised when a significant amount of time has passed since the trial;[131] no ruling on the merits can be assumed where the motion for new trial was made after the state's statutory period for such motions had passed. Another possible situation in which the question of whether a state court has passed on the merits of a federal claim arises when a state court has given its opinion on the merits of the claim later asserted in federal court although the claim was not properly presented to the state court. State courts must, of course, be free to comb the record for claims and dispose of as many as they can discover. But in order to justify an assumption by the habeas court that the state court has passed on the merits, there must be a showing that claims not raised by a prisoner but ruled on by the state courts received full consideration at some point in the state process. Thus, it will not generally be enough for a state appellate court simply to state that a claim never before considered is meritless.[132]

Once the district judge determines that the state court ruled on the merits he must then decide whether, in the particular case, it is permissible for him to reconstruct resolutions of disputed facts. A fact can be "reconstructed" if the view of the state trier is plain from his opinion

129. *Townsend* is therefore inconsistent with Judge Learned Hand's statement in Schectman v. Foster, 172 F.2d 339, 342 (2d Cir. 1949), *cert. denied*, 339 U.S. 924 (1950), that, although the state judge in a coram nobis proceeding gave no reasons for his denial of relief, the applicant failed to prove he was denied due process because the state judge "*may have* understood that the deliberate use of perjured testimony required the conviction to be vacated . . . [and] *may have* decided that the evidence did not prove that issue." (Emphasis added.)

130. 372 U.S. at 314.

131. See Coggins v. O'Brien, 188 F.2d 130, 145-46 (1st Cir. 1951) (dissenting opinion of Ford, J.), discussing the uncertainty involved in assuming the state judge decided a motion for new trial on the merits.

132. Lacklineo v. Tahash, 351 F.2d 58 (8th Cir. 1965). The court reasoned that, while the state court's disposition may not be considered to have been on the merits for the purpose of reconstructing facts, the state court's sua sponte rejection of the claim may be treated as an exhaustion of state remedies on that issue.

or from other indicia.[133] Reconstruction is also often possible from legal standards applied or assumed to have been applied at the state hearing. There are three basic types of situations with which the habeas judge may be faced in reconstructing facts from legal standards. First, the state judge may have expressed at the hearing on the merits an erroneous constitutional standard. Second, the record may reveal that the state judge applied the correct standard. Finally, the record may fail to reveal the standard applied at the state court hearing.

When it is clear that an erroneous constitutional standard was applied, reconstruction is impermissible. "[F]indings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for," and therefore "historical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them."[134] The need for a federal fact-finding hearing is obviated, however, by *Rogers v. Richmond,* which requires that the applicant be released, subject to corrective action by the state courts. The propriety of this disposition, as opposed to a habeas corpus hearing, has already been discussed.[135]

The second situation with which the district judge is faced in deciding whether it is appropriate to reconstruct findings of fact is where the state judge expressed the correct constitutional standard. Normally the habeas court may properly reconstruct facts in this situation. Judge Frank recognized that this process was unsatisfactory, but he conceded that if the trial judge, even without expressly finding the facts, "announces the legal rules he applied, you have at least *some* criterion for estimating the correctness of his decision for you can *surmise that he found facts* which, coupled with those legal rules, would logically yield that decision; and you can *then* see whether the legal rules he employed are correct and whether there is substantial evidence to support his surmised finding of facts."[136]

Possibly because of the speculation involved in this process, the Supreme Court has made an important exception to the rule that reconstruction from a correct standard is permissible. A hearing may still be required in cases presenting "mixed questions" in which law and fact are interwoven to obtain a result, greatly increasing the possibility of error. The Court in *Townsend* stated generally that,

133. 372 U.S. at 314.

134. Rogers v. Richmond, 365 U.S. 534, 547 (1961).

135. See text accompanying notes 52-57, *supra.*

136. FRANK, IF MEN WERE ANGELS 269 (1942).

"unless the district judge [in a 'mixed question' case] can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations."[137] What circumstances, however, should make the district judge uncertain that the state trier would have granted relief even if he believed the applicant's allegations? Of course if no combination of the facts alleged would prove a constitutional deprivation, the district judge may assume that the state trier handled the "mixed question" properly. Even if error is theoretically possible, the same assumption should normally control. But when any combination of the facts alleged would constitute a violation of federal right and when, in addition, the mixed question involved "presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation."[138] *Townsend* was just such a case. The facts alleged by Townsend would have proved his confession was involuntarily given. The Court assumed that a correct constitutional standard had been applied, but ruled that a hearing was required because the mixed question—the significance of the use of drugs prior to a confession—"was novel and by no means without difficulty."[139]

The third and most troublesome type of situation in which the district court is required to decide whether fact reconstruction is appropriate is when the state trier articulated no standard in the state court proceedings. The Court's general rule for such situations is that "reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim." Under such circumstances "the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, [so] a hearing is compelled to ascertain the facts."[140] Indeed, "when . . . the trial judge is silent as to both the facts and the legal rules, . . . the bases for appraising the correctness of his decision are most obscure."[141] If there is some possible combination of a set of facts and a rule which would logically result in that decision, it would have to be deemed correct unless some corrective action were taken.

Despite the dangers in reconstructing facts from a record which contains neither findings nor a legal standard, the Court in *Townsend* allows federal district judges, in light of "the coequal responsibilities

137. 372 U.S. at 315.
138. *Ibid.*
139. *Id.* at 321.
140. *Id.* at 314.
141. FRANK, *op. cit. supra* note 136.

of state and federal judges in the administration of federal constitutional law,"[142] to assume the correct standard was applied in the absence of evidence sufficient to "create doubt."[143] Of course, no hard and fast rule is available to determine whether "doubt" has been created. But the area of difficulty can be narrowed, and some guidance in handling this problem provided.

Generally speaking, this issue turns on two factors, which often are both involved in the same case: (1) the nature of the standard which the federal court must assume was applied in order to reconstruct a finding; and (2) the possible indications in each particular case that a correct or incorrect standard was applied.

If the correct standard is well settled, it is proper to assume it was applied. For example, the law is settled that third-degree methods necessarily produce a coerced confession. Thus the Court stated in *Townsend* that if third-degree methods are alleged to have been used in obtaining a confession and the state court refused, without findings or opinion, to exclude the confession from evidence, the facts may be assumed to have been found against the petitioner. Since the most blatant denials of federal rights are the best settled, prisoners who allege blatant denials of their rights will have the least chance of securing hearings on disputed fact issues. This may seem incongruous at first blush, but it is a realistic and logical rule. Of course, petitioners can still obtain hearings on other grounds, such as an allegation that the reconstructed findings are not fairly supported by the record or were made in a proceeding not otherwise full and fair.

Another set of cases which can be disposed of with relative ease are those in which the correct standard is novel or extremely difficult to apply. *Townsend* itself was such a case, and establishes that, even if the novel or difficult standard was articulated by the state court judge in deciding the question, reconstruction of the facts is impossible so long as any combination of alleged facts would have entitled the petitioner to relief.[144] This follows *a fortiori* if it is unclear whether the standard was applied.

The area of difficulty is further narrowed by the special rule which precludes reconstruction of facts from an assumed standard in cases involving waiver of the right to counsel. Whether someone has intelligently and understandingly waived his right to counsel is a mixed question of law and fact. But often the issue can turn on resolution of historical facts. Especially significant is the presence or absence in the

142. 372 U.S. at 314-15.
143. *Id.* at 315 n.10.
144. See *id.* at 315.

record of a statement to the accused by the trial court that he has a right to counsel and, where proper, an offer to have counsel assigned. Where no such statement appears in the record, *Carnley v. Cochran* precludes reconstruction of this factual dispute from an assumption that the proper standard of waiver was applied. The "fact" of whether an offer was made is really a part of the rule: "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[145]

Where the record contains no colloquy, and no allegation made and evidence offered to prove waiver, the petitioner is entitled to release. A judgment of conviction in itself is not enough to entitle the state even to a hearing on the issue.[146] But it is clear that the state should be afforded a hearing if it alleges waiver and offers a guilty plea,[147] a record entry which is somewhat probative even though inadequate to place the burden of proof upon the petitioner,[148] or any other significant indication that a waiver may have occurred.[149] In order to place the burden of proof upon the petitioner "the record—or a hearing, where

145. 369 U.S. 506, 516 (1962). The same standard has been adopted for judging waiver of the privilege against self-incrimination during the post-arrest period. Miranda v. Arizona, 34 U.S.L. WEEK 4521 (U.S. June 13, 1966).

146. It is in this respect that Carnley v. Cochran is inconsistent with Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938): "Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to counsel." The disparity is perfectly understandable, since it was not until Rice v. Olson, 324 U.S. 786 (1945), that it became established that a request for counsel was unnecessary.

147. *E.g.*, Rice v. Olson, *supra* note 146; Wilson v. Harris, 351 F.2d 840 (9th Cir. 1965); Shawan v. Cox, 350 F.2d 909 (10th Cir. 1965); Lovato v. Cox, 344 F.2d 916 (10th Cir. 1965); United States *ex rel.* Brown v. Fay, 242 F. Supp. 273 (S.D.N.Y. 1965).

148. The court in Hayes v. Holman, 346 F.2d 991, 993 (5th Cir. 1965), held the "mere statement in the record that the petitioner did not have counsel and had 'announced [he was] ready for trial without an attorney,' is not sufficient to permit the drawing of an inference that the right to counsel was intelligently and understandingly waived." But the court correctly ordered a hearing on the question, rather than granting petitioner release.

In United States *ex rel.* Taylor v. Reincke, 225 F. Supp. 985, 988 (D. Conn. 1964), the state alleged that petitioner had waived his right to counsel on appeal, citing the statement in the state court's memorandum that petitioner's lawyer went to him in prison "for the specific purpose of telling the petitioner that he was going to withdraw the appeal . . . . The petitioner consented to his withdrawal . . . ." The court properly ordered a hearing to find the facts and resolve the waiver claim.

149. See United States *ex rel.* Brown v. Fay, 242 F. Supp. 273 (S.D.N.Y. 1965) (Weinfeld, J.) (hearing ordered on issue of waiver where rubber stamped entry on judgment roll indicating acquiescence to proceed without counsel was incomplete, and where guilty plea was advanced). *Compare* Jones v. Montana, 235 F. Supp. 673, 678 (D. Mont. 1964) (plea held involuntary without hearing despite affidavit of trial judge, since affidavit contradicted by record).

required—" must reveal "his affirmative acquiescence."[150] Thus even where a hearing is required, no special burden rests upon the petitioner to disprove waiver, unless the state somehow proves counsel was offered and declined.[151]

Unfortunately, most cases presenting the issue whether a factual dispute can be resolved by reconstruction from an assumed standard probably fit within none of the three reasonably manageable categories discussed above. Even within this final group of cases, however, the nature of the standard which the federal court must assume was applied is highly significant. There are cases where, although it may have been possible to reconstruct the facts had the state court made clear its awareness of the correct standard (unlike *Townsend* where this was impossible), reconstruction is impossibe because the standard or its application are sufficiently difficult to preclude a safe assumption that the standard was applied. An example should illustrate the point. When the petitioner's claims that he was of unsound mind and unassisted by counsel were dismissed in *Massey v. Moore* without hearing as "without merit," the Court felt itself left "in doubt." The ruling, wrote the Court, "may mean that the evidence to support the finding [expressly made in an earlier habeas proceeding] that petitioner was competent to stand trial with a lawyer was also sufficient to sustain the conclusion that he was competent to stand trial without a lawyer. It may mean that in the view of the District Court the two issues are the same . . . [But] one might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."[152] Had the district judge in this case made clear he was applying the correct standard, it would have been proper to imply resolutions of disputed fact issues. But the question was subtle, and it was therefore too likely that the district court overlooked the issue. That the standard is difficult should not normally be enough to create doubt.[153] But when there is any reason to suspect error, such as the fact

150. Carnley v. Cochran, 369 U.S. 506, 516-17 (1962). Is it possible to say petitioner affirmatively acquiesced where acquiescence came after he had already pleaded guilty to the trial judge, Sandoval v. Tinsley, 338 F.2d 48 (10th Cir. 1964), or earlier to a justice of the peace, Lovato v. Cox, 344 F.2d 916 (10th Cir. 1965)?

151. See United States *ex rel.* Wagner v. Myers, 234 F. Supp. 239 (E.D. Pa. 1964), where the petitioner's allegation that he was without counsel at his sentencing was accorded controlling weight after a hearing, where the record failed to disprove his allegation, and the state was unable in any other way to controvert his testimony.

152. 348 U.S. 105, 108 (1954).

153. See Lovedahl v. North Carolina, 242 F. Supp. 938, 946-47 (E.D.N.C. 1965) (assuming proper test of insanity applied). *Compare* Near v. Cunningham, 313 F.2d 929, 932-34 (4th Cir. 1963) (refused to assume application of correct standard governing prejudice due to out-of-court statements made to jurors).

that the standard involved is especially complicated,[154] or was not reasonably well settled at the time the state court acted,[155] it is improper to assume it was applied. There is no reason to become too involved in solving this question. Any significant possibility of error should preclude reconstruction.

In most cases, district courts will have more than the nature of the standard involved to assist them in deciding whether to assume the correct standard was applied. There will often be some statement of a standard at some stage in the state court proceedings. The probative value of these statements will depend upon a number of things, including the clarity of the statement, the court which made the statement, and the context in which it was made. If the statement is ambiguous to the point that it can be read to support either the proposition that the correct standard was applied or that it was not, the statement has little if any value.[156] If the statement has any value on its face, its ultimate significance will depend upon who made it. Statements made by the judge who decided the federal issue are undoubtedly most probative, other considerations aside, of what he had in mind. Statements by other state judges indicating an awareness or unawareness of the correct standard might be probative, since such statements will sometimes reflect a general misapprehension by that state's judges of the correct standard, or at least might indicate that the standard is sufficiently novel or difficult so that its application should not readily be assumed.[157] These possibilities become even stronger when a statement indicating error was made by a state's highest court.[158] Finally, the

154. See Cordova v. Cox, 351 F.2d 269 (10th Cir. 1965) (voluntariness of guilty plea).

155. See Near v. Cunningham, 313 F.2d 929, 931 (4th Cir. 1963) (whether meeting in chambers where it is agreed that the jury need not be sequestered is part of trial, requiring defendant's presence); United States *ex rel.* Sileo v. Martin, 269 F.2d 586, 590-91 (2d Cir. 1959) (scope of right to counsel at time of plea unclear in 1956).

156. A fine example is the statement made by the state trial judge in Coggins v. O'Brien, 188 F.2d 130 (1st Cir. 1951). Petitioner claimed the prosecution had knowingly used perjured testimony. The state court dismissed the claim without findings or opinion. The issue was whether it could be assumed that the state judge had applied the proper standard—that any knowing use of perjured testimony results in a violation of due process—or had denied relief on the ground that, even if perjured testimony had knowingly been used, the testimony had not been a material factor in securing the conviction. Chief Judge Magruder (concurring) found significant the state judge's statement that "if I found as a fact he was convicted upon perjured testimony, I would set aside the verdict without the slightest hesitation." Judge Ford, in dissent, emphasized "convicted," thereby pointing up the obvious ambiguity.

157. *But see* Cunningham v. Heinze, 352 F.2d 1, 4 n.1 (9th Cir. 1965): "We are concerned with the fact finding process of the trial judge, not with the reasoning of the appellate tribunal." Are the two concerns necessarily inconsistent?

158. See Paige v. Potts, 354 F.2d 212 (5th Cir. 1965) (doubt over whether correct probable cause standard applied). Both the majority and concurring opinions in *Town-*

significance of a statement will depend upon the context in which it was made. Generally, a statement of a standard which would be erroneous if used in deciding a federal claim made in a context where that standard is proper should prove nothing. Thus if a trial judge properly instructs a jury on the credibility of a confession, this should not have any bearing on whether that judge, or any other judge,[159] applied the same reliability standard instead of the proper voluntariness standard in ruling on the confession's admissibility.[160] If the later statement includes indications that the state judge was aware of the proper standard, it should be assumed that he applied it in passing on admissibility.[161] On the other hand, the later statement may indicate an erroneous constitutional standard was applied in passing on the federal issue.[162] If the federal court actually finds an erroneous constitutional standard was applied, the prisoner must be ordered released subject to appropriate corrective action in the state courts; if only a doubt is created the federal court must find the facts under the proper standard and resolve the claim.

Other indications of whether a correct or incorrect standard was applied, while generally not as probative as statements, might often be useful. Any number and variety of indicia may reveal themselves. The state court opinion may indicate that the federal issue was avoided,[163] or disposed of as a matter of discretion where discretion has no role.[164] The state involved may have a history of error in handling the question

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send treated the Illinois Supreme Court's articulation of a "coherency" standard as significant in determining whether there was doubt that the trial court applied the "voluntariness" standard. 372 U.S. at 320, 323.

159. See United States *ex rel.* Witherspoon v. Ogilvie, 337 F.2d 427 (7th Cir. 1964), where the judge who had ruled on the motion to suppress had died and been replaced by a new judge who made the reliability instruction.

160. *Id.* at 430.

161. This was Justice Stewart's position in Townsend v. Sain, 372 U.S. 293, 329-31 (1963) (dissenting opinion).

162. In Rogers v. Richmond, 365 U.S. 534, 542 (1961), Justice Frankfurter treated as significant in determining whether an erroneous standard had been applied the state trial court's instruction to the jury, which contained statements of the reliability standard. In *Rogers*, however, the state judge purported to be instructing the jury in accordance with the voluntariness standard, rather than the reliability standard. Moreover, the judge had articulated the same erroneous principle in one of his findings, *id.* at 541, the state supreme court had done so on appeal, *id.* at 542-43, and Justice Frankfurter found other Connecticut cases indicating that the state's courts had generally taken probable truth or falsity into account in judging the admissibility of confessions, *id.* at 543 n.1.

163. See Townsend v. Bomar, 331 F.2d 19, 21 (6th Cir. 1964), where a federal judge appeared to avoid the issue of whether defendants were given sufficient time to prepare, stating only that defendants had competent counsel and were accorded a "fair trial."

164. See Coggins v. O'Brien, 188 F.2d 130, 148-49 (1st Cir. 1951) (dissenting opinion).

presented,[165] or may have followed a practice generally which, had it been followed in the case under consideration, would have raised at least a doubt of error.[166] Some federal judges have centered on what the state argued as a clue to what the state court decided.[167] Others have commented on the caliber of the state judge involved.[168] All these factors, and countless others, may legitimately create or eliminate doubt as to whether the proper standard was applied.

One final issue. The question will probably arise in future cases as to whether it is proper, where reconstruction of the facts is otherwise impossible under *Townsend*, for the federal court to examine the evidence on both sides of the factual dispute to determine in which way the state judge resolved it. It may reasonably be argued that the evidence should be examined to determine whether there is any significant likelihood that the state judge would have found the facts for the petitioner if he had applied the correct standard of law.[169] If doubt that the correct standard was applied exists,[170] it seems questionable, however, for a federal judge to attempt to speculate on the basis of the cold record as to what the state judge concluded. It is impossible to estimate the effect of having an erroneous standard in mind, even for the trial judge himself, let alone for a reviewing court. *Townsend* at least provides some objective guide to the ascertainment of error by directing the attention of habeas courts principally to indicia of deficient hearings rather than to the correctness of particular findings. The latter approach is far too speculative and would tend to undermine state court fact finding. This does not mean, of course, that the state court's comments upon the evidence should not be considered in determining whether an express finding of fact was made. It is the process of evidence evaluation which must be avoided.

165. United States *ex rel.* Smith v. Jackson, 234 F.2d 742, 745 (2d Cir. 1956). *Compare* Paige v. Potts, 354 F.2d 212 (5th Cir. 1964) (hearing ordered where state decision had sometimes expressed correct and sometimes incorrect standard).

166. Near v. Cunningham, 313 F.2d 929, 931-32 (4th Cir. 1963).

167. Cunningham v. Heinze, 352 F.2d 1, 4 (9th Cir. 1965).

168. *Id.* at 7 (dissenting opinion) ("This was an experienced trial judge, a former professor of constitutional law."); Coggins v. O'Brien, 188 F.2d 130, 142 (1st Cir. 1951) (concurring opinion of Magruder, C.J.); *cf.* 5 MOORE, *op. cit. supra* note 125, ¶ 52.03[1], at 2616.

169. Chief Judge Magruder did precisely this in Coggins v. O'Brien, *supra* note 168, reasoning that "the only foundation for Coggins' claim" was undermined because it was "most likely" that the state judge disbelieved Coggins' witness.

170. It cannot persuasively be argued that the likelihood of a finding against the petitioner should be ascertained because it will throw light on whether the correct standard was applied. All that this process could possibly show is that it made no difference whether or not the correct standard was applied.

In conclusion it should be noted that state courts wishing to avoid federal fact-finding hearings on this ground may do so simply by articulating the relevant standard of law and making express findings of fact when they decide federal claims involving personal liberty. Most courts do as much in resolving run-of-the-mill civil litigation.

C. *Determinations Not Fairly Supported by the Record*

Once the district court concludes that the state court has made findings, either express or implied, it must still grant a hearing if factual determinations are not "fairly supported by the record as a whole . . . ."[171] This significant command in *Townsend* that federal courts engage in the delicate task of evaluating the evidence upon which the state court relied is left almost entirely unexplained, and the explanation provided raises more questions than it settles. Since the significance of the state court fact-finding role depends directly upon the scope of review over factual determinations which federal courts exercise, a more complete analysis of the problem seems essential.

The *Townsend* Court's treatment of the problem can thus be accurately summarized: The duty of the federal habeas court "is no less exacting" than that of the Supreme Court on direct review, which is carefully to scrutinize the state court record and to reject all determinations not "fairly supported" by the record.[172] The careful scrutiny referred to by the Court is apparently the established practice of reviewing mixed questions of law and fact. The two cases cited by the Court are instances of this practice, which is a review of the application of a legal standard rather than a review of the sufficiency of the evidence.[173] As to what it meant by "fairly supported," the Court cited cases which stand for the proposition that findings supported by no probative evidence cannot be accepted as the basis for constitutional determinations.[174] These cases do not establish a scope of review for judging findings based on conflicting evidence; rather they deal with the legal question whether there is such an absence of evidence that due process is violated.[175]

It is an understatement to say that the habeas court's duty "is no less exacting" than the review exercised by the Court on direct review over

171. 372 U.S. at 313.

172. *Id.* at 316.

173. See Blackburn v. Alabama, 361 U.S. 199, 208-09 (1960); Moore v. Michigan, 355 U.S. 155 (1957). The Court in *Blackburn* found the evidence on one side of the issue "in such hopeless internal conflict that it raises no genuine issue of fact."

174. Blackburn v. Alabama, *supra* note 173; Fiske v. Kansas, 274 U.S. 380 (1927). Other leading cases are Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960).

175. See Akins v. Texas, 325 U.S. 398, 402 (1945).

mixed questions and over the issue whether there is *any* evidence supporting a state's finding of fact. Both of these issues present questions of law, and if the state court errs in either respect it has committed a violation of due process. If the role of the habeas court were limited to the functions of the Court on direct review, there would never be any need for a fact-finding hearing on this ground. So if the habeas fact-finding hearing is to perform any function in the review of the sufficiency of evidence, the habeas court must have a greater obligation than the Supreme Court on direct review.[176] And it does. The habeas court is required, for example, to review the record "as a whole," *i.e.*, both the disputed and the undisputed portions,[177] rather than only the undisputed portions of the record, which is the practice on direct review. This difference is obviously based on the power of the district court to grant hearings to resolve disputes which the state courts have failed to resolve.[178] The "fairly supported" formulation, therefore, must mean more than merely a review to determine whether *any* evidence supports a finding. But how much more? There are several familiar standards of review which could be adopted; which one is appropriate will depend upon the purposes of each standard, and the characteristics of habeas review which operate in favor of one standard or the other.

Since it is the general practice of state and federal courts, sometimes constitutionally required, to treat constitutional issues separately from the issue of guilt, federal district courts in habeas proceedings almost invariably deal with findings of state judges rather than of state juries.[179] If the federal court is ever properly presented with jury findings, inferred from a general verdict,[180] the findings should be treated the same as judge-made findings. *Townsend* draws no distinction between

176. For the purpose of this analysis, Norris v. Alabama, 294 U.S. 587 (1935), is treated as an anomaly. In *Norris* the Court actually engaged in evidence evaluation, and rejected the testimony of state officials as a basis for a finding of fact that Negroes had not been intentionally excluded from juries, because of the strong case made for discrimination by the uncontroverted facts.

177. See Townsend v. Sain, 372 U.S. 293, 313 (1963).

178. On the importance of reviewing the evidence on the *whole* record, see Jaffe, *Administrative Procedure Re-examined: The Benjamin Report*, 56 HARV. L. REV. 704, 733 (1943).

179. *E.g.*, N.C. GEN. STAT. § 15-221 (1953); People v. Adamson, 34 Cal. 2d 320, 210 P.2d 13 (1949); People v. Langan, 303 N.Y. 474, 481, 104 N.E.2d 861 (1952). *But see, e.g.*, Adler v. State, 35 Ark. 517 (1880).

180. For example, the states may properly use a special jury to pass on the issue of sanity. If a correct standard is given to the jury, findings of fact may arguably be found implied in the general conclusion. See 38 ILL. REV. STAT. §§ 592-93 (1963). It may be, however, that federal claims should not be resolved on the basis of findings inferred from a jury's general conclusion. The bill recommended by the Judicial Conference Committee on Habeas Corpus would require some written indication of the jury's determination.

jury and judge-made findings, and it seems fair to afford all petitioners the same scope of review although one state may give a particular issue to a jury while another gives the same issue to a judge.

The question remains, however, whether this uniform scope of review for judge and jury findings should be the narrower review normally applied to jury verdicts or the broader review generally associated with judge-made findings. Nothing in principle would appear to preclude application of the scope of review of jury verdicts to cases involving judge-made findings, but that scope of review seems too limited for habeas corpus. The jury is normally deferred to because of its role as representative of the community, a reason which is inapplicable when a judge reviews another judge.[181] Moreover, the standard of review for jury verdicts is designed for appellate courts, which do not possess the unique power of federal district courts to hear evidence and evaluate demeanor. Thus all findings should more properly be reviewed in habeas corpus by a standard normally applied to judge-made findings. The sixth and seventh amendments do not preclude this approach; the Constitution guarantees the sanctity of jury verdicts, but it does not similarly protect a jury's findings when a state voluntarily decides to give its juries the task of resolving some federal question.[182]

There are at least three reasonably distinguishable scopes of review which could be applied, other than the very limited review generally applied to jury verdicts: the substantial evidence test, the clearly erroneous rule, or some scope of review even broader than the clearly erroneous rule. The substantial evidence rule was adopted in lieu of the clearly erroneous test in order to narrow the review of findings by administrative agencies.[183] While the distinction is difficult to articulate, there does seem to be a material difference between "clearly erroneous" and "substantial evidence." In reviewing administrative findings courts presume the findings are correct because they are the product of fact

181. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 81-82 (1944).

182. Of course, before engaging in the process of determining whether to grant a hearing because a jury finding is not clear or not supported, the federal court should consider whether the interests of having the state courts decide federal issues in the first instance and of affording petitioners the full possibility of greater rights under state law than they would be entitled to under federal law do not make the case appropriate for a constitutional rule rather than a federal hearing.

183. Its use often is implied from statutes making administrative findings "final," but "even in the absence of special statutory provisions . . . , the very creation of a non-judicial agency to decide a particular type of case manifests a legislative intention that the administrative judgment be adopted unless contrary to law." Stern, *supra* note 181, at 83.

finders possessing special expertise, and reject such findings only when convinced they are unfair, rather than incorrect—to use Professor Jaffe's phrase, when the findings appear to be "the product of a preconception."[184] On the other hand, "the trial judge's finding bears no similar stamp of expertness relative to the reviewing judge, and may be thought of as clearly erroneous though it does not offend in the sense of being wilful."[185]

Substantial interests militate for a narrow scope of review of state fact finding. The fact-finding role of the state courts in constitutional adjudication is the last area in which the judgment of state judges is generally accepted. Not only do considerations of federalism operate against any dilution of this role, but other, more concrete considerations are involved. Finding the facts years after the event is even more difficult than finding facts after normal delays in the judicial process. Even where all evidence has been preserved, there is a substantial interest in preserving resources by avoiding relitigation. Finally, the substantial evidence test would make the district court's role easier to handle. The federal court under this standard can avoid evidence evaluation almost entirely. Rather than exercising its own judgment on the correctness of the state court's finding, the district court would limit itself to determining, in effect, whether the state court fairly exercised its judgment.

For a number of reasons, however, the substantial evidence test seems inappropriate. State judges are certainly no more expert at deciding issues of fact than federal district judges. While state judges have the advantage of hearing the evidence at a much earlier point in time, this superiority of position could be accorded adequate recognition by the district court in exercising its judgment over whether a hearing would serve any useful purpose and in allocating the burden of proof at hearings. Moreover, the issues dealt with in federal habeas corpus all involve constitutional rights. Always at stake is a man's liberty. This is not so in administrative proceedings. Finally, the interest in preserving the fact-finding role of the state courts would not be undermined by use of the clearly erroneous standard. That standard is used on appeal in all federal non-jury civil cases,[186] and in most non-jury criminal cases where a constitutional issue has been resolved.[187] The test is apparently narrow

184. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233, 1245 (1951).

185. *Id.* at 1245-46; Stern, *supra* note 181, at 82.

186. FED. R. CIV. P. 52(a).

187. See discussion and authorities cited in Jackson v. United States, 353 F.2d 862, 865-67 (D.C. Cir. 1965).

enough to accord trial court findings in these cases sufficient significance. The role of the federal habeas court would be too limited if it had to accept a finding underlying resolution of a federal right although "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed."[188]

An argument can be made, in fact, for a scope of review even broader than the clearly erroneous test. The habeas court, as we have seen, possesses the power to hear testimony and thereby to judge credibility. When time has not affected the evidence, therefore, the habeas court is in just as good a position as the state court to make findings. It is therefore arguable that federal judges, who are generally of high caliber and especially sensitive to arguments concerning federal rights,[189] should exercise their judgment to the full in resolving factual disputes. This is especially so since the disposition in habeas is strikingly different from that on appeal. On appeal, when a finding is rejected, the conviction usually falls, and a new trial is generally required. On habeas, rejection of a finding leads only to a hearing, after which the prisoner will be afforded relief only if the federal court concludes that his federal rights were violated.

The effect of these arguments would be to compel the complete relitigation of large numbers of state court adjudications of federal rights, would leave state court judgments with little if any significance, and might cause states to give up post-conviction litigation altogether. The clearly erroneous test recognizes the essentially speculative process that reviewing facts really is, by allowing rejection of a finding only when error seems clear. The power habeas courts have to hear testimony and judge demeanor is useful, but seldom enables the federal court to recreate the evidence which was before the state court. Time takes its toll, and probably in enough cases so that this consideration should be weighed in the adoption of a scope of review, rather than on a case-by-case basis. Moreover, the clearly erroneous standard is not based solely on a trial court's superior opportunity to weigh demeanor testimony. The standard applies whether or not there were conflicts in testimony, and simply becomes narrower when credibility is involved.[190] That a

188. This is the classic formulation of the clearly erroneous test, found in United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Use of the clearly erroneous standard by habeas courts was proposed in Note, 76 HARV. L. REV. 1253, 1262 (1963).

189. See note 14 *supra*.

190. Judge Frank's position in Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950), that appellate courts may ignore trial court findings of fact to the extent they are based upon written evidence, has been widely rejected. See discussion in 2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1132 (Wright ed. 1961).

hearing rather than outright reversal is the procedural consequence of the rejection of a finding of fact in a habeas corpus proceeding does not lessen the expenditure of resources. Once a hearing is granted, the whole federal issue may have to be tried anew. It seems likely, in fact, that the expenditure of resources by holding hearings on this ground is less justifiable than on any other, since the issue of sufficiency of the evidence will already have been canvassed by state appellate courts. Finally, if federal habeas courts review state findings of fact with a standard broader than "clearly erroneous," it will be necessary for state appellate courts who wish to avoid federal fact-finding hearings on this ground to apply a similarly broad standard in reviewing state trial court findings. This, in effect, would require more from such state appellate courts than is required of federal appellate courts, since the latter generally apply the clearly erroneous test in reviewing federal trial court findings.

Application of the clearly erroneous standard entails evidence evaluation. A number of generalizations and some lesser used techniques are available to assist in this task. Some are useful. Others are of questionable value. But the generalizations give nothing more than guidance, and all the valid insights into evidence evaluation fail to make the process even vaguely scientific.

One universally accepted generalization is that reviewing courts defer to findings based upon credibility. But we know that demeanor evidence may well deceive as often as it aids the trial judge.[191] "[T]he will to make a finding regardless of the evidence, or from evidence which permits nothing better than a guess, may be as much manifested by rulings on credibility as on any other phase of the case."[192] The plain fact is that reviewing courts do test the credibility of witnesses, by reference to such factors as corroboration, interest in the outcome, reputation, degree of recall, internal consistency of the testimony, the likelihood of the story in light of common experience and knowledge, and whether the witness behaved in a manner strongly at variance with the way in which we would expect a similarly situated person to behave.[193] Neither is the generalization that documentary evidence is somehow

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It should be noted, however, that the standard does not apply in reviewing questions of law. There is still some confusion on this in the federal courts. See, *e.g.*, Stack v. Bomar, 354 F.2d 200 (6th Cir. 1965); Shawan v. Cox, 350 F.2d 909, 912 (10th Cir. 1965).

191. See WILLIAMS, THE PROOF OF GUILT 91-92 (3d ed. 1963).

192. Jaffe, *supra* note 184, at 1244-45.

193. See the discussion of these factors and the doctrine of inherent incredibility in Jackson v. United States, 353 F.2d 862, 867-68 (D.C. Cir. 1965); United States v. Soblen, 203 F. Supp. 542, 548 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

more valuable than testimony very helpful. How is a usable comparison to be made when the value of the documentary evidence and of the conflicting testimony will vary from case to case?[194] In fact, the distinction made between testing findings of "basic fact," and "inferences" from facts or documents, is itself illusory. "[A] fact finding involves a continuous chain of inference so that the finding of basic facts itself is the drawing of an inference."[195]

This is not to say that courts should throw up their hands in despair. The generalizations above are often helpful. And while evidence evaluation may never be a science, we can still learn a great deal about the value of various types of evidence.[196] In fact, there is a great need, *because* of the amorphous nature of fact-finding review, for courts to isolate and weigh significant errors and circumstances. Thus, where evidence is uncontroverted its significance is increased and it deserves consideration;[197] where a witness was inaccurate or lied in one instance, his testimony as to other issues should be more closely scrutinized;[198] where the trial court disregarded significant evidence,[199] failed to focus on the precise issue in the case,[200] uncritically accepted

194. *Compare, e.g.*, the following cases with each other: United States v. United States Gypsum Co., 333 U.S. 364, 395-96 (1948) (contemporaneous documents in direct conflict with oral evidence); Carroll v. Boles, 347 F.2d 96, 98 (4th Cir. 1965) (statement of court proceedings apparently intended to be complete, fact alleged to have occurred absent from statement); Luton v. Texas, 310 F.2d 445, 446 (5th Cir. 1962), *cert. denied*, 372 U.S. 923 (1963) (documentary testimony equivocal); Jones v. Montana, 235 F. Supp. 673, 677-78 (D. Mont. 1964) (affidavit conflicts with the trial court record).

195. Jaffe, *supra* note 184, at 1242; see Cook, *"Facts" and "Statements of Fact,"* 4 U. CHI. L. REV. 233, 239 (1937).

196. See generally FRANK, COURTS ON TRIAL 14-36 (1963); STEPHEN, INTRODUCTION TO THE INDIAN EVIDENCE ACT (1872), reprinted in part in Cahn, *Fact-Skepticism: An Unexpected Chapter*, 38 N.Y.U.L. REV. 1025, 1035 (1963); WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES (1965); WILLIAMS, *op. cit. supra* note 191, at 86, 138; Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory*, 108 U. PA. L. REV. 59 (1959). For example, the value of expert testimony could be appraised much more systematically than now. See generally Frank, *The Lawyer's Role in Modern Society*, 4 J. PUB. L. 8, 20-21 (1955); Beuscher, *The Use of Experts by the Courts*, 54 HARV. L. REV. 1105 (1941). In Snider v. Peyton, 356 F.2d 626, 628 (4th Cir. 1966), a hearing was ordered where two experts who had found petitioner sane had failed to reveal the basis for their conclusion. Another expert, who had seen petitioner often, had concluded he was insane.

197. *Compare* Cooper v. Denno, 129 F. Supp. 123 (S.D.N.Y.), *aff'd*, 221 F.2d 626 (2d Cir.), *cert. denied*, 349 U.S. 968 (1955), where the court dealt with a significant item of uncontroverted evidence, *with* Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964), where insufficient consideration was given by the majority to some uncontroverted documentary evidence.

198. *E.g.*, McClure v. Boles, 233 F. Supp. 928, 930 (N.D.W. Va. 1964).

199. See Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964).

200. See Chessman v. Teets, 354 U.S. 156, 163 (1957); Pate v. Holman, 341 F.2d 764, 772 (5th Cir. 1965).

the prosecutor's proposed findings of fact,[201] or otherwise cast doubt upon the usefulness of his findings,[202] the reviewing court should be on its guard. The task is unquestionably difficult, and there is a danger that courts will be unduly mechanical if they look for specific indicia of error. But by concentrating on searching for and analyzing specific strengths or failings in the state court's process of evidence evaluation, the federal court's task at least becomes manageable.[203]

If the analysis above is correct, state courts wishing to avoid federal fact-finding hearings on this ground should review the findings of state trial courts by a standard no narrower than "clearly erroneous." It seems doubtful that any broader standard will be applied by the federal courts. Of course, "clearly erroneous" is no sure guide, and therefore its application will be no real assurance that federal courts will accept findings in particular cases. Realistically speaking, however, the federal courts are not eager to reject state court findings, and they seldom will do so on the ground of insufficiency of the evidence when a state reviewing court has applied the correct scope of review, and especially when it has done so in an opinion analyzing any difficulties which may be involved.

D. *Defects in the Fact-Finding Process*

Even if the district court concludes that the facts underlying a federal claim were resolved and are fairly supported, a hearing must be held when any defect in the state fact-finding process is "grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend."[204] The Court in *Townsend* indicates two types of failings: (1) where "the state trial judge has made serious procedural errors"; and (2) when the state "fact-finding procedure . . . was not adequate for reaching reasonably correct results."[205] It can readily be seen how failings of this sort will often violate the Constitution in themselves, and provide the basis for an order directing the applicant's release, subject to

201. See Stern, *supra* note 181, at 83 n.57.

202. Reliance (on "non-negating" testimony) as in United States *ex rel.* Darcy v. Handy, 224 F.2d 504 (3d Cir. 1955), *aff'd*, 351 U.S. 454 (1956), is always a questionable practice. Testimony such as "I don't remember" seldom provides much support for a finding. See discussion *id.* at 514-15 (dissenting opinion). Another example is United States *ex rel.* Conroy v. Pate, 240 F. Supp. 237 (N.D. Ill. 1965).

203. Countless other factors relevant in reviewing sufficiency of the evidence have been isolated. See, *e.g.*, Professor Moore's contention that the caliber of the trial judge should be considered. 5 MOORE, FEDERAL PRACTICE ¶ 52.03[1], at 2616 (2d ed. 1964).

204. 372 U.S. at 316.

205. *Ibid.*

state corrective action. There are times, however, when a declaration of constitutional invalidity may be inappropriate to correct the defect involved; it is at these times that a fact-finding hearing must be granted under this standard.

1. *Serious Procedural Error.* As an example of a serious procedural error, the *Townsend* opinion cites incorrect allocation by a state court of the burden of proof.[206] There are two situations in which this type of error may occur. The state may have improperly placed upon the defendant the burden of proof on a specific issue relating to a federal claim, or the state trier of fact may have applied a burden for proof of facts generally which is different from the burden applied in federal habeas corpus proceedings. An example of the first situation is where the defendant was improperly required by the state court to prove he did *not* consent to an otherwise illegal search and seizure; the burden on this issue should be placed upon the state to prove the defendant did consent.[207] The proper corrective action on habeas where it is clear that the burden of proof was improperly allocated to the defendant on a constitutional issue is to order his release, subject to state corrective action. The unfairness caused by this defect, in terms of its effect upon vindication of the basic proposition involved, is hardly less great than that caused by application of an erroneous constitutional standard. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome."[208] The burden of proof, in fact, is actually a part of the relevant standard of law. A constitutional declaration requiring states to correct this defect and to avoid it in the future therefore seems the proper corrective device.[209] Just as in cases where it is unclear whether the correct or incorrect constitutional standard was applied, however, a constitutional rule would be inappropriate where it is unclear whether the state improperly applied a burden of proof in adjudicating some federal claim; the proper corrective action

206. *Ibid.*

207. *E.g.*, Simmons v. Bomar, 349 F.2d 365, 366 (6th Cir. 1965); Montana v. Tomich, 332 F.2d 987, 989 (9th Cir. 1964).

208. Speiser v. Randall, 357 U.S. 513, 525 (1958) (improper placing of burden of proof and persuasion affecting free speech violates due process).

209. See Harris v. Boles, 349 F.2d 607, 609-10 (4th Cir. 1965) (release ordered where burden of proof on waiver of counsel improperly allocated). Improper allocation of the burden of proof on waiver will be a ground for release only where, as a part of the right involved, definite rules have been established which must be complied with for an effective waiver. Carnley v. Cochran, 369 U.S. 506 (1962), did this with respect to the right to counsel. See note 257, *infra*. If the state court places an unnecessary burden upon the state, neither party has any claim to a hearing. Noble v. Sigler, 351 F.2d 673 (8th Cir. 1965) (competency).

in this type of case is to find the facts at a hearing in which the burden of proof is properly allocated.[210]

The second type of situation involving improper allocations of the burden of proof is where the state imposes upon defendants in hearings on federal claims a burden with respect to the proof of historical facts in general which differs from that applied in federal habeas corpus hearings. It seems possible and appropriate to make this defect one of constitutional dimension where the hearing is constitutionally required,[211] in order to make sure the required hearing is meaningful. But a state may apply a burden of proof which differs from that applied in habeas corpus at a proceeding which itself is not constitutionally required. Thus a state may impose upon all applicants at its post-conviction hearings a requirement that their factual allegations be proved by "clear and convincing evidence"; the burden imposed in federal habeas corpus is that allegations be proved by a "preponderance of evidence."[212] There is at present no constitutional right to a post-conviction hearing on federal claims. Nor is uniform application of a burden of proof different from that applied in federal courts a violation of equal protection. Unless states are required to provide adequate post-conviction hearings, therefore, this procedural "error" should result only in a federal fact-finding hearing.[213]

2. *Inadequate Fact-Finding Procedures.* Fact-finding procedures which should most often result in federal hearings are those which affect development of the relevant facts in particular cases, and concerning which it would be difficult to formulate general rules. A state

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210. Thus in Hubbard v. Tinsley, 336 F.2d 854, 855 (10th Cir. 1964), the court ordered a hearing because it felt the state court had indicated an erroneous allocation of the burden of proof by its statement in denying defendant's motion to suppress "that the evidence at this hearing is insufficient to sustain the motion . . . ."

211. *E.g.*, Pate v. Robinson, 383 U.S. 375 (1966) (competency); Jackson v. Denno, 378 U.S. 368 (1964) (voluntariness of confession).

212. Walker v. Johnston, 312 U.S. 275, 286 (1941).

213. See United States *ex rel.* Brennan v. Fay, 353 F.2d 56 (2d Cir. 1965) (concluding that the relevant state court was applying the "preponderance" standard). A possible rationale for a contitutional rule even where there is no constitutional right to a post-conviction review is the reasoning in United States *ex rel.* Smith v. Baldi, 192 F.2d 540, 544 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953), that persons are entitled to "procedural" due process with respect to state-created "substantive" rights. Even if it is assumed that the right to post-conviction review is "substantive," the burden of proof applied by the state should have to be demonstrably narrower than that applied in the federal courts to justify constitutional proscription. The Supreme Court has at times exercised a fairly broad review over the adequacy of post-conviction procedures voluntarily provided by the state courts. See, *e.g.*, Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956).

court's refusal to hear certain evidence,[214] or to examine a certain part of the record,[215] or otherwise to assist the defendant in obtaining evidence,[216] may or may not have sufficient general significance to warrant constitutional correction. The federal courts can avoid ordering persons released on the ground that certain evidence pertaining to a federal claim was not heard because of some defective fact-finding procedure, and at the same time avoid injustice in the particular case, by granting a hearing to determine whether the undeveloped evidence proves some underlying claim. Once again, the extent to which inadequate fact-finding procedures could be declared constitutionally defective will depend at least in part upon whether the state court proceeding at which the defect occurred was itself constitutionally required. For example, a defect at a constitutionally required competency hearing might warrant constitutional correction, while the same defect at a post-conviction hearing, presently not constitutionally required, might properly be corrected through federal fact-finding.

State courts wishing to avoid federal hearings on the basis of this *Townsend* standard should make clear they have allocated correctly the burden of proof on all federal claims. They should impose upon defendants at post-conviction proceedings a burden of proving the facts underlying federal claims no greater than the "preponderance of evidence" standard applied at federal habeas corpus hearings. Finally, they should strive to avoid practices and procedures which tend to prevent full and fair development of the evidence underlying federal claims. Few cases have been decided on the basis of this standard. Further litigation should reveal more clearly to state and federal courts the types of procedures used in deciding federal claims which, although constitutionally valid, are so unreliable that their use requires federal hearings.

E. *Newly Discovered Evidence*

Townsend requires a hearing when evidence relating to a constitutional claim is alleged "which could not reasonably have been presented to the state trier of facts . . . ." The existence of newly discovered evidence relating to the petitioner's guilt is, however, not a ground for

214. See Chavez v. Dickson, 280 F.2d 727, 737 (9th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961) (court refused to hear tapes and compare them with transcription).

215. McCloskey v. Boslow, 349 F.2d 119 (4th Cir. 1965).

216. *E.g.*, United States *ex rel.* Drew v. Myers, 327 F.2d 174 (3d Cir. 1964) (refused to grant continuance). *Compare* Pate v. Robinson, 34 U.S.L. WEEK 4185 (U.S. Mar. 7, 1966) (refused to assist in obtaining expert testimony by granting continuance).

relief, and a hearing need not be held where the allegation is frivolous or incredible.[217]

Probably all jurisdictions, state and federal, have provisions allowing courts to grant new trials on the basis of newly discovered evidence. Virtually all these provisions have time limitations,[218] but these limitations do not apply in collateral attacks in the federal courts when constitutional rights are at stake. The motion to vacate apparently is available to federal prisoners at any time after final judgment to hear newly discovered evidence relating to constitutional rights.[219] The remedy is not, however, a new trial. A hearing is held, and if a violation of the Constitution is discovered, the petitioner is ordered released, subject to corrective action. It is up to the prosecuting authorities whether or not a new trial will be held.

The type of case which will require a hearing under this standard is where, for example, an accomplice recants his testimony that he and his co-defendant were not mistreated before a confession was obtained,[220] or where evidence relating to defendant's competency to stand trial or to any other federal right could not have been discovered.[221] It is arguable that evidence relating to a defendant's sanity at the time of the offense should not be cognizable; such evidence goes to guilt, since an insane man cannot be guilty, and habeas is unavailable to hear new evidence relating to guilt.[222] But federal habeas corpus lies to hear alleged violations of constitutional rights, and if there is a right not to be convicted if insane at the time of the acts charged, habeas should be available. The same reasoning applies when the prosecution deliberately suppresses evidence or fails to meet its duty

217. 372 U.S. at 317.

218. See generally the collection of information on state practice in Note, 40 N.Y.U.L. REV. 154, 177-82 (1964). FED. R. CRIM. P. 33 provides: "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment . . . ." Of course, jurisdictions have different standards and requirements. For a broad view of what may be "newly discovered," see Delbridge v. United States, 262 F.2d 710 (D.C. Cir. 1958).

219. See Sanders v. United States, 373 U.S. 1 (1963). A possible exception to this is the availability of 28 U.S.C. § 2255 (1964) to hear allegations of illegal search and seizure. See generally Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964). *But see* United States v. Sutton, 321 F.2d 221 (4th Cir. 1963); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963).

220. United States *ex rel.* Goins v. Sigler, 224 F. Supp. 687 (E.D. La. 1963), *aff'd*, 340 F.2d 6 (5th Cir. 1964). The district court held a hearing and concluded that the accomplice's testimony was unacceptable.

221. See Hazel v. Warden, 206 F. Supp. 142, 146-47 (D. Md. 1962) (petitioner told to exhaust state remedies).

222. See Jones v. Montana, 231 F. Supp. 531, 533 (D. Mont. 1964).

to disclose evidence. Even though the evidence suppressed or withheld goes to guilt, habeas lies since due process is violated when evidence is suppressed or wrongfully withheld.[223]

States should generally have no difficulty avoiding federal hearings on this ground. The new evidence involved must always be sufficient, if assumed to be true or convincing, to prove a federal claim. This in principle satisfies the common requirements imposed by state courts that evidence relied on be material to the issues involved and of such a nature that its presentation would probably change the result at a new trial. Furthermore, any allegation of evidence which is frivolous, incredible, or which could reasonably have been presented need not be heard under this standard.[224] The only significant change necessary will be to make some state remedy available without regard to the amount of time passed since trial.

F. *Inadequate Development of the Facts Relating to Constitutional Claims*

The Court in *Townsend* departed, however, from "the conventional notion of the kind of newly discovered evidence which will permit the reopening of a judgment . . . ," finding it "in some respects too limited to provide complete guidance to the federal district judge on habeas."[225] Specifically, the Court held: "If, for any reason not attributable to the inexcusable neglect of petitioner, . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the

223. See discussion and authorities cited in Levin v. Katzenbach, No. 19,590, D.C. Cir., May 19, 1966.

The Court's statement that the existence of newly discovered evidence relating to guilt is not cognizable in habeas does not mean that the issue of guilt or innocence is itself irrelevant when federal rights are being litigated. If there is *no* probative evidence of guilt, a conviction cannot stand. *E.g.*, Garner v. Louisiana, 368 U.S. 157 (1961). If the burden of proof on the issue of guilt is improperly placed through presumptions or other rules, due process is violated. *E.g.*, Tot v. United States, 319 U.S. 463 (1943); see Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965). It is arguably a violation of due process if the state refuses to vacate a conviction entirely based upon evidence later shown to be untrue, though not necessarily suppressed or withheld. In effect, there is no probative evidence left supporting such convictions. A court recently handled this problem by allowing a defendant who had an ironclad alibi but who pleaded guilty to challenge his conviction on the basis of ineffective assistance of counsel. Quarles v. Balkcom, 354 F.2d 985 (5th Cir. 1966). This rule presumably will not protect defendants in cases where it can be shown that counsel did everything he could or perhaps even that counsel took reasonable steps to discover the true facts. What real relevance does this have if a man is incontestably innocent—that is, if there is no probative evidence of his guilt?

224. But petitions should be liberally construed. See Near v. Cunningham, 313 F.2d 929, 933-34 (4th Cir. 1963), a good case on this point, and the comments of Sobeloff, C.J., in United States v. Glass, 317 F.2d 200 (4th Cir. 1963).

225. 372 U.S. at 317.

state hearing, a federal hearing is compelled."[226] It clearly seems unnecessary to prove under this standard that the evidence involved could not reasonably have been presented at the original trial or hearing,[227] but there are important restrictions to relief. The evidence alleged must pertain to a constitutional claim, it must be "crucial" to the claim's adequate consideration, and the habeas applicant's failure to present the evidence must not be attributable to his "inexcusable neglect."

The first restriction follows from the scope of habeas corpus jurisdiction over state prisoners, which is limited to deprivations of their federal rights. The second restriction—whether the evidence alleged is "crucial" to the claim's adequate consideration—will depend upon the facts of each case. Of course, evidence is crucial if it would necessarily or even probably have required a different result on the federal issue if presented. Thus a coerced confession claim has probably been inadequately developed if the defendant failed to introduce evidence relating to the nature and effects of the drugs with which he was injected prior to the confession.[228] A claim of illegal search and seizure has been inadequately developed if it is unclear whether the consent of a third person, relied upon by the government to legalize the search, could bind defendant or was voluntarily given.[229] Many cases will present closer questions. In *Townsend* the Court held, in effect, that petitioner's claim of coerced confession was inadequately developed because the drug administered to defendant, the nature and effect of which *were* made clear, was never characterized as "truth serum." The Court found this characterization "crucially informative" under the circumstances, one "which would have enabled the judge and jury, mere laymen, intelligently to grasp the nature of the substance under inquiry. . . ."[230] Apparently the Court intends that district judges should treat as crucial any evidence which might reasonably have affected the outcome.

226. *Ibid.*

227. See Peters v. Dillon, 227 F. Supp. 487, 496 (D. Colo. 1964) (petitioner granted hearing on evidence relating to same search and seizure developed by others who properly raised claim), *aff'd after hearing*, 341 F.2d 337 (10th Cir. 1965). *But see* United States *ex rel.* McNerlin v. Denno, 324 F.2d 46 (2d Cir. 1963), *vacated on other grounds*, 378 U.S. 575 (1964).

228. See Jackson v. Denno, 309 F.2d 573 (2d Cir. 1962), *rev'd on other grounds*, 378 U.S. 368 (1964).

229. See Nelson v. California, 346 F.2d 73, 77 (9th Cir. 1965).

230. 372 U.S. at 321-22. *Compare* United States *ex rel.* Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963), where the court distinguished between the words "grabbed" and "struggle," and found that the failure of the prosecution's witness to use the latter word was a suppression of material evidence.

The final and most difficult limitation to apply is that the inadequate development must not be attributable to petitioner's "inexcusable neglect." The Court equates "inexcusable neglect" with the "deliberate by-passing of state procedures," as defined in *Fay v. Noia*. The controlling standard of waiver adopted in *Noia* is that articulated in *Johnson v. Zerbst*: "an intentional relinquishment or abandonment of a known right or privilege."[231] In *Noia* the Court expanded on the definition:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price v. Johnston*, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. *Carnley v. Cochran*, 369 U.S. 506, 513-517; *Moore v. Michigan*, 355 U.S. 155, 162-165. A choice made by counsel not participated in by the petitioner does not automatically bar relief.[232]

The *Noia* pronouncement in no way changes the test normally applied when it is alleged that a defendant affirmatively waived a right. What it does change is the validity of the practice of inferring waivers of federal rights from procedural defaults. Since state law governs the availability and methods of using state procedures, federal courts prior to *Noia* were allowing state rules to determine the federal question of waiver of federal rights by accepting state default rulings as conclusive. Thus, the federal courts would treat as waived a petitioner's claim of coerced confession, because the state had ruled he had waived that right by failing to appeal. Of course, what petitioner may well have waived under *Zerbst* was his right to an appeal. It took an extra leap to conclude he had also waived his right to claim he was convicted on the basis of a coerced confession.[233]

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231. 304 U.S. 458, 464 (1938).

232. 372 U.S. at 439. (Footnote omitted.)

233. See discussion in Note, 39 N.Y.U.L. REV. 78, 83-86 (1964).

The consequences of a failure to appeal will vary with the circumstances. State prisoners have no constitutional right to an appeal. The right of federal prisoners to an appeal is granted under the supervisory power. Coppedge v. United States, 369 U.S. 438 (1962). If

Noia makes the standard for waiver of federal rights one of federal law, and disallows the added inference in many cases. But it allows district courts to depart from the *Zerbst* formula to infer waivers of at least some federal rights from understanding and knowing surrenders of the privilege of asserting those rights in the state courts. The surrender may be "for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures . . . ."

This deliberate bypassing test is usually applied, as in *Noia*, to determine whether the habeas applicant's petition should be considered on the merits. If the prisoner's failure properly to present a claim in the state courts amounts to a deliberate by-passing of state procedures, *Noia* allows district judges to refuse to hear the claim. We are here concerned with the test only to the extent that a state prisoner who, although he has properly presented his claim in the state courts, alleges and seeks to present at a federal fact-finding hearing evidence, crucial to the adequate consideration of the federal claim, which he did not present in his state court proceedings in accordance with state procedures. Under *Townsend*, if the prisoner's failure properly to develop evidence crucial to consideration of his federal claim amounts to a deliberate bypassing of state procedures, district judges may refuse to hear the evidence. As there is at present no adequate discussion of deliberate bypassing, it is necessary here to discuss the test generally. This is difficult so soon after *Noia* and *Townsend*, but it should be helpful to identify some of the issues and to outline a process for determining whether the right to present a claim or to develop crucial evidence underlying a claim should be deemed forfeited because of a deliberate bypass.

A recent decision requires us to deal, at the outset, with the problem whether the federal courts can find a deliberate bypass of state procedures although the state court refused to impose a forfeiture of state remedies. The Ninth Circuit has held that a state's willingness to pass upon a claim does not prevent a federal court from finding a

a state prisoner proves a denial of equal protection or due process related to his appeal, however, the federal courts will grant relief. Whether state or federal prisoners are involved, it would appear that any constitutional claims are not automatically lost by a failure to appeal. See Nash v. United States, 342 F.2d 366, 368 (5th Cir. 1965) (dictum): "[W]e see no persuasive reason why collateral attack should be more liberal for the state prisoner than for the federal prisoner. On the contrary, considerations of federalism and the policy against incursion by the federal courts on the sanctity of the judgments of another judicial system are not present in the instant case." The failure to appeal must be a deliberate bypass in order for post-conviction courts permissibly to infer a waiver of the underlying constitutional rights. *E.g.*, Dodd v. United States, 321 F.2d 240, 246 (9th Cir. 1963). Even then, under *Noia*, the court has power to rule on the merits.

deliberate bypass, since "the deliberate bypassing or waiver rule is not procedural; it is based upon a conscious choice, by the petitioner's counsel, when confronted with a procedural rule, rather than upon the rule itself."[234] The court's position is that, since the waiver standard is federal, the state's decision does not bind federal courts whether that decision imposes or fails to impose a waiver. Logically, this reasoning is unassailable. And it may well be true that, where the habeas applicant actually waived some federal right under the *Johnson v. Zerbst* formula, federal courts should insist upon the waiver although the state court does not. But the deliberate bypass rule allows district courts to impose waivers of federal rights by inference from procedural defaults only in order to vindicate substantial interests preserved by state procedural rules imposing forfeitures of remedies. It makes no sense in light of this purpose to insist upon the imposition of a forfeiture because of noncompliance with a state rule when the state itself demonstrates that strict compliance with the rule involved is not necessary, at least in the particular case, to vindicate the interests the rule is designed to serve. A state's judgment that "a suitor's conduct in relation" to some state procedure should not "disentitle him to the relief he seeks,"[235] should be final.

When a state does impose a forfeiture because of noncompliance with a procedural rule, a deliberate bypass should be found only if the default was connected with a procedural rule which serves a valid state interest. The Court in *Henry v. Mississippi*[236] ruled on direct review that "in every case we must inquire whether the enforcement of a procedural forfeiture serves . . . a [legitimate] state interest. If it does not, the state procedural rule ought not be permitted [on the adequate non-federal ground principle] to bar vindication of important federal rights."[237] If a forfeiture ruling is insufficient to preclude direct review, it follows that habeas should also be available. A forfeiture should not be imposed to protect the state interest in orderly procedure on the basis of noncompliance with a rule which serves no legitimate state interest. The Court indicated, in fact, by its disposition in

234. Nelson v. California, 346 F.2d 73, 82 (9th Cir. 1965).

235. Fay v. Noia, 372 U.S. 391, 438 (1963). In fact, *Noia* holds that the district courts have discretion to "deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.*" *Ibid.* (Emphasis added.)

236. 379 U.S. 443 (1965).

237. *Id.* at 447-48. See generally Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

Henry, that habeas will sometimes be available on the ground that no bypass has occurred, although the state ruling constitutes an adequate non-federal ground precluding direct review.[238]

The first thing a district court should determine, therefore, is whether the state procedural rule upon which the forfeiture is based serves a valid state interest. Valid state interests are served by any rule reasonably calculated to increase efficiency, conserve resources, protect rights or advance any other rational end.[239] Some indication of the types of rules which do not serve legitimate interests is available in cases where the Court has found state procedural grounds "inadequate" on direct review. Those decisions establish that meaningless and discriminatory rituals need not be followed; in fact, in *Noia* they were read as establishing the broader proposition that the Court "has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights."[240] Finally, even if the forfeiture ruling would normally be an adequate ground, where the state has retained the power to disregard the default the Court has inquired into whether the state court's refusal to exercise this power amounts to "an avoidance of the federal right."[241] The district courts should do likewise.

If the rule involved serves a valid state interest, the habeas court must inquire, as the Supreme Court does on direct review, whether the interest has been substantially served in the particular case. That is, the state may be demanding too high a price for orderly procedure

238. The Court remanded for the state to consider whether Henry had waived his rights. The state could in any event impose a forfeiture of all state remedies. But the forfeiture ruling would bind the Supreme Court on direct review only if the forfeiture vindicated a valid state interest which had not been substantially served. And it would bind the habeas court only if, in addition, the forfeiture resulted from deliberate choice.

As we have seen, one of the roles of the district courts on habeas is to assure vindication of the Supreme Court's decisions as to the scope of the fourteenth amendment in the great mass of state court cases the Court has no time to review. This role would be undermined if the district courts could refuse to hear federal claims or evidence underlying federal claims because of defaults based on procedural rules which would not preclude Supreme Court review on direct review. The burden of assuring vindication of federal claims in such cases would be shifted back to the Supreme Court.

239. In *Noia*, the Court assumed that the rule that claims cognizable but not asserted on appeal may not be asserted subsequently in post-conviction proceedings serves valid interests, presumably in getting all claims settled quickly and simultaneously. In *Henry*, the Court specifically found that the rule requiring contemporaneous objection to the admission of evidence serves the valid state interest in avoiding new trials on the ground of improperly admitted evidence.

240. 372 U.S. at 432. See generally Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375 (1961).

241. Williams v. Georgia, 349 U.S. 375, 383 (1955).

by its imposition of a forfeiture of state court remedies. If so, the ruling would not constitute an adequate non-federal procedural ground on direct review, and should not be used by the habeas court as a basis for a bypass ruling.

There is a danger that federal courts will substitute their judgment in matters which intimately concern the states in examining whether the purpose of a state rule has been "substantially" served. The Court's suggestions in *Henry* exemplify the problem. There, defense counsel failed to object to the admission of certain evidence. In a motion to dismiss after the state's case had been presented, however, counsel included in a most perfunctory manner a claim that evidence introduced was unlawfully secured.[242] Yet the Court suggested that this statement may have satisfied the interest served by the contemporaneous-objection rule by giving "the court the opportunity to conduct the trial without using the tainted evidence" and thereby avoiding reversal and new trial.[243] As Justice Harlan points out in dissent, the Court's suggestion indicates far too narrow a view of the state interests being served. A truly contemporaneous objection, he points out, "must necessarily be directed to the single question of admissibility; the judge must inevitably focus on it. . . . Usually the proper timing of an objection will force an elaboration of it."[244] This in turn increases the likelihood of correct decisions. Furthermore, a timely objection enables the state to proceed on the basis of other evidence,[245] or to order the prosecution dismissed. There is, finally, a chance if noncontemporaneous objections are too broadly treated as substantially serving the state's interests that defendants or their counsel will intentionally put off objecting to evidence when some tactical advantage may accrue as a result. In *Henry* the Court recognized this possibility.[246] Such a tactical decision would, of course, constitute a deliberate bypass. But since, as we shall see, the burden of proving a tactical decision may often be upon the state, the possibility exists that defendants will be less effectively deterred. Our point here is not that this possibility of deliberate avoidance

242. Justice Harlan, in his dissenting opinion, quotes counsel's statement in full. 379 U.S. at 459-60.

243. *Id.* at 448.

244. *Id.* at 462.

245. See United States *ex rel.* Reid v. Richmond, 295 F.2d 83, 89 (2d Cir.) (en banc), *cert. denied*, 368 U.S. 948 (1961).

246. There was a chance that the testimony, later objected to as inadmissible, could provide a basis for impeachment of the prosecution's witnesses. 379 U.S. at 451. If the defendant's calculation is correct, he not only would retain a possible remedy in habeas corpus, but he also would not be precluded by the adequate state ground doctrine from seeking direct review in the Supreme Court.

should govern rule-making in all cases. It is just that the danger is substantially increased if too rigid a view is taken of what constitutes a valid state interest, and too flexible a position is taken on how those interests may be substantially served. The suggestions in *Henry*, therefore, that only one interest—that of avoiding retrials—is involved, and that this interest could have been substantially served by a vague noncontemporaneous objection, should be treated as nothing more than suggestions, used by the Court to explain its view of the scope of the adequate state ground doctrine as it applies to procedural rules. Any reasonable advancement of a rational purpose should be sufficient to demonstrate a state interest. And only when *all conceivable* valid state interests have been substantially served does it seem proper to conclude that a state procedural rule was enforced "for its own sake."[247]

Even though a state forfeiture ruling would constitute an adequate procedural ground, thereby barring direct review, habeas corpus is still available to prisoners who have not deliberately bypassed, under the theory that the federal court in habeas acts upon the body of the petitioner rather than upon the validity of the state rule. The Court

247. *Id.* at 449. Douglas v. Alabama, 380 U.S. 415 (1965), is a clear case in which the objections of counsel served all conceivable legitimate state interests. In Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965), counsel properly objected to a charge on the ground that it assumed the existence of a fact in dispute. On appeal counsel argued that this improper assumption shifted the burden of proof of innocence. It may be that a timely objection which should apprise the trial court of an issue later made explicit should be treated as substantially serving the valid state interests involved. The Ninth Circuit found a deliberate bypass, holding that the rule demands "painstaking compliance," but went on to rule on the merits of the claim. See also Dupes v. Johnson, 353 F.2d 103, 105 (6th Cir. 1965) (coerced confession).

In United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), one co-defendant was given federal relief because the state court had rejected his explicit request that he be allowed to conduct his own defense if the court persisted in refusing to assign him a new lawyer. The other co-defendant had expressed great dissatisfaction with his lawyer, but he did not "unequivocally," United States *ex rel.* DiBlasi v. McMann, 236 F. Supp. 592, 593 (N.D.N.Y. 1964), request that he be allowed to defend himself. He claimed on habeas that, once the judge most emphatically denied his co-defendant's request, he felt his request would be pointless. The Second Circuit ruled he had waived, although the circumstances here are such that any interests that might have been served by an explicit request were served by the request which was turned down. The Second Circuit, in approving the rule that defendants "unmistakably" commit themselves to conducting their own defense, relied almost exclusively upon the interest in avoiding subsequent claims. But how likely is it that defendants will read the court's opinion and become aware of this rule? And how consistent is the ruling that a defendant must unequivocally raise a point explicitly rejected by his trial judge with the Second Circuit's view that *counsel* cannot be expected to object when the law is clearly against him? See, *e.g.*, United States *ex rel.* West v. LaVallee, 335 F.2d 230, 231 (2d Cir. 1964).

in *Noia* rejected the argument that the interests of federalism required deference to state procedural rulings which constitute adequate state grounds, reasoning that defendants have a substantial interest in not forfeiting state remedies and direct review and that "those consequences should be sufficient to vindicate the State's valid interest in orderly procedure."[248]

There are a number of situations in which action apparently tactical or otherwise deliberate cannot provide the basis for bypass rulings. If counsel who made or recommended the action which led to the default was ineffective, the applicant has a basis for relief in that fact alone, so a bypass ruling clearly would be improper.[249] The claim of ineffective assistance of counsel has been broadened in recent years. While strategic mistakes generally provide no ground for relief, recent cases imply or require that counsel investigate at least superficially,[250] and that he have some sound basis for his decision.[251] These decisions tend to guarantee tactical choices by counsel as a part of due process on at least all fundamental issues; but they are exceptional, and most courts will refuse to find ineffective assistance where counsel was unaware of the law and facts relevant to the case. A bypass ruling is likewise improper where the defendant is unrepresented, if he lacked capacity to make a deliberate decision.[252] There are times when a defendant may be competent to stand trial, but only with the assistance of counsel.[253] When such a defendant rejects the assistance of counsel, as he apparently has the right to do,[254] the court should either inform the defendant of all his alternatives or should appoint counsel to advise him. Otherwise no effective forfeiture ruling seems possible.

248. 372 U.S. at 433.

249. See *id.* at 439, where the standard enunciated for bypassing contemplates a knowing surrender of a procedural right "after consultation with *competent* counsel or otherwise . . . ." (Emphasis added.)

250. Quarles v. Balkcom, 354 F.2d 985 (5th Cir. 1966); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

251. Poe v. United States, 233 F. Supp. 173 (D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963); see Sims v. Balkcom, 220 Ga. 7, 136 S.E.2d 766 (1964) (counsel must move for new trial when no danger involved). See generally Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963).

252. Thomas v. Cunningham, 313 F.2d 934, 937 (4th Cir. 1963) (appeal); see Brown v. Allen, 344 U.S. 443, 485-86 (1954).

253. See Massey v. Moore, 348 U.S. 105, 108 (1954).

254. United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965); see Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942). In federal prosecutions the right is secured by statute. 28 U.S.C. § 1654 (1964).

Finally, rights which cannot be waived cannot be forfeited by procedural default.[255]

When a bypass ruling is possible, it will be necessary for the district court to determine whether the forfeiture imposed by the state courts followed from a tactical choice or other deliberate action. *Henry* indicates that the burden is on the state to make at least some showing to justify the forfeiture.[256] Since it will usually be unclear from the record whether a truly deliberate choice was made, state rules reasonably designed and applied to serve valid interests might be given less than appropriate weight if the showing required is too great, and defendants might often actually bypass with impunity. Of course, a bypass ruling is proper where it can be demonstrated that a defendant, (1) aware of the federal right at stake and (2) of the forfeiture rule involved, (3) intentionally failed to comply with the rule. But this seldom occurs. The question in particular cases will be whether there is enough proof to permit the federal court to assume the existence of each of these elements. The state is assisted in its burden of proof on waiver issues, however, by a number of rules and assumptions which have the effect of allowing district courts to accept state forfeiture rulings in all but the cases where there is significant doubt that a deliberate course of action was followed.

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255. Non-waivable rights would appear to include the right to a competent tribunal, and the right not to be subjected to cruel and unusual punishment. The Court has strongly suggested that the right to a hearing on competency to stand trial once "some" evidence of incompetency is introduced is not forfeited by a failure expressly to raise the claim in accordance with state rules. Pate v. Robinson, 383 U.S. 375, 384 (1966). *Contra*, Noble v. Sigler, 351 F.2d 673, 676 (8th Cir. 1965). Similar defaults with respect to the right not to be convicted if insane at the time of the offense, if there is such a right, probably also will not be binding. See Hampton v. Tinsley, 240 F. Supp. 213, 218 (D. Colo. 1965).

256. The Court pointed out that the state court ruling that petitioner was "estopped" from raising an illegally-seized-evidence claim because his counsel had brought up the matter to which the alleged illegally seized evidence related "amounts to a holding that petitioner waived his federal right. *In the absence of a showing* that this was prompted by litigation strategy, the present record is insufficient to support such a holding." 379 U.S. at 451 n.7. (Emphasis added.) See Sanders v. United States, 373 U.S. 1, 10-11 (1963): "[T]he burden is on the Government *to plead* abuse of the writ." (Emphasis added.) This it must do under Price v. Johnston, 334 U.S. 266, 292 (1948), "with clarity and particularity."

The state's burden would often be impossible to discharge if habeas applicants could prevent their attorneys from testifying to confidential communications. The attorney-client privilege was held waived in Henderson v. Heinze, 349 F.2d 67 (9th Cir. 1965), where the habeas applicant sought federal review despite a procedural default in the state courts. *Accord*, United States *ex rel.* Mitchell v. Follette, 358 F.2d 922, 928 (2d Cir. 1966) (dictum, citing 8 WIGMORE, EVIDENCE § 2327, at 636, 638 & n.4 (McNaughton rev. 1961)); Comment, 40 N.Y.U.L. REV. 1204, 1207 (1965).

The record often reveals that the habeas applicant was informed of the right he is said to have forfeited. Usually, the applicant will have been represented, and it is proper to assume counsel informed him of his rights, absent a non-frivolous allegation to the contrary, which would then require a hearing. This is not true, however, when waiver of the right involved can only be effectively demonstrated by a showing of record that the applicant knew what was at stake,[257] when counsel could not have known, because of the existing law or otherwise, that a possible claim existed,[258] and when representation has ceased.[259] Where defendant is unrepresented great difficulties arise unless the state court either informs him of his rights or appoints counsel to

257. The "right to counsel" is not dependent upon a request. Carnley v. Cochran, 369 U.S. 506, 513 (1962), requires a colloquy at which defendant is told of his right. See Davis v. Holman, 354 F.2d 773 (5th Cir. 1965) (waiver of counsel at arraignment does not shift to defendant burden of requesting counsel later when not guilty plea withdrawn and guilty plea entered); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965) (waiver of right to own counsel when representation of co-defendant may be prejudicial must be informed); Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963) (right to be present at trial).

Judge Friendly has cautioned against "treating the 'right to counsel,' 'waiver,' or any other concept of law as a Platonic reality without considering the context at hand." Collins v. Beto, 348 F.2d 823, 837 (5th Cir. 1965) (concurring opinion). He argues, in effect, that once the issue is moved back in time beyond the beginning of the criminal prosecution, there is room for reasonable compromise. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 942 n.70 (1965). Miranda v. Arizona, 34 U.S.L. WEEK 4521 (U.S. June 13, 1966), applies the *Carnley* requirement to the right against self-incrimination, and to the right to counsel as a necessary protection of the right against self-incrimination, from the time a person is "deprived of his freedom of action in any significant way." *Id.* at 4523.

258. Thus courts have ruled with apparent unanimity that defendants to whom Mapp v. Ohio, 367 U.S. 643 (1961), has been held to apply because their appellate processes were incomplete when *Mapp* was decided, see Linkletter v. Walker, 381 U.S. 618 (1965), should not be precluded from raising or developing illegal search and seizure claims in habeas corpus if raised in the state courts at the first available opportunity. *E.g.*, Peters v. Dillon, 227 F. Supp. 487 (D. Colo. 1964), *aff'd after hearing*, 341 F.2d 337, 339 (10th Cir. 1965); United States *ex rel.* West v. LaVallee, 335 F.2d 230, 231 (2d Cir. 1964); United States *ex rel.* Dalton v. Myers, 227 F. Supp. 526 (E.D. Pa. 1964) (failed to raise point on amended motion for new trial, but raised on appeal). *Compare* Sunal v. Large, 332 U.S. 174, 182 (1947):

> If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, *at least where the error does not trench on any constitutional rights* of defendants nor involve the jurisdiction of the trial court. (Emphasis added.)

259. *Compare* Norvell v. Illinois, 373 U.S. 420, 423 (1963) (allowing presumption in absence of transcript that counsel at trial protected defendant's rights on appeal), *with* Pate v. Holman, 341 F.2d 764 (5th Cir. 1965) (presumption rebutted); and Polsky in *The Problem of Adequate Representation of Indigent and Other Defendants in Criminal Cases*, panel discussion at the Judicial Conference on the Second Judicial Circuit, 36 F.R.D. 129, 153-54 (1964).

advise him. The importance of constitutional rights is such that, even where a defendant chooses to be unrepresented despite adequate warning of the dangers involved, any doubts about whether he knew his rights should be resolved in his favor.[260] An apparent exception to this general rule is where the right at stake is "personal" and deemed waived if not asserted.[261] This rule of forfeiture presumably is based upon an assumption that defendants know of these rights, which may well fail to withstand reexamination in light of *Noia*.

The state courts seldom expressly inform defendants and their counsel of state rules of forfeiture. Nor do the federal courts, for that matter. Competent counsel, qualified to practice before the local courts, are presumed to be aware of all elementary rules of practice, such as the duty to object contemporaneously to the admission of evidence or to an erroneous charge.[262] There is no authority indicating that counsel is under an obligation to inform his client of these rules, and in practice counsel seldom does so. When a rule is uncommon or when the defendant is unrepresented, however, the trial court should eliminate all doubt by informing counsel or defendant of the rule. Any significant doubt should prevent a bypass ruling.[263] On the other hand, habeas courts should consider indications other than an announcement by the state judge that the defense was aware of the relevant rule. Thus if one piece of evidence is objected to but not another, or a claim to one type of hearing made but no claim made to another related type of hearing,[264] it should be assumed that the defense was aware of the duty to object or to claim hearings, if not of the consequences of a failure to do so.

260. *Cf.* FED. R. CRIM. P. 37(a)(2): "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

261. *E.g.*, United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965) (right to represent self); United States v. Lustman, 258 F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958) (right to speedy trial).

262. See United States v. Lovely, 319 F.2d 673, 683 (4th Cir. 1963), where the court found a bypass in a § 2255 proceeding because of counsel's failure to object to an instruction or to suggest one of his own.

263. See, *e.g.*, Hunt v. Warden, 335 F.2d 936, 944 (4th Cir. 1964), where the court reversed a bypass ruling because the unrepresented petitioner, in failing to appeal to the highest state court as the federal district court had earlier directed, had been acting under a misapprehension as to his rights. The petitioner claimed to be following Fay v. Noia, "whereas you can pass State Courts." *Compare* Gordon v. Crouse, 357 F.2d 174 (10th Cir. 1966).

264. Appellant in Pate v. Robinson, 383 U.S. 375 (1966), argued that failure to raise a claim to a hearing on competency after claiming a hearing on insanity proved a deliberate bypass. Brief for Appellant, p. 24. The Court found the claim had been sufficiently raised.

It seems reasonable generally to assume that an applicant's failure to comply with a rule of forfeiture was intentional, if it can be shown both that he knew of the right at stake and of the rule involved. As we have seen, it is often proper to assume defendant was aware of his rights from the fact that he was represented by competent counsel. Moreover, if competent counsel is present, it is generally irrelevant whether defendant himself was aware of the state's forfeiture rule, since counsel is usually expected to know of such rules and has the duty of complying with them. It is often possible, therefore, to find "intentional" noncompliance with a state rule by assuming it from an assumed awareness, because of the presence of competent counsel, both of the right at stake and the rule involved. Problems arise, however, when habeas applicants claim that failure to comply with the rule was in fact unintentional, or that counsel acted without consulting them or against their express wishes.

When an applicant claims that his default was unintentional, a number of factors should be considered. If it can be shown that the defendant was actually aware of the right at stake, or if the rule of forfeiture was announced by the state judge to defendant and counsel,[265] it will be difficult to prove noncompliance was unintentional. Furthermore, the possibility of benefit from the course of action followed tends to prove at least a motive for intentional noncompliance.[266] That the course of conduct may have backfired completely is irrelevant so long as a possibility of advantage existed when the choice was made, and so long as the choice was not so unreasonable that it demonstrates

265. The Court stated in *Henry* that the adequate non-federal ground test for procedural rulings spelled out in its opinion "will not lead inevitably to a plethora of attacks on the application of state procedural rules; where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate nonfederal ground doctrine in the vast majority of cases." 379 U.S. at 448 n.3.

266. If the defendant did not take the stand, and therefore failed to develop the material facts underlying some constitutional claim, he may have done so to avoid impeachment. Counsel may let a confession into evidence so he can discuss at length the possibility of police coercion, or he may allow illegally obtained information into evidence in the form of testimony with the hope of impeaching the witness. It is even reasonable for counsel to refrain from pressing some minor points to avoid antagonizing the judge and jury. An excellent example of trial tactics is Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965). The district court held that counsel's stipulation in defendant's presence that the case be heard on the transcript of the preliminary hearing with each side retaining the right to introduce further evidence was not an effective waiver. The circuit court reversed, finding a basis for a tactical choice in surrendering the right to confront and cross-examine prosecution witnesses, in that the testimony at a trial would have been far more harmful to defendant than the simple facts recited by the victim of the crime at the preliminary hearing. Countless other examples could be imagined.

ineffectiveness of counsel.[267] Any direct evidence that a deliberate choice was made would, of course, be highly persuasive, such as where the claim involved is considered by the defense but abandoned,[268] is advanced but withdrawn,[269] is stipulated away,[270] or is deliberately withheld to secure additional hearings.[271] On the other hand, evidence that the default was a blunder or resulted from neglect tends to demonstrate an absence of intent. Thus where counsel objected inartfully,[272] or failed because of insufficient preparation or other neglect to marshall all crucial evidence underlying a federal claim,[273] a knowing default should not be found, although counsel may have been aware both of the right at stake and of the applicable rule. Moreover, once the state court rules against the defense on a given point, a knowing failure to raise the point again is not intentional in the sense required for a deliberate bypass. The defense, in fact, is justified in changing

267. In Nelson v. California, 346 F.2d 73 (9th Cir. 1965), the court found a bypass despite the absence of any good reason why counsel failed to object to the admission of certain important evidence. *Compare* Ledbetter v. Warden, 239 F. Supp. 369, 373 (D. Md. 1965), refusing to impose a bypass where no reason for not objecting to evidence appeared, despite the assumption that the failure to object did not amount to ineffective assistance. As to the possibility that an unsound decision may demonstrate ineffective assistance, see *supra* notes 250-51.

268. *E.g.*, United States *ex rel.* Reid v. Richmond, 295 F.2d 83 (2d Cir.) (en banc) (counsel said "no objection" to admission of confession after hearing held on surrounding facts), *cert. denied*, 368 U.S. 948 (1961). In *Henry* the state filed an affidavit alleging that an attorney for the defendant rose as if to make an objection when the evidence later claimed to have been illegally seized was admitted, and that another of defendant's attorneys pulled him down. This allegation was enough, the majority felt, to justify an evidentiary hearing on waiver. 379 U.S. at 450. *Compare* Justice Black's comment: "It is hard for me to see how one could infer from this 'jerk on the coat tail' even a suspicion that petitioner had consciously and knowingly waived his right to object to the evidence offered against him." *Id.* at 454 n.2 (dissenting opinion).

269. See Wong Doo v. United States, 265 U.S. 239 (1924), discussed and approved in Sanders v. United States, 373 U.S. 1, 9-10, 18 (1963).

270. *E.g.*, Cruzado v. People, 210 F.2d 789 (1st Cir. 1954).

271. Sanders v. United States, 373 U.S. 1, 18 (1963) (dictum); Berman v. Warden, 232 Md. 642, 645, 193 A.2d 551, 552 (1963); see Egan v. Teets, 251 F.2d 571, 576 (9th Cir. 1957) (two other arguments advanced at time of motion to dismiss appeal).

272. Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965).

273. In *Townsend* the expert witnesses failed to use the "truth serum" characterization. The Court held: "[T]he medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default." 372 U.S. at 322. Actually, this "failure" to testify was no more than a failure by counsel to develop the relevant facts through his witnesses. The Court's refusal to regard this failure as an inexcusable default reflects its position that unintentional flaws of counsel should not bar the assertion or full development of federal rights. The usual rule is that evidence obtainable by the defense before or during trial cannot later be advanced as "newly discovered." See United States v. Soblen, 203 F. Supp. 542, 565 n.14 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

tactics after an adverse ruling and in taking steps which normally would result in forfeiture of the claim involved. In *Henry* the Court refused to rule on the question "whether petitioner's cross-examination of the officer, before raising any objection [to the admissibility of his testimony], 'cured' the effect of the inadmissible testimony . . . ," but it stated flatly: "Of course, nothing occurring after the judge's refusal to honor petitioner's objection could have this curative effect."[274] There will be times when the correct result is not so clear. In one case the prosecutor stated in his opening remarks that a confession would be introduced, but none was. In the absence of any ruling on the admissibility of the confession, defense counsel went ahead and elicited statements relating to the treatment of his clients. This line of questioning, ruled the court, was a tactical choice, and to the extent that it, rather than the prosecutor's opening statement, brought the jury's attention to a confession, it was considered in determining whether due process was violated by the prosecutor's comment, which the court ruled did not itself sufficiently implant a confession in the jury's mind to bring the case within *Jackson v. Denno*.[275] Undoubtedly, defendants and their counsel should not be allowed to take tactical advantage of a situation where it would be unreasonable to conclude that a failure to act would cause prejudice. But counsel is obliged to act in his client's behalf when there is reason to believe action is prudent, even though perhaps unnecessary. Another problem situation is where one co-defendant alleges that he failed to preserve a point because he assumed the court would rule against him as it had against his co-defendant. While each co-defendant normally should be required to comply with the relevant rules to preserve his claim, there should be some room for cases where circumstances strongly indicate that one co-defendant's default occurred only because of the other's lack of success.[276]

Even if an intentional choice can be proved, it is open to the applicant to argue the choice was counsel's and not his own. *Noia* insisted upon a standard of waiver which "at all events . . . depends on the considered choice of the petitioner."[277] In *Henry*, however, the Court made it clear that the right to assert or develop a claim may be lost

274. 379 U.S. at 449 n.6. *Accord*, Dupes v. Johnson, 353 F.2d 103, 106 (6th Cir. 1965). See generally 1 WIGMORE, EVIDENCE § 18, at 331 (3d ed. 1940 & Supp. 1964).

275. United States *ex rel.* Fernanders v. Fay, 241 F. Supp. 51 (S.D.N.Y. 1965).

276. See discussion of United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *supra* note 247, where the issue is discussed in the context of whether a valid state interest remains to be served by the state's forfeiture ruling. A deliberate bypass requires also that the procedural default be intentional.

277. 372 U.S. at 439.

because of litigation strategy adopted by counsel without consulting his client.[278] It is not enough, therefore, for applicants to claim counsel did not consult with them, where the default stemmed from a decision involving trial strategy. Important rights are often lost, however, when trial strategy is not involved.[279] There is no reason to give attorneys more power to waive defendants' rights than they need in order to represent their clients effectively. When the decision to be made does not require a speedy judgment or involve factors which are beyond the ordinary defendant's ability to understand, consultation should normally be necessary.

The state will often be assisted, however, in contesting allegations of no consultation by the presumption generally adhered to that an attorney acts with his client's consent when he chooses a course of conduct in his client's presence, without objection.[280] This presumption cannot apply when the right involved is one that must be waived by the defendant himself.[281] Nor should it be applied without a hearing where the habeas applicant alleges in a non-frivolous petition that he can prove he was dissatisfied with counsel.[282]

An applicant may allege that, although counsel consulted him, the default resulted from a course of conduct the applicant opposed. It is clear that it is not ineffective assistance for counsel to refuse to accede

278. 379 U.S. at 451-52.

279. "The decision as to whether to appeal is not part of trial strategy. It is one that is made by the client, not his attorney. There are numerous others, *e.g.*, whether to plead not guilty, *nolo*, or guilty, whether to waive a jury [Patton v. United States, 281 U.S. 276 (1930)], that fall in this class." Nelson v. California, 346 F.2d 73, 81 n.6 (9th Cir. 1965) (dictum). Other rights which probably fall within this group include confrontation, Cruzado v. People, 210 F.2d 789 (1st Cir. 1954), public trial, United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949); and presence at trial, Cross v. United States, 325 F.2d 629 (D.C. Civ. 1963); see FED. R. CRIM. P. 43. See Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966) (foregoing right to move for new trial or to appeal without consultation with defendant constitutes ineffective assistance of counsel).

280. *E.g.*, Cruzado v. People, *supra* note 279, at 791; United States v. Sorrentino, *supra* note 279, at 723; Eury v. Huff, 141 F.2d 554 (4th Cir. 1944) (waiver of jury of twelve for jury of ten).

281. Although early federal cases applied the presumption to the extent of allowing counsel to plead defendants guilty, *e.g.*, Brown v. United States, 182 F.2d 933 (8th Cir. 1950); United States v. Moe Liss, 105 F.2d 144 (2d Cir. 1939), the present practice in the federal courts is to have the defendant plead. See FED. R. CRIM. P. 11, which allows the court to accept a guilty plea only when "made voluntarily with understanding of the nature of the charge." See also FED. R. CRIM. P. 7(b), allowing prosecution by information for offenses punishable by imprisonment for more than one year or at hard labor only if defendant, "after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment."

282. *But see* United States *ex rel.* Reid v. Richmond, 295 F.2d 83, 86 n.4 (2d Cir.) (en banc), *cert. denied*, 368 U.S. 948 (1961).

to his client's wishes.[283] But where consultation is necessary, a bypass should be found only when the attorney adhered to his client's choice, if at all reasonable.[284] The purpose for a rule requiring consultation where feasible is to premise bypass rulings as much as possible upon the actual choice of defendants rather than upon fiction or inference. It would make little sense to require consultation and then to allow counsel to ignore his client's choice. Where counsel feels defendant's choice would be prejudicial, counsel should bring the matter to the state court's attention. The court should explain the risks involved, and if defendant is competent to choose and persists, a record will have been made to demonstrate a conscious choice.

Where no consultation is required, however, attorneys should arguably be free to act on the basis of their own judgment even though they may have consulted with and found their clients opposed to their plan of action.[285] Matters concerning trial strategy are peculiarly within counsel's expertise. Counsel will usually be a better judge of whether a defendant or witness should be put on the stand, of the impeachment value of evidence, and of countless other tactical considerations. A

283. Williams v. Beto, 354 F.2d 698 (5th Cir. 1965).

284. An interesting, very recent Supreme Court case throws some light on this issue. In Brookhart v. Janis, 34 U.S.L. WEEK 4351 (U.S. Apr. 18, 1966), petitioner contended in a direct appeal from a denial of state habeas corpus relief that he had been denied his right to confront the witnesses against him. The state court had ruled that petitioner waived this right by agreeing through counsel to a prima facie trial in which the state would have to make only a prima facie showing of guilt, and defendant would neither offer evidence nor cross-examine witnesses. The Supreme Court found that under Ohio practice a prima facie trial is the practical equivalent of a plea of guilty, and that petitioner had explicitly refused to plead guilty. The question then became "whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witness against him." *Id.* at 4352. The Court held counsel did not have this power.

285. This rule would explain Nelson v. California, 346 F.2d 73, 81-82 (9th Cir. 1965), where the court found a deliberate bypass although it assumed the truth of petitioner's contention that he had explicitly objected to counsel's decision not to contest the admission of certain evidence. The court did not, however, make the distinction made here between situations requiring and those not requiring consultation as being determinative of whether a defendant's choice must be adhered to by counsel. The distinction should not be rigidly applied. Thus in Brookhart v. Janis, *supra* note 284, at 4353, Justice Harlan took the position that "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval," and cited the decision "whether or not to examine a specific witness . . ." as an example. He pointed out, however, that the prima facie trial procedure, which was a waiver of the right to introduce any evidence and to examine *all* witnesses, "involved so significant a surrender of the rights normally incident to a trial that it amounted almost to a plea of guilty or *nolo contendere*," and took the position that "such a plea" cannot be entered over a client's protest. *Ibid.*

rule requiring counsel to adhere to a defendant's trial strategy might therefore do defendants more harm than good. And since consultation is not required in these situations, counsel may tend to shun consultation even where it is possible, to avoid being bound by a course of action he believes is against his client's best interests. To the extent that consultation where possible is a benefit to counsel in making his decision, reluctance to consult would be unfortunate. So long as defendant's position is treated as irrelevant in matters of trial strategy, the problem of proving consultation occurred and that defendant actually objected to a proposed course of action (or would it be enough if he just had a plan of his own?), would be avoided.

Despite these arguments the better practice would bind counsel to his client's proven choice of tactics even in those cases where, had counsel acted without consultation, his choice would bind his client. Counsel's choice, made without consultation, is binding in matters involving trial strategy largely because of the need for a quick decision. If counsel was able to consult in a particular case, or the client able to express his preference, reliance on the rationale that there was a need for a quick decision is misplaced. This also is true where the client volunteers his desire before the tactical decision is made. The danger that defendants will suffer because counsel might be reluctant to consult on decisions involving trial strategy is highly speculative. The difficulties of proof possibly caused by a rule that no bypass may be found when counsel acts against his client's wishes can substantially be avoided if counsel is required to bring to the court's attention the fact that his client disagrees with his plan of action.[286]

In some cases, even after a tactical decision has been proved, "exceptional" circumstances will be present which will preclude a bypass ruling despite a fully considered choice by counsel or defendant. In *Henry* the Court cited *Whitus v. Balkcom*[287] as an example of a case presenting an exceptional circumstance. There, Judge Wisdom refused to find a bypass of the state's rule that objection to the selection of juries must be made when the jury is formed, and from that finding to infer a waiver of the right to a jury from which Negroes have not been systematically excluded. Trial counsel admitted he knew of this right and that he consciously decided not to raise it. The exceptional circumstance was his reason for failing to raise the claim: fear of hostility from judge, jury and community which would effectively eliminate any

286. *Cf.* Note, 78 HARV. L. REV. 1434, 1446 (1965).
287. 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).

chance of success at trial.[288] *Noia* presented a similar situation. The defendant there knew of his right to appeal but did not exercise it because he feared a death sentence on retrial instead of the sentence of life imprisonment he had received. The Court recognized the tactical nature of Noia's choice, pointing out that its holding did not preclude a bypass ruling "in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right...."[289] But the Court found an exceptional circumstance which made Noia's decision not "*merely* tactical . . . ."[290] This was the fact that the trial judge's statement to Noia at the time of sentencing "made the risk that Noia, if reconvicted, would be sentenced to death, palpable and indeed unusually acute."[291]

The common threat in *Whitus* and *Noia* is the presence of pressure upon defendant or his counsel of a sort which the Court apparently feels is illegitimate. In *Whitus* the state is not allowed to rely upon counsel's tactical choice to proceed to trial by an improperly selected jury because the element which made counsel's choice tactical—his fear of antagonizing the judge and jury in a racially prejudiced area by claiming his client's rights—was unacceptable as the basis for a deliberate choice to forego a federal right. *Noia* differs in that the trial judge's comments were not so obviously improper. It might be argued, in fact, that his comments did Noia a favor in that they apprised him fully of the risk he would be taking if he appealed. Perhaps the Court felt the trial judge's statement was unfairly emphatic. But the trial court apparently genuinely believed Noia was lucky getting off with life imprisonment and told him so. In any event, the Court's holding in

288. Presumably, this exceptional circumstance would be present in most cases from states which practice systematic exclusion of Negroes from juries. The Fifth Circuit has gradually extended its refusal to find waivers of the right to be indicted or tried by such juries until it now seems safe to say the right is virtually non-waivable. See Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964), and cases cited therein. *Compare* Randel v. Beto, 354 F.2d 496, 500 (5th Cir. 1965) (counsel asked to accede to suggestion that trial judge be substituted in order that judge meet important political engagement).

289. 372 U.S. at 440. *Compare* Larson v. United States, 275 F.2d 673, 679-80 (5th Cir. 1960).

290. 372 U.S. at 440. (Emphasis added.)

291. *Ibid.* At the time of Noia's trial, a judge in New York was not bound to accept a jury's recommendation of mercy. Thus, when sentencing Noia, the court said:

> I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance.

Id. at 396 n.3.

Noia is unlikely to do more than encourage judges to be silent when sentencing defendants.[292]

A more principled stand would be to disallow waiver rulings based on bypassing of state procedures where the bypass was caused by the rule allowing severer sentences at a new trial. That the rule is constitutional[293] does not prevent a federal habeas corpus court from denying it effect in deciding whether under federal law the right to assert a federal claim has been lost. The rule would not be invalidated, but would be left to operate in cases where the presentation of federal rights is not affected. The state has little if any interest, when a defendant appeals a conviction, in securing a penalty harsher than the one obtained at the first trial, so the rule's interference with the full and free assertion and development of federal claims is all the more unacceptable.

This reasoning would appear to allow habeas corpus petitioners, at least in some circumstances, to assert federal claims despite having pleaded guilty. It is arguable, for example, that a guilty plea induced by an involuntary confession or illegally seized evidence should not preclude an allegation that the conviction based upon the plea is void because the confession was coerced. At present, a guilty plea waives these and most other defects.[294] This is a problem of immense dimension, far beyond the scope of this discussion. It may be that guilty pleas

292. United States *ex rel.* Moore v. Fay, 238 F. Supp. 1005 (S.D.N.Y. 1965), is a strikingly similar case, at least in principle. The habeas petitioner had been charged with murder but was convicted of manslaughter. He attacked his conviction because of a juror's conduct in consulting with a friend with respect to a question the judge had allowed, and in subsequently telling the prosecutor it was good that a manslaughter verdict had been returned, since the conviction would less likely be reversed. When the court told defendant and his counsel of these events and of its own inquiry into them, defense counsel withdrew motions for a new trial and to set aside the verdict which were then outstanding. The federal district court found a deliberate choice in failing to press the claim based on defendant's fear of a retrial at which he might be convicted of murder. That petitioner was silent seems adequate proof under the circumstances that he acquiesced in counsel's decision. But even under a narrow view of *Noia*, the juror's statement, with its implication that at least he had supported a manslaughter conviction to avoid reversal because of what he felt was an error by the trial judge, may have heightened the defendant's fear of a more severe penalty, and thereby provided an "exceptional" circumstance which made the choice not "merely" tactical.

293. Stroud v. United States, 251 U.S. 15, 18 (1919); see Palko v. Connecticut, 302 U.S. 319 (1937). *But see* State v. Wolf, 34 U.S.L. WEEK 2423 (N.J. Jan. 24, 1966); People v. Henderson, 386 P.2d 677, 685-86 (Cal. 1963), invalidating the rule under state constitutions. See generally Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

294. *E.g.*, Stack v. Bomar, 354 F.2d 200 (6th Cir. 1965); Hoffman v. United States, 327 F.2d 489 (9th Cir. 1964). *But see* Shelton v. United States, 292 F.2d 346 (7th Cir. 1961), *cert. denied*, 369 U.S. 877 (1962).

perform so essential a function in the criminal law, both in settling litigation quickly and in affording defendants an opportunity for reduced sentences, that their finality should be disturbed only in the most engaging circumstances.[295] On the other hand, extensive use of guilty pleas may in itself make necessary further re-examination of the doctrine that defects occurring prior to the plea should not be open to challenge. The rule that a plea of guilty is a waiver of all prior defects may at least have to be supplemented by a requirement that it be affirmatively shown that the defendant is aware of all claims of any substance but chooses to plead guilty anyway.[296]

In concluding this discussion of deliberate bypassing it should be noted that, although the Court has authorized district courts to deny relief or, in the *Townsend* context, to refuse hearings for the purpose of developing crucial evidence relating to a federal claim, the power of the district courts in their discretion to hear claims or grant hearings despite a deliberate bypass is specifically assured.[297] Since the states have no way of knowing when to hear a claim despite a deliberate bypass, and since a bypass ruling is premised upon findings of a substantial state interest and a tactical choice, federal courts should be reluctant to exercise this power.[298] There is, in fact, very little danger that this power will be abused, and if a district court does go too far, its decision will, of course, be reviewable by higher federal courts as an abuse of discretion.

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295. Courts readily examine whether the defendant was competent when he pleaded guilty, Sanders v. United States, 373 U.S. 1 (1963), whether the plea was obtained involuntarily through threats or promises, Machibroda v. United States, 368 U.S. 487 (1962), whether defendant was represented by counsel at the time of the plea, Doughty v. Maxwell, 376 U.S. 202 (1964); United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964), and whether counsel was ineffective, Pearce v. Cox, 354 F.2d 884, 893-94 (10th Cir. 1965).

296. See Cortez v. United States, 337 F.2d 699 (9th Cir. 1964); Cooper v. Holman, 356 F.2d 82, 88 (5th Cir. 1966) (dissenting opinion of Rives, J.) (record should be made demonstrating plea was because of actual guilt rather than previously made confession or bargain. *Compare* Kercheval v. United States, 274 U.S. 220, 224 (1927): "[O]n timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence." That a guilty plea is "more than" an admission, *compare* White v. Pepersack, 352 F.2d 470 (4th Cir. 1965) (testimonial admission does not preclude attack on earlier defects), or extrajudicial confession, but is itself a conviction, hardly serves to advance the argument. Convictions are subject to collateral attack for all constitutional defects.

297. Fay v. Noia, 372 U.S. 391, 438 (1963).

298. One occasion which seems appropriate for the exercise of this power is where the habeas applicant made an apparently genuine attempt to correct his default. *Cf.* Stevans v. Marks, 34 U.S.L. WEEK 4173, 4176 (U.S. Feb. 28, 1966) (waiver of right against self-incrimination may effectively be withdrawn).

States that wish to avoid federal hearings on the ground that evidence crucial to the adequate consideration of a federal claim was not presented in the state courts should provide post-conviction procedures without time limits for hearing important evidence relating to federal claims. The deliberate bypassing test will qualify the availability of such remedies so as to assure the adequate vindication of legitimate state interests reflected in rules of forfeiture.

G. *Full and Fair Hearing*

The Court recognized in *Townsend* that it could not anticipate all the circumstances in which district courts should be required to grant hearings. It therefore left an "open-ended" category, which requires federal hearings in all cases where the state court hearing falls short of being "full and fair" in some way other than the specific ways covered in its first five categories. Any attempt to "explain" this requirement is, therefore, necessarily speculative. There are, however, a number of situations which seem clearly to require new hearings, but which do not readily fall within any of the Court's specific criteria.

The issue most likely to arise which finds no comfortable place in any of the Court's specific criteria is the allegation that the state court hearing was deficient because the petitioner was not allowed to be present and testify. As the Court in *Townsend* pointed out: "Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony."[299] If a petitioner is not given the opportunity by the state courts to testify at a post-conviction proceeding, it may well be that the federal court will have to start anew by granting a hearing. While there should be no broad constitutional rule in this area, where even the federal courts handle the matter as one involving discretion, the importance of demeanor testimony in some cases will render the state court hearing deficient.

Spelling out some generalizations concerning the need to allow post-conviction applicants to attend and testify at hearings is not too difficult. The Court has already done so, though it has done little more. And although most of the Court's pronouncements relate to the remedy for federal prisoners under 28 U.S.C. § 2255, they are equally applicable to habeas corpus for state or federal prisoners, since the language of § 2255, if anything, more clearly gives the courts power to decide issues without the petitioner's presence.[300] Thus it is clear that, before

299. 372 U.S. at 322.

300. The habeas corpus statute provides: "Unless the application for the writ and the

being entitled to be present, the petitioner must allege a constitutional deprivation in a petition which raises a factual dispute. Despite some broad language in *Walker v. Johnston*,[301] raising just any factual dispute is not enough. The petitioner's testimony must have some bearing on the dispute. Courts have recognized this by requiring that the petitioner have "knowledge" of the dispute,[302] or that the dispute pertain to an event in which he participated.[303] It seems correct, however, to state the rule simply as requiring production of the petitioner "where his testimony would be *material*."[304] Other considerations

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return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U.S.C. § 2243 (1964). 28 U.S.C. § 2255 provides: "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." The most persuasive argument for allowing less discretion in habeas corpus under the different statutory language is that the motion to vacate was passed to enable the federal courts to handle post-conviction claims in the court of sentencing rather than the court nearest the place of confinement, where habeas corpus petitions are handled. See generally United States v. Hayman, 342 U.S. 205 (1952). As a result, it became possible that cases would arise in which § 2255 petitioners would have to be transported large distances in order to be present at hearings in the sentencing court. The Congress, it is arguable, therefore authorized a rule which gave district courts broader discretion in ruling without the applicant's presence than they had exercised in habeas corpus. Even if this is true, of course, the § 2255 cases would apply a fortiori to habeas corpus. But in any case, there is no evidence that Congress compared § 2255 to habeas corpus and then came up with a rule allowing broader discretion under § 2255. The problem of transporting prisoners long distances was, of course, recognized, and undoubtedly led to the specific authorization to pass on motions without the petitioner's presence, see 342 U.S. at 215 n.23; but Congress was well aware of this possible disadvantage, and felt it was outweighed by the statute's advantages, see especially *id.* at 217 n.25 & 219. Of course, to the extent that a district court could refuse the right to be present at a § 2255 hearing to a petitioner who would have that right in habeas corpus, see Stidham v. Swope, 82 F. Supp. 931 (D. Cal. 1949), § 2255 would become inadequate and ineffective, and he could obtain a full and fair hearing through habeas corpus.

The real reason for the difference in language is possibly much more prosaic. The language in § 2243, apparently too broad for Congress to swallow in passing § 2255, was picked up from a loose statement in Walker v. Johnston, 312 U.S. 275, 285 (1941), that "if an issue of fact is presented," the "only admissible procedure" is to have the petitioner produced and hold a hearing. See Reviser's Note, 28 U.S.C. § 2243. This was simply an inaccurate statement of the law. See text immediately following this footnote.

301. *Supra* note 300.

302. United States v. Nickerson, 211 F.2d 909, 912 (7th Cir. 1954).

303. United States v. Hayman, 342 U.S. 205, 223 (1952). Juelich v. United States, 316 F.2d 726 (5th Cir. 1963) (per curiam).

304. Sanders v. United States, 373 U.S. 1, 21 (1963). (Emphasis added.) An example of a case where a state prisoner's testimony was not material is United States *ex rel.* McKenna v. Myers, 232 F. Supp. 65, 67 (E.D. Pa. 1964), where the disputed factual issue was whether his mother had consented to a search outside his presence. See also Moorer v. South Carolina, 244 F. Supp. 531 (E.D.S.C. 1965) (factual issue purely one involving compilation of statistics). See generally Note, 111 U. PA. L. REV. 788, 815-18 (1963).

should generally be irrelevant. The test should not vary, for example, by giving special consideration to serious offenders who have received severe sentences.[305] While judges cannot shut such things out of their minds, all constitutional rights are important, and any doubt about whether an applicant should have been present should be resolved in his favor regardless of the seriousness of the crime and sentence involved. Moreover, the distance[306] and danger in transporting a prisoner[307] should not normally prevent a court from letting him attend. In one old immigration case the court referred to the practice of dispensing with the applicant's attendance when he was suffering from a contagious disease, but even this practice was inapplicable when his attendance would serve some useful purpose.[308]

It should be noted that an applicant's presence may be necessary although he has nothing material to say on a disputed issue. If counsel is able to show it was necessary to have the petitioner at the courthouse for consultation, the state court's refusal to order his presence should be grounds for a new hearing. That a petitioner's presence may be significant in respects other than the need to testify is reflected in the fact that the rule requiring the presence of defendants at all stages of their trials is not conditioned on their having anything to say.

Still another deficiency which may be treated under this general "full and fair" standard is the absence of counsel at the state post-conviction

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305. *But see* Gregory v. United States, 233 F.2d 907, 908 (5th Cir. 1956).

306. This is not presently a serious problem in habeas corpus, where the hearing is held in the district in which the petitioner is confined. Under 28 U.S.C. § 2255, however, the hearing is held in the sentencing court, which may be a long distance from the place of confinement. The inconvenience and the expense of transporting the prisoner is generally outweighed, however, by the advantages of holding the hearing in the sentencing court, where the record is located, and where needed witnesses usually are nearby. After Hayman v. United States, 342 U.S. 205 (1952), it seems reasonably clear that distance should not be a factor.

Transportation of prisoners will become a problem, however, if Congress adopts a proposal similar to that of the Judicial Conference Committee on Habeas Corpus to amend 28 U.S.C. § 2241, which would allow habeas applicants to file for relief in either the district court where they are held in custody or the district court for the district in which is located the state court of conviction and sentence. The district court in each of these districts would have concurrent jurisdiction and would be empowered in "its discretion and in furtherance of justice . . . [to] transfer the application to the other district court for hearing and determination." *Reports of the Proceedings of the Judicial Conf. of the U.S.*, in ANN. REP. DIR. ADMIN. OFFICE U.S. COURTS 108 (1964). Presumably the district court could balance the convenience of a hearing in the district of the court of record against any inconvenience of transporting the applicant to that district.

307. See the well considered dicta in United States v. Newman, 126 F. Supp. 94 (D.C. 1954).

308. United States *ex rel.* Schleiter v. Williams, 203 Fed. 292, 293 (S.D.N.Y. 1913).

proceeding. The federal constitution does not require counsel in all cases at the post-conviction stage. Post-conviction proceedings are characterized as "civil," and the sixth amendment applies only to criminal proceedings. This distinction is artificial; it is certainly not based upon either the need for counsel or the stake involved in such cases.[309] There are substantial arguments under both equal protection and due process for requiring post-conviction counsel.[310] Some courts have held, in fact, "that sound discretion, perhaps deriving from the Fifth Amendment, requires that counsel be appointed for petitioners, at least in some cases."[311] Even if no constitutional rule is established, however, where state hearings appear deficient because counsel was not assigned, it is open to the district courts to hold hearings after assigning counsel.[312] *Townsend,* in this situation, provides a flexible device for uncovering injustice in particular cases, in the absence of a decision by the Supreme Court requiring counsel, when states fail to provide counsel.[313]

A number of other deficiencies which might warrant hearings under this standard include allegations that the state court hearing was less than full and fair because the state judge, defense counsel or some material witness was either biased[314] or mentally disturbed.[315] That the

309. *Cf., e.g.,* Smith v. Bennett, 365 U.S. 708, 712 (1961): "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels"; People v. Breese, 213 N.E.2d 500 (Ill. 1966) (right to counsel applies at commitment proceedings, though "civil"); State v. Loray, 34 U.S.L. WEEK 2503 (N.J. Mar. 7, 1966) (compensation must be paid attorney for representation at post-conviction stage since it is part of the criminal case).

310. See Note, 40 N.Y.U.L. REV. 154, 189-90 (1965).

311. United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404, 406 (2d Cir. 1964).

312. See United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707 (2d Cir. 1960), holding that the district court's hearing was inadequate because, among other things, counsel was not appointed.

313. Some state courts have taken steps to provide counsel. See, *e.g.,* United States *ex rel.* Bower v. Banmiller, 323 F. Supp. 627 (E.D. Pa. 1964); Note, *supra* note 310, at 187-89.

314. See Pate v. Holman, 341 F.2d 764, 772 (5th Cir. 1965) (allegations involved actions of presiding judge); Barber v. Gladden, 327 F.2d 101, 103 (9th Cir. 1964) (judge recounted boyhood experience indicating prejudice), (*compare* FRANK, COURTS ON TRIAL 152 (1963): "[T]he trial judge is a man, with a susceptibility to such unconscious prejudiced 'identifications' originating in his infant experiences."); Harris v. Thomas, 341 F.2d 560 (6th Cir. 1965) (alleged counsel biased because of position as city attorney); Goodson v. Peyton, 351 F.2d 905 (4th Cir. 1965) (counsel prosecutor from other town).

315. See United States *ex rel.* Cooper v. Reincke, 333 F.2d 608, 613-14 (2d Cir. 1964) (emotionally disturbed counsel held not ineffective); United States *ex rel.* Hicks v. Fay, 230 F. Supp. 942 (S.D.N.Y. 1964) (insane witness not violation of due process); see Note, *Effective Assistance of Counsel,* 49 VA. L. REV. 1531, 1550-51 (1963), on counsel's physical and mental ability to defend.

Constitution is not violated by these or other deficiencies[316] means only that the applicant is not entitled to release on account of them. He should still be entitled to a federal hearing on a federal claim if the non-constitutional deficiency appears to have precluded a full and fair hearing in the state courts.

H. *Discretionary Hearings*

There may be times when, although *Townsend* imposes no duty to grant a hearing, the district judge feels one should be held. He has the power to do so "in every case . . . constrained only by his sound discretion . . . ."[317] There is no reason to hold a hearing when the district judge is presented with "an impeccable record."[318] State triers of fact should be able to assume federal courts will accept their findings when properly made. The Court expressed its confidence that district judges will be "mindful of their delicate role in the maintenance of proper federal-state relations," and will not "subvert the integrity of state criminal justice" or "waste the time of the federal courts in the trial of frivolous claims."[319] When district judges fail to exercise this broad power properly, higher federal courts should reverse for abuse of discretion.

There are a few occasions which seem appropriate for the exercise of this power. The district judge should grant a hearing if he feels it will be more convenient than to require the state to prepare a record of its proceedings.[320] Furthermore, when both petitioner and respondent agree to a hearing, granting one should not normally constitute an abuse of discretion.[321] Where the district court is convinced that the decision of the state court is correct, but wishes to establish yet another basis to support the state court judgment, a hearing may be appropriate in a close case to avoid reversal.[322] Finally, there must be some room for those cases in which the federal judge simply has "a lurking

316. *E.g.*, Noble v. Sigler, 351 F.2d 673, 678 (8th Cir. 1965) (refusal of state court to allow filing of handwritten briefs may be basis for new hearing).

317. Townsend v. Sain, 372 U.S. 293, 318 (1963).

318. See Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 503 (1963).

319. 372 U.S. at 318.

320. See *id.* at 319.

321. See Trotter v. Stephens, 241 F. Supp. 33, 36 (E.D. Ark. 1965); Rees v. Peyton, 225 F. Supp. 507 (E.D. Va. 1964).

322. In Trevino v. Texas, 326 F.2d 403 (5th Cir. 1964), the district judge, though convinced that the state court's conclusion that a warrant supported only by hearsay testimony was issued with probable cause, granted a hearing which demonstrated that the warrant's issuance was supported by direct evidence as well.

doubt"[323] about the adequacy of state court findings. But courts should rarely surrender so to instinct, especially when the stake—federal-state relations—is so high.[324]

IV. Conclusion

The federal habeas corpus jurisdiction presently serves indispensable functions in assuring vindication of the constitutional rights of state prisoners. It has been our purpose to demonstrate that much can be done consistent with this broad protection to lessen federal-state tension and to assure a meaningful role for the state courts. The numerous doctrines, rules and practices which enable federal courts to deny or defer jurisdiction and to leave the states with more flexibility in correcting constitutional defects should be resorted to whenever appropriate. When unacceptable state court fact finding results from a defective state adjudication of a constitutional right, federal courts should consider whether the interests of federalism and of defendants would best be served by declaring the procedure which resulted in the unacceptable findings constitutionally deficient, thereby shifting back to the states in those cases the task of producing acceptable findings. Finally, federal courts should attempt to develop uniform, predictable rules to govern the grant of fact-finding hearings, and should articulate those rules for the guidance of state and other federal courts. The rules adopted must ultimately be designed to uncover the truth, but should reflect an awareness of the difficulty and uncertainty inherent in the process of fact finding, and of the need to leave room for a meaningful state court role.

Few areas of law illustrate as strikingly as habeas corpus, however, that the future of our federal system of criminal adjudication is ultimately in the hands of the states. While expanding constitutional protections make virtually all criminal proceedings subject to federal review, the degree of federal protection has been and will continue to be affected by the failure of state courts to provide adequate machinery properly to adjudicate and review federal claims. At present, district courts must defer to state findings of fact made after full and fair hearings, thereby leaving with state courts the power to control the ultimate

323. Lovedahl v. North Carolina, 338 F.2d 512, 513 (4th Cir. 1964).

324. *Compare* Sanders v. United States, 373 U.S. 1, 17 (1963): "[T]he burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground."

disposition of federal claims in most cases. But this allocation of fact-finding responsibility is not inviolate. The Supreme Court has made clear that federal courts have power to review both law and fact. It is up to the states whether this power will eventually be exercised to the full.