Maryland Law Review

Volume 45 | Issue 4 Article 3

Post-Conviction in Maryland: Past, Present and Future

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Maryland Law Review

VOLUME 45 1986 NUMBER 4

Articles

POST-CONVICTION IN MARYLAND: PAST, PRESENT AND FUTURE

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I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

An acquittal terminates the criminal process in the defendant's favor, but a conviction (even if affirmed on appeal) cannot have the same conclusive effect. The severe and continuing nature of criminal punishment mandates that the state make available post-conviction mechanisms for challenging a conviction. This article, after surveying the history and present operation of post-conviction relief in the Maryland courts, recommends six statutory changes to make the present system more efficient. The focus of this paper is the Post Conviction Procedure Act[1] adopted by the legislature in 1958 and significantly amended in 1965, 1983, and 1986. Since the different post-conviction remedies are interdependent, this paper will also analyze other post-conviction remedies available to state pris-

* Professor of Law, University of Maryland School of Law. The author acknowledges the generous support of the Maryland Bar Foundation. He is also thankful to the many judges and practitioners who shared their experience and knowledge with him. Needless to say, any responsibility for errors which remain rests solely with the author. An earlier version of this article, prepared for the Criminal Law and Procedure Committee of the Maryland Judicial Conference, led to the Committee's approval of the proposed statutory amendments reproduced in Appendix A. Those amendments, except where indicated, implement the recommendations presented in this article. The article, unlike the proposed legislation, expresses only the views of its author and has not received any endorsement from either the Maryland Judicial Conference or the Maryland Bar Foundation.

1. For the present codification of the Act, *see* MD. ANN. CODE art. 27, §§ 645A, 645-I (1982 & Supp. 1985).

oners (i.e., habeas corpus[2] and coram nobis[3]). Efforts at reform must address the whole system; otherwise, efficiencies achieved in one area may cause overload in other areas.[4]

The present system of post-conviction relief allocates considerable public resources to the adjudication of prisoner claims that are in most cases meritless. The justification for doing so is twofold. First, the post-conviction process has become part of the process for reviewing the validity of criminal convictions. Convicted defendants may raise on post-conviction claims which they cannot raise on appeal (e.g., the ineffectiveness of counsel, the involuntariness of a guilty plea, or the state's suppression of exculpatory evidence). Review of these types of claims has become an accepted part of the criminal process. The fact that many if not most such claims lack merit does not justify closing the courthouse door to all claimants. To do so would be analogous to denying a defendant a trial or an appeal because most defendants are found guilty.

Second, courts do have a special responsibility to verify the legality of any detention. Liberty, in the sense of freedom of movement, is the most basic of personal rights. Courts must therefore respond to claims by prisoners that their incarceration is illegal. The availability of such a remedy, despite the large number of meritless claims, is a necessary check against illegal confinements. The label that the legislature gives to the remedy (i.e., habeas corpus or post-conviction) is of little moment, but elimination of the remedy

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2. For the present statutory provisions on habeas corpus, *see* MD. CTS. & JUD. PROC. CODE ANN. §§ 3-701 to 3-707 (1984 & Supp. 1985) and MD. R. Z40-Z56.

3. There are no statutes or rules governing coram nobis. For the present status of the writ, see *infra* text accompanying notes 133-134, 177-179.

4. In 1986, the legislature adopted a piecemeal approach to reform when it amended the Post Conviction Procedure Act to allow a prisoner only two post-conviction petitions in challenging convictions arising out of a single trial. *See* Act of May 27, 1986, ch. 647, 1986 Md. Laws 2387 (amending MD. ANN. CODE art. 27, § 645A(a), (f) (1982 & Supp. 1985)). The handling of meritless subsequent petitions no doubt involves much waste, but this piecemeal approach is unlikely to provide lasting relief. Once a prisoner realizes that the courts will not accept a third post-conviction petition, the prisoner will simply relabel the filing an application for habeas corpus. The comprehensive approach suggested in this article, and in the legislation proposed by the Criminal Law and Procedure Committee of the Judicial Conference, provides more hope for relief. The suggested approach allows, in effect, one post-conviction filing; if the prisoner makes any subsequent filings, however labeled, the primary issue would be whether the prisoner had an adequate opportunity to present claims in the initial proceeding.

In 1986, the legislature did not have before it the proposed legislation found in Appendix A. The legislature's adoption of a two-petition rule does not preclude subsequent consideration and adoption of more comprehensive reforms.

would be undesirable and probably unconstitutional.[5]

The present post-conviction system in Maryland functions reasonably well. There are nevertheless problem areas where improvements are possible. Judges complain that the present system does not adequately protect the courts from the prisoner who abuses the system by filing successive, and increasingly frivolous, applications for relief.[6] Filing fees and the assessment of costs, two means traditionally utilized to deter frivolous or vexatious litigation, do not have the same effect on prisoner filings since most prisoners are indigent and all prisoners have a right of access to the courts to challenge their confinement.[7] In addition, a prisoner's delay in filing for post-conviction relief may prejudice the state's ability to defend a conviction.

The recommendations presented in this article seek to make the present system for adjudicating post-conviction claims more efficient without undermining its fairness. The recommendations build upon the principal strength of the present system: the guarantee of a full evidentiary hearing with appointed counsel for each prisoner's first petition filed under the Post Conviction Procedure Act.[8] This allocation of resources to the adjudication of first petitions is appropriate, but the state should take better advantage of the attention given first petitions. In particular, the state should broaden the preclusive effect of the first post-conviction court's decision on all subsequent prisoner filings. The state should also have available a mechanism such as a laches defense to protect itself from a prisoner's inexcusable delay in the presentation of claims.

The thrust of the recommendations is thus to avoid duplicative effort by making the prisoner's first filing under the Post Conviction Procedure Act the focal point for all collateral relief. Habeas corpus and coram nobis should play a subordinate role and be available only as last-ditch remedies when a convicted defendant has no other access to the courts. To accomplish this objective, the legislature should consider the following six statutory changes:[9]

1. The legislature should amend the Post Conviction Procedure Act to permit a convicted offender to file only *one* petition with

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5. The state constitution provides: "The General Assembly shall pass no law suspending the privilege of the Writ of *Habeas Corpus*." MD. CONST. art. III, § 55.

6. This particular complaint led to the 1986 amendment to the Post Conviction Procedure Act discussed *supra* at note 4.

7. Bounds v. Smith, 430 U.S. 817, 821 (1977).

8. MD. ANN. CODE art. 27, § 645A(f) (Supp. 1985).

9. For a fuller discussion of these six recommendations, see Part IV of this article. For statutory language implementing these recommendations, see Appendix A.

respect to convictions arising from a single criminal trial. The petitioner should be required to include in the petition all available grounds for relief. The Act should bar all subsequent petitions, while allowing a petitioner to file a motion to reopen the original proceeding on the following bases only: (a) the ineffectiveness of post-conviction counsel; (b) the announcement, subsequent to the disposition of the petition, of a new legal standard that applies retroactively; or (c) the discovery of facts, not known at the time of disposition, that afford the petitioner grounds for relief.[10]

2. The legislature should amend the Courts and Judicial Proceedings Article to eliminate habeas corpus if the relief sought by the prisoner is available under the Post Conviction Procedure Act. Thus, if the applicant for habeas corpus had not previously filed a petition under the Act, the judge should normally treat the habeas corpus application as a post-conviction petition and transfer it to the convicting court for disposition under the Act. The judge should do so even if the prisoner does not consent.

3. The legislature should amend the Post Conviction Procedure Act to eliminate coram nobis as a duplicative remedy. Coram nobis should be available only if post-conviction and habeas corpus relief are no longer available (i.e., if the convicted offender is no longer in custody).

4. The legislature should amend the Courts and Judicial Proceedings Article to specify the preclusive effect in habeas corpus proceedings of prior post-conviction and habeas corpus proceedings. That amendment should prevent prisoners from circumventing the limit of one post-conviction petition through subsequent habeas corpus filings. Further, to avoid duplicative effort by a succession of judges, the Court of Appeals should amend the habeas corpus rules to permit the transfer of habeas corpus applications to the judge who conducted the post-conviction proceeding.

5. The legislature should amend the Post Conviction Procedure Act to redefine "finally litigated" and "waived" consistently with recent judicial decisions and these recommendations.

6. Finally, the legislature should amend the Post Conviction Procedure Act to afford the state a laches defense when the prisoner's inexcusable delay in filing a post-conviction petition

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10. The legislation proposed by the Judicial Conference Committee deletes item c. *See infra* note 162 and recommendation 1 in Appendix A (proposed § 645A(g)).

prejudiced the state's ability to respond to the petition.[11]

The basic point of these recommendations is that post-conviction, like an appeal, should be a one-shot venture. Subject to very limited exceptions, the convicted offender should obtain under the Post Conviction Procedure Act *one* hearing, *one* trial court disposition, and *one* appeal. Any further relief sought by the prisoner should be by way of habeas corpus or, in rare cases, by coram nobis. Habeas corpus should not be available as a duplicative remedy for prisoners, but should only become available after the prisoner has exhausted the post-conviction remedy. Once habeas corpus does become available, it should afford the prisoner only a limited opportunity to raise new allegations or relitigate old ones.[12]

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11. The legislation proposed by the Judicial Conference Committee would also provide the state with a laches defense if the delay prejudiced the state's ability to retry the petitioner. *See infra* note 193 and recommendation 6 in Appendix A (proposed § 645A(d)).

12. The acceptance of post-conviction proceedings as a standard part of the review process suggests another, more radical reform. That reform would combine appellate and post-conviction review into a unitary review proceeding. Promptly after a conviction, the trial court would conduct a post-conviction hearing. The trial record, supplemented by the post-conviction record, would provide the basis for a single appeal to the Court of Special Appeals. *See* Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U.L. REV. 485 (1974). The National Advisory Commission on Courts has approved a similar reform. *See* REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS—REPORT ON COURTS, Standards 6.1-6.8 (1973). The Commission's proposal did not include a mandatory, pre-appeal post-conviction hearing, but assigned to the appellate court the responsibility to do whatever was necessary to decide on direct review all allegations of error, including allegations which appellate courts normally relegate to post-conviction proceedings because of the absence of an adequate record. *See* Nejelski and Emory, *Unified Appeal in State Criminal Cases*, 7 RUT.-CAM. L.J. 484 (1976).

Perhaps the new and untried nature of these proposals explains the failure of any state to adopt them. One may also criticize these proposals on the ground that they will spawn additional work for the courts. In Maryland there are roughly three times as many appeals by convicted defendants as there are first post-conviction filings. *See, e.g.*, ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT OF THE MARYLAND JUDICIARY 1983-84: STATISTICAL ABSTRACT 35 (1984) (983 criminal appeals to the Court of Special Appeals in fiscal 1984) and text *infra* at note 97 (370 first post-conviction petitions in fiscal 1984). Expanding the scope of review on appeal may therefore create more work for the courts without affording convicted defendants any additional relief, at least if we assume that most, if not all, prisoners entitled to post-conviction relief are already seeking it. That assumption does not seem unreasonable, given the advisory service run by the Public Defender's Office and the lack of merit in the overwhelming majority of post-conviction petitions presently filed. This concern over an unnecessary increase in judicial business provides a sound basis for rejecting the unitary review model, or at least for putting the proposal on the back burner.

II. DEVELOPMENT OF POST-CONVICTION REMEDIES

A. The Post Conviction Procedure Act

In 1958 the Maryland Legislature enacted the state's first Post Conviction Procedure Act.[13] The legislature modeled this Act on the 1955 version of the Uniform Post-Conviction Procedure Act.[14] The impetus behind the Maryland legislation was the sharp increase during the 1950s of habeas corpus applications filed by state prisoners. During the reporting year 1957-58, prisoners filed 495 applications for writs of habeas corpus in the trial courts of the state.[15] A substantial number of those cases reached the Maryland Court of Appeals when the prisoner sought leave to appeal a circuit judge's denial of the writ. In 1957 alone the Court of Appeals received 128 applications for leave to appeal which it disposed of in 104 published opinions.[16] Given the smaller and supposedly less litigious prison population of that era, the number of prisoners challenging their convictions through state habeas corpus was surprisingly large.[17] The legislative response to this burden was to establish in the Post Conviction Procedure Act a new procedure for challenging a state criminal conviction collaterally. The legislature evidently anticipated that the new procedure, which limited a prisoner to a single petition without any right to appeal, would reduce the burden on the courts.

The scope of the remedy as specified in the Act has remained basically unchanged since 1958. The remedy is available to any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation.[18] Claims that may be raised in a petition filed under the Act include the following: (1) the sentence or judgment was imposed in violation of the Consti-

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13. 1958 Md. Laws, ch. 44.

14. UNIF. POST-CONVICTION PROC. ACT, 9B U.L.A. 556-63 (1966).

15. ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT 1957-1958 23 (1958).

16. *Id.* at 20-21.

17. In June 1957, the Division of Correction housed 5,398 prisoners, as compared with approximately 12,600 today. Telephone interview with Robert Gibson, Maryland Department of Public Safety and Correctional Services (Aug. 6, 1986). In fiscal 1984, the Court of Special Appeals disposed of 252 applications for leave to appeal in post-conviction cases. ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT OF THE MARYLAND JUDICIARY 1983-84: STATISTICAL ABSTRACT 36 (1984). The number of post-conviction petitions filed in the trial courts was between 550 and 650. *See infra* text accompanying notes 91-96. Given the increase in the prison population, the percentage of prisoners seeking post-conviction relief seems actually to have declined between 1957 and today.

18. MD. ANN. CODE art. 27, § 645A(a) (Supp. 1985). Chapter 442 of 1965 Md. Laws extended the provisions of the original Act to include convicted offenders who were no longer incarcerated but on parole or probation.

tution of the United States; (2) the sentence or judgment was imposed in violation of the Constitution or laws of Maryland; (3) the court was without jurisdiction to impose the sentence; (4) the sentence exceeds the maximum authorized by law; and (5) the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy.[19] A convicted offender may file such a petition at any time so long as he remains incarcerated or on parole or probation for the offense. Unlike an application for a writ of habeas corpus, which a prisoner may file with any state judge,[20] a prisoner must file a post-conviction petition in the circuit court for the county in which the conviction took place.[21]

The Maryland Legislature in 1958 intended to lighten the burden imposed by prisoners on the courts by limiting each offender to one post-conviction petition in the trial court and one opportunity to seek leave to appeal from the Court of Appeals.[22] A Chief Judge of the Maryland Court of Appeals had observed prior to the passage of the Act that in most of the habeas corpus cases reaching the Court of Appeals, the applicant had filed "one or more (sometimes many) previous applications which had been denied."[23] The Legislature sought to restrict the filing of successive petitions through the single petition rule found in section 645-H of the Act as originally enacted. That section, which derived almost verbatim from section 8 of the Uniform Act, provided that a petitioner must raise in the initial petition "all grounds of relief claimed."[24] Grounds not raised were waived "unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."[25] The Commissioners' Note to section 8 of the Uniform Act recognized that the purpose of that provision was to prevent "repetitive petitions" by

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19. MD. ANN. CODE art. 27, § 645A(a) (Supp. 1985).

20. MD. CTS. & JUD. PROC. CODE ANN. § 3-701 (1984); MD. ANN. CODE art. 27, § 594D (1982) (district court judges).

21. MD. ANN. CODE art. 27, § 645A(a) (Supp. 1985).

22. Comment, *Maryland Version of the Uniform Post Conviction Procedure Act, with Special Reference to the Writ of Habeas Corpus*, 19 MD. L. REV. 233 (1959).

23. Markell, *Review of Criminal Cases in Maryland by Habeas Corpus and by Appeal*, 101 U. PA. L. REV. 1154, 1161 (1953). The author of this article, the Honorable Charles Markell, was an Associate Judge of the Maryland Court of Appeals from 1945 until he became Chief Judge on September 8, 1952. He served as Chief Judge until retiring on December 16, 1952.

24. 1958 Md. Laws ch. 44, § 1.

25. *Id.*

limiting the petitioner in most cases to a single petition.[26] Subsequent petitions were allowable only if they raised grounds that the petitioner could not have raised in the first petition.

In 1959, the General Assembly reinforced the single petition rule by authorizing the post-conviction court summarily to dismiss a subsequent petition, unless the petition raised additional grounds that the petitioner could not "reasonably have raised" in the initial petition.[27] Perhaps the legislature in 1958 and 1959 was unduly optimistic in believing it could use waiver to limit most offenders to one petition, but that certainly appeared to be the intent. Otherwise, the burden on the courts under the Act would be similar or even greater than before the Act's enactment. This is so because prisoners would simply label their multiple filings "post-conviction petitions" rather than "habeas corpus applications."

The Post Conviction Procedure Act, as introduced in the 1958 legislature,[28] further lightened the burden on the courts by superseding the habeas corpus remedy in cases covered by the Act. If an application for habeas corpus raised claims entertainable under the new Act, the bill required the judge to transmit the application to the court in which the applicant's conviction took place for disposition as a post-conviction petition.[29] This approach was consistent with section 1 of the Uniform Act, which provided that the new post-conviction remedy should replace all previously available state remedies for challenging the validity of incarceration under sentences of death or imprisonment.[30] At some point the legislature amended the bill to require the applicant's consent for post-conviction treatment of a habeas corpus application.[31] The apparent reason for this change was the legislature's concern that restricting access to the writ might constitute a suspension of the writ in violation of the Maryland constitution.[32] While this concern may well have been unfounded,[33] the legislature preferred to adopt the safer course.

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26. UNIF. POST-CONVICTION PROC. ACT, 9B U.L.A. 556, 561 (1966).

27. 1959 Md. Laws ch. 429, § 1 (amending MD. ANN. CODE art. 27, § 645H (Supp. 1958)).

28. Senate Bill 14 (printed in 1958 Md. Laws ch. 44).

29. *Id.*

30. 9B U.L.A. at 550-51.

31. Section 645-B(b) as adopted in 1958. *See supra* note 24. This provision may now be found in MD. R. Z55.

32. *See supra* note 5.

33. The Supreme Court has upheld the constitutionality of the post-conviction remedy established by Congress for federal prisoners even though that remedy superseded federal habeas corpus. United States v. Hayman, 342 U.S. 205 (1952). The federal statute provides that an application for a writ of habeas corpus by a federal prisoner shall

The safer course avoided the constitutional issue but had its own built-in disadvantage. Given the preservation of the habeas remedy, the Post Conviction Procedure Act does not provide a "single"[34] or "comprehensive"[35] remedy for challenging criminal convictions, despite the Court of Appeals' penchant for describing it in those terms. Habeas corpus (and perhaps also coram nobis) remains available as a separate, duplicative remedy. However, the 1958 legislature did encourage the use of the new post-conviction remedy by authorizing an aggrieved prisoner to seek leave to appeal from a circuit court's denial of post-conviction relief. At the same time, the General Assembly precluded all appeals in habeas corpus and coram nobis cases in which the relief sought by the prisoner was also available under the Post Conviction Procedure Act.[36] Thus, the legality of a prisoner's confinement may still be challenged through habeas corpus, but no appeal lies from the denial of a habeas application. Further, the judge must dispose of a habeas application under the habeas corpus rules unless the prisoner consents to its treatment as a post-conviction petition.[37] The continued availabilty of coram nobis as a duplicative remedy is more doubtful, not because of anything said in the Act, but because of the Court of Appeals' earlier holding that the writ does not lie where the party has an adequate remedy under an existing statutory procedure.[38]

B. Post-Conviction and Habeas Corpus Compared

The post-conviction and habeas corpus remedies have existed side-by-side from 1958 until the present, assuring a prisoner of at least two filings and two trial court determinations (although only one opportunity to seek leave to appeal). The post-conviction remedy, which guarantees a first-time petitioner a hearing in court with counsel,[39] is the procedurally favored remedy. The scope of the post-conviction remedy is also broader. The post-conviction court may decide all legal or constitutional claims affecting the validity of

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not be entertained "unless it . . . appears that the post-conviction remedy . . . is inadequate or ineffective to test the legality of [the] detention." 28 U.S.C. § 2255 (1982). No court has ever found the federal post-conviction remedy under § 2255 to be inadequate or ineffective.

34. *See* Covington v. State, 282 Md. 540, 544, 386 A.2d 336, 338 (1978).

35. Davis v. State, 285 Md. 19, 22, 400 A.2d 406, 407 (1979).

36. MD. ANN. CODE art. 27, § 645A(e) (1982) (originally § 645A(b)).

37. MD. R. Z55 (derived from MD. ANN. CODE art. 27, § 645-B(b) as enacted in 1958).

38. Bernard v. State, 193 Md. 1, 4, 65 A.2d 297, 298 (1949).

39. MD. ANN. CODE art. 27, § 645A(f) (Supp. 1985).

the conviction, while the habeas corpus court must limit its review to claims that the convicting court lacked jurisdiction or violated the defendant's fundamental rights.

Until the middle of this century, a prisoner could raise on state habeas corpus only jurisdictional questions,[40] but in the 1940s and 1950s the Maryland Court of Appeals followed the example of the Supreme Court in broadening the scope of the writ to include alleged violations of fundamental rights.[41] In those "exceptional cases," habeas corpus became available because it was the only effective means to preserve basic constitutional rights.[42] This evolution of the writ ceased after the legislature in 1958 abolished prisoner appeals in habeas corpus cases.[43] That legislative action froze the law of habeas corpus because appellate courts no longer issued opinions in cases involving the writ.[44] Despite nearly thirty years of silence from the state appellate courts, it is generally assumed that the issues that can be raised under the Post Conviction Procedure Act remain to some significant extent broader than those that can be raised under habeas corpus.[45]

1. Res Judicata and Waiver on Habeas Corpus.—While the substantive scope of the remedy available under the Post Conviction Procedure Act is broader than the remedy available on habeas corpus, the court's authority to decide the merits of issues raised by the prisoner is considerably greater on habeas corpus. This anomaly results from differences in the applicable estoppel and waiver standards. The Post Conviction Procedure Act, as originally enacted, barred the consideration of alleged errors that the petitioner had "previously and finally litigated or waived in the proceedings

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40. *See, e.g.*, State v. Glenn, 54 Md. 572 (1880).

41. For example, the court broadened the scope of the writ to include coerced waivers of counsel or jury trial, involuntary guilty pleas, or the state's presentation of perjured testimony. *See* Markell, *supra* note 23, at 1160-61.

42. Loughran v. Warden of Maryland House of Corrections, 192 Md. 719, 724-25, 64 A.2d 712, 714 (1949).

43. An appeal is available to the state if a habeas corpus judge discharges a prisoner on the ground that the law under which conviction took place is unconstitutional. MD. CTS. & JUD. PROC. CODE ANN. § 3-706 (1984).

44. The Court of Appeals had jurisdiction over habeas corpus appeals from 1945 to 1958. Judge Markell believed that the 200-odd opinions published by the court prior to 1953 made "no marked contribution to the literature of the law." Markell, *supra* note 23, at 1161. In most of these cases the court refused to address the issues raised by the prisoner, ruling that "habeas corpus cannot be used as an appeal or new trial." *Id.* at 1160.

45. For the further evolution of the federal writ to encompass all federal constitutional or legal issues affecting the validity of a conviction, see Brown v. Allen, 344 U.S. 443 (1953).

resulting in the conviction . . . ."[46] While the original Act did not define the terms "finally litigated" or "waived," the structure of section 645A(a) communicated a good deal about the meaning of those terms. The phrases "finally litigated" and "waived" appeared after the list of alleged errors that a prisoner may raise under the Act. A prisoner may raise any of the listed errors "provided that the alleged error has not been previously and finally litigated or waived."[47]

Thus, it appears that the statutory requirement that the prisoner not have finally litigated or waived an allegation of error is a prerequisite to the post-conviction court's addressing the allegation. Neither the Court of Appeals nor the Court of Special Appeals has expressly construed section 645A(a) in that jurisdictional fashion. However, most judges and practitioners assume that if the state claims that the prisoner has finally litigated or waived an error alleged in a post-conviction petition, the post-conviction court *must* resolve the res judicata and waiver issues in the prisoner's favor *before* it decides the merits.

The doctrines of res judicata and waiver have never applied so inflexibly to habeas corpus and coram nobis. Indeed, it is black-letter law that the common law doctrine of res judicata does not apply at all on habeas corpus.[48] As a result, a habeas court has the authority to relitigate issues resolved against the prisoner at trial or on appeal. Federal courts often relitigate federal constitutional issues in a habeas action brought by a state prisoner.[49] The same relitigation may also occur when the habeas court and the convicting court are part of the same judicial system. Thus, a federal habeas court may relitigate issues resolved against a federal prisoner by a federal trial or appellate court.[50] In addition, habeas courts have traditionally adopted a flexible approach in allowing a prisoner to raise issues he did not raise at trial or on appeal rather than apply

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46. 1958 Md. Laws ch. 44, § 1 (adding MD. ANN. CODE art. 27, § 645A(a)).

47. *Id.*

48. Sanders v. United States, 373 U.S. 1, 7-8 (1963). *See also* Kelley, *Finality and Habeas Corpus: Is the Rule that Res Judicata May Not Apply to Habeas Corpus or Motion to Vacate Still Viable?* 78 W. VA. L. REV. 1 (1975).

49. *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953).

50. *See, e.g.*, Davis v. United States, 417 U.S. 33 (1974). In *Davis*, the federal prisoner sought post-conviction relief under § 2255, but the Court has treated that statutory remedy as the equivalent of habeas corpus for federal prisoners. For the difficulties raised by this power to relitigate, *see* Hart & Wechsler, *The Federal Courts and the Federal System* 1528-31 (2d ed. 1973) and 423-25 (Supp. 1981).

rigid rules of waiver.[51]

Habeas courts have also consistently refused to apply the doctrines of res judicata and waiver to bar successive applications from the same prisoner. Thus, the dismissal of an earlier application did not bar a subsequent application raising the same or different claims. This reluctance to limit the prisoner to a single application was due in large part to the fact that the common-law writ developed at a time when prisoners did not have access to legal assistance.[52] Courts were unwilling to hold that an uncounseled prisoner could not raise in a subsequent application potentially meritorious claims. As a result, the doctrine of res judicata never applied to successive habeas corpus applications. Prisoners could go from judge to judge until "unsuccessful in requesting relief from twelve," they could obtain release by the "wrongheadedness of a thirteenth."[53] Similarly, prisoners could raise new grounds in a subsequent application unless they had abused the writ by deliberately withholding such grounds from an earlier application.[54] Under this approach, courts gave weight to prior determinations on the merits and sought to prevent abuses of the writ, but decided subsequent applications on the merits if justice so required.[55]

Statutory and rule provisions permit Maryland judges in habeas cases to give some finality to earlier denials of the writ, but the pro-

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51. *See* Sunal v. Large, 332 U.S. 174 (1947) (federal habeas corpus action by federal prisoner).

52. L. YACKLE, POSTCONVICTION REMEDIES §§ 150-51 (1981).

53. Eshugbayi Eleko v. Nigeria, 1928 A.C. 459.

54. *See* Sanders v. United States, 373 U.S. 1, 17-18 (1963).

55. Federal judges may give controlling weight to the denial of relief in an earlier proceeding if "1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, 2) the prior determination was on the merits, and 3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders*, 373 U.S. at 15. Similarly, the *Sanders* Court permitted a prisoner to raise new grounds in a subsequent application unless the prisoner "deliberately bypassed" an opportunity in a prior proceeding to raise and have adjudicated those grounds. *Id.* at 17. The Court based its rulings in large part on the history of the writ.

In Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986), a plurality of four Justices limited "the ends of justice" permitting relitigation of claims previously decided against the prisoner to cover only cases where the prisoner made a colorable show of innocence. *Id.* at 2622-28 (opinion of Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ.). A majority of the Justices rejected that limitation, either explicitly in dissent, *id.* at 2631 (opinion of Brennan, J., joined by Marshall, J.) and at 2639 (opinion of Stevens, J.), or implicitly by refusing to join those portions of Justice Powell's opinion (White and Blackmun, JJ.). The dissenters favored granting the lower federal courts more discretion to entertain successive petitions. They would have permitted relitigation where the prisoner invoked intervening court decisions in support of a post-conviction claim.

visions are unclear if not inconsistent. In addition, neither the statute nor the rules address the preclusive effect on a prisoner's claim of an adverse ruling at trial or on direct review or of the prisoner's failure even to raise the claim. These lacunae increase the difficulty of comparing the relief presently available under habeas corpus with that available on post-conviction.

The Maryland Legislature amended the habeas corpus statute in 1941 and 1945 to increase a judge's authority summarily to refuse a grant of the writ. Prior to 1941, it was evidently common practice in Maryland for judges to issue the writ as a matter of course.[56] That is, the judge brought the prisoner to court to inquire into the legality of the detention and then decided whether to discharge the prisoner. This practice permitted prisoners to obtain an "intermission of imprisonment through excursions to distant counties at public expense."[57] The legislature itself had contributed to this practice by providing that a judge would be liable to the party aggrieved for a refusal to grant the writ.[58] In 1941 the legislature repealed that provision and added a new provision which allowed the judge, without holding a hearing, to refuse to issue the writ, if "it appear[ed] from the complaint itself or the documents annexed that the petitioner would not be entitled to any relief."[59]

In 1945 the legislature went one step further and addressed the problem posed by successive applications for the writ. The legislature left to the judge's "discretion" whether to issue the writ if the applicant had already received "a hearing on a prior application for release from confinement under the same commitment." The legislature instructed the judge, when exercising that discretion, to consider whether the subsequent application contained "new grounds of a substantial nature" and whether any previously raised grounds had been "fully and adequately presented" in the prior application.[60] This language did not require, or even permit, habeas judges to apply principles of res judicata to dismiss subsequent applications for the writ. The judge must exercise discretion to insure that justice is done, but in doing so, a prior judge's refusal to issue

56. Olewiler v. Brady, 185 Md. 341, 347, 44 A.2d 807, 810 (1951).

57. *Id.*

58. That provision, codified as § 14 of article 42 prior to 1941, derived from the English habeas corpus statute, 37 Car. II, ch.2 (1679).

59. 1941 Md. Laws ch. 484, § 1 (amending MD. ANN. CODE art. 42, § 3 (1939)). That provision is now found in MD. R. Z44(1).

60. 1945 Md. Laws ch. 702, § 1 (adding MD. ANN. CODE art. 42, § 3A). Section 3-703 of the Courts and Judicial Proceedings Article presently contains this provision almost verbatim.

the writ is given great deference. The legislature permitted this deference because in the same year (1945) it authorized, for the first time, an appeal to the Court of Appeals by an aggrieved applicant for the writ.[61] In the legislature's opinion, it was preferable to allow the prisoner to appeal to the Court of Appeals rather than to every other judge in the State. Under the latter procedure one judge might set at naught the judgment of all the other judges on whether to release a prisoner on habeas corpus.[62]

Given the aggrieved applicant's new right of appeal, it is unclear why the legislature did not opt for the applicability of res judicata. Perhaps there was concern about applying the doctrine against an uncounseled applicant or to cases where liberty was at stake. In any event, the Court of Appeals, when it first promulgated habeas corpus rules in 1961,[63] took the legislature's concern for finality one step further. In what is now Maryland Rule Z44(2), the court came still closer to applying principles of res judicata to bar subsequent applications. At the same time, the court seemingly allowed a prisoner unlimited freedom to raise new grounds for relief. That rule provides that a judge may refuse to grant the writ to a convicted offender, if "the legality of the confinement was determined upon a prior application for the writ or other post-conviction proceeding, and no new ground is shown sufficient to warrant issuance of the writ."[64]

Rule Z44(2) differs from the 1945 statute[65] in at least two respects. First, the rule makes no explicit reference to the judge's "discretion" in deciding whether to refuse issuance of the writ on a subsequent application. Second, the rule requires the judge to consider new grounds raised in a subsequent application, as opposed simply to considering the newness of the grounds as a factor in deciding whether summarily to deny the writ. Perhaps these differences are not as great as they appear since the rule only provides that the judge "may" refuse to grant the writ on a subsequent appli-

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61. 1945 Md. Laws ch. 702, § 1 (adding MD. ANN. CODE art. 42, § 3C). In 1947 the legislature once again amended § 3C to require the aggrieved applicant to first seek leave to appeal. 1947 Md. Laws ch. 625. The legislature abolished habeas corpus appeals in cases in which the prisoner was challenging a criminal conviction when it enacted the Post Conviction Procedure Act in 1958. 1958 Md. Laws ch. 44.

62. *See* Markell, *supra* note 23, at 1157.

63. TWENTIETH REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (September 1961), as adopted by the Court of Appeals on September 15, 1961. *See* Order Adopting Rules of Practice and Procedure, MD. R. at 13-14 (1963 ed.).

64. MD. R. Z44(2).

65. Now codified as MD. CTS. & JUD. PROC. CODE ANN. § 3-703 (1984).

cation (i.e., principles of res judicata are not binding). Also minimizing the discrepancy is the rule's requirement that the judge determine whether a new ground is "sufficient" before resolving it. Nevertheless, Rule Z44(2) is inconsistent with the earlier statutory provision. While the state may argue under the rule that the habeas judge should treat a claim as barred because "finally litigated," the rule gives little or no leeway to the state to argue that a claim is barred because the prisoner waived it. The statute also provides little support for a waiver argument, but it does confer broad discretion on the habeas judge to resolve on the merits grounds previously raised by the prisoner.

2. Res Judicata and Waiver on Post-Conviction.—The rules of waiver and res judicata applicable to claims raised in post-conviction petitions have also undergone a number of changes over the years. In 1965, seven years after the passage of the original Post Conviction Procedure Act, the legislature amended it to reduce significantly the role of waiver and, to a lesser extent, res judicata. The original Act had provided that the post-conviction court could not decide any alleged error that the petitioner had "previously and finally litigated or waived" in the criminal proceeding itself or in any other proceeding to secure relief from the conviction.[66] The Act did not define those terms other than to provide that failure to include an available ground in the original petition constituted a waiver.[67] In 1965 the legislature added section 645A(c), which defined waiver to be the "intelligent and knowing" failure to make an allegation of error that could have been made at trial, on direct appeal, or in any habeas corpus, coram nobis, or prior post-conviction proceeding actually instituted by the petitioner.[68] At the same time, the legislature repealed the original section 645-H which provided that the petitioner waived all available claims not included in the first petition.[69]

By defining waiver this way, the 1965 legislature adopted the deliberate bypass test formulated by the Supreme Court in *Fay v. Noia*.[70] Under that approach, a prisoner could raise a claim not raised at trial or on appeal as long as the prior failure to present the claim was not a deliberate (i.e., knowing and intelligent) bypass of

66. 1958 Md. Laws ch. 44, § 1 (original § 645A(a)).

67. *Id.* at § 1 (original § 645-H).

68. 1965 Md. Laws ch. 442, § 1. Subsection 645A(c) still contains nearly identical language.

69. 1965 Md. Laws ch. 442, § 2.

70. 372 U.S. 391, 439 (1963). The Court of Appeals so described the legislature's action. Bristow v. State, 242 Md. 283, 289, 219 A.2d 33, 37 (1966).

an available remedy. The legislature applied that formulation not only to grounds that the petitioner failed to raise at trial and on appeal but also to grounds not raised in an earlier collateral proceeding.[71]

The new definition of waiver made it more difficult for the post-conviction court to find a waiver and thus avoid reaching the merits of the prisoner's claim. While the new subsection did contain a rebuttable presumption that a previous failure to raise an allegation constituted a knowing and intelligent waiver,[72] in practice the prisoner could rebut the presumption merely by stating in the petition that there was no awareness of the alleged error at the time of the failure to raise it. The effect of this change was especially pronounced with respect to new grounds raised in subsequent petitions—grounds that the courts had previously considered waived under the single petition rule.

The purpose of the 1965 amendment was fairly apparent. The Court in *Noia* had refused to honor state procedural defaults (i.e., the failure of the prisoner to raise a claim at the proper time in the state courts) as a bar to federal habeas corpus relief unless the default involved a deliberate bypass of state remedies. Thus, if state courts wished to limit federal court interference, they would need to loosen their own waiver rules to conform with *Noia*. Otherwise, the state prisoner could go right to federal court where the judge would most likely hold a hearing because of the absence of any resolution of the claim in the state court. As a defensive mechanism to hold off the federal judges, the legislature greatly limited the notion of waiver and opened up state post-conviction to many new claims. In a sense, the legislature only ratified what post-conviction courts were already doing in reaction to *Noia*.[73]

Subsequent events upset the legislature's calculations. In particular, the federal judges largely withdrew from the scene. In *Wainwright v. Sykes*,[74] the Supreme Court rejected the deliberate bypass standard. The Court held that to raise on federal habeas corpus a claim not raised in state court, a state prisoner must establish cause

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71. The Supreme Court, in Sanders v. United States, 373 U.S. 1, 17-18 (1963), applied a similar definition of waiver to prior post-conviction filings by federal prisoners.

72. 1965 Md. Laws ch. 442, § 1 (presently codified in the second paragraph of § 645A(c)).

73. Gleaton v. Warden of Maryland House of Corrections, 238 Md. 135, 135-36, 207 A.2d 652, 652-53 (1965) (Supreme Court's waiver doctrine applied by Maryland courts as a matter of expediency).

74. 433 U.S. 72 (1977).

for the procedural default and actual prejudice from the alleged federal constitutional error.

The legislature did not react to the retreat of the federal judges in *Sykes*, as it had to their advance in *Noia*, by amending the Post Conviction Procedure Act. Perhaps the legislature would have done so eventually, but the Court of Appeals in the year following *Sykes* made any legislative response unnecessary. In *Curtis v. State*,[75] the court held the definition of waiver in section 645A(c) applied only to allegations of error for which federal law required a knowing and intelligent waiver. The *Curtis* court identified certain fundamental rights for which the Supreme Court had traditionally required a knowing and intelligent waiver.[76] In doing so the Court of Appeals assumed that *Noia* retained some vitality and that the Supreme Court would still require a knowing and intelligent waiver to bar federal habeas review of alleged denials of those rights. With respect to other constitutional rights, the *Curtis* court observed that the Supreme Court did not require a knowing and intelligent waiver of such rights as a prerequisite to barring the defendant from subsequently asserting the right in federal court. The *Curtis* court reasoned that the legislature could not have intended its requirement of a knowing and intelligent waiver to govern those situations.

The aftermath of *Curtis* is that the determination of the applicable waiver standard in post-conviction proceedings is unclear. Post-conviction courts must identify those fundamental rights requiring a knowing and intelligent waiver and must formulate the waiver standard applicable to those rights which do not require a knowing and intelligent waiver. Despite the paucity of case law, it seems likely that the *Curtis* list of fundamental rights is fairly comprehensive.[77]

On the issue of the waiver standard applicable to nonfundamental rights, the Court of Appeals has not formulated a single waiver standard. The court has focused on "tactical decisions" by counsel and the "inaction" of counsel or of the defendant as bases for precluding the defendant from subsequently raising an allega-

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75. 284 Md. 132, 138-40, 395 A.2d 464, 468-69 (1978).

76. The fundamental rights identified included the right to counsel, to jury trial, to plead not guilty, to plead the privilege against self-incrimination, and the right not to be subject to double jeopardy. *Id.* at 142-44, 395 A.2d at 470-71.

77. In Davis v. State, 285 Md. 19, 24-31, 400 A.2d 406, 408-12 (1979), the Court of Appeals refused to characterize as a fundamental right correct jury instructions on an alibi defense. On the other hand, the court has recognized as a fundamental right the defendant's right to be personally present at trial to confront his accusers. Williams v. State, 292 Md. 201, 219, 438 A.2d 1301, 1309-10 (1981).

tion of error.[78] Certainly the court has come close, with respect to nonfundamental rights, to substituting the notion of procedural default for that of waiver. Under the procedural default approach, the defendant does not lose a right (constitutional or otherwise) by any personal decision to relinquish it, but by operation of law (i.e., by failing to assert it at the proper time).[79] Inaction, or the failure to make an objection at the proper time, constitutes a waiver or, as relabeled by Professor Westen, a "forfeiture."[80]

In 1965, the legislature also amended the Act to define "finally litigated,"[81] but that definition has not generated any difficulties comparable to those raised by the definition of "waiver." Under the statutory definition[82] a prisoner cannot relitigate an allegation of error on post-conviction, if the Court of Special Appeals has rejected the claim on direct appeal or on leave to appeal from an earlier post-conviction proceeding. In those cases the Court of Special Appeals decision is res judicata. Decisions adverse to the petitioner by trial courts do not have the same preclusive effect, but the prisoner's failure to appeal from a trial court decision may constitute a waiver.[83]

C. Summary: Overlapping Remedies

The Post Conviction Procedure Act does not provide, as originally intended, a single, comprehensive remedy for challenging criminal convictions collaterally. Habeas corpus survives as a separate remedy which a prisoner may invoke prior to, simultaneously with, or subsequent to post-conviction. The relationship between the two remedies remains undefined. Differences in the scope of the two remedies and in the applicable rules of waiver and res judicata compound the confusion caused by this overlap. The legislature has

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78. *Curtis*, 284 Md. at 147, 149, 395 A.2d at 473, 474.

79. *See generally* Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

80. *Id.*

81. 1965 Md. Laws ch. 442, § 1 (adding a new § 645A(b)).

82. MD. ANN. CODE art. 27, § 645A(b) (1982).

83. In a peculiar exception to this rule denying preclusive effect to trial court decisions, the statutory definition of "finally litigated" does give such effect to a decision by a circuit judge upon an application for a writ of habeas corpus or coram nobis previously filed by the post-conviction petitioner, unless the decision on the earlier application is "clearly erroneous." MD. ANN. CODE art. 27, § 645A(b) (1982). Wisely, the Attorney General's Office does not invoke this latter provision, which is a potential trap for the unwary *pro se* prisoner who applies for a writ of habeas corpus without realizing the possible preclusive effect of a trial court denial. Interview with Deborah K. Chasanow, Esq., Chief, Criminal Appeals and Correctional Litigation Division, Office of the Attorney General (May 1985).

made post-conviction the favored remedy by affording post-conviction petitioners additional procedural rights (e.g., appointed counsel, a hearing, and leave to appeal). These advantages naturally encourage the use of the Post Conviction Procedure Act by state prisoners. The 1986 statutory change[84] limiting prisoners to two post-conviction petitions should lead to a revival of prisoner interest in habeas corpus—a revival that will require the courts to struggle further to define the differences between the two remedies. A more unified approach appears desirable.

Before presenting such an approach, it is necessary to describe in greater detail the present functioning of the Post Conviction Procedure Act.

III. PRACTICE UNDER THE MARYLAND POST CONVICTION PROCEDURE ACT

A. The Post-Conviction Process

The court rules governing post-conviction proceedings establish informal, nontechnical procedures for the disposition of post-conviction petitions. On matters of procedure, the approach of the present rules[85] does not differ significantly from that of the rules initially promulgated by the Court of Appeals in 1961.[86] To initiate a proceeding under the Act, a prisoner need only file a petition stating: (1) The petitioner's name, place of confinement, and inmate identification number; (2) the place and date of trial, the offense for which the petitioner was convicted, and the sentence imposed; (3) the allegations of error upon which the petition is based; (4) a concise statement of facts supporting the allegations of error; (5) the relief sought; (6) a statement of all previous proceedings, including appeals, motions for new trial, previous post-conviction petitions, and any resulting determinations; and (7) a statement of the facts or special circumstances that show that the allegations of error have not been waived.[87] The petition shall also state whether the petitioner is able to pay the costs of the proceeding or to employ counsel. Finally, the court shall "freely allow" amendments to the petition in order to do substantial justice.[88]

Upon receipt of a petition, the court clerk shall notify the

84. *See infra* note 4.
85. MD. R. 4-401 to 4-408.
86. *See supra* note 63.
87. MD. R. 4-402(a).
88. MD. R. 4-402(c).

county administrative judge and the state's attorney.[89] The only additional pleading permitted by the rules is the response which the state's attorney must file within fifteen days after receiving notice of the petition.[90] The rules are silent on what may be pleaded in the response; most state's attorneys file a standard or set response which does no more than deny the prisoner's claims.

1. The Number of Petitions.—It is difficult to ascertain the number of post-conviction petitions filed annually. The Administrative Office of the Courts reports that state prisoners filed 401 petitions during fiscal 1984, but this figure, although comparable to the reported figures for prior years, is plainly too low.[91] First, the Administrative Office's table in the 1984 statistical abstract reports that circuit courts in five counties have not experienced any filings in recent years.[92] These figures obviously are in error. The explanation lies in the fact that the clerks in those courts have not separately reported post-conviction filings, but have included those filings in the miscellaneous law category. The clerk's office in Baltimore County, for example, confirms that during fiscal 1984 there were in fact forty-five post-conviction petitions filed in Baltimore County, but the office did not separately report that figure to the Administrative Office.[93] These filings, therefore, are not included in the 401 annual filings reported by the Administrative Office. If one makes similar adjustments for the other non-reporting counties, the number of annual post-conviction filings rises to approximately 550.[94]

The reported figures also understate the number of post-conviction proceedings because they usually do not include applications for habeas corpus, treated with the consent of the applicant, as post-

89. MD. R. 4-403.

90. MD. R. 4-404.

91. ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT OF THE MARYLAND JUDICIARY 1983-84: STATISTICAL ABSTRACT 75 (1984).

92. Those counties are Allegheny, Anne Arundel, Baltimore, Frederick, and Worchester. *Id.*

93. Interview with Baltimore County Chief Deputy Clerk Wylie L. Ritchey, Jr. (May 1985).

94. The new criminal rules, effective July 1, 1984, explicitly provide that a post-conviction petition shall be filed in the original criminal action rather than in the miscellaneous law category. MD. R. 4-403. This change should have ensured full reporting of post-conviction petitions; but the recently released statistics for fiscal 1985 report only 355 petitions. Ten counties (including the non-reporting counties cited in note 92 *supra*, except for Anne Arundel) still report no post-conviction petitions. ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT OF THE MARYLAND JUDICIARY 1984-1985 A-31 (1985).

conviction petitions.[95] Normally, a judge who receives a habeas corpus application seeking post-conviction relief sends the prisoner a form letter requesting consent to the application's treatment as a post-conviction petition. Many, if not most, prisoners do consent; but the written consent filed with the judge does not change or affect the prisoner's original filing in the clerk's office. In most counties, the clerk's office still counts that filing as a habeas corpus application. For example, the seventy-five post-conviction filings reported by Prince George's County for fiscal 1984 accurately report the number of prisoner filings designated by the prisoner as post-conviction petitions, but this number does not include the roughly twenty to thirty habeas corpus applications processed under the Post Conviction Procedure Act.[96]

Determining the number of filings that are first-time post-conviction petitions and those that are subsequent petitions is also difficult. Clerks' offices do not collect those statistics. One Baltimore City judge, between 1977 and 1983, disposed of by written opinion seventy petitions for post-conviction relief. Fifty-one of those petitions were first petitions, twelve were second petitions, and seven were third or later petitions.[97] Thus, fifty-one out of seventy petitions, or roughly two-thirds of the petitions filed, were first petitions. That ratio appears to be accurate state-wide. Thus, out of the 550 post-conviction filings during fiscal 1984, there were roughly 370 first petitions and 180 subsequent petitions. In addition, an indeterminate number of habeas corpus applications (probably no more than 100) were treated as post-conviction petitions with the consent of the prisoner. The great majority of those applications were undoubtedly subsequent filings, because applicants for habeas corpus have every incentive to file directly under the Post Conviction Procedure Act if they have not already filed a first petition. Therefore, the number of first petitions disposed of by the courts during fiscal 1984 was not much greater than 370. If one assumes that at least some of the subsequent filers had already submitted a petition during the fiscal year, the number of prisoners who sought some form of post-conviction relief is not much over 600.

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95. *See* MD. R. Z55.

96. Interview with the Honorable Audrey E. Melbourne, Associate Judge, Maryland Circuit Court for the Seventh Judicial Circuit (May 1985).

97. Statistics provided by the Honorable Joseph H. H. Kaplan, Associate Judge, Maryland Circuit Court for the Eighth Judicial Circuit. In addition, Judge Kaplan reported that 13 petitioners withdrew their petitions prior to any determination thereon. Interview with the Honorable Joseph H. H. Kaplan (May 1985).

Several things are striking about these figures. First, the number of initial filings under the Post Conviction Procedure Act is surprisingly low given the prison population of the state. In calendar year 1984, the Division of Correction received 4,862 inmates committed by the courts.[98] If one assumes that all of the approximately 370 first-time petitioners for post-conviction relief were inmates of the Division, which is not likely, less than ten percent of the convicted defendants who are committed to the Division seek some form of post-conviction relief. Second, the number of prisoners filing subsequent post-conviction petitions is also surprisingly small. As will be seen below, these petitions pose special problems for the judges who must rule upon them, although the burden involved should not be exaggerated. During the calendar year 1984, roughly 280 of the Division's 12,200 plus inmates filed subsequent petitions. Even this figure is a bit high because it counts all habeas corpus applications processed under the Act as subsequent petitions. Finally, the reported filings of post-conviction petitions include filings withdrawn by the petitioner before a hearing or other disposition. Rule 4-405 gives the petitioner an unlimited right to withdraw a post-conviction petition without prejudice before the date of a scheduled hearing. Roughly fifteen percent of the filed petitions are withdrawn. While these withdrawals further lighten the post-conviction workload, both the court and counsel may have expended considerable time and effort on a petition that the petitioner then decides to withdraw without prejudice.

There is no question that most post-conviction petitions are meritless in the sense that the petitioner is not entitled to any relief. In fact, the petitioner receives no relief at all in the overwhelming majority of the proceedings. The most common relief afforded is a belated appeal, due to counsel's ineffectiveness in preserving the defendant's right to appeal,[99] or a reduction in sentence.[100] The petitioner obtains a new trial in probably no more than one case out of a hundred at best. The low number of petitions with merit is in large part a reflection of the checking function of post-conviction relief. The effective functioning of a post-conviction relief system does not depend on the merit of the petitions filed.

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98. Intake statistics supplied by Robert Gibson, Maryland Department of Public Safety and Correctional Services (on file with author).

99. *See, e.g.*, Wilson v. State, 284 Md. 664, 399 A.2d 256 (1979).

100. The same relief is usually available to the prisoner under MD. R. 4-345(a)-(b).

2. Procedures for Handling Petitions.—The Post Conviction Procedure Act and the rules that implement it distinguish the procedures applicable to first petitions from those applicable to subsequent petitions. In 1983, the legislature amended the Act to recognize explicitly the right of a petitioner to a hearing and to the assistance of counsel on a first petition.[101] As a result, all first petitioners are now represented by counsel and appear in court for a hearing. On subsequent petitions, the court must determine whether to grant a hearing or to appoint counsel.[102]

The 1983 statutory amendment did not change existing practice because most judges were already appointing counsel and holding hearings on first petitions. Rather, the amendment's purpose was to clarify that trial judges, in post-conviction proceedings, had the authority to deny subsequent petitions without holding a hearing or appointing counsel. Prior to 1983, many judges had held hearings on subsequent petitions because there was no provision for denying a petition without a hearing. Also, the general practice was to afford any party-plaintiff (a post-conviction petitioner was a civil plaintiff) the process of a hearing before dismissing his law suit. The statutory amendment has changed that practice; most judges no longer hold hearings or appoint counsel on subsequent petitions. Nevertheless, the trial judge has the discretionary authority to do so, and that exercise of discretion is subject to review for abuse in the Court of Special Appeals.[103]

The public defender enters a post-conviction proceeding on behalf of a first petitioner in either of two ways.[104] First, the Collateral Division of the Public Defender's Office runs an inmate advisory service designed to inform prisoners of their post-conviction remedies. The Division distributes literature to inmates through the intake unit at the penitentiary, while the lawyers in the Division provide legal advice on initiating a post-conviction proceeding to inmates who request it. If an inmate requests advice or assistance, the lawyer assigned to the case will gather the relevant records and transcripts to determine whether the prisoner has an arguable claim for post-conviction relief. If so, the lawyer will file a post-conviction petition on behalf of the prisoner. If the lawyer does not believe a

101. 1983 Md. Laws ch. 234, § 1 (adding a new § 645A(f)).

102. *Id.*

103. Crum v. State, 58 Md. App. 303, 306, 473 A.2d 67, 69, *cert. denied*, 300 Md. 483, 479 A.2d 372 (1984).

104. Retained counsel may also represent a petitioner, but that occurs only rarely.

meritorious claim exists the prisoner is informed of the right to file a *pro se* petition without the assistance of the Division's lawyers.

The public defender may also enter a post-conviction proceeding upon appointment by the court. The court will appoint the public defender to represent a *pro se* petitioner if the petitioner claims indigence. One of the lawyers in the Collateral Division then enters the case on the petitioner's behalf. The lawyer does whatever additional investigation is appropriate and, if necessary, amends the *pro se* petition to state more clearly or fully the petitioner's allegations of error. More than half of the first petitions filed in court reach a public defender through court appointment.

The public defender plays a central role in the trial and disposition of first petitions. The attorney assumes responsibility for gathering the relevant records and transcripts, investigating the petitioner's factual allegations, amending the petition in appropriate cases, and doing everything necessary to insure the intelligible presentation of the petitioner's claims. At the hearing the petitioner's attorney normally presents the case through the testimony of the petitioner and through legal argument, supplemented by a legal memorandum if requested by the court. The public defender's input greatly assists the court because it enables the judge quickly to understand the factual and legal bases for the relief claimed by the petitioner. The state's attorney's role, on the other hand, tends to be more modest and reactive. If the petition appears meritless, very little action may be taken. If the allegations of error are potentially meritorious, considerable effort is devoted to preparing a responsive case.

The Maryland Rules require the judge to dispose of all post-conviction petitions by memorandum and order.[105] The judge must either dictate into the record or prepare a statement reciting each ground alleged in the petition, the federal or state rights involved, the court's ruling with respect to each ground, and the reasons for any action taken. The accompanying order shall either grant or deny relief. The losing party may then seek leave to appeal from the Court of Special Appeals.[106] The public defender will represent an aggrieved petitioner on appeal only if the petitioner has an arguable basis for the appeal. The Public Defender's Office rarely finds that to be the case.

In most cases, therefore, the aggrieved petitioner must proceed

105. MD. R. 4-407.
106. MD. R. 1093b.

pro se on appeal. A substantial number does so because the appeal process is easy and cost-free and is a prerequisite to seeking federal relief.[107] The application for leave to appeal need only contain a brief statement of the reasons why the Court of Special Appeals should reverse the judgment below. The record on appeal contains only the original petition, the state's attorney's response, any subsequent papers filed in the proceeding, and the trial court's memorandum and order. In the overwhelming majority of cases, the Court of Special Appeals denies leave to appeal in an unpublished opinion that merely states that the court has considered, read and denied the application for leave to appeal.[108]

The trial judge's memorandum and order is thus the only reasoned decision written in most post-conviction cases. Not only does the Court of Special Appeals normally uphold the trial judge without a written opinion, but the federal courts must treat the state trial judge's factual findings as presumptively correct if the state prisoner subsequently seeks federal habeas corpus.[109] Lawyers in the Attorney General's Office have had considerable success using decisions written by state post-conviction judges to limit or bar federal review of prisoner claims. The availability of state post-conviction relief not only helps the state's case in federal court; it also lessens the habeas corpus workload of the federal judges who are able to rule on the state record, without a hearing. This is possible only because a state post-conviction court has made findings of fact on the preliminary matters of waiver and res judicata and on any issues resolved on the merits.

3. The Problem of Subsequent Petitions.—The workload imposed on state post-conviction judges is in some respects more onerous for subsequent petitions than for first petitions because the judge does not have counsel to assist him in understanding the petitioner's claims. Of course, the judge has the authority to hold a hearing and appoint counsel, but is often reluctant to expend public funds and court time on a repeat performance which will most likely prove meritless. The judge therefore has the job of deciphering the petition. While some prisoners are quite coherent and even eloquent, most are not; and post-conviction petitions tend to become

107. 28 U.S.C. § 2254(b) (1982).

108. In fiscal 1984, the Court of Special Appeals granted 14 and denied 193 leaves to appeal. ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT OF THE MARYLAND JUDICIARY 1983-84: STATISTICAL ABSTRACT 36 (1984).

109. 28 U.S.C. § 2254(d) (1982).

more lengthy and incoherent as the petitioner becomes more frustrated by the earlier lack of success. The judge must nevertheless identify the grounds raised by the petitioner and assemble all the court files and records from prior proceedings to ascertain whether the petitioner has waived or finally litigated those grounds. Judges find this task frustrating and time consuming. Not only must the old court files be assembled and reviewed, but the memorandum denying the subsequent petition must recite the procedural history of the petitioner's prior filings and any court action previously taken. The more petitions a prisoner files, the longer become the written decisions required to deny them.

A single prisoner's prior filings may also have spawned rulings from a number of different judges, making it difficult for a judge to determine what each prior judge has done. The Circuit Court of Baltimore City has adopted a sensible response to this problem. The clerk's office assigns subsequent post-conviction petitions to the judge who ruled on the petitioner's first petition.[110] This system of assigning a petitioner to the first post-conviction judge reviewing the case avoids duplicative judicial effort. In Prince George's County, on the other hand, a single judge has acted to avoid duplicative effort by having all subsequent post-conviction petitions assigned to her.[111] In other counties, the clerk's office assigns subsequent petitions in a regular rotation, or the administrative judge or the monthly chambers judge decides whether to deny such petitions summarily or to assign them in the regular rotation for a hearing. As a result, in most counties the judge assigned the subsequent post-conviction petition is rarely the judge who heard the first petition. Perhaps a prisoner should have access to a new judge on post-conviction (i.e., a judge different from the trial judge), but sampling several different post-conviction judges should not be permitted.

Subsequent petitions are more of a nuisance than a genuine problem. Judges can handle them without any danger that a judicial default will spring a guilty person from prison. Although a judge will not often hold a hearing and appoint counsel on a subsequent petition, such action is possible if the judge really wants to understand what the prisoner is trying to say. Judges in Baltimore and Montgomery Counties have often done just that. In those counties

110. Interview with the Honorable David Ross, Associate Judge, Maryland Circuit Court for the Eighth Judicial Circuit (May 1985).

111. Interview with the Honorable Audrey E. Melbourne, Associate Judge, Maryland Circuit Court for the Seventh Judicial Circuit (May 1985).

all post-conviction petitions go either to the administrative or the chambers judge who decides whether to dismiss them summarily or assign them for a hearing before another judge.[112] Doubtful or unclear cases go to a hearing, as most chambers judges do not have the time or incentive fully to investigate all petitions to see if a hearing is necessary. In Baltimore City, on the other hand, the judge assigned a subsequent post-conviction petition has already heard the petitioner once and rarely finds it necessary to do so again. Thus, the problem of successive petitions is a manageable one, especially given the limited number of subsequent filings. One must still inquire, however, whether the judicial effort is worthwhile given the lack of merit in most subsequent petitions.

B. The Scope of the Remedy

As indicated previously, the scope of the issues that can be raised on post-conviction is quite broad. The petitioner may raise all constitutional or legal issues affecting the validity of the conviction. The post-conviction court may not, however, grant relief on an allegation of error if the petitioner has finally litigated or waived the error.[113] As a practical matter, this requirement bars the petitioner from obtaining relief for most trial errors. If the petitioner raised the alleged error at trial and pursued it on appeal, it is most likely that the allegation has been finally litigated. If the petitioner did not raise the alleged error at trial, or raised it but did not pursue it on appeal, the error has most likely been waived. The petitioner loses in either case.

The doctrine of waiver is particularly effective in barring allegations of trial error. If the allegation does not involve the loss of a fundamental right,[114] the post-conviction court will almost certainly treat counsel's failure to present the allegation to the trial or appellate court as a procedural default (i.e., a waiver by operation of law).[115] If the alleged error does involve a fundamental right, the trial transcript will contain a record of the defendant's knowing and intelligent waiver of the right if the trial court complied with appli-

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112. Interview with the Honorable John F. Fader, II, Associate Judge, Maryland Circuit Court for the Third Circuit (Baltimore County) (June 1985); Interview with the Honorable David L. Cahoon, Associate Judge, Maryland Circuit Court for the Sixth Judicial Circuit (Montgomery County) (June 1985).

113. *See supra* text accompanying notes 46-47.

114. Fundamental rights include: right to counsel, to confront one's accusers, to plead not guilty, to a jury trial, and to claim the privilege against self-incrimination. *See supra* note 76.

115. *See supra* text accompanying notes 78-80.

cable court rules and judicial decisions prescribing the procedure to follow when the defendant does not have counsel,[116] when the defendant's disruptive behavior requires exclusion from the trial,[117] or when the defendant desires to plead guilty,[118] obtain a bench trial,[119] or take the stand.[120] While the trial record is not conclusive on the issue of the defendant's waiver,[121] post-conviction petitioners are not likely to win many such cases. Absent some evidence explaining why the petitioner lied at trial, the post-conviction court will normally believe the petitioner's trial testimony rather than any testimony first offered at the post-conviction hearing.

The petitioner is more likely to obtain a determination on the merits if the trial record does not fully disclose the error alleged. The prime example is the defendant's right to the effective assistance of trial counsel—a fundamental right subject to the knowing and intelligent waiver standard.[122] The Court of Appeals has consistently refused to resolve, on direct appeal, claims of ineffective assistance of counsel. In the court's view, the trial court record does not provide an adequate basis for resolving the claim. This is true even in cases in which the defendant objected to trial counsel's effectiveness at trial or on a motion for a new trial. The court has reasoned that trial counsel should have the opportunity to present testimony challenging the allegation of ineffectiveness.[123] While it is possible for an appellate court, on direct review, to order a remand to expand the record,[124] the Court of Appeals has in most situations strongly disfavored such piecemeal appeals. Normally, the Court of Appeals instructs defendants to raise those issues not

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116. *See* MD. R. 4-215(b) (Waiver of Counsel).

117. *See* MD. R. 4-231(c) (Waiver of Right to be Present).

118. *See* MD. R. 4-242 (Pleas).

119. *See* MD. R. 4-246 (Waiver of Jury Trial).

120. State v. McKenzie, 17 Md. App. 563, 582, 303 A.2d 406, 417 (1973); Stevens v. State, 232 Md. 33, 38-39, 192 A.2d 73, 76 (1963).

121. The defendant, for example, may allege on post-conviction that a guilty plea or jury trial waiver was the result of undisclosed prosecutorial threats to seek the maximum penalty if the defendant did not forego the right. *See, e.g.*, Blackledge v. Allison, 431 U.S. 63, 76-79 (1977) (record of defendant's guilty plea not binding on federal habeas corpus).

122. Curtis v. State, 284 Md. 132, 150-51, 395 A.2d 464, 474-75 (1978).

123. Johnson v. State, 292 Md. 405, 434-35, 439 A.2d 542, 558-59 (1982).

124. Wiener v. State, 290 Md. 425, 437-38, 430 A.2d 588, 595-96 (1981) (remand to determine whether prosecutorial intrusion into Public Defender's Office violated the defendant's right to counsel); *see also* Warrick v. State, 302 Md. 162, 174, 486 A.2d 189, 195 (1984) (remand to ascertain whether state's attorney failed to disclose discoverable material).

adequately raised by the trial record in a post-conviction petition.[125]

Post-conviction courts must therefore resolve on the merits most ineffectiveness of counsel allegations. Since the claim is a constitutional one, it may be raised on post-conviction. In addition, it is not normally possible for the defendant to finally litigate or waive the claim at trial. Only in the rarest of cases is the defendant even able to obtain a ruling on the allegation prior to instituting post-conviction proceedings.[126]

Another category of allegations that post-conviction courts usually resolve on the merits is allegations of prosecutorial misconduct.[127] An appellate court is unlikely to hear such an allegation on direct review unless the misconduct occurred on the record. If the alleged misconduct involved the suppression of evidence, prosecutorial vindictiveness, or other extra-record activity, the petitioner could not have waived or finally litigated it at trial or on appeal. Post-conviction is the only form available for raising it.

The Court of Appeals' refusal to decide these issues on direct review has resulted in an expansion of the post-conviction court's jurisdiction. The Court of Appeals has in effect invoked the availability of post-conviction relief as a justification for its refusal to increase the appellate workload. Accordingly, the court has refused to hear on direct review allegations that the defendant had not knowingly and intelligently waived the right to jury trial.[128] Similarly, the court has refused review of an allegation that the trial judge had denied defendant's counsel the right to make closing argument.[129] In both cases, the court rejected the option of piecemeal appeals (i.e., a remand for the necessary factual development followed by

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125. *See* Colvin v. State, 299 Md. 88, 112-13, 472 A.2d 953, 965-66 (1983) (ineffective assistance of counsel); Covington v. State, 282 Md. 540, 544-46, 386 A.2d 336, 338 (1978) (denial of right to final argument); State v. Zimmerman, 261 Md. 11, 25, 273 A.2d 156, 163-64 (1971) (waiver of right to jury trial).

126. In White v. State, 17 Md. App. 58, 64-67, 299 A.2d 873, 876-77 (1975), the court, on direct appeal, ruled on the effectiveness of defendant's trial counsel. Defendant and his counsel had both testified on the matter on the defendant's motion for a new trial after the judge had warned the defendant that his raising the issue in this fashion would probably bar him from raising it on post-conviction. In Harris v. State, 299 Md. 511, 518, 474 A.2d 890, 893 (1984), the court likewise allowed a defendant to challenge the effectiveness of his counsel in a former Rule 731 f. 1. proceeding to withdraw a guilty plea.

127. *See, e.g.*, Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), *aff'd* 373 U.S. 83 (1963) (prosecutorial suppression of accomplice's confession admitting actual killing).

128. State v. Zimmerman, 261 Md. 11, 25, 273 A.2d 156, 163-64 (1971).

129. Covington v. State, 282 Md. 540, 544, 386 A.2d 336, 338 (1978). The Court of Appeals recently reaffirmed *Covington* in Cherry v. State, 305 Md. 631, 506 A.2d 228 (1986).

further proceedings in the appellate court) and ruled that post-conviction was the proper forum to raise the allegation.[130] On post-conviction, however, the court may still find that the defendant did in fact knowingly and intelligently waive his right to jury trial[131] or that the right to have counsel make closing argument was lost by procedural default.[132]

Post-conviction in Maryland has thus developed in ways that resemble the historic writ of coram nobis. Coram nobis differed from the ordinary writ of error in that the case remained in the trial court, as opposed to an appellate court, to review errors of fact not apparent from the trial record.[133] The Court of Appeals has used post-conviction in a fashion similar to coram nobis by relegating issues to post-conviction that appellate courts in other states are willing to decide on direct review.[134] Post-conviction has therefore become part of the review process in Maryland. Convicted defendants may raise most issues on appeal, but some issues must await post-conviction before a convicted offender may raise them. The Court of Appeals' restrictive use of direct review would be indefensible absent the availability of a subsequent review process—a process that generously furnishes the prisoner with both counsel and an evidentiary hearing.

C. Special Issues Relating to Effectiveness of Counsel

More than half of the first petitions filed under the Act allege the ineffectiveness of petitioner's trial or appellate counsel.[135] This development is not unexpected since the post-conviction court will treat most other allegations of error as finally litigated or waived. Even if the petitioner alleges numerous other trial errors, the court

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130. *Covington*, 282 Md. at 544-45, 386 A.2d at 338; *Zimmerman*, 261 Md. at 25, 273 A.2d at 163-64.

131. *Zimmerman*, 261 Md. at 25-26, 273 A.2d at 164.

132. On the other hand, it is difficult to see how a post-conviction court could find that the defendant waived the right to effective assistance of trial or appellate counsel when the defendant was not able to raise any earlier objection without discharging counsel in midtrial or midappeal, thus prejudicing the defense.

133. Bernard v. State, 193 Md. 1, 4, 65 A.2d 297, 298 (1949).

134. *See, e.g.*, Commonwealth v. Dancer, 460 Pa. 95, 100-01, 331 A.2d 435, 438 (1975) (new counsel required to raise on direct appeal ineffectiveness of trial counsel).

135. The Public Defender's Office has asserted that at least 97% of the *pro se* petitions filed under the Act allege the ineffectivness of the petitioner's trial or appellate counsel. Memorandum of Alan Murrell, Public Defender, to Administrative Judges of the Circuit Court (June 7, 1984) (copy on file with the author). Few of the petitions filed by the Public Defender's Office make a similar allegation. The *pro se* petitions outnumber the petitions filed by counsel.

will concentrate its attention on the ineffectiveness of counsel—the one issue that the petitioner plainly has not finally litigated or waived.

The hearing will include testimony by both the petitioner and petitioner's former counsel. By alleging counsel's ineffectiveness, the petitioner waives the attorney-client privilege. Normally counsel will testify for the state to describe the adequacy of the representation afforded petitioner. Very few allegations of ineffectiveness prove to have merit. Indeed, the standard for proving ineffectiveness is a rigorous one. The applicable test is whether defense counsel's representation was "reasonably effective," i.e., within the range of competence demanded of attorneys in criminal cases.[136] Judicial evaluation of counsel's performance must be "highly deferential" and judges must avoid second guessing counsel's trial strategy.[137] Even if the post-conviction court finds that trial or appellate counsel did err, the court may grant a new trial only if there is a reasonable probability that, but for counsel's errors, the outcome of the trial or appeal would have been different.[138]

The prevalence of ineffectiveness claims poses a dilemma for the public defender. In most cases, the public defender will have represented a convicted defendant at trial and on appeal. A conflict of interest may arise when an attorney from the Collateral Division of the Public Defender's Office represents a prisoner challenging the effectiveness of the assistant public defender who represented the prisoner at trial or on appeal. The issue may surface when the prisoner first contacts the Division's advisory service prior to filing a petition or when the court appoints the public defender to represent a *pro se* petitioner. In both cases, the Collateral Division's policy is to investigate the prisoner's allegation to determine whether there is any support for it in the trial or appellate record. If the review indicates that the allegation of incompetence "is frivolous and/or unsupported,"[139] the Division will so advise the prisoner and decline to file a petition alleging counsel's incompetence. However, if the prisoner has already filed a *pro se* petition alleging incompetence and the court has appointed a public defender, that attorney will con-

136. Strickland v. Washington, 466 U.S. 668, 687 (1984). The Court of Appeals adopted the *Strickland* tests for evaluating claims of ineffectiveness in State v. Tichnell, 306 Md. 428, 441, 509 A.2d 1179, 1186, (1986).

137. *Strickland*, 466 U.S. at 689; *Tichnell*, 306 Md. at 456, 509 A.2d at 1193.

138. *Strickland*, 466 U.S. at 694; *Tichnell*, 306 Md. at 441, 509 A.2d at 1186.

139. Memorandum of Alan H. Murrell, Public Defender to Administrative Judges of the Circuit Court (June 7, 1984) (copy on file with author).

tinue to represent the petitioner despite the seeming conflict of interest. While the assistant public defender will not "personally argue"[140] the frivolous point, the petitioner will receive assistance in presenting the allegation of counsel's ineffectiveness by counsel's examination of both the petitioner and the petitioner's former counsel. In this fashion the public defender does assist the court in understanding what the petitioner alleges occurred at trial or on appeal.

Only if the prisoner raises a genuine issue of effective representation or conflict of interest does the Office of Public Defender assign a post-conviction case to one of its panel attorneys. This policy is surely a debatable one, but the problems it raises are more of appearance than of unfairness to post-conviction petitioners. While it is possible to assign panel attorneys every time an indigent prisoner alleges ineffectiveness of counsel, such a policy would in effect deprive the Collateral Division of most of its business. The strength of that Division lies in the fact that six or seven experienced attorneys handle the bulk of the state's post-conviction defense work. The likelihood that dozens of panel attorneys could do the same job as efficiently or as ably is small. There is also little evidence that Collateral Division attorneys are reluctant to question the competence of the public defender who represented the petitioner at the trial or appellate stages. The Public Defender's Office is a large one. The Division attorneys do not work closely with the office's trial and appellate attorneys, many of whom they do not even know.

The public defender's representation of a post-conviction petitioner nevertheless does communicate to the court that the attorney does not believe that the petitioner's allegation of the prior public defender's ineffectiveness has merit. However, it is doubtful that implicit communication prejudices the petitioner. Most post-conviction judges treat an ineffectiveness allegation as a matter they must resolve at the hearing and appreciate the help of the public defender in presenting the petitioner's contentions as clearly as possible. The petitioner has no basis for objecting to this procedure because there is no federal or state constitutional right to counsel at a post-conviction proceeding.[141] Furthermore, a prisoner's statu-

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140. *Id.*

141. *See* Bounds v. Smith, 430 U.S. 817, 829-32 (1977) (federal constitution). The Court of Appeals has followed federal authority in determining the scope of the state constitutional right to counsel. Rutherford v. Rutherford, 296 Md. 347, 357-62, 464 A.2d 228, 234-36 (1983); Utt v. State, 293 Md. 271, 274-86, 443 A.2d 582, 583-89 (1982).

tory right to free counsel on post-conviction is a right to representation by the public defender.[142]

A more serious conflict of interest perceived by some is the lack of zealousness displayed by some public defenders in defending, when called as a witness on post-conviction, their own earlier representation of a petitioner. Public defenders do not always have the same stake in defending their professional reputations as do private practitioners. A public defender may be tempted to concede an error too readily when that concession rebounds to the benefit of a former client, or possibly even saves the client's life in a capital case. Once again, while the potential for conflict is present, the integrity of most lawyers permits the system to function fairly.

D. The Merits of Maryland's Post-Conviction Process

In sum, Maryland has a generous system of post-conviction relief. Despite its generosity, the system functions reasonably effectively. Each prisoner receives as of right one post-conviction hearing before a judge different from the judge who tried the case. At the hearing, the petitioner receives free legal assistance from the Public Defender's Office and may present evidence in support of the alleged errors. There are no filing fees, verification requirements, or assessment of costs against unsuccessful petitioners. The only place where the state is less forthcoming in furnishing a post-conviction remedy is when it assigns, for reasons of efficiency, legal representation of indigent petitioners to the Public Defender's Office despite that Office's potential conflict of interest.

By contrast, the most recent Uniform Post-Conviction Procedure Act,[143] derived in large part from the ABA Standards for Post-Conviction Remedies,[144] favors the summary disposition of petitions, including first petitions, without an evidentiary hearing.[145] The Uniform Act establishes formal pleading requirements, permits discovery, and authorizes the grant of summary judgment if no ma-

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142. *See* MD. ANN. CODE art. 27A, § 4(b)(3) (1983).

143. The National Conference of Commissioners on Uniform State Laws promulgated a new Uniform Post-Conviction Procedure Act in 1980. UNIF. POST-CONVICTION PROC. ACT, 11 U.L.A. 204-13 (Supp. 1986). The Commissioners had revised the first (1955) Uniform Act in 1966. 11 U.L.A. 485-540 (1974).

144. UNIF. POST-CONVICTION PROC. ACT, 11 U.L.A. 204 (Supp. 1986) (Prefatory Note).

145. *See* IV ABA STANDARDS FOR CRIMINAL JUSTICE 22.47 to 22.49 (Supp. 1986) (commentary to Standard 22-4.5 of Standards on Post-Conviction Remedies). Sections 8 and 9 of the Uniform Act purport to implement that Standard. *See* 11 U.L.A. 209 (Supp. 1986).

terial fact is in dispute or if the moving party is entitled to judgment as a matter of law.[146] The purpose of these provisions is to reduce the burden of post-conviction relief by avoiding unnecessary evidentiary hearings.[147] The Uniform Act even permits the judge who tried the case to rule on post-conviction applications.[148] The new Act also seeks to deter frivolous applications by allowing the assessment of costs against an applicant, if a court finds "that the applicant's claim is so completely lacking in factual support or legal basis as to be frivolous or that the applicant has deliberately misused process."[149]

Other states are also less generous in affording post-conviction process. It does not appear that any state other than Maryland mandates a hearing with free counsel on all first petitions. Pennsylvania permits the summary disposition of claims that are "patently frivolous" and "without a trace of support either in the record or from other evidence submitted by the petitioner."[150] Ohio is still more demanding. To obtain a hearing on trial counsel's ineffectiveness, the petitioner must submit "evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and *also* that the defense was prejudiced by counsel's ineffectiveness."[151] Some states do not even follow the recommendations of the ABA Post-Conviction Standards and the Uniform Act in requiring that the post-conviction court appoint counsel for indigent petitioners so that counsel may amend the pleadings, submit documentary evidence, or do whatever else is necessary to obtain an evidentiary hearing.[152] Missouri, however, has found it desirable to change its practice and now provides counsel to assist petitioners in presenting their claims. Reacting to the burden imposed on the courts by *pro se* petitions, the Missouri Supreme Court amended its rules to provide for the appointment of counsel from the Public Defender's Office to represent all indigent petitioners at the trial court

146. *See* UNIF. POST-CONVICTION PROC. ACT at § 4 (application to refer to portion of the record of prior proceedings pertinent to alleged grounds for relief); § 6 (response by answer or motion); § 8 (discovery); and § 9 (summary disposition).

147. *See supra* note 144.

148. UNIF. POST-CONVICTION PROC. ACT at § 3(g).

149. *Id.* at § 13. *See also* IV ABA STANDARDS FOR CRIMINAL JUSTICE 22-3.5(b) (Supp. 1986) (invocation of post-conviction court's jurisdiction should not be "without risk that a financial obligation may be imposed.").

150. 42 PA. CONS. STAT. ANN. § 9549(b) (Purdon 1982).

151. State v. Jackson, 64 Ohio St. 2d 107, 111, 413 N.E.2d 819, 822 (1980) (interpreting Ohio Revised Code § 2953.21(c) and (e)) (emphasis in original).

152. *See, e.g.*, Alexander, *Post-Conviction Relief in Tennessee*, 48 TENN. L. REV. 605, 637-42 (1981).

level.[153] Missouri thus follows the ABA Standards and the Uniform Act in not limiting the appointment of counsel to first petitioners.[154]

The experience of other states might be useful if Maryland's system of post-conviction relief were functioning unsatisfactorily. That does not appear to be the case. The system is generous to the prisoner and manageable for the state. Whatever time and expense other states save by avoiding evidentiary hearings seem to be lost through additional appellate litigation. For example, between March 1, 1966, and September 21, 1981, the Pennsylvania Supreme Court decided by published opinion more than 300 post-conviction appeals. That figure included only appeals in murder cases because all other post-conviction appeals went to an intermediate appellate court.[155] A similar explosion of appellate litigation in Missouri convinced the Supreme Court in that state to appoint counsel to represent all petitioners at the trial level in order to reduce the burden of appeals from the the trial courts' summary dismissal of *pro se* petitions.[156]

This brief survey of the experience of other states demonstrates that Maryland's system of post-conviction relief shines by comparison. The *strength* of the Maryland system is the mandatory hearing with counsel on the first petition. That approach does utilize considerable public resources, but the system allocates those resources to the right court (the convicting court) and, normally, at the right time (shortly after the completion of direct review). No doubt trial judges conduct many hearings that after the fact appear unnecessary. The hearing, nevertheless, has become part of the review process. The petitioner may raise allegations that cannot be raised on appeal and may present them to a new judge. For many prisoners, it is their first time in court since the day of their sentencing. To afford a petitioner one more hearing before a new judge is not an excessive demand to place on the courts when the prisoner may face many years or even life in custody. No doubt the allegation most

153. *See* Comment, *Postconviction Remedies under Missouri Rule 27.26: Problems and Solutions*, 47 MO. L. REV. 787 (1982).

154. IV ABA STANDARDS FOR CRIMINAL JUSTICE 22-4.5 (Supp. 1986); UNIF. POST-CONVICTION PROC. ACT at § 5. Both the Standards and the Act seek to achieve efficiencies through the summary disposition of all petitions.

155. *See* Comment, *Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the "Monster"?* 20 DUQ. L. REV. 237, 239 (1982).

156. Comment, *Postconviction Remedies under Missouri Rule 27.26: Problems and Solutions*, 47 MO. L. REV. 787, 790 (1982). The appellate courts had evidently found it impossible to dispose of such appeals without the aid of counsel. *Id.*

frequently litigated by prisoners, the ineffectiveness of trial or appellate counsel, is normally meritless; but it is meritless in part because trial and appellate counsel know that a post-conviction court may scrutinize their performance. Such allegations are likely to involve factual disputes, and any effort to avoid evidentiary hearings to unravel the facts is simply not worth the effort.

IV. DISCUSSION OF RECOMMENDATIONS 1 THROUGH 6

Maryland's present system of post-conviction relief functions reasonably well. Nevertheless, the case for reform is a strong one. The state's system of post-conviction relief should be as efficient as possible. The allocation of excessive resources to collateral challenges wastes valuable time and effort needed elsewhere in the criminal justice system. Nothing is more pernicious to those prisoners who have valid claims than the increasingly pervasive view that the whole system of post-conviction remedies is a "gigantic waste" of public resources.[157] If that view prevails, judges will not devote the necessary attention to collateral challenges and legislators will be tempted to abolish the whole system. The better approach, therefore, is to reform the present system to reduce inefficiencies while still assuring that prisoners with valid claims will receive a full and fair opportunity to present them.

The present system should therefore be modified to take better advantage of the full hearing with counsel granted to first petitioners. That process affords a basis for sharply limiting subsequent collateral challenges. Not only does the petitioner receive from the trial court a reasoned decision concerning the alleged errors, but also leave to appeal an adverse decision to the Court of Special Appeals. Further, for allegations of error based on federal law, a writ of habeas corpus may be sought in the federal courts. After the prisoner has exhausted those remedies, further relief should not be afforded absent exceptional circumstances. Post-conviction review should be a one-shot venture. Courts should be able to resolve subsequent collateral challenges with a minimum of effort, regardless of whether the prisoner labels them petitions for post-conviction relief or applications for writs of habeas corpus or coram nobis.

The following six recommendations seek to accomplish these objectives. The text which follows presents each recommendation

157. The phrase is Judge Friendly's from his oft-cited article attacking the excesses of most systems for post-conviction relief. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970).

in general terms. Appendix A contains precise statutory language to implement similar recommendations approved by the Judicial Conference Committee.

Recommendation 1: Limiting Convicted Offenders to One Post-Conviction Petition. The legislature should amend the Post Conviction Procedure Act to reinstate the single petition rule found in the original Act of 1958. The Act should permit each prisoner only one petition to challenge all convictions and sentences resulting from a single criminal trial. The amended Act should expressly advise the prisoner to raise all available allegations of error in the petition. The legislature was in effect too generous in 1986 when it granted prisoners an unrestricted opportunity to file a second petition. Rather, it should define, as suggested below, the limited instances in which a prisoner should receive a further hearing on the first (and only) petition.

The single petition rule is a fair accommodation of a prisoner's and the state's interest if the prisoner receives, as is the case in Maryland, the assistance of counsel and a hearing on the petition. The petitioner's attorney has the responsibility to ascertain what allegations of error the petitioner wishes to raise and to review the record for other possible claims. Under the present law of waiver, all available allegations of error must be raised in the first petition. A statutory single petition rule does no more than reiterate that requirement. If attorneys do their job properly, one wonders what errors they might miss that a petitioner should be allowed to raise at a later time.

Two categories of justifiably missed errors come to mind. First, counsel "missed" the error because the basis for the allegation was a rule of law announced by the United States Supreme Court or the Maryland Court of Appeals subsequent to the post-conviction proceeding. If the new law applies retroactively, then the prisoner should be able to raise the allegation of error notwithstanding a previous unsuccessful petition for post-conviction relief. For example, in *Hankerson v. North Carolina*[158] the Supreme Court gave full retroactive effect to its earlier holding in *Mullaney v. Wilbur*[159] invalidating jury instructions that relieved the prosecution of proving all elements of an offense beyond a reasonable doubt. A prisoner should be able to pursue an allegation of error based on *Mullaney*, even though he did not raise that allegation in a pre-*Mullaney* post-

158. 432 U.S. 233, 240 (1977).
159. 421 U.S. 684, 701-02 (1975).

conviction proceeding.[160]

A second possibility is that the lawyer "missed" the error because neither the attorney nor the petitioner was aware of its factual basis at the time of the first petition, nor could they have discovered the facts with due diligence. In that case, the prisoner should be able to raise the allegation subsequently. For example, the factual basis for an allegation that the state suppressed exculpatory evidence may not have been reasonably discoverable by the petitioner when pursuing the first post-conviction petition. The petitioner should therefore be able to raise that allegation when the relevant facts become known, at least if the petitioner pursued the matter diligently. One must acknowledge, however, that this exception to the single petition rule may prove difficult to contain. While post-conviction courts should have little difficulty ascertaining whether there is new law,[161] inquiries into allegations of new facts can be complicated and may require protracted hearings.[162]

In these two exceptional situations it makes more sense to permit the prisoner to reopen the prior proceeding rather than to file a new petition. Categorizing the matter as a reopening should result in bringing the petitioner before the judge who handled the petitioner's initial filing. In addition to being more familiar with the case, that judge seems better equipped than a new judge to determine the one remaining permissible basis for reopening an initial post-conviction proceeding: the ineffectiveness of petitioner's post-conviction counsel.

There is no federal or state constitutional right to appointed counsel on post-conviction.[163] The indigent prisoner receives free counsel as a matter of legislative grace. Therefore a prisoner has

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160. In *Hankerson*, the Court did make the startling suggestion that a state could insulate past convictions from retrospective changes in the law by enforcing on post-conviction its contemporaneous objection rule to find a waiver. 432 U.S. at 244 n. 8. The Court seemingly withdrew the suggestion in Reed v. Ross, 468 U.S. 1, 9-20 (1984) (failure to raise an objection based on a novel legal theory does not operate as a waiver).

161. The Maryland Court of Appeals has been most reluctant to admit that its path breaking decisions really constitute "new law," thus excusing a defendant's previous failure to raise an allegation of error. *See* Jones v. State, 297 Md. 7, 24-25, 464 A.2d 977, 985-86 (1983) (defendant's access to grand jury testimony of prosecution witness not new law); Davis v. State, 285 Md. 19, 30, 400 A.2d 406, 411 (1978) (prosecution's burden to negate alibi defense beyond reasonable doubt not new law).

162. For this reason the Judicial Conference Committee rejected the "new facts" exception to the single petition rule. *See* statutory language implementing recommendation 1 in Appendix A (proposed § 645A(g)). For a similar hostility to claims based on new facts, see MD. R. 4-331(c) (motion for new trial based on newly discovered evidence must be filed within one year).

163. *See supra* note 141 and accompanying text.

not suffered a constitutional violation if the state does not provide effective counsel on post-conviction. At most, the ineffectiveness of counsel affects the application of the doctrines of res judicata and waiver to subsequent collateral challenges.

Whether post-conviction counsel's ineffectiveness by itself is a sufficient basis for permitting the post-conviction petitioner to circumvent res judicata or waiver bars is not clear. Nevertheless, it appears desirable to avoid that question by affording the petitioner a new post-conviction proceeding if post-conviction counsel's ineffectiveness can be demonstrated. Once again the mechanism available to the petitioner should be the filing of a motion to reopen the original proceeding. Thus, the preclusive effect of the single petition rule applies only if the petitioner received the effective assistance of counsel. If the judge determines that post-conviction counsel was ineffective, the petitioner, assisted by new counsel, may further litigate those allegations of error previously raised and raise any new allegations.

The determination of post-conviction counsel's effectiveness should not prove to be a difficult task in most cases. The judge who must make that determination will normally have presided at the initial post-conviction hearing and observed counsel's performance. What constitutes effective representation on post-conviction is also relatively clear-cut. First of all, counsel should investigate the petitioner's allegations by reviewing the relevant records and transcripts and by interviewing prior counsel and other possible witnesses. Counsel should also determine from the same sources whether there are any other tenable allegations of error. The allegations that the petitioner wishes to raise and any potential allegations uncovered by counsel should then be reviewed with the petitioner. Finally, counsel should put the petitioner and any other available witnesses on the stand to testify in support of the allegations. If counsel does not do these things, there is a basis for a finding of ineffective assistance of counsel and the judge should reopen the post-conviction proceeding. The *Strickland*[164] "prejudice" standard for winning a new trial or sentencing hearing seems out of place here, given the limited relief (a reopening) sought by the petitioner. In addition, in most cases the adequacy of post-conviction counsel's representation will be readily apparent. An affidavit reviewing counsel's performance should permit the court to deny most mo-

164. Strickland v. Washington, 466 U.S. 668, 694 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

tions to reopen without a hearing or the appointment of new counsel.

Under the proposed single petition rule a petitioner may thus seek to reopen a post-conviction proceeding on the basis of new law, new evidence, or ineffective counsel. Whether the petitioner should be able to seek leave to appeal from the denial of a petition to reopen is a difficult question. The Judicial Conference's proposal does not permit the petitioner to do so and limits him to one appeal (i.e., an appeal from the denial of the original petition).[165] That approach seems preferable to permitting multiple appeals. One possible alternative would be to permit a petitioner to move to reopen the proceeding for ineffectiveness of post-conviction counsel before seeking leave to appeal. The petitioner's single appeal could then include the allegation of counsel's ineffectiveness.

The single petition rule poses one further problem. What about those fundamental rights that require a knowing and intelligent waiver? How can one bar a prisoner from raising a violation of a fundamental right at a later time merely because such an allegation was not included in a post-conviction petition? The answer to this question is twofold.

First, the knowing and intelligent waiver standard appropriately applies only at trial. At trial, a defendant may choose not to exercise certain fundamental rights that are then available. A defendant does so by proceeding without counsel, pleading guilty, electing a bench trial, taking the stand, or refusing to be present during the proceeding. Case law requires that a decision not to exercise a fundamental right must be a knowing and intelligent one. If the defendant's foregoing of the right at trial is not a knowing and intelligent choice, that violation is an allegation of error that the defendant may subsequently raise on post-conviction. The single petition rule makes no change in that basic rule. Going one step further and requiring a knowing and intelligent waiver on post-conviction in order to bar the prisoner from raising an allegation in a subsequent collateral proceeding makes little sense. The federal constitution does not require such a result.[166] If the petitioner had competent counsel, there should be no problem enforcing the petitioner's waiver of all allegations of error includable in a single petition.[167] What the petitioner really loses by not including an allegation is the

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165. *See* recommendation 1 in Appendix A (last sentence of proposed § 645A(g)).

166. *See* Jones v. Estelle, 722 F.2d 159, 166 (5th Cir. 1983) (*en banc*), *cert. denied sub nom.* Jones v. McKaskle, 466 U.S. 976 (1984).

167. For this variety of waiver, see *supra* text accompanying notes 78-80.

right to obtain post-conviction relief on the basis of that error. It is doubtful whether that right, unlike the fundamental right itself, is of constitutional dimension.[168]

Second, representation by competent counsel is an adequate guarantee that petitioner's waiver satisfies the more rigorous standard of a knowing and intelligent waiver. A second or subsequent post-conviction petition alleging that the petitioner's real grievance was the lack of a jury trial, ineffective trial counsel, or a coerced guilty plea is an absurdity. Either the fundamental right at stake did not mean much to the petitioner, as evidenced by the long delay in raising it, or petitioner's post-conviction counsel was asleep on the job. It therefore seems permissible to presume conclusively that a petitioner represented by competent counsel waives an allegation of error based on an earlier loss of a fundamental right if the allegation is not raised in the first post-conviction petition.[169]

The Court of Appeals' holding in *Curtis v. State*[170] is not inconsistent with this analysis. *Curtis* held that a petitioner could allege trial counsel's ineffectiveness in a subsequent post-conviction petition, if the petitioner had not knowingly and intelligently waived that allegation by failing to raise it in an earlier post-conviction petition. That holding is one of statutory interpretation. The court first held that the legislature intended that the knowing and intelligent waiver standard in section 645A(c) apply only to the loss of fundamental rights. The court then characterized the effectiveness of trial counsel as a fundamental right. Once the court had reached that point in its analysis, section 645A(c) mandated the result reached by the court. The statute plainly provided that Curtis could raise in a subsequent petition the ineffectiveness of trial counsel unless he had "knowingly and intelligently" waived the allegation at trial, on appeal, or "in a prior proceeding under this subtitle." Thus, *Curtis* held: "Consequently, subsection (c) of the Post Conviction Procedure Act is applicable to Curtis' contention, and it can only be deemed 'waived' for purpose of the Post Conviction Act if Curtis 'intelligently and knowingly' failed to raise it previously."[171] There-

168. In other words, it is doubtful whether the constitutional bar against the suspension of the writ, *see supra* note 5, prevents the courts or the legislature from narrowing the scope of the writ to cover only jurisdictional errors. For the twentieth century expansion of the writ, see *supra* text accompanying notes 40-45.

169. *Jones*, 722 F.2d at 164. *See also* Daniels v. Blackburn, 763 F.2d 205 (5th Cir. 1985); Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1985).

170. 284 Md. 132, 395 A.2d 464 (1978).

171. *Id.* at 150-51, 395 A.2d at 475.

fore, recommendation 1 does not overrule *Curtis*; it merely removes the statutory basis for its holding.

Recommendation 2: Elimination of Duplicative Habeas Corpus Applications. The thrust of these recommendations is to funnel into a single post-conviction proceeding whatever grounds a prisoner has to challenge a conviction collaterally. If the prisoner receives a full and fair opportunity in that proceeding to litigate any allegations of error, then it is proper for the legislature sharply to curtail any subsequent collateral challenges. A different problem arises if the prisoner's collateral attack by habeas corpus *precedes* the post-conviction hearing. Under present law, the judge who receives an application for a writ of habeas corpus may treat it as a post-conviction petition only with the consent of the petitioner.[172] The legislature should eliminate the requirement of the applicant's consent and authorize the judge to transfer an application to the convicting court for disposition under the Post Conviction Procedure Act if two conditions are met. First, the applicant must be seeking relief available under the Post Conviction Procedure Act. Second, the applicant must not have previously filed a post-conviction petition. If the habeas judge transfers the application upon finding these two requirements satisfied, the convicting court must rule on the application as a post-conviction petition, subject, of course, to the petitioner's right to amend or withdraw it.

This change benefits both the state and the prisoner. The state avoids the burden of duplicative remedies, habeas corpus and then post-conviction relief, while the prisoner avoids the potential trap of habeas corpus. On habeas corpus, the prisoner has no right to counsel, a hearing, or an appeal. Yet under present law,[173] the adverse decision by a single habeas judge is res judicata in any subsequent post-conviction proceeding. This preclusion provision is so questionable that the Attorney General's Office does not customarily invoke it.[174]

The proposal does not constitute a suspension of the writ of habeas corpus in violation of the state constitution. The transfer is discretionary and limited to cases in which the relief sought is available under the Post Conviction Procedure Act. The amended statute should prohibit the transfer if the habeas judge finds that "the post-conviction remedy is inadequate or ineffective to test the legal-

172. MD. R. Z55.

173. MD. ANN. CODE art. 27, § 645A(b) (1982).

174. *See supra* note 83.

ity of the petitioner's detention."[175] For example, if the habeas judge believes that the greater speed associated with habeas proceedings is necessary to afford the prisoner an adequate and effective opportunity to test the legality of the detention, then the judge should rule on the habeas corpus application rather than transfer it to the sentencing court for processing under the Post Conviction Procedure Act. This safeguard prevents any suspension of the writ.[176]

Recommendation 3: Elimination of Duplicative Coram Nobis Applications. Coram nobis has largely disappeared as a post-conviction remedy. There are no statutes or court rules governing its use. The statutory post-conviction remedy is in fact a coram nobis remedy.[177] Arguably, the new statutory remedy supersedes the common-law writ because the writ is only available in the absence of any other statutory proceeding.[178]

The one situation in which coram nobis plainly survives is when the convicted offender is no longer incarcerated or on parole or probation. The convicted offender has no remedy in this situation under the Post Conviction Procedure Act or on habeas corpus, because both those remedies are available only to offenders in custody. Coram nobis may be important to the offender facing recidivist penalties on a new charge. A recidivism proceeding offers only limited opportunities to challenge the validity of a prior conviction.[179] It may therefore be precipitous to abolish completely coram nobis. The legislature should therefore preserve the writ in situations where the defendant challenging a conviction is not in custody and therefore cannot seek relief under the Post Conviction Procedure Act.

Recommendation 4: Limitations on Subsequent Habeas Corpus Applications. If the legislature readopts the single petition rule, a prisoner should not be able to circumvent that limitation through subsequent habeas corpus applications. At the same time, habeas corpus is a constitutionally protected remedy that the legislature must preserve. To accommodate those two interests, the legislature, while leaving the habeas judge's authority to do justice untouched, should

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175. *See* Appendix A, recommendation 2.

176. *See* United States v. Hayman, 342 U.S. 204, 223 (1952), discussed *supra* at note 33.

177. *See supra* text accompanying notes 133-34.

178. Bernard v. State, 193 Md. 1, 4, 65 A.2d 297, 298 (1949).

179. MD. R. 4-245 does not afford the alleged subsequent offender any opportunity to do so, but the sentencing court must nevertheless allow the offender to challenge prior convictions that were obtained without the aid of counsel. *See* Burgett v. Texas, 389 U.S. 109, 114-15 (1967).

authorize the judge to refuse issuance of the writ for alleged errors that the applicant raised or could have raised in a prior post-conviction proceeding. The habeas judge need not, and normally should not, conduct a second post-conviction proceeding. If the judge believes it more efficient for the convicting court to rule on the application, the transfer of the application to that court should follow. Section 3-702(b) of the Courts and Judicial Proceedings Article already authorizes a transfer of the application to any court in the judicial circuit where the conviction took place. It seems sensible to be more specific and require by statute or court rule a transfer to the prior post-conviction court.

The residual authority of the habeas judge to do justice derives from the history and function of the writ. The doctrines of res judicata and waiver have never *barred* a judge from hearing allegations previously raised by the applicant or from hearing new allegations.[180] Before denying the writ, the judge must inquire into the cause of the applicant's confinement and determine that the confinement is legal. Any deference given to the denial of relief by the post-conviction court is necessarily a matter of discretion. Imposing the doctrines of res judicata and waiver on a habeas corpus judge would raise difficult questions about the suspension of the writ. As Justice Stevens has argued, the scope of the writ is narrow, but judges on habeas corpus have a responsibility to rectify fundamental injustices. Errors properly raised under the writ are "errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which the judgment was obtained."[181] A prisoner should be able to raise those types of errors at any time regardless of proper preservation in some earlier proceeding.[182]

This recommendation thus proposes a middle ground. The legislature should leave untouched the authority of the habeas judge to determine the lawfulness of the applicant's confinement but should explicitly authorize deference to the post-conviction court's denial of relief. The habeas judge should defer unless the applicant has raised an allegation of error that the applicant did not have a full and fair opportunity to present to the post-conviction court or that provides a substantial basis for questioning the fundamental fairness of the applicant's confinement. In these two exceptional situations,

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180. *But see* Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986), discussed *supra* at note 55.

181. Rose v. Lundy, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting).

182. *Id.* at 544.

the habeas corpus judge should resolve on the merits the applicant's allegation of error.

It is also appropriate, if not desirable, for the post-conviction judge to fulfill the function of the habeas judge. Statutes or court rules should permit, if not encourage, judges receiving habeas corpus applications to transfer them to the post-conviction judge if the applicant has already filed a post-conviction petition. It is more efficient for that judge to determine whether the application satisfies either of the suggested criteria for a *de novo* determination. No doubt the prisoner would prefer to obtain rulings from as many judges as possible, but it does not seem unfair to give a single post-conviction judge, who was not the trial judge, a continuing role in supervising the legality of a prisoner's detention. Considerations of efficiency support assigning that role to one judge. Of course, the post-conviction judge cannot exclude other judges from considering the legality of a prisoner's confinement, because any judge who receives an application for habeas corpus retains the authority to rule on it. This recommendation only limits the extent to which a prisoner can *require* a new judge to rule on an application.

A more difficult question is whether the preclusive effect of a prior post-conviction proceeding should apply when the petitioner did not seek leave to appeal to the Court of Special Appeals from an adverse trial court determination. The Court of Appeals has held that a habeas judge may give weight to a prior habeas judge's refusal to discharge a prisoner.[183] A post-conviction court's prior refusal to grant relief to a petitioner deserves equal or greater weight because the petitioner has received a hearing with counsel. The petitioner's right to seek leave to appeal does not add much to the post-conviction process. Nor does there appear to be much basis for allocating more resources to petitioner appeals. Therefore, it seems appropriate to give the same preclusive effect to an unappealed trial court determination as to the Court of Special Appeals' denial of leave to appeal.

Recommendation 5: Codification of Curtis. In *Curtis v. State*,[184] the Court of Appeals interpreted the definition of "waiver" in the Post Conviction Procedure Act to conform to what the court believed was the legislature's intent. Although the language chosen by the legislature seemingly required a "knowing and intelligent waiver" in all

183. *See, e.g.*, State *ex rel.* Eyer v. Warden of Maryland Penitentiary, 190 Md. 767, 59 A.2d 745 (1950).

184. 284 Md. 132, 395 A.2d 464 (1978).

cases, the court held that standard only applied to certain basic constitutional rights for which the Supreme Court had traditionally required a knowing and intelligent waiver.[185] For other errors, the *Curtis* court recognized that the defendant could waive them by failing to make an objection at the proper time.[186] This dichotomy between "fundamental rights" and other rights reflects, as demonstrated by the *Curtis* court, the present approach of the Supreme Court.

The legislature has acquiesced in the *Curtis* interpretation of waiver, and is unlikely to endorse the outmoded approach of requiring a knowing and intelligent waiver for all rights. Codifying *Curtis* is thus largely a matter of housekeeping, especially if the legislature leaves to the courts the determination of what rights are "fundamental". Such a delegation appears inevitable since the question is a constitutional one on which the courts will ultimately have the final say. Any legislative amendments should make clear, however, that the Post Conviction Procedure Act's definitions of "waiver" and "finally litigate" only apply to determine whether a petitioner waived or finally litigated an allegation of error at trial or on direct appeal. If the legislature adopts recommendations 1, 2, and 3, it will be unnecessary to address, in the Post Conviction Procedure Act, the preclusive effect in a post-conviction proceeding of prior post-conviction, habeas corpus, or coram nobis proceedings. The single petition rule and the elimination of duplicative habeas corpus and coram nobis proceedings preclude that issue from arising.

Recommendation 6: Delayed Petitions. A prisoner's delay in filing a post-conviction petition may prejudice the state's ability to respond to it. In one verified case the state could not establish that the defendant was present at a bench conference because the memories of the participants had faded.[187] In another case, it was no longer possible to transcribe the trial proceedings because the court reporter had died and his notes were missing.[188] For cases such as these, the legislature should amend the Post Conviction Procedure Act to provide the state with a laches defense. The state should be able to obtain the dismissal of the petition if the prisoner's inexcusable de-

185. *Id.* at 148, 395 A.2d at 473.

186. *Id.* at 146-7, 395 A.2d at 472.

187. In this case the Honorable Martin B. Greenfield, Associate Judge, Maryland Circuit Court for the Eighth Judicial Circuit, granted the post-conviction petitioner a new trial on May 23, 1985. The original trial took place on January 18-19, 1977.

188. Interview with the Honorable Richard B. Latham, Associate Judge, Maryland Circuit Court for the Sixth Judicial Circuit (June 1985) (discussing post-conviction proceeding brought several years previously in Montgomery County).

lay in filing it prejudiced the state's ability to respond to it. The federal habeas rules for state prisoners,[189] as well as the federal post-conviction rules for federal prisoners,[190] have long contained similar provisions.

A prisoner's delay in filing a post-conviction petition may also prejudice the state's ability to retry the prisoner who is successful in obtaining post-conviction relief. In 1983, the Judicial Conference Committee on Rules of Practices and Procedures drafted proposed amendments to the Federal Habeas Corpus Rules which would have permitted the state to raise a laches defense in these cases.[191] The Supreme Court, however, has so far declined to adopt the Committee's proposal. In addition, in *Vasquez v. Hillery*,[192] the Supreme Court refused to recognize by judicial decision any such defense. Thus, a state cannot seek federal court dismissal of a habeas corpus petition on the ground that the prisoner's inexcusable delay in filing it prejudiced the state's ability to retry the case. As long as the federal courts remain open to these prisoners, it makes little sense to close the state courthouse door. The prejudice to the state is the same regardless of which court releases the prisoner, and the state should prefer to defend its convictions in its own courts. Thus, regardless of whether the distinction drawn by the Supreme Court between the two types of prejudice discussed above is a defensible one,[193] Maryland is well advised to adopt a laches defense that protects the state only from prejudice in responding to the petition. If the Supreme Court changes its mind, then the state may respond accordingly.

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189. RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 9(a) (28 U.S.C. foll. § 2254 (1977)).

190. RULES GOVERNING § 2255 PROCEEDINGS FOR THE U.S. DIST. CTS. 9(a) (28 U.S.C. foll. § 2255 (Supp. 1986)).

191. *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts*, 98 F.R.D. 381, 411 (August 1983).

192. 106 S. Ct. 617 (1986).

193. The Judicial Conference Committee did not believe the distinction to be defensible and formulated a laches defense to cover both situations. *See* recommendation 6 in Appendix A (proposed § 645A(d)). The committee acted before the Court decided *Hillery*.

Appendix A - Statutory Text Proposed by Criminal Law and Procedure Committee of the Maryland Judicial Conference

Suggested Statutory Language to Implement Recommendations 1 through 6

Recommendation 1. The legislature should amend the Post Conviction Procedure Act to limit each convicted offender to one post-conviction petition per criminal trial. The amended Act should bar second or subsequent petitions, but it should permit, under limited circumstances, an aggrieved petitioner to move to reopen the initial proceeding. The legislature could accomplish this objective by repealing the present section 645(f) and by enacting new sections 645(f) and (g) to read as follows:

> f) *Right to counsel and hearing.* A petitioner is entitled to the assistance of counsel and a hearing on his petition. The court shall determine whether the assistance of counsel or a hearing should be granted on a motion to reopen.
>
> g) *Single petition rule; reopenings.* A petitioner may file only one petition to set aside or correct all convictions and sentences occurring at a single criminal trial. The petitioner shall include all available allegations of error in the petition. The petitioner may not file a second or subsequent petition challenging the same convictions or sentences, but he may file a motion to reopen a post-conviction proceeding if he alleges i) he did not receive the effective assistance of counsel in the proceeding; or ii) a court whose decisions are binding upon the lower courts of this state has held, subsequent to the disposition of the petition, that the Constitution of the United States or Maryland imposes upon state criminal proceedings a procedural or substantive standard not theretofore recognized and applicable retroactively to affect the validity of the petitioner's conviction. If the court reopens the proceeding under i) above and finds that petitioner's post-conviction counsel was ineffective, the court shall allow the petitioner to present any allegations of error he could have presented in the original proceeding. If the court reopens the proceeding under ii) above, the court shall consider only the new allegations of error raised by the petitioner. The court's denial of a petition to reopen does not constitute an order from which an aggrieved person may seek leave to appeal [under section 645-I of Article 27].

Recommendation 2. The legislature should amend the Courts and Judicial Proceedings Article to eliminate habeas corpus as a duplica-

tive remedy. Such duplication can be eliminated by permitting a judge who receives an application for the writ to treat the application as a petition for post-conviction relief providing the applicant has not filed a petition for post-conviction relief. The legislature could accomplish this objective by adding a new section 3-702(c) to read as follows:

> c. *Treatment of certain petitions as post-conviction petitions.* Upon receiving a petition for the writ which seeks relief available under the Post Conviction Procedure Act, the judge may inquire whether the petitioner has filed a petition under the Act. If the judge determines that the petitioner has not filed a petition under the Act, he may sign an order treating the petition for the writ as a petition filed under the Act, unless he finds that the post-conviction remedy is inadequate or ineffective to test the legality of the petitioner's detention. Upon signing such an order, the judge shall transmit the petition, a certified copy of the order, and any other pertinent papers to the court in which the petitioner's conviction took place. Upon such transfer the procedure shall be as in a Post Conviction Procedure proceeding.

Upon adoption of this amendment, the Rules Committee will need to revise accordingly Rule Z55.

Recommendation 3. The legislature should amend the Post Conviction Procedure Act to eliminate coram nobis entirely, or at least limit it to cases in which post-conviction and habeas corpus relief are no longer available (i.e., cases in which the convicted offender is no longer "in custody"). The legislature could accomplish the latter objective (partial elimination) by amending section 645A(e) to add the following new sentence after the first sentence:

> The remedy does supersede relief by way of coram nobis in cases where the applicant for the writ is incarcerated or on parole or probation.

Upon adoption of this amendment, the legislature could delete from section 645(e) the references to former Article 31B and to appeals pending in the Court of Appeals on June 1, 1958, and add a cross-reference to the new section 3-702(c) of the Courts and Judicial Proceedings Article.

Recommendation 4. The legislature should amend the Courts and Judicial Proceedings Article to specify the preclusive effect in a habeas corpus proceeding of prior post-conviction and habeas corpus proceedings. The legislature could accomplish this objective

by repealing the present section 3-703 and adding new sections 3-703(a) and (b) to read as follows:

> a. *Prior post-conviction proceeding.* The judge may refuse to issue the writ if he determines that the petitioner, confined as a result of a sentence for a criminal offense, raised or could have raised in a prior post-conviction proceeding the grounds he now raises in a petition for the writ. In exercising his discretion the judge may consider whether the petitioner had a full and fair opportunity to present the grounds in the post-conviction proceeding and whether any new grounds provide a substantial basis for questioning the fundamental fairness of the petitioner's confinement.
>
> b. *Prior habeas corpus proceeding.* The judge may refuse to issue the writ if he determines that the petitioner, confined as a result of a sentence for a criminal offense, raised or could have raised in a prior habeas corpus proceeding the grounds he now raises in a petition for the writ. In exercising his discretion the judge may consider whether the petitioner had a full and fair opportunity to present the grounds in the prior habeas corpus proceeding and whether the grounds provide a substantial basis for questioning the fundamental fairness of the petitioner's confinement.

Upon adoption of this amendment, the Rules Committee should consider amending Rule Z55 to ensure that if a habeas corpus judge transfers a habeas application to the convicting court (already authorized by section 7-202(b)(1)), the transfer will be to the judge who previously ruled on the prisoner's post-conviction petition.

Recommendation 5. The legislature should amend the Post Conviction Procedure Act to redefine "finally litigated" and "waived" to be consistent with recent judicial decisions and with these recommendations. The legislature could accomplish this objective by repealing the present sections 645(A)(b) and (c) and by enacting new sections 645A(b) and (c) to read as follows:

> b) *When allegations of error finally litigated.* For purposes of this subtitle, an allegation of error is finally litigated when the Court of Special Appeals has rendered a decision on the merits thereof on direct appeal of the defendant's conviction.
>
> c) *When allegation of error waived.* For the purposes of this subtitle, an allegation of error is waived if the petitioner could have made the allegation before trial, at trial, or on

> direct appeal but did not make the allegation, unless the court shall find that the allegation of error involves a fundamental right which the petitioner must knowingly and intelligently waive or that some other special circumstance excuses the petitioner's failure to raise the allegation. The burden of proving special circumstances shall be on the petitioner. If the court finds that the applicable standard is that of a knowing and intelligent waiver, then there is a rebuttable presumption that the petitioner's failure to allege the error when he could have done so before trial, at trial, or on direct appeal was an intelligent and knowing waiver.

Upon adoption of this amendment, the legislature should also repeal section 645A(d) and the final two lines in section 645A(a).

Recommendation 6. The legislature should amend the Post Conviction Procedure Act to afford the state a laches defense where the prisoner's inexcusable delay in filing a post-conviction petition prejudices the state's ability to respond to the petition or to retry the petitioner. The legislature could accomplish this objective by enacting a new section 645A(d) to read as follows:

> d) *Delayed petitions.* A petition may be dismissed if it appears that the state has been prejudiced in its ability to respond to the petition or to retry the petioner by delay in its filing unless the petitioner shows that it is based on allegations that he could not have had knowledge of by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.