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## Habeas Settlements

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# Habeas Settlements

Anup Malani

## **Abstract**

Why is it that criminal cases nearly always settle, but habeas corpus cases do not? The vast majority of criminal cases are resolved by guilty pleas, without a trial. But it is the rare habeas petition that is resolved out of court, rather than litigated to completion. This is an interesting puzzle because criminal and habeas corpus cases have a lot in common. They involve the same parties and the same attorneys. They also involve similar bargains: the defendant or prisoner receives a shorter, more certain sentence and the prosecutor or government attorney avoids having to litigate a criminal or habeas case, respectively. This is an important puzzle because active settlement of habeas cases could reduce habeas caseloads by nearly one-third. Although most habeas petitions are sure-losers under current law, I estimate that at least 28 percent are sufficiently credible – or costly for the government to defend – that they warrant settlement.

I attempt to resolve this puzzle and propose a series of reforms to pave the way for more active (but safe) settlement of habeas cases. Most notably, I propose that Rule 35 of the Federal Rules of Criminal Procedure be modified to permit courts to amend sentences upon a habeas settlement, regardless of whether the modified sentence is within the sentencing guideline range for the prisoner's offense. And, to ensure that any growth in habeas settlements is not at the expense of prisoners' rights, I propose that courts be required to conduct Rule 11-type colloquies with prisoners before accepting habeas settlements.

# Habeas Settlements

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## ABSTRACT

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## INTRODUCTION

Why is it that criminal cases nearly always settle, but habeas corpus cases do not? The vast majority of criminal cases are resolved by guilty pleas, without a trial. But it is the rare habeas petition that is resolved out of court, rather than litigated to completion.

This is an interesting puzzle because criminal and habeas corpus cases have a lot in common. They involve the same parties and the same attorneys. Prosecutors who actively negotiate plea agreements in criminal cases are very often the attorneys responsible for defending the government in habeas cases. The public defenders who actively negotiate pleas on behalf of their clients are nearly always prisoner's counsel in credible habeas cases. Settlement of criminal and habeas cases also involve similar bargains: the defendant or prisoner receives a shorter, more certain sentence and the prosecutor or government attorney avoids having to litigate a criminal or habeas case, respectively.

This is an important puzzle because active settlement of habeas cases could reduce habeas caseloads by nearly one-third. Although most habeas petitions are sure-losers under current law, I estimate that at least 28 percent are sufficiently credible – or costly for the government to defend – that they warrant settlement. These cases include ones where petitioners are appointed counsel by the court; win at least one vote to grant, even though they are ultimately denied; or are ultimately granted at the state or federal level. (This last category alone accounts for 8 percent of cases.) Moreover, habeas settlements are as valid under the constitution as plea bargains because the former involve rights no more important than those waived by the latter.

In this paper I attempt to resolve this puzzle and propose a series of reforms to pave the way for active (but safe) settlement of habeas cases. Based on extensive interviews with prosecutors and public defenders, as well as statistical analysis of data on habeas filings and judgments, I identify three primary obstacles to habeas settlements. First, parties to habeas cases simply do not think to settle. There is no culture of out-of-court, private resolution of habeas claims. This is not to suggest that there is opposition to compromise: most attorneys interviewed said they would welcome settlement, but it had just never come up. Second, in cases where settlement is considered, rigidities in the federal sentencing guidelines often rule out any reasonable compromise. The reason is that even sentences arising from habeas settlements must comply with sentencing guidelines, and many compromises lie outside the guidelines range for the crime that the prisoner committed. (This hurdle may be cleared if *Blakely*



*v. Washington*<sup>1</sup> invalidates sentencing guidelines. But it could persist if, instead, prosecutors simply submit sentencing factors to juries.) A third obstacle to habeas settlements is that few state and no federal courts have the authority to revise a prisoner's sentence after a habeas filing and settlement. Therefore, to implement habeas settlements, government attorneys have to concede a prisoner's habeas claims on the condition that the prisoner pleads to a lesser-included crime. The need to maintain good relations with police – or simply pride – often prevents prosecutors from making such a concession and thus implementing a settlement.

There are two basic reforms that would, for the most part, eliminate these obstacles to settlement. One is that training programs for prosecutors and public defenders should include modules on habeas settlements just they currently include modules on plea bargaining. The other reform is that Rule 35 of the Federal Rules of Criminal Procedure, and its state analogues, should be amended to permit courts, upon the government's motion, to amend a prisoner's sentence if the prisoner drops her habeas claims, regardless of whether the new sentence conforms to sentencing guidelines.

Just as the bargaining power asymmetries raise concerns about prosecutors taking advantage of defendants in plea negotiations, they also raise concerns about government attorneys exploiting prisoners in habeas settlement talks. Therefore, in order to ensure that habeas compromises are fair to defendants, I recommend two additional reforms. Following Rule 11, which requires that courts conduct a formal colloquy with defendants to ensure they understand the implication of their guilty pleas, Rule 35 and its analogues at the state level should be amended to require similar colloquies with prisoners to ensure they understand the implications of any habeas settlement that they sign. This reform is uniquely important because most of the habeas settlements I have uncovered are oral contracts, which are difficult to reconstruct and enforce. The second reform is that courts should always permit prisoners to challenge a habeas settlement on the grounds that it was not voluntary and knowing because the prisoner received ineffective assistance of counsel with regard to the settlement. There is little reason to fear that this exception would negate the value of habeas settlements to government attorneys because the use of Rule 11-type colloquies to vet settlements would render facially baseless most complaints about ineffective assistance of counsel.

Before diving into a discussion of habeas settlements, it is important to distinguish them from a related phenomenon: so-called



<sup>1</sup> 124 S.Ct. 2531 (2004).

“habeas waivers.” These are clauses in plea agreements that waive, in addition to a defendant’s right to a trial, the defendant’s right to collaterally challenge her conviction. In other words, habeas waivers occur during plea bargaining, before a defendant files a habeas petition, and they bar the defendant from ever filing a habeas petition. By contrast, habeas settlements occur after a prisoner files her habeas petition and resemble ordinary out-of-court settlements of criminal or other civil cases. The relationship between habeas settlements and habeas petitions is analogous to the relationship between plea agreements and an indictment, but it is habeas waivers, not habeas settlements, that are part of the plea bargaining process.

Although this paper – to be thorough – also examines why habeas waivers are less common than waivers of trial rights in plea agreements, I do not advocate the use of habeas waivers. The reason is that there are no gains to trade with habeas waivers. Habeas waivers purchase defendants only trivial reductions in sentence because defendants who plead guilty retain few procedural rights that can be vindicated on collateral review and generally receive sentences that expire before the habeas review can be completed. Moreover, habeas waivers offer prosecutors little respite from habeas litigation because a small percentage of all habeas petitions are filed by prisoners who pleaded guilty and habeas petitions by such prisoners are truly never granted.

The remainder of this paper may be outlined as follows. Because the case law on habeas waivers sets benchmarks against which the legality of habeas settlements are judged, Section I offers a brief account of the prevalence and enforceability of habeas waivers. It also expands on why such waivers are of little value to defendants or prosecutors. Section II returns to the primary focus of this paper, and examines prevalence and enforceability of habeas settlements. Section III discusses the constitutional validity and the policy benefits of settlement to parties in habeas litigation. It follows up by recommending procedural reforms to promote habeas settlements. The conclusion takes up the benefits of habeas settlements that flow to courts and the quality of habeas case law. Appendix A provides examples of habeas settlement agreements. Appendix B summarizes the data employed by the analysis in Sections I and II. Appendix C complements Section III with text for an amendment to Rule 35 that would give courts the authority to review and implement habeas settlements.<sup>2</sup>

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<sup>2</sup> In order to place it in academic context, this paper can be said to advance the literature on state and federal habeas review in three ways. It is, to the best of my knowledge, the first paper to discuss the settlement of habeas petitions after they are filed. Second, it is the first to conduct a nationwide survey to determine the prevalence of both habeas waivers and habeas settlements. Third, Appendix B offers

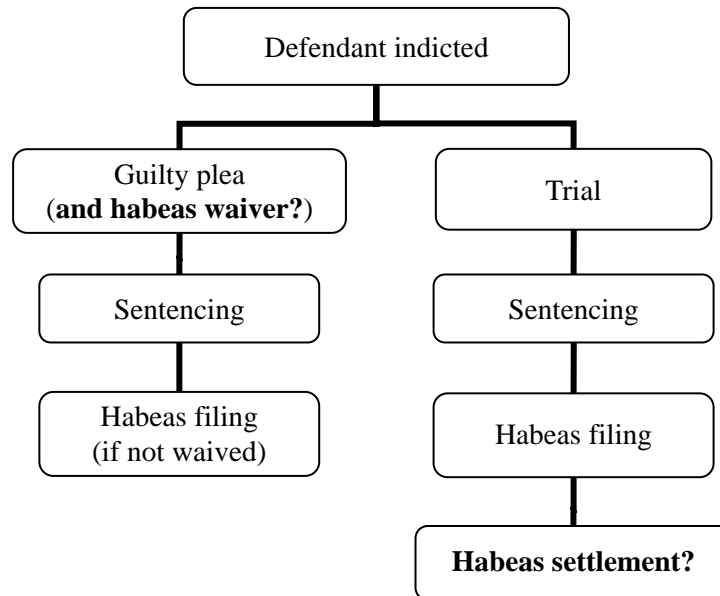
## I. HABEAS WAIVERS

Defendants can trade their habeas corpus rights for sentencing concessions from prosecutors at either of two points during the criminal process (see Figure 1). They can be traded before trial, as part of a plea bargain. In exchange for a further reduction in her sentence, the defendant could waive, in addition to her right to trial, her right to collaterally attack her conviction in a habeas petition. Such agreements may be called “habeas waivers.” Alternatively, if the defendant opts for trial, is convicted and sentenced, and then files a habeas petition, she may surrender her habeas claim in return for a downward adjustment to her sentence before the courts complete their adjudication of her habeas petition. I refer to these latter arrangements as “habeas settlements.” Note that habeas waivers and habeas settlements are mutually exclusive. If a defendant signs a habeas waiver, she cannot file a habeas petition. But without a habeas petition, there are no claims to motivate a habeas settlement.

Although the aim of this paper is to explain habeas settlements, this first section focuses on habeas waivers. This is not merely because habeas waivers precede habeas settlements in the criminal process or because their mutual exclusivity means the prevalence of habeas waivers may partially explain the paucity habeas settlements. It is also because the case law on habeas waivers sets the benchmarks against which the legal validity of settlements is judged. This, in turn, is because the case law on habeas waivers is better developed than that on habeas settlements. Moreover, habeas waivers, which surrender the right to challenge errors in the criminal process before they occur, are in some sense more provocative than habeas settlements, which surrender the right to challenge procedural errors that have already occurred.

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the first detailed examination of outcomes in 28 U.S.C. § 2254 cases after the Anti-terrorism and Effective Death Penalty Act (AEDPA). This analysis is based on a detailed study of nearly 300 cases filed in the Eastern District of New York in 2001-2002 and gathered by Marc Falkoff, the special master appointed by Judge Jack Weinstein to handle a backlog of habeas cases in that district. It is also the first to employ prisoner release data (as opposed to merely sentencing data), assembled by John Pfaff, to construct a more accurate estimate of the number of prisoners with effective habeas rights.

**Figure 1. Timing of habeas bargains in criminal process.**

This section begins with some examples of habeas waivers, and then discusses the enforceability of these waivers. I proceed to survey and explain patterns in the usage of habeas waivers. In the end, however, my investigation suggests that habeas waivers do not provide sufficient value to defendants or prosecutors to warrant a policy of promoting such agreements. The data for the discussion in this section and the next are drawn from a nationwide survey of state and federal prosecutors and public defenders. This survey was answered by parties to criminal and habeas litigation in 23 states and 41 federal districts.<sup>3</sup> Approximately 10 percent of the survey relies on open-ended phone conversations with respondents. The remainder is based on a formal survey instrument filled out by respondents over the phone or by fax.

<sup>3</sup> The states which responded are Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New Mexico, Pennsylvania, South Carolina, Washington, and Wisconsin. The federal districts that responded are S.D. Ala., D. Alaska, D. Ariz., E.D. Ark., W.D. Ark. C.D. Cal., E.D., Cal., N.D. Cal., D. Colo., D. Conn., D. Ha., D. Idaho, S.D. Ill., D. D.C., N.D. Fla., E.D. La., M.D. La., W.D. La., W.D. Mich., D. Minn., E.D., Mo., W.D. Mo., D. Nev., E.D. N.C., D. N.J., D. N.M., N.D. N.Y., W.D. N.Y., E.D. Okla., N.D. Okla., W.D. Okla., D. Ore., M.D. Penn., D. S.D., E.D. Tex., M.D. Tex., S.D. Tex., D. Utah, D. Vt., D. Wash., and D. Wyo.



### A. Examples

Consider initially the case of *U.S. v. Nicoloff*.<sup>4</sup> The defendant, a convicted felon, was arrested in Oklahoma while in possession of a firearm. She was charged under 18 U.S.C. §§ 922(g)(1) and 924(a) (2003) and pleaded guilty rather than risk trial. Importantly, her agreement with the prosecutor stipulated that

[t]he defendant agrees to waive all appellate rights, including any and all collateral attacks including but not limited to those pursued by means of a writ of habeas corpus, save and except claims of ineffective assistance of counsel.<sup>5</sup>

This is a fairly standard example of a habeas waiver. It surrenders the right to collateral review of a defendant's sentence except in the case where the defendant challenges the effectiveness of defense counsel. (The value of this exception should not be overstated since every jurisdiction that enforces habeas waivers has carved an implicit exception for ineffective assistance claims that attack the voluntary-and-knowing nature of the plea agreement.)

It is difficult to determine from the text of most plea agreements how much prosecutors agree to reduce a defendant's sentence in return for a habeas waiver. There is typically a list of concessions by the defendant followed by a list of concessions by the prosecutor, with no express language connecting specific concessions by each side. Occasionally, however, habeas waivers are made conditional on a certain sentence. This sheds some light on the marginal contribution of the habeas waiver to the defendant's welfare. Consider the following example from a plea agreement arising out a felon-in-possession indictment in Minnesota:

In the event that the Court accepts the plea agreement, including the guidelines calculations set out in paragraph 5, and sentences the defendant at or below the guidelines range for an offense level of 17 and a criminal history of III, the defendant waives his right to appeal or to contest, directly or collaterally, his sentence on any ground, with the exception of the grounds of ineffective assistance of counsel, unless the Court should impose a sentence in violation of the law apart from the sentencing guidelines.<sup>6</sup>

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<sup>4</sup> *U.S. v. Nicoloff*, No. 03-CR-109-K (N.D. Okla. 2003).

<sup>5</sup> Plea Agreement, *U.S. v. Nicoloff*, No. 03-CR-109-K (N.D. Okla. 2003), at 3 (§(A)(2)(b)). This agreement was provided by Julie O'Connell, Assistant Federal Public Defender, District of Oklahoma, Dec. 3, 2003.

<sup>6</sup> Plea Agreement and Sentencing Stipulations, *United States of America v. Robert Michael Martin*, No. 03-109 (02), D. Minn., [Date] at 6 (¶ 8).



In this case the parties disagreed on the proper sentence for the defendant under the federal sentencing guidelines. The defendant thought he deserved a sentence of 30-37 months as implied by an offense level of 17 for a defendant in criminal history category III. The prosecutor believed the defendant deserved a sentence of 46-57 months as implied by an offense level of 21 and criminal history category III.<sup>7</sup> Thus the agreement suggests that the defendant was willing to exchange his appellate and habeas rights for a sentence less than 37 months rather than one greater than 46 months.

The reader has surely noted that both agreements above involve waivers of both appellate and habeas rights. This appears to be true of all the plea agreements. Some plea bargains contain appellate waivers without habeas waivers, but I have found none that contain a habeas waiver without an appellate waiver. Moreover, none of the defense attorneys or prosecutors I interviewed could recall a plea agreement with only a waiver of collateral review rights.<sup>8</sup>

## B. Legal status and scope

Habeas waivers have been accepted in all jurisdictions but one (Indiana) that has considered them.<sup>9</sup> That said, I have found a hand-

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<sup>7</sup> United States Sentencing Guideline Manual, Ch. 5 pt. A at 632 (2003) (hereinafter U.S.S.G.).

<sup>8</sup> Finally, while most habeas waivers in plea agreements are the product of an exchange of collateral review rights for marginal reductions in sentence, there are cases where parties say a habeas waiver's primary purpose is to secure compliance with the remainder of the contract rather than secure additional sentence reductions. For example, if the parties agree that, given the uncertainty of conviction, the expected sentence for a defendant is less than the statutory minimum for the crime he has committed, no deal may be possible if the defendant pleads to that crime. A deal may be possible, however, if the defendant pleads to a different crime that he has not technically committed but that permits a sentence that approximates the expected sentence were the defendant to go to trial for the crime he did commit. The difficulty is that such a plea agreement is vulnerable to a collateral challenge on the grounds that the defendant is innocent of the crime to which he pleaded. The defendant would have to demonstrate the plea was involuntary or unintelligent because of, e.g., ineffective assistance of counsel, but the risk that the plea agreement will unravel is greater than zero. To eliminate this risk, parties will agree to habeas waivers. As in waiver-for-sentence bargains, however, such plea agreements contain both appellate and habeas waivers. Unlike waiver-for-sentence bargains, such agreements do not contain appellate waivers without habeas waivers. Telephone interview with Daniel Scott, Assistant Federal Public Defender, District of Minnesota (Dec. 3, 2003); Telephone conversation with Ahilan Arulantham, Assistant Federal Public Defender, Western District of Texas (Nov. 20, 2003).

<sup>9</sup> *Garcia-Santos v. U.S.*, 273 F.3d 506, 508-509 (2d Cir. 2001); *U.S. v. Craig*, 985 F.2d 175, 178 (4th Cir.1993) (per curiam); *U.S. v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994); *Watson v. U.S.*, 165 F.3d 486, 488-89 (6th Cir. 1999); *Mason v. U.S.*, 211 F.3d 1065, 1069 (7th Cir. 2000); *DeRoo v. U.S.*, 223 F.3d 919, 923 (8th Cir. 2000); *U.S. v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993); *U.S. v. Cockerham*, 237 F.3d 1179, 1181-82 (10th Cir. 2001); *Allen v. Thomas*, 161 F.3d 667, 670-671 (11th Cir. 1998); *Boglin v. State*, 840 So.2d 926, 929-930 (Ala. 2002); *Allen v. Thomas*, 458 S.E.2d 107, 108 (Ga. 1995). Indiana rejects habeas waivers, though such a waiver does not void the entire plea. See *Majors*, 568 N.E.2d at 1067-68. It is likely that other jurisdictions which reject appellate waivers – Arizona and certain jurisdictions in Michigan – would reject habeas waivers, if for no other reason than that most jurisdictions that permit habeas waivers do so because they liken habeas waivers to appellate waivers, which they enforce.

ful of examples where federal district courts have held that a habeas waiver bars a petitioner's habeas claims, but nonetheless addressed those claims on the merits.<sup>10</sup> These cases will probably dwindle as habeas waivers become more commonplace. Finally, at least one district court has held – in an unpublished memorandum opinion – that if a prisoner files a habeas petition despite a habeas waiver in his plea, the prosecution may treat the plea agreement as having been breached by the prisoner.<sup>11</sup>

Because a habeas waiver supplements a guilty plea, in order to determine the scope of rights that can be relinquished by the waiver, one must determine which rights remain after the guilty plea. When a defendant agrees to plead guilty, whether as part of an agreement with the prosecutor or not, she waives her right to a trial<sup>12</sup> and causes the criminal process to skip the trial phase. The plea also has implications for post-trial phases. Most importantly, a plea generally waives the right to challenge on appeal or collateral review all constitutional errors predating the plea.<sup>13</sup> This waiver may be called the *Tollett* rule, for the Supreme Court case that established it.<sup>14</sup> The scope of this waiver is described in Table 1.

Even when a defendant pleads guilty, she retains the right to raise certain claims on appeal. These claims can be partitioned into two groups. The first group includes claims that the trial court was without jurisdiction to convict the defendant or that the sentence imposed was otherwise illegal.<sup>15</sup> The first group also includes any challenge that the defendant's plea was not voluntary and knowing,<sup>16</sup> e.g., because its terms were ambiguous, the court failed to inform him of its salient terms, or defense counsel rendered ineffective assistance with regard to the plea.<sup>17</sup>

The second group of claims includes challenges based on certain narrow pre-plea rights, such as the right to protection from prosecutorial vindictiveness or the privilege against double jeopardy.<sup>18</sup> The

<sup>10</sup> See, e.g., *Rodriguez v. U.S.*, 2003 WL 21638079 (S.D.N.Y.).

<sup>11</sup> *U.S. v. Schaffer*, 2002 WL 31748619 (N.D.Ill. 2002).

<sup>12</sup> See, e.g., Fed. R. of Crim. Proc. 11(c)(3) (enumerating the rights the court must explain to the defendant are waived by a guilty plea).

<sup>13</sup> See *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (involving waiver of claim of discrimination in the selection of the grand jury).

<sup>14</sup> *Id.*

<sup>15</sup> *U.S. v. Broce*, 488 U.S. 563, 569 (1989); *Fireman v. U.S.*, 20 F. Supp. 2d 229, 233 (D. Mass 1998).

<sup>16</sup> *Brady v. U.S.*, 397 U.S. 742, 747 (1970) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

<sup>17</sup> *McMann v. Richardson*, 397 U.S. 759, 769-770 (1970).

<sup>18</sup> *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (upholding a collateral attack on a guilty plea by a defendant who was re-indicted on felony charges following his appeal of a misdemeanor conviction, on the grounds that the re-indictment was the product of prosecutorial vindictiveness); *Menna v. New York*, 423 U.S. 61, 62, 63 n.2 (1975) (per curiam) (acknowledging that, while a plea agreement that includes a



second group also includes claims based on certain statutory exceptions to the *Tollett* rule.<sup>19</sup> For example, in California and New York the defendant may raise claims challenging trial court decisions on motions to suppress specific evidence.<sup>20</sup> A final set of claims in the second group includes those challenging any errors made by the trial court in determining the defendant's sentence.<sup>21</sup>

Although a plea agreement does not bar appeals based on claims in either group above, courts will permit the defendant to waive his rights to appeal claims in the second group.<sup>22</sup> Such appellate waivers are accepted in all but three states – Arizona, Indiana, and Michigan – and all federal districts except the District of Columbia.<sup>23</sup> For certain claims, such as prosecutorial vindictiveness and double jeopardy, however, that the Supreme Court has said survive the plea and claims

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specific double jeopardy waiver waives any double jeopardy claims, a general plea does not automatically do so).

It should be noted, however, that the Supreme Court appears to have backed off, though not overruled, the decisions that created these exceptions to the *Tollett* rule. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 365 (1978) (rejecting claim of vindictiveness where prosecutor threatened to reindict defendant on more serious charges if he did not plead to existing charges, because competent counsel protected defendant from prosecutors and prosecutor's statements were interpreted as only presenting defendant with the legal risks of failing to plead); *Broce*, 488 U.S. at 569 (rejecting claim of double jeopardy where defendants plead to two conspiracies but district court found in a subsequent, related case that there had been only one conspiracy, because the plea was counseled and voluntary).

<sup>19</sup> *Lefkowitz v. Newsome*, 420 U.S. 283, 291-293 (1975) (permitting such statutory exemptions to the Tollet rule). Note that the plea agreement may also permit with specific language the defendant to challenge certain pre-plea errors.

<sup>20</sup> Cal. Penal Code § 1538.5(m) (West 2002); N.Y. Crim. Proc. Law § 710.20(1) (McKinney 1998). A 1989 study by the National Center for State Courts (NCSC) found that appeals based on these statutory exceptions account for a significant percentage of appeals. Specifically, it noted that appeals from guilty pleas and other non-trial dispositions averaged between 14 percent and 25 percent of all appeals in states without statutory exceptions to the Tollett rule and 43 percent of appeals in certain California and New York jurisdictions. National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* 31, 44 n. 8 (1989).

<sup>21</sup> See, e.g., *U.S. v. Hahn*, 2004 U.S. App. Lexis 4230 (10th Cir.).

<sup>22</sup> See, e.g., *U.S. v. White*, 258 F.3d 374 (5th Cir. 2001) (ruling that appellate waiver does not imply waiver of right not to be imprisoned for legal conduct).

With respect to sentencing errors, most federal courts permit all sentencing error expressly to be waived on appeal even though the nature of the error was unknown to the defendant at the time of the plea and appellate waiver. See, e.g., *U.S. v. Rutan*, 956 F.2d 827, 830 (8th Cir. 1992); *U.S. v. Melancon*, 972 F.2d 566, 572 (5th Cir. 1992); *U.S. v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990). California permits sentencing error to be waived only if the language of the appellate waiver is specific. See *People v. Vargas*, 17 Cal. Rptr. 2d 445, 451 (Cal. Ct. App. 1993); *People v. Sherrick*, 24 Cal. Rptr. 2d 25, 25-26 (Cal. Ct. App. 1993). Only Minnesota does not allow any appellate waiver of sentencing errors. *Ballweber v. State*, 457 N.W.2d 215 (Minn. Ct. App. 1990).

<sup>23</sup> See Kristine Cordier Karnezis, *Validity and Effect of Criminal Defendant's Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 Amer. L. Rep. 3d 864, § 3[a] (1979).

Appellate waivers are per se unenforceable only in Arizona and Indiana. See *State v. Ethington*, 592 P.2d 768 (Ariz. 1979); *Majors v. State*, 568 N.E.2d 1065 (Ind. Ct. App. 1991). They are questionable in Michigan. Compare *People v. Butler*, 204 N.W.2d 325 (Mich. App. 1972) (appellate waiver unenforceable), and *People v. Stevenson*, 231 N.W.2d 476 (Mich. App. 1975) (same), with *People v. Rodriguez*, 480 N.W.2d 287, 291 (Mich. Ct. App. 1991) (rejecting reasoning in *Butler*).



falling under statutory exemptions to the *Tollett* rule, the waiver language must be specific to the claim in order to be enforceable.<sup>24</sup> Moreover, appellate waivers, like plea agreements, are not enforceable if the waiver was not voluntary and knowing,<sup>25</sup> perhaps because the defendant received ineffective advice of counsel with respect to the waiver.<sup>26</sup> Where a waiver is held invalid, the remedy is typically to allow the appeal to proceed, perhaps with the prosecutor also given the option to void the plea bargain.<sup>27</sup> Finally, appellate waivers do not bar prisoners from raising claims from either group in a state or federal PCR motion, to the extent that such claims are not procedurally barred.

Appellate waivers are important to habeas waivers for two reasons. First, because courts that approve of habeas waivers analogize them to appellate waivers, the scope of rights that they can surrender is likely the same as the scope surrendered in appellate waivers. Specifically, they can waive claims based on certain narrow pre-plea rights, such as the right to protection from prosecutorial vindictiveness or the privilege against double jeopardy; claims based on state statutory exceptions to the *Tollett* rule; and claims asserting sentencing errors. They cannot waive claims that the trial court was without jurisdiction to convict the defendant; claims that the sentence imposed was otherwise illegal; and claims that the defendant's plea was not voluntary and knowing. Moreover, to be enforceable, habeas waivers like appellate waivers must themselves be knowing and voluntary,<sup>28</sup> a condition that requires the defendant to have received effective assistance of counsel with regard to the habeas waiver.<sup>29</sup> Where a habeas waiver is invalidated, the prisoner may proceed with

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<sup>24</sup> *People v. Williams*, 331 N.E.2d 684, 685 (N.Y. 1975) (involving waiver of right to appeal decision regarding suppression motion); *People v. Charles*, 217 Cal. Rptr. 402, 409 (Ct. App. 1985) (same); *U.S. v. Andis*, 333 F.3d 886, 890 (10th Cir. 2003); *U.S. v. Hernandez*, 242 F.3d 110, 114 (2nd Cir. 2001).

<sup>25</sup> Courts have, in specific instances, held appellate waivers invalid where relevant language in the plea was ambiguous, see, e.g., *U.S. v. Joseph*, 38 Fed. Appx. 667 (2d Cir. 2002) (finding that waiver was ambiguous); *U.S. v. Phillips*, 174 F.3d 1074 (9th Cir. 1999) (finding that amount of restitution required under plea agreement was ambiguous); or the court's plea colloquy failed properly to inform the defendant that as part of the plea agreement he had agreed to waive the right to appeal or was otherwise defective, see, e.g., *U.S. v. Benson*, 63 Fed. Appx. 88 (4th Cir. 2003) (finding that court failed address waiver during plea colloquy); *U.S. v. Normand*, 58 Fed. Appx. 679 (9th Cir. 2003) (finding that court mistakenly informed defendant he had a right to appeal); *U.S. v. Portillo-Cano*, 192 F.3d 1246 (9th Cir. 1999) (finding plea colloquy was otherwise defective).

<sup>26</sup> See, e.g., *Jiminez v. U.S.*, 168 F.Supp.2d 79 (S.D. N.Y. 2001).

<sup>27</sup> *Majors*, 568 N.E.2d at 1068 (permitting the appeal to proceed); *Gibson*, 348 A.2d 769, 775 (N.J. 1975) (permitting the appeal to proceed and the prosecutor to void the plea bargain). But see *Butler*, 204 N.W.2d at 331 (voiding the conviction).

<sup>28</sup> See, e.g., *Cockerham*, 237 F.3d at 1183; *Allen*, 458 S.E.2d at 108.

<sup>29</sup> See, e.g., *Craig*, 985 F.2d at 178; *Boglin*, 840 So.2d at 931. See also *U.S. v. Steadman*, 198 F.Supp.2d 730, 733-34 (2002) (habeas waiver not enforceable because judge failed to mention it during the plea colloquy).



**Table 1. Claims waived by plea, appellate waivers, and habeas waivers.**

Status	Claims
Waived by plea	<ul style="list-style-type: none"> <li>▪ Right to trial (and thus trial-type errors)</li> <li>▪ Most errors predating the plea</li> <li>▪ Certain double-jeopardy and prosecutorial vindictiveness claims (if waiver is specific)</li> </ul>
Not waived by plea, but may be waived by appellate waiver	<ul style="list-style-type: none"> <li>▪ Certain double-jeopardy and prosecutorial vindictiveness claims (if waiver is specific)</li> <li>▪ Statutory exceptions to <i>Tollet</i> (if waiver is specific)</li> <li>▪ Errors by the court with respect to sentencing (CA (if waiver is specific), NY, most federal courts), but not illegal sentences</li> </ul>
Not waived by plea or appellate waiver, but may be waived by habeas waiver	<ul style="list-style-type: none"> <li>▪ Claims for which exhaustion is excused</li> </ul>
Cannot be waived	<ul style="list-style-type: none"> <li>▪ Jurisdiction</li> <li>▪ Plea was not voluntary and knowing</li> <li>▪ Ineffective assistance of counsel with respect to the plea</li> <li>▪ Specific rights in specific states, e.g., speedy trial or defendant's competency to stand trial in NY.</li> <li>▪ Sentencing error (MN); illegal sentences (CA, NY, most federal courts)</li> </ul>

her post-conviction review (PCR) or habeas claims.<sup>30</sup> (I shall use the terms PCR and habeas interchangeably.)

Second, as mentioned in the Section I.A, every habeas waiver I have found has been accompanied by an appellate waiver. This is important because appellate waivers render a habeas waiver far less valuable. Most states require that a prisoner raise her PCR claims on direct appeal unless this procedural default can be excused. The federal government has an analogous rule requiring the exhaustion of all state remedies – whether a direct appeal or a state PCR motion – before a claim may be brought in a federal habeas petition. Exhaustion may be excused at the federal level for either the reasons that excuse exhaustion at the state level or because the state remedies are inadequate. Although the law on the interaction between appellate and habeas waivers is not yet firm, a number of state and federal courts have held that an appellate waiver does not excuse the exhaustion re-

<sup>30</sup> See, e.g., *Craig*, 985 F.2d at 178; *Boglin*, 840 So.2d at 936.



quirement for state and federal habeas relief, respectively.<sup>31</sup> Therefore, an appellate waiver effectively bars state or federal PCR relief on most claims that survive a plea because it prevents exhaustion of claims on direct appeal. The only claims that may succeed are those that are excused from exhaustion. See Table 1.

### C. Prevalence

Judging by my selection of examples of waivers in Section I.A, one might get the guess that habeas waivers are mainly found in federal plea agreements. This would be correct. Although habeas waivers are employed in approximately half of the states I surveyed,<sup>32</sup> they are not used with any serious frequency in these states. States where habeas waivers are employed include Alabama, Connecticut, Florida, Georgia, Iowa, Kentucky, Mississippi, New Mexico, South Carolina, and Washington. States that never appear to use habeas waivers include Colorado, Delaware, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey and Wisconsin.

Habeas waivers are more common in federal pleas, but there is significant heterogeneity across federal districts in the rate with which these waivers are employed. One-quarter of districts never employ habeas waivers.<sup>33</sup> This group includes, for example, the Western District of Missouri, the District of Columbia District, and the Northern District of Florida. Of the districts that employ habeas waivers, one-half use them in all plea bargains.<sup>34</sup> This group includes the Districts of Arizona and Hawaii. The remaining federal districts that employ habeas waivers do so on a case-by-case basis.

Moreover, those federal jurisdictions that use waivers with frequency appear to have done so only starting in the last five or ten years. The earliest example I could find of a habeas waiver was from 1984 in California.<sup>35</sup> This waiver appears to be an outlier, judging from the rare acknowledgment of such waivers by courts. California and North Carolina use waivers more frequently in the early 1990s,<sup>36</sup> although dramatic growth in usage of habeas waivers did not occur

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<sup>31</sup> See, e.g., *U.S. v. Pipitone*, 67 F.3d 34, 39-40 (2nd Cir. 1995). Indeed, on court has held that a plea agreement itself implies both an appellate and a habeas waiver, *U.S. v. Viera*, 931 F.Supp. 1224, 1228 (M.D. Pa. 1996), and another that an appellate waiver in a plea agreement implies a habeas waiver, *Bouseley v. Brooks*, 97 F.3d 284, 288-89 (8th Cir. 1996). For criticisms of these cases, see Sanford I Weisburst, *Adjusting a Criminal Defendant's Sentence After a Successful Collateral Attack*, 64 U. Chi. L. Rev. 1067, 1075-1079 (1997).

<sup>32</sup> Habeas waivers were found in 10 of 19 states.

<sup>33</sup> Specifically, waivers were found in only 28 of 37 districts contacted.

<sup>34</sup> Fourteen of the 28 districts that use habeas waivers, use them in every plea agreement.

<sup>35</sup> *In the Matter of Philip A. DeMassa*, 1 Cal. State Bar Ct. Rptr. 737 (1991).

<sup>36</sup> *U.S. v. Henslee*, 1996 WL 622789 (9th Cir.(Cal.)); *U.S. v. Miller*, 1995 WL 627710 (4th Cir.(N.C.)).



until the late 1990s. A commonly cited trigger among federal prosecutors is a 1997 directive from the Department of Justice encouraging all assistant U.S. attorneys (AUSAs) to include appellate and habeas waivers in plea agreements.<sup>37</sup>

The remainder of this subsection attempts to explain these patterns in the usage of habeas waivers. As a backdrop to this discussion, it is important to understand the nature of the bargain struck in a habeas waiver. The defendant gets her expected sentence given the probability of habeas litigation and outcomes in habeas litigation,<sup>38</sup> plus an increment in her sentence to reflect the fact that a settlement permits the risk-averse defendant to avoid the risk of suffering an error in criminal procedure and the uncertainty of error-correcting habeas litigation. If the government is risk neutral or risk averse, the government should not oppose the elimination of the risks of error and error-correction by means of a settlement. Since the government is akin to a monopoly seller of a risk-reduction technology,<sup>39</sup> if the defendant is risk averse, the government should be able extract from the defendant a sentence enhancement to reflect the amount the defendant would be willing to pay to avoid these risks. For the government, a settlement avoids the expected cost of defending against a habeas claim. The transaction cost of a habeas waiver is the time required of defense counsel and the prosecutor to negotiate a trade of habeas rights. Because there is a constitutional right to counsel in criminal cases, these costs are mainly borne by the government. The incremental cost of a habeas waiver is rather small, however, because the parties are already negotiating a plea agreement.

#### 1. Why are habeas waivers less common in state plea agreements?

The first puzzle with regard to the prevalence of habeas waivers is why they are less common in state plea agreements than federal plea agreements. Perhaps it is because the cost of habeas litigation – and therefore the value of a habeas waiver – is lower for state prosecutors. One reason may be that state prisoners are less litigious than federal prisoners. This is illustrated by Table 5 in Appendix B, which

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<sup>37</sup> David E. Carney, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 Wm. & Mary L. Rev. 1019, 1019 (1999).

<sup>38</sup> Interestingly, if habeas litigation is a statistically complete error-correction method, i.e., the average correction measured in reduction of sentence length is the same as the average error measured in increase in sentence length, then the expected sentence should be the same with or without a habeas waiver. If the defendant is risk neutral, this may be a useful test for the efficacy of habeas litigation. Were habeas litigation a poor error correction device, one should expect to see plea agreements with habeas waivers have a lower sentence than plea agreements without such waivers.

<sup>39</sup> The government does not, by consenting to a settlement, sell insurance. The reason is that a settlement does not transfer the risk from the defendant to the government. Rather, it eliminates the risk of litigation altogether.





suggests, for example, that in 1998 each state prisoner filed less than one federal habeas petition while each federal prisoner appears to have filed more than two such petitions. State prisoners may be less litigious because federal habeas rights are less valuable to state prisoners than to federal prisoners. This in turn may be due to the respect federal courts give to state appellate and post-conviction review court judgments. Alternatively, it may be due to higher success rate that state prisoners have with PCR claims in state court than in federal court. This is illustrated in Table 7 of Appendix B, which suggests that the rate at which state prisoner petitions are granted is as high as 11 percent in state court, but no higher 2 percent in federal court. Of course, the fact that state prisoners file fewer *federal* habeas petitions than federal prisoners does not mean they file fewer *state* habeas petitions. Therefore, there is insufficient evidentiary support for the proposition that state prisoners are less litigious overall than federal prisoners.

Perhaps the cost of habeas litigation is lower for state prosecutors because states have simpler sentencing systems than the federal sentencing guidelines so that there are fewer sentencing errors at the state level than at the federal level. Moreover, the state systems may impose greater limits on the rights of defendants to challenge sentencing errors than the federal guidelines. There are a number of problems with these assertions. To begin with, an increasing number of states, like the federal government, have complicated sentencing systems.<sup>40</sup> Indeed, one National Center for State Court study found that sentencing errors comprise a quarter of state direct appeals and that state appeals courts find error in a quarter of cases where sentencing issues are raised.<sup>41</sup> Moreover, errors in sentencing guideline calculations by federal district courts are mainly addressed on direct appeal, not on habeas review. To raise them in a habeas petition, the federal prisoner has to demonstrate ineffective assistance of trial and appellate counsel to excuse her failure to raise the errors on direct appeal – rather substantial hurdles. Because sentencing errors are unlikely to explain habeas litigation by federal prisoners, differences in sentencing regimes are unlikely to explain differences in habeas litigation rate by federal versus state prisoners.

Even if the costs of habeas litigation are no lower at the state level than the federal level, perhaps federal prosecutors are more likely to insist on a habeas waiver because they are more likely to in-

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<sup>40</sup> See, e.g., Cal. Penal Code, §§ 1168-1170.6 (West 1985); Ill. Ann. Stat. ch. 38, ¶¶ 1005-8-1 to 1005-8-4 (Smith-Hurd 1981); Ind. Code Ann. §§ 35-50-1-1 to 35-50-6-6 (Burns 1991); N.Y. Penal Law §§ 70.00(2)-(3), 70.02, 70.06, 220.00-43 (McKinney 1987); Ala. Code § 13-A-5-6 (2003); GA. Code Ann. § 17-10-1 (2002); N.M. Stat. Ann. § 9-3-10 (2004).

<sup>41</sup> NCSC, Understanding Reversible Error, at 8.



ternalize the cost of habeas litigation than state prosecutors. At the federal level, the prosecutor who secures the conviction of a prisoner is responsible for defending the government against any habeas claims filed by that prisoner. The same may not be the case at the state level. For example, in New York, the state district attorneys' offices have special appellate counsel who only handles habeas appeals.<sup>42</sup> The same is true of the U.S. Attorney's office in the District of Columbia, which also handles "state" crimes in that jurisdiction. Even in states where the prosecutor who secures a conviction is responsible for related habeas claims, turnover may make it less likely that the prosecutor who secures the conviction is around to defend against derivative federal habeas claims. (The costs of state habeas litigation are substantially addressed by appellate waivers, which are more common.) The time that elapses between conviction and filing of a federal habeas claim is much longer for a state prisoner than a federal prisoner because the former must exhaust state remedies. If states prosecutors' offices have a turnover rate that is roughly equal to the rate in federal prosecutors' offices, then a state prosecutor is less likely to bear the cost of defending against a federal habeas claim related to one of her convictions than a federal prosecutor is.<sup>43</sup> This is the most promising explanation, along perhaps with the higher rate of habeas litigation by federal prisoners, for the difference in state and federal usage of habeas waivers in plea agreements.

## 2. Why is there heterogeneity in the frequency of habeas waivers in pleas across federal jurisdictions?

The second puzzle with regard to the prevalence of habeas waivers is why there is heterogeneity in the rates at which these waivers are employed in different federal jurisdictions. To be clear, the mystery is not only why some Assistant U.S. Attorney (AUSA) offices never request habeas waivers, but also why some AUSA offices request habeas waivers in all plea agreements. Surely there are cases where the parties cannot agree on a price for the waiver or where the sentence negotiated in the plea expires before the defendant could possibly file a habeas agreement.<sup>44</sup> I have no satisfying explanation

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<sup>42</sup> Telephone interview with Michael Green, District Attorney, Monroe County, New York (Dec. 9, 2003).

<sup>43</sup> If the state has a higher turnover rate, this would also be true for a state habeas claims related to a state conviction. But I do not have the data to support such a claim and it is likely that appellate waivers substantially address the cost of state habeas litigation to the state.

<sup>44</sup> At first blush it is also a mystery why plea agreements with appellate waivers also include habeas waivers given cases which hold that appellate waivers do not excuse waiver for federal prisoners. But the mystery vanishes when one realizes that these cases do not span all federal jurisdictions and there are other excuses available even in the presence of appellate waivers, such as, for the purpose of bringing an ineffective assistance of trial counsel claim, that trial counsel would have been appellate counsel as

for this observation. Some assistant federal defenders have suggested that certain prosecutors will accept no plea agreements that do not contain a habeas waiver.<sup>45</sup> This bargaining position is hardly credible unless the prosecutors clearly value habeas waivers a great deal. In that case, defendants should be able to obtain a very good price for the waiver, a fact which none of the federal public defenders interviewed concede.

Why do some AUSA's never request habeas waivers? A few assistant federal defenders I interviewed suggested that certain prosecutors simply do not think it fair to extract habeas right from defendants.<sup>46</sup> This behavior is hard to reconcile, however, with the willingness of the same prosecutors to extract trial and appellate rights from defendants. Perhaps these prosecutors believe that habeas rights are "special." But there is reason to be skeptical given that prosecutors are repeat players who know the limited value of habeas rights and cost of habeas litigation – but more on that in Section I.D.

An alternative explanation for the variation in use of habeas waivers is that there may be some AUSA offices that suffer higher turnover than others. Offices with lower turnover have greater incentive to include habeas waivers in plea agreements because prosecutors in these offices will more likely bear the cost of habeas litigation related to any given plea agreement. While this explanation has the advantage that it can be verified, I do not have the data to validate it. This leaves me without any satisfactory explanation for the heterogeneity in the usage of habeas waivers across federal districts.

### 3. Why are habeas waivers in federal pleas only a recent phenomenon?

The last empirical puzzle with respect to habeas waivers is why federal plea agreements began to include habeas waivers with frequency only in the last decade or so. There are two possible reasons. The first is the adoption of the federal sentencing guidelines in 1987, which may explain why habeas waivers were rarely used prior to the 1990s. Before the federal sentencing guidelines, judges had a great deal of discretion with regard to determination of sentences and this discretion could not be challenged unless the sentence lay above the maximum prescribed in the statute defining the substantive criminal offense. The guidelines changed all that. Judicial discretion is now substantially constrained by a series of calculations that depend,

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well.

<sup>45</sup> Telephone interview with Mark Hosken, Public Defender, W.D.N.Y. (Dec. 5, 2003).

<sup>46</sup> Telephone interview with Alexander Bunin, Public Defender, N.D.N.Y. and D. Vt. (Dec. 5, 2003).



among other things, on the seriousness of the offense, the criminal history of the defendant, and the assistance rendered by the defendant to the prosecutor. These calculations can be quite complicated, and certainly generate a lot of errors.<sup>47</sup> Moreover, the guidelines provide a mechanism for defendants to challenge these errors. Although the intended forum for these challenges is the direct appeal, a good number of these claims likely find their way into habeas claims piggy-backed on ineffective assistance of counsel claims.<sup>48</sup>

A second explanation for the recent popularity of habeas waivers is the boom in habeas filings by federal prisoners since the mid-1990s. This is demonstrated by the solid line in Figure 2, which plots the relevant habeas filing data from Table 5 in Appendix B for the period 1980-2000. The cause of this boom in habeas litigation is uncertain. It could be anticipation of Anti-terrorism and Effective Death Penalty Act (AEDPA).<sup>49</sup> Certainly AEDPA dramatically increased filings in April 1997 when its one-year statute of limitations on extant claims expired. A Bureau of Justice Statistics study, though, has suggested that the level of filings probably would have been lower, though grown at the same rate, even after 1997 in the absence of AEDPA.<sup>50</sup> In any case, the growth rate of filings does appear to have increased since the mid-1990s, whatever the distortion introduced by AEDPA. This caseload has increased the resources required to handle habeas litigation in AUSA offices, but sufficient additional resources have not been made available to these offices. The shortfall is illustrated by the dotted line in Figure 2, which also plots the number of attorneys working in AUSA offices from 1989-2000.<sup>51</sup> The additional workload per attorney increased the return to a waiver of habeas rights in a plea agreement.

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<sup>47</sup> See David E. Carney, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 Wm. & Mary L. Rev. 1019, 1020-21 (1999).

<sup>48</sup> Telephone interview with Gary Weinberger, Assistant Federal Public Defender, District of Connecticut (Dec. 3, 2003).

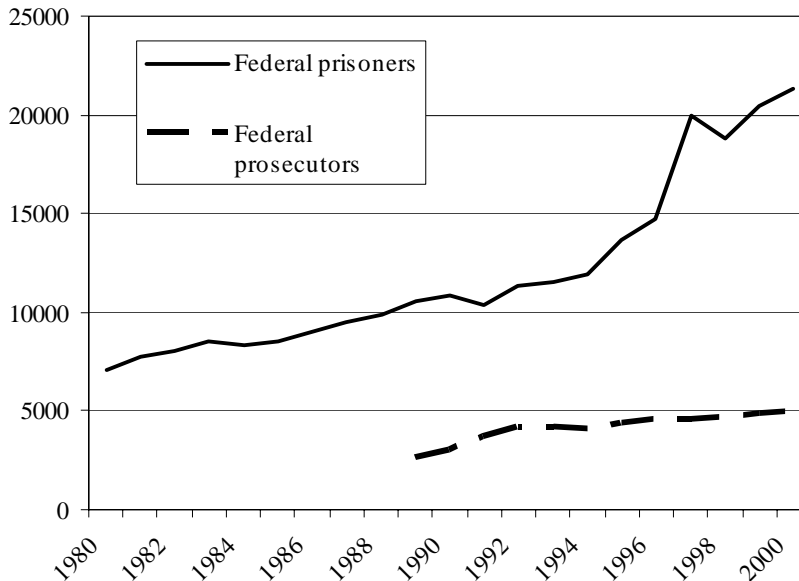
<sup>49</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18 U.S.C.).

<sup>50</sup> John Scalia, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000* (Bureau of Justice Statistics Special Report) 6 (Jan. 2002).

<sup>51</sup> These data are drawn from Ann L. Pastore and Kathleen Maguire, eds., *Sourcebook of Criminal Justice Statistics 2001* (Bureau of Justice Statistics) 61 (Table 1.57) (2002); U.S. Department of Justice, *Executive Office for United States Attorneys, United States Attorneys' Annual Statistical Report: Fiscal Year 1998*, at 2-3, and *Fiscal Year 2000*, at 2-3.



**Figure 2. Habeas filings by federal prisoners and number of federal prosecutors, by year.**



A number of federal prosecutors and public defenders I have interviewed suggested that a 1995 directive from the Department of Justice<sup>52</sup> may have triggered a jump in the use of both appellate and habeas waivers. Of course, this explanation only begs the question why the directive was issued. Given the timing of the directive and the fact that data on habeas filings are readily available to the Department of Justice, it appears likely that the directive was a response to the growth in habeas litigation by federal prisoners. Even if this growth did not cause the directive, the directive provides a plausible – if not intellectually appealing – explanation for the growth in use of habeas waivers since the mid-1990s.

#### D. Habeas waivers have little value

Whatever the explanations for the variation in use of waivers, it is also quite natural to wonder why habeas waivers would ever be included in plea bargains at either the state or federal level. The potential for habeas relief is of little benefit to prisoners who plead guilty. The only significant procedural risks these defendants face and can waive with a habeas waiver are sentencing errors.<sup>53</sup> But such errors

<sup>52</sup> U.S. Department of Justice Memorandum to All U.S. Attorneys from John C. Keeney, Acting Assistant Attorney General at 3 (Oct. 4, 1995).

<sup>53</sup> Courts do not permit prisoners to waive their ineffective assistance of counsel claims. See Sec-



are generally resolved on appeal, not on habeas. The trivial value of habeas rights to defendants who plead guilty suggests that the direct value of that right in trade, i.e., in terms of a shorter sentence, is also small.

Nor do those rights have “nuisance” value. From the prosecutor’s perspective, the expected cost of habeas litigation by defendants who plead guilty is also very low. Appendix B suggests that most prisoners do not file a habeas petition because they are released from prison before their habeas petitions are adjudicated. Therefore, habeas relief rarely offers an actual reduction in sentence. This is especially true for prisoners who plead guilty because their plea typically affords them a shorter sentence than average for their crime. Not surprisingly, a small percentage of federal habeas petitions are filed by prisoners who were convicted following a guilty plea. Appendix B also demonstrates that the probability of success conditional on having pleaded guilty is very close to – if not exactly – zero. This is consistent with the above claim that defendants who plead guilty retain few procedural rights that can be vindicated on habeas review,

These facts suggest that habeas waivers are low value transactions. It may be true that they are relatively cheap to insert in plea agreements. Although courts require that habeas waivers are voluntary and knowing, defendants already have access to counsel for the guilty plea. Because the value of habeas waivers are low, prosecutors need only offer a negligible sentence reduction, if any, to induce a waiver. The fact that waivers are of low cost, however, does not warrant legal reforms to encourage waivers. Let the system run its course. If waivers proliferate, so be it. They offer no serious, undervalued benefit that needs encouragement from legislatures or courts.

## II. HABEAS SETTLEMENTS

This brings us to habeas settlements, the central topic of the paper. Once a prisoner files a post-conviction review (PCR) or habeas petition (terms I use interchangeably), she or the government’s attorney may settle her claims outside of court in the same way a plaintiff and defendant might settle any civil suit. The resulting habeas agreement would involve an exchange of the prisoner’s habeas claims for a reduction in sentence. This section provides examples of such settlements and discusses whether they are subsequently enforceable in court. More importantly, it attempts to explain why so few habeas petitions are resolved in this manner. This is surprising because all prisoners were once defendants in criminal cases and



most criminal cases are settled via plea agreements. It is also surprising because habeas settlements have a great deal of value to all parties involved – though that discussion is deferred until Section III and the conclusion.

#### A. Examples

Although it may be obvious, note that, whereas federal prisoners may only file federal habeas petitions, state prisoners may file both state and federal habeas petitions. This fact suggests the sorting of habeas settlements into three categories: (1) those involving state prisoners, a state government defendant, and a state PCR petition; (2) those involving state prisoners and state government but a federal habeas petition; and (3) those involving federal prisoners, the federal government, and a federal habeas petition. I have been able to find examples in the wild, so to speak, of settlements from the first and last category, but none involving state actors and a federal petition.

For a typical example of a settlement involving a state PCR petition, consider the case of Clinton Flud.<sup>54</sup> Flud was convicted in an Arkansas trial court of rape and sexual solicitation of a child and was sentenced to 10 years for the first charge and six on the second, to be served concurrently. After his direct appeal failed, Flud brought a state PCR motion. His claim had sufficient merit that he was appointed counsel, who subsequently negotiated a deal with the state prosecutor whereby a first-degree sexual abuse conviction would be substituted for the rape charge. The benefit to Flud was not only that the sexual abuse charge carried a sentence that was one year shorter, but also that he avoided an Arkansas rule that a prisoner must serve 70 percent of his sentence if convicted of rape before he may be paroled.<sup>55</sup>

For examples of habeas settlements involving federal prisoners, consider the habeas compromises that came on the heels of *Bailey v. United States*.<sup>56</sup> If an individual possesses a firearm during commission of a violent or drug crime, her sentence can be enhanced two levels under U.S.S.G. § 2D1.1. Before *Bailey*, he could also be convicted for “use” of a firearm under 18 U.S.C. §924(c). Because a § 2D1.1 enhancement was not available if an individual was also convicted under § 924(c) and because a § 924(c) conviction carried a longer sentence – five years to be served consecutively – than § 2D1.1, federal prosecutors almost always sought a § 924(c) convic-

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<sup>54</sup> Flud v. State, No. CR-99-240 (Ark. 11th 2002).

<sup>55</sup> Telephone interview with Craig Lambert, Assistant Federal Public Defender, District of Arkansas (Dec. 5, 2003).

<sup>56</sup> 516 U.S. 137.



tion rather than a § 2D1.1 enhancement. In *Bailey*, the Supreme Court ended this practice when it held that a conviction under § 924(c) requires active employment of a firearm. Mere possession is insufficient.<sup>57</sup> There were two groups of § 924(c) convicts who were benefited. The first had clearly not actively employed a firearm and therefore would certainly prevail on a § 2255 motion. The only risk they faced concerned their remedy: would they simply have five years knocked off their sentences or could the district court re-sentence them using the § 2D1.1 enhancement, in which case their sentences would be reduced by less than five years? For convicts in the second group, the facts of their cases suggested that they did not actively employ a firearm, but that conclusion was less than certain. These convicts therefore faced a second risk: they might not even win their §2255 claims. Unfortunately for convicts in the first group, the federal sentencing guidelines eliminated any scope for a negotiated settlement with prosecutors. Once prosecutors seek a § 2D1.1 enhancement, courts must increase the defendant's offense level by two levels. They do not have discretion to raise the offense level by only one level. Therefore, the law gave prosecutors a choice only between seeking no enhancement or a two-level enhancement, which is identical to a choice between total capitulation and total success. There was no room to bargain. In contrast, the law did permit convicts in the second group to settle their habeas claims with prosecutors. Because there was a risk that these convicts would lose their § 2255 claims and receive no sentence reductions, they were willing to plead to a § 2D1.1 enhancement if the prosecutors would concede the convicts' habeas claims. Many prosecutors took this deal because it gave them a certain two-level sentence enhancement and avoided the risk of losing both a § 2255 claim and a request to re-sentence the defendant with the § 2D1.1 enhancement.

Most habeas settlements, whether at the state or federal level, appear to be oral agreements. They are neither on the record or reduced to a written contract. I have found only two exceptions. The first is Clinton Flud's case, which was presented orally, but on the record, at a hearing before the Arkansas trial court to which Flud's PCR motion was assigned. To protect himself, Flud requested a copy of the transcript from that hearing. The second exception is post-*Bailey* habeas settlements from the Northern District of California. An example is the case of prisoner David Eliot Everett, who filed a Motion to Vacate and Sentence citing *Bailey*. Before the district court ruled on the motion the parties settled and requested that the court treat the prisoner's motion as one for relief under § 2255, grant such relief and

<sup>57</sup> Id. at 142-143.





vacate the § 924(c) conviction, and accept a plea agreement whereby the prisoner accepts a § 2D1.1 enhancement. Both the court transcript from Flud's case and the agreement from Everett's case can be found in Appendix A.

Habeas settlements are implemented in one of two ways. More typical are cases like Flud's and Everret's. In each a prosecutor conceded the prisoner's PCR claim on the condition that he sign a plea agreement with a sentence that was lower than his present sentence but not as low as he would have received had he won his PCR claim. An alternative approach is to request the court with jurisdiction over the prisoner's sentence to amend his sentence to reflect, e.g., the fact that he provided assistance to prosecutors. An example of this approach is the case of Susan Smith.<sup>58</sup> Charged with killing her husband, Smith was convicted by an Arkansas jury of second-degree murder and sentenced to 20 years in prison. After losing her direct appeal she filed a state habeas petition claiming that her counsel was ineffective because he failed to both raise a colorable battered-woman syndrome defense and object that the prosecutor violated *Griffin v. California* by commenting on Smith's invocation of her right to remain silent during closing arguments. Her claim was sufficiently credible that, before any court had an opportunity to evaluate her claims, Smith's PCR counsel and the prosecutor negotiated an oral settlement whereby Smith would drop her PCR motion in return for the prosecutor filing a motion requesting that the court amend Smith's conviction to manslaughter and sentence to 8 years.<sup>59</sup>

The circumstances in which habeas settlements may be found are quite varied. They involve sentences less than life, life sentences (as will be illustrated by examples below), and capital sentences.<sup>60</sup> They also occur at different times during the criminal process, though by definition always after sentencing.<sup>61</sup> The earliest example I have found involved a federal prisoner in the District of Columbia.<sup>62</sup> The prisoner had plead guilty but at sentencing the defense counsel failed to alert the court to a fact that would have affected its sentencing guideline calculation and lowered the prisoner's sentence. Unfortunately, because the issue was factbound, appellate counsel could not raise it on appeal. The prisoner could, however, raise it in a § 2255

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<sup>58</sup> The prisoner's true name has been altered at the request of her PCR counsel, who is concerned about the legal validity of her habeas settlement.

<sup>59</sup> Interview with Craig Lambert, *supra* note 55.

<sup>60</sup> See *Johnston*, 739 N.E.2d at 123 n. 2 for examples of habeas agreements in capital cases.

<sup>61</sup> See *id.* at 123 nn. 1 and 2, for examples of agreements reached just before the trial court and the appellate court, respectively, ruled on a state PCR motion.

<sup>62</sup> The public defender for this prisoner requested that neither the prisoner nor the defender's name be revealed.



motion as part of an ineffective assistance of trial counsel claim. Nevertheless, before filing the prisoner's direct appeal, appellate counsel proposed and the federal prosecutor accepted an oral deal in which the prisoner would drop other admittedly weak claims on appeal and the prosecutor would not contest the prisoner's § 2255 claim of ineffective assistance and permit the prisoner to be re-sentenced. All the recommendations from the original plea remained in place; the only change was the sentencing guideline calculation.

Like habeas waivers in plea agreements, habeas settlements are typically exchanges of habeas claims for sentence reductions. Occasionally, however, the terms differ. In at least two cases, I have found proposed habeas agreements involving exchanges of not just habeas claims for sentence reductions, but also a defense in subsequent civil suits by the prisoner. Both cases are from the same state in the Third Circuit.<sup>63</sup> In each the prisoner had been convicted in the 1970s of first-degree murder and sentenced to life. After unsuccessful state PCR claims, the prisoner filed federal habeas claims.<sup>64</sup> In the first case, the prisoner asserted that there was insufficient evidence that he was the shooter and that his counsel was ineffective for failing to object, e.g., to the prosecutors comments to the jury regarding the prisoner's invocation of his right to silence. In the second, the prisoner asserted that government witnesses intentionally altered documents and testified falsely as to his guilt. In both cases the prisoner won in the district court and the state offered a settlement. The state's motivation was not simply to avoid losing the habeas claims, but to avoid liability for monetary damages were the prisoner to file a subsequent civil suit asserting, e.g., malicious prosecution. The settlement offer in each case was that the state would concede the habeas claims if the prisoner would plead to second-degree murder with a maximum 20-year sentence. The state's hope was that the plea agreement would prevent the defendant from asserting he was innocent and thus make it difficult to assert that the state was malicious.<sup>65</sup> In both cases the prisoner's counsel recommended that he take the deal but the prisoner did not. In the first case, the prisoner lost on appeal to the Third Circuit and continues to serve his life sentence. In the second the prisoner prevailed and is now suing the state in a civil action.

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<sup>63</sup> The names of the prisoners and the state are withheld at the request of an attorney who was involved in both cases and informed me of the agreement in both cases.

<sup>64</sup> Technically in the second case the prisoner filed an unexhausted federal habeas claim, which he dropped to pursue his claim in a state PCR motion. Exhaustion was not required, but the prisoner's counsel said that there were some advantages to pursuing an actual innocence claim in state court.

<sup>65</sup> Although a guilty plea does not bar a subsequent civil action for damages under § 1983, see *Harling v. Prosis*, 462 U.S. 306, 323 (1983), where the Supreme Court has enforced an agreement in which the prisoner dropped a valid §1983 suit in return for dismissal of certain charges. See *Newton v. Rumery*, 480 U.S. 386, 392-98 (1987).



## B. Legal status

Only one court has directly ruled on the validity of habeas settlements involving state habeas claims. In Indiana, a prisoner sentenced in 1964 to two consecutive life terms for the murder of two children agreed to drop his PCR motion in 1985; in return the state agreed to modify his sentence to two consecutive 40-year terms, with credit for time served. The victims' parents did not learn of this agreement until much later and in 1997 filed a motion with the trial court that heard the PCR motion and approved the habeas agreement to intervene and to vacate that agreement. The trial court rejected the motion to intervene. The court of appeals upheld this decision but found that the trial court lacked the power to amend the sentence because the state murder statute in 1964 did not authorize 40-year sentences for murder. In *Johnston v. Dobeski*,<sup>66</sup> the Supreme Court of Indiana reversed this last ruling. It initially took judicial notice of the fact that Indiana prosecutors and prisoners do reach habeas settlements<sup>67</sup> and explicitly affirmed this practice and the power of PCR courts to accept habeas settlements.<sup>68</sup> It then found that the trial court did have the legal authority to impose the revised sentence because, e.g., the prisoner could already have been paroled under the sentencing rules in effect in 1964.<sup>69</sup>

There is a temptation to suggest this case implies that habeas settlements involving state PCR claims surely stand on solid ground because the judgment above was issued in a jurisdiction that refuses to enforce either appellate or habeas waivers in plea agreements. It is important to recognize, however, that such an inference rests on only one case. If the tension between habeas waivers and habeas settlements were brought to the attention of the Indiana Supreme Court, it is plausible that the Court would reverse not its opposition to habeas waivers but its support of habeas settlements. Moreover, the tension can perhaps be reconciled by the fact that, in a plea the defendant waives the right to challenge errors that have yet to occur, while in a post-sentencing agreement the prisoner waives the right to challenge

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<sup>66</sup> 739 N.E.2d 121 (Ind. 2000).

<sup>67</sup> The court noted habeas agreements struck before the trial court ruled on a PCR motion, 739 N.E.2d at 123 n. 1 (Ind. 2000) (citing *State ex. rel. Woodford v. Marion Superior Court*, 655 N.E.2d 63, 64-65 (Ind. 1995) (prosecutor petitioned the court to set aside convict's life sentence and impose a sentence of 50 years with 10 years suspended to probation)), as well as those struck just before appeal, 739 N.E.2d at 123, n.2 (citing *McCullum v. State*, No. 45S00-9403-PD-228, CCS entry 4/29/99, at p.6; and *Townsend v. State*, No. 45S00-9403-PD-227, CCS entry 4/29/99, at p. 7 (convicts on death row resentenced to two consecutive 60-year sentences)).

<sup>68</sup> 739 N.E.2d at 123. There was a dissent in this case, but it did not dispute the validity of habeas settlements so long as their terms were legal. See *id.* at 126 (Shepard, C.J., dissenting).

<sup>69</sup> *Id.* at 125-126.



an error that has already occurred. The collateral review right is much harder to value in the former case than in the latter.<sup>70</sup>

I have found no federal cases where a court has taken judicial notice of habeas settlement, let alone a case where a federal court has explicitly stated that such agreements are enforceable. In *Williams v. Duckworth*, however, a Seventh Circuit panel including Judge Frank Easterbrook, the current Chief Judge of the Seventh Circuit, acknowledged the existence of a habeas settlement where the prisoner exchanged his state PCR claims for a modification of his Indiana conviction from a class A felony to a class B felony.<sup>71</sup> The prisoner later filed a federal habeas petition asserting that there was insufficient evidence to convict him of the class A felony in the first place. The district court dismissed this petition as moot and the Seventh Circuit affirmed in light of the prior habeas agreement.<sup>72</sup> Moreover, in *United States v. Everett*,<sup>73</sup> the district court issued an order granting a federal prisoner habeas relief under § 2255 and re-sentencing him to shorter term of years based on “the parties’ stipulation.” This stipulation was an agreement whereby the prisoner agreed to drop his motion to vacate his sentence and to consent to a sentence enhancement for possession of a firearm during a drug transaction pursuant to U.S. Sentencing Guideline §2D1.1(b)(1). In return, the AUSA agreed to concede to a § 2255 motion based on *Bailey v. United States*,<sup>74</sup> which held that a prisoner could not be sentenced to a consecutive five-year term under 18 U.S.C. § 924(c) for mere possession of a firearm during a drug transaction.<sup>75</sup> I describe the logic behind this deal in further detail below.

### C. Prevalence

Although it is not possible to provide a systematic survey of the prevalence of habeas settlements, I have found – through interviews with state and federal public defenders and state prosecutors – numerous examples of agreements involving state prisoners and state habeas claims or federal prisoners and federal habeas claims. As noted earlier, I have found no settlements involving state prisoners and federal habeas claims.<sup>76</sup> Overall, my survey of state and federal

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<sup>70</sup> Moreover, habeas waivers technically require the prisoner to surrender his PCR rights, while habeas settlements may be implemented in such a manner that the government concedes a PCR claim in return for a guilty plea to a lesser offense. This was not the case in *Johnston* 739 N.E. 2d 121.

<sup>71</sup> 738 F.2d 828 (7th Cir. 1984).

<sup>72</sup> *Id.* at 833.

<sup>73</sup> 129 F.3d 1222 (11th Cir. 1997).

<sup>74</sup> 516 U.S. 137 (1995).

<sup>75</sup> 129 F.3d at 1225.

<sup>76</sup> Later in the text there will be an example of settlement offer that was rejected by the prisoner. Moreover, Michael Tanaka, Assistant Federal Public Defender, Central District of California (Dec. 5,



practice with regard to habeas settlements suggests that they can be found in one-third of states and three-fifths of federal districts.<sup>77</sup> The states include Arkansas, Colorado, Pennsylvania and Washington; the federal districts include many western states – Alaska, Colorado, Nevada, New Mexico, Utah, Washington, and Wyoming, as well as Minnesota, the Middle District of Pennsylvania, the District of Columbia, the Northern District of Florida and the Eastern District of Texas.

My only impression regarding the difference between habeas settlements involving state prisoners and those involving federal prisoners is that the former agreements are more evenly distributed across time. Habeas settlements involving federal prisoners tend to be bunched in the periods immediately following U.S. Supreme Court cases announcing significant reinterpretations of substantive criminal laws or new criminal procedural rights. Examples of such decisions include *McNally v. United States*,<sup>78</sup> *Bailey v. United States*,<sup>79</sup> *Apprendi v. New Jersey*,<sup>80</sup> and *Ring v. Arizona*.<sup>81</sup> If such a ruling is retroactive under *Teague v. Lane*,<sup>82</sup> it triggers a surge in federal habeas filings that continues until the stock of convicts affected by the ruling have either filed a habeas claim or been released because their sentences have been served. Even if such a ruling is not retroactive, it can trigger a surge of filings until a federal court in the relevant jurisdiction declares the ruling not to be retroactive. Such a surge

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2003), provided an example in which a federal magistrate judge requested that the parties settle a habeas claim. That case involved a mentally disabled prisoner was given a life sentence for a \$25 theft under California's three-strikes law. Tanaka filed a federal habeas petition with a claim he said was reasonable on the merits and strong on the equities. At a hearing in open court, the magistrate judge requested the parties to go off-the-record. He said he was strongly inclined to grant the writ but was not sure he could provide grounds that would be sustained on appeal. He pleaded with the state to compromise. The state district attorney, although personally inclined to do so, refused on the grounds that it was the policy of state attorney general not to compromise on habeas claims.

<sup>77</sup> More precisely, they were found in four of 13 states surveyed and 16 of 27 federal districts surveyed.

<sup>78</sup> 483 U.S. 350 (1987) (holding that federal mail fraud statute is limited to schemes targeting property right). The decision was effectively overruled in 2000 by 18 U.S.C. § 1346.

<sup>79</sup> 516 U.S. 137 (1995).

<sup>80</sup> 530 U.S. 466 (2000).

<sup>81</sup> 536 U.S. 584 (2002).

<sup>82</sup> 489 U.S. 288 (1989). *Teague* held that, with two exceptions, "new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced." *Id.* at 310. New rules are those which "break[] new ground or impose[] a new obligation on the States ... [or were] not dictated by precedent." *Id.* at 301. The first exception is for rules that place certain primary private conduct beyond the power of the state to proscribe or that address a substantive guarantee accorded by the U.S. Constitution. *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989). The second exception is for "watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding" because they not only "improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990) (internal quotes omitted).



overwhelms the resources available to U.S. Attorneys' offices, encouraging them to settle cases they would otherwise litigate.<sup>83</sup>

Even in jurisdictions where they may be found, however, habeas settlements are rare. Even though habeas settlements are widely distributed from a geographic perspective, they are a tiny fraction of all habeas cases. Not only are the number of government or defense attorneys who have settled habeas claims a small fraction of all such attorneys, but those attorneys who have ever settled habeas claims have only settled a fraction of the habeas cases they have handled. This is surprising because so many of these attorneys also handle criminal cases, which they settle with great frequency. They readily admit to engaging in plea bargaining – perhaps even having signed habeas waivers – but rarely to have settled a habeas petition.

This remainder of this section attempts to explain the aforementioned patterns in the prevalence of habeas settlements. Specifically, it examines, first, why they are not more common at either the state or federal level and, second, why agreements concerning federal habeas claims are bunched after certain significant Supreme Court cases.<sup>84</sup>

#### 1. Why do so few habeas cases settle?

The first step in explaining the dearth of habeas settlements is to determine which cases are poor candidates for settlement, either because there is little room for negotiation or the costs of negotiation are greater than the benefits. The second step is to consider cases where it makes sense for parties to settle but still they do not.

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<sup>83</sup> Telephone interview with David Porter, Assistant Federal Public Defender, Eastern District of California (Dec. 5, 2003); interview with Daniel Scott, *supra* note 8.

<sup>84</sup> It should be noted throughout that the frequency of habeas settlements will very likely be less than that of habeas waivers. Although the elements of the bargain are fundamentally the same in both agreements, one important difference is that there are far fewer candidates for habeas settlements than habeas waivers because few defendants who are convicted ultimately file for habeas relief. At the very least, only those who have been incarcerated long enough to complete their direct appeal and exhaust any remaining state remedies are able to file.



**Table 2. Four basic groups of habeas cases, their suitability for habeas settlement, and shares of cases in each group.**

Group		Share of non-capital habeas cases involving (capital numbers are in parentheses):			Suitable for for habeas settlement?
No.	Description	State prisoner in state court	State prisoner in federal court	Federal prisoner in federal court	
1	Petitioner pleaded guilty or is about to be released, or petition is procedurally defaulted <sup>85</sup>	<i>Pleaded guilty:</i> 13% (1%) <i>Proc. default:</i> 7% (assume same) <i>Total:</i> 13-20% (7-8%)	<i>Pleaded guilty:</i> 18% (0%) <i>Proc. default:</i> 6% (assume same) <i>Total:</i> 18-24% (6%)	<i>Pleaded guilty:</i> unknown <i>Proc. default:</i> unknown <i>Total:</i> unknown	No
2	Not in group 1 or 4 and petitioner proceeds pro se	At most 58-63% <sup>86</sup> (4-5% <sup>87</sup> )	At most 68-76% <sup>88</sup> (16-25% <sup>89</sup> )	Unknown	No
3	Not in group 1 or 4 and petitioner has representation	At most 16-18% <sup>90</sup> (78-86% <sup>91</sup> )	At most 5% <sup>92</sup> (38-59% <sup>93</sup> )	Unknown	Perhaps
4	Petitioner secured vote of at least one judge <sup>94</sup>	At least 6% <sup>95</sup> (3-10% <sup>96</sup> )	At least 1% <sup>97</sup> (10%-40% <sup>98</sup> )	TBD <sup>99</sup> (21% <sup>100</sup> )	Yes

<sup>85</sup> Data on non-capital state prisoners is from Victor E. Flango, *Habeas Corpus in State and Federal Courts* (National Center for State Courts) 66-67 (table 19 gives petitions denied because of procedural default), 86 (table 22 gives share that pleaded guilty) (1994). Data on capital state prisoners who pleaded guilty is from id. at 86 (table 22). Data on capital petitioners denied relief due to procedural default are unavailable. Therefore, I will assume that the procedural default rate for capital cases is the same as for non-capital cases so that I can provide estimates of the size of each group.

<sup>86</sup>  $.58 = [.78 \times (1-.06-.2)]$ ,  $.63 = [.78 \times (1-.06-.13)]$ . The  $.78 (= 1-.22)$  comes from id. at 64-65 and is the share of denied state petitioners that does not have representation on state habeas. It should be noted that procedurally defaulted claims are less likely to have representation than other denied cases.

<sup>87</sup>  $.04 = .05 \times (1-.1-.08)$ ,  $.05 = .05 \times (1-.03-.07)$ . The  $.05 (= 1-.95)$  comes from id. at 64-65 and is the share of all capital petitioners – not just those denied relief – without representation on state habeas.

<sup>88</sup>  $.68 = [.94 \times (1-.01-.18)]$ ,  $.76 = [.94 \times (1-.1-.18)]$ . The  $.94 (= 1-.06)$  figure comes from id. at 64-65 and is the share of denied state petitioners that does not have representation on federal habeas.

<sup>89</sup>  $.16 = .3 \times (1-.4-.06)$ ,  $.25 = .3 \times (1-.1-.06)$ . The  $.3 (= 1-.7)$  figure comes from id. at 64-65 and is the share of all capital petitioners – not just those denied relief – without representation on federal habeas.

<sup>90</sup>  $.16 = [.22 \times (1-.06-.2)]$ ,  $.18 = [.22 \times (1-.06-.13)]$ . See note 86 for derivation of the .22 figure.

<sup>91</sup>  $.78 = .95 \times (1-.1-.08)$ ,  $.86 = .95 \times (1-.03-.07)$ . See note 87 for derivation of the .95 figure.

<sup>92</sup>  $.05 = [.06 \times (1-.01-.18)] = [.06 \times (1-.1-.18)]$ . See note 88 for derivation of the .06 figure.

<sup>93</sup>  $.38 = .7 \times (1-.4-.06)$ ,  $.59 = .7 \times (1-.1-.06)$ . See note 89 for derivation of the .7 figure.

<sup>94</sup> Shares in this row are based on the fraction of petitions ultimately granted. It excludes petitions that succeeded below but were denied on appeal. Therefore, the numbers are an underestimate of the size of this group.

<sup>95</sup> This figure is from id. at 86 (table 22)

<sup>96</sup> The 3% figure is from id. at 86 (table 22). The 10% figure is from James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 6 (June 12, 2000), at <http://justice.policy.net/cjedfund/jpreport/> (last visited August 4, 2004).

<sup>97</sup> This figure is from Flango, *supra* note 85 at 86 (table 22).

<sup>98</sup> The 10% figure is from id. at 86, table 22. The 40% figure is from Liebman, *supra* note 96 at 4. Liebman finds that in 82% of capital cases reversed on direct appeal, state habeas or federal habeas, the defendant was not re-sentenced to death. Id. at 5.

One group of habeas cases that are clearly not candidates for settlement is those in which the prisoner pleaded guilty or is scheduled to be released very shortly after the petition is filed, and those that have an obvious procedural flaw, such as being time-barred. This set of cases (which are labeled “group one” in Table 2) includes at least 29-43 percent of all petitions filed by non-capital state prisoners.<sup>101</sup> Each of these petitions has the common feature that one can predict with great accuracy at the time of filing that the petition will not attract the vote of a single state or federal judge or magistrate. This group includes only cases that are poor candidates for habeas settlements because the petitioners’ habeas rights are of *de minimis* value. The only incentive prosecutors have to settle these cases is the cost of litigating the cases. This cost is likely to be low because most of these cases will be rejected by the trial court before the government is even asked to file a reply. More importantly, the marginal transaction cost of negotiating a settlement is likely to be quite high. For a settlement to stand up to subsequent scrutiny in court, like a plea agreement it probably has to be voluntary and knowing. This in turn requires that the petitioner have counsel. Because petitioner has no constitutional right to counsel on collateral review, this means the government would have to pay for the prisoner’s counsel if it decides to settle but probably not if it does not settle.

There are two groups of cases that are good candidates for settlement. One includes those habeas petitions which garner the vote of at least one judge in the state or federal habeas review process. This set (which is labeled “group four” in Table 2) includes at least the seven percent of non-capital state prisoner petitions ultimately granted at the state or federal level.<sup>102</sup> It also includes 13-46 percent of capital state prisoner petitions.<sup>103</sup> Like group-one cases, the mem-

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<sup>99</sup> This figure is the share of § 2255 petitions granted during 1996-2001 according to the Administrative Office of U.S. Courts, ICPSR data sets 8429 and 3415.

<sup>100</sup> This figure suffers from two errors. First, it overestimates the grant rate on federal habeas because it includes convictions and sentences overturned on direct appeal. The Bureau of Justice Statistics reports that 6 of 28 defendants sentenced to death in the federal system during 1973-2001 had their sentences or conviction overturned. It does not indicate whether this was on direct appeal or federal habeas review. U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment 2001, at 15 (appendix table 3) (Dec. 2002, NCJ 197020). Second, the figure underestimates the grant rate because the 28 cases include ones where the federal habeas process has not run its course. It is possible more petitions by defendants sentenced to death during 1973-2001 – especially recent years -- will be granted.

<sup>101</sup> The overall rate of procedural default is the probability of default in state court plus the probability that a case reaches the federal court and is defaulted. Therefore, assuming the probability of default at the federal level is independent of that probability on the state level, the numbers in the text are calculated from the figures in Table 2 as follows:  $.29 = .13 + ([1-.1] \times .18)$ ,  $.43 = .20 + ([1-.03] \times .24)$ .

<sup>102</sup>  $.07 = .06 + [.94 \times .01]$ .

<sup>103</sup>  $.13 = .03 + [.97 \times .1]$  and  $.46 = .1 + [.9 \times .4]$ .





bers of group four are easily identified prior to final adjudication, though perhaps not at the moment a petition is filed. The reason they should settle is that they have significant expected value to petitioners, they are likely to cost the government significant resources to litigate, and, importantly, the transaction cost of settlement is lower in these cases because they are likely to require appointment of counsel whether or not the government settles.

The second group that should settle meet three criteria: they are not obviously without merit (like group-one cases) and have not already come close to being granted (like group-four case), but the petitioner has been appointed habeas counsel by a court.<sup>104</sup> State courts generally appoint counsel for a prisoner if her habeas claims are colorable.<sup>105</sup> Federal courts do so as long as her petition is not “patently frivolous or false.”<sup>106</sup> The reason why cases with habeas counsel (which are labeled “group-three” cases in Table 2) should be resolved out of court is that the marginal cost of settlement is very low. Although it may not be easy to identify the probability that these petitions will be granted and thus the appropriate price for these cases, these cases at least warrant a settlement offer that reflects the expected cost to the government of litigating the cases. The fact that governments are willing to pay for habeas waivers in plea agreements even though habeas petitions by those who plead guilty have virtually zero probability of success buttresses this conclusion. Data on state prisoners suggests that group three includes 20-22 percent of all non-capital and over 83-92 percent of all capital state prisoner petitions.<sup>107</sup>

So why do parties to cases in groups three and four fail to settle? One public defender suggested that the cost of habeas litigation to the government is actually quite small even in these cases because most

<sup>104</sup> The remaining cases – those which are not obvious losers, or close or actual winners, and which are not prosecuted with the assistance of habeas counsel – are probably not good candidates for settlement. The probability of success is probably neither high nor evident. More importantly, the marginal cost of negotiation is high because the government would have to pay for the prisoner to hire counsel for settlement talks.

<sup>105</sup> See, e.g., in Illinois, 725 I.L.C.S. 5/122-4; *People v. McNeal*, 742 N.E.2d 269, 273 (Ill. 2000). Note that they are not required to do so by U.S. Constitution. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987).

Other states require a higher standard, requiring that the claims be more substantial, though the court retains the discretion to appoint an attorney so long as the claims are not frivolous. All states, however, appoint the prisoner counsel if a hearing is to be held on any of his claims. See, e.g., in Montana, Mont. Code Ann. §46-21-201(2); in South Carolina, S.C. R. Civ. P. 71.1(d); Vance Cowden, *Indigent Defense Services for Post-Conviction relief in South Carolina: Current Problems and Potential Remedies*, 42 S.C. L. Rev. 417, 428-34 (1991).

<sup>106</sup> Habeas Rule 4. *Blackledge v. Allison*, 431 U.S. 63, 76 (1977).

<sup>107</sup> This is calculated assuming the probability of appointment of counsel on state habeas is independent of the same probability on federal habeas. For non-capital cases:  $.20 = .16 + [(1 - .16 - .06) \times (1 - .01 - .24) \times .06]$  and  $.22 = .18 + [(1 - .18 - .06) \times (1 - .01 - .18) \times .06]$ . For capital cases:  $.83 = .78 + [(1 - .78 - .1) \times (1 - .4 - .06) \times .7]$  and  $.92 = .86 + [(1 - .86 - .03) \times (1 - .1 - .06) \times .7]$ .

government submissions to the court are “form filings,” requiring only that government attorneys fill in the prisoner’s name, her crime, and a few case-specific facts related to her claims.<sup>108</sup> The contention is hard to reconcile, however, with the fact that so many federal plea agreements contain habeas waivers despite the low probability that defendants who plead will file for habeas relief and the even lower probability that those who do file claims that are not identifiably without merit.<sup>109</sup> Finally, even if it is true that the cost of litigation is low in most cases, the cost is most certainly not low in cases where a prisoner’s petition is granted at some level of the court system or is denied but subject to a dissent, let alone cases where the petition is ultimately granted.

Perhaps parties fail to settle because they cannot agree on the probability that the petition will ultimately be granted and thus on a price for the petitioner’s habeas rights. This is particularly likely where a court uses the vehicle of a collateral review petition to announce a new criminal right. It is unlikely, though, that such disagreements are sufficiently widespread to explain the dearth of settlements, particularly because the parties on both sides – the public defender for the prisoner and the government’s attorney – are repeat players. Moreover, there are few collateral review cases that announce a new right. Indeed, *Teague v. Lane*<sup>110</sup> bars such a result in federal cases. Finally, how is it that the defendants and the government nearly always agree on price in exchanges of trial rights for sentence in plea agreements but cannot agree on price in exchanges of habeas rights for sentence in habeas settlements? Over 90 percent of defendants plead guilty, most pursuant to a plea agreement, yet nowhere near this percent of ultimately successful habeas claims are the products of settlement.

A third explanation is that the majority of prisoners who file habeas petitions, i.e., the majority of prisoners eligible for habeas settlements, were not convicted following a guilty plea. Perhaps their failure to plead demonstrates that they are less cooperative or that they assess probabilities of winning a case differently than government attorneys. There are three problems with this logic. First, although the individuals who plead guilty are often different than those who file habeas petitions, both groups are represented by the same defense counsel, typically state or federal public defenders, public interest organizations, or private criminal defense attorneys. It is unlikely that prisoners ignore their counsel’s advice on settlement

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<sup>108</sup> Interview with Ahilan Arulanantham, *supra* note 8.

<sup>109</sup> Interview with Gary Weinberger, *supra* note 48.

<sup>110</sup> 489 U.S. 288, 310 (1989).



with much frequency and it is unlikely that defense attorneys are able to compromise for plea agreements but not for habeas agreements. Second, at least one state district attorney's office reports that they frequently get calls from defendants seeking to bargain their habeas claims for sentence reductions.<sup>111</sup> Although none of the calls appears to have resulted in a habeas settlement, they do suggest that recalcitrant – or principled, depending on your point of view – prisoners are probably not to blame for the dearth of settlements. Finally, and perhaps most fundamentally, the fact that parties cannot agree on probable outcomes of a criminal case in order to reach a plea bargain does not mean that they cannot agree on probable outcomes of a collateral challenge in order to reach a habeas settlement.

A fourth explanation for the dearth of habeas settlements is that the federal sentencing guidelines make sentencing compromises difficult because they reduce the discretion of courts over sentencing and permit only a narrow and rigid range of sentences for a crime. Even if parties agree on a revised sentence in return for the prisoner dropping her habeas petition, it is difficult to implement that compromise unless the compromise falls in the guidelines range or the parties can find a crime for which the petitioner can be convicted and offers a sentence equal to the compromise reached by the parties. This is a non-trivial task as demonstrated by the example in Section II.A of §924(c) cases following *Bailey*. Although this explanation is the most promising so far, it does have two weaknesses. It does not work for most state defendants, who are unlikely to be subject to sentencing guidelines and who constitute all state habeas petitions and one-third of federal habeas petitions. Moreover, some federal public defenders suggest that government attorneys may be open to compromises where the prisoner pleads to a lesser included offense of the crime for which the prisoner is currently serving time. This combined with the prosecutor's adroit use of a recommendation of a downward departure for substantial assistance to the prosecution<sup>112</sup> should make feasible a larger number of compromises.

The final – though probably important – explanation for low prevalence of habeas settlements is that few state courts and no federal courts have the power to amend a sentence after sentencing. Therefore, to implement a habeas settlement, the government attorney must concede a prisoner's habeas claim in return for the prisoner agreeing to plead guilty to another crime. (Recall the Flud and Everret cases from Section II.A.) The difficulty with this strategy is that

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<sup>111</sup> Telephone interview with Wendy Lehmann, Head of Appellate Division, Monroe County District Attorney's Office, New York (Dec. 9, 2003).

<sup>112</sup> Fed. Rule Crim. Proc. 35.



conceding a habeas claims requires the government attorney – often the prosecutor on the initial charge – to either admit error by police or by himself. The former concession may jeopardize cooperation between police and prosecutors, which is too high a cost for a settlement. The latter concession may be blocked by pride, often a very power human emotion.<sup>113</sup> This concern has been expressed in interviews by more than one prosecutor and may underlie other government attorneys' claims that they do not negotiate habeas settlements because no prisoners have any valid habeas claims.<sup>114</sup>

## 2. Why is their bunching in settlements of § 2255 cases?

The second puzzle concerning habeas settlements is why they are more uniformly distributed over time at the state level than at the federal level. Recall that most federal agreements come on the heels of Supreme Court opinions that significantly reinterpret federal criminal laws or announce important new criminal procedural rights. One explanation is that although state prisoners are more successful in state court than in federal court, they are more successful in federal court than federal prisoners are. The reason may be that federal courts commit fewer errors in criminal cases than state courts, at least those with respect to errors that are not caught by courts of appeal. Under this view, the only significant errors that federal courts make are those that are the subject of the landmark Supreme Court opinions above. The flaw with this story, other than the fact that habeas grant rates are poor indicators of error rates at trial and sentencing,<sup>115</sup> is that there are still a number of federal prisoner petitions that succeed on claims unrelated to those landmark rulings. It is reasonable to ask why the vast majority of these are not settled.

Ultimately my investigation reveals that a significant number of cases that should be settled are not settled. The fact that habeas waivers can frequently be found in federal pleas and that habeas settlements are struck in a wide array if not a large quantity of habeas cases suggests that, in many cases where habeas settlement is possi-

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<sup>113</sup> Another possible explanation for the dearth of habeas settlements is that the compromise sentence that the parties litigating a habeas petition would negotiate to is often less than the time already served by the prisoner. Therefore, the only chance the government has to keep the prisoner incarcerated in these cases is to defeat the habeas petition in court. This explanation fails because the premise is untenable. From the government's perspective, the worst case scenario from litigation is that the prisoner is set free, i.e., serves zero additional days. If the government has a non-zero probability of prevailing against the prisoner's habeas petition, the lowest the government will settle for is a positive additional sentence. In other words, the compromise sentence would always be greater than the time served. Interview with Gary Weinberger, *supra* note 48.

<sup>114</sup> Interview with Lehmann, *supra* note 111.

<sup>115</sup> For example, it could be that federal direct appeals are better at catching errors than state direct appeals. See, e.g., Liebman, *supra* note 96.



ble but missing, defense attorneys and prosecutors simply failed to imagine that habeas claims could be settled for a sentence reduction or other such benefit to the prisoner. Interviews confirm this. Numerous defenders have suggested to me that parties often do not think to negotiate an out-of-court resolution of habeas claims. In fact, many defenders and prosecutors found the idea of settling habeas claims quite novel – and potentially useful.<sup>116</sup> This suggests that there is considerable scope for settling habeas claims that are currently fully litigated in the current system.

### III. POLICY RECOMMENDATIONS

In this section of the paper, I turn from arms-length analysis of patterns in the use of habeas settlements to a policy embrace of these settlements. This is a three step process. First, I argue that habeas settlements are no less constitutional, and thus enforceable, than pleas bargains, appellate waivers and habeas waivers. Second, I demonstrate that, in contrast to habeas waivers, habeas settlements can significantly benefit both prisoners and government attorneys. Finally, in order to maximize the value from habeas settlements, I urge legislatures to actively promote the resolution of habeas claims without full litigation and to remove certain legal impediments to the implementation of habeas settlements. In addition, I ask courts to screen settlements to ensure that they protect the interests of prisoners.

#### A. Prisoners have a right to settle their habeas claims and habeas settlements are constitutional

To eliminate any confusion about exactly what I am claiming, the reader should note that I take as given the proposition that plea bargains, if properly policed, are both constitutional and normatively desirable from a public policy perspective. This issue has been thoroughly debated in numerous venues and I have nothing unique to contribute to that discussion.<sup>117</sup> I also take as given the constitutionality of appellate waivers and habeas waivers. Although appellate waivers and habeas waivers – again properly policed – have not been as widely debated as plea bargains, the vast majority of courts that

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<sup>116</sup> Interview with Alexander Bunin, *supra* note 46; telephone interview with Madelein Cohen, Public Defender, D. Colo. and D. Wyo. (Dec. 3, 2003); telephone interview with Michael Tanaka, Public Defender, C.D. Cal. (Dec. 9, 2003).

<sup>117</sup> See, e.g., Frank Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969 (1992); William J. Stuntz, *Plea Bargaining and the Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548 (2004); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1 (1992); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761 (1989).



have considered their constitutionality have found them unobjectionable.<sup>118</sup> I am comfortable with these assumptions in part because I agree with them and in part because I do not think it likely that an additional argument against these waivers is likely to change courts' opinions of their validity.

From this caveat I proceed, first, to make what should be a non-controversial claim: that prisoners have the right to settle their habeas claims. Individuals certainly have the right to settle civil suits and habeas petitions are merely a species of civil actions. In particular, individuals have the right to settle suits concerning the conditions of their imprisonment, i.e., § 1983 and *Bivens* actions alleging violations of their civil rights in prison.<sup>119</sup> These actions are certainly closely related, in an aesthetic sense if not strictly legal one, to habeas claims. Individuals also have the right to settle criminal cases, which may not be governed by the same procedural rules as habeas actions, but are from a formal legal perspective very closely related. Habeas actions are challenges to the procedure followed in prosecuting a criminal case. It is true that habeas settlements may potentially waive a larger set of errors in the criminal process than plea bargains. The latter waive all but a small set of pre-trial rights. Habeas settlements, however, can theoretically waive any error, even if unwaivable in a plea bargain – such as ineffective assistance of counsel relating to a plea agreement – or error that post-dates a plea. Indeed, a habeas settlement can involve rights that cannot be the subject of either appellate waivers or habeas waivers. But there is an important feature of habeas settlements that makes them “safer” than plea bargains, appellate waivers, and habeas waivers. Namely, habeas settlements occur after an error in the criminal process has occurred whereas plea bargains and the other waivers may occur before such error is detected. The additional information available to prisoners makes settlements less likely to corrupt the fairness or accuracy of the trial process.

My second claim is that habeas settlements do not offend the constitution. In order to be more precise with this statement, one must identify the provisions that settlements might violate. The most likely candidate is the due process clause.<sup>120</sup> The legal theory might be that habeas settlements undermine the sanctity of the criminal process.<sup>121</sup> Habeas litigation is necessary to ensure that process was

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<sup>118</sup> See Section I.B.

<sup>119</sup> See, e.g., *Young v. Quinlan*, 950 F.2d 351 (3d Cir 1992).

<sup>120</sup> U.S. Const. Amend. V, IV § 1.

<sup>121</sup> A separate theory is that such settlements undermine the sanctity of the habeas litigation process. But that process is not its own master. Rather it serves to clean up after the criminal process. Even if one were concerned with the habeas litigation process, it unclear why habeas settlements undermine



and continues to be without prejudicial error. Settlement, by itself, does not hinder this result. Such a settlement may include a reduction in sentence that accounts for the likely result if the habeas litigation ran its course. Moreover, settlement does not diminish the deterrence effect of habeas litigation – if there were some – any more than settlement of medical malpractice suits undermine the deterrence effect of medical malpractice law. Perhaps the argument could be made that habeas settlements allow the state to “bribe” defendants for cutting corners in the criminal process. But that is exactly what plea bargains do as well. Habeas settlements are not qualitatively different from plea bargains on this dimension. Moreover, one must ask what the purpose of the criminal process is. Does it have value other than to protect the freedom of defendants? If not, then settlements serve the purpose of the criminal process – if not the process itself – because they expedite the release of a prisoner who suffered error at the hands of the criminal process.

A second constitutional provision that habeas settlements may violate is the equal protection clause. The theory would be akin to that which renders the trade of voting rights unconstitutional. Individuals who are poor might feel greater pressure to trade their voting rights – to feed themselves or pay for medical care – than those who are rich. Therefore, rich people may be in a better position to exercise their voting rights.<sup>122</sup> The flaw in the analogy between voting rights and habeas rights is that the Constitution demands – or has been interpreted to demand – that every individual have equal capacity to exercise their voting rights.<sup>123</sup> There is no such demand with respect to habeas rights. True, Article I, Section 9, Clause 2, indicates that Congress shall not “suspend” the “Privilege of the Writ of Habeas Corpus,” but that is a prohibition on complete denial, not regulation. Indeed, the Court has sanctioned – implicitly if not explicitly – rather severe regulations of that right in AEDPA.<sup>124</sup> This statute treats state prisoners differently than federal ones and capital prisoners different than non-capital prisoners.<sup>125</sup> Another distinction

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the habeas process any more than settlements of contract disputes undermine the process by which courts police contract violations.

<sup>122</sup> See *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966).

<sup>123</sup> See *U.S. v. Classic*, 313 U.S. 299, 314-315 (date); *Harper*, 383 U.S. at 667-668.

<sup>124</sup> Anti-Terrorism and Effective Death Penalty Act Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18 U.S.C.).

<sup>125</sup> Not inconsistent with this view is the claim that, while there is only one Equal Protection Clause, it is arguable that restrictions on voting rights are treated to more exacting scrutiny than restrictions on other rights. Justices Black and Harlan suggested as much in their respective dissents in *Harper*: in their view the Court was not applying the standard rational basis test but relying on the fact that electoral processes – and by extension voting rights – are “precious” and “fundamental.” *Harper*, 383 U.S. 683 (Harlan dissenting); *id.* at 673-677 (Black dissenting).



between trading voting rights and settling habeas claims is that voting rights are exchanged for money, while a habeas settlement involves the exchange of a habeas claim for a shorter sentence. Thus, a habeas settlement is closer to exercise of the habeas right than a sale of one's vote is to exercise of that vote. Moreover, whatever variation there is in the effect habeas settlements have on different prisoners, that variation is a function not of the underlying features of those prisoners, but the differential value of those prisoners' rights. It may be a violation of the equal protection clause to treat differently two individuals who are equal under the law, but prisoners who receive different settlements are not equal under the law. A prisoner with a better claim will receive a better deal than someone with a weaker claim. Finally, if habeas settlements violate the equal protection clause, surely plea bargains and appellate and habeas waivers do as well, which would violate the basic assumption of my analysis.

#### B. Habeas settlements promote public policy

The next step I take is to demonstrate that habeas settlement is desirable from a policy perspective. Assume, for the sake of argument, that legal obstacles to habeas settlements are removed and that parties to habeas litigation actively pursue settlement. The resulting habeas agreements would promote the welfare of prisoners by guaranteeing them a reduction in sentence proportional to that which the latter might expect from vindication of their collateral review rights. The best illustration of how valuable such a guarantee might be is the two cases from the Third Circuit, recounted in Section II.A, of prisoners serving life sentences for first-degree murder. After filing habeas petitions, both were offered similar settlements which would reduce their sentences to 20 years. Although counsel for each prisoner advised them to accept the deal, both refused. One of the prisoners won, was released and is now seeking civil damages. The other, however, lost and remains behind bars. It is true that some prisoners would prefer to take such a gamble, but surely there are others – perhaps a majority – would rather take 20 years for sure rather than risk a lifetime in jail.

Settlement would also save government attorneys the time and expense of habeas litigation. These cost-reductions are significant because the cases I identify as reasonable candidates for settlement are also the most expensive cases to litigate. All of these cases are ones where the prisoner has been appointed habeas counsel, who is typically paid by the government. The appointment of habeas counsel also raises costs because claims made by counsel are harder to defend, holding quality of the claims constant, and because appointment of counsel indicates that the claims in a petition are of higher



quality. In those cases where the petition wins the vote of at least one judge along the way to final adjudication, the costs can be particularly large because litigation can be drawn out. Each of these arguments about costs is particularly compelling in the case of prisoners serving capital sentences. Estimates suggest the cost of state and federal habeas review is between \$3.5 and \$4.5 million per death row inmate.<sup>126</sup>

The policy objections to habeas settlements fall in two classes: those targeted towards internalities and those targeted towards externalities of these deals. By internalities I mean concerns about whether a deal promotes the interest of the parties to the deal. This in turn can be broken down into two separate inquiries. Are the parties no worse off than if they had not struck a deal? If they are no worse off, how are the rents of the deal allocated among the defendant/prisoner and the government? I believe the concern that motivates the first inquiry can be addressed by policy reforms which require courts to police habeas settlements to ensure that the exchange is knowing and voluntary. This in turn demands, among other things, that the prisoner received the advice of habeas counsel.<sup>127</sup> While one might be concerned about the quality of this counsel, no one suggests that habeas counsel, when appointed, perform worse than trial counsel. To the extent that the criminal justice system promotes plea bargains, it should therefore be willing to promote habeas bargains.<sup>128</sup>

The concern underlying the second inquiry – the distribution of gains from trade – is difficult to brush aside. Habeas bargains are between a monopolist (the government) and a competitive entity (the prisoner). The prisoner who seeks insurance against the risk of habeas litigation must purchase that insurance from the government. However, the government, when it seeks relief from the expense of litigation, can turn to any of a large number of prisoners. This imbalance implies that any rents to a habeas bargain will accrue to the government. By itself this complaint does not require that courts invalidate habeas settlements. So long as they are voluntary, prisoners will not be left worse off by habeas settlements. Ordinarily, the concern with monopoly pricing is that it precludes consumers who are willing to pay more than marginal cost from purchasing a product. But this

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<sup>126</sup> C. Linder, *Cost of Death: A Billion Dollars and Counting*, Los Angeles Times, Aug. 29, 1993, at 1. See also D. Lay, *The Writ of Habeas Corpus, A Complex Procedure for a Simple Process*, 77 Minn. L. Rev. 1015, 1016 (1993).

<sup>127</sup> See Section III.C.

<sup>128</sup> In any case, if further reassurance is required, courts may be encouraged to vet the substance of settlements to ensure they are “fair.” This would be similar to logic behind why courts apply greater scrutiny to duty of loyalty violations than to duty of care violations in corporate law. The reason for the difference in treatment is that with duty of loyalty violations the board of directors of the corporation has a conflict of interest that impedes her ability adequately to represent corporate shareholder.



deadweight loss is something that should not trouble people who are concerned about habeas settlements because it simply means there will be fewer habeas settlements. Moreover, the government is more like a discriminating monopolist than an ordinary monopolist. Where it sees that a party cannot “afford” the price – here a smaller reduction in sentence – it demands for insurance against habeas litigation risk, it can lower the price of that insurance. The reason is that it has a good deal of information on the criminal history, medical condition, and age of the prisoners with which it negotiates. Finally, habeas settlements are qualitatively no worse on this score than plea bargains, which extract all rents from defendants when they want to avoid a trial.

Habeas settlements may have important externalities. Cases which are settled have no opportunity to establish new rules of criminal procedure, which in turn are necessary to ensure that the criminal justice system treats defendants fairly. Moreover, it could be argued that courts must publicly punish the government for procedural errors lest the government not be deterred from ignoring or even manipulating the criminal process to the disadvantage of defendants. Finally, public policing of criminal procedure by the courts is necessary to prevent erosion of public confidence in and therefore support for the criminal justice system.

Although these claims sound plausible, they do not stand up to scrutiny. To begin with, habeas settlements do not meaningfully hinder the creation of new procedural rights. First, *Teague v. Lane* bars the creation of such rights in federal habeas litigation. Such litigation can only resolve questions about rights to habeas review. Second, the option to settle does not bar litigation. Just as many prisoners who are subsequently found to be guilty elect not to plead guilty but go to trial, many prisoners with meritorious habeas claims will not settle but litigate. These prisoners will provide courts many opportunities to establish new habeas law. (Recall that nearly a third as many habeas cases (21,345) were filed by federal prisoners in 2000 as criminal cases (62,152) were filed against defendants in federal district court that year.<sup>129</sup>) Third, legally meaningful cases are unlikely to settle. These are cases where habeas law is not clear and therefore parties are more likely to disagree about what the court will do. And even if legally significant cases are settled, what is the purpose of habeas law if not to correct errors in the criminal process that improperly extend a prisoner’s sentence? If habeas settlements can achieve

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<sup>129</sup> The habeas filing statistic is from Table 5 in Appendix B. The criminal case statistic is from Pastore and Maguire, *supra* note 51, at 402 (table 5.9).



the same end without changing the law, are they still objectionable on the grounds that they do not facilitate changes in habeas law?

Concerns that settlements erode deterrence of procedural errors are similarly overblown. First, there little evidence that suggests government officials are more likely to implement legal reforms if they lose a court judgment than if they settle a complaint. Although, the absence of such data may be a product of the secrecy which typically surrounds settlements, there are other problems with the deterrence objection. If judgments deter errors in the criminal process, one would expect that rates at which petitions are filed and are granted would decline over time. There is no evidence of such a trend.<sup>130</sup> Moreover, because courts cannot announce new rules of criminal procedure in habeas cases after *Teague*, deterrence depends on the frequency with which courts grant habeas petitions. Since the number of settlements will exceed the number of cases where courts grant habeas petitions, however, settlements may actual promote deterrence.

Finally, there is no empirical data which suggests that confidence in the criminal justice system is a function of how robust habeas law is. To the contrary, any observer paying even a modicum of attention to academic discussions of AEDPA would conclude that the system is broken in the absence of habeas settlements.<sup>131</sup> If anything, people pay attention to criminal justice results not the process that generates those results. If habeas settlements lead to reductions in sentences in cases where the criminal process was perverted, they will have the same effect on public confidence as judgments. Would it have made any difference to public perception regarding insider trading law that Martha Stewart was convicted by a jury rather than pleaded guilty? It is likely that most people do not even know that Ms. Stewart was not even indicted for violating insider trading laws but for obstruction of justice.<sup>132</sup>

### C. Recommended policy reforms

In light of the gains to trade from habeas settlements, the federal government and the states should act to promote habeas settlements. This first requires that training programs for government attorneys and public defenders at both levels begin including practicums on bargaining over habeas rights. These may be modeled after those on

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<sup>130</sup> See Table 5 in Appendix B.

<sup>131</sup> See, e.g., Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal F 315 (1998); James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brook. L. Rev. 411 (2001).

<sup>132</sup> *USA v. Stewart, et al* 1:03 CR 717, (S.D.N.Y. 2003).



plea bargaining. In addition, to overcome the inertia of tradition, judges presiding over habeas proceedings should continuously encourage parties to resolve their differences out of court. This is not unheard of: one federal public defender from California recounted how a magistrate judge strongly urged parties to a habeas case involving a three-strike sentence to settle their dispute without his intervention.<sup>133</sup> Although the state's attorney ultimately balked, other government attorneys will likely pay heed to judges, who are the ultimate arbiters of their defenses.

Exhortation alone, however, is insufficient to maximize the value of negotiation. The sentencing guidelines, at both the federal and state levels, may rule out certain sentencing compromises. This is unlikely to change after the Supreme Court's recent decision in *Blakely v. Washington*.<sup>134</sup> *Blakely* is a clarification of *Apprendi v. New Jersey*,<sup>135</sup> which holds that any fact that increases a defendant's sentence beyond the "statutory maximum" for her crime must be submitted to the jury.<sup>136</sup> *Blakely* holds that relevant maximum is not the *absolute* maximum mentioned in the relevant statute but the maximum authorized *given* the facts submitted to the jury.<sup>137</sup> Although the Supreme Court has agreed to hear challenges to the sentencing guidelines based on *Blakely*,<sup>138</sup> it is unlikely to rule the sentencing guidelines altogether unconstitutional. First, that result is not required by *Apprendi*, which permits determinate sentencing conditional on a given set of facts being submitted to a jury. Second, striking down the sentencing guidelines would cause much havoc in the criminal justice system and the Supreme Court is not insensitive to the practical consequences of its rulings.<sup>139</sup>

To overcome obstacles to settlement created by sentencing guidelines, Congress should amend Federal Rule of Criminal Procedure 35 to permit courts, upon the government's motion, to amend a prisoner's sentence if she drops her habeas claims, regardless of whether the modified sentence was within the guideline range for the

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<sup>133</sup> Interview with Tanaka, *supra* note 116.

<sup>134</sup> 124 S.Ct. 2531 (2004). Interestingly, there may be another reason that *Blakely* increases habeas settlements. Until courts determine whether *Blakely* is retroactive to cases beyond direct appeal but decided after *Apprendi*, it may trigger a flood of habeas cases. See *id.*, at 2549 (O'Connor, J., dissenting). Just as AUSA offices began to settle §924(c) cases when they were overloaded with habeas petitions based on *Bailey*, AUSA office may begin to settle habeas petitions based on *Blakely* – or its progeny.

<sup>135</sup> 530 U.S. 466 (2000).

<sup>136</sup> *Id.* at 490.

<sup>137</sup> *Blakely*, 124 S.Ct. at 2537.

<sup>138</sup> See *United States v. Booker*, 2004 WL 1713654; *United States v. Fanfan*, 2004 WL 1713655.

<sup>139</sup> Indeed, the most likely consequence of *Blakely*, which simply increases the cost of imposing any sentence, is an increase the extent of plea bargaining. To the extent that it makes higher sentences more difficult to impose because a greater amount or quality of facts must be submitted to the jury, *Blakely* will tend to reduce the average sentence imposed on all defendants.



prisoner's offense. Currently, Rule 35 requires that the prisoner provide substantial assistance to prosecutors in another case before the court may reduce her sentence. Moreover, any modification in her sentence must comport with the policy goals of the sentencing guidelines. Possible language for these changes are presented in Appendix C. Analogous changes should also be implemented by state legislatures in their codes of criminal procedure.<sup>140</sup>

The proposed reform will encourage habeas settlement not just by making more compromises legally feasible, but also by making them politically feasible at the district level. Recall that, under existing rules, government attorneys typically have to concede a prisoner's habeas petition on the condition that she plead to a lesser-included crime. The need to maintain good relations with police or simply pride prevents many prosecutors from making such a concession, and thus blocks many settlements. Amending Rule 35 as suggested, however, would permit modification of a prisoner's sentence without admissions of error by government attorneys, eliminating this roadblock.

Because the constitutional and public policy arguments above in favor of habeas bargaining depend on the knowing-and-voluntary nature of resulting deals, legislatures and courts should take two precautions to ensure that habeas settlements are fair to defendants. First, state and federal legislatures should establish a more formal process for court review of habeas bargains. Already Federal Rules of Criminal Procedure require that Rule 11 colloquies discuss any habeas waivers in federal plea agreements.<sup>141</sup> There is no formal procedure, however, at the federal or state level for Rule 11-type colloquies for habeas settlements with prisoners. This is a concern because a significant percentage of the habeas settlements I have found are purely oral contracts. If these are challenged, the outcome will be highly uncertain in the absence of a paper trail. As a result, courts may ultimately choose not to enforce bargains, robbing prisoners of the benefits of their bargain with the government. This can be avoided by amending Rule 35 to also require courts to screen habeas settlements along the lines that they screen plea bargains in Rule 11. Plausible language for such an amendment can also be found in Appendix C.

Second, courts should permit prisoners to challenge the validity of their bargains on the grounds that the bargain was not voluntary or

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<sup>140</sup> Although this reform appears to displace the sentencing guidelines, it is a narrow exception that does not undermine the purpose of those guidelines. Those guidelines are intended to reduce arbitrary variation in sentencing. Reductions in sentence due to success on habeas claims are not arbitrary, even if discounted by the probability of success.

<sup>141</sup> See F.R.Cri.Pro. 11(b)(1)(N). This amendment was made in 2002.



knowing or that they received ineffective assistance of counsel with respect to the bargain. Indeed, courts that have addressed the validity of habeas waivers in plea agreements have carved exactly such exceptions to their enforcement of such waivers. These exceptions are unlikely lower value of habeas settlements to government attorneys so long as courts conduct proper Rule 11-type colloquies at the time a habeas bargain is struck. Such colloquies would render meritless most ex post voluntary-and-knowing challenges to habeas bargains in the same way that Rule 11 screening of guilty pleas reduces the number of habeas filings (and the success rate of these filings).

#### CONCLUSION

My discussion of the policy merits of habeas settlements in Section III.B focused on the welfare of the parties to the settlement. There are, however, two equally important beneficiaries that I failed to mention. One is the court system. I estimate that a policy of promoting the settlement of post-conviction review motions could reduce habeas litigation by one-third. I arrive at this number by estimating the share of habeas petitions that are good candidates for settlement, i.e., where the petitioner makes credible claims that warrant the appointment habeas counsel or where the petitioner one or more votes to grant during the course of litigation. These two groups of petitions, which account for at least 28 percent of all non-capital cases and 96 percent of all capital cases, are natural candidates for settlement because the cost of litigation is sufficient high and the cost of negotiation is sufficiently low.<sup>142</sup> Importantly, because these two groups of cases are among more complicated and resource-intensive to litigate, mere case counts underestimate the full benefit to the courts, which may free up half the time they spend on habeas petitions.

The other – and perhaps more important – beneficiary may be prisoners not directly involved in settlements. Post-conviction litigation has exploded in the last few decades. For example, the number of federal habeas petitions filed by prisoners has tripled between 1980 and 2000, when courts docketed nearly 30,000 cases.<sup>143</sup> Because settlement could reduce this load by one-third, it could lower the work load of federal district courts by around 10,000 cases. Such relief would reduce the pressure courts and legislatures feel to adopt procedural rules to expedite the handling of habeas cases, rules which may lead to the rejection of petitions that are otherwise meritorious

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<sup>142</sup> True, not all these cases would ultimately settle. But the fact that 90 – 95 percent of criminal cases settle suggests that a very high proportion of these habeas cases would also settle.

<sup>143</sup> See Table 5 in Appendix B.



simply because prisoners have failed to follow procedure. A reduced caseload would also free up courts to spend time on habeas cases that do not settle, and the prisoners who bring them. Significantly, these cases would probably include petitions involving novel habeas claims. Such claims are poor candidates for settlement because parties are less likely to agree on the probable outcome of the claims. In this manner – and perhaps counter-intuitively, habeas settlement may actually improve the quality of habeas case law rather than replace it.

## APPENDIX A: TEXT OF HABEAS SETTLEMENTS

A. Habeas settlement involving a state prisoner trading his state PCR rights

IN THE CIRCUIT COURT OF BOONE COUNTY, ARKANSAS  
THIRD DIVISION<sup>144</sup>

CLINTON FLUD, PLAINTIFF

VS.

STATE OF ARKANSAS, DEFENDANT

CASE NO. CR-99-240

HEARING BEFORE THE HONORABLE ROBERT W.  
MCCORKINDALE, II, CIRCUIT JUDGE FOR THE 1TH JUDI-  
CIAL DISTRICT ON OCTOBER 4, 2002

## APPEARANCES

## ON BEHALF OF PLAINTIFF

Mr. Gordon Webb, Prosecuting Attorney  
P.O. Box 483  
Harrison, AR 72601

## ON BEHALF OF DEFENDANT

Mr. Craig Lambert  
Attorney at Law  
400 W. Capitol  
Suite 1700  
Little Rock, AR 72201

THE COURT: We can take up the – is there an agreement in Flud that you all need to read something into the record?

...

MR. WEBB: Yes. Your Honor, the case before the Court is Clinton Flud v. State of Arkansas, CR 99-240 and comes before the Court on a petition pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. Mr. Flud is represented here by Craig Lambert, who appears with him to day [sic], and Mr. Lambert and myself have entered into a discussion with regard to a proposed disposition of the

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<sup>144</sup> This transcript was certified on Oct. 26, 2002, by Linda Adams, Official Court Reporter for the Circuit Court of the 14<sup>th</sup> Judicial District, Division 3, Arkansas, Supreme Court Certificate No. 528. The transcript was paid for by the plaintiff, Clinton Flud, well before this study was begun.



Rule 37 petition and we would like to present that to the Court at this time.

MR. [sic] COURT: State the agreement.

MR. WEBB: Your Honor, for the record, Mr. Flud was convicted at trial of the crime of rape and the crime of solicitation of a child. He received a ten year sentence on the rape and a six year sentence on solicitation of a child. At this time, pursuant to our agreement the State would, and the defense, would enter into a proposed agreement that the rape charge be amended to a lesser charge of sexual abuse in the 1st degree. I guess [sic] the rape conviction be vacated and the sexual abuse in the 1st degree be substituted for it with the recommendation that his sentence on the substituted charge be nine years as opposed to the original ten. We don't propose to disturb the solicitation of a child felony conviction and the six year sentence imposed there on [sic]. We'd recommend to the Court that the sentence now imposed in the amended judgment be nine years and six years and those sentences to run concurrent and that the defendant be given credit for time served. It is also proposed to the Court that at this point we recommend that the Court --- that the defendant not be required to complete the RSVP at this point in light of the fact that probably given the fact that he's served over three years at this point, there's probably very little benefit to be obtained from that program. That's the proposed agreement.

MR. LAMBERT: Your Honor, to follow up on the final point that was made, we would ask that, and there's a place in the amended judgment where the Court can put that in writing, that the RSVP program not --- the Court recommends that his completion of the RSVP program be not made a condition of his parole because there is a lengthy waiting list for that and it's also about a one year program.

THE COURT: Very well. The Court will go ahead and adopt the agreement of the parties. He'll be adjudicated on the sexual abuse --- is that what it is?

MR. WEBB: Sexual abuse in the 1st degree, Your Honor.

THE COURT: And then we're not altering the other charge?

MR. WEBB: No, sir.

THE COURT: And he'll be sentenced to a term of nine years on the sexual abuse charge.

MR. WEBB: The State will prepare a precedent [sic] reflecting this agreement, Your Honor, and this should dispose of the Rule 37 petition.

MR. LAMBERT: I do want to make it clear that the amended judgment will so reflect so they want [sic] misconstrue it at the ADC that the rape conviction is vacated and the 1st degree sexual abuse is

substituted for that. If there's anyway [sic] they can misconstrue that, I think they would.

THE COURT: Okay. Anything else?

MR. LAMBERT: Thank you.

B. Habeas settlement involving a federal prisoner trading his federal habeas rights

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,

v.

DAVID ELIOT EVERETT, Defendant.

NO. CR S-92-115

STIPULATED REQUEST TO VACATE CONVICTION AND SENTENCE, DISMISS INDICTMENT, AND RESENTENCE; [LODGED] ORDER

Defendant, DAVID ELIOT EVERETT, by and through Daniel Broderick, Assistant Federal Defender, and David Porter, Research Attorney, and the United States of America, by and through Johnny L. Griffin, III, Assistant U.S. Attorney, in order to resolve the above-entitled matter without protracted litigation, hereby enter into the following stipulation, and request that the Court enter the proposed order attached hereto.

The parties hereby agree and stipulate to the following:

1. Defendant is hereby withdrawing in a separate pleading the Motion to Vacate Conviction and Sentence, filed on December 6, 1996, and assigned CIV S-96-2120-DFL-GGH. The parties join in petitioner's request that the court vacate its Notice and Order filed in that case on December 23, 1996, directing the parties to file responsive pleadings.

2. In *Bailey v. United States*, 116 S.Ct. 501 (1995), the U.S. Supreme Court held that conviction of a defendant for "use" of a firearm under 18 U.S.C. §924(c) requires evidence sufficient to show an active employment of the firearm by the defendant. 116 S.Ct. at 505. The underlying conduct with respect to the firearms conviction in Mr. Everett's case, however, is insufficient to show active employment of weapons by Mr. Everett. Under the authority of *Bailey*, the conviction and sentence on the §924(c) count must be vacated and the underlying charge dismissed.



3. There is evidence in the record that Mr. Everett possessed dangerous weapons in relation to his drug trafficking crimes. Thus, under Sentencing Guideline §2D1.1, Mr. Everett's base offense level for his conviction under Count One should be increased by two offense levels.

4. The parties jointly request that the Court consider this pleading to be the functional equivalent of a § 2255 motion and a statement by the United States in response that it has no objection to the Court granting relief to the defendant in accordance with *Bailey v. United States*, 116 S.Ct. 501 (1995), and vacating his conviction and sentence under count five of the indictment in Case #CR. S-92-115-DFL, for violation of 18 U.S.C. § 924(c).

5. Pursuant to Rule 11, Federal Rules of Criminal Procedure, the parties agree that Mr. Everett be resentenced on count one of the superseding indictment as follows:

a. Pursuant to U.S. Sentencing Guideline §2D1.1(b)(1), Mr. Everett's base offense level for conspiracy to distribute and possess with intent to distribute methamphetamine should be enhanced by 2 levels.

b. The Defendant's Offense Level is Level 25, the Criminal History is Category II, with an imprisonment range of 63-78 months. The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Seventy-Eight (78) months.

6. Mr. Everett's waiver of presence at resentencing is attached hereto.

Accordingly, the government and Mr. Everett hereby request the court to enter the lodged order attached hereto.

Respectfully submitted,

Dated: January 16, 1997  
QUIN DENVIR  
Federal Defender

By: \_\_\_\_\_  
DANIEL J. BRODERICK  
Assistant Federal Defender  
Attorney for Defendant  
DAVID ELIOT EVERETT



Dated: January \_\_, 1997  
CHARLES J. STEVENS

United States Attorney

By: \_\_\_\_\_  
JOHNNY L. GRIFFIN, III  
Assistant U.S. Attorney

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O R D E R

After reviewing the parties' stipulation and the file in this matter, and good cause appearing therefor [sic], the court hereby ORDERS that:

1. The conviction and sentence of DAVID ELIOT EVERETT, Reg. No. 06051-097, for violation of Section 924(c) of Title 18, United States Code, is hereby VACATED and count five of the indictment against defendant DAVID ELIOT EVERETT for violation of the same offense is hereby DISMISSED;

2. Defendant, DAVID ELIOT EVERETT is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SEVENTY-EIGHT (78) months on Count I of the indictment charging violation of 21 U.S.C. §§ 841(a)(1) and 846;

3. The clerk shall forthwith prepare an amended judgment reflecting only the conviction on Count I of the superseding indictment and shall serve a copy of the amended judgment on the Warden at the United States Penitentiary Lompoc, 3901 Klein Boulevard, Lompoc, CA 93436; and

4. The clerk shall also serve a copy of the amended judgment on the United States Bureau of Prisons and the United States Probation Office.

Dated: January \_\_\_\_, 1997

\_\_\_\_\_  
HONORABLE DAVID F. LEVI  
United States District Court

## APPENDIX B: STATISTICAL APPENDIX ON HABEAS LITIGATION

This section presents statistics on the demand for, prevalence of, and outcomes in habeas litigation.<sup>145</sup> These numbers suggest three conclusions relevant to habeas settlements. First, most habeas litigation is generated by a small subset of the prison population that is incarcerated long enough to benefit from habeas relief. Second, most convicts plead guilty but convicts who pleaded guilty are responsible for a small percentage of habeas petitions filed by prisoners. Third, the probability of federal habeas relief is certainly small, but not as small as suggested in prior studies. These studies generally ignore the fact that state prisoners have two bites at the PCR apple, once in state court and one in federal court. The one exception to this conclusion concerns federal habeas petitions by convicts who pleaded guilty. Their probability of success is basically zero.

A. Few convicts have sentences long enough to benefit from collateral review

My empirical survey of habeas litigation begins with data on the number of individuals who possess state or federal PCR rights. Table 3 presents data from 1980-2000 on the number of individuals on probation, in jail, in prison and on parole. In 1998, for example, the numbers in each category were roughly 3.7 million, 590 thousand, 1.3 million and 715 thousand, respectively. This is a rough estimate of the population eligible for collateral review. Omitted are individuals who have completed their sentence, but are eligible to attack their conviction due to the collateral consequences on future convictions because of habitual offender sentencing rules. Convicts are typically sentenced to probation or incarceration. The population in jail includes individuals in custody awaiting trial and most convicts sentenced to less than one year of incarceration. Those on parole have been released from prison after some term of years, but remain under supervision of the government. Their release is typically conditioned

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<sup>145</sup> The data are drawn a number of sources. Data on outcomes in criminal cases and sentences come from the Bureau of Justice Statistics. Prisoner data come from the National Correctional Reporting Program and the Bureau of Justice Statistics. Data on federal habeas filings come from the Administrative Office of U.S. Courts. Data on outcomes in federal habeas litigation come from a number of sources. Pre-AEDPA data is primarily from studies sponsored by the Bureau of Justice Statistics and the National Center for State Courts. Post-AEDPA data come from a new data set assembled by Marc Falkoff, a Special Master assigned to handle a backlog of federal habeas petitions filed by state prisoners in the Eastern District of New York. This data set includes roughly 500 cases since 1996 – nearly 300 since 2002 – and this paper is the first to employ the data to validate some of the conclusions from pre-AEDPA studies of habeas litigation. It should be acknowledged that often data are available for state prisoners or federal prisoners but not both or for federal habeas filings but not state habeas filings. I assume in these cases that state data are representative of federal data and vice versa.

**Table 3. Population under jurisdiction of state or federal correctional systems.**

Year	Probation	Jail	Prison	Parole	Total
1980	1,118,097	182,288	319,598	220,438	1,840,400
1981	1,225,934	195,085	360,029	225,539	2,006,600
1982	1,357,264	207,853	402,914	224,604	2,192,600
1983	1,582,947	221,815	423,898	246,440	2,475,100
1984	1,740,948	233,018	448,264	266,992	2,689,200
1985	1,968,712	254,986	487,593	300,203	3,011,500
1986	2,114,621	272,735	526,436	325,638	3,239,400
1987	2,247,158	294,092	562,814	355,505	3,459,600
1988	2,356,483	341,893	607,766	407,977	3,714,100
1989	2,522,125	393,303	683,367	456,803	4,055,600
1990	2,670,234	405,320	743,382	531,407	4,350,300
1991	2,728,472	424,129	792,535	590,442	4,535,600
1992	2,811,611	441,781	850,566	658,601	4,762,600
1993	2,903,061	455,500	909,381	676,100	4,944,000
1994	2,981,022	479,800	990,147	690,371	5,141,300
1995	3,077,861	507,044	1,078,542	679,421	5,342,900
1996	3,164,996	518,492	1,127,528	679,733	5,490,700
1997	3,296,513	567,079	1,176,564	694,787	5,734,900
1998	3,670,441	592,462	1,224,469	696,385	6,134,200
1999	3,779,922	605,943	1,287,172	714,457	6,349,800
2000	3,826,209	621,149	1,316,333	724,486	6,445,600

on certain behavioral standards; if these are violated the parolee may be returned to prison for a portion of his remaining sentence. With few exceptions, only incarcerated convicts file PCR motions. Pre-trial detainees will almost always obtain a trial before they will obtain PCR relief.<sup>146</sup> For those on probation or release, the filing of a habeas claim takes up valuable time that is not otherwise spent in a prison cell.

The criminal process takes time. The median time for processing convicts in federal courts in 2001 was 11.1 months for jury trials and 6 months for guilty pleas.<sup>147</sup> Median time for state courts in 1998 was 379 days for jury trials and 216 days for guilty pleas.<sup>148</sup> This delay serves to further reduce the population that has habeas rights valuable enough to exercise. Table 4 provides data from 1980-2000

<sup>146</sup> This is most certainly the case given federal and state speedy trial statutes. N.Y. Crim. Proc. Law §30.30 (1996); Cal. Pen. Code § 686 (1972); 18 U.S.C.S. § 3161 (1988).

<sup>147</sup> Pastore and Maguire, *supra* note 51 at 442 (Table 5.41).

<sup>148</sup> *Id.* at 447 (Table 5.48).



on the number of prisoners with sentences longer than one year, broken down by those in the federal system and the state system.<sup>149</sup> In 1998, for example, there were roughly 104 thousand inmates in federal prisons and 1.14 million inmates in state prisons serving sentences longer than one year. The state and federal breakdown is relevant insofar as state prisoners have both state and federal PCR rights, whereas federal prisoners have only federal PCR rights. To some extent such a simplistic description overstates the bundle of rights that state prisoners possess relative to federal prisoners. A state prisoner's federal habeas rights are limited by procedural rules that require the prisoner to exhaust state PCR and that accord state judgments a certain respect in federal court. That said, state prisoners likely have greater PCR rights than federal prisoners because federal rules excuse exhaustion if state remedies are inadequate or state judgments are not fully *res judicata* on federal courts.

Table 4 also breaks down prison populations into the stock of individuals in prison each year and the annual flow of individuals into prison. The stock is the sum of the flow in and the flow out. The flow for state and federal prisons in 1998 was roughly 350 thousand and 34 thousand, respectively. Although there was no statute of limitations on federal habeas claims prior to AEDPA, there were strong rules that limited successive and fragmented petitions.<sup>150</sup> Such rules, along with the gradual decay of evidence with time, likely ensured a steady flow of prisoners with habeas claims into federal court over time that was proportional to the flow of convicts into prisons.<sup>151</sup> Of course the time required for direct appeal – one study suggests that this typically takes a year<sup>152</sup> – and the statute of limitations for state and federal PCR claims suggests that the current year's admissions will not affect the number of state petitions filed by state prisoners

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<sup>149</sup> The figures for 1999-2000 are projections based on 1998 data and growth rates in the overall prison population in Table 3. Importantly, these figures do not include convicts with life or capital sentences, though these convicts are a very small fraction of the total.

<sup>150</sup> 28 U.S.C. § 2244 (1996); N.Y. Civ. Prac. Law and Rules § 7003 (1963); Cal. Pen. Code § 1475 (1967).

<sup>151</sup> That said, there was a dramatic spike in monthly habeas corpus filings exactly one year after AEDPA was enacted. This spike is due to the one-year statute of limitations imposed retroactively on prisoners with claims more than one year old when AEDPA was enacted. The clock on these claims started when AEDPA went into effect in April 1996 and expired on April 1997, subject to tolling for claims filed in state court in the interim. Scalia, *supra* note 50 at 6; Fred Cheesman, Roger Hanson, Brian Ostrom, and Neal Kauder, Prisoner Litigation in Relation to Prisoner Population, 4(2) *Caseload Highlights: Examining the Work of State Courts* (National Center for State Courts) 3 (Sept. 1998). This spike also shows the up in annual statistics in Table 4. After 1997, however, the growth rate of habeas filings is similar to that in the mid-1990s prior to AEDPA.

<sup>152</sup> See, e.g., Daniel J. Foley, *The Tennessee Court of Criminal Appeals: A Study and Analysis*, 66 *Tenn. L. Rev.* 427, 442-443 (1999). This study found that criminal appeals in Tennessee, which has one of the faster state appellate court systems, took a little over 11 months on average during the period 1993 - 1995.



**Table 4. Stock and flow of incarcerated population, by sentence length and actual time of incarceration (excluding prisoners serving life or capital sentences).**

Year	Sentence length > 1 year (thous.)					Incarceration length (%)	
	Stock			Flow		> 4 yr.	> 5 yr.
	Fed.	State	Total	Fed.	State	Flow State	Flow State
1980	20.6	295.3	316.0	10.9	131.2		
1981	22.2	331.5	353.7	11.1	149.2		
1982	23.7	371.9	395.5	12.5	164.6		
1983	26.3	393.0	419.3	14.1	173.3		
1984	27.6	415.8	443.4	13.5	166.9	0.22	0.16
1985	32.7	447.9	480.6	15.4	183.1	0.22	0.15
1986	36.5	485.6	522.1	16.1	203.3	0.19	0.12
1987	39.5	521.3	560.8	16.3	225.6	0.19	0.12
1988	42.7	561.0	603.7	15.9	245.3	0.18	0.11
1989	47.2	633.7	680.9	18.4	297.8	0.16	0.08
1990	50.4	689.6	740.0	18.5	323.1	0.13	0.09
1991	56.7	732.9	789.6	20.2	317.2	0.14	0.09
1992	65.7	780.6	846.3	22.2	334.3	0.16	0.07
1993	74.4	857.7	932.1	23.7	318.1	0.16	
1994	79.8	936.9	1,016.7	24.0	321.1		
1995	83.7	1,001.4	1,085.0	24.0	337.5		
1996	88.8	1,048.9	1,137.7	27.3	326.5		
1997	95.0	1,099.3	1,194.3	30.6	334.5		
1998	103.7	1,144.7	1,248.4	34.4	347.3		
1999	109.0	1,203.3	1,312.3	36.1	365.1		
2000	111.5	1,230.6	1,342.0	37.0	373.3		

and federal petitions filed by federal prisoners until at least one year into the future. For state prisoners filing federal petitions the lag between admission and filing is extended further by the time required to exhaust state remedies. Indeed, a Bureau of Justice Statistics study of habeas filings in 1992 found that the average amount of time that elapsed between the date a state prisoner was convicted and the date he filed a federal habeas petition was 1,802 days or nearly 5 years.<sup>153</sup>

Not only do direct appeals, statute of limitations and exhaustion delay filing of prisoner petitions, they also likely reduce the number

<sup>153</sup> Roger A. Hanson and Henry W.K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* (Bureau of Justice Statistics Discussion Paper NCJ-155504) 12 (Sept. 1995). This lag has been increasing over time. A Department of Justice study from 1979 estimated that the time from conviction to filing was around 1.5 years. Paul Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* (U.S. Department of Justice) 4(a), (1979).



of petitions filed. Prisoners may take into account the time required to obtain PCR relative to the length of their sentences when deciding whether to file for such relief.<sup>154</sup> If the time to relief is greater than one's sentence, there is no value to filing for PCR. Table 5 uses data from Table 4 on the share of state admissions that will remain in prison for four and five years before being released to calculate the number of state and federal inmates admitted into prisons from 1980-2000 who will remain there long enough to make filing for PCR relief worthwhile.<sup>155</sup> The four and five year data are chosen because it is assumed that a trial, direct appeal, delay before filing a PCR petition, disposition of a state petition, and disposition of a federal petition each take around one year. While data on processing times for state PCR claims are generally unavailable, data on federal habeas petitions suggest that in 1995 these took on average 273.9 days to process.<sup>156</sup> My assumptions imply a delay of four years before relief for a state prisoner filing a state PCR motion and a federal prisoner filing a federal habeas petition. For a state prisoner filing a federal habeas petition the delay is five years because of exhaustion requirements.

Table 5 also presents annual data from 1980-2000 on the number of federal habeas petitions and petitions to vacate a sentence filed by state and federal prisoners. In order to determine the prisoner population from which petitions filed in a given year by state prisoners

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<sup>154</sup> This delay certainly affects the number of dispositions since a prisoner is likely to drop a petition once he is released.

<sup>155</sup> Data in Table 2 on the share of admissions incarcerated for more than four and five years are based on data from the National Corrections Reporting Program (NCRP). Shares incarcerated for more than four years, for example, are calculated by taking the number of individuals released in years  $t+1$  to  $t+4$  who were admitted in year  $t$ , summing them and the subtotal from the total number of admissions in year  $t$ , and dividing by the total number of admissions in year  $t$ . Note that incarceration length is not the same as sentence length since most prisoners are released before serving the full length of their assigned sentence. Since data on releases by year of admission are only available for 1984 to 1998, data on shares are only available for 1984 – 1993 for greater-than-four year incarceration and 1984 – 1992 for greater-than-five year incarceration. Due to data limitations, I have used estimates rather than actual numbers for: admissions for the years 1980-1983; admissions with sentences greater than four years for the years 1994-2000; and admissions with sentences greater than five years for 1993-2000. The figures in Table 3 on the number of admissions incarcerated more than four or five years are calculated by taking the shares from Table 2 and applying them to estimates of prison populations by the Bureau of Justice Statistics (BJS). The NCRP data only contain data on states that voluntarily report their prison populations on the NCRP questionnaire. Many states do not. This problem does not afflict the data gathered by the BJS. This gap in the NCRP data means the admissions-by-incarceration-length numbers in Table 3 implicitly assume that states that report to the NCRP are representative of states that do not. The admissions-by-incarceration-length numbers in Table 3 that lie outside the range for which their analogous shares in Table 2 are available are based on projections assuming that the admission shares are constant at the 1984 rate before 1984 and at the 1992 or 1993 rates after those years. I do not make linear projections because the actual data are not monotonic.

Moreover, I have not yet obtained analogous federal data so the conditional federal inmate estimates are based on state release statistics.

<sup>156</sup> John Scalia, Prisoner Petitions in the Federal Courts, 1980-1996, at 7 (Table 7) (BJS Oct. 1997).



**Table 5. Prisoners with valuable federal habeas rights and quantity of federal habeas filings, by jurisdiction and year.**

Year	Prison admissions				Federal habeas petition filings by	
	State prisoners released after		Federal prisoners released after		State prisoners	Federal prisoners
	4 years	5 years	4 years	5 years		
1980	28575	20513	2375	1705	7029	2735
1981	32488	23323	2414	1733	7786	2877
1982	35855	25740	2714	1948	8036	3113
1983	37737	27091	3075	2207	8523	3225
1984	36352	26096	2938	2109	8335	3332
1985	40244	26649	3377	2236	8520	4932
1986	39603	24568	3130	1941	9040	3235
1987	42339	27135	3051	1956	9524	3472
1988	45182	26806	2934	1741	9867	3938
1989	46619	23273	2878	1437	10545	4344
1990	41613	28023	2380	1603	10817	4937
1991	42851	29025	2734	1852	10325	5440
1992	53300	22780	3539	1513	11296	5490
1993	50275	21674	3739	1612	11574	6846
1994	50751	<b>21879</b>	3787	1632	11908	6069
1995	53345	22997	<b>3789</b>	1634	13627	7331
1996	51615	22252	4322	1863	14726	11432
1997	52876	22795	4830	2082	19956	13577
1998	54891	23664	5434	2342	<b>18838</b>	<b>8608</b>
1999	57702	24876	5712	2462	20493	9342
2000	59009	25439	5841	2518	21345	10211

were drawn, the relevant number is the population of state prisoners admitted four years earlier but who will not be released for at least five years. Because federal prisoners do not have to exhaust state remedies, the relevant population of federal prisoners is that admitted three years earlier but who will not be released for at least four years. Moreover, the total number of habeas filings has to be adjusted downwards to account for the fact that the prisoner data in Table 4 and Table 5 do not include convicts with life or capital sentences. The Bureau of Justice Statistics study of pre-AEDPA habeas filings mentioned earlier estimated that such convicts account for 21 and under one percent of habeas filings, respectively.<sup>157</sup> Under this logic, 22 thousand of the state prisoners admitted in 1994 are responsible



<sup>157</sup> Hanson and Daley, *supra* note 153 at 11.

for roughly 15 thousand federal habeas filings by state prisoners in 1998 and 3,800 of the federal prisoners admitted in 1995 are responsible for the 6,700 federal habeas filings by federal prisoners in 1998.<sup>158</sup>

These statistics suggest that federal prisoners are far more litigious than state prisoners. In 1998, each state prisoner filed less than one federal habeas petition while each federal prisoner appears to have filed more than two such petitions. The difference in filing rates cannot be explained by federal rules with regard to successive and fragmented habeas petitions because these rules, which discourage but do not prevent multiple petitions, apply equally to state and federal prisoners. Part of the difference in filing rates may be explained by the fact that some state prisoners obtain relief from errors in their convictions or sentences by means of a state PCR motion and therefore do not file for federal habeas relief. For those state prisoners denied state PCR, a federal habeas petition is not as valuable as for federal prisoners because federal courts will respect to some extent state court judgments denying a state prisoner's claims of error, even if those judgments are based on state procedure rather than federal constitutional law. The remainder of the difference in filing rates is likely attributable to the fact that, although Table 5 attempts to present accurately the number of prisoners who can reasonably hope to obtain habeas relief before release, it may be incorrect or there may be federal prisoners who file without reasonable hope for timely relief. For example, if I have underestimated the time required for habeas relief by a year, then the proper population of state prisoners who files is roughly 14 thousand. If federal release policy is stricter than state release policy or all federal prisoners incarcerated past their direct appeal file for habeas relief, then the number of federal prisoners responsible for any given year's habeas filings will rise. For example, if the proportion of federal prisoners who serve more than three years is similar to the proportion of state prisoners who serve more than three years, and this is the amount of time required for federal prisoner to obtain habeas relief or all federal prisoners who can file for habeas relief do so, then the relevant population of federal prisoners is roughly 5,900.

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<sup>158</sup> The numbers from which these statistics are derived are bolded in Table 4 to facilitate determination of the prisoner populations responsible for habeas filings in other years. The statistics on filings are 78 percent of the bolded numbers in order to account for the share of federal filings by prisoners serving life sentences or on death row, prisoners who are not included in prison admissions numbers. See text accompanying note 157.



**Table 6. Disposition of federal criminal cases.**

Year	Total defendants (thous.)	Defendants convicted (thous.)						Defendants sentenced to prison (thous.)
		Total	By guilty plea	By guilty plea (%)	By nolo contendere plea	By jury trial	Bench trial	
1990	58.70	47.49						28.66
1991	60.19	48.95						30.56
1992	63.12	52.35	46.13	0.88	0.52	5.09	0.61	34.35
1993	64.64	53.44	48.02	0.90	0.35	4.58	0.49	34.84
1994	61.40	50.70	45.96	0.91	0.39	3.86	0.50	33.02
1995	56.48	47.56	43.58	0.92	0.30	3.20	0.48	31.81
1996	61.43	53.08	48.69	0.92	0.28	3.62	0.48	36.37
1997	64.96	56.57	52.51	0.93	0.28	3.26	0.52	39.43
1998	76.95	68.16	64.56	0.95	0.38	2.57	0.65	43.04
1999	75.72	66.06	62.40	0.94	0.42	2.73	0.50	47.66
2000	76.95	68.16	64.56	0.95	0.38	2.57	0.65	50.45

**B. Prisoners who pleaded guilty rarely file habeas petitions and their petitions are almost never granted**

To more precisely pin down the population responsible for federal habeas filings, Table 6 presents data from 1990-2000 on the number of defendants in federal criminal cases, the number of defendants convicted of federal crimes, data on the manner in which they were convicted, and the number of defendants sentenced to incarceration.<sup>159</sup> The most important numbers are the high share of individuals who plead guilty and the share of individuals who opt for trial. In 1995, for example, these numbers were 92 percent and 8 percent, respectively. These numbers are important for three reasons. First, the method of conviction determines the scope of claims available to prisoners in habeas petitions. Individuals who plead guilty cannot, for the most part, assert errors that predate the plea or trial-type errors. Their claims are confined to sentencing errors. The scope of claims in turn affects the time consumed by habeas filings from the perspective of both parties and the courts. Second, and more relevant for my purposes, pre-AEDPA data suggest that 20-30 percent of federal habeas petitions filed by state prisoners are brought by prisoners who plead guilty.<sup>160</sup> Post-AEDPA data from the Eastern District of

<sup>159</sup> Analogous data on state prisoners is not readily available. Nor is data on the manner of conviction for federal defendants in 1990 and 1991.

<sup>160</sup> Flango, *supra* note 85 at 36; Robinson, *supra* note 153 at 7; Faust, Rubinstein & Yackle, *The*



New York suggest an even lower number: eight percent.<sup>161</sup> These data reduce significantly the number of prisoners responsible for most habeas filings. Third, as I will demonstrate in the next subsection, the probability of having a petition granted conditional on the petitioner having pleaded guilty is virtually zero.<sup>162</sup>

C. The probability of a habeas petition ultimately being granted is larger than previously suggested

The final empirical feature of PCR litigation relevant to habeas bargaining is the percentage of PCR petitions that are granted. Only one study – sponsored by the National Center for State Courts – contains data on outcomes in PCR litigation in state courts. Looking at four states (Alabama, California, New York and Texas), that study found that 6.2 percent of state PCR claims involving non-capital sentences were granted in 1992.<sup>163</sup> Table 7 reproduces a table from that study that breaks down this success rate by type of claim raised. It reveals that the success rate varies dramatically across claims, rang-

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*Great Writ in Action: Empirical, Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. Rev. L. & Soc. Change 637, 678 (1991). Importantly, these estimates are based on data on federal habeas filings by state prisoners, not federal prisoners.

<sup>161</sup> For example, in the period 2001-2002, there were 296 cases, of which 24 were by prisoner who plead guilty. Allocating these 24 across all methods of disposition in proportion the allocation of all cases across the methods of disposition, one finds – among cases where the prisoner did not plead – 18 petitions which were stayed to permit the petitioner to exhaust state remedies and 23 that were time barred. The numbers for the period 1996-2003 are 493 total cases, 39 where the prisoner plead guilty, 29 stayed to exhaust, 29 time-barred, and 3 second and successive.

<sup>162</sup> Indeed, the data from Table 6, combined with statistics on the number of federal prisoners with sentences long enough to obtain habeas relief from Table 5, suggest that roughly 300 federal prisoners admitted in 1995 – the number of prisoners convicted after a trial – were responsible for at least 48 percent of the habeas filings by federal prisoners in 1998 – roughly 4,100 petitions. Even if one was to assume only a three-year lag to federal relief or that all federal prisoners incarcerated past their direct appeal file for habeas relief, the number would be at most 500 prisoners responsible for nearly eight petitions each. Of course, these estimates assume that defendants who plead serve sentences that are equally as long as those who are convicted following a trial. This assumption is incorrect because the purpose of pleading guilty is to obtain a lower sentence. Yet, even if all the 3,200 defendants convicted by trial were to have filed a habeas petition, that would still leave 900 petitions – more than one in 10 – unaccounted for. Successive petitions or petitions that can be characterized as abuse of the writ cannot explain these petitions because these account for only five percent of issues filed in habeas petitions according to the Bureau of Justice Statistics' pre-AEDPA numbers. In the post-AEDPA data from the Eastern District of New York, the share of petitions dismissed as successive is 0.6 percent. None were dismissed as an abuse of the writ. (Three of 493 were dismissed as second or successive.) This analysis suggests that there are a significant number of habeas filings whose source is not easily explained by the extant data. While this is a most interesting puzzle, it is not the focus of this paper. The main lesson to draw from this analysis for the purposes of this paper is that a small number of federal prisoners – roughly 300 hundred out of the 3,800 that have sentences less than life, plus all those with life or capital sentences, have meaningful habeas rights. Extrapolating these numbers to state prisoners suggests 1,700 state prisoners serving a term of years, plus those serving a life or capital sentence, have meaningful habeas rights.

<sup>163</sup> Flango, *supra* note 85 at 62.



**Table 7. Success rate of PCR petitions by court and claim raised (reproduced from Victor E. Flango, *Habeas Corpus in State and Federal Courts* (National Center for State Courts) 62 (Table 17) (1994)).**

Claim raised in PCR petition	State courts		Federal courts	
	No. of claims	Percent granted	No. of claims	Percent granted
Ineffective assistance of counsel	732	8	584	<1
Trial court error	528	6	378	2
Prosecutorial misconduct	199	3	206	<1
Fourth amendment	79	1	172	<1
Fift amendment	414	2	380	<1
Sixth amendment	220	1	224	<1
Eighth amendment	463	11	261	<1
Fourteenth amendment	728	7	426	1

ing from one percent for Fourth and Sixth Amendment claims to 8 percent for ineffective assistance claims and 11 percent for Eighth Amendment claims.<sup>164</sup>

Data on federal habeas litigation initiated by state prisoners suggest a lower rate of success – between one and four percent – than in state court.<sup>165</sup> The most recent pre-AEDPA study was the Bureau of Justice Statistics' study of petitions filed by state prisoners disposed in 1992. (These data include the federal court data from the four states in the National Center for State Courts study, plus data from federal courts in four other states.) Ignoring dismissals for failure to exhaust, the Bureau's study found that only 1.6 percent of petitions were granted. This is not far off from estimates drawn from post-AEDPA data on non-capital cases from the Eastern District of New York. Those data suggest a success rate of 1.9 percent. Of course these are unconditional numbers. In the post-AEDPA data, none of the 40 petitions filed by prisoners who pleaded guilty were granted. This suggests a success rate of zero conditional on pleading guilty and 2.1 percent conditional on conviction by trial. If one ignores cases that are dismissed for procedural reasons, on the basis that these cases are easily identified – and rejected – by prosecutors look-

<sup>164</sup> It should be noted that the high rate of success on Eighth Amendment claims can be attributed to a spate of excessive bail claims from New York. Ignoring these, the success rate for Eighth Amendment claims probably falls significantly, though an exact number cannot be derived from the data presented in the study. Flango, *supra* note 85 at 62-63.

<sup>165</sup> *Id.* at 62-63; Faust, Rubenstein & Yackle, *supra* note 160 at 681; Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 333 (1973). See also Robinson, *supra* note 153 at 23, 35 (looking at success rate on appeal conditional on losing at the district court level). One systematic exception is the set of capital cases. They account, however, for a very small percentage of all habeas cases.

ing for habeas bargaining opportunities, then the success rate rises to 2.7 percent in the pre-AEDPA data from the Bureau of Justice Statistics. It rises to 2.3 percent in the post-AEDPA data.<sup>166</sup>

So far the analysis of outcomes has focused on non-capital cases. Whereas state courts are more generous with PCR than federal courts in non-capital cases, this pattern is reversed in capital cases. According to National Center for State Court data, petitioners on death row obtain relief in three percent of petitions they file in state court and 17 percent of petitions they file in federal court.<sup>167</sup> This is much lower than the 6.2 percent success rate of non-capital petitioners in state court but much higher than the 1.6 percent pre-AEDPA success rate of non-capital petitioners in federal court.

Together, the outcome statistics suggest two conclusions about outcomes. First, the success rate is low, though perhaps not as low as suggested by other studies. The probability of not obtaining relief at either the state or federal level is 92.2 percent pre-AEDPA and 91.9 percent post-AEDPA in non-capital cases. It is just 80 percent in capital cases. Second, if one conditions on the nature of a petitioner's claims or whether his petition is procedurally defaulted – features that are relatively easy to identify, then the probability of failing to obtain PCR falls even further, perhaps below 90 percent in non-capital cases.



<sup>166</sup> This figure is not conditional on prisoners convicted by trial.

<sup>167</sup> Flango, *supra* note 85 at 86.

## APPENDIX C: PROPOSED AMENDMENT TO RULE 35

The text below should be appended to Federal Rule 35 (Correcting or Reducing a Sentence) of Criminal Procedure. The language is modeled on Rules 11(b) and 35(b). It was drafted with an eye to § 2255 motions by federal prisoners. State analogues should allow for settlement of motions for post-conviction review under the appropriate state statute and under § 2254.

*(c) Reducing a Sentence pursuant to a Settlement of a 28 U.S.C. § 2255 Motion.*

*(1) In General. Upon the government's motion, the court may reduce a sentence if the defendant agrees to voluntarily dismiss a pending petition under 28 U.S.C. §2255.*

*(2) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.*

*(3) Considering and Accepting a Settlement of § 2255 motion.*

*(A) Advising and Questioning the Defendant. Before the court accepts a settlement of a motion under 28 U.S.C. § 2255, the prisoner may be placed under oath, and the court must address the prisoner personally in open court. During this address, the court must inform the prisoner of, and determine that the prisoner understands, the following:*

*(i) the right to persist with his or her §2255 motion;*

*(ii) the right to have the motion considered by the district court;*

*(iii) the defendant's waiver of these rights to collateral review if the court accepts a the settlement;*

*(iv) the right to advise of counsel during the negotiation and finalization of the settlement;*

*(v) the right to challenge the settlement as the product of ineffective assistance of counsel;*

*(vi) the nature of each claim proffered to support the prisoner's § 2255 motion;*





(vii) *the maximum possible penalty, including imprisonment, fine, and term of supervised release to which the prisoner is subject if the district court denies the § 2255 motion;*

(viii) *the minimum penalty to which the prisoner is subject if the § 2255 motion is granted in part or in full;*

(ix) *the penalty to which the prisoner is subject if the court grants the government's motion to reduce the prisoner's sentence; and*

(x) *the terms of any settlement provision waiving the right subsequently to collaterally attack the sentence imposed by the district court pursuant to the settlement, save and except claims of ineffective assistance of counsel.*

*(B) Ensuring That a Settlement Is Voluntary. Before accepting a settlement of a § 2255 motion, the court must address the prisoner personally in open court and determine that the settlement is voluntary and did not result from force, threats, or promises (other than promises in the settlement agreement).*

*(C) Determining the Factual Basis for a Settlement. Before entering judgment on a settlement, the court must determine that the prisoner's § 2255 motion contains a colorable claim under that provision.*

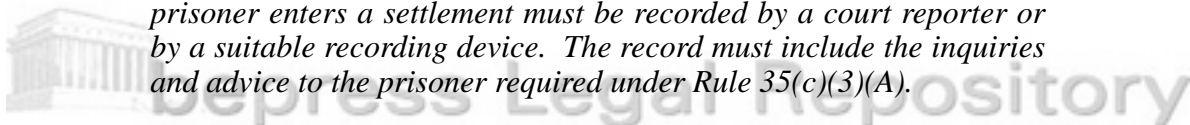
*(4) Withdrawing from a settlement. A defendant may withdraw consent to a settlement of a § 2255 motion:*

*(A) before the court accepts the settlement, for any reason or no reason; or*

*(B) after the court accepts the settlement, but before it imposes sentence if the defendant can show a fair and just reason for requesting the withdrawal.*

*(5) Finality of a Settlement. After the court imposes sentence, the prisoner may not withdraw consent to a settlement, and the settlement may be set aside only on collateral attack for ineffective assistance of counsel.*

*(6) Recording the Proceedings. The proceedings during which the prisoner enters a settlement must be recorded by a court reporter or by a suitable recording device. The record must include the inquiries and advice to the prisoner required under Rule 35(c)(3)(A).*



*(7) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.*

