Habeas Corpus in State and Federal Courts

Victor E. Flango, Ph.D.
Director of Court Research

State Justice Institute
Habeas Corpus in State and Federal Courts

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The cooperation of a great many individuals is required to complete a research effort of this magnitude. The help of the following people is gratefully acknowledged:

Advisory Committee

Honorabe Harry L. Carrico
Chief Justice
Supreme Court of Virginia
100 North Ninth Street
Richmond, Virginia 23210

Honorabe Patrick E. Higginbotham
United States Courts of Appeals,
Fifth Circuit
13E1 U.S. Courthouse
1100 Commerce Street
Dallas, Texas 75242

Ms. Lynne M. Abraham
District Attorney
1421 Arch Street
Philadelphia, Pennsylvania 19102

Mr. Benjamin F. Blake
Chief Defender
462 Gratiot Avenue
Detroit, Michigan 48226-2320

Mr. Joseph S. Cecil
Federal Judicial Center
Research Division
1 Columbus Circle, NE
Washington, DC 20544

State Justice Institute
Sandra Thurston, Project Manager

Administrative Office of the U.S. Courts
David Cook

Mead Data Central

A grant from Mead Data Central provided the NCSC staff with access to the NEXIS database for the literature review necessary in research of this nature.
Cooperating Research Sites

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Honorable Sonny Hornsby,
Chief Justice
John Lazenby, Clerk

Alabama Court of Criminal Appeals
Lane W. Mann, Clerk
Dr. Norwood Kerr,
Department of Archives and History

Supreme Court of California
Honorable Malcolm Lucas, Chief Justice
Robert F. Wandruff, Clerk

California Court of Appeal for the
Third Appellate District
Honorable Robert K. Puglia,
Presiding Judge
Robert L. Liston, Clerk

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Presiding Justice
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SECOND DEPARTMENT
Honorable Guy James Mangarro,
Presiding Justice
Martin H. Brownstein, Clerk of Court

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Presiding Judge
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James Gilmore, Chief Deputy Clerk
Richard W. Wieking, District Clerk
Dennis Belecki, Court Manager
Mary Louise Caro,
Head Pro Se Law Clerk
Lorna Conti
Case Processing Service Manager

U.S. DISTRICT COURT FOR THE
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Chief Judge
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Robert C. Heinemann, Clerk of Court
Celia Volk, Pro Se Clerk

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SOUTHERN DISTRICT OF NEW YORK
Honorable Charles L. Brieant, Chief Judge
James M. Parkinson, Clerk of Court
Lois Bloom, Senior Staff Attorney Clerk

U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
David M. Baldwin, Staff Attorney

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David Bradley, Chief Deputy Clerk
Pretest Sites

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Arizona Court of Appeals Division One
Richard H. Weare, Clerk, U.S. District Court
James K. McKay, Pro Se Law Clerk

Michigan

Honorable Thomas Brown
Ann Vrooman
Liaison with the Michigan Judges Association

John Ferry
Deputy Court Administrator
Peter Trezise
Attorney General's Office.

Douglas Van Eppe
Manager of the Circuit Court Services Unit

Virginia

Honorable Harry L. Carrico Chief Justice
Supreme Court of Virginia
Pat Davis Clerk of the Court of Appeals

David Beach
Supreme Court Clerk

Lois Salmon
Deputy U. S. District Court Clerk.
National Center for State Courts

Editing Staff

Carol Flango
William Fishback
Charles Campbell
Pamela Petrakis
Hillery Efkeman

Data Collection Teams

Staff                        Law Students

Henry Daley                Tom Johnson
Janice Fernette            Tom Joss
Carol Flango               Joan Kane
Kent Pankey                Patrick McGuirk
John Richardson            Patricia McKenna
                            Chuck Rohde

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Preface

Despite the intensity of long-standing controversy over the scope of federal habeas corpus review of state convictions, the amount of empirical research on the topic remains scant. This research aspires to contribute to the quality of the debate by adding empirical evidence from an extensive multi-state research effort based on habeas corpus petitions terminated in both state and federal courts in 1990 and 1992. It also responds, in part, to the Conference of Chief Justices concerns, as expressed in Resolution XI (See, Exhibit 1). All habeas corpus petitions including petitions filed by state prisoners sentenced to death, were sampled so this research is a snapshot of claims raised and court responses. The samples were independent of each other and included petitioners filing their first claims as well as those who have filed multiple petitions. One goal of the study was to determine whether reforms in state court habeas procedure were necessary to reduce the need for federal review. This research has found that the assumption of federal court critique of state convictions was overstated, few petitions were granted and so this cause of state-federal tension is ameliorated. Because habeas corpus is used as another arena in which to debate the death penalty, separate longitudinal studies of habeas corpus in death penalty are needed to untangle those issues. That research, however, should not deter habeas reform in noncapital cases.
WHEREAS, the Conference of Chief Justices has repeatedly expressed the view that duplicative and overlapping reviews of state criminal convictions by federal courts unduly prolong and conflict with state criminal proceedings without furthering the historic purposes of the writ of habeas corpus; and

WHEREAS, the Conference has repeatedly endorsed legislation which would modify federal habeas corpus procedures on petitions by state prisoners so as to lessen the heavy burden these writs place on state as well as federal courts; and

WHEREAS, the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States, whose members include four state judges, three of whom are chief justices, is studying the problems involved in administration of the writ in the federal courts and believes well designed studies could suggest solutions that could help ease tensions between state and federal courts resulting from the writ; and

WHEREAS, the Judicial Conference Committee has asked the Conference of Chief Justices to initiate studies that could: (1) help identify those factors in state criminal proceedings which increase or reduce habeas activity, and (2) provide a historical analysis of the rate at which habeas writs have been granted, analyze the evolution of the grounds for granting them, and determine whether the need for the writ is declining;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices requests the National Center for State Courts to conduct such studies of the writ of habeas corpus and to apply to the State Justice Institute for a grant for that purpose; and urges that the State Justice Institute favorable consider such an application.

Adopted as proposed by the State-Federal Relations Committee of the Conference of Chief Justices at the 41st Annual Meeting in Lake Tahoe, Nevada, on August 3, 1989.
Chapter 1
Habeas Tension Between
State and Federal Courts

The scope of federal habeas corpus is one of the most politically divisive questions of federal jurisdiction.

---Federal Courts Study Committee¹

Habeas corpus petitions challenge the constitutionality of a person's detention and request release.² Federal courts have jurisdiction over habeas petitions from state prisoners claiming they are held in custody in violation of federal law.³ Policy makers, including elected representatives to the U.S. Congress,⁴ state and federal court judges as well as legal scholars and policy activists

¹ Federal Courts Study Committee, WORKING PAPERS AND SUBCOMMITTEE REPORTS, July 1, 1990, at 468.

² The challenge is through collateral attack, which means that the remedy provides an avenue for upsetting judgment of conviction that were otherwise final. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 27.1(a) at 1010 (1985).


⁴ U.S. Senator Strom Thurmond (R-SC) introduced the "Reform of Federal Intervention in State Proceedings Act" in the 97th Congress (and several Congresses
have been engaged in a long standing debate over the appropriate scope of relief available through the writ of habeas corpus. The proposed crime bill has sparked renewed media interest in habeas corpus reform. Not only has the debate been going on for quite some time, but it "... is likely to continue, no matter what course legislation may take so long as there are state prisoners and federal courts."

Federal court review of state court convictions is particularly controversial. Those who seek to restrict the scope of the writ believe that the volume of habeas petitions is unnecessarily large, relief is denied in the vast majority of petitions, and the deterrent effect of the criminal law is undermined by lack of finality to the litigation. In an August 3, thereafter). Thurmond's bill would bar federal habeas corpus relitigation of a claim if the issue was "fully and fairly" litigated in state court. Senate Judiciary Committee Chairman Joseph R. Biden, Jr. (D-Del) has offered legislation to limit habeas corpus petitions by prison inmates (S. 1441, August 6, 1993). The Biden Bill would limit state inmates to a single federal habeas corpus petition, subject to a 180-day time limit.

5 See Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 CRIM. L. REP (BNA) (Called the Powell Committee after its Chair, retired Justice Lewis F. Powell, Jr.). The controversy over habeas corpus is part of the larger debate over state sovereignty in preserving domestic order versus federal preeminence in protecting national interests. See I. Robbins, Toward a More Just and Effective System of Review in State Death Penalty Cases 42 (American Bar Association, August, 1990), citing Judge Irving Kaufman's comment that "Nowhere are these two competing imperatives more inextricably intertwined than in a federal court's habeas corpus duties," Sanders v. Sullivan, 863 F.2d 218, 219 (2d Cir. 1988).


8 See P. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, at 451 (1963), which argues that the presumption should be against relitigation "if a job can be well done once, it should not be done
1989 resolution, the Conference of Chief Justices (CCJ) confirmed its "repeatedly expressed view" that federal habeas review of state convictions duplicates the work of state trial and appellate courts, unduly prolongs state proceedings, and causes unnecessary tension between state and federal courts. 9 Tension between state and federal courts is engendered when "a single federal judge may overturn the judgment of the highest court of a State."10 Those who oppose restriction of habeas corpus argue that a more expansive policy toward the federal review of state court convictions is essential to: safeguard federal constitutional rights in general; ensure national uniformity in the enforcement of rights; overcome the errors of ineffective counsel in state trial court proceedings; and avoid improper incarceration or, worse, execution of individual defendants.11

The roots of the current habeas controversy can be traced to an 1867 amendment by the U.S. Congress to the federal habeas corpus statutes, which authorized federal trial courts to issue writs of habeas

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9 See Exhibit 1, Conference of Chief Justices, Resolution XI, Research on Habeas Corpus.

10 Sumner v. Mata, 449 U.S. 543, 543-544 (1981). See also Schneckloth v Bustamonte 412 U.S. 218 at 263-64 (1973), quoting Massachusetts Supreme Court Justice Paul C. Reardon on the "humiliation of review from the full bench of the highest state appellate court to a single, United States District Court judge." On the other hand, some state judges have testified as to the necessity of federal oversight. Justice Garter, a former state judge, noted that the very existence of the federal writ of habeas corpus resulted in state court improvements (See Withrow v. Williams 113 S.Ct. 1745 (1993)).

11 For arguments that habeas corpus petitions in federal courts are necessary to preserve individual rights, see L. W. Yackle, Explaining Habeas Corpus 60 N.Y.U. L. REV. 991 (1985). For the argument that availability of federal habeas corpus review creates needed federal-state dialogue, see R.M. Cover & T.A. Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 YALE L. J. 1035 (1977).
Habeas Corpus in State and Federal Courts

corpus on behalf of any person in custody "in violation of the constitution" even though state authorities were responsible for the detention. For the remainder of that century and the early part of the twentieth century, habeas review was available only to challenge trial court jurisdiction.

The contemporary conflict over habeas arose in 1963, when three U.S. Supreme Court cases changed criteria for federal review of state criminal cases. After these cases, federal district courts, rather than the U.S. Supreme Court, became "the principal means through which the federal judiciary exercised authority over the state criminal process." Much of the criticism of federal court review of state court

---

12  Act of Feb 5, 1867, ch. 28 § 1, 14 Stat. 385, 385-86 (codified at 28 U.S.C. §2241). Ex parte McCordle, 73 U.S. (6 Wall.) 318, 325-26 (1868), stated that the Habeas Corpus Act of 1867 "... brings within habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."

13  Cases from this period include Ex Parte Royall, 117 U.S. 241 (1886), in which the U.S. Supreme Court held that state criminal defendants must exhaust all state remedies before seeking a writ of habeas corpus in federal court. After Moor v. Dempsey 261 U.S. 86 (1923) ordered federal courts to inquire into the merits of a due process violation, it became a collateral remedy for constitutional error.

14  Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); and Townsend v. Sain, 372 U.S. 745 (1963). Higginbotham traces the modern history of habeas to the U.S. Supreme Court decision in Brown v. Allen, 344 U.S. 443 (1953), which expanded the scope of the writ from a narrow focus on jurisdictional error to claims of constitutional error brought by prisoners in state custody. That decision empowered federal district courts to redetermine the merits of constitutional issues arising in the course of state criminal prosecutions even if the state has "corrective procedures" and the conviction was proper according to those procedures. See Higginbotham, Reflections on Reform of § 2254 Habeas Petitions, 18 Hofstra L. Rev. 1005, 1008 (1990), and Allen, Schachtman & Wilson, Federal Habeas Corpus and Its Reform: An Empirical Analysis 13 Rutgers L.J. 675, n.1 (1982).

15  D. Meador, Straightening Out Federal Review of State Criminal Cases 44 Ohio St. L.J. 273, 274 (1983). Meador added that the federal district courts "... were empowered to review any alleged federal constitutional defect in the process leading to a state criminal conviction, whether or not the defect was raised in the state proceeding and whether or not it had been passed upon by the state courts." It is
convictions came from state court judges who objected to having a conviction considered proper by a state trial court, an intermediate appellate court, and a supreme court set aside by a single federal district court judge. In the 1970s, this criticism subsided somewhat as the state courts focused on improving their capacity to apply appropriate constitutional standards to criminal cases. However, a new dimension was introduced into the debate as federal judges became increasingly dissatisfied with the scope of federal habeas review of state convictions. In a 1982 dissent Judge Richard Posner said:

important to note that since 1871 inmates have an alternative way to initiate lawsuits against state and federal prisons. The Federal Civil Rights Act, 42 U.S.C. § 1983, has been used to challenge the legality of actions by state agencies, including mental institutions, welfare departments, police agencies and prisons who deprive individuals of any federally protected rights. See Call, Recent Case Law on Overcrowded Conditions of Confinement: An Assessment of Its Impact on Facility Decisionmaking and McCoy, The Impact of Section 1983 Litigation on Policymaking in Corrections: A Malpractice Lawsuit by Any Name Would Smell as Sweet both in THE DILEMMAS OF PUNISHMENT, K.C. Haas & G. P. Alpert (eds.)


17  F.J. Remington, State Prisoner Access to Post-Conviction Relief--Assenting Role for Federal Courts: An Increasingly Important Role for State Courts, 44 Ohio St. L. J. 287 (1983). After the decision in Stone v. Powell, 428 U.S. 465 (1968), state prisoners seeking federal habeas corpus relief on Fourth Amendment grounds of illegal search and seizure would not be granted relief as long as state courts provided the prisoner with the opportunity for full and fair litigation of this claim.

18  The U.S. Supreme Court began to impose procedural requirements for habeas corpus petitions, e.g., Rose v. Lundy, 455 U.S. 509 (1982), requiring the dismissal of petitions containing both exhausted and unexhausted claims; Engle v. Isaac, 456 U.S. 107 (1982), requiring prisoners bringing a constitutional claim to federal court after state procedural default to demonstrate cause and actual prejudice before relief is granted; Marshall v. Lonberger, 259 U.S. 422 (1983), requiring federal court to conclude that state court findings lacked "fair support" in the record, rather than
Perhaps this apocalypse is already upon us. Our criminal prosecutions are becoming—to use an ugly but apt word—multiphasic. The familiar first phase comprises the criminal trial itself and any direct appeal from it. After the conviction has been affirmed, the phase of post-conviction proceedings begins—first the state post-conviction proceedings..., then federal habeas corpus and maybe, after the sentence has been served, coram nobis as well. The third phase...consists of the section 1983 lawsuits, often numerous, complaining about mistreatment or neglect by prison officials and employees. When the imagination in devising section 1983 claims, the fourth phase begins, consisting of lawsuits against the prisoner's lawyers and judges in the earlier phases....

The trend in recent years has been to restrict the scope of federal habeas corpus and thus to reduce the role of federal courts as a check on state courts. In 1990, three U.S. Supreme Court cases limited the ability of petitioners to obtain relief in federal court. In 1991, the Court ruled in *McCleskey v. Zant* that the government bears the simple disagreement with the state court, before state factual determinations are rejected.

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21  *Teague v. Lane*, 489 U.S. 288 (1990), states that with two exceptions "new rules" of constitutional law are not applicable to earlier habeas petitions pending review; *Butler v. McKellar*, 110 S. Ct. 1212 (1990), construes "new rules" broadly, and *Staffle v. Parks*, 110 S. Ct. 1257 (1990), indicates that the two exceptions to the "new rule" are to be construed narrowly.

burden of pleading abuse of the writ when a prisoner files a second or subsequent application. The failure to raise a claim in an earlier petition may be excused if the petitioner can show that a fundamental miscarriage of justice would result. That same year, the Court in *Coleman v. Thompson*\(^{23}\) held that a state prisoner's federal habeas petition should be dismissed if the prisoner had not exhausted all available state remedies to *any* of his federal claims.

In another habeas case, the Virginia assistant attorney general summarized the point as "what this case boils down to is how much does this Court trust the state courts."\(^{24}\) Other observers noted that if trust is the issue, the Court's inability to produce a majority opinion in *Wright* suggests that the answer to the assistant attorney general's question is "more than before, but not completely."\(^{25}\)

Before speculating on the possible impact of changes in the scope of federal habeas corpus jurisdiction, it is necessary to consider the context in which state prisoners file petitions in federal court. The next chapter considers the potential burden caused by state prisoners filing habeas corpus petitions in federal court.


Chapter 2
State Prisoners in Federal Courts

Trends in Federal Habeas Corpus Filings

To determine whether the more recent debates over habeas corpus jurisdiction have been triggered by a dramatic increase in filings, the starting point for this research is to examine the number of habeas corpus petitions from state prisoners filed in federal court historically. In the early 1940s, when the habeas petitions filed by state prisoners in federal district court numbered in the hundreds, federal judges spoke of an "avalanche" and "deluge" of applications.\textsuperscript{26} Figure 1 shows the number of habeas corpus petitions filed in U.S. District Courts between 1941 and 1991 by persons convicted in state courts.\textsuperscript{27} Habeas filings in federal court grew very slowly between 1941 and 1962, rose sharply to 1970 (when they reached 9,063), then leveled off until 1981, when they began to rise again, although the 1980s was a period in which the U.S. Supreme Court is believed to have narrowed the scope of the writ. The Federal Courts Study Committee said that the increase in habeas filings before 1970 can be explained by the U.S. Supreme Court's expansion of substantive constitutional protections and the scope of the habeas corpus statute.\textsuperscript{28} The sharp increase in habeas filings

\textsuperscript{26} W. Calvin Chestnut to John J. Parker, 2 April 1942, Parker Papers, Box 30 and Evan A. Evans to John J. Parker 7 May 1943, Parker Papers, Box 31 as quoted in Winkle, \textit{Judges as Lobbyists: Habeas Corpus Reform in the 1940s}. 68 \textit{Judicature} 263--265 (February-March 1985). In 1941 there were 127 habeas petitions filed in federal court; in 1942 there were 130, and in 1943 there were 269. The peak year for habeas petitions was 1944 with 605, but a number that high was not seen again until 1955. Almost without exception the petitions were deemed legally frivolous and were therefore denied.

\textsuperscript{27} Again, note that these figures do \textit{not} include habeas corpus petitions from persons convicted of federal offenses.

Figure 1: Trends in Habeas Corpus Litigation

Number of Habeas Corpus Petitions Filed in U.S. District Courts 1941 to 1989

Source: Graph is produced from data provided by the Administrative Office of the U.S. Courts.
filings began in 1962-63, after the U.S. Supreme Court expanded the writ.29

Examining habeas litigation in the context of other private, civil litigation may help determine whether some exogenous influence was affecting habeas corpus filings alone or whether the increase was part of a more general trend in litigation.

Figure 2 compares trends in private civil litigation with trends in federal habeas corpus cases in the same 50 year period.30 Habeas filings paralleled private civil litigation between 1941 and 1962, but while civil litigation continued the slow steady increase between 1962 and 1980, the habeas filings increased dramatically. Between 1980 and 1990, the rates of increase were synchronized again, but in 1989 civil filings began to decline, whereas habeas filings continued to rise.

Figure 3 compares habeas filings to the number of state prisoners incarcerated between 1961 and 1991.31 Again, the increase in habeas corpus petitions greatly outstripped the growth in prisoner populations. Taken together, the figures show that the increase in habeas corpus petitions since the early 1960s was not the result of growth in the general civil litigation or prisoner population, but had other causes. This conclusion is bolstered by Table 1 which shows habeas corpus filings as a percentage of state prisoners. The ratio of federal habeas filings to state prisoners increased steadily from a half percent in 1961 to a high of 5% in 1970 at a time when the number of state prisoners decreased slightly from 196,453 in 1961 to 168,211 in 1968. Since 1968, however, the total number of state prisoners has nearly quadrupled to 653,392 in 1989, but the proportion of habeas petitions filed to prisoners has steadily declined.32

29  The increase in habeas corpus may have been part of the general expansion of criminal defendants' constitutional rights in the 1960s.

30  Habeas corpus is a civil writ about a criminal case and is usually counted in the civil caseload.

31  Data for 1941-1961 were not available.

32  A. Blumstein, Making Rationality Relevant 31 CRIMINOLOGY 1 (1993), contends that the growth in state prison populations during the 1980s was driven in large part by increasing admissions of Blacks on drug convictions.
Figure 2: Trends in Civil Litigation and Federal Habeas Corpus, 1941-1991

Source: Graph is produced from data provided by the Administrative Office of the Courts.
Figure 3: Trends in State Prisoner Habeas Filings in U.S. District Courts and of State Prisoner Population

Source: Graph is produced from data provided by the Administrative Office of the Courts and the series Correctional Populations in the United States.
These figures show that even though a smaller proportion of prisoners overall are filing habeas corpus petitions in federal court, the increase in raw number of prisoners accounts for the increase in numbers of habeas petitions filed.

Table 1
State Prisoner Habeas Filings in U.S. District Courts as Percentage of State Prisoner Population

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of State Prisoners</th>
<th>Habeas Corpus Filings</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>196,453</td>
<td>1,020</td>
<td>0.52%</td>
</tr>
<tr>
<td>1962</td>
<td>194,886</td>
<td>1,408</td>
<td>0.72%</td>
</tr>
<tr>
<td>1963</td>
<td>194,155</td>
<td>2,106</td>
<td>1.08%</td>
</tr>
<tr>
<td>1964</td>
<td>192,627</td>
<td>3,694</td>
<td>1.92%</td>
</tr>
<tr>
<td>1965</td>
<td>189,855</td>
<td>4,845</td>
<td>2.55%</td>
</tr>
<tr>
<td>1966</td>
<td>180,409</td>
<td>5,839</td>
<td>3.24%</td>
</tr>
<tr>
<td>1967</td>
<td>175,317</td>
<td>6,201</td>
<td>3.54%</td>
</tr>
<tr>
<td>1968</td>
<td>168,211</td>
<td>6,488</td>
<td>3.86%</td>
</tr>
<tr>
<td>1969</td>
<td>176,384</td>
<td>7,359</td>
<td>4.17%</td>
</tr>
<tr>
<td>1970</td>
<td>176,391</td>
<td>9,063</td>
<td>5.14%</td>
</tr>
<tr>
<td>1971</td>
<td>177,113</td>
<td>8,372</td>
<td>4.73%</td>
</tr>
<tr>
<td>1972</td>
<td>174,379</td>
<td>7,949</td>
<td>4.56%</td>
</tr>
<tr>
<td>1973</td>
<td>181,396</td>
<td>7,784</td>
<td>4.29%</td>
</tr>
<tr>
<td>1974</td>
<td>196,105</td>
<td>7,626</td>
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</tr>
<tr>
<td>1975</td>
<td>216,462</td>
<td>7,843</td>
<td>3.62%</td>
</tr>
<tr>
<td>1976</td>
<td>235,853</td>
<td>7,833</td>
<td>3.32%</td>
</tr>
<tr>
<td>1977</td>
<td>267,936</td>
<td>6,866</td>
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</tr>
<tr>
<td>1978</td>
<td>277,473</td>
<td>7,033</td>
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</tr>
<tr>
<td>1979</td>
<td>288,086</td>
<td>7,123</td>
<td>2.47%</td>
</tr>
<tr>
<td>1980</td>
<td>305,458</td>
<td>7,031</td>
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</tr>
<tr>
<td>1981</td>
<td>341,255</td>
<td>7,790</td>
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</tr>
<tr>
<td>1982</td>
<td>384,689</td>
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</tr>
<tr>
<td>1983</td>
<td>405,312</td>
<td>8,492</td>
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</tr>
<tr>
<td>1984</td>
<td>427,739</td>
<td>8,309</td>
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</tr>
<tr>
<td>1985</td>
<td>462,284</td>
<td>8,482</td>
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<tr>
<td>1986</td>
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<td>9,012</td>
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<tr>
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<td>536,784</td>
<td>9,480</td>
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<tr>
<td>1988</td>
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<td>9,852</td>
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<tr>
<td>1989</td>
<td>653,392</td>
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<td>1.61%</td>
</tr>
<tr>
<td>1990</td>
<td>635,974</td>
<td>10,809</td>
<td>1.70%</td>
</tr>
<tr>
<td>1991</td>
<td>752,525</td>
<td>10,323</td>
<td>1.00%</td>
</tr>
</tbody>
</table>
The figures presented above reflect the aggregate trends in filings of habeas corpus petitions, but do not provide any indication of what impact the number of state convictions had on variations in filings. Are these general trends in habeas filings consistent nationwide, or do they vary by state or region?

For example, it would not be surprising if habeas filings were a function of state population. If so, the larger states would have a greater number of habeas petitions filed in federal courts, just as they would have larger numbers of filings in general. That is indeed the case. Because the states are arranged in population order in Figure 4, the habeas filing figures for 1990 should follow a descending pattern if habeas petitions were filed in exact proportion to state population. That this descending pattern is not strictly followed indicates that factors other than population size are governing habeas filings. Figure 4 shows that filings generally follow population, but not strictly. Several of the larger states, including New York, Illinois, and Ohio, have fewer habeas corpus petitions filed in federal court than would be expected based upon population alone. Several other states, including Missouri, Alabama, and Louisiana, have more habeas petitions filed that one would expect based upon population. Over all, more than half (54 percent) of all habeas petitions filed in 1990 were from U.S. District Courts in nine states: California, Texas, New York, Florida, Pennsylvania, Alabama, Missouri, Louisiana, and Michigan. These nine states averaged 645 habeas petitions each, compared with an average of 116 petitions in the remaining 41 states plus the District of Columbia and Commonwealth of Puerto Rico.

However, it could be argued that the number of state prisoners, rather than general state population, is a more appropriate standard of comparison. Figure 5 is comparable to Figure 4 except that states

33 While population and state prisoner population are highly correlated at .97, they are not identical measures. Regression analysis indicates that habeas corpus petitions filed in federal court are more closely related to prisoner populations than to state populations in general.
**FIGURE 4**

HABEAS CORPUS FILINGS IN
U.S. DISTRICT COURTS BY STATE -- 1990
(States arranged in population order.)

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<th>State</th>
<th>Filings</th>
</tr>
</thead>
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</tr>
<tr>
<td>New York</td>
<td>918</td>
</tr>
<tr>
<td>Texas</td>
<td>663</td>
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<tr>
<td>Florida</td>
<td>589</td>
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<td>Pennsylvania</td>
<td>590</td>
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<tr>
<td>Illinois</td>
<td>303</td>
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<tr>
<td>Ohio</td>
<td>411</td>
</tr>
<tr>
<td>Michigan</td>
<td>190</td>
</tr>
<tr>
<td>New Jersey</td>
<td>130</td>
</tr>
<tr>
<td>North Carolina</td>
<td>236</td>
</tr>
<tr>
<td>Georgia</td>
<td>242</td>
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<td>Massachusetts</td>
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<td>Wisconsin</td>
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<tr>
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<td>462</td>
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<tr>
<td>Minnesota</td>
<td>562</td>
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<tr>
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<td>281</td>
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<td>Alabama</td>
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<tr>
<td>Oregon</td>
<td>103</td>
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<tr>
<td>Iowa</td>
<td>93</td>
</tr>
<tr>
<td>Mississippi</td>
<td>210</td>
</tr>
<tr>
<td>Kansas</td>
<td>57</td>
</tr>
<tr>
<td>West Virginia</td>
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<tr>
<td>Utah</td>
<td>62</td>
</tr>
<tr>
<td>Nebraska</td>
<td>65</td>
</tr>
<tr>
<td>New Mexico</td>
<td>25</td>
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<tr>
<td>Maine</td>
<td>145</td>
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<tr>
<td>Nevada</td>
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<tr>
<td>New Hampshire</td>
<td>61</td>
</tr>
<tr>
<td>Hawaii</td>
<td>25</td>
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<tr>
<td>Idaho</td>
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<tr>
<td>Montana</td>
<td>29</td>
</tr>
<tr>
<td>South Dakota</td>
<td>24</td>
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<tr>
<td>Delaware</td>
<td>66</td>
</tr>
<tr>
<td>North Dakota</td>
<td>9</td>
</tr>
<tr>
<td>D.C.</td>
<td>60</td>
</tr>
<tr>
<td>Vermont</td>
<td>16</td>
</tr>
<tr>
<td>Alaska</td>
<td>27</td>
</tr>
<tr>
<td>Wyoming</td>
<td>17</td>
</tr>
</tbody>
</table>

Habeas Filings
### Chapter 2: State Prisoners in Federal Courts

**Figure 5**

**Habeas Corpus Filings in U.S. District Courts by State – 1990**

(States arranged by prisoner population.)

<table>
<thead>
<tr>
<th>State</th>
<th>Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>1,070</td>
</tr>
<tr>
<td>New York</td>
<td>663</td>
</tr>
<tr>
<td>Texas</td>
<td>93</td>
</tr>
<tr>
<td>Florida</td>
<td>559</td>
</tr>
<tr>
<td>Ohio</td>
<td>411</td>
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<tr>
<td>Michigan</td>
<td>303</td>
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<tr>
<td>Illinois</td>
<td>290</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>236</td>
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<tr>
<td>Georgia</td>
<td>225</td>
</tr>
<tr>
<td>North Carolina</td>
<td>210</td>
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<tr>
<td>Maryland</td>
<td>190</td>
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<tr>
<td>New Jersey</td>
<td>190</td>
</tr>
<tr>
<td>South Carolina</td>
<td>190</td>
</tr>
<tr>
<td>Missouri</td>
<td>1,539</td>
</tr>
<tr>
<td>Virginia</td>
<td>242</td>
</tr>
<tr>
<td>Louisiana</td>
<td>295</td>
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<tr>
<td>Arizona</td>
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<td>Alabama</td>
<td>326</td>
</tr>
<tr>
<td>Indiana</td>
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<tr>
<td>Oklahoma</td>
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<td>Connecticut</td>
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<td>Tennessee</td>
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<td>Massachusetts</td>
<td>60</td>
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<td>D.C.</td>
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<tr>
<td>Hawaii</td>
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<td>Rhode Island</td>
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<td>North Dakota</td>
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</table>

0 200 400 600 800 1,000 1,200

Habeas Filings
are arranged in order of the number of state prisoners. A strong plurality of prisoners, 41 percent, are found in just six states: California, New York, Texas, Florida, Ohio, and Illinois, but these have 35 percent of the habeas petitions filed in 1990. Table 2 explains this phenomenon by showing prisoner petitions as a percentage of state prisoners. (It also shows variation by federal district within states.) Overall, two habeas petitions are filed for every 100 prisoners, but this ratio does vary by state. Among the states with the largest prisoner populations, California, New York, and Florida have comparatively fewer habeas petitions filed in federal court than do other states (fewer than 1 petition for every 100 prisoners). Alabama has the highest rate of filings in federal court (an average of 5 petitions per 100 prisoners).

Table 2

1990 Prisoners and Filing Percentages by State

<table>
<thead>
<tr>
<th>States</th>
<th>Dist.</th>
<th>Habeas Filings</th>
<th>Number Prisoners</th>
<th>%</th>
<th>States</th>
<th>Dist.</th>
<th>Habeas Filings</th>
<th>Number Prisoners</th>
<th>%</th>
</tr>
</thead>
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<td></td>
<td>562</td>
<td>12,385</td>
<td>5%</td>
<td>Florida</td>
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<td>589</td>
<td>40,028</td>
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<tr>
<td></td>
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<td>265</td>
<td></td>
<td></td>
<td></td>
<td>N</td>
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<td>2,493</td>
<td>1%</td>
<td>Georgia</td>
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<td>236</td>
<td>18,131</td>
<td>1%</td>
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</tr>
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<td>Number Prisoners</td>
<td>%</td>
<td>States</td>
<td>Habeas Filings</td>
<td>Number Prisoners</td>
<td>%</td>
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<td>3%</td>
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</tr>
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<td></td>
<td></td>
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<td>7,870</td>
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<td>1,251</td>
<td>2%</td>
<td></td>
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</tr>
<tr>
<td></td>
<td>W 168</td>
<td></td>
<td>1%</td>
<td>Tennessee</td>
<td>303</td>
<td>8,250</td>
<td>4%</td>
<td></td>
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</tr>
<tr>
<td>Minnesota</td>
<td>50</td>
<td>3,175</td>
<td>1%</td>
<td></td>
<td>E 156</td>
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<tr>
<td>Mississippi</td>
<td>103</td>
<td>6,890</td>
<td></td>
<td></td>
<td>M 78</td>
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<td>W 69</td>
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<tr>
<td></td>
<td>S 59</td>
<td></td>
<td>2%</td>
<td>Texas</td>
<td>918</td>
<td>47,837</td>
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<td>539</td>
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<td>N 332</td>
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<tr>
<td></td>
<td>W 227</td>
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<td></td>
<td>S 326</td>
<td></td>
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</tr>
<tr>
<td>Montana</td>
<td>29</td>
<td>1,247</td>
<td></td>
<td></td>
<td>W 135</td>
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</tr>
<tr>
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<td>62</td>
<td>2,322</td>
<td>4%</td>
<td>Utah</td>
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<td>2,705</td>
<td>1%</td>
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<tr>
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<td>145</td>
<td>5,548</td>
<td></td>
<td>Vermont</td>
<td>16</td>
<td>791</td>
<td>2%</td>
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<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>17</td>
<td>1,354</td>
<td>2%</td>
<td>Virginia</td>
<td>242</td>
<td>14,192</td>
<td>2%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>190</td>
<td>15,689</td>
<td>3%</td>
<td></td>
<td>E 177</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>65</td>
<td>3,061</td>
<td>3%</td>
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<td>W 65</td>
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<tr>
<td>New York</td>
<td>663</td>
<td>53,359</td>
<td>1%</td>
<td>Washington</td>
<td>195</td>
<td>6,869</td>
<td>3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N 83</td>
<td></td>
<td>1%</td>
<td></td>
<td>E 87</td>
<td></td>
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<tr>
<td></td>
<td>E 232</td>
<td></td>
<td>2%</td>
<td></td>
<td>W 108</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>S 256</td>
<td></td>
<td>1%</td>
<td>West Virginia</td>
<td>57</td>
<td>1,511</td>
<td>4%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>W 92</td>
<td></td>
<td></td>
<td></td>
<td>N 34</td>
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<td></td>
<td></td>
<td></td>
<td>S 23</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>130</td>
<td>18,062</td>
<td></td>
<td>Wisconsin</td>
<td>145</td>
<td>6,516</td>
<td>2%</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>E 60</td>
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<td>M 54</td>
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<td>W 61</td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>W 16</td>
<td></td>
<td></td>
<td>Wyoming</td>
<td>7</td>
<td>1,181</td>
<td>1%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>9</td>
<td>558</td>
<td>2%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>303</td>
<td>32,124</td>
<td>1%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N 190</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td></td>
<td>S 113</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>10,809</td>
<td>635,974</td>
<td>2%</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
Looked at another way, Figure 6 shows the ratio of habeas corpus filings to prisoners. In Alabama, one petition is filed for every 22 state prisoners, whereas in Rhode Island one petition is filed for every 312 prisoners. The average number of prisoners to filings is one per 59 prisoners in Kansas and Virginia. Although Figure 6 presents a different perspective, it may be misinterpreted because of the unlikelihood that one petition is filed from each set of 59 prisoners. A more realistic explanation is that one prisoner in 118 has filed two habeas petitions.\footnote{The data for 1990 may be persuasive, but the astute reader might wonder if that year was representative enough to base conclusions on. The conclusions drawn using 1990 data hold for other recent years as well. The correlations between federal habeas cases filed by state between 1990: and 1991 is .98; and 1989 is .98; and 1988 is .97; and 1987 is .95; and 1986 is .94; and 1985 is .93; and 1984 is .92, etc. Indeed all of the intercorrelations between 1977 and 1990 are high (all above .80). A Kendall Coefficient of Concordance is used to compare two sets of rankings, in this instance the extent to which states have preserved their relative ranking with respect to habeas filings from year to year. That measure also indicates consistency in the relative number of petitions. Kendall's W. is .94 between 1970 and 1991; .96 between 1970 and 1976; .96 between 1977 and 1984; and .97 between 1985 and 1991. A description of Kendall's Coefficient of Concordance can be found in S. Siegel, NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES, p. 229.}

Federal courts receive a significant number of habeas corpus petitions in only about nine states. In the other 43 states (including the District of Columbia and the Commonwealth of Puerto Rico), the number of petitions from state prisoners filed in federal courts is relatively small. Consequently, the volume of habeas petitions filed is large only in U.S. District Courts in specific states.

Moreover, habeas petitions are not a large proportion of federal caseload. In 1992 habeas cases represented 4.7 percent of civil cases terminated in federal courts.\footnote{Figures provided by the Administrative Office of U.S. Courts (10,688 habeas corpus terminations from a total of 226,596 civil terminations). The 4.7 percent proportion for calendar year 1992 is identical to the proportion for calendar year 1990.}
Chapter 2: State Prisoners in Federal Courts

Note: State are arranged in order of habeas filings per number of prisoners.
time than other cases. In calendar year 1990, for example, there were 10,125 habeas petitions terminated by all federal district courts in the United States. Of these, 10.8 percent (1,093) were terminated without any court action, and another 87.4 percent (8,849) were terminated before trial, which generally means they were dismissed. Consequently, over 98 percent of these habeas petitions took relatively little judge time. Of the remaining cases, 63 were decided during pretrial and 120 went to trial, which in the federal classification scheme simply means a contested action. Of the 120 trials, a third came from the Middle District of Alabama and another third came from the Arkansas Districts (Eastern and Western).

It should be noted, however, while many habeas petitions require modest amounts of judge time, they require staff time to screen for constitutional violations and to determine whether counsel should be appointed. Most petitions are filed without assistance of counsel and are handwritten. Identifying the issues can be time consuming and tedious. The care taken with petitions from prisoners under sentence of death, obviously requires much more time than other habeas petitions. Indeed, U.S. District Courts often have special staff, "death penalty" clerks, to track the legal cause of prisoners sentenced to death. These concerns will be discussed specifically in Chapter 7.

**Summary**

Federal review of state court convictions is a point of conflict between state and federal courts and has been for some time. Some state judges resent the presumption of state court incompetence implicit in federal review. Looking at habeas corpus petitions filed over a 40-year period, it is clear that the federal court review of state convictions began in earnest in 1963 when the U.S. District Courts, rather than the U.S. Supreme Court, became the primary means of federal court review of state court judgments. Even though the number of state prisoners has nearly quadrupled in the past 25 years, the rate of habeas filings per prisoner has declined steadily. The Federal Courts Study Committee attributes the decline to Supreme Court decisions that make habeas
more difficult to obtain. The volume of habeas petitions from state prisoners is generated largely by convictions in nine states. These petitions generate work for magistrate judges because they must be reviewed for constitutional violations, but petitions are not a large portion of U.S. District Courts caseloads, and the vast majority are dismissed. These conclusions apply to the ordinary habeas corpus petition filed by a state prisoner in U.S. District Court, not to petitions from prisoners sentenced to death. Petitions in capital cases require special handling and are discussed separately in Chapter 7.

Federal Courts Study Committee, supra note 1 at 471. The Committee also notes that lack of prisoner success in obtaining habeas review combined with liberalizing of Section 1983 prisoner petitions, which may also have "deflected" prisoner attention from habeas corpus petitions to civil rights suits, are other reasons for the decline in petitions per prisoner.
Many of the important points of contention in the current debate about habeas corpus are empirical questions, yet the amount of data brought to bear on these issues is slight. Shapiro decried the lack of empirical studies on habeas corpus 20 years ago, and only two empirically-based works have been written since that time. The current research is only the second multisite study of habeas corpus ever completed. Shapiro's research was conducted in the U.S. District Court in the District of Massachusetts for the years ending June 30, 1970, 1971, and 1972, and the Faust, Rubenstein, and Yackle research was based on data from the U.S. District Court, Southern District of New York for the time periods 1973-75 and 1979-81. A study by Robinson for the Department of Justice, completed in 1979, was the only study prior to this one to use data from more than one U.S. District Court. None of the previous empirical studies included a comparison group of state court habeas petitions. All of the prior empirical studies relied solely upon data from federal courts. Arguments by Posner cited in Chapter 1, such as the one that prisoners are "overly litigious," could be influenced by the more

37 Shapiro, supra note 7.

38 P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments (Washington, D.C.: Federal Justice Research Program, Office for Improvements in the Administration of Justice, 1979) and Faust, Rubenstein, & Yackle, supra note 3, at 638 noted that the "ideological debate over habeas has not often been informed by hard evidence."

39 Ibid. U.S. Districts included in this sample included the Central District of California, the Northern District of Illinois, the Eastern District of Virginia, and the District of New Jersey. The Southern District of California was added to determine if there were differences between large and small districts within the same state.
numerous claims brought by federal prisoners\textsuperscript{40} or because they only encounter petitions from state prisoners who litigate in federal court, and do not see the comparable set of habeas corpus petitions that were \textbf{not} appealed to federal court.\textsuperscript{41}

A classic experimental design was considered as a methodological approach to this research, but ultimately modified to a quasi-experimental design.\textsuperscript{42} Ideally, it would be desirable to track the same set of cases from state court to federal court to facilitate the comparison of the claims raised in federal court with those raised earlier in state court. The problem with this design is that it is impossible to obtain a pure sample of cases that were not appealed to federal court. Because there is currently no time limit governing when a state prisoner may file a habeas corpus petition in federal court, the possibility of filing in federal court always exists.\textsuperscript{43} Besides, the time required to track cases through state and federal courts would be prohibitive. An involved case, such as Robert Alton Harris, took 13 years, making a longitudinal study

\textsuperscript{40} M. Galanter, \textit{The Day after the Litigation Explosion}, 46 Md. L. Rev. 3 at 18 n.54 (1986).

\textsuperscript{41} Only a few states report the number of habeas corpus petitions filed or disposed as a separate case category. Data from the California Administrative Office of Courts showed that 9,415 petitions were filed in California Superior Court in 1990, while that same year 1,070 habeas petitions were filed in all U.S. District Courts in California. Habeas corpus filings in California have been declining steadily from a high of approximately 15,000 in 1980. \textit{Judicial Council of California, 1991 Annual Report}, Vol. II, (San Francisco: Administrative Office of the Courts, 1991), p.48. In smaller states, the habeas filings in U.S. District Court and state courts of general jurisdiction are roughly equivalent, but small. Examples from 1990 include Connecticut Superior Court 246, U.S. District Court 75; Nebraska District Court 59, U.S. District Court 63; Utah District Court 129, U.S. District Court 24; and Washington Superior Court 114; U.S. District Court 195.


\textsuperscript{43} In affirming a grant of relief from a 24-year old conviction, the U.S. Supreme Court said in \textit{Vasquez v. Hillery}, 106 S. Ct. 617, 624 (1986) "There is not at present a fixed statute of limitation for filing federal habeas corpus petitions." \textit{In Heflin v. United States}, 358 U.S. 415, 420 (1959) the Court said "… in habeas corpus, there is no statute of limitations."
impractical unless a sample of cases were drawn at conclusion, whether that be execution, clemency or reduction of sentence to life imprisonment, and the procedural history traced backwards. This is a viable option for studying petitions in cases involving the death penalty. However, this research was designed to cover all habeas petitions disposed in state and federal court at two separate time periods and so is a snapshot of petitions rather than an historical picture of habeas corpus. Consequently, separate state and federal samples were appropriate.

**Sites**

The Advisory Committee to this research effort recommended that staff use states, rather than federal districts, as units of analysis. The Committee also recommended the following criteria be used for site selection:

- absolute number of habeas petitions filed in federal court. In effect this criterion mandated the selection of larger states which would have sufficient petitions filed from which to draw a representative sample;
- the proportion of habeas petitions to state prisoner populations;
- geographic diversity among sites chosen to represent different regions of the country;
- states with a death penalty and states without a death penalty; and
- states having the court records necessary to complete the study.

Data on the first four selection criteria are presented in Table 3.
Table 3

Site Selection Criteria

<table>
<thead>
<tr>
<th>Possible Sites</th>
<th>Sufficient Number of Habeas Corpus Filings in U.S. District Court by State - 1990</th>
<th>Habeas Corpus Petitions as Percentage of Prisoners</th>
<th>Death Penalty</th>
<th>Prisoners under Sentence of Death, April 1991</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. California</td>
<td>1,070</td>
<td>1%</td>
<td>yes</td>
<td>299</td>
</tr>
<tr>
<td>2. New York</td>
<td>663</td>
<td>1%</td>
<td>no</td>
<td>0</td>
</tr>
<tr>
<td>3. Texas</td>
<td>918</td>
<td>2%</td>
<td>yes</td>
<td>335</td>
</tr>
<tr>
<td>4. Florida</td>
<td>589</td>
<td>1%</td>
<td>yes</td>
<td>295</td>
</tr>
<tr>
<td>5. Pennsylvania</td>
<td>590</td>
<td>3%</td>
<td>yes</td>
<td>132</td>
</tr>
<tr>
<td>6. Michigan</td>
<td>411</td>
<td>1%</td>
<td>no</td>
<td>0</td>
</tr>
<tr>
<td>7. Ohio</td>
<td>303</td>
<td>1%</td>
<td>yes</td>
<td>99</td>
</tr>
<tr>
<td>8. Missouri</td>
<td>539</td>
<td>4%</td>
<td>yes</td>
<td>73</td>
</tr>
<tr>
<td>9. Indiana</td>
<td>356</td>
<td>3%</td>
<td>yes</td>
<td>53</td>
</tr>
<tr>
<td>10. Tennessee</td>
<td>303</td>
<td>4%</td>
<td>yes</td>
<td>85</td>
</tr>
<tr>
<td>11. Louisiana</td>
<td>462</td>
<td>3%</td>
<td>yes</td>
<td>34</td>
</tr>
<tr>
<td>12. Alabama</td>
<td>562</td>
<td>5%</td>
<td>yes</td>
<td>109</td>
</tr>
<tr>
<td>13. Kentucky</td>
<td>281</td>
<td>4%</td>
<td>yes</td>
<td>27</td>
</tr>
</tbody>
</table>

Given these parameters, the four states chosen for the study were: California, New York, Texas and Alabama. All had sufficient numbers of petitions filed in federal courts and taken together represent geographic diversity. Alabama had the highest ratio of habeas corpus petitions filed to prisoner population.44

44 States above the dotted line are the 12 states actively considered for the sample. Kentucky was listed as a reserve site in the event four sites could not be chosen from the 12. Michigan and Pennsylvania were seriously considered as sites. Michigan was attractive because of the ready access to records by staff already working there and because Michigan does not have a death penalty. Examination of records on site, however, revealed that too few cases were filed in state court to warrant inclusion in the study. For example, in Wayne County only 46 habeas petitions were filed in 1991, and only 24 were filed in Ingham County, the state capital. Habeas cannot be used to challenge a conviction in Michigan and there is virtually an
Table 4

Research Sites

<table>
<thead>
<tr>
<th>State Courts</th>
<th>Case Sample</th>
<th>Federal Courts</th>
<th>Case Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>U.S. District Courts:</td>
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</tr>
<tr>
<td></td>
<td></td>
<td>Middle District of Alabama</td>
<td>258</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Southern District of Alabama</td>
<td>45</td>
</tr>
<tr>
<td>Alabama Court of Criminal Appeals</td>
<td>381</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Supreme Court of California</td>
<td>507</td>
<td>Northern District of California</td>
<td>152</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Eastern District of California</td>
<td>156</td>
</tr>
<tr>
<td>Supreme Court of the State of New York Appellate Division, First Judicial Department</td>
<td>35</td>
<td>Southern District of New York</td>
<td>213</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Eastern District of New York</td>
<td>274</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Supreme Court of New York, Wyoming County</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Texas Court of Criminal Appeals</td>
<td>640</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Northern District of Texas</td>
<td>136</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Southern District of Texas</td>
<td>392</td>
</tr>
<tr>
<td>Totals</td>
<td>1,835</td>
<td></td>
<td>1,626</td>
</tr>
</tbody>
</table>

Table 4 shows number of petitions drawn from habeas corpus petitions disposed in both state and federal courts in each of the four states. Samples of habeas petitions were drawn from the state's highest criminal courts to ensure a sample that was representative of petitions disposed in the entire state. The exception was New York, where the court of last resort, the Court of Appeals, had very few petitions disposed, so the sample was drawn in the intermediate appellate courts and one trial court. Staff had expected to find many habeas petitions automatic right to appeal to the Court of Appeals. Consequently, there were only six cases appealed to the Court of Appeals in 1989, 12 in 1990, and 12 in 1991. Pennsylvania is similar to Michigan in that the vast majority of habeas petitions are brought under the Post Conviction Relief Act. There are few habeas petitions per se and records kept in trial courts do not identify habeas petitions from other cases separately.
disposed in the densely populated Manhattan and Brooklyn areas and were surprised at the relative small number of petitions. Court personnel suggested that because few prisons are located within the city, prisoners may be filing petitions in the jurisdictions where they are incarcerated. Wyoming County, the location of Attica Prison, was then included as a site, but very few petitions were available there either. This indicates that New York state courts in general do not receive an abundance of habeas filings, perhaps because other postconviction remedies are available (although also not frequently used), all prisoners are given one direct review, and because New York, alone among the sites in the study, does not have the death penalty.

This interpretation is strengthened by experience in another state. In Michigan all habeas corpus cases filed in federal court by state prisoners go through the Attorney General's Office, except in Wayne County where prosecutors have the option of filing directly. The Attorney General reviews petitions for exhaustion, procedural default, and abuse of process. The Department of Corrections screens habeas petitions and Section 1983 civil rights petitions. The number of habeas petitions filed in state court in Michigan is relatively small because habeas cannot be used to challenge the conviction and counsel is not provided. There is virtually an automatic right to appeal to the Court of Appeals. The defense bar is active. Michigan has good grievance procedures, and administrative remedies must be exhausted before court action can be taken. Consequently, a request for a rehearing would be made before habeas is filed. Finally, like New York, Michigan does not have the death penalty.

Creating a comparison group of state habeas cases was more difficult than anticipated. In California and Texas writs of habeas corpus are the primary postjudgment remedies. In New York and Alabama, however, many of the actions brought in federal courts as habeas corpus petitions granted by the state Court of Criminal Appeals were oversampled because granted petitions were stored separately from petitions that were denied or dismissed. The rate of granting petitions is so low in all courts that a large sample of petitions granted would facilitate analysis of the reasons why petitions were granted. The number of habeas corpus petitions filed in death penalty cases before the California Supreme Court was also oversampled for similar reasons.
habeas corpus petitions are brought in state court by other postconviction remedies. To facilitate meaningful comparisons among sites, data was collected on Rule 440 petitions in New York and Rule 32 petitions in Alabama as well as habeas petitions filed in all courts.\footnote{In New York, the habeas petition itself is used primarily to challenge bail. Other procedures used to make claims would be habeas claims in other states or in federal court. Some of these grounds, (e.g. failure to seek continuances), may entitle petitioners to a new trial, but not to be released as a habeas corpus remedy would provide. N.Y. [CRIM. PROC.] Law §440 (Consol. 1970). §440.10 motions to vacate judgment provides that the court may vacate the judgment upon the motion of the defendant if: 1) the court did not have jurisdiction of the action or of the person of the defendant; 2) the judgment was procured by duress, misrepresentation or fraud on the part of the court, prosecutor, or a person acting on behalf of the court or a prosecutor; 3) material evidence adduced at the trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecution or by the court to be false; 4) material evidence presented by the prosecution at trial was procured in violation of the defendant's rights under the New York state Constitution or the United States Constitution; 5) during the proceedings which resulted in judgment against the defendant, the defendant was incapable of understanding or participating in such proceedings; 6) improper and prejudicial conduct not appearing in the record occurred during the trial which resulted in the judgment, if this conduct had appeared in the record it would have required a reversal of judgment upon an appeal therefrom; 7) new evidence has been discovered since the entry of the guilty judgment, which could not have been produced by the defendant at the trial even with due diligence on his part and if the evidence had been received at trial the verdict would have been more favorable to the defendant; provided that a motion based upon this ground must be made with due diligence after the discovery of such alleged new evidence; or 8) the judgment was obtained in violation of a right of the defendant under the New York State Constitution or the United States Constitution. N.Y. [Crim. Pro. §440.10] Law (Consol. 1970). There is no statute of limitations on any of the 440 motions. Id., Practice Commentary by Joseph W. Bellacosa at 320. counsel. See People v. Prentice, 459 N.Y.S.2d 194, 91 A.D.2d 1202 (1983), in which the court states that any claim that the defendant was deprived of effective assistance of counsel should be resolved by the trial court on motion to vacate judgment. New York Civil Rule 440 is used to claim ineffective assistance of counsel and petitioners may use article 78 to challenge decisions of the parole board. Because every defendant has one automatic appeal, many issues raised in habeas petitions in other states can be addressed on direct appeal here known at the time of trial or sentencing and would have, if known, change the result. Alabama also has an alternative postconviction remedy in Rule 32, Rules of Criminal Procedure, formerly Rule 20 modified slightly. Any defendant convicted of a criminal offense may seek relief if the sentence imposed exceeds the maximum...
Pretest

The Advisory Committee helped staff identify the data elements required to test key propositions. A coding sheet of minimum essential data elements was prepared, reviewed by the Advisory Committee, refined, and pretested in Arizona. The final version of the data collection instrument is presented here as Appendix A. Data collectors were trained by having them code habeas cases in Virginia.

In addition to testing the data collection instrument, the pretest enabled staff to review the data collection approach. Lessons learned in Arizona and their implications for the research design included:

1. Many petitions from state prisoners do not reach federal courts, but there is no way to determine how many petitioners never file in federal courts. Some possible reasons state prisoners may not file in federal court include:

   • most prisoners who have sentences under five years do not have the time to exhaust lengthy appeals in state courts and then to undertake further habeas litigation in federal courts.
   • petitioners tend not to have counsel. The state does not assign counsel to prisoners who have already had two reviews of their conviction.
   • counsel provided to represent prisoners in state courts do not represent them at the federal level.

   Implication: Conditions under which counsel are appointed initially and for successive petitions must be determined in each site.

authorized by law or if newly discovered material facts exist and were not known at the time of trial or sentencing and would have, if known, change the result. Rule 32 forbids successive petitions, thus, many Rule 32 petitions tend to raise multiple claims.
2. Despite recent decisions by the U.S. Supreme Court restricting the scope of federal habeas corpus,\textsuperscript{47} petitioners still have an incentive to raise the issue of ineffective counsel, or they cannot raise other issues not raised earlier or argue new evidence.

\textit{Implication: Most petitions will raise the issue of ineffective assistance of counsel and so collection forms must permit multiple coding of claims raised.}

3. Habeas procedures in capital cases are significantly different from habeas petitions in other cases. Habeas petitions involving the death penalty:

\begin{itemize}
  \item bypass the intermediate appellate court on direct appeal and are filed with the Supreme Court,
  \item are the only type of case that is separately tracked by the Arizona Supreme Court, and
  \item federal courts also devote resources to the tracking of habeas cases involving the death penalty to the extent that a "death penalty" clerk is employed by the U.S. District Court in Phoenix.
\end{itemize}

The policy interest in habeas petitions involving the death penalty is much greater at both the state and federal level than interest in any other habeas petitions, including those sentences of life imprisonment with no possibility of parole.

\textit{Implication: A separate data collection strategy for death penalty cases should be established.}

\textsuperscript{47} \textit{Teague v. Lane, supra} note 21; \textit{McCleskey v. Zant, supra} note 22 and \textit{Coleman v. Thompson, supra} note 23.
4. In Arizona, the Supreme Court memo decisions give the grounds for petitions that are granted. If the petition is denied, the grounds must be obtained from the decisions of the Court of Appeal.

_Implication:_ The proportion of habeas petitions being granted in the state courts is small, and the grounds on which they are denied are unknown, especially in noncapital cases.

5. Procedures differ within states as well as among states.

_Implication:_ Data on case characteristics, particularly the offense, sentence, disposition, and counsel, must be collected at the trial court level, in the opinion of a direct appeal or a habeas review at the intermediate appellate level, and sometimes from the opinion of the Supreme Court for cases that are accepted, but not granted relief.
Chapter 4
Petitioners' Characteristics

What type of prisoners file habeas corpus petitions? As noted in the pretest, only prisoners sentenced to a fairly long term have time to complete the rather lengthy procedures prerequisite to filing a habeas corpus petition. As a consequence of being convicted of a relatively serious offense after a jury trial, it is not surprising that the length of the sentences of habeas petitioners is relatively long, with median times ranging from a minimum sentence of 24 years to a maximum of 30 years in state courts, and 16 to 24 years for petitioners in federal courts.

Prior research shows that most habeas petitioners have been convicted of a serious offense. The percentages differ somewhat because prior studies recorded multiple offenses, and so do not sum to 100 percent.

Table 5
Habeas Petitioners by Original Offense

<table>
<thead>
<tr>
<th>Convictions</th>
<th>State</th>
<th>Federal</th>
<th>Robinson</th>
<th>Faust et al.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homicide</td>
<td>30%</td>
<td>22%</td>
<td>21%</td>
<td>29%</td>
</tr>
<tr>
<td>Robbery</td>
<td>18%</td>
<td>22%</td>
<td>23%</td>
<td>30%</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>10%</td>
<td>9%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault</td>
<td>5%</td>
<td>7%</td>
<td>13%</td>
<td>11%</td>
</tr>
<tr>
<td>Burglary/Theft</td>
<td>16%</td>
<td>13%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drug Offenses</td>
<td>12%</td>
<td>15%</td>
<td></td>
<td>12%</td>
</tr>
<tr>
<td>Other</td>
<td>10%</td>
<td>12%</td>
<td></td>
<td>55%</td>
</tr>
<tr>
<td>Number of Petitions</td>
<td>1,569</td>
<td>1,484</td>
<td>1,899</td>
<td>585</td>
</tr>
</tbody>
</table>

This study counted only the most serious offenses. Nevertheless, it certainly confirms the conclusion of prior work that

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49 P. Robinson, supra note 38, at 7.

habeas petitioners were likely to be convicted of serious offenses. Moreover, they are much more likely to have been convicted at trial. Research in 26 urban areas reveals that the jury trial rate for felonies averages 6 percent, yet the majority of habeas petitioners were convicted by jury trial (62 percent of the state court sample and 66 percent of the federal court sample). Convictions by jury trial are much more prevalent than convictions by bench trial (4 percent of the state sample; 8 percent of the federal); guilty plea (32 percent of the state sample; 24 percent of the federal) or nolo contendere (3 percent of the state sample and 2 percent of the federal). Because a very high proportion of convictions are achieved by pleas of guilty, a greater representation of guilty pleas among habeas petitioners may have been expected. However, while guilty pleas do not prevent filing of a habeas petition, they may reduce the number of issues over which the petitioner may complain. Robinson also suggests that petitioners may believe their chances of a successful habeas petition are reduced after a guilty plea because it is less convincing to maintain innocence after pleading guilty. In any event, it is clear that habeas petitions are not used by a representative sample of all convicted state prisoners, but rather by the smaller proportion in custody as a result of a jury trial conviction for a serious offense.

Perhaps also as a consequence of the seriousness of the offense, petitioners were likely to have been represented in state court during the original trial. Data on type of attorney was the single most difficult characteristic to find in the transcripts, and half of the habeas records reviewed had no information on the type of representation the convicted individual received at trial. The data that are available (for 894 petitioners out of 1,835) reveal that 64 percent of the petitioners in state court received court-appointed counsel, 9 percent had public defenders, 51 J. Goerdt, EXAMINING COURT DELAY, National Center for State Courts 1989 at 68. These figures comport well with the state figures in Court Statistics Project, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1988 (Williamsburg, Va.: National Center for State Courts, 1990), at 56 which reports felony jury trial rates from 12 states. These rates range from 2.1 percent in Texas to 6.9 percent in Alaska.

52 P. Robinson, supra note 38, at 8.
19 percent had contract attorneys, and 8 percent represented themselves (pro se). Of the 1,093 petitioners in federal court for whom data were available, 70 percent had court appointed counsel in the trial court, an additional 8 percent used public defenders, 12 percent had contract attorneys, and 6 percent represented themselves. Fewer than one percent of petitioners in either state or federal court had retained counsel at trial.

Although the overwhelming number of petitioners were represented by counsel for their initial offense, most were not represented by counsel in filing the habeas corpus petitions. States are not obligated to provide counsel for collateral attacks. Three-quarters (75 percent) of the petitioners in state court and 91 percent of the petitioners in federal court represented themselves. (The number of pro se petitioners in federal court seems to have increased since the 1970s when Robinson found 79 percent of the petitioners filing without an attorney.) For the petitioners who were represented by counsel in state court, 12 percent had court-appointed counsel and 7 percent had privately retained counsel. The remaining 6 percent were represented by counsel but the records did not make clear how counsel was obtained. Of the 9 percent of the petitioners represented by counsel in federal court, 5 percent of the petitioners were represented by court-appointed counsel, 3 percent by retained counsel, and the remaining 1 percent were represented by counsel, whose appointment status was unknown.

Of the state petitioners, 35 percent were filing their first petition, 15 percent had filed one previous petition, 17 percent had filed two prior petitions, and the remainder filed three or more prior habeas petitions. Of the federal petitioners, 46 percent were filing their first petition, 18 percent their second, 17 percent their third, while the remainder had previously filed three or more petitions.

Using both 1990 and 1992 data from habeas corpus petitions disposed in both state court, as well as federal court, this research has

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54 P. Robinson, supra note 38, at 9.
confirmed earlier findings that habeas petitioners have been convicted of serious offenses at jury trial and have received long sentences. Although most petitioners were represented by counsel at trial, most filed habeas corpus petitions pro se.
Chapter 5
Petitioners' Claims

Which claims are raised by petitioners and against whom are the claims raised? Do petitioners primarily question the practices and procedures of attorneys, the police, the prosecutor, or the courts? Before these important questions are discussed, however, a few caveats are in order.

First, some of the legal claims raised are difficult to understand and classify because the large majority of habeas corpus petitioners represented themselves, as noted in Chapter 4. Although some petitions filed by prisoners were as concisely drawn and had claims as clearly specified as those prepared by attorneys, others contained claims difficult to identify. Exhibits 2 and 3 show two examples of these.

Second, claims, often handwritten by prisoners, were sometimes difficult to decipher. Third, although all of the researchers collecting the data were experienced and trained to code habeas corpus petitions, some interrater inconsistencies surely appear in the data. It is unlikely, however, that any of these would affect the basic conclusions of the study. For example, even if coders differed somewhat in judgments about how specific claims should be mapped into existing categories, most are general claims, such as ineffective assistance of counsel, that are easily identified. Moreover, petitioners filing in federal court had the benefit of a standard form which gives specific examples of grounds for relief (See Appendix B, especially question 12).

Finally, some information is necessarily lost when specific prisoner complaints are classified into standard categories. Yet, this categorization in necessary to standardize prisoner claims. Single claims to one petitioner may be multiple claims to another. For example, one petitioner may claim counsel was ineffective for failure to call witnesses (one claim), another would list failure to call each specific witness as a separate claim, and a third would make the general claim of ineffective assistance as well as several specific claims, (e.g., failure to call witnesses, failure to communicate with the client etc.). These specific
Exhibit 2

I. Ground 9: Conviction obtained by action of a petit jury which was unconstitutionally selected and impaneled.

Supporting Facts: The people called for jury duty all looked white to me. The jury was not called from a proper cross section of the community.

<table>
<thead>
<tr>
<th>Section</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>640</td>
</tr>
</tbody>
</table>

14 1/4 x 5 25 = 7 x 5 = 10 2 + 5 = 7 10 + 7 = 17 14 1/4 = 8

S= 2 or 2 square. Vertical 8 would be 14 1/4: 10

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[Diagram and notes related to the exhibit]
Chapter 5: Petitioners' Claims

Exhibit 3

A MAN WHO I PUT IN A WRIT IN 1992, THEY ARE SAYING HE IS GOING TO BE KILL. HE LIVE AT 329 CHANCELOUR AVE, THE POLICE IS LETING THEM HURT AND KILL HERE. A MAN AT 332 CHANCELOUR AVE I KNOW HIM, A MAN WHO LIVE AT 403 CHANCELOUR AVE. I HAVE KNOW FOR A LONG TIME THEY ARE DOING THING TO HIM TO. JUDGE IS GOING ON AND WE NEED HELP NOW, I KNOW YOU DO NOT WANT TO SAY THIS IS GOING -
Habeas Corpus in State and Federal Courts

Exhibit 3 (continued)

On the 12th day of October, 1989, I have been writing you from 1989 to 1992. This is true the sla is here now court the got some of my writ form your court out of my truck, the police let him do this.

You did not believe the woman the sla had.

You do not want to believe me this true.

I declare under penalty of perjury this is true.

6/2/92
claims may not be distinct in practice. Moreover, petitions sampled were in very different stages of the process. Some petitioners were filing their first claim, while others had already filed multiple claims in multiple state or federal courts. In sum, Table 6 is probably a conservative indicator of claims raised by petitioners.

**Number of Claims**

How many petitioners tend to file multiple claims? The following comparison is based upon number of petitioners making claims, rather than numbers of claims raised. It shows that most petitioners raise more than one claim per petition.

Claims raised were categorized by institution against which the claim was made, and also by amendment. For example, petitioners could challenge police for their arrest, prosecutors for their charging, trial courts for the conviction or sentencing, and their attorneys for ineffective representation.

Many claims classified under the amendments might have been classified differently. Claims such as insufficient evidence to convict were classified under Fourteenth Amendment concerns because the police, the prosecutor, the trial court judge, and the attorney could all have an impact on conviction. Speedy trial violations could be the responsibility of the judge, and therefore were classified as another form

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55 The author is indebted to an anonymous reviewer for this decision to count multiple specific claims once. He noted that a lawyer who fails to make an evidentiary objection at trial fails to raise the issue on appeal so that specific claims of ineffectiveness "failure to object to admissibility/sufficiency of evidence" and "failure to appeal or raise important issues on appeal" are in effect the same claim. The locus of the failure to raise the issue is seldom important; what matters is whether the claim was properly preserved at all necessary stages, and whether the claim, at whatever stage it was raised, is truly meritorious. Continuing, the reviewer cited the examples of separate categories for "failure to investigate," "failure to call witnesses," and "failure to raise an affirmative defense" coming down to a question of whether counsel should have been aware of certain evidence. He further adds "it matters little which of these labels is assigned to the claim. This coalescence is simply an illustration of the fact that ineffective assistance is often just a procedural overlay for more traditional claims of error."
Table 6

Number of Claims Raised by Petitioners

<table>
<thead>
<tr>
<th>Number of Claims</th>
<th>State Claims</th>
<th>Percentage of Petitioners</th>
<th>Federal Claims</th>
<th>Percentage of Petitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Petitioners</td>
<td></td>
<td>Number of Petitioners</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>593</td>
<td>32%</td>
<td>440</td>
<td>27%</td>
</tr>
<tr>
<td>2</td>
<td>532</td>
<td>29%</td>
<td>435</td>
<td>27%</td>
</tr>
<tr>
<td>3</td>
<td>331</td>
<td>18%</td>
<td>348</td>
<td>21%</td>
</tr>
<tr>
<td>4</td>
<td>162</td>
<td>9%</td>
<td>196</td>
<td>12%</td>
</tr>
<tr>
<td>5</td>
<td>74</td>
<td>4%</td>
<td>80</td>
<td>5%</td>
</tr>
<tr>
<td>6</td>
<td>41</td>
<td>2%</td>
<td>48</td>
<td>3%</td>
</tr>
<tr>
<td>7</td>
<td>26</td>
<td>1%</td>
<td>15</td>
<td>1%</td>
</tr>
<tr>
<td>8</td>
<td>22</td>
<td>1%</td>
<td>7</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>9+</td>
<td>16</td>
<td>1%</td>
<td>19</td>
<td>1%</td>
</tr>
<tr>
<td>Unknown</td>
<td>38</td>
<td>2%</td>
<td>38</td>
<td>2%</td>
</tr>
<tr>
<td></td>
<td>1,835</td>
<td>99%</td>
<td>1,626</td>
<td>100</td>
</tr>
</tbody>
</table>

of trial court error. Because a speedy trial is expressly provided for in the Sixth Amendment, these claims were classified separately to avoid combining too many claims into any one category.

Obviously, petitioners raising multiple claims are more likely to touch upon multiple issue areas. Figure 7 shows the types of claims raised, which were generally similar in state and federal court.
Note: Percentages are greater than to 100% because petitioners can raise multiple claims.

**Ineffective Assistance of Counsel**

Challenges to the competency of the attorney representation were the most common claims in both state and federal court. The Sixth Amendment guarantees the right to counsel for criminal defendants.\(^{56}\) In one sense, this claim is a precondition for all others because ineffective assistance of counsel is a reason given for not raising

related claims previously. Despite recent Supreme Court decisions, petitioner still have an incentive to raise the issue of ineffective assistance of counsel or else they cannot argue new evidence or raise issues not raised earlier.

Of the 146 applications examined by Shapiro in Massachusetts, about a quarter (26 percent) claimed ineffective assistance of counsel. Of the total 467 petitions in the Faust, Rubenstein and Yackle study covering three years, 67 or 14 percent claimed ineffective assistance of counsel. The multi-site study of Robinson reported that 1,270 of 2,225 claims were an attack on the conviction, as opposed to challenges to sentences, conditions of confinement, or other claims. Of the attacks on conviction, 42 percent included ineffective assistance of counsel as one of the grounds. Accordingly, about 23 percent of all claims involved ineffective assistance of counsel.

This study found that the number of ineffective assistance claims have increased. Of the 1,835 petitioners in the state sample, 755 (41 percent) raised the claim either generally or specifically. Of these 755

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57 See, e.g., Coleman v. Thompson, supra note 23.
58 D. Shapiro, supra note 7, at 331.
60 P. Robinson, supra note 38, at 12.
61 This percentage may be an underestimate. In California and Texas where habeas corpus is the primary post-conviction remedy the proportion of ineffective assistance claims are 46 percent and 45 percent respectively. In Alabama and New York, the proportion of ineffective assistance claims is partially dependent on the relative portion of Rule 32 and Rule 440 petitions in the respective samples. Of the 223 habeas petitions in Alabama, only 53 (24 percent) contained claims of ineffective assistance of counsel, whereas 109 of the 158 Rule 32 petitions in the sample (69 percent) contained those claims. Together then 43 percent of the Alabama petitions contained ineffective assistance claims, a proportion close to the 45 percent and 46 percent represented in Texas and California. In New York, however, only 7 petitions of the habeas sample of 115 contained a claim of ineffective assistance of counsel and these were filed inappropriately. If the sample of 155 Rule 440 petitions is considered separately, the proportion of claims involving ineffective assistance increases to 41 percent.
petitioners, 319 raised the claim the general claim only, and another 317 raised one or more particular claims of ineffectiveness. The remaining 119 petitioners raised a particular claim in conjunction with the general claim. Note that these were only counted once in arriving at the total claims made. Of the 1,626 petitioners in the federal sample, 736 (45 percent) claimed ineffective assistance of counsel. Of these 736 petitioners, 408 raised the general claim only, 200 raised specific claims only and another 128 raised the general claim in conjunction with one or more particular claims. General claims included such allegations as the attorney lacked experience, violated the attorney-client privilege, or failed to file a claim or discovery motion, meet with the defendant on a regular basis, or otherwise failed to prepare adequately.

Jeffries and Stuntz conclude that most ineffective assistance of counsel claims are not based on the counsel's failure to raise a federal claim or defense, but rather involve the attorney's decision that affected the development of facts.\(^6\) They cite as examples, failure to offer a character witness or an alibi or to uncover and present exculpatory evidence.\(^6\) Basically, the defendant argues that evidence or a claim was never properly presented.

The single claims of ineffectiveness, either raised separately, in conjunction with other specific claims, or in conjunction with the general claim were as follows:

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\(^6\) *Id.*, at 24.
Habeas Corpus in State and Federal Courts

Table 7
Specific Ineffective Assistance of Counsel Claims

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>Number/Percentage of Petitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State Courts</td>
</tr>
<tr>
<td>Failure to investigate</td>
<td>167 9%</td>
</tr>
<tr>
<td>Failure to object to</td>
<td></td>
</tr>
<tr>
<td>admissibility/sufficiency of evidence</td>
<td>153 8%</td>
</tr>
<tr>
<td>Failure to appeal or raise important issues on appeal</td>
<td>125 7%</td>
</tr>
<tr>
<td>Failure to call witnesses</td>
<td>42 2%</td>
</tr>
<tr>
<td>Misled defendant</td>
<td>40 2%</td>
</tr>
<tr>
<td>Failure to raise an affirmative defense</td>
<td>26 1%</td>
</tr>
<tr>
<td>Failure to cross-examine</td>
<td>26 1%</td>
</tr>
<tr>
<td>Conflict of interest</td>
<td>25 1%</td>
</tr>
</tbody>
</table>

Specific claims are probably underrepresented because many petitions do not indicate the type of ineffective assistance of counsel received. Nevertheless, an examination of the specific claims presented in Table 7 can be instructive. In both state and federal courts, failure to investigate and failure to object to admissibility or the insufficiency of evidence were not only the claims most likely to be raised, but also the two claims most likely to be raised together. The claim that attorneys misled the defendant was often raised in the context where the attorney failed to explain adequately the plea agreement and its consequences to the defendant. Forty-three percent (66) of the 152 petitioners in the state sample and 50 percent of the 128 petitioners in the federal sample who claimed a coerced guilty plea, also claimed ineffective assistance of counsel.

Habeas corpus petitions brought to federal courts by state prisoners must use the cause-and-prejudice test for procedural defaults. The cause prong of the test is satisfied by actual ineffective assistance of counsel or by some other factor that impeded counsel's effort to comply with the state's procedural rule. A defendant must first show that

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64 I. Robbins, HABEAS CORPUS CHECKLISTS 12-11 (New York: Clark, Boardman, Callaghan, 1994).
counsel's trial performance was deficient. Next, to satisfy the prejudice prong of the text, the defendant must illustrate that the counsel's deficient trial performance so prejudiced the defense as to deprive the defendant of a fair trial.

The purpose of the Sixth Amendment right to effective assistance of counsel is to ensure that the defendant receives a fair trial. The U.S. Supreme Court asserts that in judging any claim of ineffective assistance of counsel, one must examine whether counsel's conduct undermined the proper functioning of the adversarial process to such an extent that the trial did not produce a fair and just result. The proper measure of attorney performance is "reasonable" under the prevailing professional norms, and the defendant must show that the representation received fell below the objective standard of reasonableness. For the petition to succeed, the strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance must be overcome. It is not clear, however, whether the court should examine the counselor's errors individually or cumulatively when determining if his or her deficient performance prejudiced the defense.

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65 Strickland v. Washington, supra note 56. See also M. Peake supra note 56, at 599.

66 Id at 687.

67 Id.

68 Id. at 688.

69 Id. at 690.

70 The Fourth Circuit has applied the standards in Strickland to each individual error of counsel to determine whether counsel's performance prejudiced the defendant. Peake at 602 citing Hoots v. Allsbrook, 785 F. 2d 1214 (4th Cir. 1986). In Roach v. Martin 757 F.2d 1463 (4th Cir. 1985), the Fourth Circuit examined the defendant's ineffective assistance of counsel claims individually and concluded that the defendant did not receive deficient counsel. Peake noted that the Fifth Circuit applied the Strickland standard individually, whereas the Second, Third, and Sixth Circuits applied the standard individually and cumulatively. Applying the deficient performance standard cumulatively would lead more courts to conclude that the counsel provided was ineffective. In McNeil v. Cuyler, 782 F.2d 443 (3rd Cir.
A losing defendant can point to a list of evidentiary decisions by counsel that could have been decided differently: Did the counselor have enough meetings with the defendant? Was the defendant adequately prepared for trial? Was the counselor prepared? Should the attorney have called additional witnesses or perhaps not have called certain witnesses? Should the attorney have asserted an affirmative defense? Did the attorney fail to cross-examine properly or should the attorney have objected to the prosecution's questions or evidence? The Supreme Court in *Strickland* seems to recognize this problem by stressing that the reasonableness of the counsel's challenged conduct must be judged on the facts of the particular case as known at the time, not on the basis of hindsight.

**Trial Court Error**

Whereas the previous set of claims asserted error on the part of the attorney, this set of claims asserts error on the part of the trial court. Nearly 30 percent of both state court and federal court petitioners (27 percent and 29 percent respectively) claimed trial court error. Unlike the claims of ineffective assistance of counsel, which were likely to be general, the claims against trial courts were quite specific. Few petitioners, 86 state and 47 federal petitioners respectively, asserted the claim of trial court error without further specification. Most of the remaining claims were particular claims, (see Table 8), and some of which were alleged in conjunction with the general claim. Many of the general claims of trial court error included the claim that the judge failed to explain charges to the defendant.
Table 8

Specific Trial Court Error Claims

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>Number/Percentage of Petitioners</th>
<th>State Courts</th>
<th>Federal Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Detrimental procedural error</td>
<td>200 11%</td>
<td>135 8%</td>
<td></td>
</tr>
<tr>
<td>Improper jury instructions</td>
<td>129 7%</td>
<td>156 10%</td>
<td></td>
</tr>
<tr>
<td>Failure to suppress improper evidence</td>
<td>85 5%</td>
<td>171 11%</td>
<td></td>
</tr>
<tr>
<td>Excluded exculpatory/mitigating evidence</td>
<td>27 2%</td>
<td>25 2%</td>
<td></td>
</tr>
<tr>
<td>Improper joinder/failure to sever</td>
<td>16 1%</td>
<td>11 &lt;1%</td>
<td></td>
</tr>
<tr>
<td>Biased judge</td>
<td>15 1%</td>
<td>17 1%</td>
<td></td>
</tr>
<tr>
<td>Abuse of discretion</td>
<td>12 1%</td>
<td>1 ---</td>
<td></td>
</tr>
<tr>
<td>Denied motion for self-representation</td>
<td>6 &lt;1%</td>
<td>6 &lt;1%</td>
<td></td>
</tr>
</tbody>
</table>

Detrimental procedural error was the single most frequent trial court error claim specified in state court, whereas failure to suppress improper evidence was the single trial court error most often specified in federal court. Detrimental procedural errors, other than those listed specifically, included lack of trial court jurisdiction and failure to admonish the defendant on certain rights.

**Sixth Amendment Claims**

Ineffective assistance of counsel was discussed separately above. Other Sixth Amendment claims are discussed separately here, although some of these may be related to trial court error as well. Most of these relate to challenges to the jury. Only 14 general Sixth Amendment claims were raised in state court and only 10 in federal court.
Table 9

Specific Sixth Amendment Claims

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>Number/Percentage of Petitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State Courts</td>
</tr>
<tr>
<td>Jury improperly selected</td>
<td>64  4%</td>
</tr>
<tr>
<td>Speedy trial</td>
<td>35  2%</td>
</tr>
<tr>
<td>Denied assistance of counsel</td>
<td>33  2%</td>
</tr>
<tr>
<td>Juror impartiality</td>
<td>31  2%</td>
</tr>
<tr>
<td>Confrontation/cross examination</td>
<td>25  1%</td>
</tr>
<tr>
<td>Challenge to lineup</td>
<td>11  1%</td>
</tr>
<tr>
<td>Invalid waiver of jury trial</td>
<td>9 &lt;1%</td>
</tr>
</tbody>
</table>

Detainment and Punishment Issues (Eighth Amendment)

Most Eighth Amendment claims could also be considered a form of trial court error because they deal with sentence and detention issues. These are the claims that provoke complaints about coddling of criminals from the media and public, especially when claims of cruel and unusual punishment refer to inmates denied such items as chunky peanut butter, or offered tooth powder instead of tooth paste, powdered eggs instead of real eggs, or nutritional meat loaf instead of the standard variety.71

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71 Some examples cited by Chief Judge Barbara J. Rothstein, U.S. District Court for the Western District of Washington in her remarks at the National Conference on State-Federal Judicial Relationships, Orlando, Florida, April 10, 1992. Substitution of nutra loaf, in which vegetables, beef or chicken, apples, eggs and potatoes are ground into mush, for meat loaf caused three inmates of Clark County Jail in Vancouver, Wash. to claim "cruel and unusual punishment" and asked the court to ban the nutra loaf from the prison diet. HAMPTON ROADS DAILY PRESS, April 28, 1993, A2. Other examples include: Charles McManus who claims medical indifference because the cafeteria seating arrangement forces him to eat faster than he wants to, and Mitchell Jackson who claims unconstitutionally being denied access to tarot cards, a broom, and a cauldron. John Kolbe, GOP Spats Put Reason Behind Bars, THE PHOENIX GAZETTE, May 23, 1993, G2. Perhaps the most notorious example is Kenneth Parker's two year suit over a prison canteen's substitution of a jar of creamy peanut butter for chunky. Ashley Dunn Flood of Prisoners' Rights Suits Provokes Efforts to Limit Access NEW YORK TIMES March 27, 1994, B4.
Chapter 5: Petitioners’ Claims

Only eight general Eighth Amendment claims were made in state court and six in federal court.

Table 10

Specific Eighth Amendment Claims Raised

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>Number/Percentage of Petitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State Court</td>
</tr>
<tr>
<td>Excessive sentence</td>
<td>175</td>
</tr>
<tr>
<td></td>
<td>10%</td>
</tr>
<tr>
<td>Excessive bail</td>
<td>142</td>
</tr>
<tr>
<td></td>
<td>8%</td>
</tr>
<tr>
<td>Challenge to sentence enhancement</td>
<td>127</td>
</tr>
<tr>
<td></td>
<td>7%</td>
</tr>
<tr>
<td>Probation/parole issue</td>
<td>117</td>
</tr>
<tr>
<td></td>
<td>6%</td>
</tr>
<tr>
<td>Cruel and unusual punishment</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>2%</td>
</tr>
<tr>
<td>Sentence inconsistent with plea bargain</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>2%</td>
</tr>
<tr>
<td>Conditions of confinement</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>2%</td>
</tr>
</tbody>
</table>

Claims that a sentence was excessive were the most common Eighth Amendment issue raised in both state and federal courts. Claims of excessive bail raised in state court, but not federal court, were primarily the result of claims made in New York, where habeas corpus petitions are used almost exclusively to challenge bail. A sentence inconsistent with a plea bargain includes claims that the prosecutor, defense counsel, or judge had broken the plea agreement.

Prosecutorial Misconduct

Prosecutorial misconduct was claimed by 11 percent of the state petitioners and 16 percent of the federal petitioners. Nearly 4 percent of the state claims (118) and 6 percent of the federal claims (103) were general claims of prosecutorial misconduct. The specific claim made most frequently by both state and federal prisoners was failure to disclose.
Table 11

Specific Prosecutorial Misconduct Claims

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>Number/Percentage of Petitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State Courts</td>
</tr>
<tr>
<td>Failure to disclose</td>
<td>70 4%</td>
</tr>
<tr>
<td>Use of perjured testimony</td>
<td>37 2%</td>
</tr>
<tr>
<td>Improper comments</td>
<td>23 1%</td>
</tr>
<tr>
<td>Inflammatory summation</td>
<td>18 1%</td>
</tr>
<tr>
<td>Improper cross-examination</td>
<td>6 &lt;1%</td>
</tr>
</tbody>
</table>

Fourth Amendment

In Stone v. Powell, the U.S. Supreme Court held that prisoners are precluded from using federal habeas corpus proceedings to assert illegal search and seizure claims if provided a full and fair opportunity to be heard in state court.72 Perhaps for this reason, Fourth Amendment claims were the least raised of all. Claims of alleged police misconduct were raised by 5 percent of the petitioners from the state court sample and by 13 percent of the petitioners in the federal court sample. If Stone v. Powell were effective, however, more petitioners should have raised Fourth Amendment claims in state court than in federal court.

Most often the claim was specific--either unlawful arrest [46 claims in state court (3 percent) and 137 claims in federal court (8 percent)] or illegal search and seizure [47 claims in state court (3 percent) and 104 in federal court (6 percent)]. Only 2 general Fourth Amendment claims were made in state court and only 27 in federal court.

**Fifth Amendment**

Petitioners raised only a few general Fifth Amendment claims (11 in state court and 12 in federal court).

**Table 12**

**Specific Fifth Amendment Claims**

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>Number/Percentage of Petitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State Courts</td>
</tr>
<tr>
<td>Invalid/coerced guilty plea</td>
<td>152</td>
</tr>
<tr>
<td>Improper/defective indictment fn*</td>
<td>73</td>
</tr>
<tr>
<td>Double jeopardy</td>
<td>48</td>
</tr>
<tr>
<td>Self-incrimination</td>
<td>30</td>
</tr>
<tr>
<td>Coerced confession</td>
<td>23</td>
</tr>
<tr>
<td>Grand jury issue</td>
<td>10</td>
</tr>
</tbody>
</table>

* Includes improper amendment

Invalid or coerced guilty plea includes claims that the defendant was not informed of the consequences of the plea. This is particularly relevant where a habitual offender statutes exist. Some petitioners claim that had they been aware of these statutes and the resulting sentence enhancements, they would not have pleaded guilty to the first offense.

**Fourteenth Amendment Concerns**

The claims included here could have been classified as due process because they all involve claims that fundamental fairness was denied. Only 48 state court petitioners and 9 federal court petitioners raised the general claim.
The due process/equal protection claims are ambiguous. This category included many more fundamental due process claims than equal protection claims. Equal protection claims were relatively easy to identify, e.g., petitioner was housed in a segregated and deficient housing unit. In contrast, due process claims raised tended to be more general rather than specific. Indeed, the Fourteenth Amendment claims are often used to incorporate other amendments to the state rather than to indicate due process violations themselves. For example, petitioners need to assert a due process claim for a violation of the Fifth Amendment because it applies to the state through the Fourteenth Amendment. Moreover, due process claims can be raised at any stage of processing, arrest, pretrial activities, trial or appeal. Some of the claims classified as due process include failure to preserve evidence, denial of a hearing, and failure to receive notice of charges.

A leading concern for petitioners in state courts were challenges to prison administration, rulings, or procedures, commonly the assertion that the administrator miscalculated or denied the petitioner "good time" credits. The specific claim raised most often in federal court was insufficient evidence to convict or that the burden of proof was not met.

Table 14 compares the types of claims raised by first-time petitioners with the claims raised by more experienced petitioners (those who had raised previous claims).

---

Table 14

Types of Claims Raised by First Time and Experienced Petitioners

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>State Courts</th>
<th></th>
<th>Federal Courts</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>First Time</td>
<td>Experienced</td>
<td>First Time</td>
<td>Experienced</td>
</tr>
<tr>
<td>Ineffective Counsel</td>
<td>285</td>
<td>45%</td>
<td>442</td>
<td>43%</td>
</tr>
<tr>
<td></td>
<td>201</td>
<td>35%</td>
<td>378</td>
<td>56%</td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>185</td>
<td>29%</td>
<td>281</td>
<td>28%</td>
</tr>
<tr>
<td></td>
<td>168</td>
<td>29%</td>
<td>211</td>
<td>31%</td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>76</td>
<td>12%</td>
<td>124</td>
<td>12%</td>
</tr>
<tr>
<td></td>
<td>76</td>
<td>13%</td>
<td>118</td>
<td>17%</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>23</td>
<td>4%</td>
<td>59</td>
<td>6%</td>
</tr>
<tr>
<td></td>
<td>74</td>
<td>13%</td>
<td>91</td>
<td>13%</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>114</td>
<td>18%</td>
<td>212</td>
<td>21%</td>
</tr>
<tr>
<td></td>
<td>118</td>
<td>20%</td>
<td>171</td>
<td>25%</td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>79</td>
<td>13%</td>
<td>145</td>
<td>14%</td>
</tr>
<tr>
<td></td>
<td>88</td>
<td>15%</td>
<td>119</td>
<td>18%</td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>183</td>
<td>29%</td>
<td>295</td>
<td>29%</td>
</tr>
<tr>
<td></td>
<td>132</td>
<td>23%</td>
<td>143</td>
<td>21%</td>
</tr>
<tr>
<td>Fourteenth Amendment Concerns</td>
<td>219</td>
<td>35%</td>
<td>421</td>
<td>41%</td>
</tr>
<tr>
<td></td>
<td>191</td>
<td>33%</td>
<td>681</td>
<td>37%</td>
</tr>
</tbody>
</table>

Overall, petitioners raise more claims on subsequent petitions than they raised on the initial petition, but the types of claims raised are similar. This is almost universally true in state courts, with the exception that ineffective assistance of counsel claims are just as prevalent on the initial petitions. In federal court, experienced petitioners are much more likely to raise all claims except Eighth Amendment claims, which are just as prevalent on initial petitions.

Do claims raised vary by site? An example will illustrate how the numbers in Table 15 should be interpreted. Forty six percent, or 235 of the 507 habeas corpus petitioners in the California state sample, claimed ineffective assistance of counsel. Ineffective assistance of counsel was the most frequently raised claim overall in California and Texas state courts, and indeed in all federal courts sampled. Although slightly overshadowed by Fourteenth Amendment due process claims, ineffective assistance of counsel claims in Alabama were also high. Only in New York, where habeas corpus petitions are not used to challenge effectiveness of counsel, was the picture different.
Table 15
Types of Claims by Site

<table>
<thead>
<tr>
<th>Claims</th>
<th>STATE COURTS</th>
<th>FEDERAL COURTS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Alabama</td>
<td>California</td>
</tr>
<tr>
<td>Ineffective Counsel</td>
<td>162</td>
<td>235</td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>86</td>
<td>160</td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>34</td>
<td>84</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>39</td>
<td>20</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>101</td>
<td>59</td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>56</td>
<td>75</td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>92</td>
<td>144</td>
</tr>
<tr>
<td>Fourteenth Amendment Concerns</td>
<td>209</td>
<td>131</td>
</tr>
</tbody>
</table>

Fourteenth Amendment concerns were raised by more than 40 percent of petitioners in Alabama and Texas. Claims of trial court error ranged between 21 percent and 32 percent, with the state samples containing both the lowest percentage (New York) and the highest (California). Fourth Amendment claims were raised by the fewest petitioners in all sites except Alabama. These findings illustrate the importance of conducting habeas corpus research in multiple sites. Types of claims do vary among sites, especially in the state samples.

The findings with respect to time period are different. The initial research design called for collecting data from two different time periods, 1985 and 1990 to determine if it were possible to detect burgeoning trends. This aspect of the research design was modified for both practical and theoretical reasons to petitions terminated in 1990.
Claims presented in 1990 were not different from those raised in 1992 and, therefore could be combined for purpose of analysis (see Table 16).

Table 16

Types of Claims Raised in 1990 and 1992

<table>
<thead>
<tr>
<th>Claims</th>
<th>Number/Percentage of Petitions</th>
<th>State Court Petitions</th>
<th>Federal Court Petitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ineffective Counsel</td>
<td>337 38% 409 45%</td>
<td>291 43% 429 47%</td>
<td></td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>184 21% 304 33%</td>
<td>191 28% 274 29%</td>
<td></td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>85 9% 120 13%</td>
<td>110 16% 143 16%</td>
<td></td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>42 5% 41 5%</td>
<td>98 15% 114 12%</td>
<td></td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>179 20% 161 18%</td>
<td>150 22% 216 24%</td>
<td></td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>114 13% 112 12%</td>
<td>118 18% 155 17%</td>
<td></td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>285 32% 297 32%</td>
<td>146 22% 201 22%</td>
<td></td>
</tr>
<tr>
<td>Fourteenth Amendment</td>
<td>364 41% 288 31%</td>
<td>230 34% 340 37%</td>
<td></td>
</tr>
</tbody>
</table>

74 On the practical side, federal courts place inactive files in off site archives after six months. In California, state archives are located in Sacramento and federal archives are located in San Bruno; in New York, federal files are stored in Bayonne, New Jersey. Files in storage are difficult to access, and sometimes require payment of a retrieval fee. Docket numbers must be converted to an accession number, and then the appropriate shelf, storage box, and file located. On the theoretical side, changes in composition of the California Supreme Court, especially the change from Chief Justice Rose Bird to Chief Justice Malcolm Lucas, reflected a change in philosophy between 1985 and 1990. See Preble Stolz, JUDGING JUDGES (New York: The Free Press, 1981) for an account of Chief Justice Rose Bird's service on the California Supreme Court. In Texas, an amendment to Article 42.18 was passed on September 1, 1987 that reduced mandatory parole eligibility time from one-third of the sentence to one quarter and reduced the number of habeas corpus petitions filed. Passage of an habitual offender act in Alabama with stiff mandatory sentences for third offenses resulted in prisoners challenging their first or second convictions, which were likely to be the result of guilty pleas. Upon learning that they were now classified as habitual offenders, prisoners began to claim that previous plea agreements were invalidly entered and that they were not informed of their rights. Court personnel also expressed the opinion that the enactment of the habitual offender statute caused prison administrators to change their practice of using court proceedings for offenses committed in prison, but rather developed administrative sanctions for minor offenses.
In sum, petitioner claims are difficult to classify because most habeas corpus petitions are raised without counsel and claims raised are not always clear. Petitioners may misunderstand their rights, e.g., assume that any conversation between an attorney and judge without their presence is misconduct. Moreover, it is difficult to know how to categorize petitions when some are very general, (e.g. "due process was violated"), and some are very specific.

Overall, ineffective assistance of counsel claims occur most frequently in state and federal court. When state prisoners are convicted it may be easiest to blame the attorney for the conviction or at least to second-guess the strategy used. Moreover, as noted during the pretest, petitioners often must claim ineffective assistance of counsel to justify not raising claims earlier in the process or in a more timely manner. Although there are some differences, notably with Fourth Amendment and Eighth Amendment claims, it appears that the same types of claims are raised in federal court as are raised in state court. Moreover, petitioners who file multiple petitions, raise about the same type of claims on subsequent petitions that they raise on the initial petitions. The exception is that the petitioners raising subsequent claims in federal court are more likely to raise ineffective assistance of counsel.
Chapter 6
Outcomes in State and Federal Court

Petitioner Success Rates

Which claims raised tend to be granted? In other words, do the petitioner success rates vary by the claims raised?

Before these questions are answered, however, the point must be emphasized that because so few petitions in either the state or the federal courts were granted, conclusions drawn from success rates of petitioners must be regarded with care. Of the 1,626 federal petitions in the sample, only 17 were granted (2 in California, 3 in Alabama, 5 in New York, and 7 in Texas). Of the petitions filed in state courts, only 1 was granted in California, and only 3 were granted in Alabama. In New York, 48 petitions were granted. Because granted petitions are filed in a separate location from petitions denied or dismissed, it was possible to oversample granted petitions in Texas, which facilitated the comparison between petitions granted and denied. The proportion of petitions granted in this sample is double the actual proportion granted and so must be analyzed separately.75

Table 17 shows overall petitions granted, including the Texas sample, by types of claims made.

75 In fiscal year 1992, The Texas Court of Criminal Appeals disposed of 2,244 habeas corpus petitions. Of the petitions disposed, 116 were sent back to trial courts for additional hearings, 152 were filed and set for hearings, and 8 were granted with orders. The remaining petitions were denied (56 with an order 1,812 without), dismissed (55), dismissed summarily for abuse of the writ (43), or dismissed with no action necessary (2). Even assuming that all of the petitions filed and set would eventually be granted, the petitioner success rate in the Texas Court of Criminal Appeals would be less than 8 percent. Figures contained in this footnote are courtesy of Thomas Lowe, Clerk of Court, and Texas Judicial Council and Office of Court Administration, TEXAS JUDICIAL SYSTEM, ANNUAL REPORT, FY 1992, at 150-52 (December 1992).
Table 17

Rates at Which Petitions Are Granted

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>State Courts</th>
<th>Federal Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td></td>
<td>of Claims</td>
<td>Granted</td>
</tr>
<tr>
<td>Ineffective Assistance of Counsel</td>
<td>732</td>
<td>8%</td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>528</td>
<td>6%</td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>199</td>
<td>3%</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>79</td>
<td>1%</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>414</td>
<td>2%</td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>220</td>
<td>1%</td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>463</td>
<td>11%</td>
</tr>
<tr>
<td>Fourteenth Amendment</td>
<td>728</td>
<td>7%</td>
</tr>
</tbody>
</table>

This table shows that federal courts grant a very small proportion of habeas corpus petitions, typically less than one in a hundred in state court, and that the claims raised do not affect the petitioner's success rate. The picture in state courts is somewhat different. For prosecutorial misconduct and Fourth, Fifth and Sixth Amendment claims, petitioner's success rates in state courts is comparable to the low success rate in federal courts. The success rate for Eighth Amendment claims at 11 percent was markedly different. Further analysis revealed that 41 of the 149 petitions granted involved questions of excessive bail in New York. Eleven of the 41 granted petitions involved coerced guilty pleas.

Ineffective assistance of counsel, trial court error and Fourteenth Amendment concerns claims were also granted at a higher rate. To specify the particular claims responsible for this higher success rate, individual claims were examined separately. Moreover, the claims from the Texas Court of Criminal Appeals must be separated from the others because petitions granted there were oversampled in an attempt to enlarge the sample of granted petitions. Consequently, the rate at which petitions in state courts were granted will be compared with the rate at which federal petitions were granted without the confounding influence of the Texas sample. This is done in Table 18, which lists both the
Table 18

Prisoner Petitions Granted by Specific Claims Raised

<table>
<thead>
<tr>
<th>Number/Percentage of Petitioners</th>
<th>Texas</th>
<th>State Courts</th>
<th>Federal Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ineffective Counsel</strong></td>
<td>4</td>
<td>3%</td>
<td>3</td>
</tr>
<tr>
<td>Failure to Investigate</td>
<td>4</td>
<td>6%</td>
<td>2</td>
</tr>
<tr>
<td>Failure to Object to Admissibility</td>
<td>2</td>
<td>4%</td>
<td>1</td>
</tr>
<tr>
<td>Failure to Appeal</td>
<td>43</td>
<td>68%</td>
<td>0</td>
</tr>
<tr>
<td><strong>Trial Court Error</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Improper Jury Instruction</td>
<td>2</td>
<td>5%</td>
<td>0</td>
</tr>
<tr>
<td>Failure to Suppress Improper</td>
<td>2</td>
<td>7%</td>
<td>1</td>
</tr>
<tr>
<td>Detrimental Procedural Error</td>
<td>23</td>
<td>29%</td>
<td>1</td>
</tr>
<tr>
<td><strong>Eighth Amendment</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Excessive Sentence</td>
<td>0</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Challenge to Sentence</td>
<td>1</td>
<td>4%</td>
<td>2</td>
</tr>
<tr>
<td>Enhancement</td>
<td>2</td>
<td>5%</td>
<td>0</td>
</tr>
<tr>
<td>Conditions of Confinement</td>
<td>0</td>
<td>-</td>
<td>0</td>
</tr>
<tr>
<td>Cruel and Unusual Punishment</td>
<td>0</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Excessive Bail</td>
<td>3</td>
<td>30%</td>
<td>41</td>
</tr>
<tr>
<td>Sentence Not Consistent with</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plea Bargain</td>
<td>4</td>
<td>4%</td>
<td>0</td>
</tr>
<tr>
<td>Probation/Parole Issue</td>
<td>2</td>
<td>2%</td>
<td>2</td>
</tr>
<tr>
<td><strong>Fourteenth Amendment</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burden of Proof</td>
<td>2</td>
<td>2%</td>
<td>0</td>
</tr>
<tr>
<td>Denial of Appeal</td>
<td>20</td>
<td>77%</td>
<td>0</td>
</tr>
<tr>
<td>New Evidence</td>
<td>0</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Challenge to Prison Administration</td>
<td>6</td>
<td>12%</td>
<td>0</td>
</tr>
</tbody>
</table>

Note: General claims are in boldface.

number of petitions granted, as well as the percentage granted, because a large percentage difference can be the result of a relatively small number of petitions.

Table 18 shows that failure to appeal, denial of appeal and to a lesser extent detrimental procedural error, claims were those most likely to be granted by the Texas Court of Criminal Appeals, but these were not significant issues in other state courts. In 1989, the U.S. Supreme Court ruled that the death penalty in Texas was unconstitutional because
it did not provide a way for juries to consider mitigating evidence of mental retardation and childhood abuse.\textsuperscript{76} Excessive bail claims in New York, discussed above, were the only other claims granted in significant proportions.

As noted in Chapter 4, only prisoners with relatively long sentences have time to complete the entire habeas process. There is no way of knowing from the data gathered here the extent to which early release dates resulted in the dismissal of habeas petitions. Further analysis of the state sample reveals that petitioners filing a first petition had a better chance of having that petition granted (15 percent) than did prisoners who had filed claims before (2 percent). Petitioners in federal court, however, were just as likely to have a subsequent petition granted as a first petition granted (1 percent in both instances). This is not surprising because all federal petitioners are experienced. Even though these state prisoners may be filing their first petition in federal courts, they must have filed previous petitions in state courts.

Faust, Rubenstein and Yackle found that professional representation was "... the single most important predictor of success in federal habeas corpus" and recommend legislation providing counsel in noncapital cases.\textsuperscript{77} However, courts screen habeas petitions for merit and only those with promise have counsel assigned or appointed. The question then becomes whether petitions are granted because prisoners have counsel or whether meritorious petitions are more likely to be provided with counsel. That relationship cannot be disentangled here. Furthermore, conclusions are hard to draw because very few habeas corpus petitions are granted, and information on counsel was not available in all of these. Nevertheless, of the 103 petitions granted by state courts where representation was known, petitioners had counsel in 60 percent of them (62), of the 1,452 petitions denied or dismissed 22 percent of the petitioners had counsel. Of the 444 habeas petitions by state prisoners denied in federal court, for which information on counsel was available, 94 percent (417) did not have legal representation. There were just too few federal petitions granted in the

\textsuperscript{76} Penry v. Lynaugh, 492 U.S. 302 (1989).

\textsuperscript{77} Faust, Rubenstein & Yackle, supra note 3, at 707.
sample to draw any firm conclusions about counsel. Of the 17 petitions granted, information on counsel was available on 16, and of these, 6 had counsel and 10 did not.

**Court Reasons for Denying Habeas Petitions**

In federal court, petitions not granted are not only denied, but also withdrawn by the petitioner (often so state claims can be exhausted), dismissed by the court, or remanded. Habeas petitions not granted by state courts are usually denied (less than 10 percent are dismissed). The term "denied" is construed broadly here to include petitions not granted.

Table 19 shows about 75 percent of the petitions were dismissed or denied summarily without a reason given in state courts, whereas reasons for the denial were given in about three-quarters of the federal petitions. For all of the attention given in law journals to reasons, such as of successive petitions and abuse of the writ, these were very rarely given as reasons for denying or dismissing petitions.

What are the primary reasons courts give for denying writs of habeas corpus? Table 19 shows that state courts, when they give a reason, deny petitions on the merits or because of procedural default. The pattern is the same for federal courts, except that they add failure to exhaust as one of the primary reasons for dismissing or denying petitions for relief. In one sense, however, this is not a denial, but rather a postponement of the claim because petitioners can raise these claims again in federal court after they first raise unexhausted claims in state courts.

Case law is divided on the question of which reason takes precedence for denials when several alternatives are available. The major reasons for denial are discussed in more detail below.

**Failure to Exhaust**

Prisoners filing habeas corpus petitions in federal court were

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78 Wise v. Fulcomers, 958 F.2d 30 (3d Cir. 1992), prefers abuse of the writ over failure to exhaust; Smith v. Black 904 F.2d 50 (5th Cir. 1990), says retroactivity should dominate procedural default; but Poyner v. Murray 964 F.2d 1404 (4th Cir. 1992), concludes just the opposite, i.e., procedural default trumps retroactivity.
Table 19
Reasons for Denying Relief

<table>
<thead>
<tr>
<th>Claims in State Courts</th>
<th>Total Claims</th>
<th>No Reason Given</th>
<th>Failure to Exhaust</th>
<th>Procedural Default</th>
<th>On the Merits</th>
<th>Successive Petitions</th>
<th>Abuse of Writ</th>
<th>Not in custody</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ineffective Assistance of Counsel</td>
<td>773</td>
<td>561</td>
<td>73%</td>
<td>-</td>
<td>-</td>
<td>53</td>
<td>7%</td>
<td>134</td>
<td>17%</td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>500</td>
<td>372</td>
<td>74%</td>
<td>-</td>
<td>-</td>
<td>31</td>
<td>6%</td>
<td>84</td>
<td>17%</td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>210</td>
<td>153</td>
<td>74%</td>
<td>-</td>
<td>-</td>
<td>12</td>
<td>6%</td>
<td>40</td>
<td>19%</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>87</td>
<td>57</td>
<td>66%</td>
<td>-</td>
<td>-</td>
<td>8</td>
<td>9%</td>
<td>18</td>
<td>21%</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>350</td>
<td>234</td>
<td>67%</td>
<td>1</td>
<td>-</td>
<td>40</td>
<td>12%</td>
<td>65</td>
<td>18%</td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>234</td>
<td>173</td>
<td>74%</td>
<td>-</td>
<td>-</td>
<td>16</td>
<td>7%</td>
<td>39</td>
<td>17%</td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>585</td>
<td>466</td>
<td>80%</td>
<td>-</td>
<td>-</td>
<td>31</td>
<td>5%</td>
<td>77</td>
<td>13%</td>
</tr>
<tr>
<td>Fourteenth Amendment</td>
<td>662</td>
<td>480</td>
<td>73%</td>
<td>-</td>
<td>-</td>
<td>50</td>
<td>8%</td>
<td>120</td>
<td>18%</td>
</tr>
<tr>
<td>Claims in Federal Courts</td>
<td>Total Claims</td>
<td>No Reason Given</td>
<td>Failure to Exhaust</td>
<td>Procedural Default</td>
<td>On the Merits</td>
<td>Successive Petitions</td>
<td>Abuse of Writ</td>
<td>Not in custody</td>
<td>Other</td>
</tr>
<tr>
<td>--------------------------</td>
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<td>--------------</td>
<td>---------------------</td>
<td>-------------</td>
<td>---------------</td>
<td>-------</td>
</tr>
<tr>
<td>Ineffective Assistance of Counsel</td>
<td>757</td>
<td>194 29%</td>
<td>237 31%</td>
<td>56 7%</td>
<td>198 26%</td>
<td>17</td>
<td>22</td>
<td>11</td>
<td>22</td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>490</td>
<td>136 28%</td>
<td>136 28%</td>
<td>23 5%</td>
<td>151 31%</td>
<td>10</td>
<td>15</td>
<td>9</td>
<td>20</td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>256</td>
<td>62 23%</td>
<td>89 32%</td>
<td>14 5%</td>
<td>75 27%</td>
<td>7</td>
<td>11</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>221</td>
<td>39 18%</td>
<td>82 38%</td>
<td>20 9%</td>
<td>51 23%</td>
<td>3</td>
<td>5</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>383</td>
<td>94 25%</td>
<td>122 33%</td>
<td>24 6%</td>
<td>95 26%</td>
<td>8</td>
<td>13</td>
<td>9</td>
<td>13</td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>287</td>
<td>56 20%</td>
<td>98 35%</td>
<td>20 7%</td>
<td>85 30%</td>
<td>7</td>
<td>7</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>360</td>
<td>75 21%</td>
<td>119 34%</td>
<td>18 5%</td>
<td>99 28%</td>
<td>6</td>
<td>9</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Fourteenth Amendment</td>
<td>592</td>
<td>162 28%</td>
<td>175 30%</td>
<td>32 6%</td>
<td>147 26%</td>
<td>9</td>
<td>6</td>
<td>14</td>
<td>29</td>
</tr>
</tbody>
</table>
likely to use the standard form (Appendix B) which advises them to exhaust all state remedies before filing in federal court.

The exhaustion doctrine was established by the U.S. Supreme Court in *Ex Parte Royall*, 79 which held that state prisoners were encouraged to seek state court remedies for their federal claims before presenting those claims in a petition for federal habeas relief. The court stated that the exhaustion doctrine prevents unnecessary conflict between courts equally bound to guard and protect rights secured by the U.S. Constitution. 80 At the time, exhaustion was not considered a jurisdictional bar and could be relaxed in circumstances justifying immediate federal adjudication. 81 Presently, the exhaustion doctrine applies routinely as a prerequisite to addressing the merits of every federal habeas claim.

The exhaustion doctrine is a very important reason for denying federal habeas corpus claims. Before a district court judge or federal magistrate will examine the merits of a habeas case to determine if a constitutional right has been violated, they scrutinize the procedural history to see if the petitioner has exhausted all state remedies. Claims raised in the habeas petition are not considered if the petitioner has not previously raised all of the issues in present petition at the state court level. The court wants to make certain that the state has a "fair opportunity" to apply controlling legal principles to the facts bearing on the petitioner's constitutional claims. 82

Currently, satisfaction of the exhaustion doctrine occurs when the petitioner presents all disputed claims to the state court before asking the federal court to examine these claims; 83 when the petition

79 117 U.S. 241 (1886).

80 Id., at 251.

81 R. Faust, T. Rubenstein, & L. Yackle, supra note 3, citing *Ex parte Royall* at 251-253.


83 Id., at 278.
does not include both unexhausted and exhausted claims;\textsuperscript{84} and when the merits of the petitioner's habeas claim have been reviewed by the state court.\textsuperscript{85} The state courts must have had the opportunity to contemplate the issues raised in the petition that is now at the federal court.

In the early 1970s, the U.S. Supreme Court applied the exhaustion doctrine more stringently. In \textit{Picard v. Connor}, the Court announced that the substance of a federal habeas corpus claim must be presented fairly to the state courts.\textsuperscript{86} Not only must the petitioner have been through the state courts, but the states must have had the first opportunity to hear the claim.\textsuperscript{87} In this case, Connor did not bring up the equal protection claim until he reached the United States Supreme Court; therefore the state courts never had a fair opportunity to consider and act upon this claim. The Court of Appeals held that the respondent had exhausted available state judicial remedies, because he had presented the state court with an opportunity to apply legal principles to the facts bearing upon his constitutional claim.\textsuperscript{88} The Supreme Court rejected this view and held that the state courts need more than an opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.\textsuperscript{89} The exhaustion doctrine is not satisfied if all the facts necessary to support the federal claim were before the state courts or if a somewhat similar state claim was made.\textsuperscript{90} The petitioner must raise the same constitutional issues that the federal court

\textsuperscript{84} Rose v. Lundy, supra note 18.

\textsuperscript{85} Ex parte Hawk, 321 U.S. 114, 116 (1944).

\textsuperscript{86} Supra note 78, at 278.

\textsuperscript{87} Id., at 276.

\textsuperscript{88} Id., at 271-72.

\textsuperscript{89} Id., at 276-77.

\textsuperscript{90} Anderson v. Harless, 459 U.S. 4, 6 (1982).
is asked to address. Thus, it is not enough for a petitioner to merely pass through the state court system on the way to federal court; the state court must have considered every claim.

Federal habeas corpus claims must be fairly presented to the state courts before being raised in federal court if the exhaustion doctrine is to prevent unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. "It would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."91 To solve this tension the courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within the courts of another sovereign with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."92

The exhaustion requirement minimizes friction between federal and state systems of justice by allowing the state an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights.93 An exception is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief.94


92 Id., at 204.

93 Exhaustion requirement, which is codified Title 28 U.S.C. § 2254 (b) & (c) provides in pertinent part:

b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

In *Pitchess v. Davis*, the Court reiterated the need for exhaustion of state remedies and stated more clearly what they considered to be an exhausted claim.95 The Supreme Court held that the defendant did not exhaust state remedies available to him so long as he had a right under state law to raise the question presented. In this case, the denial of an application for a writ of prohibition does not constitute an adjudication on the merits of the claim presented.96 Even if Davis had another trial, he still had full post-trial appellate review available, therefore, the claim is not exhausted. Denial of an application for an extraordinary writ by state appellate courts does not exhaust state remedies where the denial could not be fairly taken as an adjudication of the merits of claims presented, and where normal state remedies are available.97 Therefore, the state courts must look at the merits of the claims presented in order for the exhaustion doctrine to be satisfied.

In *Rose v Lundy*98 the Supreme Court held that a federal district court must dismiss mixed petitions containing both exhausted and unexhausted claims. This exhaustion requirement is designed to encourage habeas petitioners to present the federal court with a single habeas petition after all claims in state court have been exhausted.99 It is designed to protect the state court's role in enforcement of federal law and prevent disruption of state judicial proceedings.100 Both the courts and prisoners should benefit from this doctrine, because as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thereby providing a more focused and thorough review.

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96 *Id.*, at 488.
98 *Rose v. Lundy*, *supra* note 18.
99 *Id.*, at 520.
100 *Id.*, at 518.
If the petition contains both exhausted and unexhausted claims, the petitioner can either return to state court to exhaust his claim or amend his habeas petition to present only exhausted claims to the District Court. If the prisoner is concerned with speedy federal relief on his claims, the prisoner can easily amend his petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. However, if the petitioner amends his claim, he is running the risk of forfeiting consideration of his unexhausted claims in federal court. Under 28 U.S.C. § 2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those new grounds in a prior petition constituted an abuse of the writ." 102

If a petitioner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, . . . the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay. 103

Therefore, if the petitioner desires quick federal review and amends his or her petition, the unexhausted claims may be barred from federal review at a later date.

101 Id., at 520.

102 Id., at 520-21.

103 Id., at 521, citing Sanders v. United States, 373 U.S. 1, 18 (1963).
In *Granberry v. Greer*, the Court held that when the state raises a nonexhaustion defense for the first time at the United States Court of Appeals, an appellate court is neither required to dismiss for non-exhaustion nor obligated to regard the state's omission as an absolute waiver of the claim.\textsuperscript{104} The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.\textsuperscript{105}

In *Castille v. Peoples*, the U.S. Supreme Court revisited the question of the extent to which the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court.\textsuperscript{106} Justice Scalia, in the majority opinion, states that the court has previously rejected a finding that state court remedies are not exhausted if there is any possibility of further state court review available. In *Brown v. Allen*, the Court held that once the state courts have ruled upon a claim, it is unnecessary for a petitioner "to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review."\textsuperscript{107} The Court states that it would be inconsistent with the principle announced in § 2254 (b)\textsuperscript{108} and with the principles of comity, "to mandate recourse to state collateral review whose results have effectively been predetermined, or permanently to bar from federal habeas prisoners in States whose post conviction procedures are technically inexhaustible."\textsuperscript{109} When the state court has already ruled upon a claim or ignored the right presented it would be useless to require further state court proceedings. However, where the claim, is

\textsuperscript{104} 481 U.S. 129 (1987).

\textsuperscript{105} Id., at 136.


\textsuperscript{108} See supra note 93.

\textsuperscript{109} *Castille v. Peoples*, supra note 106 at 350.
represented for the first time in a procedural context in which its merits will not be considered unless "there are special and important reasons therefore," this does constitute "fair presentation" and fails to satisfy the exhaustion requirement.\(^{110}\)

**Procedural Default**

"A procedural default occurs in the habeas corpus context when a state prisoner has exhausted his state remedies without obtaining any decision on the merits of his federal constitutional claim, because he failed to comply with state procedural rules on how the claim must be raised."\(^{111}\) The consequence of a procedural default is that the petitioner's federal claim will never be heard in state court.\(^{112}\) The procedural default brings two significant government interests into conflicts: providing a federal forum to hear alleged constitutional rights violations and reinforcing the procedural integrity of state court systems.\(^{113}\) Of the procedural defaults where representation was known, 82 percent of the petitions in state courts and 91 percent of the petitions in federal courts were filed without benefit of counsel.

The U.S. Supreme Court in *Francis v. Henderson*\(^ {114}\) addressed the issue of whether a state prisoner who failed to make a timely challenge to the composition of the grand jury that indicted him could challenge the grand jury composition in a postconviction federal habeas corpus proceeding. Under Louisiana law any objection to the

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110 Id., at 351.


112 Dest, *supra* note 111, at 266.

113 Id.

composition of the grand jury that indicts a defendant must be made in advance of the trial, otherwise objections are considered waived. Francis never made any objection to the composition before or during trial, and was found guilty. Moreover, Francis never appealed the conviction.

The Supreme Court held that the defendant could not challenge his conviction in a habeas proceeding. In some circumstances, considerations of comity and concerns for orderly administration of criminal justice require a federal court to exercise discretion and forgo the exercise of the courts' habeas corpus power. Delays make it hard to overcome the prima facie claim that may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction and memories may lose their sharpness. In addition, the decision may affect other convictions based on indictments returned by the same grand jury. In *Davis v. U.S.* (1974), the Court stated a federal prisoner, who failed to make a timely challenge to the allegedly unconstitutional composition of the grand jury that indicted him, could not after his conviction attack the grand jury’s composition in an action for collateral relief under 28 U.S.C. § 2255 or under habeas corpus.

In *Wainwright v. Sykes* the Supreme Court held that failure to comply with a state procedural rule will bar habeas corpus review by a federal court unless the defendant can show both cause for his failure to comply with the state rule and actual prejudice created by the default. In his habeas challenge, Sykes claimed that he had not understood the *Miranda* warnings, thus, the statement was involuntary, even though neither he nor his counsel raised that claim before or during the trial. The applicable state procedural rule required that such claims be raised by a pretrial motion to suppress, but it also granted the trial court discretion to entertain an objection at trial.

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115 *Id.*, at 538-39.


Did Sykes' violation of the state's procedural rule by failing to challenge his confession at trial bar federal habeas corpus review? The Supreme Court decided that the rule of *Francis v. Henderson* barring federal habeas corpus review absent a showing of "cause" and "prejudice" attendant to state procedural waiver, should be applied to a waived objection to the admission of a confession at trial. The "cause and prejudice" rule is premised upon the belief that a state procedural rule deserves a fair amount of respect "both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right."\(^{118}\) The Supreme Court decided that the "cause" and "prejudice" exception of the *Francis* rule would afford an adequate guarantee that a federal court would for the first time be able to hear the federal constitutional claim of a defendant who, in the absence of such an adjudication, would be the victim of a miscarriage of justice. Sykes advanced no explanation whatever for his failure to object at trial and therefore did not satisfy the cause and prejudice standard. The precise definition of the "cause" and "prejudice" left open for resolution in future decisions and noted only that it was narrower than the standard set forth in dicta in *Fay v. Noia*.\(^{119}\)

Subsequent cases have defined these standards. *Murray v. Carrier* asks whether a federal habeas petitioner can show "cause" for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.\(^ {120}\) The Supreme Court, in reaching their decision that Carrier failed to establish cause for the procedural default, noted that the constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not, ensure that defense counsel will recognize and raise every conceivable

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\(^{118}\) *Id.*, at 88.

\(^{119}\) *Fay v. Noia*, *supra* note 14, promulgated the deliberate bypass rule, which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention.

\(^{120}\) 477 U.S. 478(1986).
The mere fact that counsel failed to recognize the factual or legal basis for a claim or failed to raise it does not constitute cause. The question of cause for procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. As long as the defendant does not receive ineffective assistance of counsel, there is no inequity in requiring the defendant to bear the risk of attorney error that results in procedural default. The Court states that cause for a procedural default can turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule.

Additionally, the habeas petitioner must establish that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. In conclusion, the court held that the petitioner never alleged any external impediment that may have prevented counsel from raising his claim and disallowed any claim that counsel was ineffective.

**Successive Petitions and Abuse of the Writ**

Successive petitions and abuse of the writ are related reasons for denying habeas corpus petitions. A successive petition is a second or

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121 The Court cites *Engle v. Isaac*, 456 U.S. 107 (1982), to state that the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it does not constitute cause for procedural default. 477 U.S. at 486.

122 *Id.*, at 488.

123 *Id.*, at 488-89. Possible examples of cause under this standard may include showing that the factual or legal basis for a claim was not reasonably available to counsel, that some interference by officials made compliance impracticable, or ineffective assistance of counsel. However, the exhaustion doctrine would require that a claim of ineffective assistance of counsel be presented to state courts as an independent claim before it may be used to establish cause for procedural default.


125 *Id.*, at 497.
subsequent habeas corpus petition that raises the same claims raised, and rejected, on an earlier petition, whereas an abusive petition is another petition that raises a new claim that could have been raised in an earlier petition.\textsuperscript{126}

The U.S. Supreme Court set forth the rules governing successive petitions in \textit{Sanders v. United States}.\textsuperscript{127} Basically, a successive petition was entertained unless it was an "abuse of the writ." In turn, an abuse was found when a petitioner "deliberately withheld" the claim from a previous federal petition or where the successive petition was clearly filed in bad faith.\textsuperscript{128} The U.S. Supreme Court has taken some steps to limit multiple petitions. In 1989, \textit{In re McDonald}, the Court denied a petitioner the opportunity to file a habeas corpus petition because he had filed 75 "frivolous" petitions over a ten year period.\textsuperscript{129} Dissenters noted that in this decision, the Court "bars its door to a litigant prospectively."\textsuperscript{130} State courts do not have limits on successive petitions as such.

Observers differ on the need to restrict prisoner access to courts. Robbins contends that prisoner cases are not causing the burden on courts but are the easiest group of cases to eliminate, whereas Alan Slobodin of the Washington Legal Foundation says that cases barred are factually specific and involve excessive filings of an almost "recreational" nature.\textsuperscript{131} The ABA recommends restrictions on filing

\textsuperscript{126} I. Robbins, \textsc{Habeas Corpus Checklists} supra note 64 § 16-3.

\textsuperscript{127} \textit{Supra} note 14. For a discussion of the application of \textit{Sanders} see Federal Courts Study Committee \textit{supra} note 1, at 475-77.


\textsuperscript{130} \textit{Ibid}.

\textsuperscript{131} Wohl, \textit{supra} note 129 at 45.
successive federal habeas corpus petitions. Second or successive claims would be dismissed summarily unless a new federal right was applicable retroactively, new facts not previously discoverable were introduced, or evidence of actual innocence or miscarriage of justice were produced. In other words, they attributed successive petitions not to "sandbagging" but to "peer lawyering, mixed petition rules, execution-date practices, new counsel at later stages of the proceedings and changes in the law." 

The conclusion of the Federal Courts Study Committee that the problem of successive petitions is "overstated" is supported here. Only 17 state habeas petitions and 67 federal were denied because they were successive petitions. The denials involving abuse of the writ were similar, (11 state petitions and 88 federal petitions). All of the petitions denied because they were successive petitions or abuse of the writ in state courts were filed pro se. Similarly in federal court, of those cases where representation status is available, 27 of 28 petitions denied on the grounds that they were successive petitions and 34 of the 37 petitions that were denied on the grounds of abuse of the writ were filed by prisoners who did not have benefit of counsel.

In sum, the proportion of petitions granted by type of claim appears to be very low and rather uniform between state and federal courts, when the exceptions of particular claims in Texas and New York are taken into account. It also must be stressed that even granted petitions may provide only limited relief, (e.g., bail may be reduced), but a granted petition does not necessarily mean that the prisoner is released. State courts typically do not give reasons for the denial, but for these petitions where a reason for denial is given, it is likely to be procedural default or denial on the merits. Reasons are more often given by federal judges, who deny petitions for the same reasons plus failure to exhaust state remedies.

132 Robbins (ABA Report) supra note 5 at 35.

133 Id.

134 Federal Courts Study Committee, supra note 1, at 471.
Chapter 7
Habeas Corpus Petitions in Death Penalty Cases

To this point, the tensions between state and federal courts have been identified with reference to habeas corpus petitions generally. These tensions are exacerbated when the petitions are filed by state prisoners under sentence of death. The basic question is whether death penalty cases require a different, and higher, standard of habeas corpus review than cases where the sentence of death is not involved. Chief Justice Rehnquist has answered the question in the negative, but Justice Brennan has argued the affirmative by stating that execution is "...the most irremediable and unfathomable of penalties; that death is different."\(^{135}\)

Most sociologists and psychologists studying the issue are opponents of the death penalty and argue that the death penalty is not a deterrent and is not administered evenhandedly.\(^ {136}\) The Supreme Court considers other factors as well in making these decisions, such as promoting federalism,\(^ {137}\) deferring to the judgments of legislatures and

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other elected officials, and accommodating administrative costs. Many prosecutors and judges see habeas petitions as frivolous attempts to prolong the lives of prisoners properly condemned to death, rather than as petitions raising legitimate constitutional issues. In these circumstances habeas petitions become another de facto appeal, whose purpose is to delay executions, rather than a collateral review. In a speech to the Ninth Circuit's Annual Judicial Conference, Justice O'Connor reminded the judges of their responsibility to be "fair to the states, in not disrupting the states' enforcement of their criminal laws." In a resolution passed in 1990, the Conference of Chief Justices noted that the abuse of the writ encouraged by current practices has effectively negated the law of the 37 states that impose the death penalty. The Chief Judge of the Court of Appeals (Eighth Circuit), Donald P. Lay, argues that if states eliminated the death penalty, a large amount of litigation would disappear, and the savings to state government would be enormous.

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139 *Lockhart v. McCree*, 476 U.S. 162 (1986); *Murray v. Giarratano* 492 U.S. 1 (1989). For a fuller discussion of these other considerations, see Acker, supra note 130, at 81.


142 Resolution XVIII, Habeas Corpus in Capital Cases, adopted as proposed by the State-Federal Relations Committee of the Conference of Chief Justices in San Juan, Puerto Rico, February 1, 1990.

Death penalty litigation is complex because it involves all of the issues of "ordinary" habeas cases, but also special issues unique to capital cases.\textsuperscript{144} As Liebman points out, no habeas petitions, capital or noncapital, should be filed until nine steps are completed: the trial that ascertains guilt, the sentencing hearing, proceedings on a motion for a new trial, appeals of right in state courts, discretionary appeals in state courts, certiorari review to the U.S. Supreme Court, state post-conviction proceedings on all state and federal claims, all state post-conviction appeals, and certiorari review of postconviction proceedings by the U.S. Supreme Court.\textsuperscript{145} The ABA Report notes that the least complicated case, in which relief is denied at every stage, can go to the U.S. Supreme Court at least three times and to federal district and appellate courts twice.\textsuperscript{146} Moreover, habeas petitions in death penalty cases are filed in the glare of publicity and often under very short time frames, so that complex issues are presented a flurry of last-minute post-conviction petitions.\textsuperscript{147} Judicial resources are expended because the prisoner must seek a stay of execution in order to press the habeas claims.

How do habeas claims raised in death penalty claims differ from claims raised in noncapital cases? In general more petitioners under a sentence of death raised a greater variety of claims than other habeas corpus petitioners. The exceptions were Fourth and Fifth Amendment claims in federal court, and Fifth, Eighth, and Fourteenth Amendment claims in state courts, which were more likely to be raised by petitioners not sentenced to death.

\textsuperscript{144} I. Robbins (ABA Report), \textit{supra} note 5, at 42-43 notes special voir dire of jurors, special penalty procedures, proportionality review and competence of counsel among others.

\textsuperscript{145} J. Liebman, \textit{supra} note 48, at 31.

\textsuperscript{146} \textit{Supra} note 5.

Table 20

Claims Raised by Petitioners Sentenced to Death

<table>
<thead>
<tr>
<th>Claims Raised</th>
<th>State Courts</th>
<th></th>
<th>Federal Courts</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Death</td>
<td>Non Death</td>
<td>Death</td>
</tr>
<tr>
<td>Ineffective Counsel</td>
<td>61</td>
<td>64%</td>
<td>694</td>
<td>40%</td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>48</td>
<td>50%</td>
<td>446</td>
<td>26%</td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>45</td>
<td>45%</td>
<td>165</td>
<td>10%</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>8</td>
<td>8%</td>
<td>76</td>
<td>4%</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>6</td>
<td>6%</td>
<td>336</td>
<td>24%</td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>30</td>
<td>32%</td>
<td>202</td>
<td>12%</td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>12</td>
<td>13%</td>
<td>580</td>
<td>33%</td>
</tr>
<tr>
<td>Fourteenth Amendment</td>
<td>23</td>
<td>24%</td>
<td>632</td>
<td>36%</td>
</tr>
</tbody>
</table>

Table 20 is read as follows: ineffective assistance claims were raised by 64 percent of the state prisoners sentenced to death and by 40 percent of the petitioners not sentenced to death. To determine whether petitions from the California Supreme Courts, which were oversampled, exerted too much influence over the relationship between claims raised in state courts versus those raised in federal courts, an analysis of California was conducted separately. Table 21 shows that ineffective assistance of counsel claims were raised more frequently in California death penalty cases than in death penalty petitions filed in other states. Without California data, ineffective assistance of counsel was raised by approximately the same percentage of capital petitioners as noncapital petitioners. With respect to the remaining claims in both state and federal courts, more petitioners under sentence of death were likely to claim trial court error, prosecutorial misconduct, and Sixth Amendment violations in both state and federal court. General concerns of due process (Fourteenth Amendment) were raised less often in California than in other states and by fewer death penalty petitioners than by other state petitioners.
Table 21

Claims Raised by Sentence

<table>
<thead>
<tr>
<th>Claims</th>
<th>California Supreme Court</th>
<th>Other State Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Death</td>
<td>Life</td>
</tr>
<tr>
<td>Ineffective Counsel</td>
<td>47</td>
<td>66</td>
</tr>
<tr>
<td>Trial Court Error</td>
<td>33</td>
<td>50</td>
</tr>
<tr>
<td>Prosecutorial Misconduct</td>
<td>29</td>
<td>19</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>8</td>
<td>22</td>
</tr>
<tr>
<td>Sixth Amendment</td>
<td>16</td>
<td>14</td>
</tr>
<tr>
<td>Eighth Amendment</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>Fourteenth Amendment</td>
<td>6</td>
<td>37</td>
</tr>
</tbody>
</table>

Academic writers tend to agree with Justice Brennan and note that capital cases are different because they are exceptionally serious and receive special handling i.e., "super due process."\(^{148}\) Emerson further notes that attorneys in capital cases assume from the beginning that a case will go to trial, that the trial will be before a jury, and that the trial outcome, if unacceptable, will be appealed.

Data from this research confirm this impression. Table 22 shows that nearly all of the petitioners sentenced to death were convicted of homicides by juries. Nearly all were represented by counsel at trial, and unlike the vast majority of other petitioners, most had counsel to prepare the habeas petitions. The number of claims raised by petitioners sentenced to death was higher than the number of claims raised by other petitioners.

prisoners. The time from conviction to filing of the current habeas petition is obviously much longer for prisoners sentenced to death or to life imprisonment than for prisoners given lesser sentences. Petitions in death penalty cases were granted more frequently than other cases in federal court, but less frequently by state courts.

Table 22

Comparison of Petitioners Sentenced to Death with Other Petitioners

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>State Courts</th>
<th>Federal Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Death Penalty</td>
<td>Life Imprisonment</td>
</tr>
<tr>
<td>Homicide</td>
<td>98%</td>
<td>59%</td>
</tr>
<tr>
<td>Trial by Jury</td>
<td>99%</td>
<td>82%</td>
</tr>
<tr>
<td>Petitions Granted</td>
<td>3%</td>
<td>4%</td>
</tr>
<tr>
<td>Pro Se</td>
<td>5%</td>
<td>9%</td>
</tr>
<tr>
<td>Representation at Trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pro Se</td>
<td>5%</td>
<td>87%</td>
</tr>
<tr>
<td>Representation (Habeas)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median Days from Conviction to Habeas Filing</td>
<td>2,319</td>
<td>1,985</td>
</tr>
<tr>
<td>Median Number of Habeas Claims</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Number of Petitioners</td>
<td>91</td>
<td>431</td>
</tr>
</tbody>
</table>

To justify retaining or even expanding federal habeas corpus those opposed to the death penalty cite evidence that the U.S. Supreme Court has granted relief to a significant proportion of state prisoners under the death sentences. For example, one source stated federal appellate courts have found constitutional flaws in as many as 73
percent of state death penalty cases.149 Another figure used to demonstrate that habeas corpus is a necessary check on state courts is the often-repeated figure that "in 40 percent of the cases petitioned, defendants win some measure of relief."150 Note that the distinction between capital cases and noncapital cases is important here, even opponents of the death penalty do not dispute the fact that the rate of success in noncapital federal habeas corpus cases is "less than five percent."151 In a letter to the editor of the Washington Post, W. Lee Rawls, Assistant Attorney General for the U.S. Department of Justice, said that the 40% is calculated by dividing the total number of death-row inmates to complete habeas corpus review since 1976 (344) by the number of petitions in which some relief was granted (135).152 In fact, Rawls points out that many of the 135 decisions were themselves overturned. Rawls notes that 6 of the 135 decisions were instances where the Ninth Circuit disagreed with the state supreme courts on questions of death penalty law. In 5 of the 6, the U.S. Supreme Court agreed with the state supreme court rather than the Ninth Circuit.

Data from the Administrative Office of U.S. Courts reveal that of the habeas corpus petitions terminated in calendar year 1990, judgments were reached in 4,378. Ninety-five percent (4,164) of these petitions were dismissed or denied, four percent (168) were decided in


151 Tabak and Lane, supra note 20, at 11, which cites the origin of the 40 percent figure as a Memorandum from James S. Liebman to Senator Joseph Biden (July 15, 1991).

favor of the petitioner, and 1 percent were mixed. Only 36 of the 1990 terminations involved state prisoners under sentence of death. Most of these 36 came from just three districts: 6 from the Southern District of Texas, 7 from the Eastern District of Missouri, and 8 from the Middle District of Florida. Of the 36 death penalty petitioners, a judgment was rendered in 12 and, only one of the twelve was decided in favor of the petitioner.

The results using 1992 data were similar. In that year, U.S. District Courts reached judgments on 4,410 of the 10,688 habeas petitions filed by state prisoners. Again, 94 percent of these petitions were denied, 5 percent granted, and 1 percent were mixed. Judgments were reached in 45 of the 91 death penalty terminations. The petitioner was successful in 7 of these 45 petitions (15 percent). Table 22 above shows habeas petitions were granted more frequently in death penalty cases than in other cases in federal courts, but granted less frequently than other cases in state courts. In either event, petitioner's success rate in death penalty cases are vastly overstated. These data lend support to the argument that state courts can be trusted to guarantee constitutional rights, or conversely, weakens the argument that state courts are making so many errors that federal oversight is essential.
Robbins argues that the United States Supreme Court has not consistently applied a single overarching theory of habeas corpus review. He lists three competing theories: "the constitutional model" which focuses on the importance of habeas corpus as the remedy for constitutional violations; "the process model," which emphasizes the importance of habeas as a remedy to correct flaws in lower court processes; and "the innocence theory," which stresses the importance of habeas as a remedy for constitutional violations that are supplemented with a claim of factual innocence. A recent cartoon shows that the interplay between these different aspects of jurisprudence has not gone unnoticed by the media (see Exhibit 4).

How well has this intensive research effort, the first to encompass a study of habeas corpus petitions terminated in both state and federal courts, accomplished its goal of changing the character of the debate? The answer to this question must be discussed separately for habeas corpus petitioners under the sentence of death and other petitioners.

In noncapital cases, the findings from this research should reduce tensions between state and federal courts. Federal courts are simply not overturning state court convictions by granting a large number of habeas corpus petitions. Indeed, so few petitions from state prisoners were granted by federal courts that a planned separate analysis of characteristics of petitions granted versus those denied had to be abandoned. Without that analysis, it is not possible to make recommendations on which aspects of state court process or procedure need to be reformed to avoid federal oversight. This finding can be interpreted to mean state courts are doing a good job in protecting federal constitutional rights and weakens the argument that federal

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153 Robbins, supra note 64, at 3-1.
154 Id.
Ruben Bolling's comic strip, *Tom the Dancing Bug* is distributed by Quaternary Features and was named the "Hot Comic Strip" of the year in *Rolling Stone's* 1993 Hot List. Used with permission of Ruben Bolling.
review is a necessary safeguard against errors made in state courts. Proponents of expanded federal review, however, could use this same evidence to weaken the argument that federal review is a challenge to finality. After all, in an overwhelming number of cases, the judgment of the state trial court is confirmed. The public perception that prisoners are being released on "technicalities," such as habeas corpus, is simply not accurate.

The impact of counsel on success rates is unresolved in these cases for the same reason—so few were granted that differences in representation were not meaningful. Moreover, the issue is complicated by the fact that attorneys are more likely to be appointed to cases exhibiting some merit and so conflicting interpretations could explain any differences found. Is it that petitions filed by attorneys were more likely to be granted or that, when screened, petitions with merit were more likely to have counsel appointed?

The argument that federal review of state convictions is a duplication of effort is given support here. A comparison of claims raised in state court with claims raised in federal court shows great similarity. With a few minor exceptions, notably with Fourth Amendment and Eighth Amendment claims, similar claims are raised in both state and federal courts, which implies over litigation. Ineffective assistance of counsel, and general due process concerns overall were claims raised by most petitioners in both state and federal courts. This is not unexpected because not only is it common to blame the lawyer for a loss, but in some instances, it is necessary to give ineffective assistance of counsel as a reason for not raising particular claims earlier in the process or in a timely manner. Claims raised do vary by state. For example, habeas is often used to challenge pleas where the defendant claims a failure to be informed about: the habitual offender statute in Alabama, sentence enhancements in California, excessive bail in New York, and appellate processes in Texas. Overall, however, not only are new claims not raised in federal court, but the chance of having petitions granted is very slim. Less use was made of the "successive petitions" or "abuse of the writ" as reasons for denial of the petitions than was anticipated, perhaps because the relevant decisions of the U.S. Supreme Court are so recent. Prisoners stand the best chance of having their petitions granted the first time a habeas corpus petition is presented to a
state court. Subsequent petitions are less likely to be granted, regardless if they are filed in state or federal court.

Only petitioners sentenced to long terms have the time to surmount the procedural steps requisite to filing a habeas corpus petition. Overwhelmingly, these are prisoners who have committed serious offenses and were sentenced to long terms after a jury trial. Many habeas petitions are filed in both state and federal courts.

These petitioners, however, do have the opportunity to submit multiple petitions to both state and federal court. Impressionistic evidence from examining the files and interviewing court staff leads to the conclusion that prisoner petitions are considered seriously and are not dismissed summarily. Because habeas claims are often filed pro se, they do represent work for federal court staff, particularly magistrate judges, who must try to identify the claims raised and determine whether or not counsel needs to be appointed. Magistrate judges do a commendable job in identifying claims raised and in evaluating the merits of petitions. On the other hand, habeas corpus petitions are a relatively small proportion of federal court workload in most districts. The data indicate that only a small proportion of prisoners file habeas corpus petitions, although a few prisoners file a large number of petitions. If no limits are placed on federal review of habeas corpus cases, perhaps additional support for pro se law clerks and staff attorneys who screen these petitions should be considered. That same type of support is even more essential in state courts and may reduce the number of petitions not resolved, but rather postponed for failure to exhaust. A survey of judges attitudes toward habeas corpus petitions would be interesting to determine the consequences of receptivity toward habeas corpus petitions and petitions filed. At least a few judges interviewed expressed the opinion that writing petitions was a rehabilitative and therapeutic exercise for prisoners.

What is clear is that habeas corpus reform has become another arena in which to debate the death penalty. Regardless of the proposals made, habeas corpus reform in capital cases needs to be separated from

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155 A related study by the National Center for State Courts is currently examining the relationship between habeas corpus petitions in federal court and Section 1983 prisoner petitions, with the hypothesis that restriction on habeas corpus are resulting in an increased use of the Section 1983 Civil Rights remedy.
reform in noncapital cases. Death penalty cases do in fact require special handling. State courts are careful to document the status of appeals in capital cases, and federal courts are even more so. Special clerks are assigned to track capital cases and to ensure that all the procedures are followed. Unlike most habeas petitions, which are filed pro se, virtually all capital prisoners have attorneys to prepare their petitions. Hence, the shortage of attorneys who represent petitioners is a more serious problem in capital cases. Even so, capital petitioners are not much more likely to have their petitions granted, especially since petitioners are prone to raising multiple claims in multiple petitions a variety of state and federal courts. Even counting court endorsement of any one claim in any one petition as a success, the petitioner success rate is very low. Is a petition granted by the U.S. Court of Appeals and later overturned by the U.S. Supreme Court a success if the prisoner is ultimately executed? A better way to measure success in capital cases would be to track the histories of all prisoners sentenced to death to determine how often a successful petition somewhere along the line makes a difference in the ultimate outcome. That, however, is beyond this study's initial look at the scope of all habeas corpus litigation.

The other data presented in this study will undoubtedly receive different interpretations based upon the reader's attitude toward the death penalty. Although rarely granted overall, federal habeas corpus petitions are granted more frequently in capital cases than in noncapital cases. Given the inevitability of multiple petitions raising multiple claims in multiple state and federal courts, some will conclude that procedures must be streamlined and strict time limits placed on petitions. Others will conclude that elimination of the death penalty itself would obviate the need for these elaborate safeguards. In either event, progress is more likely to be made if that issue is joined directly rather than having all habeas corpus reform efforts in all cases driven by attitudes toward the death penalty.

156 Margolick, supra note 140, discusses the problem of obtaining attorneys for death penalty appeals and shows that a third of the attorneys handling post-conviction relief in Texas are from other states.
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Barbara J. Rothstein, address to NATIONAL CONFERENCE ON STATE-FEDERAL JUDICIAL RELATIONSHIPS, Orlando, Florida, April 10, 1992.


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Appendix A
HABEAS DATA ELEMENTS
State Proceedings and Petitioner Characteristics

Case Identification Number________________________ NCSC Site Number____________________

County or Court Where Petition Was Initially Filed________________________
Petitioner's Name____________________________________________________

Month/ Day /Year

Legal Representation on this petition:

Date Petition _____/_____/_____ Pro Se
Date Disposed _____/_____/_____ Court Appointed
Privately Retained
Other (Specify)________________________
Can't determine

Claims: (Check all that apply)

Ineffective assistance of counsel (general) ☐
  failure to investigate ☐
  failure to cross examine ☐
  failure to object to admissibility ☐

Trial Court Error (general) ☐
  improperly selected jury ☐
  failure to suppress improper evidence ☐

Prosecutorial Misconduct
(specify below) ☐

Fourth Amendment (general) ☐
  search and seizure ☐
  unlawful arrest ☐

Fifth Amendment (general) ☐
  self incrimination ☐
  coerced confession ☐
  due process/equal protection ☐
  double jeopardy ☐

Sixth Amendment (general) ☐
  confrontation/cross examination ☐
  line-up challenge ☐
  juror impartiality ☐
  speedy trial ☐

Eighth Amendment (general) ☐
  excessive sentence ☐
  conditions of confinement ☐
  cruel and unusual punishment ☐

Fourteenth Amendment (general) ☐
  burden of proof ☐
  coerced guilty plea ☐
  denial of appeal ☐

Other ________________________________

Please specify other or general claims:
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Outcome: Granted ☐ Denied ☐ Dismissed by court ☐ Remanded to state court ☐
If petition denied:

- Failure to exhaust remedies
- Procedural default
- Successive petition
- Abuse of the writ
- Petitioner not in custody
- Jurisdictional bar (e.g. Fourth Amendment exclusionary rule)
- Denied on merits
- Other (Specify)_________________________________

Appealed to U.S. District Court? Yes ☐ No ☐ Date Appealed:

If Yes: ☐ Granted ☐ Denied ☐ Pending ______________

Previous habeas petition filed or collateral post-conviction rule in state court?
Yes ☐ No ☐ If yes:

<table>
<thead>
<tr>
<th>Prior Claims</th>
<th>Court Where Raised</th>
<th>Resolution</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior Petition 1.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Petition 2.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Petition 3.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior Petition 4.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Petitioner Characteristics

<table>
<thead>
<tr>
<th>Convicting State Trial Court</th>
<th>Date of Conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Give Complete Name)</td>
<td>Month/Day/Year</td>
</tr>
</tbody>
</table>

**Type of Offense:** (Check most serious)
- Homicide ☐
- Rape ☐
- Robbery ☐
- Assault ☐
- Burglary/Theft ☐
- Drug Sale/Possession ☐
- Other (Specify)______ ☐

**Legal Representation:** (Check One)
- Pro Se ☐
- Court appointed: ☐
- Public Defender ☐
- Assigned ☐
- Contract ☐
- Can't Determine ☐
- Privately retained ☐
- Other (Specify)______ ☐

**Method of Disposition:** (Check One)
- Jury trial ☐
- Bench trial ☐
- Guilty plea ☐
- Nolo contendere ☐

**Length of Sentence (Years):**
- Minimum____ Maximum____
- Death penalty Yes ☐ No ☐
- Yes ☐ No ☐
Appendix B
(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions-Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed in forma pauperis, in which event you must execute form AO 240 or any other form required by the court, setting forth information establishing your inability to pay the costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your personal account exceeds $____________________, you must pay the filing fee as required by the rules of the district court.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and at least two copies must be mailed to the Clerk of the United States District Court whose address is

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.
<table>
<thead>
<tr>
<th>Name</th>
<th>Prisoner No.</th>
<th>Case No.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Name of Place of Confinement**

**Name of Petitioner (include name under which convicted)**

**Name of Respondent (authorized person having custody of petitioner)**

**The Attorney General of the State of:**

**PETITION**

1. Name and location of court which entered the judgment of conviction under attack __________________________________________

2. Date of judgment of conviction ________________________________

3. Length of sentence ____________________________________________________________________________________

4. Nature of offense involved (all counts) ___________________________________________________________________

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   ____________________________________________________________

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☐
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:

(a) Name of court ________________________________

(b) Result ______________________________________

(c) Date of result and citation, if known ____________

(d) Grounds raised __________________________________

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court ________________________________

(2) Result ______________________________________

(3) Date of result and citation, if known ____________

(4) Grounds raised __________________________________

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court ________________________________

(2) Result ______________________________________

(3) Date of result and citation, if known ____________

(4) Grounds raised __________________________________

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court ________________________________

(2) Nature of proceeding ________________________________

(3) Grounds raised ____________________________________
(4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes ☐ No ☐

(5) Result

(6) Date of result

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?  

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.
For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: __________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________

Supporting FACTS (state briefly without citing cases or law) ____________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________

B. Ground two: _________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________

Supporting FACTS (state briefly without citing cases or law): ______________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
C. Ground three: ____________________________________________

Supporting FACTS (state briefly without citing cases or law): ____________________________________________

__________________________________________________________________________________________

__________________________________________________________________________________________

D. Ground four: ____________________________________________

Supporting FACTS (state briefly without citing cases or law): ____________________________________________

__________________________________________________________________________________________

__________________________________________________________________________________________

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: _________________________________

__________________________________________________________________________________________

__________________________________________________________________________________________

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?  
Yes ☐  No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary bearing ____________________________________________

__________________________________________________________________________________________

(b) At arraignment and plea ____________________________________________

__________________________________________________________________________________________
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
   Yes □ No □

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
   Yes □ No □
   (a) If so, give name and location of court which imposed sentence to be served in the future: ___________________________

   (b) Give date and length of the above sentence: _______________________________________________________________

   (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
   Yes □ No □

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

___________________________
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

___________________________
(date)

___________________________
Signature of Petitioner