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questionable practice,[86] and in *Morlang* the Fourth Circuit adhered to this policy.

Prior to *Morlang*, the Fourth Circuit, in *United States v. Lineberger*,[87] had generally stated that impeachment of one's own witness had been properly allowed in sound judicial decisions.[88] The *Morlang* court, therefore, clarified the limits to which such impeachment is allowable, and also outlined the scope of the court's interpretation of Federal Rule of Evidence 607.[89] The Fourth Circuit will thus not allow impeachment of one's own witness in all circumstances, and presumably, the right to impeach one's own witness under the Federal Rule is confined to the more traditional situation where counsel is surprised by his witness' damaging testimony.[90] What is definitely disallowed in the Fourth Circuit is the impeaching of one's own witness merely for the purpose of getting otherwise inadmissible hearsay evidence to the jury.[91] The court declared that while it is permissible to impeach one's own witness in proper conditions, the practice may not be used as a subterfuge.[92]

FRANK F. BARR

VII. HABEAS CORPUS AND PRISONERS' RIGHTS

A. Federal Habeas Corpus Relief for State Prisoners

The writ of habeas corpus[1] is a civil remedy[2] by which those in government custody[3] may attack constitutional defects in a criminal

[86] *See* Vanston v. Connecticut Gen. Life Ins. Co., 482 F.2d 337 (5th Cir. 1973); United States v. Coppola, 479 F.2d 1153 (10th Cir. 1973); Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

[87] 444 F.2d 122 (4th Cir. 1971), *cert. denied*, 404 U.S. 1060 (1972).

[88] *Id.*

[89] *See* note 79 *supra*.

[90] *See* text accompanying note 84 *supra*.

[91] United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975).

[92] *Id.*

[1] The phrase "habeas corpus" used alone refers to the common law writ of habeas corpus ad subjiciendum. Stone v. Powell, 96 S. Ct. 3037, 3042 n.6 (1976). At common law there were several types of habeas corpus writs. *See* 3 W. BLACKSTONE, COMMENTARIES *129-31.

[2] Cross v. Burke, 146 U.S. 82, 88 (1892). In addition, 28 U.S.C. § 2254 (1970) confers civil jurisdiction upon federal courts to issue the writ to state prisoners "only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States."

[3] The government custody requirement does not necessitate actual imprisonment.

conviction and inquire into the legality of their detention.[4] Federal courts have the power to issue writs of habeas corpus to state prisoners upon a determination that rights guaranteed by the federal Constitution have been violated.[5] Because federal constitutional rights control subordinate state law, the federal judiciary has employed the writ as a method of supervising state court administration of federally protected rights.[6]

The Fourth Circuit recently decided two cases in which the petitioners' adherence to procedural requirements preceded consideration of the merits of the habeas corpus claims. The court of appeals dismissed one case for petitioner's failure to exhaust his state remedies.[7] In the other case, the court found that the federal right upon which the habeas corpus claim was based had not been waived earlier in the judicial process.[8] While both decisions were based upon apparently settled law, the Supreme Court shortly thereafter significantly changed the law concerning waiver.[9] In addition to procedural requirements, the Fourth Circuit examined the merits of cases within

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See, e.g., Peyton v. Rowe, 391 U.S. 54 (1968) (constitutionality of a sentence scheduled for future service may be challenged). Carafas v. LaVallee, 391 U.S. 234 (1968) (prisoner need not be incarcerated at the time his habeas corpus action arrives at final disposition).

[4] *See* 28 U.S.C. § 2241(c) (1970); Fay v. Noia, 372 U.S. 391, 400 (1963).

[5] *Ex parte* Royall, 117 U.S. 241, 250 (1886). The primary objective of federal habeas corpus jurisdiction is to provide a federal forum for the vindication of federal rights. *Developments in the Law—Habeas Corpus*, 83 HARV. L. REV. 1038, 1040 (1970) [hereinafter cited as *Habeas Corpus*]. Under the American dual judicial system, comity requires federal deference to state court determinations. *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). Ultimately, however, federal courts are preferable to test the constitutional basis of a conviction because the federal forum permits more uniform application of federal constitutional law to state prisoners. *Habeas Corpus, supra*, at 1060-62.

[6] The application of selected provisions of the Bill of Rights to the states has brought much of the state criminal process under federal suprevision. *Habeas Corpus, supra* note 5, at 1039. Commentators have argued that federal rights would not be effectively protected if left solely to the state judicial system. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 521-22 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 430 (1961). The Supreme Court, however, is not willing to assume that a general lack of appropriate respect for constitutional rights exists in state courts. Stone v. Powell, 96 S. Ct. 3037, 3051 n.35 (1976). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Note, *Expanding Criminal Procedural Rights Under State Constitutions*, 33 WASH. & LEE L. REV. 909 (1976).

[7] *See* text accompanying notes 41-58 *infra*.

[8] *See* text accompanying notes 11-39 *infra*.

[9] *See* text accompanying notes 30-39 *infra*.

the traditional substantive scope of habeas corpus. However, the Supreme Court's restriction of habeas corpus in search and seizure cases may subsequently limit the Fourth Circuit's review of that ground for relief.[10]

Although state noncompliance with federal constitutional rights in criminal proceedings generally provides grounds for granting federal habeas corpus relief,[11] federal courts may refuse to review the merits of a state conviction if the petitioner waived his constitutional rights through a procedural default[12] or a deliberate bypass of state

[10] Stone v. Powell, 96 S. Ct. 3037 (1976); *see* text accompanying notes 62-76 *infra*.

[11] *See generally Habeas Corpus, supra* note 5.

[12] A state prisoner failing to make a timely challenge to the composition of the grand jury has been barred from habeas corpus relief because of this procedural default. Francis v. Henderson, 425 U.S. 536 (1976). *See* text accompanying notes 36-39 *infra*. The Supreme Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In accordance with the *Johnson* standard, a petitioner enjoys "every reasonable presumption against waiver of fundamental constitutional rights." *Id.* at 464. *See* Fay v. Noia, 372 U.S. 391, 439 (1963) (clarifying the *Johnson* standard in the context of habeas corpus litigation). The *Fay* Court, in stressing the importance of the defendant's participation with counsel in waiving his rights, made no distinction among pretrial, trial, and post-trial waivers, implying that the same waiver standard should be applied throughout. *Id.* at 439. Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1273 (1966).

In Blake v. McKenzie, Civ. No. 76-1322 (4th Cir. Mar. 24, 1976), *disposition recorded* 535 F.2d 1349, the Fourth Circuit held that when the defendant had failed to assert three specific claims in his four previous habeas corpus petitions, there could be no finding of waiver absent evidence that the failure to assert the claims was deliberate. The reasoning of the court focused upon the principle that mere failure to raise a claim may not be construed as a deliberate waiver absent additional evidence. *Id.* at 3, *citing* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Hunt v. Warden, 335 F.2d 936 (4th Cir. 1964).

While the decision in *Blake* was based on waiver, principles of finality might have been considered to bar the petition. Principles of finality were initially developed by the courts because at common law habeas corpus judgments were not appealable. Fay v. Noia, 372 U.S. 391, 402 (1963); Salinger v. Loisel, 265 U.S. 224, 230 (1924). The principles of finality have been codified as the "identical ground" and "abuse of remedy" rules. 28 U.S.C. § 2244(a) (1970). *See generally* Note, *Amendment of* 28 U.S.C. §§ 2244, 2254 (1964), 45 TEX. L. REV. 592 (1967). A petitioner usually would be barred from presenting a subsequent petition if he has "abused" the privilege of the writ by needlessly splitting his claims between two federal petitions. Sanders v. United States, 373 U.S. 1, 18 (1963). *See also* Price v. Johnston, 334 U.S. 266, 287-93 (1948); FED. R. HABEAS CORPUS 9(a)(b), effective Feb. 1, 1977.

The "abuse of remedy" ground, as an alternative to the Fourth Circuit disposition of *Blake* in terms of waiver, may be more appropriate. While it developed as a principle of finality, the waiver standard has been utilized to protect an individual's constitutional rights. Because the petitioner in *Blake* had petitioned the court four times,

procedure.[13] The waiver issue often creates friction between state procedural requirements for the presentation of substantive issues and the federal obligation to insure defendants their constitutional protections.[14] The Supreme Court has indicated that federal habeas corpus jurisdiction is not necessarily precluded by the defendant's procedural defaults in the state criminal trial.[15] However, when the procedural default constitutes a deliberate bypass of state procedures, the Supreme Court has provided that federal courts may exercise discretion to deny habeas relief.[16]

The Fourth Circuit in *Resendez v. Garrison*[17] considered whether an accused had waived his federal claims by deliberately bypassing state procedures. Defendant Resendez was convicted of felony murder and kidnapping and was sentenced to life imprisonment. At the time of his conviction, North Carolina juries possessed absolute discretion in capital cases to decide whether a defendant received a life sentence or the death penalty.[18] Resendez and his attorneys decided not to appeal the conviction because of the possibility that a new trial might result in a death sentence. The court considered whether the petitioner's decision to forego appeal upon the advice of counsel con-

finality would seem to be the more appropriate consideration.

[13] A deliberate bypass may be found if a habeas applicant, after consultation with counsel, knowingly relinquished the privilege of asserting a claim. Fay v. Noia, 372 U.S. 391, 439 (1963).

[14] *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

[15] Federal courts may find that a deliberate bypass acts as a binding waiver of the petitioner's constitutional claim when he has voluntarily and intelligently foregone state procedure. Fay v. Noia, 372 U.S. 391 (1963). Federal habeas corpus jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state proceedings. *Id.* at 426-27. In light of Stone v. Powell, 96 S. Ct. 3037 (1976), this is no longer true with respect to full state adjudication of a search and seizure claim. *See* text accompanying notes 62-76 *infra*. By committing a procedural default, a defendant may be barred from challenging his conviction in the state courts, even upon federal constitutional grounds. However, forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured. Fay v. Noia, 372 U.S. 391, 427-28 (1963).

[16] 372 U.S. at 438.

[17] 528 F.2d 1310 (4th Cir. 1975), *petition for cert. filed*, 45 U.S.L.W. 3260 (U.S. Aug. 28, 1976) (No. 76-301).

[18] N.C. GEN. STAT. § 14-17 (1969), *as amended*, N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975). The former statute imposed the death penalty, but the jury could give life imprisonment in lieu of death. The 1973 amendment deleted the proviso authorizing the jury to recommend life imprisonment. In Woodson v. North Carolina, 96 S. Ct. 2978 (1976), the Supreme Court held that the North Carolina statute imposing a mandatory death sentence for first-degree murder violated the eighth and fourteenth amendments. *Id.* at 2990.

stituted deliberate bypass of his state remedies. The *Resendez* court held that the intelligent and rational choice of the defendant not to appeal was not the kind of deliberate bypass that would preclude legitimate constitutional assertion of the claim in federal court.[19]

The Fourth Circuit based its decision upon the factual similarity of the defendant's situation to that in *Fay v.Noia*.[20] In *Fay*, although the defendant had intentionally chosen not to appeal, the Supreme Court held that no binding waiver existed because the decision was forced upon him by the "grisly choice"[21] between accepting an unconstitutionally obtained conviction or appealing that conviction with the possibility of a death sentence upon retrial.[22] Relying upon *Fay*, the Fourth Circuit in *Resendez* recognized that while the defendant's decision to forego appeal was deliberate in that it was intentional, it was not deliberate in the sense of being "merely tactical or strategic."[23]

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[19] 528 F.2d at 1311. The Fourth Circuit noted that in Wilson v. Bailey, 375 F.2d 663 (4th Cir. 1963), a defendant's failure to appeal his first degree murder conviction following a recommendation of life imprisonment by the jury was held not to be a deliberate bypass. *Id.* at 669. In *Wilson*, defendant's attorney counselled him that upon a successful appeal and retrial he would face either a possible death penalty if found guilty or commitment to the state mental asylum if his insanity defense prevailed. *Id.*

[20] 372 U.S. 391 (1963).

[21] *Id.* at 440. The common threat in both *Fay* and *Resendez* was the pressure of the decision between permitting a constitutionally defective conviction to stand, or appealing with the possibility of a capital sentence. Resendez v. Garrison, 528 F.2d 1310, 1311 (4th Cir. 1975).

[22] The possibility of a harsher sentence on retrial was especially acute because the sentencing judge was not bound to accept the jury's recommendation of a life sentence. Furthermore, the judge had made certain harsh remarks to the defendant. 372 U.S. at 397.

After formulating the deliberate bypass standard, the *Fay* majority held that petitioner's failure to appeal, although intentional, was not a deliberate circumvention of state procedure because exceptional circumstances had forced him to make the "grisly choice." *Id.* at 438. On the other hand, the decision also held that federal courts had the power to overlook the state procedural default. *Id.* at 422, 426. The Supreme Court stated that although Noia actually had waived access to the state appellate process, a federal court could refuse "to concede jurisdictional significance to the abortive state court proceeding," *id.* at 426, and thereby render the prior waiver ineffective in the habeas hearing. The first approach denies the existence of a waiver, while the latter rationale is based upon the federal courts' discretionary power to overlook what otherwise would have been an effective waiver. The better approach is to recognize the effective waiver while at the same time affirming the court's discretionary power to overlook it when the defendant is forced to make such a choice of evils. Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1291 n.198 (1966). *See* Fay v. Noia, 372 U.S. 391, 438 (1963).

[23] Resendez v. Garrison, 528 F.2d 1310, 1311 (4th Cir. 1975). The Fourth Circuit

Although a defendant's decision between two distasteful alternatives may satisfy the knowing, intelligent, and deliberate bypass standard of *Fay*,[24] the position of having to make such a choice may constitute sufficiently exceptional circumstances to vitiate the waiver.[25] Notwithstanding the narrowness of the "grisly choice" exception[26] and the Supreme Court's recent finding of waiver by procedural default,[27] the exception may still have considerable merit and continuing validity[28] in providing the courts with flexibility and encouraging compliance with state procedure.[29]

When the Fourth Circuit again approaches the question of waiver, however, it will confront recent significant changes by the Supreme Court in the waiver standard. In *Estelle v. Williams*,[30] the Court held that although the state cannot compel an accused to stand trial before a jury while in prison garb, the defendant's failure to make a timely objection at trial was sufficient evidence upon which to infer a waiver.[31] Moreover, defendant's failure to object negated the pres-

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noted without elaboration that the Supreme Court had held that the motivation behind the criminal defendant's decision determines whether he has engaged in a deliberate bypass, possibly foreclosing his federal remedy. The *Resendez* holding was based upon this language in *Fay v. Noia* which acted as the test for a deliberate bypass: "If a habeas applicant . . . understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures . . .". 372 U.S. at 439. Resendez v. Garrison, 528 F.2d 1310, 1311 (4th Cir. 1975).

[24] 372 U.S. at 439. *See* note 12 *supra*.

[25] *See* Fay v. Noia, 372 U.S. 391, 438-40 (1963).

[26] *Id.* at 440. *See also Habeas Corpus, supra* note 5, at 1108. *Cf.*, Chaffin v. Stynchcombe, 412 U.S. 17, 29 (1973).

[27] *See* text accompanying notes 30-39 *infra*.

[28] *Compare* Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964), *cert. denied*, 379 U.S. 931 (1964); *and* Mirra v. United States, 255 F. Supp. 570 (S.D.N.Y. 1966) *with* Aaron v. Capps, 507 F.2d 685 (5th Cir.), *cert. denied*, 423 U.S. 878 (1975); *and* Winters v. Cook, 489 F.2d 174 (5th Cir. 1973); *and* United States v. Haywood, 360 F. Supp. 956 (D.D.C. 1973); *and* United States *ex rel.* Schaedel v. Follette, 275 F. Supp. 548 (S.D.N.Y. 1967), *aff'd* 447 F.2d 1297 (2d Cir. 1971).

[29] Comment, *Criminal Waiver: The Requirement of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1292 (1966).

[30] 425 U.S. 501 (1976).

[31] No objection was made to the trial judge concerning the jail attire either before or during the trial. At the pre-trial evidentiary hearing, defense counsel did not suggest that he feared any adverse consequences accompanying an objection. In addition, defense counsel was free to have the judge cure the defect without fear of aggravating him. At trial, defense counsel expressly referred to respondent's attire during voir dire. Under these circumstances, the Supreme Court thought the trial judge might reasonably have assumed that failure to object was a deliberate approach to elicit jury sympathy. 425 U.S. 501, 510-12 (1976).

ence of compulsion necessary to establish a constitutional violation.[32] While the Court had previously indicated disfavor with inferred waivers of constitutional rights,[33] the *Estelle* Court would not extend that policy of allowing defense counsel deliberately to forego objection to curable trial defects merely because he thought objection would be futile.[34] The *Estelle* view of waiver changed the test from a knowing, intelligent and deliberate act by the defendant as in *Fay*, to whether the state's activity has precipitated a waiver by compulsion.[35]

In *Francis v. Henderson*,[36] the Supreme Court held that a state prisoner who had failed to make a timely challenge to the composition of the grand jury which indicted him could not initiate a post-conviction challenge to the grand jury five years later in a federal habeas proceeding.[37] *Francis* thus established a technical forfeiture unless the petitioner can show both good cause for his failure to challenge and also that he suffered actual prejudice.[38] The Court's decision further restricted the expansive federal habeas corpus jurisdiction outlined by *Fay*. In addition, it undermined the principle that a defendant's procedural default will bar relief only if it was a deliberate bypass.[39] Because the Fourth Circuit followed the *Fay* approach

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[32] *Id.*

[33] *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 525-26 (1972); Carnley v. Cochran, 369 U.S. 506, 516 (1962); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[34] The majority in *Estelle* felt that a finding of no inferred waiver might impose a burden on the trial judge to elicit an affirmative waiver. 425 U.S. at 512. Additionally, defense counsel was aware of the factual and legal basis for an objection. *Id.* at 510.

[35] *See* Estelle v. Williams, 425 U.S. 501 (1976) (Brennan, J., dissenting). Justice Brennan asserted that the Court, for the first time, defined the waiver of a right that radically affects due process in terms of state compulsion rather than in terms of an individual's affirmative relinquishment of that right. *Id.* at 516. The significance of this change is that it might replace the *Johnson* waiver standard. *Id.* at 521-23. *But see* 425 U.S. at 508 n.3. Justice Brennan argued that this factual situation should have been resolved solely under the *Johnson* test. *Id.* at 516. Likewise, Justice Brennan feared that by defining the due process right in prison garb cases in terms of state compulsion, the Court opened the door for the complete abandonment of the *Johnson* waiver doctrine. *Id.* at 523 n.6.

[36] 425 U.S. 536 (1976).

[37] *Id.* The *Francis* decision extended the holding of Davis v. United States, 411 U.S. 233 (1973), to a request that a federal court overturn a state conviction because of an allegedly unconstitutional grand jury indictment. In *Davis*, the Court concluded that petitioner had waived his claim of discriminatory jury composition when he failed to attack the composition, and three years had passed since his conviction in federal court. *But see* McNeil v. North Carolina, 368 F.2d 313 (4th Cir. 1966); Guzewicz v. Slayton, 366 F. Supp. 1402 (E.D. Va. 1973); Hairston v. Cox, 361 F. Supp. 1180 (W.D. Va. 1973), *aff'd* 500 F.2d 584 (4th Cir. 1974).

[38] Francis v. Henderson, 425 U.S. 536, 538 (1976).

[39] Brief for Petitioner, at 24-27; Francis v. Henderson, 425 U.S. 536, 542 (1976)

avoiding the technical forfeiture of claims through procedural default, there necessarily will be new examination of the waiver question involving the *Estelle* and *Francis* rationale that under certain circumstances a defendant's waiver is manifested by inaction.

In addition to waiver by deliberate bypass, federal courts traditionally have refused to grant habeas corpus relief to defendants who have failed to exhaust all remedies available in state courts.[40] In *Durkin v. Davis*,[41] the Fourth Circuit remanded the habeas corpus petition with directions to dismiss the petition without prejudice for failure to exhaust state remedies.[42] The rationale behind the exhaustion rule is to avoid upsetting convictions without first permitting the states an opportunity to correct constitutional defects.[43] Federal courts examine the current availability of state remedies to determine whether they have been exhausted. The rule of exhaustion, now codified in the federal habeas corpus statute,[44] is rooted in considerations of federal-state comity.[45]

The petitioner in *Durkin* was convicted in state court of robbery, abduction and unauthorized use of a motor vehicle and sentenced to forty years in prison. Unable to post bond, he spent sixteen months in jail while awaiting his trial and pending his appeal. Thereafter, he escaped and was re-apprehended.[46] The trial court decided that the defendant was not entitled to credit for the period of confinement

(Brennan, J., dissenting). Fay v. Noia, 372 U.S. 391 (1963); Wilson v. Bailey, 375 F.2d 663 (4th Cir. 1967). In *Fay v. Noia*, the Court stated that "federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." 372 U.S. 391, 424 (1963). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 271-72 (1973) (Powell, J., concurring).

[40] *Ex parte* Hawk, 321 U.S. 114 (1944).

[41] 538 F.2d 1037 (4th Cir. 1976), *rev'g* 390 F. Supp. 249 (E.D. Va. 1975).

[42] 538 F.2d at 1042.

[43] Schlesinger v. Councilman, 420 U.S. 738, 755-56 (1975); Darr v. Burford, 339 U.S. 200, 204 (1950).

[44] 28 U.S.C. § 2254 (1970). Section 2254(b) provides that a petition for a writ of habeas corpus will not be granted unless state judicial remedies have been exhausted or the available state remedies are inadequate. The exhaustion requirement is further qualified by the provision that a person must raise his complaint within the state "by any available procedure" before seeking to enter federal court. 28 U.S.C. § 2254(c) (1970). *See also* FED. R. HABEAS CORPUS 4-5, effective Feb. 1, 1977.

[45] The doctrine of comity requires federal court deference to the state court until the latter has passed on the matter. However, the federal court, while deferring, still has concurrent jurisdiction with the state court. Fay v. Noia, 372 U.S. 391, 419-20 (1963), *quoting* Darr v. Burford, 339 U.S. 200, 204 (1950). Applying *Fay*, the Fourth Circuit has held that exhaustion is a doctrine of comity, not a definition of power. Hunt v. Warden, 335 F.2d 936, 940 (4th Cir. 1964).

[46] 538 F.2d at 1038-39.

prior to his escape.[47] Upon defendant's petition for habeas corpus relief, the district court restored his pre-escape jail time. The Fourth Circuit found it difficult to fault the district court's rationale that summary deprivation of defendant's sentence credit infringed upon his constitutional rights.[48] Nevertheless, the *Durkin* court refused to sustain the writ because petitioner had failed to pursue his state habeas corpus remedy.[49] The court of appeals reasoned that the power behind the exhaustion requirement rests not only upon principles of comity,[50] but also upon the positive command of the statute itself.[51]

The Fourth Circuit applied the exhaustion requirement unmechanically and indicated that it would be inclined to resolve any doubt about exhaustion in favor of the petitioner if allowing the jail time credit would permit immediate consideration of his release or parole.[52] This statement by the court of appeals followed prior cases in which the exhaustion requirement was satisfied although some state remedies were, in fact, still available.[53] These findings indicate that direct state appellate remedies, rather than state collateral remedies, are more important in vindicating the interests underlying the

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[47] *Id.* at 1039. VA. CODE ANN. § 53-208 (1950) provides that any person sentenced to confinement under the criminal laws shall have all time actually spent in jail credited toward satisfaction of his sentence. The statute limits credit so that "[n]o such credit, . . . shall be given to any person who shall break jail or make an escape." 538 F.2d at 1038.

[48] The district court held that summary deprivation of pre-conviction and post-conviction confinement credit upon sentence, by operation of the Virginia statute, infringed upon the prisoner's fifth, sixth, and fourteenth amendment rights. Durkin v. Davis, 390 F. Supp. 249, 255 (E.D. Va.), *rev'd*, 538 F.2d 1037 (4th Cir. 1976).

[49] Although petitioner had been denied a writ of mandamus in state court, he still could have sought relief by habeas corpus in state court. 538 F.2d at 1042.

[50] If the state court had denied the writ of mandamus on jurisdictional grounds, then the federal court should have deferred to the state court until the latter had reached the merits of the petitioner's claim. *See id.* at 1042. Exhaustion preserves the role of the state courts in the application of federal laws and rights. *Habeas Corpus, supra* note 5, at 1094.

[51] 28 U.S.C. § 2254 (1970). *See* note 44 *supra*.

[52] 538 F.2d at 1042.

[53] The Fourth Circuit has stated a general rule that after issues have been properly presented to the state's highest court on direct review, a federal habeas petitioner may be deemed to have fully complied with the exhaustion requirement. It is not necessary to urge a question upon the state court a second time. Thompson v. Peyton, 406 F.2d 473 (4th Cir. 1968); Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960). Crawford v. Cox, 307 F. Supp. 732 (W.D. Va. 1969). *Accord*, Brown v. Allen, 344 U.S. 443, 447-50 (1953). *See also* Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971) (when state prosecuting authorities request that a federal court hear a case, the federal court may properly exercise jurisdiction).

exhaustion rule and in fulfilling its major function.[54] Once state appellate remedies have been exhausted, further state collateral remedies need not necessarily be pursued. The few exceptions to the exhaustion requirement found by the Fourth Circuit do not undermine the general function of the exhaustion rule because the number of claims directed to the state courts prior to petitioning for the federal habeas corpus writ is not reduced by these exceptions.[55]

The Fourth Circuit also has heard claims absent exhaustion of state remedies if the claims are patently frivolous.[56] The rationale for reaching the merits of frivolous claims is that exhaustion does not require an exercise in futility.[57] In such cases, dismissal for failure to exhaust state remedies would waste valuable state and judicial time.[58]

The procedural requirements that affect the issuance of habeas corpus relief in the Fourth Circuit serve to regulate the court's discretion in handling a petitioner's constitutional claims. Moreover, a waiver bar to the assertion of a claim and the exhaustion requirement serve the state's interests in adjudicating state prisoner claims and structuring the orderly pursuit of habeas corpus relief within the framework of both federal and state judicial processes. Procedural limitations on the use of habeas corpus and the validity of the substantive claims for such relief affect the granting of the habeas corpus remedy. The grounds upon which the Fourth Circuit has granted relief in recent cases have included constitutional defects in search and seizure,[59] discrimination in the jury selection process,[60] and viola-

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[54] State appellate processes are most important in vindicating the interests underlying the exhaustion rule because they provide the higher state courts an opportunity to supervise trial courts and to facilitate uniform application of the law. *Habeas Corpus*, *supra* note 5, at 1095.

[55] *Id.* at 1102-03.

[56] *See, e.g.*, Woodall v. Pettibone, 465 F.2d 49, 51 (4th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973); Thomas v. Muncy, 408 F. Supp. 734, 736 (W.D. Va. 1976). *See also* Russell v. Missouri, 511 F.2d 861, 863 (8th Cir. 1975); Ham v. North Carolina, 471 F.2d 406, 407-08 (4th Cir. 1973).

[57] *See, e.g.*, Ham v. NorthCarolina, 471 F.2d 406 (4th Cir. 1973); Woodall v. Pettibone, 465 F.2d 49 (4th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973).

[58] Francisco v. Gathright, 419 U.S. 59, 62-63 (1974); Hensley v. Municipal Court, 411 U.S. 345, 350 (1973) ("The demand for speed, flexibility, and simplicity is clearly evident in our decisions concerning the exhaustion doctrine . . . .") (citations omitted). *See, e.g.*, Webb v. Peyton, 345 F.2d 521, 522 (4th Cir. 1965); Thomas v. Muncy, 408 F. Supp. 734, 736 (W.D. Va. 1976). For a discussion of exceptions to the exhaustion requirement, see *Habeas Corpus*, *supra* note 5, at 1093-1103.

[59] *See* text accompanying notes 62-76 *infra*.

[60] *See* text accompanying notes 77-103 *infra*.

tion of the defendant's right to counsel.[61]

The Fourth Circuit in *Campbell v. Superintendent*[62] examined petitioner's claim that evidence seized from an automobile subsequent to an arrest was made without probable cause and thus was improperly admitted at trial in violation of the fourth amendment. Virginia police officers knew only three relevant facts: that the defendant and two companions had rented a motel room near the scene of the robbery, that they were driving a certain vehicle with out-of-state license plates, and that they had vacated the motel room after the crime.[63] Maryland police, relying upon this information provided from a police bulletin, arrested the petitioner although neither an arrest warrant nor a search warrant had been obtained in Maryland or Virginia.[64] The Fourth Circuit concluded that the Supreme Court's decision in *Whiteley v. Warden*[65] indicated that the officers did not have probable cause to arrest the petitioner, thereby rendering the arrest unconstitutional.[66] The court therefore held that the evidence secured by the search incident to that unlawful arrest should have been excluded from Campbell's trial.[67]

While the Fourth Circuit based its decision in *Campbell* upon settled law, the scope of federal habeas corpus review of state convictions has been significantly altered by the Supreme Court decision in *Stone v. Powell*.[68] In *Stone*, the Court held that when the state has provided an opportunity for full and fair litigation of a fourth amendment claim, the federal constitution does not require that a state prisoner be granted federal habeas corpus relief.[69] *Stone* does not

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[61] *See* text accompanying notes 103-117 *infra*.

[62] Campbell v. Superintendent, Civ. No. 76-1533 (4th Cir. May 24, 1976), *disposition recorded* 538 F.2d 323, *petition for cert. filed*, 45 U.S.L.W. 3258 (U.S. Aug. 20, 1976) (No. 76-256).

[63] Campbell v. Superintendent, No. 76-1533, slip op. at 6 (4th Cir. May 24, 1976), *disposition recorded* 538 F.2d 323.

[64] *Id.* at 4.

[65] 401 U.S. 560 (1971). In *Whiteley*, the Court found that the arrest warrant contained only the conclusory allegations of a sheriff's complaint based upon an informer's tip. Police reliance on such a warrant in order to arrest and conduct a full search incident to the arrest was improper because there was insufficient probable cause for issuance of the warrant. *Id.* at 568-69.

[66] Campbell v. Superintendent, No. 76-1533, slip op. at 5-7 (4th Cir. May 24, 1976), *disposition recorded* 538 F.2d 323.

[67] *Id.* at 7.

[68] 96 S. Ct. 3037 (1976). *See* McFeely, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 556-60 (1976); Note, *The Fourth Amendment Exclusionary Rule in Federal Habeas Corpus*, 37 LA. L. REV. 289 (1976).

[69] 96 S. Ct. at 3052.

purport to narrow the exclusionary rule itself,[70] but only the circumstances under which a petitioner may claim the necessity of its application upon collateral review.[71] While noting in *Stone* that the exclusionary rule was justified by the belief that exclusion of evidence would deter unlawful police conduct,[72] the Court adhered to the view that the additional deterrent effects of exclusion are not appreciably increased upon collateral review when claims have already been fully adjudicated in state courts.[73]

The primary question for review of a habeas corpus petition in post-*Stone* cases will be whether petitioner was provided a fair opportunity to raise the search and seizure claim and have it fully adjudicated in state court proceedings.[74] The Fourth Circuit summarily applied the proscription of *Stone* in *Fankboner v. Paderick*,[75] revers-

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[70] The majority did not address the issue of whether the exclusionary rule should be eliminated. *See id.* at 3046 n.17. *But see* Stone v. Powell, 96 S. Ct. 3037, 3055 (1976) (Burger, C. J., concurring). *Cf.*, United States v. Janis, 96 S. Ct. 3021 (1976) (exclusionary rule was not extended to a federal civil tax proceeding where evidence was obtained by a state criminal law enforcement officer in good-faith reliance on a warrant later proved defective and no proof existed of any federal participation in the illegality).

[71] The *Stone* Court was concerned merely that the general administration of the exclusionary rule would remain with the state courts. The states must provide a "full and fair litigation" of the fourth amendment claim, 96 S. Ct. at 3046-49. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

[72] The Court in *Stone* indicated that while the majority in Mapp v. Ohio, 367 U.S. 643 (1961), justified the application of the exclusionary rule to the states on several grounds, 367 U.S. at 656-59, its principal justification was the belief that exclusion would deter unlawful police conduct. Stone v. Powell, 96 S. Ct. 3037, 3047 (1976).

[73] 96 S. Ct. at 3050-51. The Court noted that the exclusionary rule deters unlawful police conduct when applied to the trial and direct-appeal stages. Despite the broad deterrent purpose of the exclusionary rule, the Court has never interpreted it to proscribe the introduction of illegally seized evidence in *all* proceedings. *Id.* at 3047-49. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 119 (1975); United States v. Calandra, 414 U.S. 338 (1974); Walder v. United States, 347 U.S. 62 (1954).

[74] A number of federal courts have applied *Stone* retroactively, holding that no federal habeas corpus relief can be considered for state prisoners' fourth amendment claims if fully and fairly litigated in state courts. Bracco v. Reed, 540 F.2d 1019 (9th Cir. 1976); Chavez v. Rodriguez, 540 F.2d 500 (10th Cir. 1976); Poindexter v. Wolff, 540 F.2d 390 (8th Cir. 1976); Fankboner v. Paderick, Civ. No. 75-1502 (4th Cir. Aug. 4, 1976), *disposition recorded* 538 F.2d 324; George v. Blackwell, 537 F.2d 833 (5th Cir. 1976). *Stone v. Powell* enunciated no new formulation of the exclusionary rule. Rather, the Court held that the purposes of that rule are not served by allowing one who has fully and fairly litigated a fourth amendment claim in a state court to reargue the question in a federal habeas corpus action. No police conduct heretofore unlawful was legitimated. *Id.* at 3050-51. *But see* Stone v. Powell, 96 S. Ct. 3037, 3055-71 (Brennan, J., dissenting).

[75] Fankboner v. Paderick, No. 75-1502 (4th Cir. Aug. 4, 1976), *disposition recorded*

ing the grant of habeas relief by a district court preceding *Stone*. In order for the writ to issue, the Fourth Circuit will have to find that the petitioner was denied a full and fair hearing at the state level upon facts similar to *Campbell*.[76]

In addition to claims of an illegal search and seizure, habeas corpus relief has been appropriate for evaluating the substantive claim of discrimination in the jury selection process.[77] Jury discrimination violates the equal protection and due process clauses of the fourteenth amendment.[78] For almost a century the Supreme Court has held that a conviction cannot stand if based upon an indictment or verdict by juries from which blacks were excluded.[79] However, a de-

538 F.2d 324. In a per curiam opinion, the court stated merely that the state court had conducted a full hearing on petitioner's motion to suppress evidence.

[76] The Supreme Court in *Stone* left unanswered the question of what constitutes a full and fair hearing on the search and seizure claim and by what criteria it will be judged. A number of federal courts have reviewed state court records to ensure that claims have been heard, but have offered no dicussion of the factors in their analysis. *See* cases cited in note 74 *supra*. However, the Second Circuit in Gates v. Henderson, Civ. No. 76-2065 (2d Cir. Jan. 12, 1977), recently held that a footnote in *Stone*, 96 S. Ct. 3037, 3052 n.36, indicates that Townsend v. Sain, 372 U.S. 293 (1963) is relevant to the question whether an adequate opportunity has been provided, "although the 'cf.' signal preceding the citation makes its exact meaning uncertain . . . ." Gates v. Henderson, slip op. at 1353. The *Gates* court pointed out that *Townsend* listed six situations in which the inadequate state factfinding would entitle a habeas petitioner to a federal evidentiary hearing. Gates v. Henderson, slip op. at 1353-55. The six situations are: 1. Where the state court has not made adequate factual or legal findings to support its conclusion, 372 U.S. at 313-16; 2. Where the state factual determinations are "not fairly supported by the record," *id.* at 316; 3. Where "serious procedural errors" have been employed in the factfinding process, *id.*; 4. Where newly discovered evidence bearing upon the constitutionality of the detention is alleged in a habeas application, *id.* at 317; 5. Where "evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing," unless there was "inexcusable" default under Fay v. Noia, 372 U.S. 301, 438 (1963), 372 U.S. at 317; and 6. Where—open-endedly—"the state court has not after a full hearing reliably found the relevant facts," *id.* at 318.

[77] Where the petitioner has been convicted by a jury from which blacks have been systematically excluded because of their race, he is entitled to be released from custody on habeas corpus. *See* Brown v. Allen, 344 U.S. 443, 470-71 (1953).

[78] *See, e.g.*, Whitus v. Georgia, 385 U.S. 545, 549 (1967); Strauder v. West Virginia, 100 U.S. 303 (1879).

[79] Whitus v. Georgia, 385 U.S. 545 (1967); Strauder v. West Virginia, 100 U.S. 303 (1879); Winters v. Cook, 489 F.2d 174 (5th Cir. 1973). However, such a claim must be timely raised. *See* text accompanying notes 36-39 *supra*. In addition, where a state criminal defendant pleads guilty on advice of counsel, he cannot in a federal habeas corpus proceeding raise independent claims relating to the deprivation of constitutional rights that antedated the plea. Tollett v. Henderson, 411 U.S. 258 (1973); *see* Parker v. North Carolina, 397 U.S. 790 (1970); *but see* Lefkowitz v. Newsome, 420 U.S. 283 (1975).

fendant is not entitled to a jury of any particular composition as long as the selection process which produced the jury did not systematically operate to exclude a distinctive group present within the community.[80] The Supreme Court has never announced a mathematical standard for demonstrating "systematic exclusion;" instead, it has inquired into the facts of each case.[81] In providing habeas corpus relief in *Spratley v. Paderick*,[82] the Fourth Circuit meticulously examined the state record and found prima facie evidence of racial discrimination in the jury selection process.

In *Spratley*, a Virginia jury convicted the petitioner, a black, of attempted rape. He sought federal habeas corpus relief from a life sentence, claiming that he was convicted by a jury selected in a racially discriminatory manner, but the district court denied the petition.[83] The Fourth Circuit examined the record from the state court hearing and found a significant disparity between the proportion of blacks eligible for jury service, approximately 44%, and the proportion on the master jury list, 16%.[84] Because this statistical finding was coupled with a showing that the selection process itself presented an opportunity for jury discrimination, the court found a prima facie case of racial discrimination.[85] The Fourth Circuit reversed the dis-

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[80] *See* Taylor v. Louisiana, 419 U.S. 522 (1975); Grech v. Wainwright, 492 F.2d 747 (5th Cir. 1974).

[81] *See* Alexander v. Louisiana, 405 U.S. 625 (1972). In addition, the Constitution forbids not only the exclusion of blacks but discrimination in the form of token inclusion of blacks on juries. *See* Swain v. Alabama, 380 U.S. 202, 206 (1965); *See also* Whitus v. Georgia, 385 U.S. 545, 549-50 (1967); Stephens v. Cox, 449 F.2d 657, 659 (4th Cir. 1971); Witcher v. Peyton, 382 F.2d 707 (4th Cir. 1967). The prima facie case is not destroyed by the token inclusion of blacks on the jury panel, *see* Avery v. Georgia, 345 U.S. 559 (1953), nor by the fact that the jury commissioners placed on the rolls only those persons with whom they were personally acquainted. Cassell v. Texas, 339 U.S. 282 (1950).

[82] 528 F.2d 733 (4th Cir. 1975).

[83] *Id.* at 734.

[84] The record from the state hearing revealed that in Isle of Wight County, 46.4% of the presumptively eligible voters in the 1960 census were blacks and that in the 1970 census 42.6% of them were black. In 1965 and the preceding four years, however, the percentage of blacks on the master jury list ranged from a low of 11.7% to a high of 21.4%. *Id.* at 734.

[85] *Id.* Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974); Blackwell v. Thomas, 476 F.2d 443 (4th Cir. 1973); Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971). The showing in *Spratley* differs in one respect from that in *Stephens*. In *Stephens*, the petitioner presented statistical evidence concerning the representation of blacks on venires in addition to their representation on the master list. Nevertheless, the *Spratley* court did not find the difference crucial because the random selection of venires from the box was not susceptible to weighting in favor of one race. After the selection of a number of venires, presumably the proportion of

missal of the petition but noted that the showing of discrimination was not conclusive. The case was remanded for a hearing to afford the Commonwealth of Virginia an opportunity to rebut the prima facie case.[86]

The burden of establishing a pattern of exclusion from jury selection rests upon the petitioner.[87] The *Spratley* court found that a prima facie case of discrimination was established by the opportunity for discrimination in the formulation of a master jury list[88] and the disparate percentages between the black population and black representation on the master list.[89] In *Spratley*, white jury commissioners selected only individuals whom they knew for the jury master list.[90] Although there are several methods of demonstrating a prima facie case of jury discrimination,[91] proof that the selection process discriminates against a cognizable class[92] and that the discrimination is occasioned by the selection process are two essential elements.[93]

The Fourth Circuit consistently has subscribed to the view that mere statistical evidence of discrimination is insufficient proof absent additional positive indicia of discrimination or a showing that a procedure either discriminates on its face or was administered so as to effect discrimination.[94] In contrast, a number of circuits have held

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blacks on all venires approximated the proportion on the master list. Spratley v. Paderick, 528 F.2d 733, 734 (1975).

[86] *Id.* at 735. Prima facie evidence raises only a presumption of discrimination. Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971). The state, however, may show that the disparities can be explained by factors other than discrimination. 528 F.2d at 735.

[87] *See* Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972).

[88] 538 F.2d at 734. Each year the jury commissioners selected names for the master jury list, VA. CODE ANN. § 8-182 (1950) (repealed 1973). The commissioners were required to select persons of "good repute for intelligence and honesty." VA. CODE ANN. § 8-181 (1950) (repealed 1973). The state conceded that to make such a choice, a commissioner must personally know the individual. 528 F.2d at 734. Therefore, white jury commissioners could fail to search out qualified blacks.

[89] *See* note 84 *supra*.

[90] *See* note 88 *supra*.

[91] *See generally* Comment, *The Civil Petitioner's Right to Representative Grand Juries and A Statistical Method of Showing Discrimination in Jury Selection Cases Generally*, 20 U.C.L.A.L. REV. 581 (1973).

[92] Cognizability denotes that a group exists subject to community prejudice as a distinct class. Hernandez v. Texas, 347 U.S. 475, 478 (1954).

[93] *See generally* Foster v. Sparks, 506 F.2d 805, 834-35 App. (5th Cir. 1975).

[94] *See, e.g.*, Smith v. Yeager, 465 F.2d 272, 274 (3d Cir. 1972) ("key man" system—strategically located persons n the county suggested capable people for jury duty); Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), *cert. denied*, 409 U.S. 929 (1972) ("clear thinking" test used to select master jury panel was culturally biased); Stephens v. Cox, 449 F.2d 657, 659 (4th Cir. 1971) (primary source of jurors was a

that statistics alone are sufficient to establish a prima facie case.[95] Because all of the successful challenges to selection systems in the Supreme Court have been based upon evidence of total exclusion or statistical disparities coupled with a prima facie opportunity to discriminate, the Court has provided very little guidance on the sufficiency of proof.[96]

The *Spratley* court relied upon the demonstration that an extreme difference existed between the proportion of blacks selected for jury service and the proportion of blacks within the general voter population.[97] Although the showing of such a striking disparity is regarded as the crucial aspect of the prima facie test, any attempt to discern a minimum standard of disparity would be difficult.[98] The Fourth Circuit acknowledged that a two-to-one disparity between those blacks presumptivly eligible for jury service and those actually on the master list was an appropriate threshold for establishing convincing proof of discrimination.[99]

The contrast between the proportion of blacks in the population eligible for jury service and the proportion of blacks on the master list

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racially designated poll tax list); Black v. Curb, 422 F.2d 656 (5th Cir. 1970) (discrimination in making up jury roll).

[95] Gibson v. Blair, 467 F.2d 842, 844 (5th Cir. 1972); United States v. Hyde, 448 F.2d 815, 825 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972) (where there is complete absence or "spectacular" underrepresentation of blacks on juries, a prima facie case of purposeful discrimination is established—dictum); United States v. Butera, 420 F.2d 564, 569 (1st Cir. 1970) (significant disparity raises the inference of discrimination that the state must dispel). The view that statistics alone are sufficient to establish a prima facie case may be justified by the Supreme Court's decision in Alexander v. Louisiana, 405 U.S. 625, 630-31 (1972). In *Alexander*, the Court did not preclude the possibility that evidence of a "progressive decimation" of potential black grand jurors could establish a prima facie case. Instead, in the face of proof that an opportunity to discriminate clearly existed, the Court chose not to rely solely on the statistics which evidenced discrimination. *Id.* at 630.

[96] *E.g.*, Jones v. Georgia, 389 U.S. 24 (1967) (the opportunity to discriminate was found where the source of jury venire selection, local tax digests, was maintained on a segregated basis). *Accord*, Whitus v. Georgia, 385 U.S. 545 (1967).

[97] 528 F.2d at 734. In using statistics as an aspect of the prima facie test, courts have relied heavily upon an "intuitive and untutored understanding of the laws of chance." Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 255 (1968). Once sufficiently convincing statistical evidence has been presented, a court may infer that "[c]hance and accident alone could hardly have brought about the [exclusion] . . . ." Smith v. Texas, 311 U.S. 128, 131 (1940). *See also* Finklestein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 374 (1967).

[98] *See, e.g.*, Sims v. Georgia, 389 U.S. 404, 407-08 (1967).

[99] Spratley v. Paderick, 528 F.2d 733, 734 (1975); Stephens v. Cox, 449 F.2d 657, 659 (4th Cir. 1971).

may be evaluated in absolute or comparative terms. The Fourth Circuit has employed the less preferable comparative approach by acknowledging a two-to-one disparity between those presumptively eligible for jury service and the proportion of blacks on the master list.[100] The preferable view is that an absolute measure should be employed[101] because the comparative measure may distort the significance of the disparity where blacks compose a very small percentage of the population.[102] In order to refine judicial analysis of statistical disparity, additional categories of comparison utilized by other courts[103] should be employed by the Fourth Circuit.

In addition to considering a case of discriminatory jury selection, the Fourth Circuit has considered whether a suspect's right to request counsel and to halt immediate interrogation prevents the police from

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[100] For example, the Fourth Circuit has employed the comparative view by characterizing the contrast between a 34% black composition of the total population and 14.6% and 15.74% appearance of blacks on juries as 2:1 rather than a difference in absolute terms of 15%.

[101] Foster v. Sparks, 506 F.2d 805, 834-35 App. (5th Cir. 1975). *See also* Smith v. Yeager, 465 F.2d 272, 279 n.19 (3d Cir. 1972).

[102] *See, e.g.*, United States v. Whitley, 491 F.2d 1248 (8th Cir.), *cert. denied*, 416 U.S. 990 (1974). The court held that while the comparative index may be proper where blacks constitute a significant proportion of the population, it is ordinarily inappropriate where a very small proportion of the population is black. *Id.* at 1249.

[103] Need exists for "compartmentalizing" data at different stages in the jury selection process. Foster v. Sparks, 506 F.2d 805, 835-36 App. (5th Cir. 1975). The effectiveness of statistical evidence must be assessed at these different stages. *Id.* The need for compartmentalization is exemplified in Whitus v. Georgia, 385 U.S. 545 (1967). In *Whitus*, the proof was based on a disparity between black composition in the source, segregated tax lists, 27.1%, and composition of grand and petit jury venires, 9.1% and 7.8%. The tax lists were used to uphold the challenge to the selection process, but a challenge might also have been registered against the composition of the source itself. There was a 15.5% disparity between eligible black population and composition on the tax lists, as against the 33.5% disparity between eligibles and composition of jury venires. While in *Whitus* discrimination occurred at two stages in the jury selection process, compartmentalization of data may serve to isolate the occurrence of discrimination in the process. Instead of strictly compartmentalizing data for each stage of the process, the Fourth Circuit in *Spratley* found rather uncautiously that evidence of population versus eligible population was the same as evidence in *Stephens* of venires versus population. *See* note 81 *supra*.

Categories of evidence often vary according to the state jury selection process. The categories utilized by courts are as follows: (1) population versus eligible population—Spratley v. Paderick, 528 F.2d 733 (4th Cir. 1975); (2) population versus venire—Whitus v. Georgia, 385 U.S. 545 (1967); Muniz v. Beto, 434 F.2d 697 (5th Cir. 1970); (3) eligible population versus qualified jury panel—Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971) (those who passed test); Black v. Curb, 464 F.2d 165 (5th Cir. 1972) (eligibility list submitted by jury commissioner); (4) composition of source (tax records) versus actual service—Arnold v. North Carolina, 376 U.S. 773 (1964).

later questioning him in the absence of counsel. The right to the presence of counsel during police questioning is another substantive right for which habeas corpus relief is appropriate.[104] In *Strickland v. Garrison*,[105] the Fourth Circuit found that petitioner's state court conviction for robbery was invalid because his confession had been obtained in violation of the requirements of *Miranda v. Arizona*.[106] Strickland was informed of his *Miranda* rights at 9:00 a.m. in the local police station. At that time, he requested a lawyer and police halted the interrogation. Strickland subsequently was transferred to the county law enforcement center where he was again warned of his rights at about 3:00 p.m. and asked if he wanted to make a statement. In the absence of counsel, Strickland stated that he understood his rights, and he confessed.[107]

Relying upon *Miranda*, the *Strickland* court noted that it was improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of persuading him to reconsider his insistence upon the presence of counsel.[108] The Fourth Circuit strictly interpreted the command of *Miranda* that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[109] The court of appeals reasoned that the *Miranda* decision created a per se rule against further interrogation once the request for counsel is made.

The Fourth Circuit in *Strickland* has recognized only one limited situation in which a suspect who has invoked his right to counsel in a custodial interrogation may change his mind and decide to submit to questioning without the aid of counsel.[110] According to the court, a

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[104] *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

[105] Strickland v. Garrison, Civ. No. 76-1683 (4th Cir. June 28, 1976), *disposition recorded* 538 F.2d 325.

[106] 384 U.S. 436 (1966).

[107] Strickland v. Garrison, Civ. No. 76-1683, slip op. at 3 (4th Cir. June 28, 1976), *disposition recorded* 538 F.2d 325.

[108] The court noted that the suspect's subjective intent in requesting a lawyer is irrelevant to the state's obligation to provide one. Strickland v. Garrison, Civ. No. 76-1683, slip op. at 3 (4th Cir. Jund 28, 1976), *disposition recorded* 538 F.2d 325.

[109] 384 U.S. at 474.

[110] Strickland v. Garrison, Civ. No. 76-1683, slip op. at 4 (4th Cir. June 28, 1976), *disposition recorded* 538 F.2d 325, *relying upon* United States v. Tafoya, 459 F.2d 424 (10th Cir. 1972). In *Tafoya*, the defendant was arrested, taken into custody and twice advised of his rights. The arresting officer then asked the defendant if he wanted to discuss the charges. The defendant declined and stated that he wanted to speak to a lawyer. Subsequently, while in a jail cell, the defendant expressed a desire to speak with a specific officer. Approximately an hour later, that officer received the defendant

suspect must initiate the second interrogation himself[111] in order to waive his right to the presence of counsel. In all other cases, the court has held that *Miranda* dictates the exclusion of a confession obtained from a suspect who has yielded to police pressure that he proceed without counsel.[112] The police cannot initiate the re-interrogation before a suspect actually consults an attorney.[113]

In so holding, the Fourth Circuit concluded that the Supreme Court's rule in *Michigan v. Mosley*,[114] that a suspect's invocation of his right to remain silent does not forever foreclose further efforts at interrogation,[115] had no application to this case.[116] The *Strickland*

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from the jailer, advised him of his rights for a third time, and heard the accused's confession, which was later admitted into evidence. 459 F.2d at 425-26. The *Tafoya* court held that the defendant had effectively waived his right to have counsel present during the interrogation when he had initiated the interview. *Id.* at 427-28. In *Strickland*, the police improperly initiated communication with the suspect after he had expressed his wish to be represented by counsel but had not yet met with him. Strickland v. Garrison, Civ. No. 76-1683, slip op. at 4 (4th Cir. June 28, 1976), *disposition recorded* 538 F.2d 325.

[111] Strickland v. Garrison, Civ. No. 76-1683, slip op. at 4 (4th Cir. June 28, 1976), *disposition recorded* 538 F.2d 325. *Accord*, United States v. Tafoya, 459 F.2d 424, 427 (10th Cir. 1972).

[112] United States v. Clark, 499 F.2d 802, 807-08 (4th Cir. 1974); *cf.* United States v. Slaughter, 366 F.2d 833, 840-41 (4th Cir. 1966).

[113] United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974).

[114] 423 U.S. 96 (1975).

[115] *Id.* at 102-03. Respondent, who had been arrested in connection with certain robberies, was advised by a detective in accordance with *Miranda* that he was not obliged to answer any questions and that he could remain silent if he wished. Having made oral and written acknowledgment of the *Miranda* warnings, he declined to discuss the robberies, whereupon the detective ceased the interrogation. More than two hours later, after re-administering *Miranda* warnings, another detective questioned respondent solely about an unrelated murder. Respondent made an inculpatory statement, which was later used in his trial for murder, resulting in his conviction. The Court held that the admission in evidence of respondent's incriminating statement did not violate *Miranda* principles. Respondent's right to "cut off" questioning was "scrupulously honored," the police immediately having ceased the robbery interrogation after his refusal to answer and having commenced questioning about the murder only after a significant lapse of time and after a fresh set of warnings had been given. *See generally* Boss, Michigan v. Mosley: *A Further Erosion of* Miranda?, 13 SAN DIEGO L. REV. 861 (1976). *See also* Comment, Michigan v. Mosley: *A New Constitutional Procedure*, 54 N.C.L. REV. 695 (1976).

The *Mosley* Court found that the great majority of federal and state courts have held that *Miranda* does not absolutely prohibit further questioning once the accused has elected to remain silent. 423 U.S. at 103 n.9 (1975). *But see* United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974).

[116] The Fourth Circuit held that an examination of *Mosley* indicated that it was inapplicable to *Strickland*. Strickland v. Garrison, Civ. No. 76-1683, slip op. at 3-4 (4th Cir. June 28, 1976), *disposition recorded* 538 F.2d 324. The accused in *Mosley* did not

court noted that the opportunity to remain silent and the right to an attorney are procedural safeguards which the *Miranda* Court distinguished. In contrast, the Ninth Circuit has held that *Mosley* permits an implied waiver of rights despite an earlier demand to have an attorney.[117] The Ninth Circuit relied on the broad implication of *Mosley* that *Miranda* is not to be interpreted literally.[118] *Mosley* is

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indicate a desire to consult with a lawyer at any time during the interrogation. 423 U.S. at 97. The Supreme Court indicated that *Mosley* does not involve the procedures to be followed when the accused requests the assistance of counsel. Rather, the *Mosley* Court noted that such procedures were clearly detailed in *Miranda*. 423 U.S. at 101 n.7. By its reference to the plain language of *Miranda*, the Supreme Court in *Mosley* apparently proscribed the resumption of questoning after an accused has requested the presence of an attorney until an attorney is present. *See also* 423 U.S. at 104 n.10; 423 U.S. at 110 n.2 (White, J., concurring); 423 U.S. at 116 n.4 (Brennan, J., dissenting).

[117] United States v. Pheaster, 544 F.2d 353, 367 (9th Cir. 1976). The Ninth Circuit held that a kidnapping suspect who insisted upon seeing a lawyer but decided to cooperate after learning of the extensive evidence against him voluntarily waived his *Miranda* rights. The Fourth Circuit and the Ninth Circuit essentially differ in analytical approach. The Fourth Circuit favors a literal reading of the *Miranda* guidelines because the Supreme Court said the purpose of *Miranda* was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-42. In contrast, the *Pheaster-Mosley* approach employs several factors which are reminiscent of the pre-*Miranda* "totality of the circumstances" test. Boss, Michigan v. Mosley: *A Further Erosion of* Miranda?, 13 SAN DIEGO L. REV. 857, 870 (1976). This inconsistency among circuits reflects the difference between *Miranda* and *Mosley* which has underscored the philosophical shift from the Warren Court to the Burger Court. *Id.*

In Brewer v. Williams, the Supreme Court was asked to overrule or limit *Miranda* by replacing it with a voluntariness standard based upon the totality of the circumstances surrounding an inculpatory statement. In a 5 - 4 decision the Court reaffirmed *Miranda* and held that Iowa had deprived the accused of his constitutional right to the assistance of counsel by failing to sustain its burden of proving that the accused had waived his right to counsel in accordance with the *Johnson* waiver standard. Brewer v. Williams, 45 U.S.L.W. 4287 (U.S. Mar. 23, 1977) (No. 74-1263).

In *Brewer*, a child-stealing warrant had been issued for the accused's arrest. The defendant contacted a Des Moines attorney who advised him to surrender to Davenport police and later not to make any statements during his 163-mile transportation from Davenport to Des Moines. A transporting policeman agreed with defendant's attorney not to question respondent. In addition, he knew that the accused was an escapee from a Missouri mental institution. Police informed the accused of his *Miranda* rights before leaving on the trip, but did not repeat them enroute to Des Moines. During the trip the defendant made inculpatory statements which led to the discovery of the victim's body. The issue was whether the defendant had effectively waived his rights to remain silent and to counsel during the 163-mile trip.

[118] The *Pheaster* court noted that the Supreme Court in *Mosley* refused to examine in depth the effect of a suspect's request for an attorney. 544 F.2d at 367. While the specific holding in *Mosley* was not direct precedent for *Pheaster*, the Ninth Circuit found that "*Mosley* does indicate both a recognition that the procedure set out in

indicative of the recent trend toward erosion of the literal requirements of *Miranda*.[119]

In recent habeas corpus decisions, the Fourth Circuit has taken few novel positions and has decided habeas cases consistently with its prior holdings. The court has dealt with the procedural requirements of waiver and exhaustion, which promote the orderly administration of habeas corpus relief.[120] Recent Supreme Court decisions have blurred the concept of waiver as articulated in *Fay v. Noia* and relied upon by the Fourth Circuit.[121] The waiver test has been modified by the Supreme Court's analysis of state compulsion[122] and the increased possibility of finding waiver by a procedural default.[123] The Fourth Circuit will now have to analyze *Fay* in light of these decisions.

The Fourth Circuit has also examined cases which analyze appropriate substantive grounds for habeas corpus relief. Under previously settled law, the exclusionary rule was applied to habeas corpus cases where there had been an illegal search and seizure.[124] In *Campbell v. Superintendent*, the court reviewed a petitioner's claim that evidence should have been excluded because an illegal arrest rendered the subsequent search and seizure violative of the fourth amendment. After the Supreme Court's decision in *Stone v. Powell*, however, the only question for review of a habeas corpus petition based upon a search and seizure claim is whether the petitioner was provided a fair opportunity to raise the claim and have it fully adjudicated in state courts. The Fourth Circuit's review of such cases is substantially restricted by *Stone*. In the area of discriminatory jury composition, the Fourth Circuit should administer the statistical test differently.[125]

Miranda is not as clear as the language of that opinion might suggest and a willingness to import a greater degree of flexibility in the application of *Miranda* to varying factual situations." *Id.* at 367. *See generally* Boss, Michigan v. Mosley: *A Further Erosion of* Miranda?, 13 SAN DIEGO L. REV. 861 (1976).

[119] *See, e.g.*, Oregon v. Mathiason, 97 S. Ct. 711 (1977). In a per curiam opinion, a six-Justice majority of the Supreme Court recently held that a police officer who invited a burglary suspect down to the police station was not required to give the suspect *Miranda* warnings before questioning him about the crime because the interrogation was not custodial or coercive. *See also* Oregon v. Haas, 420 U.S. 714 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971). *See* text accompanying notes 104-18 *supra*.

[120] *See* text accompanying notes 11-58 *supra*.

[121] *See* text accompanying notes 30-39 *supra*.

[122] *See* text accompanying notes 30-35 *supra*.

[123] *See* text accompanying notes 36-39 *supra*.

[124] *See* note 65 *supra*.

[125] *See* note 103 *supra*.

One required element of a prima facie case, opportunity for discrimination, might be eliminated.[126] In addition, new tests based upon statistics indicating discrimination might be employed. Finally, the Fourth Circuit has continued to interpret strictly the requirement of *Miranda v. Arizona* in the face of a trend toward its erosion.[127] The court of appeals narrowly applied the *Miranda* per se rule against reinterrogation of a witness who has invoked his right to counsel and provided habeas relief for such a violation. While the Fourth Circuit has followed long-standing precedents in its recent habeas corpus decisions, many changes are forthcoming. The Supreme Court has provided new procedural and substantive limitations with which the Fourth Circuit may properly restrict the habeas corpus remedy and which must be explored in upcoming cases.

JONATHAN SAGER

B. A New Consideration for Prison Administrators: The Practicality of Increasing Prisoners' Privileges

Generally, federal courts will not interfere with internal prison administraton.[1] The rationales behind this "hands-off" doctrine are the separation of powers,[2] lack of judicial expertise in penology,[3] and the principles of federalism.[4] However, in cases where serious in-

[126] *See* text accompanying notes 88-96 *supra*.

[127] *See* text accompanying notes 104-17 *supra*.

[1] The courts formerly completely avoided intervention concerning the treatment of inmates in prisons. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 398 (1974); Cruz v. Beto, 405 U.S. 319, 321 (1972); Ross v. Blackledge, 477 F.2d 616, 618 (4th Cir. 1973). *See generally* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962). Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[2] The courts express fear that judicial intervention in this area will subvert prison discipline and undermine the authority of prison officials. The courts also recognize that supervision of prisons is a function of the executive branch of government. *See, e.g.*, Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949); Peretz v. Humphrey, 86 F. Supp. 706, 707 (M.D. Pa. 1949); Note, *Cruel and Unusual Punishment: Of Straps and Strip Cells*, 19 CATH. LAW. 200, 202 (1973).

[3] *See* Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Novak v. Beto, 453 F.2d 661, 671 (5th Cir. 1971), *cert. denied sub nom.* Sellers v. Beto, 409 U.S. 968 (1972).

[4] This rationale recognizes that states, not the federal government, are responsible for their prisons and prisoners. While acknowledging that administration of state prisons is a state function, recent cases have held that where state regulation of prison

fringements of fundamental rights have been alleged, federal courts will assume jurisdiction and decide the rights of prisioners.[5]

The nonintervention policy has been modified because courts recognize that individuals do not lose all their constitutional rights when they enter prison[6] and that prisoners complaining about the conditions of their confinement should not be limited to the remedies available in state courts.[7] To insure constitutional incarceration, courts have applied the cruel and unusual punishment clause of the eighth amendment[8] to grant relief from the infliction of corporal pun-

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inmates conflicts with federally guaranteed rights, the regulations must be invalidated. *E.g.*, Johnson v. Avery, 393 U.S. 483, 486 (1969).

[5] When prison conditions deteriorate to the extent that they violate laws or rights under the Constitution, they become matters for the federal courts, which then have a responsibility to fashion relief for these violations. Pell v. Procunier, 417 U.S. 817, 822 (1974); Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

The courts intervene in three major areas. First, courts require open access to the courts, which includes communication with legal counsel and access to legal materials. *See* Gilmore v. Lynch, 319 F. Supp. 105, 109-12 (N.D. Calif. 1970), *aff'd* 404 U.S. 15 (1971) (prison regulation limiting law books in prison libraries to a few volumes invalid as denying prisoners reasonable access to courts notwithstanding state's arguments for economy and standardization); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) (per curiam) (access to courts required); Johnson v. Anderson, 370 F. Supp. 1373 (D. Del. 1974) (access to law books a right not constitutionally required only if effective access to courts assured by other means). Second, the courts require prison authorities to respect prisoners' religious freedom and to avoid racial discrimination. *See* Washington v. Lee, 263 F. Supp. 327 (N.D. Ala. 1966) *aff'd* 390 U.S. 333 (1968) (per curiam) (state regulations requiring racial segregation in prisons unconstitutional); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (prisoner in solitary confinement for discipline problems, not because of his religious beliefs). Finally, courts will intervene to protect a prisoner from cruel and unusual punishment. *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) *aff'd* 442 F.2d 304 (8th Cir. 1971) (conditions and administration of entire prison system constituted cruel and unusual punishment); Note, *Cruel and Unusual Punishment: Of Straps and Strip Cells*, 19 CATH. LAW. 200 (1973).

[6] Rights that are not inconsistent with an inmate's status as a prisoner or with the legitimate goals of the corrections process are not forfeited when a prisoner is confined. These include: first amendment rights to freedom of expression, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); and religion, Cruz v. Beto, 405 U.S. 319 (1972); fourteenth amendment rights to equal protection of the laws, Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966); and due process of law, Morrisey v. Brewer, 408 U.S. 471 (1972); Specht v. Patterson, 386 U.S. 605 (1967); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) (per curiam); Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963); *cert. denied*, 376 U.S. 920 (1964) and the eighth amendment right of freedom from cruel and unusual punishment, Novak v. Beto, 453 F.2d 661 (5th Cir. 1972), *cert. denied*, 409 U.S. 968 (1972); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971).

[7] *See* Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971); Note, *Decency and Fairness: An Emerging Role in Prison Reform*, 57 VA. L. REV. 841, 847 (1971).

[8] The eighth amendment provides: "Excessive bail shall not be required, nor

ishment[9] and harsh living conditions in the general prison population,[10] and to ameliorate the conditions of segregated confinement.[11]

In applying the eighth amendment to the prison setting, the courts agree that solitary confinement[12] is a legitimate tool of prison administration.[13] By confining those who violate prison rules or by confining those who may be the object of other prisoners' violence, prison authorities are better able to maintain discipline. Solitary confinement is divided into two categories: administrative confinement, imposed to protect a prisoner from harm; and punitive confinement, imposed to punish a prisoner who has violated prison rules.[14] Usually, courts do not distinguish punitive isolation from administrative segregation.[15] As a result, the treatment accorded inmates in both

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excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

Originally, the eighth amendment prohibited only those punishments that were viewed as cruel and unusual at the time of its adoption, such as drawing and quartering. Trop v. Dulles, 356 U.S. 86 (1958); Hart v. Commonwealth, 131 Va. 726, 109 S.E. 582 (1921). This limited approach was changed in Weems v. United States, 217 U.S. 349 (1910), where the Supreme Court held that punishment could violate the eighth amendment not only because of its form, but also because of its grossly disproportionate relationship to the offense for which it was imposed.

[9] Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (whipping cruel and unusual punishment per se).

[10] *See* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) *aff'd* 442 F.2d 304 (8th Cir. 1971).

[11] The courts use the terms "solitary confinement," "segregated confinement," and "maximum security confinement" interchangeably. When they are distinguished, "solitary" denotes the most severe punishment; "maximum security," the least severe. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969). *See generally* McAninch, *Penal Incarcertation and Cruel and Unusual Punishment,* 25 S.C.L. REV. 579 (1973).

[12] There are generally five reasons for imposing segregated confinement on an inmate: (1) where the inmate is a threat to himself or others, Wright v. McMann, 387 F.2d 519, 526 n.15 (2d Cir. 1967); (2) where the prisoner is destructive of the physical facilities of the prison, Courtney v. Bishop, 409 F.2d 1185, 1188 (8th Cir. 1969); (3) where the prisoner is an escape threat, Krist v. Smith, 309 F. Supp. 497, 500 (S.D. Ga. 1970), *aff'd* 439 F.2d 146 (5th Cir. 1971) (per curiam); (4) where the prisoner has disobeyed prison rules, Winsby v. Walsh, 321 F. Supp. 523, 527 (C.D. Cal. 1971); and (5) where the prisoner causes an increased likelihood of rebellion, Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962).

[13] *See, e.g.,* Sostre v. McGinnis, 442 F.2d 178, 192 (2nd Cir. 1971); Burns v. Swenson, 430 F.2d 771, 777 (8th Cir. 1970), *cert. denied,* 404 U.S. 1062 (1972).

[14] *See* note 12 *supra.*

[15] The Fourth Circuit recognizes a difference between the two, but finds them substantially alike in actual treatment. Abernathy v. Cunningham, 393 F.2d 775, 777 (4th Cir. 1968) (prison discipline problems confined in same facility as those in administrative confinement); Howard v.Smyth, 365 F.2d 428, 429 (4th Cir.), *cert. denied,* 385

circumstances is, in many situations, essentially the same.[16] However, subjecting prisoners who are protectively segregated to the same deprivations as those to which prisoners punitively segregated are subjected raises questions of fairness and due process of law.[17] By according great weight to prison officials' determinations that administrative segregation is required by the particular inmate's potential for disrupting the institution,[18] most courts have avoided considering these issues. This modified "hands-off" approach, therefore, generally acts to preclude prisoner recovery unless exceptional abuses are shown.[19]

The validity of any particular form of solitary confinement de-

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U.S. 988 (1966) (privileges limited whether punishment described as "punishment" or "segregation").

[16] Administrative segregation is distinguished from punitive segregation in that the latter is imposed as punishment, and the former is imposed for the protection of the inmate from himself or others, or for protection of other inmates from him. The length of the confinement is also a significant distinction. Administrative confinement is for an indefinite period while the length of punitive confinement is at the reasonable discretion of prison administrators. Under the eighth amendment, there is no significance in the distinction between the two when a condition is deemed to be per se violative of the cruel and unusual clause such as stocks or the rack. *See* Singer, *Confining Solitary Confinement: Constitutional Arguments For A "New Penology,"* 56 IOWA L. REV. 1251 (1971); Comment, *Prisoner's Constitutional Rights: Segregated Confinement as Cruel and Unusual Punishment,* 1972 WASH. U.L.W. 347.

[17] *See* Breeden v. Jackson, 457 F.2d 578, 582 (4th Cir. 1972) (Craven, J., dissenting). *But see* O'Brian v. Moriarty, 489 F.2d 941 (1st Cir. 1974).

[18] *See* United States *ex rel.* Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973) (petitioner's classification as security risk justified solitary confinement); Blake v. Pryse, 444 F.2d 218 (8th Cir. 1970) (per curiam) (maintenance of inmate health and hygiene justified confinement conditions); Kostal v. Tinsley, 337 F.2d 845 (10th Cir. 1964) (per curiam); *cert. denied,* 380 U.S. 985 (1965) (enforcement of prison rules not improper reason for solitary confinement).

In the absence of factual allegations sufficient to establish that a prisoner has been subjected to cruel and unusual punishment, the summary administration of discipline, including the use of physical force, does not give rise to a claim for relief under 42 U.S.C. § 1983 (1970). Cullum v. California Dep't of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967) (prisoner refused to move at direction of guard). This reasoning was recently affirmed in two Fourth Circuit cases involving alleged assaults by prison guards. Patterson v. Leeke, 529 F.2d 516, No. 74-2091 (4th Cir. Feb. 18, 1976) (prisoner refused to allow guard to examine his locker and cursed at guard; guard's response by shaking prisoner held not to be sufficiently brutal as to shock the conscience and support a § 1983 claim); Brown v. Mandel, No. 75-1735 (4th Cir. May 13, 1976) (prison guard pushing prisoner against wall in response to derogatory remarks not excessive force since no injury inflicted and force applied in good faith effort to maintain discipline).

[19] The courts conduct a balancing test, and if no clear abuse of prisoners' rights is shown, the court will generally uphold the judgment of the prison administrator. *See, e.g.,* Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967).

pends on the harshness of its conditions.[20] There are certain basic standards of sanitation and nutrition that segregated confinement must meet.[21] However, like any other punishment challenged under the eighth amendment, the conditions of any particular solitary confinement must be reviewed on a case by case basis.[22] The test usually applied to determine if conditions under which an inmate is confined is constitutional is whether they are so offensive as to "shock the general conscience."[23] These determinations require the courts to decide what conditions shock society's conscience. Although the test applied is objective,[24] the determinations are necessarily subjective,[25] and there is little uniformity among the courts.[26]

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[20] 529 F.2d at 860-61.

[21] These basic standards include: adequate lighting, LaReau v. MacDougall, 473 F.2d 974, 977-78 (2d Cir. 1972), *cert. denied*, 414 U.S. 818 (1973); opportunities to wash, White v. Commissioner of Ala. Bd. of Corrections, 470 F.2d 55, 56 (5th Cir. 1972) (per curiam); adequate heating and ventilation, Wright v. McMann, 387 F.2d 519, 521 (2d Cir. 1967); adequate clothing and bedding, Anderson v. Nosser, 438 F.2d 183, 187, 192 (5th Cir. 1971), *cert. denied sub nom.* Nosser v. Bradley, 409 U.S. 848 (1972); opportunity to exercise, Sinclair v. Henderson, 331 F. Supp. 1123, 1130 (E.D. La. 1971) (5th Cir. 1970); toilet facilities, Hancock v. Avery, 301 F. Supp. 786, 789 (M.D. Tenn. 1969); medical care, Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966) (per curiam); adequate nutrition, Knuckles v. Prasse, 302 F. Supp. 1036, 1062 (E.D. Pa. 1969), *aff'd* 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 906 (1971). *But cf.* Crowe v. Leeke, 540 F.2d 740 (4th Cir. 1976) (overcrowded conditions in maximum security, forcing one inmate to sleep on floor, not cruel and unusual punishment; however, prisoner scheduled to be transferred to new facility under construction). The Supreme Court has held that prison administrators must give general recognition to prisoner's rights. Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam).

[22] These conditions must be measured against what the Supreme Court has termed "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

[23] This subjective test inquires whether a condition "shocks [the] general conscience or [is] intolerable in fundamental fairness." Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965). This test is also characterized as whether contemporary society would reject a certain punishment. Trop v. Dulles, 356 U.S. 86, 101 (1957). When determining if punishment is unconstitutional, the courts decide if it is disproportionate to the offense for which it is imposed. Punishment that is disproportionate to the offense for which it is imposed is deemed to shock society's conscience. Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1971). However, this disproportionate test is inapplicable where the condition complained of is not a condition of a punishment.

[24] Ralph v. Warden, 438 F.2d 786, 789 (4th Cir. 1970).

[25] *See* Comment, *The Eighth Amendment and Prison Conditions: Shocking Standards and Good Faith*, 44 FORDHAM L. REV. 950, 959 (1976); Note, *Constitutional Law—The Eighth Amendment and Prison Reform*, 51 N.C.L. REV. 1539, 1541 (1973).

[26] Novak v. Beto, 453 F.2d 661, 667-69 (5th Cir. 1971) (no "shocking" conditions where solitary cells were clean and prisoners provided with basic elements of hygiene);

In *Sweet v. South Carolina Department of Corrections,*[27] a state prisoner who had been segregated for over five years sued South Carolina prison officials,[28] seeking both injunctive and monetary relief under § 1983 of the Civil Rights Act of 1871.[29] Sweet had been placed in administrative segregation at his own request after threats to his life were made by other inmates.[30] While Sweet did not request return to the general prison population, he argued that to subject him to the same deprivations as those of prisoners punitively segregated was cruel and unusual punishment within the meaning of the eighth amendment.[31]

Applying the "shock the conscience" test, the district court found no evidence to support any of the plaintiff's allegations that conditions of confinement violated any constitutional rights, and dismissed the action.[32] The Fourth Circuit, sitting en banc, affirmed the

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Sostre v. McGinnis, 442 F.2d 178, 193-94 (2d Cir. 1971) (quality of solitary confinement not shocking when adequate diet, personal hygiene implements, general reading matter, opportunities for exercise, and for participation in group therapy available to prisoner); Bethea v. Crouse, 417 F.2d 504, 509 (10th Cir. 1969) (prison officials allowing beating and mistreatment at hands of other prisoners cruel and unusual); Landman v. Royster, 354 F. Supp. 1302, 1318 (E.D. Va. 1973) (shocking practices included unnecessary use of tear gas and practice of handcuffing inmates to cell bars).

[27] 529 F.2d 854 (4th Cir. 1975).

[28] The defendants, sued both officially and individually, were the director of the South Carolina Department of Corrections and the Warden of the Central Correctional Institution. *Id.* at 857. Monetary relief was denied because the prison warden established good faith reliance on prison procedures as a defense to a prisoner's suit for compensatory damages brought under § 1983. *Id.* at 866. *See* Skinner v. Spellman, 480 F.2d 539, 540 (4th Cir. 1973) (warden entitled to immunity when relying on validity of procedure held invalid in that case).

[29] 42 U.S.C. § 1983 (1970). Although prisoners do not have to exhaust state remedies when bringing a civil rights action under § 1983, Wilwording v. Swenson, 404 U.S. 249, 251 (1971) (per curiam), when a prisoner brings a writ of habeas corpus to compel his release he must exhaust all state remedies before bringing the suit. 28 U.S.C. § 2254(b) (1970). *See* Johnson v. Avery, 393 U.S. 483, 485 (1969) (writ of habeas corpus).

[30] Sweet was privy to the details of a planned prison riot and was either threatened by some of the co-conspirators and reported their actions to the prison guards, or else disclosed the riot plans to the guards and thus incurred the other inmates' wrath. 529 F.2d at 857.

[31] The more important deprivations which Sweet alleged were: (1) that he had been denied reading and writing material; (2) that he had been denied extra food; (3) that he had been denied adequate medical care; (4) that he had been denied the right to engage in regular religious services; and (5) that he was allowed only two one-hour exercise periods, each followed by a shower per week. 529 F.2d at 854.

[32] Sweet v. South Carolina Dep't of Corrections, No. 70-160 (D.S.C. Feb. 19, 1970). The Fourth Circuit found no evidence to support plaintiff's allegations of denials of reading and writing material, adequate medical care or any denial of extra food to plaintiff. The court further found that the prison authorities were reasonably justified

lower court's decision that these alleged deprivations, even if true, did not violate the eighth amendment, except for one allegation that Sweet was denied sufficient opportunity to exercise and shower.

The majority applied a two prong analysis to determine whether Sweet's confinement satisfied constitutional standards. First, the court considered if the conditions of his confinement met minimum constitutional standards.[33] This involved not only consideration of the basic physical conditions of confinement, but also how these conditions affected the prisoner when viewed with the other circumstances of his confinement. Second, the court considered whether the confinement constituted a rationale means to reach a permissible end.[34] The court recognized that to separate Sweet for his own protection was a rationale means to reach a legitimate prison objective, and thus satisfied the latter test.[35]

The Fourth Circuit, however, remanded the case to the district court for a determination of whether Sweet's opportunities to exercise and shower met minimum constitutional standards. The lower court was instructed to determine if, considering the indefinite length of Sweet's confinement,[36] the restricted opportunities to exercise and shower would be harmful to his health. If these restrictions were harmful, they would constitute cruel and unusual punishment mandating relief.[37] The Fourth Circuit specifically noted that reasonable restrictions of exercise and shower opportunities during punitive segregation ordinarily would not transgress constitutional standards because such confinement, usually imposed only for short periods of time, would not have the same adverse impact on the prisoner's health that the indefinite nature of administrative segregation might have.[38]

In addition, the Foruth Circuit indicated that since the limitation on exercise time might be harmful to Sweet's health, the district

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in not allowing plaintiff to attend regular chapel services with the general prison population in the interest of prison discipline and order. 529 F.2d at 862-65.

[33] 529 F.2d at 860.

[34] *Id.* at 857-58.

[35] *Id.* at 861.

[36] *Id.* at 866. Length of segregated confinement for administrative purposes is "indefinite" in the federal system. *See, e.g.*, Novak v. Beto, 453 F.2d 661, 666 n.2 (5th Cir. 1971).

[37] 529 F.2d at 866. *See generally* Taylor v. Strickland, 411 F. Supp. 1390, 1392 (D.S.C. 1976) (constitutional issue could be found as to deprivation of exercise in solitary confinement); Sinclair v. Henderson, 331 F. Supp. 1123, 1130 (E.D. La. 1971) (exercise yards must be provided for condemned prisoners where it could be done economically and without impairment of security).

[38] 529 F.2d at 866. *See* note 36 *supra.*

court should consider the practicality of expanding Sweet's exercise privileges without unduly burdening prison administration.[39] Apparently, the court thought that a restriction on exercise time for an indefinite period raised a presumption that the restriction would adversely affect health. Consequently, even without actual proof of harm to the prisoner, prison authorities should increase exercise opportunities if practical.[40]

In *Sweet,* the Fourth Circuit moved away from the position it took in *Breeden v. Jackson,*[41] a case involving facts almost identical to those in *Sweet.* The majority in *Breeden* held that where the conditions of administrative segregation were the usual incidents of confinement in maximum security,[42] the deprivations were constitutionally permissable.[43] Unlike the *Sweet* court, the *Breeden* court failed to distinguish punitive from administrative segregation and thus did not consider the constitutionality of administrative solitary confinement and the extended periods of time for which it may be imposed. The *Sweet* court, however, remanding for consideration of the effects of the indefiniteness of Sweet's solitary confinement and the practicality of expanding his exercise and shower privileges, was careful to note that this analysis would be inapplicable to prisoners punitively segregated because such confinement was for a limited period.[44]

Judge Butzner filed a concurring opinion stating that although the majority's remedy was better than no relief at all, it did not

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[39] 529 F.2d at 866. This 'practicality' criterion had not previously been applied by the Fourth Circuit.

[40] *Id.* Although the case was remanded for consideration of the effect of both shower and exercise limitations, the Fourth Circuit was primarily concerned with the exercise issue. The opinion seems to suggest that the issue of showers was included in the remand only because it was includable in the health issue presented by limited exercise. The opinion is not clear as to whether showers are so closely linked to exercise that one may not be considered without the other or whether showers may be a separate consideration altogether. The court did not indicate whether the shower's issue in and of itself would present a constitutional claim. *See also* Taylor v. Strickland, 411 F. Supp. 1390, 1395 (D.S.C. 1976).

[41] 457 F.2d 578 (4th Cir. 1972).

[42] For a list of minimum standards which all segregated confinement must meet to be consitutional, see note 21 *supra.*

[43] 457 F.2d at 581.

[44] 529 F.2d at 866. Punitive segregation is limited to a certain number of days. *See, e.g.,* Sostre v. McGinnis, 442 F.2d 178, 190 (2d Cir. 1971). Thus, the potential health hazards presented by extended periods of segregated confinement for adminstrative purposes are not a problem in punitive segregation. However, experts disagree as to the physical or psychological injury to the health of prisoners confined over extended periods of time. *Id.* at 190 n.11.

provide the full relief required by the eighth amendment.[45] He concluded that confining Sweet under the same conditions as those of prisoners punitively segregated, when he had broken no prison rules, thus denied him due process and equal protection of the law.[46]

Judge Butzner's conclusion that solitary confinement for protective reasons constituted cruel and unusual punishment in violation of the eighth amendment arose from his application of a different constitutional test from that applied by the majority to Sweet's confinement.[47] Butzner reasoned that since Sweet was deprived of the same privileges as punitively segregated prisoners, his confinement constituted punishment.[48] Sweet's segregation should be analyzed not in terms of whether it satisfied minimum standards of sanitation, health, and nutrition, but rather in terms of whether it was disproportionate to the conduct for which it was imposed. Because Sweet had violated no prison regulations, under this analysis his confinement was clearly excessive punishment disproportionate to his conduct.[49]

The validity of applying the disproportionate test to Sweet's confinement depends on the propriety of Judge Butzner's conclusion that the conditions of confinement are punishment. The South Carolina prison officials clearly did not intend to punish Sweet,[50] nor did Sweet himself consider his confinement to be punishment.[51] Segregated confinement was no more than a reasonable means by which the prison authorities could protect Sweet. To view this confinement as punishment instead of as an acceptable tool of prison discipline for control and protection ignores the practical limitations of prison administration.[52] Solitary confinement of Sweet was not punishment but rather

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[45] 529 F.2d at 866-67 (Butzner, J., concurring). Judge Butzner was joined by Judge Winter and Judge Craven.

[46] *Id.* at 868.

[47] Judge Butzner argued that the test of proportionality of punishment to the offense for which it was imposed was applicable to Sweet's confinement in solitary for protective reasons. Since Sweet had committed no violation of prison rules, Judge Butzner concluded that solitary confinement was an excessive "punishment." *Id.* at 868. *See* Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring). A punishment may be cruel and unusual when it goes beyond what is necessary to achieve a legitimate penal aim. Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966).

[48] 529 F.2d at 868.

[49] *Id.*

[50] *Id.* at 857. For other cases recognizing solitary confinement as a legitimate method for protection of prisoners, *see* note 52 *infra*.

[51] 529 F.2d at 858.

[52] *See, e.g.*, O'Brian v. Moriarty, 489 F.2d 941, 944 (1st Cir. 1974); Adams v. Pate, 445 F.2d 105, 107-08 (7th Cir. 1971); Sostre v. McGinnis, 442 F.2d 178, 192 (2d Cir. 1971).

a reasonable means to meet the legitimate end of prison protection, thus rendering application of the disproportionate test inappropriate.

Judge Butzner further argued that even under the majority's test Sweet's confinement was wrongful. He reasoned that prison discipline was not promoted by placing the victims of prison lawlessness in solitary confinement while those who threatened them enjoyed the privileges of prisoners at large.[53] Thus, administrative segregation was not a rational means to meet a legitimate end and the second prong of the majority's test was not satisfied. Judge Butzner thought that prison authorities should be obligated to provide protection for inmates without any sacrifice of their general prison privileges.[54] In support of this argument, Judge Butzner observed that alternative means of protection existed that did not necessitate Sweet's sacrificing any privileges, such as: isolation or transfer of prisoners who threatened Sweet's life;[55] provision of extra guards for Sweet so he could safely enjoy more privileges;[56] or transfer of Sweet to another institution.[57]

These alternatives ignore the realities of prison administration. First, Sweet was threatened by an extremely large number of his fellow inmates[58] and the prison plainly did not have the physical

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[53] 529 F.2d at 867.

[54] *Id.* at 869.

[55] *Id.* Initiative and decision to transfer are entirely within the discretion of prison officials. *Cf.* Kohler v. Nicholson, 117 F.2d 344, 347 (4th Cir. 1941) (discretion to transfer federal prisoner within sole discretion of U.S. Atty. Gen.). The courts may be reluctant to direct the state Attorney General to commit a state prisoner to a federal institution because a federal statute which confers this control of federal prisons on the United States Attorney General. 18 U.S.C. § 4082(a) (1970). *See* Thogmartin v. Moseley, 313 F. Supp. 158, 160 (D. Kan. 1969), *aff'd,* 430 F.2d 1178 (10th Cir.), *cert. denied,* 400 U.S. 910 (1970). *See also* Montanye v. Haymes, 96 S. Ct. 2543, 2547 (1976) (New York law that prison commissioner has absolute right to transfer or not transfer state prisoners upheld); Taylor v. Strickland, 411 F. Supp. 1390, 1394 (D.S.C. 1976) (although plaintiff alleges he could not safely rejoin general inmate population, there was no constitutional violation in the denial of transfer); Note, *A Prisoner's Right to a Protective Transfer from State to Federal Prison,* 50 IND. L.J. 143 (1974).

[56] 529 F.2d at 869.

[57] *Id. Cf.* Kersh v. Bounds, 501 F.2d 585, 588-89 (4th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975) (where change in prison administrative practices would be a nuisance and administrative inconvenience, no change required as long as practices were reasonable and rationale means to legitimate prison ends). *See* note 53 *supra.*

[58] 529 F.2d at 863. To incarcerate a large number of individuals is more burdensome in terms of space limitations as well as administrative burdens. Although this is true in the *Sweet* case, this alternative may be more practical where there are fewer prison victimizers. Still, this approach would result in a significant reduction in the flexibility that prison officials need to frame individual treatment for prisoners. This

facilities to segregate these wrongdoers in order to protect Sweet.[59] Second, although extra guards could be provided for Sweet at an increased cost, to hire new guards whenever a prisoner requires special protection would be a significant administrative burden, aside from the considerations of expense. Finally, although transfer might allow more privileges, Sweet did not request a transfer. No state or federal statute confers the right to be transferred, nor is that any judicial decision that recognizes such a right.[60] Thus, while these alternative means may be effective protective measures, they are unnecessary and unreasonable since they place significant burdens on prison authorities as a means to alleviate minimal deprivations of a prisoner's movement while confined. Moreover, for a court to order any one of these alternatives would constitute a substantial intrusion into prison administration, an area in which the courts have consistently held prison administrators are to retain primary responsibility.[61]

Although the majority's holding reaffirms the hands-off doctrine, it apparently justifies judicial intervention into the area of administrative confinement, even without "shocking conditions," upon a prima facie showing that a condition of confinement might have an adverse impact on the health of a prisoner. The opinion, however, does not provide any guidance as to what health considerations raise constitutional issues or what will constitute a prima facie showing that a condition is harmful to a prisoner. Indeed, a recent district court, faced with limitations on an administratively confined prisoner's shower privileges, noted that under the *Sweet* opinion almost any physical limitation could affect a prisoner's health.[62]

Although on remand the district court in *Sweet* should establish some guidelines for the courts, the Fourth Circuit opinion currently requires a case by case analysis of each condition of administrative confinement to determine if it raises health hazards sufficient to justify court intervention. This approach is conceivably as intrusive into the affairs of prison management as the overseer position which the Fourth Circuit was attempting to avoid.[63] If prison administrators

would also closely involve the courts with the administration of prisons, an unwanted burden for the courts. *See* text accompanying notes 1-4, *infra*.

[59] *See* 529 F.2d at 863.

[60] *See* note 53 *supra*.

[61] *See* notes 18-19 *supra*.

[62] Taylor v. Strickland, 411 F. Supp. 1390, 1395 n.13 (D.S.C. 1976) (considering whether a prisoner in administrative confinement should have increased shower privileges, the court speculated as to whether district judges would next have to decide how many times a prisoner should "brush his teeth, go to the bathroom, wipe his nose, comb his hair, or scratch.")

[63] 529 F.2d at 859.

must have every restriction of solitary confinement reviewed as to its constitutional impact, the Fourth Circuit will, in effect, have discarded the hands-off doctrine. A more desirable approach would have been to limit the analysis concerning the indefinite nature of administrative segregation to specific and substantial health hazards which prison authorities can reasonably avoid. This would have provided tangible guidelines for the district courts and limited judicial intervention into prison administration to a more reasonable level.

JEAN L. BYASSEE

C. Due Process and Prisoner Transfer and Reclassification

Prisoner transfer and classification affects nearly every aspect of daily life in a prison.[1] Because of the impact of transfer and classification decisions on a prison inmate's existence, due process questions have been raised regarding the procedure used in making such decisions.[2] Until recently, courts have declined to consider procedural due process questions in the context of discretionary administrative decisions within prisons.[3] Prisoners thus had been without judicial remedies for potentially arbitrary decisions by prison officials.[4]

The Supreme Court, however, developed certain due process re-

[1] A prisoner's classification determines his place of confinement, his access to medical care and particular treatment programs, his work assignments, his eligibility for good time, and the likelihood of his receiving parole. In addition, all privileges available to a prisoner depend upon his classification status. Such privileges include outdoor recreation, access to the prison commissary, frequent visitation, access to a library, opportunity to work outside the prison, and amount of compensation received for prison labor. A transfer or reclassification of a prisoner may result in any or all of these matters being re-determined. H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 336 (1974).

[2] *Id.* at 450-53. *See also* Diamond v. Thompson, 364 F. Supp. 659, 664 (M.D. Ala. 1973), *aff'd per curiam*, 523 F.2d 1201 (5th Cir. 1975); Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971); Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968); Roberts v. Pepersack, 256 F. Supp. 415, 431-32 (D. Md. 1966).

[3] The recent trend is exemplified by Parker v. McKeithen, 488 F.2d 553, 556 (5th Cir. 1974), where, in the context of an eighth amendment violation claim, the court stated: "[I]t can no longer be correctly asserted that the federal courts are unwilling in all situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights." *See also* note 2 *supra*.

[4] *See* Bailey, *The Realities of Prisoners' Cases Under 42* U.S.C. *§ 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. CHI. L.J. 527, 540 (1975); *see also* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

quirements for prison administrative proceedings in *Wolff v. McDonnell.*[5] *Wolff* required that a prisoner receive written notice of charges against him at least 24 hours prior to an administrative hearing, that the factfinders provide a written statement of the evidence relied upon and the reason for the action, and that the inmate be allowed to call witnesses and present documentary evidence "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[6] However, the Supreme Court held that neither the right to confront and cross-examine accusers, nor the right to counsel were required under this limited due process test.[7]

The scope of the *Wolff* holding was narrowly confined in the recent decision of *Meachum v. Fano.*[8] The Supreme Court in *Meachum* held that due process does not require a *Wolff*-type hearing[9] in prisoner transfer cases, even if the convict is transferred to a prison where the conditions are substantially less favorable.[10] The Court reasoned that

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[5] 418 U.S. 539 (1974). McDonnell, an inmate in a Nebraska prison, brought suit under 42 U.S.C. § 1983 (1970) for damages, alleging the denial of due process in a prison disciplinary proceeding. Under Nebraska's disciplinary scheme, good time credits are forfeited in cases of serious misconduct, and privileges are forfeited for less serious misbehavior. The procedure for establishing misconduct prior to *Wolff* was to hold a conference at which the prisoner was informed orally of the charges against him and to prepare a conduct report for a hearing before the disciplinary committee where the accused was allowed to ask questions of the charging party. The Court found these proceedings inadequate under due process standards. 418 U.S. at 546-58.

[6] *Id.* at 566. *See generally 20th Annual Survey of Developments in Virginia Law 1974-75—Prisoners' Rights*, 61 VA. L. REV. 1822 (1975).

[7] 418 U.S. at 567-70. The Supreme Court reasoned that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. . . . [T]here must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.* at 556.

[8] 96 S. Ct. 2532 (1976). *Meachum* involved § 1983 claims by prisoners in a Massachusetts medium security prison. Plaintiffs alleged that they were being transferred to less favorable institutions without adequate factual hearings, and hence were deprived of due process of law. Three of the claimants had been moved to a maximum security prison. *Id.* at 2535-37.

[9] *See* text accompanying note 5 *supra.*

[10] 96 S. Ct. at 2538-39. The Supreme Court indicated in *Meachum* that a change in conditions of confinement having a substantial adverse impact on the prisoner involved does not per se deserve due process protection. The due process clause forbids convicting a person of a crime and depriving him of his liberty without compliance with the requirements of the clause. However, a valid conviction has the effect of constitutionally depriving a defendant of his liberty. Thereafter the convict cannot expect the due process clause to guarantee him assignment to a particular prison, even though the degree of confinement in one prison may be quite different from that in another. "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons." *Id.* at 2538.

if a prisoner has been duly convicted and incarcerated, he has been constitutionally deprived of his liberty and thus cannot expect the due process clause to shield him from intra-prison system transfers.[11] The *Wolff* due process requirements were held to be applicable only when a state-created liberty interest, such as good time credit, is at stake.[12] The *Meachum* Court determined that prisoners have no inherent constitutional liberty interest in location of incarceration to which the due process clause affords protection.[13]

Against this background of Supreme Court decisions concerning prisoners' due process rights in transfer and reclassification, the Fourth Circuit recently decided three cases in which these issues were raised: *Kirby v. Blackledge*,[14] *Benfield v. Bounds*,[15] and *Bratten v. Davis*.[16] *Kirby* and *Benfield* were handed down prior to *Meachum* and thus did not benefit from that decision's interpretation of *Wolff*. *Bratten*, however, was a post-*Meachum* case and directly applied that decision.

In *Kirby v. Blackledge*,[17] North Carolina State Prison officials reclassified and assigned several inmates to a maximum security cell block after informal hearings. The prisoners sued prison officials under 42 U.S.C. § 1983 alleging a violation of the due process clause of the fourteenth amendment.[18] The district court summarily granted

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[11] *Id.*

[12] *Id.* at 2539. The language in *Wolff* provided the *Meachum* Court with ample support for the proposition that the liberty interest at stake in *Wolff* was not present in *Meachum:*

> [T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

[13] 96 S. Ct. at 2538-39.

[14] 530 F.2d 583 (4th Cir. 1976).

[15] 540 F.2d 670 (4th Cir. 1976).

[16] No. 75-1664 (4th Cir., Aug. 6, 1976), *disposition recorded* 538 F.2d 323.

[17] 530 F.2d 583 (4th Cir. 1976).

[18] *Id.* at 584-85. In addition to raising a due process claim, the plaintiffs asserted that they were subjected to cruel and unusual punishment within the prison. *Id.* at 585-86. Plaintiffs alleged that a firehose occasionally was used on the prisoners; that they were allowed only two hours of recreation per week, and only one shave every three days, with 31 prisoners using the same blade; that prisoners were denied access to a doctor and to a library; and that the cells were covered with filth. Finally, they alleged the existence of a punishment room known as the "Chinese Cell," of which the court remarked:

defendants' motion to dismiss the complaint.[19] The Fourth Circuit reversed the summary judgment and held that the reclassification hearings did not comply with the *Wolff* due process requirements.[20] The court determined that the *Kirby* plaintiffs did not receive advance written notice of the charges against them or any statement of the evidence or reasoning of the committee which reclassified them. Thus, the prison officials did not satisfy those due process standards established in *Wolff*.[21]

The *Meachum* decision, which limited the application of the *Wolff* standards, was decided subsequent to *Kirby*. *Wolff*'s restricted applicability, however, would not have affected the Fourth Circuit's decision on the *Kirby* facts. *Meachum* pointed out that a real liberty interest such as good time credit must be at stake before the *Wolff* minimum standards attach.[22] Such a liberty interest was at stake in *Kirby*, since North Carolina provides a statutory right to good time credit which is forfeited upon reclassification to maximum security.[23] Thus, the *Meachum* decision did not disturb the *Kirby* holding that *Wolff* due process standards were applicable.

In *Bratten v. Davis*,[24] the Fourth Circuit relied on *Meachum* as the basis for its holding.[25] The plaintiff, an inmate in a Virginia State Prison, was transferred within the state prison system without *Wolff*-type proceedings. In his complaint, the plaintiff alleged that the transfers had adversely affected his chances of adjustment and rehabilitation, and that he had been denied due process since each transfer had not been accompanied by a *Wolff* hearing.[26] The Fourth Cir-

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> The prisoners' allegation no. 1 is so bizarre that it is difficult to believe that such a situation could exist in our society; it is reminiscent of the Black Hole of Calcutta. The allegation is that there is a strip or "Chinese Cell" where prisoners are occasionally placed in which there is no bedding, no light, and no toilet facilities save a hole in the floor.

Id. at 586.

The Fourth Circuit reversed the district court's dismissal of the cruel and unusual punishment claim without citing any authority holding such activity to be cruel and unusual. Apparently, the court believed that the alleged activity was so outrageous that a constitutional violation would be clear upon proof of the allegations. *Id.* at 587.

[19] *See id.* at 585.

[20] *Id.* at 587.

[21] *Id. See* text accompanying notes 4-6 *supra*.

[22] 96 S. Ct. at 2539.

[23] GEN. STAT. N.C. § 162-46 (Repl. Vol. 1976); GEN. STAT. N.C. § 14-263 (Repl. Vol. 1969).

[24] No. 75-1664 (4th Cir. Aug 6, 1976), *disposition recorded* 538 F.2d 323.

[25] *Id.* at 2-3.

[26] *Id.* at 2. Bratten also alleged that $674.35 worth of personal property was taken from him upon his arrival at Saint Brides Prison and was not returned to him when

cuit held that the due process claim in *Bratten* was without merit since no liberty interest such as good time credit was at issue.[27]

Unlike the plaintiffs in *Wolff* and *Kirby,* Bratten had not lost good time credit as a result of the administrative action in question.[28] In Virginia, a prisoner acquires good time for good behavior, and can lose good time only through violation of prison disciplinary rules. Virginia does not provide for any gain or loss of good time upon transfer from one prison to another.[29] Consequently, the Fourth Circuit relied on *Meachum* to hold that the plaintiff had no liberty interest at stake which required procedural due process safeguards in administrative transfer proceedings.[30]

In another Fourth Circuit case, *Benfield v. Bounds,*[31] four separate transfer and reclassification cases were combined on appeal.[32] Each of the plaintiffs alleged a denial of due process in the transfer or reclassification proceeding involved. In two of the cases, *Benfield v. Bounds* and *Johnson v. Bounds,*[33] the alleged violations occurred prior to the *Wolff* decision.[34] The Fourth Circuit held that since *Wolff*

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he was transferred to Church Road Prison. The district court dismissed this portion of the claim because the alleged deprivation did not rise to a level of constitutional magnitude. *Id.* at 3. The Fourth Circuit reversed, holding that Bratten was entitled to recover this amount if the evidence supported his claim. There is no jurisdictional minimum for a § 1983 suit. *Id.* at 4; *accord,* Lynch v. Household Finance, 405 U.S. 538, 546 (1972).

[27] No. 75-1664 at 3.

[28] *See* VA. CODE ANN. §§ 53-19.17, 107, 151, 210-214 (Repl. Vol. 1974).

[29] *Id.* Virginia awards 10 days of good time for every twenty days an inmate spends without a prison rule violation. *Id.* at § 53-213. The inmate may also acquire one to five days of good time credit per month if he is engaged in a vocational or educational training program. *Id.* at § 53-213.1. However, upon violation of a prison regulation, the inmate must "forfeit such portion of accumulated credit for good conduct as may be deemed proper by the Director." *Id.* at § 53-214.

[30] No. 75-1664 at 3.

[31] 540 F.2d 670 (4th Cir. 1976).

[32] The four actions combined were: Benfield v. Bounds, No. 73-2159; Carroll v. Jones, No. 75-1069; Johnson v. Bounds, No. 75-1867; Denson v. Department of Corrections, No. 75-1868.

[33] No. 75-1867, 540 F.2d 670 (4th Cir. 1976).

[34] Benfield appeared before a classification board several times between 1971 and 1973. His record included seven felonies and four escapes. Prison officials claimed that "reliable" sources had informed them that Benfield was arranging to smuggle two pistols into the prison for purposes of escape. Subsequently, one pistol was found within the prison walls. This incident led to the flurry of transfers and classification board hearings. 540 F.2d at 673. Johnson's pro se complaint provided the only factual information in that case, and because of its lack of clarity, the Fourth Circuit could not ascertain exactly what had occurred. *Id.* at 674; *see* note 37 *infra.*

was not intended to apply retroactively,[35] the standards enunciated in *Wolff* were not controlling with respect to these two plaintiffs.[36] The court affirmed the dismissal of Benfield's complaint, and ordered *Johnson* remanded for lack of sufficient information.[37]

The Fourth Circuit then considered the two remaining cases, *Carroll v. Jones*[38] and *Denson v. Department of Corrections.*[39] Carroll was a North Carolina prisoner who complained that his transfer from one medium custody prison to another resulted in a major change in the conditions of his confinement. Carroll requested damages as well as declaratory and injunctive relief because he was denied a *Wolff*-type hearing before his transfer occurred.[40] The bare allegations of the complaint did not indicate whether there was in fact a major change in conditions of confinement. Thus, the court held that *Wolff* standards apply if a major change is found to have resulted from the transfer and remanded the case for further findings on that issue.[41] The validity of this determination, however, was altered by *Meachum* and its companion case *Montanye v. Haymes.*[42]

Montanye dealt precisely with the *Carroll* problem: an intra-prison system transfer unaccompanied by a *Wolff*-type hearing. The Court held that a prisoner without a statutory right to remain at one particular prison facility cannot demand *Wolff* due process measures upon transfer, regardless of whether the transfer is for punitive or administrative reasons.[43] Thus, the remand of the *Carrolll* case for failure to satisfy *Wolff* due process standards was unnecessary, since Carroll was not entitled to a *Wolff* hearing under the *Montanye* ruling.[44]

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[35] 540 F.2d at 674, *see* Wolff v. McDonnell, 418 U.S. 539, 573 (1974).

[36] 540 F.2d at 674.

[37] The district court had dismissed the *Johnson* complaint without requiring an answer from defendants. The Fourth Circuit insisted on a response "containing sufficient information to establish that the action complained of by the inmate was not so egregiously unfair as to require relief." *Id. Benfield* was not remanded because there was sufficient information at hand to indicate that he had not been reclassified as a result of arbitrary or discriminatory conduct on the part of prison officials. *Id.* at 673-74.

[38] No. 75-1069, 540 F.2d 670 (4th cir. 1976).

[39] No. 75-1868, 540 F.2d 670 (4th Cir. 1976).

[40] 540 F.2d at 674-75.

[41] *Id.* The district court had dismissed Carroll's complaint without requiring a response from the defendants. The Fourth Circuit found Carroll's claim to have possible merit, and required the defendants to respond to the complaint upon remand. *Id.*

[42] 96 S. Ct. 2543 (1976).

[43] *Id.* at 2547.

[44] The Fourth Circuit relied on various courts of appeal cases for the proposition

Plaintiff Denson in *Denson v. Department of Corrections,* was a Virginia prisoner who complained that no hearing was afforded him before his reclassification for violation of prison rules.[45] Denson's pro se complaint reveals, however, that he may have had an earlier hearing at which his breach of the rules was determined, but which left his classification unresolved.[46] The Fourth Circuit found that a separate *Wolff* hearing should have been granted before the prisoner's classification was redetermined.[47] Accordingly, the case was remanded to the district court.[48]

As in *Carroll,* the result in *Denson* would have been altered if the Fourth Circuit had had the benefit of *Meachum* and its "liberty interest" orientation. In Virginia, the liberty interest of good time credit does not vary according to classification, but rather, varies according to time spent free of rule violations.[49] Thus, if the hearing in which Denson was found guilty of rule violations satisfied the *Wolff* standards, no due process rights were violated. Reclassification hearings in Virginia, such as that desired by Denson, are not controlled by *Wolff* since good time determinations in Virginia are wholly independent of classification procedures. No liberty interests are at stake in Virginia reclassification hearings,[50] and thus, the remand of

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that *Wolff* standards apply not only to punitive transfers but to administrative transfers as well if the result will subject the inmate to "potentially materially adverse effects." 540 F.2d at 675. *See* Lokey v. Richardson, 527 F.2d 949 (9th Cir. 1975); Carlo v. Gunter, 520 F.2d 1293 (1st Cir. 1975); Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974) (per curiam). In view of *Montanye,* the Fourth Circuit correctly held that administrative and punitive transfers should be treated alike, but incorrectly held that the treatment accorded both should include *Wolff* due process standards. As both *Meachum* and *Montanye* pointed out, *Wolff* standards apply only when a state-created liberty interest is at stake. In states where no statutory right to remain in a particular institution exists, a transfer, whether for punitive or administrative reasons, need not be preceded by a *Wolff* hearing.

[45] The Fourth Circuit was aware of the pending *Meachum* and *Montanye* cases and accordingly advised the district court on remand to await these decisions. 540 F.2d at 675.

[46] *Id.* Denson's pro se complaint was apparently so cryptic that the precise facts could not be discerned.

[47] *Id.* at 676.

[48] The district court had dismissed Denson's complaint without requiring a response from the defendants. On remand the Fourth Circuit required the defendants to answer before the district court proceeded further. *Id.*

[49] *See* VA. CODE ANN. § 53-210 to 214 (Repl. Vol. 1974); *see* note 29 *supra.*

[50] *See generally* VA. CODE ANN. § 53-210 to 214 (Repl. Vol. 1974); note 29 *supra.* Virginia has no statutes pertaining to prisoner reclassification. In North Carolina, however, a prisoner can lose accumulated good time credit when reclassified. GEN. STAT. N.C. § 162-46 (Repl. Vol. 1976); GEN. STAT. N.C. § 14-263 (Repl. Vol. 1969).