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ment of his excise taxes, such a decision would have been in accord with the law in the majority of jurisdictions which have decided this issue.[57]

KURT L. JONES

IX. HABEAS CORPUS AND PRISONERS' RIGHTS

A. Federal Habeas Corpus

The writ of habeas corpus[1] is a civil remedy[2] by which petitioners may challenge the legality of their restraint.[3] Habeas corpus jurisdiction over persons in custody pursuant to a state court judgment was granted to federal courts by the Act of 1867.[4] By exercising habeas corpus jurisdiction, federal courts can supervise state court adjudication of constitutional claims.[5] Federal scrutiny of state courts ensures the protection of federal constitutional rights of state prisoners.[6]

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[57] *See* text accompanying notes 44-47 *supra*.

[58] *See* text accompanying notes 48-51 *supra*.

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[1] The term "habeas corpus" refers to the common law writ known as habeas corpus ad subjiciendum, the "Great Writ." Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976). *See generally* D. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY (1966) [hereinafter cited as MEADOR].

[2] Fisher v. Baker, 203 U.S. 174, 181 (1906).

[3] Custody is a jurisdictional requirement of habeas relief. 28 U.S.C. § 2241(c)(3) (1970). A habeas petitioner need not be physically imprisoned; a significant restraint of his liberty satisfies the custody requirement. Jones v. Cunningham, 371 U.S. 236, 243 (1963); *see, e.g.*, Hensley v. Municipal Court, 411 U.S. 345 (1973) (restraints placed on petitioner during release on own recognizance pending appeal from state court conviction constitutes "custody" for purposes of habeas jurisdiction); Carafas v. LaVallee, 391 U.S. 234 (1968) (habeas jurisdiction exists when petitioner in custody at time habeas application filed, notwithstanding his subsequent release); Peyton v. Rowe, 391 U.S. 54 (1968) (court had habeas jurisdiction to review petitioner's sentence scheduled for later service); *see* note 9 *infra*.

[4] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (currently codified at 28 U.S.C. § 2241(c)(3) (1970)). The Act of 1867 and the fourteenth amendment were instituted by Congress to protect blacks from the "Black Codes" which had the effect of returning them to slave status. *See* McFeeley, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 535 (1976) [hereinafter cited as *Due Process*].

[5] The American system of federalism dictates that state courts and federal courts share the responsibility of administering federal constitutional law. The doctrine of federal-state comity requires federal courts to defer consideration of federal constitutional questions raised in prosecutions under state law until state courts have fully considered those questions. *Developments in the Law — Habeas Corpus*, 83 HARV. L. REV. 1038, 1048 (1970) [hereinafter cited as *Developments*]. *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441 (1963). One commentator has suggested, however, that a desire for equality of justice has properly been considered more important than principles of federalism. Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 258 (1968). *But see* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953-954 (1965) (application of Bill of Rights to states should not be regarded as an inflexible code of criminal procedure).

[6] Historically, the common law writ of habeas corpus has been issued by courts to protect

The federal habeas corpus statute confers federal court jurisdiction only over petitioners satisfying the custody requirement of the statute.[7] The judicial expansion of the common law concept of "custody"[8] has increased significantly the number of petitioners who satisfy this requirement.[9] The Fourth Circuit in *Wright v. Bailey*[10] considered whether the imposition of a fine alone was sufficient to constitute "custody" within the meaning of the federal habeas corpus statute.[11] The district court's finding that habeas corpus jurisdiction did not exist for consideration of a challenge of a disorderly conduct conviction by one of the *Wright* petitioners was affirmed by

individual liberty through judicial power to determine jurisdiction of the sentencing court. This historic function of the writ provided the basis for the expansion of statutory habeas corpus jurisdiction, empowering federal courts to ensure that federal constitutional rights of state prisoners are being protected at the state level. *Due Process, supra* note 4, at 537. Selective application of the Bill of Rights to the states through the due process clause of the fourteenth amendment was aimed at implementing uniform constitutional standards for criminal proceedings at state and federal levels. Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L. J. 895, 898 (1966). Commentators have argued that federal courts necessarily must review state court determinations because the state courts alone are unable to effectively administer the new constitutional guidelines. *Due Process, supra* note 4, at 537. Arguably, state court awareness that federal habeas corpus jurisdiction may overcome state procedural barriers encourages state vindication of federal rights. Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism,* 7 UTAH L. REV. 423, 442 (1961). Nevertheless, the Supreme Court is "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights" in state courts. Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976).

[7] 28 U.S.C. § 2241(c) (1970) requires that a habeas petitioner be "in custody" before federal courts can exercise jurisdiction over his application for the writ of habeas corpus.

[8] *See* Oaks, *Legal History In The High Court-Habeas Corpus,* 64 MICH. L. REV. 451 (1966). In both its early statutory and common law forms the writ of habeas corpus could be issued only if the petitioner was "subject to an immediate and confining restraint" on his liberty. *Id.* at 469. Early state court decisions and Stallings v. Splain, 253 U.S. 339, 343 (1920) held that the writ of habeas corpus was unavailable to a petitioner not in actual restraint or imprisonment. *Id.*

[9] *See* note 3 *supra.* The "custody" requirement of habeas jurisdiction has recently undergone an era of liberal interpretation by the Supreme Court. *Due Process, supra* note 4, at 542. In 1963, the Supreme Court held that although a paroled petitioner may not be in a state of "immediate physical imprisonment," conditions imposed upon him may sufficiently restrain his freedom so as to place him in "custody" for purposes of exercising habeas corpus jurisdiction. Jones v. Cunningham, 371 U.S. 236, 243 (1963). The Supreme Court later held that the custody requirement was satisfied where the habeas corpus petitioner's sentence had expired and he was released before the final adjudication of his habeas petition. Carafas v. LaVallee, 391 U.S. 234, 238-40 (1968).

Restrictions resulting from the petitioner's conviction, such as loss of voting rights, were deemed to satisfy the custody requirement. *Id.* at 237. In both *Jones* and *Carafas,* the petitioners were in physical custody when applications for the habeas writs were submitted. However, the Supreme Court in Hensley v. Municipal Court, 411 U.S. 345 (1973), recognized that the custody requirement for jurisdiction of an application for a writ of habeas corpus could be independently supported by civil liabilities such as petitioner's need to maintain a stay of incarceration. *Id.* at 352. The *Hensley* petitioner, who had been released on his own recognizance pending an appeal, was ruled to be in "custody" within the meaning of the federal habeas corpus statute. *Id.* at 353.

[10] 544 F.2d 737 (4th Cir. 1976), *cert. denied,* 98 S.Ct. 72 (1977).

[11] 544 F.2d at 739.

the Fourth Circuit.[12]

The habeas corpus petitions of the *Wright* defendants were consolidated for disposition by the district court because both convictions were the product of one transaction and involved the same defendants.[13] Petitioner Steven Wright was convicted of disorderly conduct and fined $50. In addition, he received a $50 fine and a suspended jail sentence for unlawfully resisting arrest. Petitioner Clarence Wright was found guilty of unlawfully resisting arrest, and assault and battery on a police officer. He received a 30 day jail sentence and a $50 fine on each charge.

There was no issue as to the "custody" of Clarence Wright because of his jail sentence.[14] The petitioners, however, argued that Steven Wright's nonpayment of the fine for his disorderly conduct conviction would result in imprisonment and this "expectation of future imprisonment" should constitute "custody".[15] Nevertheless, imposition of a fine alone does not involve a threat of incarceration. Steven Wright's original conviction was for disorderly conduct and the only penalty was a fine. Nonpayment of the fine could result in a finding of contempt for which the penalty would be incarceration. Therefore, incarceration would be the result of a contempt conviction and not the original conviction.[16] The Fourth Circuit held that a fine alone is not sufficient to constitute "custody" for purposes of establishing habeas corpus jurisdiction;[17] the threat of imprisonment where a fine has been imposed may be sufficiently remote from the original crime so as to vitiate the threat of imprisonment.

The district court's ruling that petitioner Steven Wright's suspended sentence and probation for one year for unlawfully resisting arrest satisfied the custody requirement was affirmed by the Fourth Circuit without elaboration.[18] Nevertheless, the acceptance by the Fourth Circuit of this deter-

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[12] *Id.*

[13] *Id.* at 738. The charges against petitioners resulted from a bar room altercation. *Id.* at 739.

[14] *See* note 3 *supra.*

[15] Brief for Petitioners at 9.

[16] Brief for Appellees at 10. See VA. CODE § 19.2-358 (Cum. Supp. 1977) for the procedure on default in payment of fine.

[17] 544 F.2d at 739. The Ninth Circuit, in Edmunds v. Won Bae Chang, 509 F.2d 39 (9th Cir.), *cert. denied,* 423 U.S. 825 (1975), reasoned that imposition of a fine alone did not satisfy the custody requirement of habeas corpus jurisdiction.

> [A] threat of incarceration is implicit in a court-imposed fine, for jail is one of the sanctions by which courts enforce their judgements and orders. Hence a fine may in some circumstances ultimately prove to be the price of freedom. But until confinement is imminent . . . the 'special urgency' justifying use of the habeas corpus remedy is notably absent.

509 F.2d at 41. *Accord,* Russell v. City of Pierre, 530 F.2d 791 (8th Cir. 1976) (mere $25 fine does not constitute "custody"); Westberry v. Keith, 434 F.2d 623 (5th Cir. 1970) (fine and revocation of driver's license does not constitute "custody"); *see* Walker v. State, 262 F. Supp. 102 (W.D.N.C. 1966), *aff'd,* 372 F.2d 129 (4th Cir.), *cert. denied,* 388 U.S. 917 (1967) (conditionally suspended 30 days sentence constitutes "custody" for purposes of federal habeas corpus jurisdiction).

[18] 544 F.2d at 739.

mination was sound in view of the judicial expansion of the custody concept,[19] and of the Virginia statutes concerning revocation of suspended sentences and probation.[20] Moreover, the probationary period alone entails civil liabilities which were recognized by the Supreme Court in *Hensley v. Municipal Court*[21] as constituting "custody sufficient to support independently jurisdiction of a petition for a writ of habeas corpus".[22] Under the Virginia Code, the suspended sentence and probation could be revoked at any time during the probationary period.[23] The probationer, Steven Wright, could be taken into immediate custody if it appeared to the revocation board that incarceration would likely follow the revocation hearing.[24] Thus, the threat of Steven Wright's immediate physical restraint was sufficient to place him in "custody" within the meaning of the federal habeas corpus statute.[25]

Although the Fourth Circuit found that the district court had jurisdiction to review petitioner Steven Wright's conviction for resisting arrest and petitioner Clarence Wright's convictions for assault and battery upon a police officer and resisting arrest, the Fourth Circuit affirmed the district court's denial of relief.[26] The petitioners were arrested under the Virginia disorderly conduct statute[27] which was held to be unconstitutional two years after the arrest.[28] The petitioners asserted that Steven Wright's arrest

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[19] *See* note 3 *supra. See generally* Smith, *Federal Habeas Corpus: State Prisoners and the Concept of Custody*, 4 U. RICH. L. REV. 1 (1969).

[20] VA. CODE §§ 19.2-306 (Repl. Vol. 1975), 53-290.1 (Cum. Supp. 1977).

[21] 411 U.S. 345 (1973).

[22] *See* note 9 *supra.* The civil liabilities referred to by the *Hensley* Court were the restrictions placed on the petitioner's movement, the swiftness with which his "freedom" could be ended, and the fact that violation of the conditions of his release would constitute a criminal offense. 411 U.S. at 351. Similarly, VA. CODE § 53-272 (Cum. Supp. 1977) provides that the court may impose probation on the defendant "for such time and under such conditions of probation as the court shall determine."

[23] VA. CODE § 19.2-306 (Repl. Vol. 1975) provides in pertinent part:

> The court may, for any cause deemed by it sufficient which occurred at any time within the probation period, . . . revoke the suspension of sentence and any probation, . . . and cause the defendant to be arrested and brought before the court at any time within one year after the probation period, . . . whereupon, in case the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed.

[24] VA. CODE § 53-250 (Cum. Supp. 1977) authorizes probation officers to arrest and confine defendant for violation of the terms of their probation or suspended sentences, pending a hearing by the Board or court to determine whether revocation of probation or the suspended sentence is appropriate. VA. CODE § 53-278.5 (Repl. Vol. 1974) permits probation officers to arrest a probationer without a warrant when in an officer's judgment the terms of the probation have been violated. Due process requires that a probationer receive a judicial hearing when the suspension of his sentence is revoked, but a summary hearing is sufficient. Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479 (1946).

[25] *See* note 22 *supra.*

[26] 544 F.2d at 742.

[27] VA. CODE § 18.1-253.2 (1950) (repealed 1975).

[28] Squire v. Pace, 380 F. Supp. 269 (W.D. Va. 1974), *aff'd* 516 F.2d 240 (4th Cir.), *cert. denied*, 423 U.S. 840 (1975). *Squire* was decided in August 1974, and the trial of the petition-

was unlawful; thus, Steven Wright legally used force to resist the arrest[29] and his brother Clarence Wright legally assisted him.[30] However, at the time the arrest was made, the statute appeared valid.

Although the petitioners asserted their actions were within their common law right to resist an unlawful arrest,[31] no such right exists when an arrest is authorized by an apparently valid statute, even though that statute is later declared unconstitutional.[32] The overriding policy consideration supporting this exception to the common law is that the validity of a statute should be tested only in a court of law.[33] Also, persons resisting arrest should not be excused for their resistance when they successfully challenge the validity of the statute under which they were arrested.[34] Thus, the Fourth Circuit properly held the petitioners' contention to be without merit.[35]

In addition to the custody requirement of habeas corpus jurisdiction, available state remedies must be exhausted before a federal court can consider a writ of habeas corpus.[36] The exhaustion requirement allows states an opportunity to review state court consideration of federal rights.[37]

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ers occurred in June 1972. The *Squire* court found the Virginia disorderly conduct statute to be unconstitutionally vague and overbroad. 380 F. Supp. at 280.

[29] The common law right to resist unlawful arrest is derived from the concept that assertion of arbitrary authority is a provocation to resist. *See,* Chevigny, *The Right to Resist an Unlawful Arrest,* 78 YALE L. J. 1128, 1132 (1969) [hereinafter cited as Chevigny]. Virginia has not judicially or legislatively abandoned the common law right to resist unlawful arrest. 544 F.2d at 740 n.4.

[30] The issue whether a third party may assist a person being illegally arrested was resolved by the Missouri Court of Appeals when it held that a third party "may not interfere with an arrest, even if such arrest is illegal, so long as the police are not using unreasonable or unnecessary force which would result in serious injury to the arrestee." City of St. Louis v. Treece, 502 S.W.2d 432, 434 (Mo. Ct. App. 1973). For a discussion of *Treece,* see 18 ST. LOUIS L. J. 283 (1973).

[31] *See* note 29 *supra.*

[32] 544 F.2d at 740; *see* Chevigny, *supra* note 29, at 1131; Note, *Defiance of Unlawful Authority,* 83 HARV. L. REV. 626, 636 (1970).

[33] State v. Briggs, 435 S.W.2d 361, 364-65 (Mo. 1968).

[34] *Id.* at 365.

[35] Although the *Wright* opinion indicates the Fourth Circuit's general disapproval of the common law right to resist unlawful arrest, *see* 544 F.2d at 740 n.4, federal courts will adopt state court recognition of the common law right. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 52 (3d ed. 1976).

[36] 28 U.S.C. § 2254(b), (c) (1970). Section 2254(b) provides that a writ of habeas corpus will not be granted unless the petitioner has exhausted available state remedies, or circumstances were such as to render the state process ineffective to protect the prisoner's rights. Section 2254(c) provides that petitioner has not exhausted available state remedies if he has not availed himself of his right under state law to raise the constitutional question by any available procedure. *See* Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461 (1960).

[37] *Developments, supra* note 5, at 1093-94. Applying Fay v. Noia, 372 U.S. 391 (1963), the Fourth Circuit has held exhaustion to be a doctrine of comity, and not a definition of power. Hunt v. Warden, 335 F.2d 936, 940 (4th Cir. 1964); *see* note 5 *supra.* The Fourth Circuit has noted that not only the comity concept, but the language of 28 U.S.C. § 2254 (1970) requires that the state be given a fair opportunity "by any available procedure" to

However, exhaustion of state remedies is not required where the state process is either not available or "ineffective to protect the rights of the prisoner."[38] In two recent cases, the Fourth Circuit considered whether petitioners' pursuit of relief in state courts would be futile. In *Patterson v. Leeke,*[39] the court of appeals held that South Carolina's post-conviction relief statute[40] provides an available remedy which necessarily must be exhausted by petitioners before federal courts can consider their habeas corpus claims.[41]

The petitioners[42] in *Patterson* contended that they were denied effective assistance of counsel at trial because their attorneys failed to advise them of their rights to appeal their convictions to the South Carolina Supreme Court.[43] Because they were not advised of this right, petitioners failed to file timely notices of appeal and were precluded from obtaining direct appeals to the South Carolina Supreme Court.[44] Consequently, the South Carolina Post-Conviction Relief Act provided the only procedure by which the petitioners could challenge their convictions.[45] Petitioners claimed that

consider assertions of the petitioner and provide relief when deserved. Durkin v. Davis, 538 F.2d 1037, 1041 (4th Cir. 1976). Until the state is afforded this opportunity, federal courts should refrain from granting habeas relief. *Id.; see* Fourth Circuit Review, *Federal Habeas Corpus Relief for State Prisoners,* 34 WASH. & LEE L. REV. 625, 632-34 (1977).

[38] *See* 28 U.S.C. § 2254(b) (1970). The statutory language of 28 U.S.C. § 2254(b) (1970) codifies the futility doctrine, thereby allowing petitioners access to the federal courts, although state remedies may be procedurally adequate, if it appears almost certain that state courts will rule adversely to petitioner's substantive claims. *Developments, supra* note 5, at 1098-1100. The futility doctrine does not greatly extend the Supreme Court's ruling that the habeas corpus petitioner has to present his claim only once to the state's highest court. Brown v. Allen, 344 U.S. 443 (1953).

[39] 556 F.2d 1168 (4th Cir. 1977).

[40] Uniform Post-Conviction Procedure Act, S.C. CODE §§ 17-601 to 17-612 (1962) (current version at S.C. CODE §§ 17-27-10, 17-27-120 (1976).

[41] 556 F.2d at 1173.

[42] The Fourth Circuit consolidated the claims of ten habeas corpus petitioners for resolution in *Patterson.* 556 F.2d at 1168.

[43] For a discussion of ineffective assistance of counsel claims, see text accompanying notes 71-114 *infra.*

[44] In South Carolina, the appellant or his attorney has ten days after receiving written notice of judgment to give notice to the opposite party of an intent to appeal to the Supreme court. S.C. CODE § 17-405 (1962) (current version at S.C. CODE § 18-9-60 (1976)). Unless notice of appeal is given and timely served, the South Carolina Supreme Court has no jurisdiction over the appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The requirement that notice of intent to appeal is given within a statutorily prescribed time is based on the interest of terminating litigation promptly to ensure judicial efficiency. *See* Note, *Failure to File Timely Notice of Appeal in Criminal Cases: Excusable Neglect,* 41 NOTRE DAME LAW. 73, 73 (1965).

[45] The South Carolina Uniform Post-Conviction Procedure Act "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. CODE § 17-601 (b) (1962) (current version at S.C. CODE § 17-27-20(b) (1976)). Most states limit post-conviction relief by not allowing a prisoner to use the procedure to raise all issues that could have been presented on direct appeal. *See* Note, *The North Carolina Post-Conviction Hearing Act: A Procedural Snare,* 55 N.C.L. REV. 653, 659-60 (1977).

unlike direct appeals, all alleged trial errors, such as insufficiency of the evidence supporting the conviction, would not be considered through the post-conviction procedure.[46] Thus, petitioners contended that exhaustion of state remedies would be futile, and that they should be allowed to forego the state proceedings and pursue their constitutional claims of ineffective assistance of counsel in the federal courts.[47]

Although the South Carolina Supreme Court might not consider all trial errors alleged by the petitioners,[48] application for relief under the statute would not necessarily be futile. In two post-conviction appeals, the South Carolina Supreme Court has recognized that where failure to perfect an appeal resulted from neglect of counsel, all alleged trial errors would be considered by the state Supreme Court.[49] Therefore, petitioners could be granted relief as a result of any of the alleged trial errors. The uncertainty of the outcome of the state court proceedings creates the necessity for petitioners to exhaust their available state remedies.[50] Thus, the Fourth Circuit determined that the South Carolina courts should have an opportunity to adjudicate fully petitioners' claims of ineffective assistance of counsel before the federal court exercises its jurisdiction. The decision was a sound applicaton of the doctrine of federal-state comity, which requires that the state courts have a fair opportunity to consider petitioners'

[46] The *Patterson* petitioners cited the South Carolina Supreme Court decision of Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), as support for their argument that all alleged trial errors would not be considered in the post-conviction process. The record indicated that Simmons' attorney had neglected to file a notice of intent to appeal within the required ten day period. *See* note 44 *supra.* The South Carolina Supreme Court affirmed the state circuit court's denial of the application for post-conviction relief on the basis that the trial errors raised could only be properly considered on direct appeal. 264 S.C. at 423, 215 S.E.2d at 885. The Fourth Circuit in *Patterson* distinguished *Simmons,* stating that the petitioner Simmons did not allege, nor did the lower court find that the failure to give timely notice of a direct appeal was a result of the neglect of counsel to advise Simmons of his right to a direct appeal. 556 F.2d at 1172. For a discussion of *Simmons,* see 28 S.C.L. REV. 302 (1976).

[47] 556 F.2d at 1171.

[48] *See* 28 S.C.L. REV. 302, 304-07 (1976). In White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), the petitioner alleged in his application for post-conviction relief that counsel had failed to inform petitioner of his right to appeal, and thus he was denied effective assistance of counsel. In denying petitioner's appeal from the post-conviction relief order, the South Carolina Supreme Court found petitioner's criminal record made it almost impossible to believe he was not aware of his right to appeal. Moreover, "in the absence of any showing of prejudice to the defendant," failing to be informed of his right to appeal is not grounds for a new trial. 263 S.C. at 119, 208 S.E.2d at 39. For a discussion of *White,* see 27 S.C.L. REV. 380 (1976).

[49] DeLee v. Knight, 266 S.C. 103, 221 S.E.2d 844, *cert. denied,* 426 U.S. 939 (1976); Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973). Although the petitioner in *DeLee* gave timely notice of intent to appeal, he failed to perfect his appeal within 210 days. 266 S.C. at 107, 221 S.E.2d at 845. The trial court found that the failure to perfect the appeal within the statutory time limits was the result of counsel's neglect. *Id.*

[50] *See* Documentary Supplement, *State Post-Conviction Remedies and Federal Habeas Corpus,* 12 WM. & MARY L. REV. 149, 151-59 (1971).

claims and provide relief before federal courts exercise habeas corpus jurisdiction.[51]

The Fourth Circuit also resolved *Franklin v. Conway*[52] by applying the doctrine of federal-state comity. The petitioner asserted that the Virginia Code section dealing with possession of burglary tools[53] was invalid, because it creates a presumption[54] of intent to commit larceny and thus denies due process of law.[55] The due process assertion had not been raised in the state post-conviction process, and therefore, the federal court deferred the exercise of its jurisdiction to allow a state court determination of the statute's constitutional validity.[56]

The Virginia Supreme Court had upheld the validity of the statute in two earlier cases.[57] Relying upon an earlier Supreme Court precedent,[58] the

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[51] *See* notes 5, 37 *supra.*

[52] 546 F.2d 579 (4th Cir. 1976).

[53] VA. CODE § 18.2-94 (1950) provides in pertinent part:

> The possession of such burglarious tools, implements or outfit by any person other than a licensed dealer, shall be prima facie evidence of an intent to commit burglary, robbery or larceny.

Id.

[54] Under the Thayer theory of presumptions, a presumption shifts the burden of producing evidence on an issue from the party having the burden of persuasion on that issue to his opponent. *See* J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 337 (1896). *See also* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L. J. 165, 172-73 (1969); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1954). Another view of presumptions, known as the Morgan approach, not only places the burden of introducing evidence on the opponent of the presumption, but also shifts the burden of persuasion to that party. *See* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 33-35 (1954). The federal district court of Virginia has held that Virginia's burglarious tools statute codifies a Thayer-type presumption. Richards v. Cox, 303 F. Supp. 946 (W.D. Va. 1969).

[55] Statutory presumptions are usually enacted by legislatures as a method of facilitating the establishment of a particular element of a crime. *See* Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 544 (1955). The use of statutory presumptions is subject to constitutional limits because of possible adverse effects on criminal defendants. Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 706 (1967). Mr. Justice Black has argued that the utilization of statutory criminal presumptions dilute, if not eliminate, eight constitutional rights of a defendant:

> 1. His right not to be compelled to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury;
> 2. The right to be informed of the nature and cause of the accusation against him;
> 3. The right not to be compelled to be a witness against himself;
> 4. The right not to be deprived of life, liberty, or property without due process of law;
> 5. The right to be confronted with the witnesses against him;
> 6. The right to compulsory process for obtaining witnesses for his defense;
> 7. The right to counsel; and
> 8. The right to trial by an impartial jury.

Turner v. United States, 396 U.S. 398, 425 (1970) (Black, J., dissenting). For a discussion of Justice Black's position, see Fuller & Urich, *An Analysis of the Constitutionality of Statutory Presumptions that Lessen the Burden of the Prosecution*, 25 U. MIAMI L. REV. 420 (1971).

[56] 546 F.2d at 581.

[57] Nance v. Commonwealth, 203 Va. 428, 124 S.E.2d 900 (1962); Burnette v. Common-

Virginia court construed the burglarious tool statute as meeting the "rational connection" test.[59] A rational connection between the fact proved and the ultimate fact presumed indicates a statutory presumption may be constitutional.[60] The Virginia court has also found that the presumption of intent to burglarize could be rebutted by the defendant's reasonable explanation of his possession of the burglarious tools.[61] However, the Supreme Court decision relied upon by the Virginia Supreme Court arguably has been altered by later Supreme Court decisions.[62] The Supreme Court strengthened the requirements of the rational connection test in *Leary v. United States,*[63] by holding that in order to satisfy the test the correlation between the basic and presumed facts must be at least more likely than not.[64] Thus, the Fourth Circuit denied relief because the state court should have an opportunity to consider the statute in light of more recent Supreme Court decisions. Furthermore, the statutory construction of a state statute is more appropriately determined by courts of that state.[65]

When the issue is raised the Virginia Supreme Court should find the

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wealth, 194 Va. 785, 75 S.E.2d 482 (1953). The *Burnette* court recognized that burglarious tools are usually designed and manufactured for lawful purposes. However, mere possession of the tools themselves does not constitute a violation of the statute; rather, the possession of the tools with the intent to use them in commission of a crime constitutes a violation. 194 Va. at 790, 75 S.E.2d at 487. The *Nance* court ruled that a person in possession of burglarious tools, other than a licensed dealer, has the burden of making a reasonable explanation for his possession of the tools in order to overcome the statutory presumption against him. 203 Va. at 432, 124 S.E.2d at 904.

[58] Yee Hem v. United States, 268 U.S. 178 (1925).

[59] Burnette v. Commonwealth, 194 Va. 785, 75 S.E.2d 482 (1953).

[60] *See* Comment, *Criminal Statutory Presumptions And The Reasonable Doubt Standard of Proof: Is Due Process Overdue?*, 19 ST. LOUIS U.L.J. 223, 235-38 (1975) [hereinafter cited as *Presumptions*]. The Supreme Court in Tot v. United States, 319 U.S. 463 (1943), ruled:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience.

Id. at 467-68.

[61] *See* Nance v. Commonwealth, 203 Va. 428, 432, 124 S.E.2d 900, 904 (1962). The *Nance* court held that once possession is proven, the burden of presenting evidence to rebut the presumption of intent to burglarize is on the defendant, but the burden of ultimate proof does not shift, nor deprive the defendant of his right to have the jury instructed on the presumption of innocence. *Id.*

[62] Barnes v. United States, 412 U.S. 837, 843 (1973) (presumption meeting both reasonable-doubt standard and more-likely-than-not standard satisfies due process); Leary v. United States, 395 U.S. 6 (1969); *see Presumption, supra* note 60, at 237-38 n.93.

[63] 395 U.S. 6 (1969).

[64] *Id.* at 36. *See Presumptions, supra* note 60, at 237-38. *See also* Mullaney v. Wilbur, 421 U.S. 684, 702 (1975) (ultimate burden of proof can not be shifted to the defendant).

[65] 546 F.2d at 581. For the expectation of an adverse ruling by a state court in an area of substantive law to be strong enough to allow bypass of the exhaustion requirement, there usually must be only a short period of time between the controlling prior decision and petitioner's claim, indication by the state courts of their inability to change the prior ruling, or repeated adverse determinations by the state courts. *See Developments, supra* note 5, at 1099.

burglarious tools statute to be unconstitutional. The rational connection test, as set forth in *Leary,* may not be satisfied by the Virginia statute.[66] The basic fact is the possession of the tools, and the presumed fact is the intent to use them to commit a crime.[67] Virginia has recognized that these tools are usually designed and manufactured for lawful purposes.[68] Thus, the *Leary* requirement that the correlation between the basic and presumed facts being more likely rationally connected than not apparently could not be satisfied.[69]

Once a federal court has determined that jurisdictional requirements such as "custody" and exhaustion of state remedies have been satisfied, the federal court may examine proper substantive grounds for habeas corpus relief in order to prevent restraint in violation of petitioners' federal constitutional rights.[70] One such right guaranteed under the constitution is that criminal defendants are entitled to effective assistance of counsel.[71] In *Marzullo v. State,*[72] the Fourth Circuit considered a petition alleging that the petitioner had been denied effective assistance of counsel. Formerly, in cases involving allegations of ineffective assistance of counsel, the Fourth Circuit evaluated attorney conduct by applying the "farce and mockery of justice" test[73] which requires a subjective inquiry into whether counsel was so obviously inadequate as to make a farce of the trial.[74] The *Marzullo* court expressly rejected this test,[75] however, and adopted the

[66] *See* text accompanying notes 63, 64 *supra.*

[67] *See* Burnette v. Commonwealth, 194 Va. 785, 75 S.E.2d 482 (1953).

[68] *Id.; see* note 57 *supra.*

[69] *See* text accompanying notes 63, 64 *supra.*

[70] *See Developments,* supra note 5, at 1040.

[71] U.S. CONST. AMEND. VI. The sixth amendment right to counsel has been held to apply to the states through the fourteenth amendment in all felony prosecutions. Gideon v. Wainwright, 372 U.S. 335 (1963). This right was later extended to all criminal prosecutions, including misdemeanors, where the possibility of imprisonment exists. *See* Argersinger v. Hamlin, 407 U.S. 25, 37, 40 (1972). Nevertheless, the Supreme Court has been reluctant to address the ineffective assistance of counsel problem. *See* Chambers v. Maroney, 399 U.S. 42, 54 (1970). However, the Supreme Court has indicated that the right to effective counsel is implicit in the sixth amendment right to counsel. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970). Although the present judicial trend is to view the right to effective assistance of counsel as a sixth amendment right, this right has also been derived solely from due process considerations. U.S. CONST. AMEND. VI; U.S. CONST. AMEND. XIV; *see* Note, *Effective Assistance of Counsel: A Constitutional Right in Transition,* 10 VAL. U.L. REV. 509 (1976) [hereinafter cited as *Transition];* The ineffectiveness of counsel is usually raised in collateral attacks upon convictions, and these collateral attacks are usually in the form of applications for writs of habeas corpus. *See* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 NW. U.L. REV. 289, 290 n.7 (1964).

[72] 561 F.2d 540 (4th Cir. 1977).

[73] The "farce and mockery of justice" test was approved by the Fourth Circuit in Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965) (affirming district court's ruling that counsel was effective). This standard is derived from the fifth amendment due process guarantee to a fair trial. *See* Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945).

[74] *See generally* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 VA. L. REV. 927 (1973) [hereinafter cited as Bines].

[75] The Fourth Circuit appears formerly to have been inconsistent in applying standards

"normal competency" standard.[76] This standard requires that counsel's advice must be "within the range of competence demanded of attorneys in criminal cases" in order to be considered effective assistance.[77]

Petitioner Marzullo had been separately indicted for two different rapes. His habeas corpus petition alleged that he had been represented inadequately by appointed counsel.[78] Of the alleged deficiencies, the Fourth Circuit found that the allegation that counsel was ineffective in the jury selection process determined petitioner's right to habeas relief.[79] The prosecuting witness in the first rape case told the judge in the presence of

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for determining effective assistance of counsel. *Compare* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968) (implicit acceptance of an objective standard by setting out specific minimal requirements for counsel's conduct) *with* Bennett v. State, 425 F.2d 181, 182 (4th Cir.), *cert. denied,* 400 U.S. 881 (1970) (applying the farce and mockery of justice test). *See* note 77 *infra.*

[76] The "normal competency" standard was derived from Supreme Court dicta in McMann v. Richardson, 397 U.S. 759, 770-71 (1970). The Supreme Gourt held that the *McMann* defendant was not entitled to a habeas hearing where his guilty plea was based on competent advice, and he alleged the guilty plea was a product of a prior coerced confession. *Id.* at 771. The Supreme Court reemphasized its *McMann* dicta in Tollet v. Henderson, 411 U.S. 258, 267-68 (1973). The *Tollet* Court held that where a state criminal pleads guilty on advice of counsel, he can only attack the voluntary and intelligent nature of the guilty plea by showing counsel's advice did not meet the attorney competency standards of *McMann. Id.* at 266.

[77] McMann v. Richardson, 397 U.S. 759, 770-71 (1970). The Fourth Circuit in *Marzullo* noted that it would "adhere" to the following description of the normal competency standard of certain aspects of counsel's assistance set forth in dicta in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968). There the court stated:

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

389 F.2d at 226.

[78] 561 F.2d at 545. The Fourth Circuit has noted that the "farce and mockery of justice" standard was particularly applicable where the defendant chose and employed his own counsel. Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965). Most circuits do not distinguish between appointed counsel and retained counsel when determining counsel's effectiveness because criminal defendants cannot realistically judge the competence of their attorney prior to trial. *See, e.g.,* Crismon v. United States, 510 F.2d 356, 357 n.2 (8th Cir. 1975) (retained counsel effectively assisted); United States v. McCord, 509 F.2d 334, 351 n.63 (D.C. Cir.), *cert. denied,* 421 U.S. 930 (1974) (no evidence that attorney disloyal to defendant); United States v. Marshall, 488 F.2d 1169, 1193 (9th Cir. 1973) (although counsel retained, prisoner can assert ineffective assistance of counsel); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (indigent entitled to same level of legal service as fee-paying client); Ellis v. State, 430 F.2d 1352, 1356 (10th Cir.), *cert. denied,* 401 U.S. 1010 (1970) ("farce and mockery of justice" test applicable to both appointed and retained counsel); Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962) (defendant assured effective assistance of counsel whether attorney is retained or court appointed); Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954) (immaterial whether counsel is court appointed or retained).

[79] 561 F.2d at 545.

the jurors that she could not identify Marzullo as her attacker because she had not seen his face.[80] The prosecutor replied that she had previously identified Marzullo. The case was subsequently dismissed with the consent of the state[81]

Marzullo was then arraigned on the second indictment and pleaded not guilty before the same jurors who were present during the trial for the first rape charge. Only nineteen jurors were present at this proceeding, and the court noted that this was an insufficient number of jurors to allow the twenty peremptory challenges to which Marzullo was entitled under Maryland law.[82] Marzullo's attorney told the court that twelve jurors could be chosen even with the challenges.[83] A jury was chosen from the nineteen members of the jury panel and this jury convicted Marzullo of assault with intent to rape and perverted practices.[84] The Fourth Circuit concluded that Marzullo's attorney should have moved to exclude the jury while the first indictment was being dismissed,[85] and furthermore, that counsel should have preserved his peremptory challenges instead of relinquishing them before the voir dire examination.[86] The Fourth Circuit was guided particularly by the ABA Standards Relating to Defense Function stating that after consultation with his client, counsel has the sole responsibility of jury selection and other trial motions and tactics.[87] Also, in discharging the responsibility of jury selection, counsel should prepare himself prior to trial.[88]

Proof that Marzullo's counsel was ineffective could have been rebutted if the state proved that counsel's ineffectiveness had no prejudicial effect on the trial.[89] The state asserted that Marzullo had waived his right to have

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[80] *Id.*

[81] *Id.*

[82] MD. CTS. & JUD. PROC. CODE ANN. § 8-201 (1974).

[83] 561 F.2d at 545.

[84] The perverted sexual practices statute is codified at MD. ANN. CODE art. 27, § 554.

[85] Allowing the jury to hear information about the first rape charge could only damage the credibility of Marzullo, and thus this prejudicial information should have been kept from the jury. 561 F.2d at 546.

[86] *Id.*

[87] *ABA Standards Relating to Defense Function* § 5-2(b) (App. Draft 1971) provides:

> The decisions on . . . what jurors to accept or strike, what trial motions should be made, and all other strategies and tactical decisions are the exclusive province of the lawyer after consultation with his client.

[88] *Id.* at § 7.2(a).

[89] The burden of proving habeas corpus allegations or other collateral allegations for post-conviction relief is always on the defendant. *See* 28 U.S.C. §§ 2241, 2244, 2255 (1971). If the defendant proves that counsel's assistance was ineffective, the Fourth Circuit addresses the further question of whether the mistakes of counsel were so prejudicial to the accused as to justify remand or reversal of the case. The Fourth Circuit places the burden on the state to show that prejudice did not result from defense counsel's ineffectiveness. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). The Fourth Circuit in Coles stated that counsel's failure to meet the objective standard of competency automatically constituted a denial of effective assistance, "unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." 389 F.2d at 226;

the first indictment conducted in the absence of the jury.[90] A waiver must be knowing and intelligent; since there was no proof that Marzullo knew his rights, the state could not meet its burden of proof.[91] The state also alleged that defense counsel's decision not to challenge the jury was a trial tactic, but the record clearly refuted this assertion.[92] Thus, the state failed to rebut defendant's proof that he had been denied effective assistance of counsel.

To begin its analysis in *Marzullo,* the Fourth Circuit established the "normal competency" test as the controlling standard for determining whether counsel's assistance has been effective.[93] Adoption of this test brings the Fourth Circuit into harmony with the majority of circuits adopting more objective standards.[94] The Supreme Court's decision to make the sixth amendment applicable to the states[95] has destroyed the legal and practical basis of the "farce and mockery of justice" standard.[96] No longer is the fifth amendment due process approach exemplified in the "farce and mockery of justice" standard appropriate; the sixth amendment more specifically focuses on the "assistance of counsel."[97] Although valid convic-

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cf. Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967) (burden on state to prove lack of prejudice when counsel unprepared as a result of late appointment); Martin v. Commonwealth, 365 F.2d 549 (4th Cir. 1966) (prejudice resulting from ineffectiveness of counsel is matter for district judge as trier of fact in post-conviction relief proceeding).

[90] 561 F.2d at 546.

[91] Waiver has been defined as the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In applying *Johnson,* the Supreme Court has not always insisted that the relinquishment of the right be intentional or that the right be known to the defendant. *See* Estelle v. Williams, 425 U.S. 501 (1976) (defendant's failure to make timely objection at trial held sufficient evidence upon which to infer waiver); Francis v. Henderson, 425 U.S. 536 (1976) (prisoner's failure to make timely objection to grand jury composition precluded a post-conviction challenge of the same grand jury five years later); Davis v. United States, 411 U.S. 233 (1973) (no evidence of defendant's intent to relinquish right to be indicted by properly selected grand jury; court held right waived); Brady v. United States, 397 U.S. 742 (1970) (defendant asserted guilty plea was to avoid death penalty that was later held unconstitutional; court held waiver of challenge existed). *But see* McMann v. Richardson, 397 U.S. 759 (1970) (competent legal counsel must be present before rights can be waived); Boykin v. State, 395 U.S. 238 (1969) (requiring express warning that certain rights are about to be waived).

[92] 561 F.2d at 546. The defense attorney also testified that he remembered the jury to be absent when prosecuting witness in first indictment said she could not identify Marzullo. The record indicates the attorney was incorrect. *Id.* at 547.

[93] *See* note 76 *supra.*

[94] *See* United States v. Easter, 539 F.2d 663, 665-67 (8th Cir. 1976); Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), *cert. denied,* 423 U.S. 876 (1975); Herring v. Estelle, 491 F.2d 125, 128-29 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970). *But see* Rickenbacker v. Warden, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied,* 46 U.S.L.W. 3215 (U.S. Oct. 4, 1977) (No. 76-1655) (applying the "farce and mockery of justice" test); United States v. Jones, 512 F.2d 347, 349 (9th Cir. 1975); Dunker v. Vinzant, 505 F.2d 503, 505 (1st Cir. 1974), *cert. denied,* 421 U.S. 1003 (1975); Lorraine v. United States, 444 F.2d 1, 2 (10th Cir. 1971).

[95] Gideon v. Wainwright, 372 U.S. 335 (1963).

[96] *See Transition,* supra note 71, at 550-51.

[97] *See* note 71 *supra.*

tions may be lost and courts' efficiency impeded,[98] the Supreme Court has indicated that defendants' sixth amendment right to effective assistance of counsel should be fully protected.[99]

The Fourth Circuit also has applied the "normal competency" standard subsequent to *Marzullo* in *Tolliver v. United States.*[100] The Fourth Circuit held defendant Tolliver's guilty plea to be invalid as a result of the ineffective assistance of counsel.[101] Tolliver had been persuaded by his lawyers to plead guilty to a charge of conspiracy to manufacture phencyclidine, a controlled substance.[102] He was advised that in return for his guilty plea another charge would be dropped and the government would not seek the "double penalty" allowed by statute.[103] In convincing him to plead guilty, Tolliver was advised by his attorneys that his trial testimony could be impeached by use of his prior convictions, possibly increasing his punishment upon conviction.[104]

Tolliver's prior convictions, however, were for violations of the Marijuana Tax Transfer Act[105] and were possibly no longer valid. The Supreme Court in *Leary v. United States*[106] held any payment of the tax under the Act to be incriminating, and thus, in violation of the fifth amendment.[107] After *Leary,* timely assertion of the fifth amendment privilege would bar prosecution for violation of the Act.[108] Although Tolliver's convictions predated *Leary,* the *Leary* decision could have been determinative because

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[98] One commentator argues that the constitutional right to effective assistance of counsel presents unique problems for the trial court in its attempt to control ineffective representation. Bines, *supra* note 74, at 943. Usually a state can adhere to a constitutional standard by intervention of the trial judge or prosecutor, but controlling counsel's ineffectiveness is almost impossible. *Id.* at 944. Regardless of the competence of the prosecutor or reliability of the trial's result, "every instance of ineffectiveness is potentially a lost conviction." *Id., see* Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1, 22-23 (1973).

[99] Gideon v. Wainwright, 372 U.S. 335, 339-45 (1963).

[100] 563 F.2d 1117 (4th Cir. 1977).

[101] *Id.* at 1121.

[102] A controlled substance is a drug or other substance for which the federal government has deemed necessary the control of its illegal importation, manufacture, distribution, and possession and improper use. *See* 21 U.S.C. § 801(2) (1970); 21 U.S.C. § 802(6) (1970).

[103] *See* 21 U.S.C. § 841(b)(1)(B) (1970). The maximum penalty for a first offense for possession of a controlled substance is 5 years and $15,000. The punishment can be doubled if there has been a previous conviction. *Id.*

[104] 563 F.2d at 1119.

[105] 26 U.S.C. § 4744(a) (repealed 1970). This section of the Marijuana Transfer Act made it unlawful for the transferee of marijuana not to pay the transfer tax imposed by 26 U.S.C. § 4741(a) (repealed 1970). By paying the tax, an individual was required to submit certain information that identified the individual and associated him with possession of marijuana. *Id.* Upon receipt of this information the Internal Revenue Service could forward copies to state and local law enforcement agencies on request. 563 F.2d 1119-20 n.5. Thus, by paying the tax, the individual may have subjected himself to prosecution for violation of state and local drug laws. *Id.*

[106] 395 U.S. 6 (1969).

[107] *See id.* at 52.

[108] *See* note 105 *supra.*

many courts applied it retroactively.[109] Tolliver had inquired whether *Leary* would have an effect on his prior convictions, but his attorneys assured him the convictions were valid.[110] The Fourth Circuit's holding in *Tolliver*, however, did not go so far as to require counsels' knowledge of *Leary* and its effect on the defendant's prior convictions. The holding was based on the attorneys' failure to learn more of the facts and law supporting a motion to withdraw the guilty plea before the imposition of the sentence even though Tolliver had notified his attorneys that *Leary* may have invalidated his convictions for violations of the Marijuana Tax Transfer Act.[111]

The Fourth Circuit's adoption of the "normal competency" standard demonstrates its interest in the rights of the accused as opposed to the more practical interest of judicial expediency.[112] The court has not, however, imposed a standard of competency on attorneys requiring them to be infallible in their representation, which might result in many lost convictions.[113] Rather, the Fourth Circuit has attempted to reconcile defendants' sixth amendment right to effective assistance of counsel with public interest in the preservation of validly obtained convictions.[114]

Another substantive determination concerning federal habeas corpus relief made by the Fourth Circuit was directed toward the constitutionality of a contempt of court conviction.[115] The power to punish contempt is

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[109] *See, e.g.*, United States v. Liguori, 430 F.2d 842, 846 (2d Cir. 1970), *cert. denied*, 402 U.S. 990 (1971). The retroactive effect of any new constitutional decision is determined by three factors. *See* Bines, *supra* note 74 at 956-58. First, the greater the effect on the guilt-determining process, the greater the likelihood of retroactive application. Secondly, the degree and justifiability of state reliance on the previous rule is a factor. If decisions tend toward change in the rule, then there is an increased likelihood of retroactive application. Finally, if the first two factors are indeterminate, the deciding factor is the impact of retroactivity on the administration of justice. *Id.*

[110] 563 F.2d at 1119.

[111] *Id.* at 1120-21.

[112] *See Transition, supra* note 71, at 551.

[113] *See* Bines, *supra* note 74, at 943-44.

[114] Commentators have suggested that the harmless error test could best preserve validly obtained convictions while protecting the sixth amendment rights of defendants. *See Transition, supra* note 71, at 552. The Supreme Court formulated a harmless-constitutional-error rule in Chapman v. California, 386 U.S. 18 (1967). The constitutional error must be shown to be harmless beyond a reasonable doubt, with the burden of proof on the beneficiary of the error, before the challenged judgment is valid. *Id.* at 24. 28 U.S.C. § 2111 (1970) provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

FED. R. CRIM. P. 52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[115] 18 U.S.C. § 401 (1970) provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—
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> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . .

inherent in the court and the existence of the power is essential to the preservation of order in judicial proceedings.[116] In *Paul v. Pleasants,*[117] the Fourth Circuit affirmed the district court's denial of habeas relief on any of the petitioner's assertions. Jerry Paul, the petitioner, was the defense counsel for Joan Little, who was acquitted of murdering a prison guard in a much publicized trial.[118] Paul, who had been found in contempt of court for his conduct during the trial, first contended that his conduct did not constitute contempt and was constitutionally protected.[119] The Fourth Circuit examined the record and found Paul's conduct surpassed the bounds of zealous advocacy. Paul's turning his back to the court and addressing the news media in a loud disrespectful voice was viewed by the court as particularly contemptuous.[120] The Supreme Court has expressly condemned conduct of this nature.[121]

Paul contended alternatively that although his conduct might have been contemptuous, his right to due process was violated because he was given neither adequate notice of the charges against him, nor afforded an opportunity to be heard prior to his sentencing.[122] Paul also asserted that

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For a general history of the contempt power, see J. FOX, THE HISTORY OF CONTEMPT OF COURT (1927).

[116] *See* Sedler, *The Summary Contempt Power And The Constitution: The View From Without And Within,* 51 N.Y.U.L. REV. 34, 36 (1976) [hereinafter cited as Sedler].

[117] 551 F.2d 575 (4th Cir.), *cert. denied,* 46 U.S.L.W. 3262 (U.S. Oct. 17, 1977) (No. 76-1838).

[118] *See, e.g.,* Footlick & Smith, *Defending Joan Little,* Newsweek, July 28, 1975 at 34; Reston, *Joan Little Case,* N.Y. Times Mag., April 6, 1975 at 38; *Case of Rape or Seduction: Joan Little Case,* Time, July 28, 1975 at 49.

[119] Paul claimed that his vigorous advocacy was protected under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, 551 F.2d at 578. A lawyer has a duty to be a vigorous advocate as stated by ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-101. However, the ABA STANDARDS RELATING TO THE PROSECUTING FUNCTION AND THE DEFENSE FUNCTION (1971) provides in pertinent part:

> It is unprofessional conduct for a lawyer to engage in behavior or tactics purposedly calculated to irritate or annoy the court or the prosecutor. *Id.* at 7-1 (c).

The Commentary to 7-1 observes:

> A reasonable balance must be reached on matters of conduct so that judicial proceedings are not permitted to degenerate to the level of street brawls, but it is important that no artificial standards of court room conduct impede the advocates from performing their legitimate function so as to preclude vigorous advocacy of their viewpoints on legal questions, and the zealous advancement of their side of the case . . . Of necessity, the lawyer must often be forceful and vigorous in his questioning of the witness and his argument to the jury. This does not mean, however, that he may make a farce of the trial or undermine the dignity of the legal process by excessive histrionics . . . .

Id. at Commentary to paragraph 7-1(c).

[120] 551 F.2d at 578.

[121] *See* Sacher v. United States, 343 U.S. 1, 5 (1952). *See generally,* Gilmore, *Professional Responsibility Problems and Contempt in Advocacy,* 12 SAN DIEGO L. REV. 288 (1975).

[122] Although petitioner asserted that he was deprived of his fifth amendment due process rights, FED. R. CRIM. P. 42(a) provides in pertinent part:

> A criminal contempt may be punished summarily if the judge certifies that he saw

when a direct contempt occurs in the presence of the court and the order is not entered until the conclusion of the trial, due process requires that a hearing be held prior to the determination of contempt.[123] The final contention of Paul was that he and the trial judge had become "embroiled" in controversy; thus the trial judge should have disqualified himself.[124]

The Fourth Circuit relied on the Supreme Court decision in *Taylor v. Hayes,*[125] in resolving the assertions of the petitioner. The *Taylor* Court held that where the judge postpones a contempt citation until after the trial, due process requires that "reasonable notice of the specific charges and opportunity to be heard" be given to the defendant.[126] The Supreme Court in *Taylor* also held that when a judge becomes "embroiled in a running controversy" with an attorney, the judge should disqualify himself from disposing of contempt charges.[127]

The Fourth Circuit held that the facts clearly established that Paul was accorded due process within the holding of *Taylor.* As in *Taylor,* the *Paul* judge did not proceed summarily with the contempt charges, but delayed his actions until the end of the trial.[128] Petitioner was advised on July 21, 1975 that he would be cited for contempt following the jury verdict, and on August 12, 1975 he was told that the court would hear a statement from him following the jury charge.[129] On August 15, 1975 the court gave Paul two opportunities to address the contempt charge and at neither hearing did he deny the validity of the charges.[130] Consequently, Paul's claims regarding notice and hearing of the contempt charges were without merit.

The Supreme Court found that the judge in *Taylor* became prejudiced against the attorney as a result of the alleged contemnable facts, and thus the judge should have disqualified himself.[131] In contrast, the record indi-

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or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.

The Supreme Court in Sacher v. United States, 343 U.S. 1 (1952), held that a trial judge could defer judgment until the completion of the trial without losing the power to summarily punish the contempt under FED. R. CRIM. P. 42(a). Some commentators have been very critical of the summary contempt power because of the potential for judicial abuse of this power. *See* Sedler, *supra* note 116, at 85-91.

[123] 551 F.2d at 579.

[124] *Id.*

[125] 418 U.S. 488 (1974).

[126] *Id.* at 499. When the contempt action is delayed, the contemnor is allowed to be heard in his own defense because the justification of "necessity" for a summary action carries much less weight. *Id.* at 497-98. The *Taylor* Court also noted that a full-scale hearing was required where the conduct did not occur in the court's presence. *Id.* at 500-01 n.9. For a discussion of *Taylor,* see Sedler, *supra* note 116, at 63-84 (the author, Robert Allen Sedler, was counsel for petitioner in *Taylor).*

[127] The Supreme Court has held that a trial judge who has become "embroiled" in controversy with the alleged contemnor must disqualify himself from proceeding summarily when he has delayed the contempt actions. Taylor v. Hayes, 418 U.S. 488, 501 (1974).

[128] 551 F.2d at 577.

[129] *Id.*

[130] *Id.*

[131] 418 U.S. at 503 n.10. In *Taylor,* the judge's words and conduct were set out at length

cates that the judge in *Paul* maintained his impartiality throughout the trial. Moreover, the trial judge commended Paul publicly for his trial efforts and expressly based the contempt finding on the interest of preserving "court decorum."[132] The Fourth Circuit therefore properly rejected petitioner's assertion that the judge should have disqualified himself.

If a prisoner's constitutional right to avoid double jeopardy has been violated, he is entitled to habeas corpus relief.[133] The prohibition against double jeopardy arises from both the policy that a person should not be punished more than once for the same offense, as well as the consideration that it would be improper to harass an individual by repeated prosecution for a single offense.[134] In the recent case of *Midgett v. McClelland,*[135] the Fourth Circuit was presented with issues concerning double jeopardy and due process. At his first trial, petitioner Midgett was convicted of kidnapping and armed robbery for which he was sentenced 15 and 20 years respectively. The sentences, totalling 35 years, were to be served consecutively.[136] Midgett was subsequently retried because his absence from the courtroom when the judge received and answered written questions from the jury constituted a procedural trial error.[137] Although an assault charge had been dropped by the prosecution at the end of the first trial,[138] Midgett was again charged with assault on retrial.[139] Also, new charges of kidnapping[140] and conspiracy, as well as the armed robbery charges dropped previously, were adjudicated at the second trial.[141] At the second trial, Midgett was convicted of kidnapping, for which he was sentenced 30 years, conspiracy, for which he was sentenced 5 years to be served consecutively after his kidnapping sentence, and assault, for which he was sentenced 5 years to be served concurrently with his kidnapping conviction.[142] In reversing the district court's denial of habeas relief, the Fourth Circuit held petitioner Midgett's conviction for assault violated the double jeopardy clause of the

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in the opinion. *Id.* at 491-492 n.2, 502. Also, the Court relied on the failure of the judge to provide a hearing on the contempt charges as showing bias on the part of the judge. *Id.* at 501-02.

[132] 551 F.2d at 579.

[133] U.S. CONST. AMEND. V, prohibits double jeopardy.

[134] *See* Note, *Statutory Implementation Of Double Jeopardy Clauses: New Life For A Moribund Constitutional Guarantee,* 65 YALE L.J. 339, 339-40 (1956).

[135] 547 F.2d 1194 (1977).

[136] *Id.* at 1195.

[137] The defendant's constitutional right to be present at every stage of the trial was violated at his first trial. *See* Midgett v. State, 216 Md. 26, 139 A.2d 209 (1958) (reversing the first trial of petitioner).

[138] 547 F.2d at 1196.

[139] *See* Midgett v. State, 223 Md. 282, 164 A.2d 526 (1960), *cert. denied,* 365 U.S. 853 (1961) (affirming judgment in second trial of petitioner).

[140] The crimes of kidnapping and false imprisonment were confused in the jury charge at the first trial. 547 F.2d at 1195. Midgett's motion to dismiss the kidnapping indictment was sustained by the trial judge upon the condition that a new indictment be sought. *Id.*

[141] 547 F.2d at 1196.

[142] These sentences were imposed by a judge who did not try Midgett the first time. *Id.*

Constitution.[143] Additionally, the court held that the increase in Midgett's sentence on retrial was retaliatory, and thus violated his due process rights.[144]

In Midgett's first trial, the assault charge was dropped by the prosecution after all testimony had been given.[145] The Supreme Court has held that jeopardy attaches in a jury trial when the jury has been impaneled and sworn.[146] Because jeopardy had attached to the assault charge, the dropping of this charge was the equivalent of an acquittal for purposes of determining whether Midgett was exposed to double jeopardy.[147] Thus, trying Midgett on the same assault charge at his second trial violated the double jeopardy clause.[148]

The due process question precipitated by the harsher sentence Midgett received for his second kidnapping conviction was not as readily resolved as the double jeopardy issue.[149] Had the Fourth Circuit held that the second indictment for kidnapping charged a greater offense than the first indictment,[150] the court would have been required to determine whether the prosecution had acted vindictively.[151] By holding that both indictments

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[143] The double jeopardy clause was applied to the states by the Supreme Court in Benton v. Maryland, 395 U.S. 784 (1969).

[144] 547 F.2d at 1197.

[145] Although Midgett had served his sentence for assault before the Fourth Circuit considered the instant case, the Fourth Circuit directed that the assault conviction be stricken because the conviction may have had the effect of increasing the punishment subsequently imposed upon Midgett for a parole violation in 1975. 547 F.2d at 1196. The assault charge in Midgett's first trial was not dropped by the prosecution until all testimony had been given. *Id.*

[146] Krepner v. U.S., 195 U.S. 100 (1904); *see* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1275-76 (1964) [hereinafter cited as Double Jeopardy]. *See also*, United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (no retrial or appellant review when defendant's motion for acquittal granted).

[147] *Double Jeopardy, supra* note 146, at 1275.

[148] Midgett had served his assault sentence by the time of the second trial. 547 F.2d at 1196.

[149] Midgett's motion to dismiss the kidnap indictment in his first trial was granted by the trial judge on the condition that a new kidnap indictment would be sought. 547 F.2d at 1195. Most circuit courts of appeals have held that the sentencing court's increase of a legally imposed sentence is barred by the double jeopardy clause. *See* United States v. Turner, 518 F.2d 14 (7th Cir. 1975) (no sentence may be increased once service of that sentence has begun); United States v. Bowens, 514 F.2d 440 (9th Cir. 1975) (sentence under Youth Corrections Act, 18 U.S.C. § 5005-26 (1970), could not be increased after sentence has begun); Chandler v. United States, 468 F.2d 834 (5th Cir. 1972) (sentence reduced on one count could not be increased on unchallenged count). Nevertheless, the Fourth Circuit has indicated that increasing a legally valid sentence after its imposition may be constitutional when the prisoner has applied for a review of his sentence. Robinson v. Warden, 455 F.2d 1172, 1176 (4th Cir. 1972). For a discussion of sentence increases and double jeopardy, see Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325, 334-37 (1977).

[150] The Court of Appeals of Maryland held that the first indictment charged false imprisonment rather than kidnapping, but the Fourth Circuit held that the first indictment "clearly" charged kidnapping. 547 F.2d at 1196.

[151] The Supreme Court dealt with the issue of prosecutorial vindictiveness in Blackledge v. Perry, 417 U.S. 21 (1974). The *Blackledge* rule assures a prisoner of his right to appeal

were for kidnapping and had equal impact,[152] the Fourth Circuit was presented with the issue whether the judge acted in a retaliatory manner.[153]

In holding that the second sentence violated Midgett's due process rights, the Fourth Circuit determined that the second sentence was retaliatory and thus, impermissable.[154] Petitioner's conviction was prior to *North Carolina v. Pearce,*[155] a case in which the Supreme Court placed restrictions on the resentencing of defendants. Although *Pearce* does not apply retroactively, the holding in *Pearce* is analogous to the Fourth Circuit's ruling in *Midgett.*[156]

The *Pearce* Court held that vindictiveness against a defendant arising because of his successful appeal of his conviction should not be a factor present in resentencing the defendant.[157] Moreover, the Supreme Court's reasoning in making the *Pearce* decision non-retroactive would seem applicable to the due process issue in *Midgett.*[158] The Supreme Court reasoned that retroactive application of *Pearce* could substantially interfere with the administration of justice because of the difficulty in determining reasons for sentences imposed in the past.[159] The Fourth Circuit, however, implicitly determined the reasons for the sentence, and held the second trial

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without fear that the prosecutor will retaliate with a more serious charge if the original conviction is reversed. *Id.* at 24-29. Due process requires that a defendant be relieved of apprehension of retaliatory motivation on the part of the prosecutor, so that defendants will not be unconstitutionally deterred from exercising their appeal rights. *Id.* at 28.

[152] *See* note 140 *supra.*

[153] Retaliation by a judge may now be assumed when there is a sentence increase on retrial. *See* North Carolina v. Pearce, 395 U.S. 711 (1969). The basis for this assumption relates to the judge's position within the justice system. Aplin, *Sentence Increases on Retrial After* North Carolina v. Pearce, 39 U. CIN. L. REV. 427, 432-33 (1970) [hereinafter cited as Aplin]. Judges may resent the defendant who obtains a reversal because the reversal indicates the potential unfairness of the judicial system. *Id.* at 432. Further, the judge may view a sentence increase as a method of punishment for a defendant's "unwarranted" appeal, as well as a way to discourage "unwarranted" appeals by others. *Id.* at 433.

[154] 547 F.2d at 1197. The Fourth Circuit found the greater sentence impermissable because "[o]n its face, it seems retaliatory." *Id.*

[155] 395 U.S. 711 (1969). When a sentence is increased on retrial the resentencing judge must affirmatively state his reasons for imposing the harsher sentence. These reasons must be "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726; *see* Aplin, *supra* note 153, at 427-29.

[156] The Supreme Court decided in Michigan v. Payne, 412 U.S. 47 (1973), that the *Pearce* rule should only be applied prospectively. *Id.* at 57. For a discussion of *Payne,* see Recent Decisions, *Criminal Procedure-Resentencing,* 40 BROOKLYN L. REV. 786 (1974). On the same day of the *Payne* decision, the Supreme Court rendered its opinion in Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Supreme Court ruled in *Chaffin* that the double jeopardy clause was not violated by jury imposition of a harsher sentence on retrial. If the jury is not informed of the prior sentence and the defendant fails to show vindictiveness caused the sentence increase, then the due process clause is not violated. *Id.* at 24-28; *see* Recent Cases, *Jury Imposed Harsher Sentence On Retrial Held To Be Constitutional,* 78 DICK. L. REV. 597 (1974) [hereinafter cited as *Harsher Sentence];* Note, *Harsher Sentencing by Jury on Retrial Is Permissable: Chaffin v. Stynchcombe,* 28 SW. L. J. 469 (1974).

[157] *See* note 157 *supra.*

[158] Chaffin v. Stynchcombe, 412 U.S. 17, 36-37 (1973).

judge's sentence to be retaliatory because he acted vindictively.[160] This determination appears to shift the burden of proof from the defendant by requiring the judge to show he did not act vindictively. Such a result would accord with *Pearce*.[161] Had the Fourth Circuit placed the burden of showing judicial vindictiveness on the defendant, as did pre-*Pearce* cases, the greater second sentence may have been affirmed.[162]

In recent cases, the Fourth Circuit has adhered to traditional concepts limiting the scope of habeas corpus relief, but has also rendered decisions that may increase its availability. The Fourth Circuit has strictly enforced the habeas corpus jurisdictional requirements that petitioners be in "custody"[163] and exhaust available state remedies.[164] In cases involving the contempt citation of an attorney[165] and the constitutional validity of a statute that was the basis of petitioners' arrest,[166] the Fourth Circuit found none of the substantive claims merited habeas corpus relief. Nevertheless, the Fourth Circuit's recent adoption of an objective standard for determining the effectiveness of counsel's assistance[167] may increase both the substantive scope of federal habeas relief and the number of habeas applications alleging ineffective assistance of counsel. Although this standard may be a beneficial development, the impact of the Fourth Circuit's adoption of the standard may not be determined until the court further articulates criteria outlining minimum requirements for determining the effectiveness of counsel in future cases. In addition, the Fourth Circuit's decision that petitioner's harsher sentence at his second trial was impermissable because it appeared retaliatory[168] may have broadened the ambit of habeas corpus relief.

PAUL A. DOMINICK

B. Prisoners' Rights

Medical Care For The Incarcerated

Modern judicial thought affords prisoners many rights and privileges[1]

[160] The dissenting opinion noted that the second trial judge's sentence seemed vindictive even though the district court had found the facts to work against a presumption of prejudice. 547 F.2d at 1198 (Bryan, J., dissenting).

[161] 395 U.S. at 726.

[162] In *Pearce*, the Supreme Court recognized the extreme difficulty of proving the existence of a retaliatory motivation. 395 U.S. at 725 n.20. *See* Harsher Sentence, *supra* note 157, at 802.

[163] *See* text accompanying notes 7-35 *supra*.

[164] *See* text accompanying notes 36-69 *supra*.

[165] *See* text accompanying notes 117-132 *supra*.

[166] *See* text accompanying notes 26-35 *supra*.

[167] *See* text accompanying notes 71-114 *supra*.

[168] *See* text accompanying notes 133-162 *supra*.

[1] *See* Johnson v. Avery, 393 U.S. 483, 486 (1969) (when state prison regulations conflict

previously unavailable to the incarcerated.[2] Whereas courts formerly refused to interfere with matters concerning prison administration and regulation,[3] today federal courts adjudicate prisoner allegations of constitutional deprivations occuring in state as well as federal penal institutions.[4] When officials[5] violate constitutional or statutory rights of prisoners, courts grant relief in the form of money damages[6] as well as injunctive decrees[7] proscribing further violations.[8]

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with paramount constitutional or federal statutory rights, federal courts will intervene and void those regulations); *see, e.g.,* Pell v. Procunier, 417 U.S. 817 (1974) (regulation barring media representatives from prison did not violate inmates' freedom of speech due to availability of alternative modes of communication); *cf.* Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

[2] The Virginia Supreme Court gave the classic characterization of the status of penal inmates in Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871), where that court stated that a prisoner is temporarily the slave of the state. *Id.* at 796.

[3] Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied,* 348 U.S. 859 (1954).

[4] *See* note 1 *supra.*

[5] Typical of those officials against whom suit is brought are the corrections director, *e.g.,* Cruz v. Beto, 405 U.S. 319 (1972); the state governor, *e.g.,* Houghton v. Shaefer, 392 U.S. 639 (1968); the prison doctor in charge of rendering medical assistance, *e.g.,* Cole v. Williams, 526 F.2d 588 (4th Cir. 1975); the prison guard who has allegedly violated the prisoner's rights, *e.g.,* Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974); the sheriff in charge of the prisoner, *e.g.,* Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); and the prison warden, *e.g.,* Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970). *See* note 8 *infra.*

[6] Preston v. Cowan, 369 F. Supp. 14 (W.D. Ky. 1973), *modified sub nom.,* Ault v. Holmes, 506 F.2d 288 (6th Cir. 1974). The *Preston* court assessed nominal damages against the prison warden due to his refusal to mail a prisoner's letter to the prisoner's attorney. *See* note 8 *infra.*

[7] Preston v. Cowan, 369 F. Supp. 14 (W.D. Ky. 1973) (court enjoined prison officials from censoring any of the prisoners' outgoing mail); Palmigiano v. Travisono, 317 F. Supp. 776 (D. R.I. 1970) (prison officials enjoined from censoring incoming and outgoing mail between prisoners and certain public officials); H. KERPER, LEGAL RIGHTS OF THE CONVICTED 423 (1974) [hereinafter cited as KERPER]; *see* note 8 *infra.*

[8] When a prisoner litigates the conditions of his confinement, he usually proceeds either under 42 U.S.C. § 1983 (1970) or 42 U.S.C. § 1985 (1970). KERPER, *supra* note 7, at 222. *See* Remington, *State Prisoner Litigation and the Federal Courts,* 1974 ARIZ. ST. L. J. 549. Section 1983 provides that any person shall be liable to any party to whom he has caused injury by depriving that party of constitutional or federal statutory rights while acting under the color of state "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983 (1970). Section 1985(3) imposes liability upon any party to a conspiracy to violate § 1983. 42 U.S.C. § 1985(3) (1970).

The prisoner challenging prison conditions under § 1983 proceeds in federal court under the authority of 28 U.S.C. § 1343(3) (1970) which grants original jurisdiction to federal district courts for civil actions commenced by any person wherein a claim is asserted that that individual has been deprived of his rights guaranteed protection under § 1983. Stuart v. Heard, 359 F. Supp. 921, 923 (S.D. Tex. 1973) (federal district court has jurisdiction of any complaint by state prisoner against his jailers for alleged misconduct or deprivation of rights). *Ex parte* Young, 209 U.S. 123 (1908), eliminated possible barriers to the litigation of these rights presented by state immunity doctrine. In *Young,* the Supreme Court decreed that state immunity guaranteed by the eleventh amendment must give way to the supreme law of the United States as prescribed in the Constitution. *Id.* at 159-60, 167-68; *see* Wood v. Strickland, 420 U.S. 308, 320-22 (1975) (no absolute immunity of public school board officials from

In *Wester v. Jones*,[9] the Fourth Circuit examined the extent to which proper medical care, a right secured by the eighth amendment's prohibition of cruel and unusual punishment,[10] must be provided to a prisoner in order to meet the constitutional standard.[11] The issue in the case was whether a prisoner, who had received a thorough physical examination that indicated that he was not suffering from the complained of ailment, had a right to subsequent complete examinations when he returned with the same complaint. The court held that such later examinations are not constitutionally mandated.

Wester, a North Carolina state prisoner, petitioned the district court for relief,[12] alleging he had been denied proper medical care in violation of his constitutional rights.[13] He contended that this violation resulted from

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prosecution for acts undertaken in their role as public school officials).

Certain advantages accrue to the prisoner proceeding under these statutes rather than seeking a writ of habeas corpus. The primary benefit is that the prisoner need not exhaust all available state remedies before filing suit in federal court. *Compare* McCray v. Burrell, 516 F.2d 357, 359-65 (4th Cir.), *cert. granted*, 423 U.S. 923 (1975), *cert. dismissed*, 426 U.S. 471 (1976) (civil rights proceeding by state prisoner negates necessity of exhaustion of state remedies before filing in federal court) *with* 28 U.S.C. § 2254(b)(1970) (unless state has no appropriate remedial procedures or available procedures are ineffective to protect the prisoner's rights, a writ of habeas corpus can not be sought in federal court until state remedies are exhausted). The Supreme Court has ruled, however, that when a state prisoner challenges the constitutionality of a state administrative act, and the effect of the relief sought is immediate release or a reduction in time to be served, his remedy is habeas corpus and not § 1983. Preiser v. Rodriguez, 411 U.S. 475, 487 (1973) (allegation that illegal revocation of good conduct time credits caused prisoners to be incarcerated beyond expected time of release is habeas corpus proceeding and not a proper § 1983 proceeding); *cf.* Peyton v. Rowe, 391 U.S. 54 (1968) (habeas corpus relief is appropriate for future as well as immediate release).

[9] 554 F.2d 1285 (4th Cir. 1977).

[10] U.S. CONST. amend. VIII. The Supreme Court has pointed out on several occasions that the legal understanding of what actions constitute cruel and unusual punishment progresses with society's evolving notions of decency. Trop v. Dulles, 356 U.S. 86, 100-01 (1958). As mankind develops toward new and more enlightened standards of what is cruel and unusual, the legal protection afforded by the eighth amendment expands its coverage. Gregg v. Georgia, 428 U.S. 153, 169-73 (1976). For an historical analysis of the development of the concept in English law and its incorporation into the American legal system, see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969).

[11] Estelle v. Gamble, 429 U.S. 97 (1976). In *Estelle*, the Supreme Court held that "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment. . . . Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Id.* at 104-05; *see* note 8 *supra*.

[12] The circuit court's opinion does not state the relief sought. Since Wester later received adequate treatment, 554 F.2d at 1286, appropriate relief would have consisted of money damages to compensate him for his injury. *See* notes 6-7 *supra*.

[13] Wester alleged violations of both the eighth and fourteenth amendments. 554 F.2d at 1286; *see* Williams v. Vincent, 508 F.2d 541, 543-44 (2d Cir. 1974) (callous indifference to serious medical needs of prisoner constitutes violation of eighth amendment); Fitzke v. Shappell, 468 F.2d 1072, 1075-76 (6th Cir. 1972) (allegation that sheriff held plaintiff in custody for seventeen hours before rendering medical attention may constitute violation of fourteenth amendment).

the prison doctor's failure to examine him thoroughly when he complained of pain in his eye and deteriorating vision, and that the failure to examine him ultimately resulted in a permanent visual impairment.[14] When Wester first complained of his infirmity, a prison doctor examined him and discovered no eye ailments.[15] Wester asserted, however, that when he subsequently complained about the persisting eye pain the doctor performed only a cursory examination.[16] Later visits resulted in no examination whatsoever.[17] The district court found no genuine issue of material fact and entered summary judgment for the defendants on the basis of Wester's complaint and supporting affidavits.[18] The Fourth Circuit in a per curiam decision affirmed the lower court's judgment.

In affirming the grant of sumary judgment, the appellate court adopted the "deliberate indifference" standard[19] enunciated by the Supreme Court in *Estelle v. Gamble.*[20] In *Estelle,* the complainant visited prison medical personnel on seventeen occasions over a three month period and usually received some form of medical treatment.[21] The Court refused to accept the contention that failure to use more extensive diagnostic techniques constituted cruel and unusual punishment,[22] and ruled that the prisoner's suit, if cognizable, must be a medical malpractice suit against the examining physician.[23] Under a markedly dissimilar set of facts,[24] the Fourth Circuit arrived at the same conclusion, ruling that the prison doctor's failure to

[14] 554 F.2d at 1286. After Wester filed his complaint, an eye specialist examined him and correctly diagnosed the ailment. He received adequate treatment but suffered a permanent visual reduction. *Id.*

[15] *Id.*

[16] *Id.* The *Wester* dissent argued that the prison doctor performed no examination whatsoever after Wester's initial visit. 554 F.2d at 1287 (Winter, J., dissenting), *citing* Brief for Appellant at 17. The majority opinion did not deem important the factual conflict as to the nature of the second visit. The discrepancy was whether the doctor performed a cursory examination or none at all. 542 F.2d at 1286.

[17] Both the majority and dissent concurred that no examination was performed after Wester's second visit. 542 F.2d at 1286; 542 F.2d at 1287 (Winter, J., dissenting).

[18] 542 F.2d at 1286.

[19] *Id.*

[20] 429 U.S. 97, 104 (1976).

[21] *Id.* at 107.

[22] *Id.; see* note 10 *supra.*

[23] 429 U.S. at 107. Pre-*Estelle* courts recognized that allegations amounting to no more than accusations of negligence are not cognizable under § 1983. Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970) (delay of eleven days in performing surgery at most an act of negligence and not so shocking as to violate the eighth amendment); Gittlemacker v. Prasse, 428 F.2d 1, 6 (3rd Cir. 1970) (allegations that prisoner transfer to an institution lacking adequate medical care violates the Constitution insufficient to state federal cause of action); Church v. Hegstrom 416 F.2d 449, 450-51 (2d Cir. 1969) (absent additional allegation of severe or obvious injury, mere contention that prison officials knew or should have known of prisoner's illness is no more than allegation of negligence and not actionable under § 1983).

[24] The plaintiff in *Estelle* saw several different doctors, underwent at least three thorough examinations, and was prescribed various medications. Estelle v. Gamble, 429 U.S. at 98-101 (1976). Wester, on the other hand, saw only one doctor and received only one thorough examination. Wester v. Jones, 554 F.2d 1285, 1286 (4th Cir. 1977).

conduct a thorough examination after his originial diagnosis did not demonstrate deliberate indifference to the serious medical needs of a prisoner.[25] Rather, the failure of the doctor to perform any further examination evidenced an exercise of the doctor's medical judgment.[26]

Several circuits had adopted the deliberate indifference test prior to the Supreme Court's holding in *Estelle.*[27] These cases illustrate the proper factors to be considered in determining whether actions complained of by prisoners constitute deliberate indifference to a prisoner's serious medical needs rather than a permissible exercise of medical judgment.

The Second Circuit in *Williams v. Vincent*[28] set forth the standard that the action alleged must have been such as to shock the conscience or demonstrate deliberate indifference on the part of the offending official.[29] There, the plaintiff prisoner lost part of his ear in an inmate fracas.[30] Williams alleged before the district court that prison doctors told him "he did not need his ear" and refused to attempt to suture it back after the prisoner's request that they make an effort.[31] In reversing the lower court's dismissal of the pro se[32] complaint, the Second Circuit ruled that the district court must give petitioner the opportunity to present evidence substantiating his civil rights claim.[33] If after such showing the district court finds that failure to attempt to sew the ear back represented a medical judgment, no valid action under 42 U.S.C. § 1983[34] would lie.[35]

In the Seventh Circuit case of *Thomas v. Pate,*[36] the court devised a three-step test to determine the necessity of medical care for a prisoner. Under the *Thomas* test, the court must determine: first, whether an ordinary physician exercising reasonable care would have determined that the prisoner evidenced a serious injury or illness; second, whether the delay in

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[25] 554 F.2d at 1286.

[26] *Id.; see* note 23 *supra.*

[27] Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976); *accord* Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.), *rev'd on other grounds,* 419 U.S. 813 (1974).

[28] 508 F.2d 541 (2nd Cir. 1974).

[29] *Id.* at 544.

[30] *Id.* at 543.

[31] *Id.*

[32] A pro se pleading is drafted without benefit of an attorney's assistance. BLACK'S LAW DICTIONARY 1364 (Rev. 4th ed. 1968). *See* Flannery & Robbins, *The Misunderstood* Pro Se *Litigant: More Than A Pawn in the Game,* 41 BROOKLYN L. REV. 769 (1975). The complainant in *Wester* also filed a pro se complaint, but the *Wester* majority did not consider this issue. *See* Wester v. Jones, 554 F.2d 1285, 1287 (4th Cir. 1977) (Winter, J., dissenting). Since pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers," and are not dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim . . . ", Haines v. Kerner, 404 U.S. 519, 520-21 (1972), *quoting* Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the *Wester* majority impliedly held that Wester had not made a cognizable constitutional claim. *See* 554 F.2d at 1287 (Winter, J., dissenting).

[33] Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974).

[34] *See* note 8 *supra.*

[35] Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); *see* note 23 *supra.*

[36] Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974).

providing treatment increased the potential for harm; and third, whether actual harm resulted.[37] The plaintiff in *Thomas* alleged that medical personnel gave him penicillin when his records demonstrated that he had an allergy to the drug. He further contended that after he experienced an allergic reaction the prison doctor concluded, without performing an examination, that no treatment was necessary.[38] The district court dismissed the allegation, but the Seventh Circuit reversed holding that the petitioner had stated facts sufficient to support a cause of action.[39] Consequently, the court gave the plaintiff an opportunity to prove that the medical care provided was so inadequate as to amount to, in the words of the *Estelle* Court, a "refusal to provide essential care," or was so markedly inappropriate "as to evidence intentional mistreatment likely to seriously aggravate the prisoners' condition."[40]

The prisoners in each of these cases proceeded under 42 U.S.C. § 1983,[41] which provides a cause of action to any person whose federal statutory or constitutional rights have been violated by someone acting under the color of state authority.[42] In determining whether a valid section 1983 claim is presented in cases involving a prisoner's right to medical care, courts have considered such factors as: unwarranted delay in providing medical care when the need is known,[43] an attempt to harm,[44] an illness or injury so obvious as to call attention to the need for aid,[45] and dismissal of a prisoner's complaint by a prison doctor without the performance of an examination.[46] The plaintiff in *Wester* alleged no delay in being permitted to visit the doctor and admitted that the prison physicians performed an examination.[47] While Wester contended that further examinations should have been performed,[48] the court found that the prison doctor's failure to do so evidenced only an exercise of the physician's medical judgment and not a blatant disregard for the prisoner's welfare.[49] Based upon this finding, the court concluded that any negligence by the prison doctor in incorrectly diagnosing the ailment failed to present a constitutional issue.[50]

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[37] *Id.* at 158.

[38] *Id.*

[39] *Id.* The prisoner in *Thomas* further alleged that prison officials placed him in unsanitary confinement. The appellate court found that this allegation, if true, constituted an actionable § 1983 claim. *Id.* at 158-59. Petitioner's additional complaint that the doctor failed to x-ray his chest when he vomited blood raised no constitutional issue. *Id.* at 159; *see* note 23 *supra.*

[40] *Id.* at 158.

[41] *See* note 8 *supra.*

[42] *Id.*

[43] Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976).

[44] Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973).

[45] *Id.*

[46] Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970).

[47] 554 F.2d at 1286.

[48] *Id.*

[49] *Id.*

[50] *Id.; see* Estelle v. Gamble, 429 U.S. 97, 107 (1976) (incorrect diagnosis by prison

The Fourth Circuit's holding not only comports with the other circuits' interpretation of "deliberate indifference," but also is consistent with the reasoning in the earlier Fourth Circuit decision of *Cole v. Williams.*[51] In that case, petitioner Cole alleged that the prison doctor delayed calling an eye specialist to examine him. Cole further contended that once the specialist did examine him and diagnose the ailment, the specialist found that quick and effective treatment could have saved the vision in the afflicted eye. The Fourth Circuit concluded that the original treatment was adequate.[52] However, the court reversed the district court's grant of summary judgment for the defendant physician on the ground that the lower court should have read the complaint to include a charge of negligence for delay in admitting Cole to sick call.[53] Thus, in *Cole,* the prison doctor's failure to diagnose the ailment was not actionable under section 1983. Likewise in *Wester,* once the Fourth Circuit concluded that the failure to perform subsequent examinations represented an exercise of medical judgment, Wester's only cause of action was for negligence against the doctor under state law.[54]

While the issue in *Wester* concerned the duty of the state to provide prisoners with medical care for physical ailments, the Fourth Circuit also recently considered whether the state has a constitutional duty to provide psychiatric care to mentally disturbed prisoners. In *Bowring v. Godwin,*[55] the court held that prisoners are entitled to psychological or psychiatric treatment if a member of the health care community determines that a prisoner has a serious mental illness which may be cured or substantially alleviated and that delay or denial of care increases the potential for harm.[56]

The Probation and Parole Board[57] denied plaintiff Bowring parole partially on the ground that the result of a psychological evaluation indicated that he could not successfully complete a parole period.[58] Bowring main-

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doctors presents a possible claim under state tort law but is not indicative of any constitutional error).

[51] Cole v. Williams, 526 F.2d 588 (4th Cir. 1975).

[52] *Id.; see* note 23 *supra.*

[53] 526 F.2d 588. *See* note 32 *supra.* Prison officials allegedly delayed admitting Cole to sick call after the fight during which he was injured. 526 F.2d 588.

[54] *See* note 50 *supra.*

[55] 551 F.2d 44 (4th Cir. 1977).

[56] *Id.* at 47.

[57] Plaintiff Bowring was an inmate of the Virginia penal system. In Virginia a convicted felon becomes eligible for parole after serving one-fourth of his term or twelve years, whichever period is shorter. VA. CODE § 53-251 (Cum. Supp. 1977). The Virginia Parole Board divides each claendar year into equal parts deemed most effective for administration and reviews each prisoner's case in the segment during which the prisoner first becomes eligible for parole. If parole is not granted at that time, the Board must continue to review the case annually until the prisoner is paroled or discharged; however, the Board has discretionary authority to review a prisoner's parole eligibility any time after the prisoner first becomes eligible. *Id.* § 53-252 (Cum. Supp. 1977).

[58] 551 F.2d at 46. The Board denied plaintiff parole not only because a psychological evaluation indicated that he was presently incapable of completing a parole period, but also

tained that the state must provide him psychological diagnosis and treatment in order that he might have an expectation of eventually qualifying for parole.[59] He alleged that failure to provide these services constitutes cruel and unusual punishment and a denial of due process.[60] The district court dismissed the action, holding that Bowring alleged no infringement of a constitutional right.[61] The Fourth Circuit reversed on the ground that a prisoner's right to medical care[62] encompasses a right to psychiatric treatment.[63]

The Fourth Circuit premised its conclusion upon a finding that no distinction separates the right to medical care for physical infirmities from the right to medical care for psychiatric problems.[64] The court cited the Fifth Circuit case of *Newman v. Alabama*[65] as its sole legal authority for this conclusion.[66] The *Newman* court considered the lack of any psychia-

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because of the nature of the crimes for which he was convicted and his work and conduct while incarcerated. *Id.*

[59] *Id.* Parole boards exercise vast discretionary powers in granting or denying parole. Scarpa v. United States Bd. of Parole, 477 F.2d 278, 280 (5th Cir.), *rev'd on other grounds*, 414 U.S. 809 (1973); *see* Rasmussen v. Rogen, 146 F.2d 516, 517 (7th Cir. 1947). Only when a prisoner alleges a constitutional violation, or when a court finds that the board abused its discretionary powers will a court remand to the board with instructions for correction. Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944 (2nd Cir. 1976).

The Parole Board had to give Bowring the reasons for his parole denial because of the Fourth Circuit's holding in Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975). In that case the Fourth Circuit decided that a grievous loss results when the Board denies parole. The court accordingly held that due process requirements apply to parole hearings. Hence, the Board must inform a prisoner of the reasons for denial so that he might be aware of the changes he needs to make in order to obtain release. 519 F.2d at 732. *See* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) (prisoner denied parole must be given the basis of the denial in writing). *Compare* Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975) (Board must present prisoner with reasons underlying denial) *and* Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (same) *with* Bell v. Kentucky Parole Bd., 556 F.2d 805 (6th Cir. 1977) (no due process constitutionally mandated for parole hearing) *and* Brown v. Lundgreen, 528 F.2d 1050 (5th Cir. 1976) (same). The better view is that giving a prisoner the reasons underlying a parole denial helps him direct his actions toward possible later parole. Moreover, this serves to allay the resentment a prisoner may feel toward the parole board and the prison system itself by demonstrating that the denial was not simply an arbitrary act. Johnson, *Federal Parole Procedures*, 25 AD. L. REV. 459 (1973) prepared for Administrative Conference of the United States.

[60] 551 F.2d at 46. *See* notes 11 & 13 *supra.*

[61] *See* 551 F.2d at 46.

[62] *See* note 11 *supra.*

[63] 551 F.2d at 46, 47.

[64] *Id.* at 47.

[65] 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

[66] 551 F.2d at 47. The *Newman* case was one of the few sources examining the subject of psychiatric care for penal inmates. For other cases and commentaries dealing with the rights of mental patients and the duty of the state regarding civil commitment proceedings and psychiatric treatment, *see generally* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (mental patient cannot be detained against his will if he is determined not dangerous to himself or society and is capable of safely surviving by himself or with the aid of willing friends or family); McNeil v. Director, Patuxent Institution, 407 U.S. 245, 248-50 (1972) (prisoner

trists, social workers, or counselors within the Alabama prison system as one of many deficiencies rendering that entire system unconstitutional.[67] Although the *Newman* court did not elaborate on the necessity of any program of treatment, the *Bowring* court dictated a limited right to treatment[68] premised upon an interpretation of the eighth amendment's prohibition of cruel and unusual punishment and the well-recognized goal of prisoner rehabilitiation.[70] Once the *Bowring* court equated the right to treatment for mental disturbances with the right to treatment for physical ailments, application of the *Estelle* deliberate indifference test dictated that lack of any program to treat the mentally infirm prisoner is unconstitutional.[71]

The *Bowring* court's conclusion that for the purpose of constitutionally requiring treatment mental illness is indistinguishable from physical maladies is indicative that modern medical opinion considers mental illness a disease that lends itself to treatment.[72] Several difficulties permeate the court's conclusion, however, and these problems raise serious questions regarding implementation of a viable program of psychiatric care at penal institutions.

One difficulty concerns the difference between the recognized effectiveness of a program to treat physal ailments and treatment of psychiatric problems. While medical programs of rehabilitation have been shown to be effective,[73] available research data does not document the efficacy of psychotherapeutic treatment in changing behavior patterns.[74] An essential element of the Fourth Circuit's test of whether an inmate has a right to a

committed to mental institution to determine whether his commitment should be indeterminate is entitled to release if, after expiration of his prison term, no determination as to his need to be mentally committed has been made); Specht v. Patterson, 386 U.S. 605, 608 (1967) (commitment procedures require due process whether designated civil or criminal). *See also,* 62 CAL. L. REV. 671-1068 (1974); Katz, *The Right to Treatment—An Enchanting Legal Fiction?,* 36 U. CHI. L. REV. 755 (1969).

[67] 503 F.2d at 1330-31.

[68] *See* text accompanying note 56 *supra.* The *Bowring* court also concluded that treatment provided must be necessary and not merely desirable. Moreover, the cost and time involved in treatment must be reasonable. 551 F.2d at 47-48. *But see* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974) (if state cannot afford to alleviate unconstitutional confinement (overcrowding), possible remedy is either to transfer or release some prisoners); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510, 1527 (1975).

[69] 551 F.2d at 48; *see* note 10 *supra.*

[70] 551 F.2d at 48. The Supreme Court stated in Pell v. Procunier, 417 U.S. 817 (1974), that rehabilitation is a paramount objective of penal institutions, a goal weighed against the state's interest in maintaining prison internal security. *Id.* at 832.

[71] *See* note 11 *supra.*

[72] *See* 551 F.2d at 47.

[73] *See* note 74 *infra.*

[74] Schwitzgebel, *The Right to Effective Mental Treatment,* 62 CAL. L. REV. 936, 938 (1974). Chief Justice Burger also expressed reservations about psychiatrists' understanding of human personality and behavior. Burger, *Psychiatrists, Lawyers, and the Courts,* 28 FED. PROB. 3, 7 (1964), *cited at* Ennis & Litwack, *infra* note 77, at 751-52.

psychiatric program of treatment is that the disease diagnosed must be substantially curable.[75] The highly subjective nature of both the diagnosis[76] and treatment of mental illness increases the difficulty in making such a finding.[77] The diagnosis of mental illnnss or emotional disturbance necessarily must be left to the independent judgment of the examining psychiatrist or psychologist. Given the perplexities of psychotherapeutic treatment, a psychiatrist's opinion will rarely be subject to court adjudication.[78]

While explicitly recognizing a constitutional right to a program of treatment for psychiatric problems, the *Bowring* decision does not address the question whether a concurrent right exists requiring diagnosis of psychiatric ailments. On the *Bowring* facts, the Fourth Circuit ascertained a constitutional need for a state evaluation of the petitioner's eligibility for treatment and accordingly instructed the district court to conduct an evidentiary hearing to evaluate such eligibility under the Fourth Circuit's test.[79] The Fourth Circuit's opinion, however, is not clear as to when this duty arises in factual circumstances different from that in *Bowring.* Where the state determines, as it did in *Bowring,* the unsuitability of a prisoner for parole on the basis of a psychological evaluation, the state obviously believes that the prisoner suffers some form of mental disturbance. But, when the state makes no such determination, a prisoner will experience difficulty proving his need for treatment.[80]

If the *Bowring* opinion impliedly includes the existence of a constitu-

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[75] 551 F.2d at 47.

[76] *See* text accompanying note 79 *infra.*

[77] *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CAL. L. REV. 693 (1974).

[78] 551 F.2d at 48. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 106 (1976). Thus, questions of medical judgment do not rise to constitutional proportions. Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975). *See* note 23 *supra.*

[79] 551 F.2d at 49.

[80] The Fourth Circuit's opinion in Wester v. Jones, 554 F.2d 1285 (4th Cir. 1977), illustrates the difficulty in proving a need for psychiatric treatment. In Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975), a federal district court indicated that at least one Virginia prison files the results of intelligence tests and a summary of inmate interviews with state psychologists. *Id.* at 313. In *Wester,* the Fourth Circuit held that no requirement exists for a prison physician to perform more than one examination upon a prisoner alleging a physical infirmity. *See* text accompanying note 25 *supra.* Hence, even if *Bowring* is read to include a constitutional right to psychiatric diagnosis where files such as those described in *Franklin* exist, *Wester* would require no further psychiatric examinations by the state unless the files indicated some form of mental infirmity. *See* Cates v. Ciccone, 422 F.2d 926, 928 (8th Cir. 1970) (reviewing court must be able to place confidence in prison medical records when considering allegation of improper medical care). Thus, the prisoner's only recourse to secure diagnosis would be to demonstrate a serious mental ilness so obvious as to serve notice upon prison officials that he is sick. *See* Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973), wherein the First Circuit held that either an attempt to harm a prisoner or an illness severe enough to call attention to the need for medical aid must be present to substantiate a constitutional tort when a prisoner alleges deprivation of medical care. *Id.* at 569.

tional right to psychiatric diagnosis as well as the right to a program of treatment, and assuming the availability of diagnostic techniques for prisoners and workable programs of treatment, the effect of the decision in safeguarding the health of prisoners evinces a step forward in recognizing the rights of the mentally ill.[81] The effectiveness of *Bowring* in achieving this result depends upon the ability of the physician treating the prisoner[82] as well as the state's ability to underwrite the cost of administering the program.[83] The *Bowring* decision contains far reaching implications,[84] but effective implementation depends upon cooperation between prison officials and psychiatric experts, as well as the ability of those experts to provide a meaningful service to penal inmates.

Right to Be Present During Inspection of Incoming Attorney Mail

Prisoners recently have experienced an increase in judicial recognition of constitutional rights in the area of correspondence with persons outside the prison walls, particularly in the area of correspondence with the inmate's attorney.[1] Although prison officials may not read mail sent by attorneys to their clients in prison, they may inspect the mail for contraband.[2] Several federal circuits recognize a constitutional right of prisoners to be present when that mail is opened for inspection.[3] The Supreme Court, however, has stated that such a practice may exceed the constitutional requirement.[4] The Fourth Circuit in *Crowe v. Leeke*[5] faced the narrow issue

[81] No Supreme Court opinion grants civilly committed mental patients a constitutional right to psychiatric treatment. Plotkin, *Recent Developments in the Law of Prisoners' Rights*, 11 CRIM. L. BULL. 405, 417 (1975). The Fifth Circuit, however, recognizes such a right. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 563 (1975); *see* Rouse v. Cameron, 373 F.2d 451, 454 (D.C. Cir. 1966) (right to treatment statutorily guaranteed). The *Bowring* court stated its belief that civilly committed patients have this right. 551 F.2d at 48, n.3.

[82] The *Bowring* court recognized that psychiatric experts must define the exact contours of relief. 551 F.2d at 28, n.3.

[83] *See* note 68 *supra*. *See also* Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976) (state not at liberty to limit constitutional rights by monetary considerations).

[84] Since the Fourth Circuit decided *Bowring*, one court adopted virtually verbatim the *Bowring* test for determining prisoners' constitutional right to a program of psychiatric rehabilitative treatment: Laaman v. Helgemae, No. 75-258 (D. N.H. July 1, 1977). *See also* note 81 *supra*.

[1] In Procunier v. Martinez, 416 U.S. 396 (1974), the Supreme Court circumscribed the ability of prison officials to censor inmate mail. *Id.* at 413. *See* text accompanying notes 14 & 15 *infra*.

[2] *See* note 38 *infra*.

[3] *See* Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976); Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir.), *cert. denied*, 418 U.S. 910 (1974); McDonnell v. Wolff, 483 F.2d 1059, 1066 (8th Cir. 1973), *modified*, 418 U.S. 539 (1974); Smith v. Robbins, 454 F.2d 696, 697 (1st Cir. 1972). *But see* Sostre v. McGinnis, 442 F.2d 178, 201 (2nd Cir. 1971), *cert. denied*, 405 U.S. 978 (1972) (prison officials may open and read all correspondence).

[4] Wolff v. McDonnell, 418 U.S. 539, 577 (1974). The issue in *Wolff* was whether a constitutional obligation exists which would require penal officials to do any more than permit the

whether mail sent by attorneys may be opened in the prisoners' absence in order to be searched for contraband. The court decided that prisoners do not have an unqualified right to be present when their mail is inspected.[6]

Petitioners, South Carolina penal inmates, alleged that their absence at the mail opening process violated rights guaranteed by the first, sixth, and fourteenth amendments.[7] The district court dismissed the claim as barred by a prior action that had held that the prison mail regulations met constitutional standards.[8] On appeal, the Fourth Circuit ruled that the claim was not barred either by res judicata or collateral estoppel principles.[9] The court then remanded the case for a determination whether protection of the inmates' sixth amendment rights required alteration in the existing practice of opening prisoner mail.[10]

On remand, the District Court was instructed to conduct an evidentiary hearing[11] to balance the state's interest in excluding the prisoners against the prisoners' right to be present when their attorney mail is opened.[12] Such a balancing test is necessary in light of recent Supreme Court decisions, in which the Court dictated that the government interest in providing

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inmate's presence at the opening of his attorney mail. The Court found that this practice satisfied all and perhaps more than the Constitution required. *Id.* at 575-77. *See also* Procunier v. Navarette, 46 U.S.L.W. 1130 (Feb. 28, 1978).

[5] 550 F.2d 184 (4th Cir. 1977).

[6] *Id.* at 188.

[7] *Id.* at 186.

[8] *Id.* at 185. In an earlier class action suit, Hamilton v. South Carolina, No. 72-273 (D. S.C. Feb. 27, 1974), a federal district court held the mail regulations at issue in *Crowe* constitutional. *See* 550 F.2d at 186. The plaintiffs in *Crowe* conceded that they were members of that class. Brief for Appellants at 4, Crowe v. Leeke, 550 F.2d 184 (4th Cir. 1977). The district court held that this earlier action operated as res judicata to bar appellants' present action. 550 F.2d at 186. Since the instant claim involved a continuing action, i.e., the opening of attorney mail outside the addressee-inmate's presence, the circuit court found res judicata inapplicable. *Id.* at 186-87; *see* Cherry, *Res Judicata Reexamined,* 57 YALE L.J. 339, 341 (1948).

The circuit court also considered the possibility of collateral estoppel operating to prevent the present action if the same matters presented in the second case had been litigated and determined previously. 550 F.2d at 187-88; *see* Scott, *Collateral Estoppel By Judgment,* 56 HARV. L. REV. 1, 7-10 (1942). The appellate court also determined this doctrine was inapplicable, as the precise question presented was whether attorney mail may be opened in the prisoner's absence, which question was not litigated in the previous suit. 550 F.2d at 188.

[9] 550 F.2d at 186-88; *see* note 8 *supra.*

[10] 550 F.2d at 188-89. The institution involved in *Crowe* used an automatic or electronic letter opener to open mail for inspection. Appellees argued that due to the large volume of mail, requiring the presence of inmates at the opening process would be impractical. A substantial increase in the number of employees handling the mail would be necessary, thereby resulting in a diversion of funds from other areas deemed more important by prison officials. Brief for Appellees at 3, Crowe v. Leeke, 550 F.2d 184 (4th Cir. 1977). *But see* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974) (cost considerations insubstantial when protection of prisoners' constitutional rights at issue).

[11] 550 F.2d at 188-89.

[12] *Id.*

internal security must be weighed against the constitutional interests of the prisoner.[13] In an earlier case that formulated guidelines for the censorship of inmate mail, the Court also ruled that such censorship is constitutional so long as it serves a substantial government interest through preserving security, order, and rehabilitation.[14] An additional test enunciated by the Supreme Court to determine the validity of penal regulations mandates a finding that constitutional limitations be no greater than necessary to protect the government interests.[15] Hence the *Crowe* court's requirement of an evidentiary hearing[16] recognizes the possibility of the government presenting valid objections to allowing the inmates' presence at the mail opening process.

Although the *Crowe* court's holding implied the possibility that prison officials could constitutionally exclude prisoners from the process,[17] the Fourth Circuit briefly noted two cases from the First and Fifth Circuits that reached a contrary result.[18] The First Circuit premised its requirement that inmates be present at the mail opening process upon a finding that prisoner-attorney correspondence requires confidentiality,[19] and rejected several justifications forwarded for exclusion of the prisoners.[20] Likewise the Fifth Circuit, in holding for the prisoners, rejected prison officials' assertion that practical considerations required prisoner exclusion from the mail opening process.[21] That court ruled that the prisoners' right of access

[13] Pell v. Procunier, 417 U.S. 817 (1974). The *Pell* court found a substantial government interest in restricting interviews between inmates and media representatives. Even though the restrictions hampered free exercise of first amendment rights, the Court found the state justified in formulating these restrictions since alternative channels of communication existed. *Id.* at 826-27.

[14] Procunier v. Martinez, 416 U.S. 396, 413 (1974). The *Martinez* Court, however, based its decision on the first amendment rights of those with whom the prisoner corresponds rather than the prisoner himself. *Id.* at 408-09; *see* United States v. O'Brien, 391 U.S. 367 (1968). At least one commentator severely criticized the Court for failing to extend first amendment rights to prisoners. *See* Frank & Nitsche, *Civil Rights—Prisoners' Rights,* 1974/1975 ANN. SURVEY OF AM. L. 457.

[15] 416 U.S. at 413; *see* United States v. O'Brien, 391 U.S. 367 (1968).

[16] 550 F.2d at 188-89.

[17] *See* text accompanying note 16 *supra.*

[18] 550 F.2d at 188. The Fourth Circuit discussed Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976) and Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); *see* text accompanying notes 19-22 *infra.*

[19] Smith v. Robbins, 454 F.2d 696, 697 (1st Cir. 1972). The court conveyed its fear that inmates and attorneys suffered inhibitions in their correspondence when prisoners suspected prison officials of reading their attorney mail. *Id.*

[20] *Id.* The warden contended that the lower court's ruling requiring inmate presence at the mail opening process implied that he would violate any order prohibiting him from reading inmate mail. The *Robbins* court rejected the contention that this possible indignity warranted exclusion of prisoners from the mail opening process. *Id.*

[21] Taylor v. Sterrett, 532 F.2d 462, 473 n.16 (5th Cir. 1976). Prison officials contended in *Taylor* that requiring the inmates' presence at the opening of mail creates an onerous administrative burden. The court's opinion found no evidence in the record to support this contention and expressed doubt that cost factors warrant consideration when dealing with fundamental constitutional rights. *Id.*

to the courts mandated their presence as assurance that no one would read their attorney mail.[22]

The Fourth Circuit's order requiring an evidentiary hearing probably indicates only the court's unwillingness to decide the issue upon an incomplete set of facts.[23] An important element when considering the implications of the *Crowe* decision is the general rejection by other circuit courts of the reasons forwarded for excluding prisoners at the opening process.[24] The *Crowe* opinion failed to indicate clearly what grounds are sufficient for enforcing the prison's present practice of excluding prisoners.[25] Other circuits have rejected reasons such as increased security rules,[26] delay in the mail process,[27] indignity to prison officials,[28] and the onerous cost burden.[29] In light of the rejection by other circuits of reasons forwarded to justify inmate exclusion, the Fourth Circuit likely will rule in the prisoners' favor when considering the question upon a complete set of facts.

Although the *Crowe* court's opinion recognized the Supreme Court's test of balancing prisoners' constitutional rights against state security interests,[30] the Fourth Circuit's adoption of sixth amendment rights for prisoners[31] exceeded existing Supreme Court rulings. Dictum in the Supreme Court opinion of *Wolff v. McDonnell*[32] underscored the fact that the sixth amendment only protects the attorney-client relationship within the criminal setting.[33] Although the Supreme Court did not address the operative effects of the sixth amendment,[34] the Fifth Circuit recognized the potential

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[22] *Id.* at 470-78.

[23] The *Crowe* court expressed a reluctance to decide a constitutional issue without a complete record before it. 550 F.2d at 189. The Fourth Circuit thereby followed the logic expressed by the Eighth Circuit in Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972). Confronted with an inadequate record upon which to formulate a remedy, the *Moore* court remanded the case to assimilate evidence to be used in weighing the prisoners' interest in rightful access to the courts against the prison security interest. *Id.* at 577.

[24] *See* text accompanying notes 20-21 *supra* & 26-29 *infra.*

[25] 550 F.2d at 188-89. Factors deemed relevant by the *Crowe* court in deciding the feasibility of allowing inmate presence included inmate fear that prison officials read their attorney mail, the practicality of permitting random observation of the opening process, and other means to inspect for contraband which preclude the necessity for opening mail. *Id.*

[26] Bach v. Illinois, 504 F.2d 1100, 1102 n.1 (7th Cir.), *cert. denied,* 418 U.S. 910 (1974).

[27] *Id.*

[28] Smith v. Robbins, 454 F.2d 696, 697 (1st Cir. 1972).

[29] Taylor v. Sterrett, 532 F.2d 462, 473 n.16 (5th Cir. 1976).

[30] *See* text accompanying notes 12-15 *supra.*

[31] 550 F.2d at 188. The *Crowe* court asserted without discussion that sixth amendment privileges extend to penal inmates.

[32] 418 U.S. 539 (1974).

[33] Wolff v. McDonnell, 418 U.S. 539, 576 (1974).

[34] *Id.* at 575-76; *see* note 3 *supra.* The Eighth Circuit in McDonnell v. Wolff, 483 F.2d 1059 (8th Cir. 1973), refuted defendant's argument that prison officials could not definitively ascertain that purported attorney letters were in fact from attorneys. The court stated that a telephone call to the attorney of record would determine if he sent the letter should prison officials doubt the letter's validity. 483 F.2d at 1067; *see* Marsh v. Moore, 325 F. Supp. 392, 395 (D. Mass. 1971) (prison officials may use fluoroscopes or metal detecting devices; they may manually manipulate envelopes; attorneys unable to send packages; placement of sealed

effect of the Supreme Court's statement as implying an absence of sixth amendment rights in a prison context.[35] That court based its decision granting prisoners the right to be present at the mail opening process upon an interpretation of the fourteenth amendment guaranteeing prisoners a right of access to the courts.[36] By arguing that effective assistance of counsel was essential to protecting the fourteenth amendment right, the Fifth Circuit extended constitutional protection to attorney-inmate correspondence.[37] When the Fourth Circuit later examines a question similar to the one presented in *Crowe,* a legal analysis grounding the prisoners' right in the fourteenth rather than the sixth amendment would serve to minimize the possibility of conflict over the issue of prisoners' sixth amendment rights to counsel. Thus, a Fourth Circuit decision granting inmates an unqualified fourteenth amendment right to be present when prison officials open their attorney mail would not only concur with most recent federal decisions,[38] but also would withstand Supreme Court scrutiny.

Pursuing Rights In Forma Pauperis

A prisoner unable to meet the costs of bringing suit to litigate alleged

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prisoner's letter inside an envelope with an explanatory cover letter sent to prison superintendent). *See also* Note, *Judicial Recognition of Prisoners' Constitutional Right to Send and Receive Mail,* 76 DICK. L. REV. 775, 787-88 (1972).

On appeal to the Supreme Court, the defendants in *McDonnell* argued for a ruling that the practice of opening attorney mail solely to inspect for contraband in the addressee-prisoner's presence was constitutional. The Court found no need to address the application of the first, sixth, or fourteenth amendments. 418 U.S. at 575.

[35] Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976). "Since the right to effective counsel extends only to criminal matters . . . it is applicable solely to pretrial detainees or to a convicted prisoner being tried on additional charges or contesting the legality of a previous conviction." *Id.* at 472.

[36] *Id.* Bounds v. Smith, 430 U.S. 817 (1977) (assuring prisoners meaningful access to courts requires state to provide either law library or some alternative scheme such as training of inmates as para-legal assistants, use of law students, or use of full-time staff attorneys); Procunier v. Martinez, 416 U.S. 396, 419 (1974) (corollary to due process guarantee requires access to courts for prisoners to seek redress for violations of constitutional rights); *Ex parte* Hull, 312 U.S. 546 (1941) (prison officials not to impair or abridge prisoners' right of access to courts in seeking writ of habeas corpus); *see* text accompanying note 29 *infra. But see* Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (heretofore, only guarantee of access to courts for prisoners extended to right to prepare a petition or complaint). *See also* Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir.), *cert. denied,* 418 U.S. 410 (1974) (effective assistance of counsel and access to the courts).

[37] 532 F.2d at 473.

[38] Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976) (presence of prisoner required during mail opening); Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir.) (same); McDonnell v. Wolff, 483 F.2d 1059, 1066 (8th Cir. 1973) (prisoners' attorney mail opened only under probable cause and then only in inmate's presence); Smith v. Robbins, 454 F.2d 696, 697 (1st Cir. 1972) (presence of prisoner required at mail opening); *accord,* Preston v. Cowan, 369 F. Supp. 14, 24 (W.D. Ky. 1973); Holt v. Hutto, 363 F. Supp. 194, 210 (E.D. Ark. 1973); Palmigiano v. Travisono, 317 F. Supp. 776, 788-89 (D. R.I. 1970). *Contra,* Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971) (prison officials may open and read all correspondence).

constitutional deprivations can seek leave to proceed in forma pauperis.[1] Section 1915 of title 28 of the United States Code,[2] which grants federal courts the authority to allow filing of suits without prepayment of costs, also provides that courts may dismiss such suits if satisfied that the action is frivolous.[3] In *Graham v. Riddle*,[4] the Fourth Circuit held that section 1915 grants district courts the power to review prisoner complaints before the action is filed and deny leave to proceed in forma pauperis upon a finding that the complaint is frivolous.[5]

Plaintiff Graham, a Virginia prisoner, filed six complaints with the district court during a five month period, each dealing with the nature of the food provided by the prison.[6] Each compalint included a motion for leave to file in forma pauperis which the district court routinely granted.[7] Each complaint was dismissed upon a determination that it was frivolous.[8] The sixth dismissal included an order than denied Graham further leave to file in forma pauperis "except upon good cause shown."[9] The district court denied six subsequent motions requesting leave to file in forma pauperis.[10] Without contesting the findings of frivolity,[11] Graham asked the appellate court to rule that leave to file in forma pauperis cannot be conditioned upon the merits of a complaint.[12] The Fourth Circuit held that district courts need not grant leave to file in forma pauperis before dismissing a frivolous complaint, and that the trial court may review a complaint prior to its filing and dismiss it under the authority of section 1915(d).[13]

The widely accepted view is that the court first should grant petitioner leave to proceed in forma pauperis before dismissing the action on a finding

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[1] 28 U.S.C. § 1915(a) (1970). Section 1915(a) permits any United States court to authorize the commencement of a civil suit without prepayment of costs or the posting of security for costs. The applicant must state by affidavit his inability to bear the costs of the suit. In addition, he must state the nature of his action and his belief that he is entitled to relief.

[2] *Id.* § 1915.

[3] *Id.* § 1915(d). This section permits dismissal of suits brought under section 1915(a) if the applicant's allegation of poverty is untrue or if the court is satisfied that the action is malicious or frivolous. A frivolous plea is one which the court determines to have no basis for prosecution, thereby evincing the pleader's bad faith in bringing the suit. United States v. Delaney, 8 F. Supp. 224 (D. N.J. 1934), *rev'd other grounds*, 77 F.2d 916 (3d Cir. 1935); *see, e.g.*, Durham v. United States, 400 F.2d 879, (10th Cir.), *cert. denied*, 394 U.S. 932 (1968) (inability of petitioner to make a rational legal or factual argument in his behalf constitutes sufficient grounds to deny him the right to prosecute his claim in forma pauperis).

[4] 554 F.2d 133 (4th Cir. 1977).

[5] *Id.* at 135.

[6] *Id.* at 134.

[7] *Id.*

[8] *Id.*

[9] Graham v. Slayton, No. 195-73-R (E.D. Va. April 12, 1973), *aff'd sub. nom*, Graham v. Riddle, 554 F.2d 133 (4th Cir. 1977).

[10] 554 F.2d at 134.

[11] *Id.*

[12] *Id.*

[13] *Id.*

that the complaint is frivolous.[14] This process insures that an adequate record of the proceeding is made.[15] Nevertheless, the approach taken by the Fourth Circuit also has certain advantages. Under both views, the court can consider previous complaints to determine whether a petitioner's present complaint is legitimate.[16] The Fourth Circuit's approach has the additional advantages of filtering out frivolous claims and deterring abuse of in forma pauperis proceedings.[17]

In affirming the lower court's ruling, the Fourth Circuit found that the authority to dismiss a frivolous case includes the implicit authority to find a complaint frivolous, and to dismiss it upon that ground without first requiring the court to file the action.[18] Since Graham retained the right to file any claims he desired to prosecute by first paying the fifteen dollar filing fee, and also retained the right to proceed in forma pauperis "upon good cause shown,"[19] he was not denied access to the court system.[20]

The Fourth Circuit further premised its conclusion upon a finding that Graham had abused the statutory right to proceed in forma pauperis.[21] In this respect the *Graham* opinion is in accord with a similar decision ren-

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[14] Forester v. California Adult Auth., 510 F.2d 58 (8th Cir. 1975); Duhart v. Carlson, 469 F.2d 471 (10th Cir. 1972), *cert. denied,* 410 U.S. 958 (1973); Conway v. Fugge, 439 F.2d 1397 (9th Cir. 1971); Hawkins v. Elliott, 385 F. Supp. 354 (D. S.C. 1974). While the discretionary power of a district court to dismiss a suit is especially broad with regard to prisoners attemting to proceed in forma pauperis, Conway v. Fugge, 439 F.2d 1397 (9th Cir. 1971); *see* Shobe v. California, 362 F.2d 545 (9th Cir.), *cert. denied,* 385 U.S. 887 (1966), apparently only two circuits have faced the precise issue whether leave to proceed in forma pauperis can be denied prior to filing a complaint. Graham v. Riddle, 554 F.2d 133 (4th Cir. 1977); West v. Procunier, 452 F.2d 645 (9th Cir. 1971).

[15] A permanent record of the proceeding inures both to the benefit of the plaintiff and defendant. The plaintiff has a record upon which to base a possible appeal claiming abuse of the district court's discretionary authority to dismiss the suit, and the defendant is protected from similar suits in the future. Forester v. California Adult Auth., 510 F.2d 58, 60 (8th Cir. 1975); Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972).

[16] Daye v. Bounds, 509 F.2d 66, 68-69 (4th Cir.), *cert. denied,* 421 U.S. 1002 (1975) (court may consider its own records in determining validity of in forma pauperis proceeding); *accord* Duhart v. Carlson, 469 F.2d 471, 473 (10th Cir. 1972); Conway v Oliver, 429 F.2d 1307, 1308 (9th Cir. 1970). The *Graham* court not only reviewed the record of petitioner's first six complaints but also took notice of the nature of the subsequent complaints which the district court had refused to file. 554 F.2d at 134. Thus, the Fourth Circuit had a basis upon which to determine whether Graham abused the statutory right to proceed in forma pauperis, and thereby decide whether the district court justifiably forbade him further leave so to prosecute his complaints.

[17] *See* text accompanying notes 28-30 *infra.*

[18] 554 F.2d at 134-35. *See* West v. Procunier, 452 F.2d 645, 646 (9th Cir. 1971) (where petitioner filed 10 complaints in three month period, order issued that further complaints be reviewed and filed only if deemed to have merit); Mann v. Leeke, 73 F.R.D. 264, 267 (D. S.C. 1974), *aff'd,* 551 F.2d 307 (4th Cir. 1975) (prisoner denied further leave to proceed in forma pauperis due to frivolous nature of present suit and prior filing and dismissal of habeas corpus petitions).

[19] 554 F.2d at 133.

[20] The Supreme Court in Bounds v. Smith, 430 U.S. 817 (1977), recognized prisoners' fundamental right of access to the court system. *See* Part B, note 36 *supra.*

[21] 554 F.2d at 135. *See* text accompanying notes 6-7 *supra.*

dered by the Ninth Circuit in *West v. Procunier.*[22] The *West* court affirmed a district court order requiring a certain prisoner's complaints to be lodged with the court clerk and filed only if the lower court deemed the complaints meritorious.[23] The court there found a need to restrict the prisoner's prolific filing of in forma pauperis complaints inasmuch as ten such complaints had been filed during a three month period.[24]

Although the Supreme Court has not addressed the validity of dismissing in forma pauperis complaints prior to filing, the Court recently has noted that courts do pass judgment on the merits of a case before granting leave to proceed in forma pauperis.[25] The Court cited that fact as partial justification for a ruling that prisons must provide law libraries to help enable prisoners to draft complaints not subject to dismissal on a finding of a lack of merit.[26]

The power of a court to deny leave to proceed in forma pauperis on the basis of the complaint is not dictated by the language of section 1915(d).[27] However, both the *Graham* and *West* courts recognized the implicit power of courts to restrict the use of the proceedings.[28] This power to dismiss is justified by the policy underlying section 1915(d). That underlying policy is to safeguard the public from persons who abuse the right to proceed in forma pauperis by attempting to subject those whom they hold in disfavor to vexatious and frivolous legal proceedings.[29] The *Graham* decision not only better protects prison officials from vexatious lawsuits, but also presents a method of reducing the burdensome number of prisoners' rights cases prosecuted in federal courts[30] while insuring that legitimate complaints still will be heard.

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[22] 452 F.2d 645 (9th Cir. 1971).

[23] *Id.* at 646.

[24] *Id.*

[25] Bounds v. Smith, 430 U.S. 817, 826 (1977). In *Bounds,* the Court expressly reserved judgment on the practice of judging the merits of an in forma pauperis complaint before filing. *Id.* at 826 n.15.

[26] 430 U.S. 817; *see* Part B, note 36 *supra.*

[27] Section 1915(d) of Title 28 provides that "[t]he court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1970).

[28] *See* note 18 *supra.*

[29] Caviness v. Somers, 235 F.2d 455, 456 (4th Cir. 1956), *quoting* O'Connell v. Mason, 132 F. 245, 247 (1st Cir. 1904). The prisoner in *Caviness* alleged mistreatment by a United States Marshall while in confinement. The district court dismissed the action on the basis that the complaint lacked merit. The Fourth Circuit affirmed after a finding that nothing in the record indicated an abuse of discretion by the district court.

[30] For a discussion of the overwhelming caseload within the federal system, see Remington, *State Prisoner Litigation and the Federal Courts,* 1974 ARIZ. ST. L.J. 549, wherein the author discussed some of the problems, and possible remedies, presented by the increased case load of federal courts due to the flood of state prisoner litigation in the federal court system.