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Habeas Corpus Committee - Memoranda

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TO: JUDICIAL CONFERENCE AD HOC COMMITTEE
ON FEDERAL HABEAS CORPUS REVIEW
OF CAPITAL SENTENCES
FROM: ALBERT M. PEARSON, REPORTER
RE: LEGISLATIVE RECOMMENDATIONS
DATE: NOVEMBER 21, 1988

I. INTRODUCTION

Two principal topics are discussed in this memorandum: (1) areas where the development of some statistical or illustrative information might be helpful to justify legislative proposals coming from the Committee; and (2) habeas corpus reform measures that have been presented in Congress or advanced in other forums over the past two decades. In connection with the habeas corpus reform measures, I have noted the major arguments for and against each measure.

II. POTENTIAL NEEDS FOR EMPIRICAL DATA

A. Case Load Burden

One issue that the Committee will probably have to address at some point is whether the focus on death penalty cases is justified. When you look at <u>total</u> habeas corpus filings annually for the past two decades, it would be hard to say that such filings have contributed inordinately to the federal court workload. For example, total civil filings between 1966 and 1986 increased by 359%. 1 In contrast, total prisoner filings (federal and state) increased by 469%. 2 A closer look at total prisoner

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1. The jump was from 70,906 to 254,828. Wilkes, Federal and State Postconviction Remedies and Relief, $ 8.2 (1st ed. 1983)(1986 supplement).

2. The change was from 6,248 to 29,333. Id.

filings, however, puts an important perspective on these figures. The great bulk of this increase has been in prisoner civil rights actions, particularly section 1983 suits by state prisoners, and not because of a dramatic increase in section 2254 petitions. In fact, section 2254 petitions between 1966 and 1986 increased by only 169%, 3 a rate which is considerably below the 359% increase experienced in total civil filings. 4

This review suggests---in my view strongly---that the Committee's focus on capital cases is valid. For at least two reasons, they present the federal (and state) courts with unique fairness, procedural and administrative problems. One is that death row inmates have an incentive to exploit every opportunity to delay the processing of their cases and to relitigate issues which sharply differentiates them from inmates sentenced to a term of years. That point seems so intuitively obvious that a search for more documentation would be a waste of effort.

The second is that, as a sub-category of section 2254 filings, death penalty cases pose a greater burden on the federal courts than their actual numbers reflect. Some supporting is readily available such as: (1) data showing that the death row population is increasing more rapidly than the courts can process

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3. The increase was from 5,339 section 2254 petitions in 1966 to 9,045 in 1986. By comparison, the jump in state prisoner section 1983 actions was from below 1,000 to more than 20,000 over the same time. Id.

4. This figure would still be 350% even if you excluded all prisoner filings from <u>total</u> civil filings.

these cases to a final disposition; and (2) according to the report of the Spangenburg Group issued in September, 1987, there is literally a flood---in comparison to what we have experienced thus far---of death penalty cases headed for the federal courts. The report stated that 174 death penalty cases were pending at the federal district court level and 97 before various circuit courts or on petition for certiorari. For fiscal year 1988, it predicted that 304 death penalty cases would be in a position to shift from state to federal court; for fiscal year 1989 the number predicted was 340. 5

Even though these figures suggest a crisis in the volume of work soon to face the federal courts in death penalty cases, we could attempt to get more detailed information about the actual judicial time devoted to an average death penalty case (if such a thing exists). For example, how many hours each year does a federal judge spend on all his or her duties? What percentage of this time would be consumed by a death penalty case? When sitting as a district judge? When sitting as a circuit judge---with opinion writing responsibility and without it? The question posed is not simply whether death penalty cases are too much work or too hard, but whether they consume so much time that the other business of the federal courts is unjustifiably put to one side. Information of this sort might be helpful in deciding whether death penalty cases should have special procedures making it possible

5. Report of the Spangenberg Group, Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989, 20 (Sept. 1987)

to handle them more efficiently without compromising fairness or the scope of federal review.

A related question is the intensity of the pressure under which federal (and state) judges often must work in death penalty cases. Here I refer to the role that death warrants and stays of execution presently play in moving a case through the federal and state systems. Judge Sharp's statement of February 26, 1988 provides a graphic picture of the the dynamics of this process.6 Do we need to delve into this more? For reasons mentioned elsewhere in this memorandum, this information would support the use of a statute of limitation as the mechanism for an orderly transition of capital cases from state to federal court.

B. SOURCES OF DELAY

In this section, I try to identify reasons for delay in the handling of capital habeas cases that are structural or doctrinal in nature.

As a preliminary matter, some comment about the problem of delay seems appropriate. One reason for delay in death penalty cases is due to the fact of lower federal court review of state criminal convictions. Unless the Committee wants to recommend change in the substantive scope of federal habeas review, this cause for delay is something that we have to be aware of but

6. Statement of the Honorable G. Kendell Sharp before the Subcommittee on Government Information, Justice and Agriculture of the House Committee on Government Operations.

need not emphasize.

Of the 101 executions in the United States since Furman, 90 were resisted legally by the prisoner. In states that have had 5 or more executions (Texas, Florida, Louisiana and Georgia), the average time from the date of the crime to the date of execution has ranged from 5 years 10 months in Louisiana to 9 years 10 months in Georgia. To the extent that any of this time is due to the necessity of a retrial whether on guilt-innocence or the imposition of the death penalty, the delay is a result of a substantive legal judgment about the fairness of the state criminal trial.

As you all know, the number of reversals in death penalty cases has been high---indeed far higher than in cases involving inmates sentenced to a term of years. 7 Of course, not all of the reversals have occurred in federal court, but many, perhaps a considerable majority, have. To death penalty opponents, this pattern is a powerful proof of the need for federal collateral review of state criminal convictions, particularly in capital cases. Any delay in the imposition of the death penalty attributable to this, in their view, is legally and morally justified. I mention this only to emphasize the importance of questions about structure and administrative efficiency separate

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7. According to a 1987 report of the NAACP Legal Defense and Education Fund quoted by the Los Angeles Times on March 23, 1988, 558 death sentences had been declared unconstitutional; there have been 1,209 reversals on other grounds. These figures were not broken down to reflect whether the decisions occurred in state or federal court.

from concerns that might appear to call into question the present scope of federal habeas corpus review of state convictions.

With this in mind, here is a list of sources of delay that arguably can be addressed under the rubric of administrative or procedural reform:

1. There are two phases of state and federal post-conviction review not subject to any time tables: (a) the step between direct appeal and the initiation of state post-conviction review; and (b) the step between the conclusion of state post-conviction proceedings and the initiation of federal habeas review. In death penalty cases, it is not unusual for legal proceedings to come to a halt after a ruling by the state supreme court on direct appeal. Typically, the setting of an execution date (or the threat to set one) serves as the stimulus to trigger further legal action on behalf of the inmate. At that point, post-conviction relief is initiated and a stay of execution is sought. This ad hoc process varies from state to state, however, and it inevitably leaves some cases in limbo. It also places a premium on crisis management skills. Plainly, this situation suggests the utility of a statute of limitation, actually two statutes of limitations, one federal and the other state. Except for Florida's two year statute of limitations,8 I know of no other precedent for this approach. Do we need to document this problem in a more detailed fashion?

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8. Florida Rule of Criminal Procedure 3.850.

2. Another source of delay is the time (and judicial energy) expended in considering requests for stays of execution. In death penalty cases, why shouldn't the operating assumption be that no person will be executed until he or she has had at least one trip through the federal system pursuant to section 2254. If we can devise a way to move cases into federal court in a more timely and orderly manner, there would probably be no need for the practice of setting an execution date to force the prisoner to take his case to the next stage of review. In this vein, a statute of limitation, as I conceive it, would serve the function that the setting of an execution date (or its threat) now does. I don't know how much judicial time (or energy) this would save. Perhaps this is something we should try to document. But, it seems to me that any judicial time now devoted to considering requests for stays of execution during the first trip through post-conviction review---whether at the state or federal level---is entirely unnecessary.

3. Another means of saving time in the death penalty review process would be the elimination of multiple opportunities for Supreme Court review. Presently, a skilled advocate knows that in a death penalty case he or she can get at least three chances for Supreme Court review: (a) after state supreme court review on direct appeal; (b) after state supreme court review in the state habeas phase; and (c) after federal circuit court review in a section 2254 proceeding.

Why not shift the time for Supreme Court review to the end

of this process? Under this scheme, death penalty cases would have at least four stages of appellate or post-conviction review in the lower courts: (a) state direct appeal; (b) state post-conviction review (which would include trial level and appellate review); (c) federal district court review under section 2254; and (d) federal circuit court appellate review.

Defer Supreme Court review until the entire record has been developed in a death penalty case. Supreme Court review at this point would literally bring the case to an end and might enhance the sense of finality that ought to be associated with its actions. As it now stands, a petition for certiorari is a roll of the dice that costs nothing to try yet in every instance buys a capital defendant time which obviously is precious to him. But is the opportunity for multiple Supreme Court review essential to fairness in death penalty cases? I think not as long as we preserve the right to petition for certiorari when all lower court review---state and federal---is over.

Another advantage of modifying the certiorari rules in capital cases is that it would limit, perhaps end, the involvement of the Supreme Court Justices in reviewing applications for stays of execution. This responds to one of the Chief Justice's major concerns. It also is in line with my earlier point about devising a system which, as a matter of policy, does not contemplate the execution of a prisoner under death sentence until the completion of federal habeas review.

4. The total exhaustion requirement of Rose v. Lundy is

another source of delay in death penalty cases. Because of it, considerable time can be consumed sending a case back to the state system even on a single issue. Needless to say, an inmate under death sentence is not going to complain about this. Do the benefits of comity expressed in Rose outweigh the costs of delay at least in death penalty cases? Admittedly, the states have the option of waiving the total exhaustion rule, but should we pursue a legislative solution? A point to bear in mind here is that if the Committee ultimately recommends a system for the appointment of counsel in death penalty cases, concern about the effect of the total exhaustion rule will probably become moot. 9

5. Is there a need for review in section 2254 cases by the federal district courts? Shouldn't all post conviction evidentiary hearings and fact finding take place in the state system? If that can be achieved, wouldn't federal habeas review become tantamount to another stage of appellate review. District court involvement plainly can serve a screening function in death penalty cases, but its decision on the merits during an inmate's first trip through the federal system is never going to be final. Would there be a worthwhile time savings if the system were changed in death cases so that upon exhaustion of state remedies, an inmate took his case directly to the appropriate federal circuit court as an appeal? This idea was first raised by

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9. Counsel will have responsibility for developing the record factually and legally in the state courts. If something is not raised there, a federal court would not necessarily have to view the omission as a problem of failure to exhaust. It would probably be handled as a procedural default question.

Professor Meador; in my opinion, it has a lot of potential.

III. PRINCIPAL LEGISLATIVE PROPOSALS: 1973-1988

Attached is a list of habeas corpus reform bills (Appendix 1-12) introduced in Congress from 1973 to 1988. Every important approach to habeas corpus reform is included in this group. My survey shows that 10 different versions of habeas corpus reform legislation have been since 1973. As you might expect, most of the recently proposed reform bills have picked up earlier proposals giving later proposals an omnibus quality. A summary of these bills follows; copies of selected bills are in the appendix.

1. HR 5217 (introduced August 11, 1988) with one notable exception is the prime example of omnibus legislation that has been presented in Congress at least 13 times since 1982. (A 12) It proposes these changes: (a) a codification of Wainwright v. Sykes; makes it applicable to both section 2254 and 2255 cases; (b) a three year statute of limitation triggered by the exhaustion of state remedies; this provision is linked to prisoner access to an approved state funded legal assistance program; the statute of limitation will not run if there is a state imposed impediment preventing a prisoner from filing a section 2254 petition; a newly recognized right is asserted; or a

claim is based on newly discovered evidence; 10 (c) an amendment to section 2253 requiring a certificate of probable cause from a circuit judge in order for a prisoner to appeal; applicable in both section 2254 and 2255 cases; (d) a modification of the section 2254 exhaustion requirement to permit denial of the writ even if a petitioner has not exhausted on all claims; (e) a strengthening and simplification of the presumption of correctness which attaches to state findings of fact; the burden is on petitioner to rebut this presumption by clear and convincing evidence; (f) a codification of Stone v. Powell across the board to all constitutional claims fully and fairly adjudicated in state court.

The three year statute of limitation in HR 5217 is unusual in two respects. First, it links the application of any statute of limitation to the provision of legal assistance at state expense. None of the other 12 omnibus proposals do this. The only other bill that has linked a statute of limitation to the provision of counsel was a proposal introduced by Congressman Rodino in 1974 (HR 14534). Second, all of the other omnibus proposals have a one year rather than three year / statute of limitation.

2. HR 72 (introduced January 6, 1987) is illustrative of 6 bills that propose less sweeping habeas corpus reform than HR

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10. In my judgment, the triggering mechanism used in all of the statute of limitation proposals needs to be reconsidered. Using exhaustion of state remedies as the trigger will produce confusion because exhaustion occurs on an issue by issue basis at different times throughout state review of a criminal conviction.

5217. (A 21) Its provisions include: (a) an expansion of the federal magistrate's fact finding role in habeas cases; (b) a codification of Wainwright v. Sykes, but in slightly different language than that used in HR 5217; (c) a three year statute of limitation that is tolled only for newly recognized rights given retroactive application; and (d) a strengthening of the presumption of correctness afforded to state factfinding by simplifying and rewording section 2254(d).

3. S 211 (introduced January 6, 1987) is one of a kind. (A 25) It is limited to death penalty cases and would deny federal habeas corpus consideration of state death penalty cases unless the petitioner "makes a credible showing of innocence. . ." The restriction on access to federal court under section 2254 is tied to an adequate state system of direct appeal and post-conviction review. In other words, it is a bill that would codify Stone v. Powell, but only in death penalty cases.

4. HR 2613 (introduced May 23, 1985) is an odd bill that attempts to tighten the legal standards for determining whether a claim has been exhausted under section 2254. (A 28) Not very clearly drafted, this bill was introduced three different times by the same representative, Congressman Fiedler.

5. HR 2615 (introduced May 23, 1985) is a narrowly focused bill designed to prevent federal judges from granting bail to state prisoners while their section 2254 petitions are being considered. (A 30) I have been unaware that this was a problem. This bill was introduced twice by Congressman Fiedler.

6. HR 2614 (introduced May 23, 1985) would prevent a state prisoner from attacking a conviction based on a plea agreement. (A 31) Another proposal from Congressman Fiedler.

7. S 1817 (introduced September 25, 1979) is an example of six bills proposed between 1976 and 1979 that sought to reverse Stone v. Powell and to revive Fay v. Noia. (A 33)

8. S 567 (introduced January 26, 1973) is illustrative of five bills proposed in 1973 that: (a) amended section 2253 to require a circuit rather than district judge to issue the certificate of probable cause for appeal; (b) codified the procedural default principle now established under Wainwright v. Sykes and did so for both section 2254 and 2255 cases. (A 37)

9. HR 14534 (introduced May 1, 1974) proposes: (a) a clarification of the exhaustion requirement; and (b) gives a state prisoner 120 days after exhaustion of state remedies to file in federal court provided the state notifies the prisoner of the fact of exhaustion and offers him free legal assistance in deciding whether to apply for federal habeas corpus relief. (A 44)

10. HR 13918 (introduced April 2, 1974) would have required the federal to bear the costs of section 2254 litigation under certain circumstances. (A 49)

IV. CONCLUSION

Generally, the habeas corpus reform proposals have not been

tailored to address the special problems posed by death penalty cases. The most promising approach for the Committee would probably be to leave the substantive scope of federal habeas corpus review in death penalty cases as it now stands. The temptation to codify Wainwright v. Sykes should be resisted because such a proposal would trigger much more political resistance than it would be worth. Two other changes seem unobjectionable as reform measures---amending the certificate of probable cause provision of section 2253 and strengthening the presumption of correctness for state fact findings---but neither one would really be helpful in death penalty.

Two measures that would be helpful in death penalty cases are the statute of limitation proposal and the modification of the exhaustion doctrine to permit the denial of the writ in conjunction with unexhausted claims. The utility of both of these proposals would be enhanced by a mechanism providing for counsel in death penalty cases throughout the entire post conviction phase. Counsel would make the imposition of the death penalty in this country fairer in many respects. It would also make it possible for courts to ensure that death penalty cases move through the review process in a more structured and expeditious manner. The enforcement of procedural default rules and bars to successive petitions would be perceived as more just.

But, as beneficial as this might be, there is still a need to eliminate unnecessary steps in the death penalty review process: (a) all executions should be stayed automatically until

federal habeas review has been completed including the opportunity to file a certiorari petition to the Supreme Court; (b) each inmate under death sentence should be afforded a single chance to seek certiorari to the Supreme Court---after all lower court post conviction review; (c) subject to narrow exceptions, all fact finding in post conviction review should be handled in state court so that federal habeas review can bypass the district courts and go straight to the circuit courts.

I hope this effort is helpful and at the least provokes some lively discussion.

September 15, 1988

HABEAS CORPUS LEGISLATION in 100th CONGRESS

1. **H.R. 5217** (Introduced August 11, 1988)
Codifies cause and prejudice standard for procedurally defaulted claims and requires in addition that prisoner show constitutional violation "probably resulted in an erroneous conviction." Applies three year statute of limitations to petitions from prisoners who have access to a State-funded legal assistance program. Requires that a circuit justice or judge issue a certificate of probable cause for appeal. Requires exhaustion of claims in state court before a writ could be granted, but would allow a district court to deny a petition on the merits without exhaustion. Strengthens the present presumption in favor of the correctness of state court factual findings. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings.

2. **S. 1970 / H.R. 3777** (Introduced December 16. 1987)
Codifies cause and prejudice standard for defaulted claims and adds a "factually erroneous conviction" requirement. Applies one year statute of limitations to federal habeas claims, running from time state remedies exhausted. Requires certificate of probable cause from circuit justice or judge for appeal. Allows denial on merits of unexhausted claim. Strengthens presumption of correctness for state factual findings. No writ granted with respect to any claim fully and fairly litigated in state court.

3. **S. 1285 / H.R. 1333** (Introduced May 28, March 2, 1988)
Codifies cause and prejudice standard. Applies one year statute of limitations running from exhaustion of state remedies. Requires certificate of probable cause from circuit judge for appeal by prisoner; none required for appeal by state. Allows dismissal on merits of unexhausted claims. Strengthens presumption in favor of state factual findings.

4. **S. 211** (Introduced January 6, 1987)
Applies only to prisoners under death sentence. Requires "credible showing of factual innocence" before petition may be considered so long as state provides appellate review of conviction and a collateral review system.

5. **S. 260 / H.R. 273** (Introduced January 6, 1987)
Codifies cause and prejudice standard. Applies one year statute of limitations to run from exhaustion of state remedies. Requires certificate of probable cause from circuit justice or judge for appeal.

6. **H.R. 72** (Introduced January 6, 1987)
Codifies cause and prejudice standard. Applies three year statute of limitations to run from conclusion of direct appeal. Provides that state findings of fact "shall not be" relitigated unless the material facts "could not be" developed at the state proceeding.

99th Congress

1. S. 238 (Thurmond; Jan. 21, 1985)
Codifies the cause and prejudice standard with reference to procedural defaults. Applies a one year statute of limitations in sec. 2244 cases (two years in sec. 2255 cases), running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Strengthens presumption in favor of fact findings by the state court. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

2. S. 2301 (Thurmond; Ap. 8, 1986)
Codifies the cause and prejudice standard with reference to procedural defaults. Applies a one year statute of limitations in sec. 2244 cases (two years in sec. 2255 cases), running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Strengthens presumption in favor of fact findings by the state court. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

3. H.R. 274 (Bennett; Jan. 3, 1985)
Permits evidentiary hearing by a U.S. magistrate upon parties' consent. Codifies cause and prejudice standard. Applies a three year statute of limitations (sec. 2244) running from final state court judgment. Strictly limits the ability of federal courts to review state court findings of fact.

4. H.R. 275 (Bennett; Jan. 3, 1985)
Codifies the cause and prejudice standard. Applies a one year statute of limitations in sec. 2244 cases (two years in sec. 2255 cases), running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Strengthens presumption in favor of fact findings by the state court. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

5. H.R. 1127 (Lungren; Feb. 19, 1985)
Codifies the cause and prejudice standard with reference to procedural defaults. Applies a one year statute of limitations in sec. 2244 cases (two years in sec. 2255 cases), running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Strengthens presumption in favor of fact findings by the state court. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

6. H.R. 1204 (Darden; Feb. 21, 1985)
Codifies cause and prejudice standard with reference to procedural defaults.

Applies a *two* year statute of limitations running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state claims. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings. Strengthens presumption in favor of state court fact findings.

7. H.R. 2613 (Fiedler; May 23, 1985)
   Exhaustion occurs when the applicant presents each and every issue in state court. Failure to follow state procedural rules constitutes failure to present an issue. Failure of state court to cite authority does not create a presumption that the decision was not reached on the merits.

8. H.R. 2614 (Fiedler; May 23, 1985)
   Plea agreement on record rebuts conclusively any contrary allegations by the applicant.

9. H.R. 2615 (Fiedler; May 23, 1985)
   Federal court may not grant release pending conclusion of hearing.

98th Congress

1. S. 1716 (Thurmond; Aug. 1, 1983)

Codifies the cause and prejudice standard with reference to procedural defaults. Applies a one year statute of limitations in sec. 2244 cases (two years in sec. 2255 cases), running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Strengthens presumption in favor of fact findings by the state court. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

2. H.R. 2238 (Lungren; March 22, 1983)

Codifies the cause and prejudice standard with reference to procedural defaults. Applies a one year statute of limitations in sec. 2244 cases (two years in sec. 2255 cases), running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings. ~~*Note: does not alter presumption to favor state court findings of fact.*~~

3. H.R. 4409 (Fiedler; Nov. 16, 1983)

Federal courts may not release applicant pending conclusion of suit.

4. H.R. 4410 (Fiedler; Nov. 16, 1983)

Plea agreement on record conclusively rebuts contrary allegations by applicant.

5. H.R. 4411 (Fiedler; Nov. 16, 1983)

Exhaustion occurs when the applicant presents each and every issue in state court. Failure to follow state procedural rules constitutes failure to present an issue. Failure of state court to cite authority does not create a presumption that the decision was not reached on the merits.

97th Congress

1. S. 653 (Thurmond; Feb. 16, 1981)
Permits U.S. magistrate to conduct evidentiary hearings with parties' consent. Codifies cause and prejudice standard. Applies a three year statute of limitations running from final state court judgment. Strictly limits the ability of a federal court to conduct evidentiary hearings.

2. S. 2216 (Thurmond; Feb. 22, 1982)
Codifies the cause and prejudice standard with reference to procedural defaults. Applies a one year statute of limitations in sec. 2244 cases (two years in sec. 2255 cases), running from the exhaustion of state remedies. Requires certificate of probable cause from a circuit court judge for prisoner appeals; none required for appeal by the state. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Strengthens presumption in favor of fact findings by the state court. Provides that no writ shall be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

3. H.R. 134 (Bennett; Jan. 5, 1981)
Permits a U.S. magistrate to conduct evidentiary hearings with parties' consent. Codifies cause and prejudice standard. Applies a three year statute of limitations running from final state court judgment. Strictly limits fact finding ability of federal courts.

4. H.R. 3416 (Bennett; May 4, 1981)
Permits a U.S. magistrate to conduct evidentiary hearings with parties' consent. Codifies cause and prejudice standard. Applies a three year statute of limitations running from final state court judgment. Strictly limits fact finding ability of federal courts.

5. H.R. 4419 (Brinkley; Sept. 9, 1981)
Permits a U.S. magistrate to conduct evidentiary hearings with parties' consent. Codifies cause and prejudice standard. Applies a three year statute of limitations running from final state court judgment. Strictly limits fact finding ability of federal courts.

6. H.R. 4425 (Fiedler; Sept. 9, 1981)
Plea agreement on record conclusively rebuts contrary allegations of applicant.

7. H.R. 4426 (Fiedler; Sept. 9, 1981)
Exhaustion occurs when the applicant presents each and every issue in state court. Failure to follow state procedural rules constitutes failure to present an issue. Failure of state court to cite authority does not create a presumption that the decision was not reached on the merits.

8. H.R. 6050 (Lungren; Ap. 1, 1982)
Codifies cause and prejudice standard with reference to procedural defaults. Applies a one year statute of limitations in sec. 2244 cases (2 years in sec. 2255 cases) running from the exhaustion of state remedies. Requires exhaustion of state remedies, but permits dismissal on the merits notwithstanding failure to exhaust state remedies. Strengthens presumption in favor of fact findings by the state court. Provides that no writ shall be granted with respect to any

claim that has been fully and fairly adjudicated in state proceedings.

96th Congress

1. S. 1817 (Nelson; June 21, 1979)
Provides that no writ shall be denied on the grounds that the applicant had a full and fair opportunity to have claim decided in state court. Failure to raise claim at trial is not a bar unless right was knowingly waived.

2. H.R. 2201 (Kastenmeier; Feb. 15, 1979)
Provides that no writ shall be denied on the grounds that the applicant had a full and fair opportunity to have claim decided in state court. ("Notwithstanding any other provision . . . prescribed by the Supreme Court."). Failure to raise claim at trial is not a bar unless right was knowingly waived.

3. H.R. 4879 (Gonzalez; July 20, 1979)
Provides that no writ shall be denied on the grounds that the applicant had a full and fair opportunity to have claim decided in state court. ("Notwithstanding any other provision . . . prescribed by the Supreme Court."). Failure to raise claim at trial is not a bar unless right was knowingly waived.

95th Congress

1. S. 1314 (Nelson; Feb. 21, 1977)
   Provides that no writ shall be denied on the grounds that the applicant had a full and fair opportunity to have claim decided in state court. Failure to raise claim at trial is not a bar unless right was knowingly waived.

2. H.R. 5631 (Kastenmeier; Mar. 28, 1977)
   Provides that no writ shall be denied on the grounds that the applicant had a full and fair opportunity to have claim decided in state court. ("Notwithstanding any other provision . . . prescribed by the Supreme Court."). Failure to raise claim at trial is not a bar unless right was knowingly waived.

3. H.R. 5776 (Gonzalez; Mar. 30, 1977)
   Provides that the exclusionary rule apply to sec. 2254 actions.

94th Congress

1. S. 3886 (Nelson; Sept. 30, 1976)

Provides that no writ shall be denied on the grounds that the applicant had a full and fair opportunity to have claim decided in state court. Failure to raise claim at trial is not a bar unless right was knowingly waived.

2. H.R. 245 (Downing; Jan. 14, 1975)

Federal court may grant habeas only where the claimed constitutional violation was not, and cannot, be raised in state court; where the right has as its primary purpose the protection of the reliability of the factfinding process; and otherwise a different result would have accrued. Limits ability to assert incompetence of counsel as grounds for habeas.

93rd Congress

1. S. 567 (Hruska; Jan. 26, 1973)
Federal court may grant habeas under sec. 2254 only where the claimed constitutional violation was not, and cannot, be raised in state court; where the right has as its primary purpose the protection of the reliability of the factfinding process; and otherwise a different result would have accrued or the applicant is in custody in violation of the constitution. Requires that the applicant first apply to the trial court for relief, unless such a course would be ineffective. Requires a certificate of probable cause from a circuit judge for a prisoner appeal; none required for appeal by the state.

2. H.R. 3329 (Wiggins; Jan. 30, 1973)
Federal court may grant habeas under sec. 2254 only where the claimed constitutional violation was not, and cannot, be raised in state court; where the right has as its primary purpose the protection of the reliability of the factfinding process; and otherwise a different result would have accrued.

3. H.R. 6573 (Mayne; Ap. 4, 1973)
Federal court may grant habeas under sec. 2254 only where the claimed constitutional violation was not, and cannot, be raised in state court; where the right has as its primary purpose the protection of the reliability of the factfinding process; and otherwise a different result would have accrued.

4. H.R. 7084 (Downing; Ap. 16, 1973)
Federal court may grant habeas under sec. 2254 only where the claimed constitutional violation was not, and cannot, be raised in state court; where the right has as its primary purpose the protection of the reliability of the factfinding process; and otherwise a different result would have accrued.

5. H.R. 7580 (Wiggins; May 7, 1973)
Requires that a prisoner apply for relief first to the trial court. Requires certificate of probable cause for a prisoner appeal under sec. 2255; none required for appeal by the state. Federal court may grant habeas under sec. 2255 only where the claimed constitutional violation was not, and cannot, be raised in state court; where the right has as its primary purpose the protection of the reliability of the factfinding process; and otherwise a different result would have accrued.

6. H.R. 13918 (Perkins; Ap. 2, 1974)
U.S. bears the costs of a habeas proceeding to the extent the applicant cannot afford.

7. H.R. 14534 (Rodino; May 1, 1974)
Applicant must exhaust state remedies. Three month statute of limitations, provided that the state notify the applicant when the period begins running and offers legal assistance. State has burden to prove compliance with notice procedures. If an applicant seeks habeas after five years, state has presumption that it would be prejudiced by the release.

100TH CONGRESS
2D SESSION

H. R. 5217

To reform procedures for collateral review of criminal judgments.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 11, 1988

Mr. GRANT introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To reform procedures for collateral review of criminal judgments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This title may be cited as the "Reform of Collateral Review of Criminal Judgments Act of 1988".

SEC. 2. FAILURE TO STATE CLAIM; PERIOD OF LIMITATION.

Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsections:

"(d) When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of proce-

dure, the claim shall not be entertained in an application for a writ of habeas corpus unless—

"(1) actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted; and

"(2)(A) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(B) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable;

"(C) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default; or

"(D) a constitutional violation asserted in the claim probably resulted in a factually erroneous conviction or a sentence predicated on an erroneous factual determination.

"(e)(1) A three-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court who, with respect to the claim, has access to an approved State-funded legal assistance program. The limitation period shall run from the latest of the following times:

"(A) The time at which State remedies are exhausted.

"(B) The time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action.

"(C) The time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable.

"(D) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.

"(2) As used in this section, the term 'approved State-funded legal assistance program' means a State-funded legal assistance program that, as determined by the Attorney General, provides an adequate level of legal representation for persons with applications referred to in paragraph (1).

"(f) An application under this section shall contain all claims known to the applicant at the time the application is made.".

SEC. 3. APPEAL.

Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"(a) In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"(b) There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"(c) An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 4. AMENDMENT TO RULES OF APPELLATE PROCEDURE RELATING TO APPEAL.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"Rule 22. Habeas Corpus and Section 2255 Proceedings

"(a) APPLICATION FOR AN ORIGINAL WRIT OF HABEAS CORPUS.—An application for a writ of habeas corpus shall be made to the appropriate district court. If ap-

plication is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) NECESSITY OF CERTIFICATE OF PROBABLE CAUSE FOR APPEAL.—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representatives, a certificate of probable cause is not required.".

SEC. 5. SECTION 2254 AMENDMENTS.

(a) SUBSECTION (b) AMENDMENT.—Subsection (b) of section 2254 of title 28, United States Code, is amended to read as follows:

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

(b) EFFECT OF STATE DETERMINATION OF FACTUAL ISSUE.—Section 2254 of title 28, United States Code, is amended by striking out subsection (d) and inserting in lieu thereof the following new subsection:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence.".

(c) EFFECT OF STATE ADJUDICATION OF CLAIM.—Section 2254 of title 28, United States Code, is amended by inserting after subsection (c) the following new subsection:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings.".

(d) CONFORMING REDESIGNATION.—Section 2254 of title 28, United States Code, is amended by redesignating subsections (e) and (f) as subsections (f) and (g), respectively.

SEC. 3. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended—

(1) by striking out the second paragraph and the penultimate paragraph; and

(2) by adding at the end the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless—

"(1) actual prejudice resulted to the movant from the alleged denial of the right asserted; and

"(2)(A) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(B) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable;

"(C) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default; or

"(D) a constitutional violation asserted in the claim probably resulted in a factually erroneous conviction or a sentence predicated on an erroneous factual determination.

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) The time at which the judgment of conviction becomes final.

"(2) The time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action.

"(3) The time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable.

"(4) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

O

100TH CONGRESS
1ST SESSION

H. R. 72

To amend title 28 of the United States Code to change the types of hearings which a magistrate may conduct, and to change the jurisdiction for the consideration of, and the standards for the granting of, writs of habeas corpus by Federal courts upon the application of persons in custody pursuant to judgments of State courts.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 1987

Mr. BENNETT (for himself and Mr. CHAPPELL) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28 of the United States Code to change the types of hearings which a magistrate may conduct, and to change the jurisdiction for the consideration of, and the standards for the granting of, writs of habeas corpus by Federal courts upon the application of persons in custody pursuant to judgments of State courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 636(b)(1)(B) of title 28, United States Code, is amended—

(1) by inserting "except evidentiary hearings in cases brought under section 2254 of this title," after "evidentiary hearings,", and

(2) by adding at the end "A United States magistrate may conduct evidentiary hearings in cases brought under section 2254 of this title upon the written consent of the parties.".

SEC. 2. Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsections:

"(d) A petition filed in a habeas corpus proceeding in behalf of a person in custody pursuant to the judgment of a State court, raising a Federal question which was not properly presented under State law in the State court proceeding both at trial and on direct appeal, or which was presented in a collateral proceeding but not disposed of exclusively on the merits, shall not be considered unless the petitioner establishes that—

"(1)(A) the Federal right asserted did not exist at the time of the trial and such right has been determined to be retroactive in its application, or

"(B) the State court procedures precluded the petitioner from asserting the right sought to be litigated, or

"(C) the prosecutorial authorities or a judicial officer suppressed evidence from the petitioner or his at-

torney which prevented the claim from being raised and disposed of, or

"(D) material and controlling facts upon which the claim is predicated were not known to the petitioner or his attorney and could not have been ascertained by the exercise of reasonable diligence; and

"(2) the alleged violation of the Federal right was prejudicial to the petitioner as to his guilt or punishment.

"(e) No petition filed in behalf of a person in custody pursuant to the judgment of a State court shall be considered or determined by a judge or court of the United States if it is filed later than three years after the date on which the State court judgment and sentence became final under State law or the date on which appellate review of such judgment and sentence has been concluded, unless the Federal right asserted did not exist at the time of the State court trial and such right has been determined to be retroactive, in which case the petition may be entertained not later than three years after the date on which such right was determined to exist.".

SEC. 3. Section 2254(d) of title 28, United States Code, is amended—

(1) by striking out "be presumed to be correct" and inserting in lieu thereof "not be redetermined or relitigated by a judge or court of the United States",

(2) by striking out "were not adequately" in paragraph (3) and inserting in lieu thereof "could not be",

(3) by striking out paragraphs (6) and (7),

(4) by redesignating paragraph (8) as paragraph (6), and

(5) by striking out "on a consideration of such part" and all that follows and inserting in lieu thereof the following: "viewing the record in the light most favorable to the prosecution concludes that a rational trier of fact could not have made such finding.

No evidentiary hearing may be conducted in the Federal court when the State court records demonstrate that such factual issue was litigated and determined, unless the existence of one or more of the circumstances respectively set forth in paragraphs (1) through (6) is shown by the applicant.".

SEC. 4. The amendments made by this Act shall take effect upon the date of the enactment of this Act.

O

100TH CONGRESS
1ST SESSION

S. 211

To amend section 2254 of title 28, United States Code, to provide specific procedures for the consideration of writs of habeas corpus filed on behalf of individuals under a sentence of death.

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1987

Mr. SYMMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend section 2254 of title 28, United States Code, to provide specific procedures for the consideration of writs of habeas corpus filed on behalf of individuals under a sentence of death.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2254 of title 28, United States Code, is amended by adding at the end thereof the following:

"(g)(1) An application for a writ of habeas corpus on behalf of a person in custody under a sentence of death pursuant to a judgment of a State court shall not be considered by any Federal court unless the applicant makes a credible

showing of innocence by affidavit or other instrument taken upon oath or affirmation. An assertion of innocence shall not be deemed credible unless—

"(A) if based upon recanted testimony given under oath, the confession or admission of another or a claim of alibi, the recantation, confession, admission, or claim of alibi is supported by substantial evidence of its truthfulness;

"(B) it is shown that material evidence on which the applicant's conviction was based was clearly false; or

"(C) there exists competent, admissible evidence of the applicant's innocence that was not presented at the time of applicant's trial.

The showings required by subparagraphs (A) through (C) shall be under oath or affirmation and shall state all known supporting facts in detail.

"(2) The limitation on Federal review of a State conviction resulting in death sentences set forth in paragraph (1) shall not apply if—

"(A) the State does not provide by law for a right to appeal convictions resulting in death sentences and appellate review of death sentences; or

"(B) the State provides a right to appeal capital convictions and appellate review of death sentences,

but does not provide a procedure for collateral review of State proceedings resulting in sentences of death. Nothing in this paragraph shall authorize a Federal court to review claims procedurally forfeited in State courts.

"(3) No stay of execution granted for the purpose of making possible the showing required by paragraph (1) shall exceed 60 days in length unless the applicant for a stay shows that there is reason to believe that a credible showing of innocence can be made and that such showing could not be made within the time allowed, in which case the district court may grant an additional stay of up to 60 days duration.".

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99TH CONGRESS
1ST SESSION

H. R. 2613

To amend section 2254 of title 28 of the United States Code to limit Federal habeas corpus proceedings based on State convictions in certain cases where State courts remedies may not be properly exhausted.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1985

Ms. FIEDLER introduced the following bill: which was referred to the Committee on the Judiciary

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A BILL

To amend section 2254 of title 28 of the United States Code to limit Federal habeas corpus proceedings based on State convictions in certain cases where State courts remedies may not be properly exhausted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2254(c) of title 28 of the United States Code is amended by adding at the end the following: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section unless the applicant shows that each issue in the proceeding under this section was fairly presented by the applicant in the

State court, and failure to follow State procedural rules is a failure to fairly present an issue for the purposes of this sentence. Failure by a State court to cite authorities for a decision against the applicant does not create a presumption that such decision was on the merits.".

O

99TH CONGRESS
1ST SESSION

H. R. 2615

To amend section 2254 of title 28 of the United States Code to limit release of State prisoners by Federal courts pending Federal habeas corpus consideration.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1985

MR. FIEDLER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend section 2254 of title 28 of the United States Code to limit release of State prisoners by Federal courts pending Federal habeas corpus consideration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2254 of title 28 of the United States Code is amended by adding at the end the following new subsection:

"(g) No court of the United States shall have jurisdiction to grant bail or release on recognizance pending the conclusion of a proceeding under this section to an inmate incarcerated under a State conviction.".

○

99TH CONGRESS
1ST SESSION

H. R. 2614

To amend section 2254 of title 28 of the United States Code to provide for conclusive rebuttal of certain allegations made by applicants for Federal habeas corpus if the record of State proceedings contradicts such allegations.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1985

Ms. FIEDLER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend section 2254 of title 28 of the United States Code to provide for conclusive rebuttal of certain allegations made by applicants for Federal habeas corpus if the record of State proceedings contradicts such allegations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2254(d) of title 28 of the United States Code is amended by adding at the end the following: "If the record of the State proceeding leading to the judgment which is subject to an application under this section sets forth a plea agreement between the applicant and the State and a statement by the applicant that no other promise or agreement was made

with respect to the plea, such record shall be deemed to rebut conclusively any allegations of the applicant contrary to such record.".

O

96TH CONGRESS
1ST SESSION

S. 1817

To amend title 28, United States Code, to provide that State prisoners and Federal prisoners shall not be denied Federal habeas corpus relief on the ground that such prisoners were previously afforded a full and fair opportunity to litigate their claims, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 25 (legislative day, JUNE 21), 1979

Mr. NELSON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to provide that State prisoners and Federal prisoners shall not be denied Federal habeas corpus relief on the ground that such prisoners were previously afforded a full and fair opportunity to litigate their claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2254 of title 28, United States Code, is amended:

(1) by redesignating subsections (b), (c), (d), (e), and (f) as subsections (c), (d), (e), (f), and (g), respectively;

(2) by adding immediately after subsection (a) the following new subsection:

"(b) No application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall be denied on the ground that such State afforded the applicant a full and fair opportunity to raise and have decided his claim that his rights, privileges, or immunities under the Constitution or laws or treaties of the United States were violated by officers of such State, or any agency or political subdivision thereof, in connection with the investigation, apprehension, processing, or conviction of such person or any appeal relating to the judgment of such State court.";

(3) by inserting "(1)" immediately before "An" in subsection (d), as redesignated by paragraph (1) of this section; and

(4) by adding at the end of subsection (d), as redesignated in paragraph (1) of this section, the following:

"(2) No application for a writ of habeas corpus shall be denied under this section on the ground that the applicant did not raise the claim at trial or in any pretrial proceeding

unless after a hearing the court finds that such applicant, after consultation with competent counsel or after a knowing and understanding waiver of the right to counsel, understandingly and knowingly forwent the privilege of seeking to vindicate his claim in the State courts.".

SEC. 2. Section 2255 of title 28, United States Code, is amended—

(1) by adding immediately after the second paragraph the following:

"No motion for such relief shall be denied on the ground that such prisoner was afforded a full and fair opportunity to raise and have decided his claim that his rights, privileges, or immunities under the Constitution or laws or treaties of the United States were violated by officers of the Federal Government or any agency or political subdivision thereof, in connection with the investigation, apprehension, processing, or conviction of such prisoner or any appeal relating to the sentence of such court."; and

(2) by adding after the fifth paragraph of such section, taking into account the new paragraph added by paragraph (1) of this section, the following:

"No such motion shall be denied on the ground that the prisoner did not raise the claim at trial or in any pretrial proceeding unless after a hearing the court finds that such applicant, after consultation with competent counsel or after

a knowing and understanding waiver of the right to counsel, understandingly and knowingly forwent the privilege of seeking to vindicate his claim in such trial court or in such pretrial proceedings.".

O

93D CONGRESS
1ST SESSION

S. 567

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1973

Mr. HRUSKA (for himself and Mr. SCOTT of Pennsylvania) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To revise title 28 of the United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Habeas Corpus Act Amendments of 1973".

SEC. 2. That chapter 153 of title 28 of the United States Code, is amended—

(a) by amending sections 2253 to 2255 to read as follows:

"§ 2253. Appeal; State and Federal custody

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the

final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right to appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may be taken to the court of appeals from the final order in a habeas corpus proceeding or a proceeding under section 2255 of this title only if the court of appeals issues a certificate of probable cause: *Provided, however,* That the certificate need not issue in order for a State or the Federal Government to appeal the final order.

"§ 2254. State custody; remedies in State courts

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that either:

"(1) (i) he is in custody in violation of the Constitution of the United States, and

"(ii) the claimed constitutional violation presents a substantial question—

"(aa) which was not theretofore raised and determined, and

"(bb) which there was no fair and adequate opportunity theretofore to raise and have determined, and

"(cc) which cannot thereafter be raised and determined in the State court, and

"(iii) the claimed constitutional violation is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction: *Provided,* That, insofar as any constitutional claim of incompetency of counsel is based on conduct of the counsel with respect to constitutional claims barred by the previous language of this subsection, the claim of incompetency of counsel shall to that extent be likewise barred, and

"(iv) the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred;

or

"(2) he is in custody in violation of the laws or treaties of the United States.

"(b) A copy of the official records of the State court,

duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing a factual determination by the State court, shall be admissible in the Federal court proceeding.

"§ 2255. Federal custody; remedies on motion attacking sentence

"(a) A prisoner in custody under sentence of a court established by Act of Congress may move the court which imposed the sentence to vacate, set aside, or correct the sentence, if—

"(1) (A) he is in custody in violation of the Constitution of the United States, and

"(B) the claimed constitutional violation presents a substantial question—

"(i) which was not theretofore raised and determined, and

"(ii) which there was no fair and adequate opportunity theretofore to raise and have determined, and

"(C) the claimed constitutional violation is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction: *Provided*, That insofar as any constitutional claim of incompetency of counsel is based

on conduct of the counsel with respect to constitutional claims barred by the previous language of this subsection, the claim of incompetency of counsel shall to that extent be likewise barred, and

"(D) the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred; or

"(2) he is in custody in violation of the laws of the United States; or

"(3) the sentence was imposed in violation of the laws of the United States; or

"(4) the court was without jurisdiction to impose such sentence; or

"(5) the sentence was in excess of the maximum authorization by law; or

"(6) the sentence is otherwise subject to collateral attack.

"(b) A motion for such relief may be made at any time.

"(c) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that

the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been a denial or infringement of the constitutional rights of the prisoner as described in subsection (a) of this section, the court shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"(d) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"(e) The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"(f) An appeal may be taken to the court of appeals from the order entered on the motion in accordance with section 2253 of this title.

"(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

(b) by amending the analysis at the beginning of the chapter by deleting

"2253. Appeal."

and inserting in lieu thereof

"2253. Appeal; State and Federal custody.".

93D CONGRESS
2D SESSION

H. R. 14534

IN THE HOUSE OF REPRESENTATIVES

MAY 1, 1974

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 2254, title 28, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2254 of title 28 of the United States Code is amended—

(1) by striking subsections (b) and (c) and inserting in lieu thereof the following:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State as to all issues which he wishes to raise in Federal court, or that there is either an absence of available State

corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant who has not presented an issue to the courts of the State shall not be deemed to have exhausted the State court remedies as to that issue within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the issue presented. If a habeas corpus application presents an issue to the highest State court, which enters a decision on that issue adverse to the applicant, and if the applicant does not petition the United States Supreme Court for a writ of certiorari, he will be deemed to have exhausted his remedies as to that issue on the day following the final day on which he can seek such a writ of certiorari. If the applicant petitions for a writ of certiorari from the United States Supreme Court, he will be deemed to have exhausted his remedies on the day when that petition is denied or, if it is granted, on the day of the entry of a decision adverse to the applicant.

"(d) An application for Federal habeas corpus relief shall be barred unless such application is made within one hundred and twenty days following the date upon which the State notifies the potential applicant of the fact that he has exhausted his State remedies: *Provided*, That:

"(1) State procedures have afforded the applicant a fair opportunity to raise and have adjudicated the Federal question in State court; and

"(2) After the date of the exhaustion of State remedies the State informs the applicant that he has exhausted his State remedies, that Federal habeas corpus relief may be available if he applies within the one hundred and twenty-day filing period, and that, if he is indigent, he is entitled to free legal assistance in deciding whether to apply for Federal habeas corpus relief.

"(e) If the State seeks to dismiss a habeas corpus proceeding brought pursuant to this section on the ground that it was commenced after the expiration of the one hundred and twenty-day filing period, the State has the burden of proving compliance with the requirements of subdivision (d).

"(f) If a habeas corpus applicant who has received notice that he has exhausted his State remedies as to one or more issues determines that there are other issues, cognizable in a Federal habeas corpus proceeding, as to which he has not exhausted his State remedies, he may move the Federal court in which the petition is pending to order that the applicant's one hundred and twenty-day filing period commence on the date of notice of exhaustion as to those remaining issues. The court shall grant a reasonable period of time within

which to file such an action in State court unless it appears that the remaining issues present no colorable Federal claim.

"(g) The one hundred and twenty-day period shall not apply if—

"(1) the requirements of subdivision (d) were not complied with; or

"(2) the application is based on grounds of which the applicant had no knowledge and of which by the exercise of due diligence he could not have had knowledge prior to the expiration of his one hundred and twenty-day filing period; or

"(3) the application is based on grounds which, prior to the expiration of the one-hundred-and-twenty-day filing period, would not have entitled the applicant to relief and which, because of a change in law, do afford him a colorable claim for relief at the time of the filing of the application.

"(h) A late application may be filed under the conditions specified in subdivision (g), at any time: *Provided*, That the court may dismiss an application if it appears that there was a substantial delay in filing, that there is no reasonable justification for the delay, and that the delay has caused serious prejudice to the State. If the application is

filed more than five years after the imposition of sentence, there shall be a rebuttable presumption of serious prejudice to the State."

(2) by redesignating subsections (d), (e), and (f), as subsections (i), (j), and (k).

93D CONGRESS
2D SESSION

H. R. 13918

IN THE HOUSE OF REPRESENTATIVES

APRIL 2, 1974

Mr. PERKINS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to provide for Federal payment of certain expenses of States in connection with habeas corpus proceedings in Federal courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2254 (c) of title 28 of the United States Code is amended by inserting immediately after the second sentence the following: "Whenever the State produces any part of the record under this subsection, the expense of such production shall be borne by the United States.".

SEC. 2. Section 2254 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection:

I

"(g) Whenever a proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court terminates adversely to the applicant, the United States shall bear the costs of court, including all witness and marshal fees and allowances, of such proceeding to the extent such costs are not recoverable from the applicant."

93D CONGRESS
2D SESSION

H. R. 13918

A BILL

To amend title 28 of the United States Code to provide for Federal payment of certain expenses of States in connection with habeas corpus proceedings in Federal courts.

By Mr. PERKINS

APRIL 2, 1974

Referred to the Committee on the Judiciary