SUSPENDING JUSTICE: THE UNCONSTITUTIONALITY OF THE PROPOSED SIX-MONTH TIME LIMIT ON THE FILING OF HABEAS CORPUS PETITIONS BY STATE DEATH ROW INMATES

MICHAEL MELLO*
DONNA DUFFY**

* Associate Professor, Vermont Law School. J.D., 1982, University of Virginia; B.A., 1979, Mary Washington College. In the interest of full disclosure, I note that between 1983 and 1986 I was an assistant public defender in Florida, where my clients were all condemned inmates. I presently represent three death row inmates. In 1989 I testified before the United States Senate Judiciary Committee in opposition to proposed legislation expanding the scope of the federal death penalty.

** Law Clerk for the Honorable Albert W. Coffrin, Senior Judge for the United States District Court for the District of Vermont. J.D., 1990, Vermont Law School; B.S., 1979, University of Wisconsin — Stevens Point.

We are grateful to Susan Apel, Pamela J. Stephens, and Nancy Levit, who read and commented helpfully on the manuscript.

Due to our stylistic preferences, at our request words such as "article," "framers," "committee," "task force," and "act" have not been capitalized, contrary to the conventions of the *Review of Law & Social Change.*

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.[1]

For the first time in the history of the United States, there is a strong likelihood that Congress will encumber the Great Writ of habeas corpus with a statute of limitations. Two time limit bills were given serious consideration in the 101st Congress. This article will focus on the proposed six-month time limit recommended by the so-called Powell committee on habeas reform.[2] Following a discussion of the Powell committee's proposals and a critique of the committee's reasoning, this article traces the history of the suspension clause of the United States Constitution and argues that the clause applies to state as well as federal prisoners. Measuring the suspension clause against the Powell committee's time limits, this article concludes (1) that any absolute time limit probably violates the clause, and (2) that the Powell committee's six-month limit definitely violates the clause.

The constitutionality of the six-month time limit is a matter of literally vital importance. We wonder, however, whether our topic is a matter of academic interest only, because it has been eclipsed by the Supreme Court's 1989 and 1990 "retroactivity" decisions.[3] These cases, taken together, appear to stand for the proposition that the right of habeas will be unavailable to inmates basing their constitutional claims on "new rules" articulated in decisions rendered after the date their convictions become final on direct appeal. A "new rule" is defined as any decision not "dictated" by precedent or about which "reasonable minds" could differ.[4] This good faith exception[5] to the habeas statute is sophistry, but it could have a devastating impact on death

1. U.S. CONST. art. I, § 9, cl. 2 (the suspension clause).

2. Although the Powell committee's report is no longer being debated in Congress, subsequent bills were proposed in both the Senate and House that propose time limits for bringing habeas corpus proceedings. The Thurmond-Specter bill, Amendment 1687 to S. 1970, 101st Cong., 2d Sess., 136 CONG. REC. S6805-07 (daily ed. May 23, 1990), adopted almost all of the Powell committee's proposal. Another bill, which was introduced by Senator Biden, S. 1970, 101st Cong., 1st Sess., 135 CONG. REC. S16,725-34 (daily ed. Nov. 21, 1989), had a statute of limitations of one year. In addition, the Hyde Amendment to the House crime control bill, H.R. 5269, 101st Cong., 2d Sess., 136 CONG. REC. H8758-02 (daily ed. Oct. 3, 1990), was very similar to the Powell report. *See* 136 CONG. REC. H8876-81, D1255 (daily ed. Oct. 4, 1990). For a comprehensive treatment of these bills and an explanation of why they are significant despite not being included in a 1990 bill approved by the Senate and House, see Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1677, 1704-14 (1990). Even though the proposal of the Powell committee is no longer on the Senate floor, the following discussion of this committee's report and the constitutionality of a statute of limitations in this area is still very relevant.

3. Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Teague v. Lane, 109 S. Ct. 1060 (1989). *See generally* Blume & Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1990-91); Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415 (1990-91).

4. *Butler*, 110 S. Ct. at 1216-18.

5. The Court gave a chilling *cf.* citation to United States v. Leon, 468 U.S. 897 (1984), the case that created a good faith exception to the fourth amendment exclusionary rule. The cita-

row inmates who are confined in violation of the Constitution. The retroactivity decisions craft an elegant box. If the inmate must rely on a "new rule," then she loses under the retroactivity holdings. But if not relying on a new rule, then how can an inmate explain why her claims failed in state court?

While the Powell committee's proposed six-month time limit would significantly impair condemned inmates' access to federal review, the retroactivity cases may effectively foreclose federal review altogether except in those rare cases where an inmate can show that the state courts did not act in good faith in rejecting her claims. At least the time limits permit condemned inmates to get through the courthouse door. But after the retroactivity decisions, it may not matter. The retroactivity cases appear to have cemented a barrier far stronger than any time limit.

I.
HOSTILITY TO HABEAS: THE POWELL COMMITTEE AND TIME LIMITS ON HABEAS

> "[Federal] *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved [it] opens the inquiry whether they have been more than an empty shell." Foremost among these [underlying purposes of the habeas writ] is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the [state court] proceedings.[6]

Events confirm Professor Shapiro's view that the habeas corpus debate "goes on, and is likely to continue, no matter what course legislation may take, so long as there are state prisoners and federal courts."[7] The hostility towards allowing a state prisoner broad access to federal habeas corpus remains undiminished. The reasons for this hostility include: the perceived waste of judicial resources on stale or frivolous claims; federal review of state court rulings as an affront to the state court system; and the lack of finality reducing the deterrent effect of conviction.[8] The Supreme Court has been re-

---

tion could be a clue as to what the Court ultimately has in mind for habeas — a good faith exception to habeas as well.

6. *Parks*, 110 S. Ct. at 1260 (quoting Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)).

7. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 324 (1973).

8. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 259-66 (1973) (Powell, J., concurring); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 614-15 (1981) (brief summary of pros and cons of collateral relitigation of federal constitutional issues); Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and State Correctional Programs*, 85 MICH. L. REV. 570, 571 (1986) [hereinafter Remington, *Availability of Federal Habeas Corpus*]; Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339, 340-41 (1988) [hereinafter Remington, *Access to Federal*

ceptive to these criticisms. Starting in 1976, the Burger Court began radically to restrict state prisoner access to federal habeas corpus.[9] With less success, proponents of restrictions on access to federal habeas corpus have pressed their cause in Congress for the last thirty-five years.[10]

In addition to dissatisfaction with state prisoners' access to federal habeas in general, certain Supreme Court Justices, past and present, have been particularly dissatisfied with state death row inmates' access to federal habeas. Former Associate Justice Lewis Powell has been a long-time critic.[11] Recently he reiterated his criticisms of federal habeas procedure for capital cases by stating:

Habeas Corpus]; Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 U. COLO. L. REV. 167, 180-81 (1988); Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 999, 1010-11 (1985).

For example, in Engle v. Isaac, 456 U.S. 107, 127-29 & n.33 (1982), Justice O'Connor wrote that state prisoner access to federal habeas corpus "undermines" the finality of judgments, "degrades" the "prominence" of the trial itself, and may, in some cases, "frustrate" the state's interest in punishing the guilty.

9. Over the last 20 years, the Supreme Court has imposed many restrictions, including barring state prisoners' access to federal habeas for fourth amendment violations unless the prisoner demonstrates that she was deprived of a full and fair hearing at the state level. Stone v. Powell, 428 U.S. 465 (1976). The federal courts also will not review a state prisoner's habeas claim if she was barred from raising the constitutional claim in the state court system because of a procedural default, unless the prisoner can show cause for, and prejudice from, the default. Wainwright v. Sykes, 433 U.S. 72 (1977). For general discussions of Supreme Court decisions limiting access to federal habeas corpus, see 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 27 (1984); Remington, *Availability of Federal Habeas Corpus*, *supra* note 8, at 573-74.

In 1983, the Court made clear its view that habeas corpus had a limited role even in capital cases, stating that

> when the process of direct review — which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

10. For a summary of the three-decade history of proposed legislation to limit federal habeas, see OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS, TRUTH IN CRIMINAL JUSTICE REP. NO. 7 (May 27, 1988); L. YACKLE, POSTCONVICTION REMEDIES § 19 (Supp. 1990); Remington, *Access to Federal Habeas Corpus*, *supra* note 8, at 340 n.2 & 343-44.

The more modern proposals for limiting state prisoner access to federal habeas are based on the "process" theory, first articulated in Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). In this now [in]famous article, Professor Bator argued that federal courts should entertain a state prisoner's habeas petition only if the state court failed to provide an adequate opportunity for the treatment of federal claims in the state forum. He argued that federal habeas courts should not second guess substantive decisions made by state courts, even as to federal issues, unless reasons exist to doubt the "process" by which those decisions were reached. *Id.* at 445-60. For critiques of Bator's vision of habeas, see Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Mello, *Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1080-82 (1989).

11. *See* Stephens v. Kemp, 464 U.S. 1027, 1028-32 (1983); Schneckloth v. Bustamonte, 412 U.S. 218, 249-75 (1973) (Powell, J., concurring); Powell, *Review of Capital Convictions Isn't Working*, 3 CRIM. JUST. 10 (1989); Remarks by Justice Lewis Powell, 11th Circuit Judicial Conference (May 8-10, 1983), *reprinted at* 96 L.A. DAILY J. 4 (May 12, 1983).

> [O]ur present system of multi-layered appeals has led to excessively repetitious litigation and years of delay between sentencing and execution. This delay undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system. If capital punishment is to serve its intended purposes, perhaps the time has come for some reexamination of our system of dual collateral review. Of course, it is not suggested that habeas corpus relief be left to the States. It is appropriate, however, to consider limitations on federal habeas review in order to reduce delay and curb abuse.[12]

Chief Justice Rehnquist has also expressed concern with what he considers unnecessary delay in the current system of federal habeas review for state death row inmates. Dissenting from the denial of certiorari in *Coleman v. Balkcom*,[13] Justice Rehnquist stated that the Court has

> made it virtually impossible for states to enforce with reasonable promptness their constitutionally valid capital punishment statutes. When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system.[14]

Later, in an opinion joined by Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor, the Court stated that federal habeas is not "a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error."[15]

Thus, the focus of the criticism concerning "delay" in habeas capital cases has been on the dual nature of the post-conviction process and on death row inmates' access to and use of the process.[16] Former Justice Powell acknowledged that much of the delay can be attributed to the difficulty of obtaining counsel for the post-conviction process.[17] However, Powell has

12. Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989).

13. 451 U.S. 949 (1981).

14. *Id.* at 959.

15. Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983) (holding that a court could deny a stay of execution without formally deciding habeas corpus appeal).

16. Professor Amsterdam suggests that the real reason former Justice Powell and others are upset about the delay in federal habeas for capital cases is that the Court is not being taken seriously when it said that the death penalty was constitutional. Professor Amsterdam cogently argues that the Justices feel foolish because "nobody seems to be taking [them] at all seriously; people are simply not getting executed, and here are all these lawyers running around making the system look foolish." Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 52 (Winter 1987).

17. Powell, *supra* note 12, at 1040.

consistently recommended that federal habeas procedures for capital cases be changed to restore "a measure of finality and regularity."[18] Consequently, few were surprised when the committee, chaired by Lewis Powell and appointed by Chief Justice Rehnquist, recommended that time limits be placed on a death row inmate's right to seek federal habeas relief.

The Powell committee, formally called the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases,[19] issued its report on September 21, 1989. The report focused entirely on the federal post-conviction process for state death row inmates.[20]

The Powell committee proposed new statutory procedures for federal habeas review in capital cases only where the state supplies the inmate with "adequate" counsel during the state post-conviction process.[21] However, the Powell committee never defined what "adequate counsel" meant. Under the committee's proposal, an inmate would be required to file her federal petition within six months of the entry of the order appointing counsel to initiate state post-conviction review, but this limitations period would be tolled while any state proceeding was pending.[22] In addition, an automatic stay of execution would be effective until the termination of federal habeas proceedings or until the inmate failed to file within the six-month period.[23] Only claims exhausted in state court would be reviewable in federal habeas proceedings. Subsequent and successive federal habeas petitions would not be granted unless the inmate

18. *Id.* at 1042.

19. Chief Justice Rehnquist appointed this committee chaired by former Justice Powell. The committee members included Chief Judge Clark of the Fifth Circuit, former Chief Judge Roney of the Eleventh Circuit, Judge Hodges of the Middle District of Florida, and Judge Sanders of the Northern District of Texas. Powell, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. 3239 (1989).

The American Bar Association's task force on death penalty habeas corpus [hereinafter ABA task force] has made a substantially different proposal from the Powell committee's proposal. *See* RECOMMENDATIONS: REPORT OF THE ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES (Oct. 1989) [hereinafter ABA TASK FORCE REPORT]. The task force included state and federal court judges, law school professors, an assistant attorney general, a defense attorney, a court administrator, and an attorney in private practice.

20. *See* Powell, *supra* note 19. In contrast to the Powell committee's limited analysis, based on written submissions only, the ABA task force held a series of public hearings, took testimony from witnesses, and analyzed the underlying causes of the problems in the capital post-conviction process. ABA TASK FORCE REPORT, *supra* note 19, at 5. The ABA task force issued a 380-page report that differed in many aspects from the Powell committee's proposal. The ABA task force recommended that states be required to provide competent, adequately compensated counsel at all stages of the process from trial to post-conviction. *Id.* at 15, 19-21, 57-69. In addition, the ABA task force recommended changes in habeas corpus procedures, specifically in the areas of procedural default and retroactivity. *Id.* at 16-17, 21-27. Finally, it recommended a one-year statute of limitations period for filing a federal habeas petition, with a 90-day grace period. *Id.* at 17, 24-25, 326-29. Unlike the Powell committee proposal, the ABA task force's proposal would be mandatory and would apply to all states with capital punishment statutes. *Id.* at 15.

21. Powell, *supra* note 19, at 3241.

22. *Id.* at 3244.

23. *Id.* at 3243.

could prove that extraordinary circumstances existed and could make a colorable showing of factual innocence.[24]

Under the Powell committee's proposal, states could choose whether or not to participate in the new federal system for post-conviction review of capital cases.[25] Death row inmates in states that chose to follow the committee's proposed system would be guaranteed counsel during state post-conviction proceedings, but would have limited access to federal habeas because of the proposed six-month statute of limitations and the extreme limitations on successive federal habeas petitions.[26]

Most of the Powell committee's proposals were cogently and powerfully criticized by the ABA task force created to study the capital post-conviction process. We refer all readers interested in this area to the ABA task force's eloquent and comprehensive report.[27] Our project is far more modest. This article will concentrate on the flaws inherent in the Powell committee's proposal to place a six-month statute of limitations on federal habeas petitions. Although a statute of limitations for federal habeas review is unprecedented in United States and English history,[28] Congress has considered and rejected many such proposals in the past.[29]

The Powell committee proposed a six-month statute of limitations in order to combat "unnecessary delay and repetition."[30] The committee cited the following as justification for imposition of a limitations period:

> There are now approximately 2200 convicted murderers on death row awaiting execution. Yet, since the Supreme Court's 1972 Furman decision only 116 executions have taken place. The shortest of these judicial proceedings required two years and nine months to complete. The longest covered a period of 14 years and six months. The length of the average proceeding was eight years and two

24. *Id.* at 3243, 3245. The Supreme Court adopted an essentially similar standard in McCleskey v. Zant, 111 S. Ct. 1454 (1991).

25. *Id.* at 3242. Thus, two bodies of habeas corpus law would evolve — one for states that follow the committee's proposal and another for states that do not. The complexity and arbitrariness created by such a "voluntary" system should be obvious. For example, within the same federal circuit the law concerning stays of execution, counsel in the state post-conviction process, exhaustion, certificates of probable cause and successor petitions would be different for different states, depending on whether the state did or did not follow the Powell committee's proposal.

26. The ABA task force argues strongly that the proposed ban on successive federal habeas petition will significantly increase the number of innocent people executed. ABA TASK FORCE REPORT, *supra* note 19, at 135-164. In light of *McCleskey v. Zant*, however, it may not make a difference.

27. *See generally* ABA TASK FORCE REPORT, *supra* note 19.

28. *See* Heflin v. United States, 358 U.S. 415, 420 (1959) (Stewart, J., concurring, joined by four other Justices) (in habeas corpus, "there is no statute of limitations").

29. *See* Powell, *supra* note 12, at 1042 n.44 (summary of recent legislative proposals to place a statute of limitations, ranging from one to three years, on federal habeas review of state prisoners' petitions); Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 612 n.22 (1983).

30. Powell, *supra* note 19, at 3239.

> months. The committee does not believe eight years are required for the appropriate habeas review of state criminal proceedings.[31]

The Powell committee, without holding public hearings, concluded that the delay in federal habeas was caused mainly by the fact that res judicata does not apply to federal habeas proceedings, thus allowing "many capital litigants [to] return to federal court with second — or even third and fourth — petitions for relief."[32] The committee lamented that "[c]urrent rules governing abuse of the writ in successive petitions have not served to prevent these endless filings" and, therefore, a statute of limitations is required to deal with the problem of unnecessary delay.[33]

The committee's conclusion that federal habeas review of capital convictions needs a six-month statute of limitations is flawed as a matter of public policy because it misunderstands the reasons for the "delay" that preoccupied the committee. The absence of res judicata in federal habeas review is not the fundamental cause of "delay." The fundamental causes of delay in federal habeas review of capital cases, according to the ABA task force, are the lack of competent counsel to represent indigent death row defendants at all stages of the judicial process, combined with the time required by *courts* to decide these vexing and increasingly complex cases.[34]

The Powell committee's approach would provide condemned inmates with lawyers through the state post-conviction stages of litigation but not in subsequent federal habeas corpus proceedings. The committee's recommendations do nothing to ensure that the counsel provided by the states are *competent* to conduct capital collateral litigation. Thus, the Powell committee's half-measure on counsel is a recipe for the litigation chaos described elsewhere by one author[35] — chaos that leads to the very "delay" that so troubled the Powell committee. More than ninety-five percent of the prisoners on death row are paupers, and many cannot read or write.[36] In addition, capital cases at all judicial levels are among the most difficult, complex, and time consuming types of litigation.[37] Yet, with few exceptions, the majority of capital punishment states make no formal provisions for counsel in capital post-conviction proceedings. The states also fail to provide capital defendants with adequate defense services at the trial and appellate levels.[38] The lack of coun-

31. *Id.* at 3239-40; *see also* Spalding v. Aiken, 460 U.S. 1093, 1093-94 (1983) (Burger, C.J., dissenting) (Chief Justice Burger argued that for capital cases, "[t]he time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing stale claims that were fully ventilated in state courts"), *denying cert. to* 684 F.2d 632 (9th Cir. 1982).

32. Powell, *supra* note 19, at 3239.

33. *Id.* at 3239-40.

34. ABA TASK FORCE REPORT, *supra* note 19, at 57-69, 101.

35. Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513 (1988).

36. Mello, *supra* note 10, at 1068-69.

37. Mello, *supra* note 35, at 554-63; *see also infra* notes 227-96 and accompanying text.

38. ABA TASK FORCE REPORT, *supra* note 19, at 8-9.

sel, and the lack of *competent* counsel where counsel is provided, prompted the ABA task force to conclude: "If competent counsel represented petitioners from the earliest stages of state post-conviction review, then the entire capital litigation process would be shortened, perhaps greatly so."[39] Thus, the Powell committee's proposed six-month statute of limitations will do nothing to reduce a significant cause of "delay" in capital cases — the lack of competent counsel for condemned inmates.

Further, the proposed statute of limitations does nothing to solve the "problem" of "delay" caused by the judiciary itself. Since 1976, the Supreme Court has decided a series of capital cases concerning thorny constitutional issues, and these cases have appropriately caused many states to stop their capital punishment systems sometimes for years at a time. Professor Amsterdam has aptly stated:

> Capital criminal procedure is a long assembly line, with a long succession of inspectors. The assemblers at the front of the line commonly do a very poor job of assembly, and the inspectors at the front of the line all too often do an equally poor job of inspecting, with the result that later inspectors must repeatedly shunt products off the line, or return them to earlier points for reassembly. When, in addition, the entire line in many states is stopped cold, swept bare, and then restarted twice or thrice within a decade, you cannot expect to see many finished products coming rapidly off the end of the line.[40]

The state judiciary is also a culprit in causing "delay" in the execution of death sentences — and in federal habeas review of capital cases. An interesting example is Theodore Bundy, whose case is viewed by many as emblematic of the unjustified "delays" caused by federal review of capital sentences. As one author traced in a forthcoming article,[41] most of the "delay" in Bundy's case[42] occurred at the *state* level — on direct appeal to the state supreme court. The state supreme court affirmed Bundy's convictions and sentences five years after they were imposed.[43] The federal courts expedited their review of Bundy's case.[44] The time between the conclusion of the state post-conviction litigation and the initiation of the federal habeas proceedings totalled two days.

Moreover, since *Furman v. Georgia*,[45] an alarmingly high number of capital trials have been plagued with constitutional violations, and these violations have not been rectified by state courts. As of 1982, between sixty and seventy-five percent of the capital cases that reached the federal appeals courts on

39. *Id.* at 105.
40. Amsterdam, *supra* note 16, at 50.
41. Mello, *On Mirrors, Metaphors and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE (1990-91) (forthcoming).
42. Theodore Bundy was convicted of first degree murder and kidnapping. *See id.*
43. Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986).
44. Mello, *supra* note 41.
45. 408 U.S. 238 (1972).

habeas contained constitutional error, seventy percent as of 1983, and sixty percent as of 1986.[46] Of the fifty-six capital appeals decided by the United States Court of Appeals for the Eleventh Circuit between 1981 and 1987, fifty percent of the inmates were granted relief.[47] These figures have declined in recent years, in part because substantive death penalty law has become more settled, but principally because of the Court's relentless creation of procedural barriers to federal review of constitutional claims. The Court's recent retroactivity cases will accelerate this trend.

Even with curtailed habeas review, however, a "snowball" effect will continue to cause much of the "delay"[48] in federal habeas review of capital cases. Incompetent representation by trial and appellate counsel ensures that constitutional claims will not be timely asserted or capably litigated. Even if timely asserted, the state courts will fail to rectify the constitutional errors much of the time. The federal courts are left with the "snowball" — that is, the complex and time consuming task of identifying and correcting the constitutional errors that occurred at the state level. The Powell committee's proposal for a six-month statute of limitations would do nothing to reduce this "delay" caused by the judiciary itself.

In addition to constituting poor public policy, the six-month time limit raises constitutional concerns. A six-month statute of limitations would violate the suspension clause[49] of the United States Constitution. No time limitation has ever been placed on the writ of habeas corpus, either by statute[50] or common law, in the United States or England.[51] In commenting on the fact that res judicata did not apply to habeas corpus, Justice Brennan observed in 1963 that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[52]

---

46. Mello, *supra* note 35, at 521.

47. *Id.*

48. The Powell committee states that the length of the average death penalty "proceeding" was eight years and two months, but nowhere does it define "proceeding." Powell, *supra* note 19, at 3239-40. In contrast, a review of all federal habeas petitions filed by state prisoners during a two-year period (which included districts with some of the heaviest habeas dockets), revealed that the interval between conviction and filing of a habeas petition was, on the average, 2.8 years. This average also represented the amount of time it took to exhaust state remedies. The authors of the study thus concluded that, despite the fact that the habeas rules create the possibility of filing delays, "such delays rarely occur." *See* Allen, Schachtman & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 703-05 (1982).

49. U.S. CONST. art. I, § 9, cl. 2 provides that: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

50. As originally drafted, Habeas Corpus Rule 9(a) would have provided that a five-year filing delay created a presumption that the state was prejudiced by the defendant's delay. However, Congress deleted this five-year limitation because it was "unsound policy to require the defendant to overcome a presumption of prejudice." H.R. REP. NO. 1471, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2478, 2481.

51. United States v. Smith, 331 U.S. 469, 475 (1947). *See generally* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

52. Sanders v. United States, 373 U.S. 1, 8 (1963).

Like the inapplicability of res judicata, the inapplicability of a statute of limitations to habeas is inherent in the very role and function of the writ.

II.
HISTORY: THE FEDERAL WRIT AND STATE PRISONERS

> You think that just because it's already happened, the past is finished and unchangeable? Oh no, the past is cloaked in multicolored taffeta and every time we look at it we see a different hue.[53]

As several commentators[54] and Supreme Court Justices[55] have noted, the suspension clause guaranteed a federal writ of habeas corpus and guarded the writ against congressional (and perhaps executive) tampering except in the event of invasion or rebellion. As the Constitution evolved, the clause's protection extended to state prisoners.[56]

There is by no means a consensus that the writ of habeas corpus is enshrined in the Constitution. Two lines of reasoning have developed concerning the scope and meaning of the "privilege of the Writ of Habeas Corpus" protected by the suspension clause. One strain of thought, dating back to statements made by Chief Justice Marshall in Ex parte *Bollman*,[57] suggests that the scope of federal habeas depends solely on congressional discretion and is not significantly limited by the suspension clause.[58] In other words, Con-

53. M. KUNDERA, LIFE IS ELSEWHERE 97 (1974).

54. *See generally* Brief of Paul A. Freund, Assigned Counsel for Respondent, United States v. Hayman, 342 U.S. 205 (1952) (No. 23) [hereinafter Brief of Paul Freund]; W. DUKER, *supra* note 51; Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605; Peller, *supra* note 10 (interpreting the Habeas Corpus Act of 1867 and subsequent history of federal habeas corpus for state prisoners).

55. In his dissent in Johnson v. Eisentrager, 339 U.S. 763, 798 (1950), Justice Black, joined by Justices Douglas and Burton, stated that "[h]abeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress." *See also* Fay v. Noia, 372 U.S. 391, 406 (1963) (Justice Brennan stating in dicta that "at all events it would appear that the Constitution invites, if it does not compel, a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice.").

56. *See* Peller, *supra* note 10.

57. 8 U.S. (4 Cranch) 75, 93 (1807). On this page the Chief Justice stated "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law."

Proponents of the view that the authority of the federal courts to issue the writ of habeas corpus is statutory inevitably fail to cite another passage in Ex parte *Bollman* where Chief Justice Marshall reaches the opposite conclusion. *See infra* text accompanying note 88. For a complete analysis of the *Bollman* case and its meaning in the law of habeas corpus, see Paschal, *supra* note 54, at 623-41.

58. *See generally* Chisum, *In Defense of Modern Federal Habeas Corpus for State Prisoners*, 21 DE PAUL L. REV. 682, 688-91 (1972); Collings, *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335 (1952); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 171 (1970).

In his concurring opinion in Swain v. Pressley, 430 U.S. 372, 384-85 (1977), Chief Justice Burger adopted the theory that the authority of the lower federal courts to issue the writ derives

gress is free to define habeas as it sees fit.

The second line of reasoning, which we believe to be sounder and better supported by history, suggests that the suspension clause imposes on Congress and the courts an obligation to provide for a federal writ of habeas corpus. In addition, the suspension clause protects the availability of federal habeas corpus for federal prisoners. As the Constitution evolved before and after the Civil War, the suspension clause came to guarantee the availability of habeas corpus for state prisoners as well as federal prisoners. This evolution mirrors the development of the writ of habeas corpus in England from the fourteenth to the seventeenth century.

A. English Origins of the Writ

In England, the writ of habeas corpus evolved over three centuries from a command to compel the prisoner's appearance into a Great Writ of liberty, which sought to correct the errors and injustices of the courts. This development was principally the result of the "unconscious forces of the constitutional law."[59] In the fourteenth century, the central English courts used a summonsing process (developed in the thirteenth century) to produce the prisoner, who was usually unwilling to appear before the court.[60] At the same time, the central court issued an order questioning the cause of the imprisonment, in an effort to correct any injustices of the initial court.[61] This summons and order eventually united to form the writ of habeas corpus cum causa. In the fifteenth, sixteenth, and seventeenth centuries, the superior common law courts used the writ of habeas corpus cum causa to counter the encroaching jurisdictions of the equity and ecclesiastical courts and various councils. A subject convicted by one court of general criminal jurisdiction could be released by means of the writ of a rival court.[62] The writ usually stated that the commit-

from statutes enacted by Congress pursuant to article III, and not directly from the suspension clause. Consequently, he reasoned that Congress could completely withdraw the lower federal courts' authority to review state convictions on habeas without violating the Constitution.

Burger's reasoning does not withstand scrutiny. It was based on an incomplete survey of the history and scope of habeas corpus in England and the United States at the time the Constitution was drafted and a misreading of the framers' intent concerning the suspension clause. Furthermore, his reasoning is unpersuasive because it would lead to the absurd result of the suspension clause being seen as providing little or no guarantee, in peacetime, of federal review of the constitutionality of convictions ordered by state or federal courts. For now, Burger's reasoning has not been adopted by the majority of the Court. *See id.* at 380 n.13 (majority observes that Congress has broadened the scope of the writ beyond the limits of the seventeenth and eighteenth centuries and cautions against the conclusion that Congress could totally repeal post-eighteenth century developments in habeas law).

See also Schneckloth v. Bustamonte, 412 U.S. 218, 256 (1973) (Powell, J., concurring). Justice Powell (then also joined by Chief Justice Burger) stated that "[no] one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries." *Id.*

59. W. DUKER, *supra* note 51, at 12.

60. *Id.* at 12-23.

61. *Id.* at 23-26.

62. *Id.* at 33-40; *see also* Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670). Bushell was one

ting court lacked jurisdiction in the case and that the prisoner's release had nothing to do with her guilt or innocence. Thus, contrary to the analysis of some habeas corpus historians,[63] under the common law in England, after a trial and conviction, a rival court could examine the facts and overturn a conviction or sentence.[64]

The Habeas Corpus Act of 1679[65] did not supplant the common law of habeas corpus in England; it merely supplemented the common law and remedied some of its abuses. Because the common law writ could only be issued by a court in session, the Habeas Corpus Act of 1679 created a new right by giving some judicial officers the power to issue the writ "in the vacation time, and out of term."[66] The act also reformed many of the procedures governing the writ, such as requiring jailers to return the writ within three days.[67] Excepted from the act were those persons detained for felony or treason or those convicted by legal process. However, those persons excepted still had the right to the common law writ of habeas corpus as mentioned above.[68]

Thus, at the time of the United States Constitutional Convention in 1787, the English writ of habeas corpus had evolved to include a common law writ that a court could issue to those convicted by a criminal court as well as a statutory writ for those arrested for minor crimes. This English common law history must animate any attempt to define the intent of the framers of our own Constitution.

B. American History of the Suspension Clause: A Federal *Writ of Habeas Corpus*

By 1787, all the states had adopted either a common law writ of habeas corpus or a statutory writ patterned after the English Habeas Corpus Act of 1679.[69] Although the draft federal Constitution first reported by the commit-

---

of the jurors imprisoned by the trial court in the trial of William Penn and William Mead. The trial court imprisoned the jurors because the court disagreed with the jury's verdict. Although already imprisoned, the Court of Common Pleas granted Bushell's petition for habeas corpus, stating that "[t]he Writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he has been against law deprived of it." *Id.* at 1007; *see also* Collings, *supra* note 58, at 337-38.

63. In Oaks, *Habeas Corpus in the States*, 32 U. CHI. L. REV. 243, 244-45 (1965), Professor Oaks states that

> [a]t common law and under the famous Habeas Corpus Act of 1679 the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus.

64. Brief of Paul Freund, *supra* note 54, at 34-35; W. DUKER, *supra* note 51, at 62.

65. 31 Car. 2, ch. 2.

66. *Id.* § 2.

67. *Id.* § 1.

68. Brief of Paul Freund, *supra* note 54, at 32-33.

69. W. DUKER, *supra* note 51, at 115-16.

tee of Detail contained no habeas corpus provision,[70] this omission was soon corrected. On August 20, 1787, Charles Pinckney of South Carolina offered the following motion: "The privileges and benefit of the Writ of Habeas Corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding __ months."[71]

Eight days later, Pinckney, urging the propriety of securing the benefit of habeas corpus in the most ample manner, moved "that it should not be suspended but on the most urgent occasions, and then only for a limited time not exceeding twelve months."[72] Farrand reports:

> Mr. Rutlidge was for declaring the Habeas Corpus inviolable — He did [not] conceive that a suspension could ever be necessary at the same time through all the States —
>
> Mr. Governeur Morris moved that "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it."
>
> Mr. Wilson doubted whether in any case [a suspension] could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.[73]

A comparison of Pinckney's proposal on August 20th with his proposal of August 28th shows that he dropped the affirmative guarantee of the writ, relying only on the qualified prohibition of suspending the writ. Pinckney's reliance on simply prohibiting suspension did not mean he was backing away from a guarantee of a federal writ, however. On both August 20th and August 28th, he sought to secure the "benefit" of habeas corpus in the "most ample" manner.

After limited debate[74] the current version of the suspension clause was approved.[75] The convention record discloses no concern that the Constitution did not expressly grant the privilege of habeas corpus.

Some modern commentators argue that the delegates expressed no concern because they considered that the right to the writ already existed under the common, statutory, or constitutional laws in force in the states. Accord-

70. 5 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 376-81 (2d ed. 1836).

71. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341 (rev. ed. 1937) (omission in original). This provision was similar to the habeas corpus provision in the Massachusetts Constitution of 1780. Collings, *supra* note 58, at 341 n.34.

72. 2 M. FARRAND, *supra* note 71, at 438.

73. *Id.*

74. Three colonies, Georgia, North Carolina, and South Carolina, voted against the language proposed by Governeur Morris after the word "unless" because they contended that the privilege of the writ should never be suspended. 5 J. ELLIOT, *supra* note 70, at 484.

75. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

ing to this theory, the suspension clause only protected against the federal government's interference with the state writ.[76]

However, the suspension clause does not merely prohibit suspension of habeas corpus statutes. It prohibits the suspension of the "*privilege* of the writ." The words and deeds of the framers and others reveal that the word "privilege" meant a *federal* writ, and that the suspension clause was intended to protect this writ from interference by the federal government in peacetime.

Alexander Hamilton argued, in *Federalist Number 83*, that the Constitution was not flawed for lacking a bill of rights because many constitutional provisions acted as a bill of rights. For example, he stated that "trial by jury in criminal cases, aided by the habeas corpus act . . . [is] provided for in the most ample manner."[77] In *Federalist Number 84* Hamilton compared the proposed federal Constitution to New York's constitution and noted the federal Constitution's "establishment of the writ of habeas corpus."[78] Because he was comparing the federal Constitution to the state's constitution and because New York had its own writ of habeas corpus, it seems logical to infer that Hamilton was referring to the establishment of a *federal* writ of habeas corpus.

Echoing Hamilton, James Wilson informed the Virginia constitutional convention that the proposed federal Constitution provided for a writ of habeas corpus when he stated that "the right of habeas corpus was secured by a particular declaration in its favor."[79] Furthermore, Charles Pinckney, the originator of the suspension clause, remarked in a pamphlet to the public that the suspension clause "provides for the privilege of the Writ of Habeas Corpus," and that this privilege is one of three "essential" items for a "Free Government."[80]

Those in opposition to the consolidating tendency and intention of the Constitution — the so-called anti-federalists — also had things to say about the suspension clause. Luther Martin, a leading opponent of ratification, believed that the suspension clause and the laws of the states established a right to habeas corpus. His concern was preventing the central government from suspending that right.[81] Some called for the "clear and unequivocal establishment of the writ of habeas corpus" in the federal Constitution.[82] In contrast, others saw the suspension clause as securing "the people of the benefit of personal liberty by the *habeas corpus*."[83] Finally, some anti-federalists saw the benefits of the writ of habeas corpus as being "constitutional or fundamental" and not to "be altered or abolished by the ordinary laws."[84]

76. Oaks, *supra* note 63, at 248-49, 251-52; W. DUKER, *supra* note 51, at 126-56.
77. THE FEDERALIST No. 83, at 562-63 (A. Hamilton) (J. Cooke ed. 1961).
78. THE FEDERALIST No. 84, at 577 (A. Hamilton) (J. Cooke ed. 1961).
79. 2 J. ELLIOT, *supra* note 70, at 455.
80. 3 M. FARRAND, *supra* note 71, at 122.
81. *Id.* at 213, 290.
82. 3 H. STORING, THE COMPLETE ANTI-FEDERALIST 157 (1987).
83. 2 H. STORING, THE COMPLETE ANTI-FEDERALIST 152 (1981).
84. *Id.* at 261.

The D.C. Circuit observed in 1949 that the framers, by placing the suspension clause directly in the Constitution, thought that protection of the writ was so important that they did not "leave the possibility of misunderstanding upon the topic to later determination, as they did the several prohibitions later included in the first 10 Amendments."[85] In addition, the first Congress (which contained many of the framers), by the Judicial Act of 1789,[86] immediately directed the federal courts to take jurisdiction of the federal writ for persons held in federal custody. The first Congress understood that the writ would be unlawfully suspended unless the federal courts had power to issue the federal writ guaranteed by the suspension clause.[87]

Chief Justice Marshall understood that the suspension clause placed Congress under an "obligation" to provide an efficient way to activate the privilege of the writ. In Ex parte *Bollman*, he reasoned that "if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."[88] Professor Freund, echoing Marshall in his brief on behalf of the prisoner in *United States v. Hayman*,[89] argued that once Congress established the federal courts it was powerless to deny the privilege of a federal writ of habeas corpus. To do otherwise would reduce the suspension clause to a "dead letter."[90] In fact, Alexander Hamilton saw the federal Constitution as allowing an "appeal from the State courts" directly to the federal district courts, and he saw "many advantages attending the power of doing it."[91]

The writ's most direct challenge came during the Civil War. In 1861, President Lincoln authorized his military commanders to suspend habeas corpus,[92] and Congress subsequently endorsed his actions.[93] In Ex parte *Mer-*

85. Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 763 (1950).

86. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

87. Paschal, *supra* note 54, at 605-06.

88. 8 U.S. (4 Cranch) 75, 95 (1807). *See* Paschal, *supra* note 54, for a detailed analysis of the meaning of Marshall's statements in *Bollman*.

89. 342 U.S. 205 (1952).

90. Brief of Paul Freund, *supra* note 54, at 29.

91. THE FEDERALIST No. 82, at 514 (A. Hamilton) (J. Cooke ed. 1961).

92. *See* M. NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES *passim* (1991). Margaret Leech recorded this history bitterly:

> Mr. Lincoln moved slowly in abrogating a cherished safeguard of the Constitution. In May 1861, he authorized the suspension of the writ on a small section of the Florida coast; in July, on the military line north of Philadelphia, as far as New York; in October, for soldiers in the District of Columbia. Not until the autumn of 1862 did he deny the privilege to all persons imprisoned by military order. Still another year passed before, on authority given him by Congress, he found it necessary to suspend it throughout the Union.

M. LEECH, REVEILLE IN WASHINGTON: 1860-1865, at 143 (1941). On April 27, 1861, Lincoln wrote to General Winfield Scott, his General-in-Chief:

> You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line . . . you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you, personally or through the officer in command at the point where the resistance occurs, are authorized to suspend that writ.

ryman[94] Chief Justice Taney, sitting as a trial judge, held Lincoln's suspension of the writ invalid and ordered the release of Merryman — who had been seized for participating in the obstruction of federal troops coming through Baltimore to the defense of Washington, D.C. Lincoln refused to comply, simply ignoring the court's mandate in *Merryman*.[95] The issue did not reach the Supreme Court until after the war. In 1866 in Ex parte *Milligan*,[96] the Supreme Court, despite being dominated by Lincoln appointees, held that the federal government acted unlawfully in establishing military tribunals where civil courts remained open.

Milligan reached the Court in 1866. Lamdin Milligan, a civilian, had

---

B. CATTON, THE COMING FURY 354 (1961) [hereinafter THE COMING FURY].

The Confederacy also suspended the writ. Robbins, *The Confederacy and the Writ of Habeas Corpus*, 55 GA. HIST. Q. 83 (1971); *see also* B. CATTON, NEVER CALL RETREAT 307 (1965); J. MCPHERSON, BATTLE CRY OF FREEDOM 393 (1988).

93. *See generally* M. NEELY, *supra* note 92, at 11-14, 68. Lincoln's July 4, 1861 message to the special session of Congress is in IV COLLECTED WORKS OF ABRAHAM LINCOLN 421-41 (R. Basler ed. 1953), and 1 B. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 393-95 (3d ed. 1938). The special session endorsed most of Lincoln's war measures, measures that constituted national martial law. But Congress did not ratify Lincoln's suspension of the writ until 1863. Act of Mar. 3, 1863, 1 Stat. 81. *See generally* 1 J. BURGESS, THE CIVIL WAR AND THE CONSTITUTION 234-35 (1906); 2 *id.* at 214-18; J. MCPHERSON, *supra* note 92, at 598-99.

94. 17 F. Cas. 144 (1861) (No. 9487); *see also* E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE GREAT REBELLION 154-58 (1865); J. MCPHERSON, *supra* note 92, at 286-89; Sheffer, *Presidential Power to Suspend Habeas Corpus: The Taney-Bates Debate and Ex Parte* Merryman, 11 OKLA. CITY U.L. REV. 1 (1986).

95. Catton described *Merryman* this way:

> The arrest of Merryman was precisely the kind of act which the government could not, in any ordinary circumstances, perform, and there were laws to govern such cases. Justice Taney promptly issued a writ of habeas corpus, and a United States marshal ventured off to serve it; could not, because the way was blocked by soldiers; returned to the Chief Justice with a report from General Cadwalader stating that Merryman appeared to be guilty of treason and that he, General Cadwalader, was authorized by the President to suspend the writ in such cases. Taney cited the general for contempt, and the marshal went to serve an attachment on him, only to find once again that armed soldiers made his job impossible. Taney could do nothing further, except to announce that Merryman ought to be discharged immediately and that "the President, under the Constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it."
>
> But Lincoln controlled the soldiers and Taney did not, and the arrest stuck. Explaining his position in a message to Congress a few weeks after this happened, Lincoln discussed the legal points briefly. The Constitution, he said, provided that the privilege of the writ might be suspended in cases of rebellion or invasion if the public safety required it; the government (that is, the President) had "decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ" and that was that. Furthermore: "Are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Merryman would remain under arrest (for a time, at least), as would many others, and the state of Maryland would remain in the Union.

THE COMING FURY, *supra* note 92, at 356-57.

For an excellent and comprehensive treatment of Lincoln's suspension of the writ, published while this article was in the production process, see M. NEELY, *supra* note 92. On the Lincoln-Taney clash generally, see Spector, *Lincoln and Taney: A Study in Constitutional Polarization*, 15 AM. J. LEGAL HIST. 199 (1971).

96. 71 U.S. (4 Wall.) 2 (1866).

been arrested by the federal military for various charges of treason and tried and sentenced by a military court.[97] At that time Congress had authorized the President to suspend the federal writ of habeas during the rebellion.[98] Despite the fact that the privilege of the writ was suspended, the Court held that Milligan, as a civilian and resident in a state where article III courts existed, could not be tried, convicted, or sentenced except by ordinary courts of law.[99] The Court reasoned that the framers, knowing the country would be at war at some future time, secured in the Constitution the safeguards of the right to trial and right to the writ of habeas corpus to protect citizens from the unlimited power of the government during war.[100] Justice Davis, writing for the majority, stated that the framers "secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these [constitutional] safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus."[101]

Even though the privilege of the writ had been suspended by an act of Congress and order of President Lincoln, Justice Davis reasoned that the article III courts still had jurisdiction to hear Milligan's habeas petition.[102] The federal courts had jurisdiction because the suspension clause guaranteed the federal writ and any "suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."[103]

Almost 100 years after *Milligan*, the Supreme Court in 1963 implied that the federal writ is grounded in the Constitution. In dictum, the Court stated that the statute giving the federal courts jurisdiction to grant a writ of habeas corpus to state prisoners[104] "implements the constitutional command that the writ of habeas corpus be made available."[105] The Court also warned that changes that "derogate from the traditional liberality of the writ . . . might raise serious *constitutional* questions."[106] In addition, Justice Douglas in *Scaggs v. Larsen*[107] relied on the force of the suspension clause to order the release of a military reservist who was not "in custody" and, therefore, not *entitled* to be released under the habeas *statutes*.[108]

97. *Id.* The history of *Milligan* is detailed in VI C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 134-51, 185-252 (1971).

98. Act of Mar. 3, 1863, 1 Stat. 81.

99. *Ex parte* Milligan, 71 U.S. at 130-31.

100. *Id.* at 125.

101. *Id.*

102. *Id.* at 130-131.

103. *Id.* at 131.

104. 28 U.S.C. § 2244 (1988).

105. Jones v. Cunningham, 371 U.S. 236, 238 (1963).

106. Sanders v. United States, 373 U.S. 1, 11-12 (1963) (emphasis added).

107. 396 U.S. 1206 (1969).

108. *Id.* at 1208.

As is usually the case with history, the record provides no definitive answer. However, the framer's words, the placement of the suspension clause in the original Constitution, the enactment of the Judiciary Act of 1789, and the interpretation of the suspension clause by past and present Supreme Court Justices suggest that the federal writ of habeas corpus is constitutionally based in the suspension clause.

C. The Suspension Clause and State Inmates' Right to the Federal Writ

In the United States, the federal writ evolved from its early form of applying only to those held in federal custody into a general post-conviction remedy for those in custody — state or federal.[109] This development may be seen as beginning in 1833 when Congress passed legislation authorizing federal relitigation of claims by state prisoners who were held pursuant to the authority of the United States.[110] The evolution accelerated, of course, after the Civil War. It should come as no surprise that the adoption of the thirteenth, fourteenth, and fifteenth amendments would soon result in a modified, if not new, interpretation of the law of the Constitution — particularly that of the character of the government of the people, and the rights and privileges of its citizens.

In line with the great changes wrought by the Civil War, and building on the liberalization of the writ that it started in 1833, Congress passed the Habeas Corpus Act of 1867.[111] This act provided that

> [t]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or a treaty or law of the United States . . . .[112]

On its face the act authorized federal habeas corpus jurisdiction over all prisoners, state or federal, who were denied liberty in violation of federal law.[113]

---

109. For a statutory and common law history of the federal writ in the United States, see W. DUKER, *supra* note 51, at chs. 3-5.

110. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634. This act gave federal courts power "to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail . . . by any authority or law, for any act done . . . in pursuance of a law of the United States."

111. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241-2255 (1988)).

112. *Id.*

113. This broad wording was deliberate because Congress refused to adopt the initial version of the act that had expressly limited its application to persons held in slavery or involuntary servitude. *See* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 34 (1965).

Curiously, Professor Mayers argues that the Habeas Corpus Act of 1867 was not intended to provide federal habeas review to state prisoners, but merely extended federal habeas to the recently freed slaves. However, Senator Trumbull, chairperson of the Senate Judiciary Committee at the time of the act's enactment, made comments that directly refute this. Senator Trumbull explained:

> [T]he habeas corpus act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States Courts in issuing writs of habeas corpus to persons

After the 1867 habeas act was passed, the lower federal courts[114] followed its broad mandate and permitted every available constitutional claim to be heard on federal habeas review, regardless of prior state court jurisdiction.[115] The Supreme Court, once it had regained its habeas jurisdiction, was more reluctant than the lower federal courts to apply the act of 1867 broadly. At first the Court inquired only into the jurisdiction of the state court.[116] With the passage of time and the settling of its due process doctrine, however, the Court broadened federal habeas review to include constitutional claims that the prisoner had no opportunity to raise fully in state court.[117] Finally, as the Court enlarged its concepts of criminal justice and due process under the Constitution, it also enlarged the scope of federal habeas review to include redetermination of state court rulings on almost all federal constitutional claims.[118]

The history of federal habeas in the United States, like the history of habeas in England, is a model of evolution and change without resort to for-

---

who are held under United States laws. *Now, a person might be held under a State law in violation of the Constitution and laws of the United States,* and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

Id. at 38-39 (emphasis added). In support of his thesis, Professor Mayers dismisses the comments of Senator Trumbull as being in "apparent ignorance of the House bill." *Id.* at 39.

Perhaps, however, the Reconstruction-era Supreme Court also rejected the thesis later advanced by Professor Mayer: "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867).

114. Congress removed the Supreme Court's habeas jurisdiction in 1868 and did not restore it until 1885. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

115. Professor Bator claimed that the Habeas Corpus Act of 1867 did not require collateral review of all federal claims decided against a state prisoner. Bator, *supra* note 10. Chief Justice Burger and Justice Powell substantially based their arguments for restricted federal habeas review of certain claims by state prisoners on Bator's thesis. *E.g.*, Stone v. Powell, 428 U.S. 465, 475 n.7, 476 nn.8 & 9 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 253 nn.3 & 5, 255 n.7 (1973) (Powell, J., concurring).

However, after a thorough analysis of case law and habeas statutes before and after the Habeas Corpus Act of 1867, Professor Peller refuted the basis for Professor Bator's theory. Peller showed that history sustains the interpretation that the act authorizes every available constitutional claim by a state prisoner to be heard on federal habeas review. *See* Peller, *supra* note 10, at 602-61; *see also* Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on* Schneckloth v. Bustamonte, 1975 WIS. L. REV. 484.

116. *E.g.*, Andrews v. Swartz, 156 U.S. 272, 276 (1895).

117. Frank v. Mangum, 237 U.S. 309, 321 (1915).

118. Brown v. Allen, 344 U.S. 443, 447 (1953) (reviewing state conviction on claim of discrimination in jury selection); Fay v. Noia, 372 U.S. 391 (1963) (reviewing a state conviction where there was a violation of the fourteenth amendment); Townsend v. Sain, 372 U.S. 293, 320 (1963) (holding that an evidentiary hearing was required in state prisoner habeas case). The broad availability of the writ evinced by *Noia* and *Sain* has been constrained in recent years. *E.g.*, *Powell*, 428 U.S. 494 (state prisoner may not be granted federal habeas relief on illegal search and seizure grounds). The Court's decision in *Powell* to preclude fourth amendment claims from federal habeas review is an unprecedented restriction of the writ based on a misreading of the Habeas Corpus Act of 1867. *See* Peller, *supra* note 10, at 610-63.

mal amendment.[119] Chief Justice Marshall stated that the Constitution is "intended to endure for ages to come, and, consequently to be *adapted* to the various *crises* of human affairs."[120] Other Justices also recognized the concept of the "living" Constitution as it specifically relates to the federal writ of habeas corpus. In 1868, Chief Justice Chase wrote that "the general spirit and genius of our institution has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States."[121] A

119. The application of the suspension clause's guarantee of a federal writ to state prisoners is surprisingly similar to the Supreme Court's gradual incorporation of the Bill of Rights' guarantees to state prisoners through the due process clause of the fourteenth amendment. For decades, the Court struggled with the issue of determining the extent to which the fourteenth amendment imposed upon the states the same prohibitions that are imposed upon the federal government by the Bill of Rights. By the 1960s, after extensive debates among the Justices, the Court gradually concluded that the fourteenth amendment made most of the Bill of Rights applicable to the states. *See generally* 3 W. LAFAVE & J. ISRAEL, *supra* note 9, at 33-60.

In addition to applying the Bill of Rights to the states through evolving constitutional interpretation, the Supreme Court's decisions, until recently, favored broad construction of criminal procedure guarantees. Several factors contributed to the Court's expansionist philosophy, including: (1) the interrelationship between criminal procedural guarantees; (2) the relationship of criminal procedure to the protection of racial minorities; and (3) the presence of various structural elements that enhance the Court's authority in exercising constitutional review of the criminal process. *See generally* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Court Ideologies*, 72 GEO. L.J. 185 (1984).

Since the beginning of this century, the Court has shifted its focus from protection of property rights to protection of rights deemed fundamental to the preservation of individual freedom. The writ of habeas corpus, since the middle ages in England, has been held to be fundamental to individual freedom. Accordingly, Justice Clark stated in Smith v. Bennett, 365 U.S. 708, 714 (1961), that "[t]hroughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained." Now, to suggest that the Constitution offers no guarantee of the privilege of the federal writ to state prisoners is to deny state prisoners a right as fundamental to the concept of ordered liberty as any found in the Bill of Rights. The Constitution has evolved, along with the values of American citizens, to provide state prisoners the protection of the Bill of Rights. This same evolution must necessarily be seen to afford state prisoners the "other" liberty guarantee — that of a federal writ of habeas corpus as written into the constitution through the suspension clause.

120. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis added).

121. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 102 (1868).

Sixteen years earlier Justice Nelson (joined by Chief Justice Taney and Justice Daniel), in his dissent to a denial of a habeas corpus petition, stated:

> This writ has always been justly regarded as the stable bulwark of civil liberty; and undoubtedly, in the hands of a firm and independent judiciary, no person, be he citizen or alien, can be subjected to illegal restraint, or be deprived of his liberty, except according to the law of the land. So essential to the security of the personal rights of the citizen was the uninterrupted operation and effect of this writ, regarded by the founders of the Republic, that even Congress cannot suspend it, except when, in cases of rebellion or invasion, the public safety may require it. I cannot, therefore, consent to cripple or limit the authority conferred upon this Court by the Constitution and laws to issue it, by technical and narrow construction; but, on the contrary, prefer to follow the free and enlarged interpretation always given, when dealing with it by the courts of England, from which country it has been derived. They expound the exercise of the power benignly and liberally in favor of the deliverance of the subject from all unlawful imprisonment; and, when restrained of his liberty, he may appeal to the highest common-law court in the kingdom, to inquire into the cause of it. So liberally do the courts of England deal with this writ, and so unrestricted is its operation in favor of the security of the personal rights of the subject, that the decision of one court

century later, Justice Black stated that the writ "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[122] On this same theme, the Court has stated that federal habeas corpus for state prisoners is a flexible device, with "[i]ts preeminent role" recognized by the suspension clause,[123] and has continually developed in order to protect individuals from "unlawful restraints on liberty."[124]

Although knowledge of a constitutional provision's past history and purpose is beneficial for interpreting today's problems, history should be only one of many tools to aid us in making constitutional judgments.[125] A search for knowledge is a search for changes over time, not for a purpose at a certain historical moment. As Justice Holmes wrote in construing the scope of the tenth amendment, "[t]he case before us must be considered in the light of our whole experience and not merely in that of what was a hundred years ago."[126]

The suspension clause, as part of the living Constitution, protects the federal writ of habeas corpus, as it has evolved by statute and common law, to include all constitutional claims by state prisoners — including state death row inmates. To reach an opposite conclusion would be to ignore the historical evolution of habeas corpus in England and the United States. It would embalm the suspension clause in its eighteenth century form.

III.
TIME LIMITS GENERALLY, THE SIX-MONTH LIMIT PARTICULARLY, AND THE SUSPENSION CLAUSE

The suspension clause has provided a procedural backdrop against which the Supreme Court's decisions relating to the scope and availability of the federal writ of habeas corpus have been played out. Concerning its role in protecting the federal writ, the Warren Court stated that it had no higher duty than to " 'maintain it unimpaired', and unsuspended, save only in the cases

---

or magistrate upon the return to it, refusing to discharge the prisoner, is no bar to the issuing of a second, or third, or more, by any other court or magistrate having jurisdiction of the case, and it may remand or discharge, according to its judgment, upon the same matters.

In re Kaine, 55 U.S. (14 How.) 103, 147 (1852).

122. Jones v. Cunningham, 371 U.S. 236, 243 (1963). In Preiser v. Rodriguez, 411 U.S. 475 (1973), Justice Stewart also recognized the evolving nature of the writ when he stated that "over the years, the writ of habeas corpus *evolved* as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Id.* at 485 (emphasis added).

123. Harris v. Nelson, 394 U.S. 286, 291 (1969).

124. Peyton v. Rowe, 391 U.S. 54, 63 (1968).

125. *See* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

126. Missouri v. Holland, 252 U.S. 416, 433 (1920).

specified in our Constitution."[127] In addition, the Court warned that any statutory changes that "derogate from the traditional liberality of the writ . . . might raise serious constitutional questions."[128]

A constitutional test has emerged from the cases in which the Supreme Court has examined proposed substitutes for the federal writ of habeas corpus. In order to avoid possible conflict with the suspension clause, any proposed statutory changes must be read so as to provide a prisoner with the same full range of rights that she would have had with the traditional petition for writ of federal habeas. Any proposed change that appears to be less than "exactly commensurate" with traditional federal habeas corpus and that results in an "inadequate and ineffective remedy" when compared with the traditional writ, engenders serious constitutional doubts.

The words "exactly commensurate" first appeared in 1962 in *Hill v. United States*,[129] where the Court stated that the motion remedy defined in 28 U.S.C. section 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."[130] Thus, to pass constitutional muster, a substitution for the traditional writ must encompass as great a remedy as the traditional federal habeas remedy.[131]

Earlier, in *United States v. Hayman*,[132] the first section 2255 case to reach the Supreme Court, the Court was presented with a thorough brief by Professor Paul Freund on behalf of the inmate. The brief argued that the suspension clause barred Congress from tampering with the federal writ of habeas corpus in peacetime.[133] However, the Court found it unnecessary to confront the knotty problem concerning the suspension clause — because it concluded that section 2255 provided a remedy commensurate with and as effective as the writ of habeas corpus.[134] Review of the history of section 2255 led the Court to conclude that

> [n]owhere in the history of section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.[135]

127. Smith v. Bennett, 365 U.S. 708, 713 (1961) (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)).

128. Sanders v. United States, 373 U.S. 1, 11-12 (1963).

129. 368 U.S. 424 (1962).

130. *Id.* at 427.

131. *Id.*

132. 342 U.S. 205 (1952).

133. Brief of Paul Freund, *supra* note 54.

134. *Hayman*, 342 U.S. at 223.

135. *Id.* at 219.

Because section 2255 provided a remedy exactly like that supplied by the traditional writ of habeas corpus, the Court accepted it as constitutional.

In *Sanders v. United States*,[136] the Supreme Court reviewed both the "exactly commensurate" test of *Hill* and the constitutional background of *Hayman*. In *Sanders*, an inmate had filed a section 2255 motion making certain summary allegations and asking that his conviction be vacated. The district court denied the first motion without a hearing, and Sanders filed a second motion alleging new grounds for release. The district court denied the second motion. The Ninth Circuit affirmed, stating that the matter was res judicata as a result of the ruling on the first motion.[137]

The Supreme Court examined the language of section 2255 that implied a bar to successive motions where "similar relief is being sought." The Court observed that the "language might seem to empower the sentencing court to apply res judicata virtually at will"; however, "the language cannot be taken literally."[138] Instead, the Supreme Court read these words as being "the material equivalent of 28 U.S.C. § 2244."[139] Thus, the doctrine of res judicata did not apply to section 2255 because the doctrine did not apply to the traditional writ of habeas corpus (as codified in section 2244).[140]

The Supreme Court reached its conclusion in *Sanders* because section 2255, like section 2244, was constitutional only if it was exactly commensurate with the traditional writ of habeas corpus. The Court in *Sanders* quoted the "exactly commensurate" test from *Hill*, and then the Court discussed the constitutional problems that would be raised by any construction of section 2255 that would make it less than "exactly commensurate" with habeas corpus.[141] Indeed, the Court reasoned that if Sanders were subject to any substantial procedural hurdles which made his remedy under section 2255 less swift than the federal writ of habeas corpus, "the gravest constitutional doubts would be engendered."[142]

Most recently, in 1977, the Court in *Swain v. Pressley*[143] ruled on the constitutionality of the habeas provisions in the 1970 District of Columbia Court Reform and Criminal Procedure Act.[144] The act created a motion remedy for persons convicted by the D.C. superior courts and created an inferior court system to hear these claims. This motion remedy was very similar to the remedy provided in 28 U.S.C. section 2255. In contrast to article III federal judges, however, D.C. superior court judges do not enjoy life tenure or salary guarantees. Section 110(g) of the act provided that a federal district court (an

136. 373 U.S. 1 (1963).
137. *Id.* at 4.
138. *Id.* at 13.
139. *Id.* at 14.
140. *Id.* at 11-12.
141. *Id.* at 14.
142. *Id.*
143. 430 U.S. 372 (1977).
144. D.C. CODE ANN. § 23-110 (1981).

article III judge) could not consider a D.C. prisoner's habeas petition if the prisoner had not applied for relief in the D.C. superior court or if the prisoner's application had been denied by the D.C. superior court. A district court could consider a D.C. prisoner's petition for the writ only if it appeared to the court that the motion remedy in section 110(g) was "inadequate or ineffective."[145] In effect, section 110(g) divested D.C. district judges of habeas jurisdiction over D.C. prisoners except in the rarest of instances.

Despite the provisions of section 110(g), D.C. prisoner Pressley filed a petition for a writ of habeas corpus in the United States District Court. The district court dismissed his petition because Pressley had failed to pursue the motion remedy mandated in section 110(g). The D.C. Circuit reversed and construed section 110(g) as an exhaustion of superior court remedies requirement.[146] In doing so, the court (as the Supreme Court would do later) avoided the "difficult" question of whether section 110(g), in precluding federal district court review of a D.C. prisoner's habeas petition, was an unconstitutional suspension of the writ.[147]

The Supreme Court reversed, holding that section 110(g) was more than an exhaustion requirement; it was a substantive limitation on the habeas corpus jurisdiction of the district court.[148] Despite the fact that section 110(g) limited the habeas corpus jurisdiction of the district court, the Court reasoned that the section did not violate the suspension clause.[149] Section 110(g) was constitutional because it created a remedy substantially similar to 28 U.S.C. section 2255 — a statute that *Hayman* already held to be "exactly commensurate" with (and as adequate and effective as) the traditional writ of habeas corpus.[150]

Thus, the cases from *Hayman* through *Pressley* stand for the proposition that Congress may substitute for the protections offered by the traditional federal writ of habeas corpus (as codified in 28 U.S.C. section 2254), but only if the substitution provides a mode of relief: (1) "exactly commensurate" with the traditional federal writ in all constitutionally significant respects; and (2) provides a remedy as adequate and effective as the traditional federal writ.[151] As this article will suggest below, any absolute time limits on the

145. *Id.* § 110(g).

146. Pressley v. Swain, 515 F.2d 1290, 1292-93 (D.C. Cir. 1975), *rev'd*, 430 U.S. 372 (1977).

147. *See* Palmore v. Superior Court of D.C., 515 F.2d 1294, 1301-1304 (1975).

148. *Pressley*, 430 U.S. at 377-78.

149. *Id.* at 381.

150. The Court in *Pressley* conducted a *Hayman*-type analysis to determine whether section 110(g) differed from 28 U.S.C. section 2255 in any constitutionally significant way. The Court found that section 110(g) differed only in that D.C. superior court judges lacked the salary and life tenure protections given federal district court judges under article III of the United States Constitution. The Court found this distinction to be constitutionally irrelevant and, thus, concluded that section 110(g) provided a remedy commensurate with section 2255. *Id.* at 381-84.

151. *See also* United States v. MacCollum, 426 U.S. 317 (1976). In the plurality opinion written by Justice Rehnquist, four Justices stated that the granting of free trial transcripts to

availability of habeas should be held to violate the suspension clause. A six-month limit for condemned prisoners certainly should.

A. Absolute Time Limits and the Suspension Clause

Like the English writ of habeas corpus, no statute of limitations has ever been applied to the federal writ.[152] The Supreme Court noted in *United States v. Smith*[153] that the federal writ "provides a remedy for jurisdictional and constitutional errors at the trial without limit of time."[154] To apply a statute of limitations to habeas corpus would violate the principle underlying the writ — that it is never too late to discover the truth which would release a person confined either for a cause for which no person should be restrained or by a process by which no person should be convicted.[155]

---

indigent prisoners who proceed under section 2255, only upon their satisfying certain conditions, was not an unconstitutional suspension of the writ. *Id.* at 322. In reaching this conclusion, the plurality looked to the history of the traditional writ of habeas corpus and found that a provision for free transcripts was not "concomitant of the writ which the Founders declared could not be suspended" because no provision for free transcripts existed until 1944. *Id.* Thus, the plurality reasoned that Congress could limit the granting of free transcripts to certain prisoners wishing to attack collaterally their sentences without "suspending" the writ because providing the free transcripts at all broadened the writ from its traditional form. *Id.* at 323.

In contrast, a provision for a statute of limitations for the writ of habeas corpus would limit, not broaden, the writ from its traditional form as a writ without time limitation. Applying the plurality's reasoning in *MacCollum* suggests that a statute of limitations would unconstitutionally suspend the writ because a writ with a time limitation would not be "concomitant of the writ which the Founders declared could not be suspended." *Id.* at 322.

152. Heflin v. United States, 358 U.S. 415, 420 (1959) (Stewart, J., concurring).

153. 331 U.S. 469 (1947).

154. *Id.* at 475; *see also* United States v. Morgan, 346 U.S. 502, 505 (1954) (federal district court has power to issue writ of error *coram nobis*, which was available at common law to correct errors of fact in both civil and criminal cases, and which, like habeas, existed without limitation of time).

155. Critics of federal habeas corpus for state prisoners could point to the fact that some states have placed statutes of limitation on their post-conviction processes for capital cases as support for a federal statute of limitation. *See, e.g.*, IDAHO CODE § 19-2719 (1987) (42-day statute of limitation); OKLAHOMA STAT. ANN. tit. 22, § 1089 (West Supp. 1990) (60-day statute of limitation). However, state statutes are compared against the respective state constitutions, not the federal Constitution. For example, the Iowa Supreme Court held that the state's three year statute of limitation for state post-conviction relief did not violate Iowa's bill of rights because the state constitutional provision for habeas allowed a legislative enactment of a reasonable time restriction. Davis v. State, 443 N.W.2d 707, 709 (Iowa 1989). The court reasoned that because the state constitution stated that refusal of the writ could occur "when the application is made as required by law," the framers of the constitution expressly provided general authority for legislative restriction of habeas corpus. *Id.* Unlike the Iowa constitution, no such phrase appears in the suspension clause of the United States Constitution. U.S. CONST. art. I, § 9, cl. 2.

In addition, the Supreme Court of Nevada held that the state's two-year time limitation for awarding a new trial based on newly discovered evidence did not violate a death row inmate's eighth amendment rights, nor did it enhance the risk of unwarranted execution, because the petitioner could still file for a writ of habeas corpus, which had no time limitation. Snow v. Nevada, 105 Nev. 521, 522, 779 P.2d 96, 97 (1989). Thus, the Nevada court acknowledged that time limitations could infringe on a death row inmate's federal constitutional rights only so long as there is unlimited availability of habeas corpus.

In several cases, the Supreme Court has refused to attach a statute of limitations to habeas corpus proceedings. The Court in *Uveges v. Pennsylvania*[156] held in 1948 that the Pennsylvania state court should have granted a prisoner's petition for habeas corpus relief even though the prisoner petitioned for the writ seven years after his conviction. Three years later, the Supreme Court in *Palmer v. Ashe*[157] again remanded a habeas case to the Pennsylvania state court, despite the fact that the prisoner filed his petition eighteen years after his conviction. The Court reasoned that the state court must hear the petition for habeas corpus, despite the lapse of time. In this case, the trial record indicated that the petitioner's right to counsel had been violated when the petitioner (a young, mentally abnormal person) pled guilty to charges of armed robbery without benefit of counsel and without being advised of his right to counsel.[158]

In *Herman v. Claudy*,[159] the Court again held that a state prisoner was entitled to a habeas corpus hearing, despite the fact that he filed his petition eight years after his conviction. Here, the Court was faced with a case of a young person, of limited educational background, who may have been coerced into entering a guilty plea.[160] Justice Black, after reviewing this case along with the *Uveges* and *Palmer* cases, stated that these cases stood for the proposition that no passage of time barred the challenge to conviction through the writ of habeas corpus.[161] He concluded that "[t]he sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."[162]

A year after *Herman* was decided, the Supreme Court again strongly emphasized that a lengthy passage of time (in that case seven years) between a prisoner's conviction and his application for the writ of habeas corpus did not bar relief under federal habeas.[163] Justice Harlan, writing for the majority in the *Chessman* case, put it eloquently:

> On many occasions the Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, *no matter how late it may be* that a violation of the Constitution is found to exist. This Court may not

156. 335 U.S. 437 (1948).
157. 342 U.S. 134 (1951).
158. *Id.* at 137-38.
159. 350 U.S. 116 (1956).
160. *Id.* at 119-20.
161. *Id.* at 123.
162. *Id.*
163. Chessman v. Teets, 354 U.S. 156 (1957).

> disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. *We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late,* because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States.[164]

Thus, the history of habeas corpus since its origins in England, and modern Supreme Court interpretations of the federal writ, reveal that time limitations have no place in the scheme of federal habeas relief because constitutional rights are at issue.[165]

The adoption of Habeas Corpus Rule 9(a)[166] in 1976 reinforces the idea that a statute of limitations is inapplicable to the federal writ. Rule 9(a), incorporating the doctrine of laches[167] into federal habeas law, provides that a petition may be dismissed if the state has been prejudiced in its ability to respond because of unreasonable filing delays. Yet, even if the state proves that it has been prejudiced by the delay, a court cannot dismiss the petition if the prisoner proves that the petition raises grounds that she could not have discovered through reasonable diligence before the circumstances prejudicial to the state occurred. Given the potentially adverse impact of Rule 9(a) on the availability of federal habeas relief to state prisoners, the rule has been liberally construed in favor of petitioners.[168]

In addition, courts have construed Rule 9(a) as no more than a procedural device designed to prevent abuses of the habeas process. In *Davis v. Adult Parole Authority*,[169] the Sixth Circuit overruled the district court's use of Rule 9(a) as a statute of limitations and reasoned:

---

164. *Id.* at 165 (emphasis added).

165. A time limit may also not be applicable because federal habeas relief is not limited to immediate release from illegal custody. State prisoners may also use the federal writ to attack the constitutionality of future confinement under consecutive sentences. Peyton v. Rowe, 391 U.S. 54 (1968).

The Court in *Peyton* reasoned that the federal habeas statute allows collateral attacks of future confinements because "[s]ince 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.'" *Id.* at 66-67.

166. Habeas Corpus Rule 9(a) states:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

167. 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 325-32 (1988).

168. *E.g.*, McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982). The Fifth Circuit described the purpose of the rule as being "to permit summary dismissals of stale claims," but because that is such a "drastic and final" disposition, it should be done "only when the evidence before the court fully satisfies the standards required in the rule." *Id.* at 254-55.

169. 610 F.2d 410 (6th Cir. 1979).

> Our review of pertinent Supreme Court decisions and other authorities persuades us that a rule which would permit a court to dismiss an action for habeas relief without any consideration of the equities presented renders the habeas corpus process inadequate to test the legality of a person's conviction and, thereby, constitutes a prohibited suspension of the writ. Therefore, we hold that the district court's application of the Rule as a strict statute of limitations here constituted error.[170]

Moreover, Congress demonstrated its disfavor of dismissal for delay under Rule 9(a) by eliminating from the proposed draft of the rule a rebuttable presumption of prejudice that could be invoked by the state after a filing delay of five years.[171] As recently as 1986 the Supreme Court declined to create, on its own, a statute of limitations for federal habeas actions under the "guise of constitutional interpretation."[172] Thus, any time limit — and particularly the proposed six-month statute of limitations — appears to violate the suspension clause because such time limits would create a new federal post-conviction remedy that would not be "exactly commensurate" with the existing federal habeas relief which has no (and never has had any) time limitations.

B. The Proposed Six-Month Statute of Limitations and the Suspension Clause

As discussed above, to avoid violating the suspension clause any changes to the federal writ must be "exactly commensurate" with the federal habeas corpus remedy and must be neither an "inadequate" nor an "ineffective" way of testing the legality of a person's detention.[173] Any time limit — and certainly the Powell committee's proposed six-month statute of limitations — would appear to violate the suspension clause because the time limitation would not be even close to — much less exactly commensurate with — the habeas corpus remedy, which has never had a time limitation. Further, the Powell committee's extremely short time limitation renders the federal post-conviction remedy inadequate and ineffective for death row inmates because the limitation makes it practically impossible for counsel properly to prepare and litigate the complex post-conviction proceedings for capital cases.

The most offensive aspect of the Powell committee's six-month limit is its denial of the realities of capital collateral litigation at the federal level. The ivory tower arrogance of the committee's proposal is mind-bending in the degree of its detachment from the real world. Maybe if the committee had re-

170. *Id.* at 414.

171. Congress deleted the five-year limitation because it was "unsound policy to require the defendant to overcome a presumption of prejudice." H.R. REP. NO. 1471, *supra* note 50, at 5.

172. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

173. Swain v. Pressley, 430 U.S. 372, 381 (1977).

ceived testimony from participants in the habeas process, it would not have recommended a regime so likely to produce injustice.

We believe that two features of the committee's recommendations will, as a practical and therefore, a constitutional matter, suspend the writ. First, under the committee's proposals, the right to counsel ends with the state post-conviction process. Second, six months is not enough time for *lawyers* — much less for confined and condemned inmates — to prepare and file meaningful habeas petitions and supporting documents.

1. The Powell Committee and the Right to Counsel

By its own terms, the Powell committee's proposals do not contemplate the automatic appointment of counsel at the federal habeas corpus stage. However, such an omission does not necessarily mean that no such entitlement exists. One potential source of this entitlement is the Anti-Drug Abuse Act of 1988.[174] The act created a federal death penalty for drug-related killings or solicitations to kill.[175] It also appears to create a mandatory right to counsel in federal post-conviction proceedings:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services . . . .[176]

In the absence of any meaningful legislative history for this provision, one could argue that its counsel requirement was intended to apply only to those federal death sentences that are imposed under the act and not to all state death penalty cases on federal habeas corpus review. However, because death sentences imposed under the act will be imposed by federal courts for federal crimes, death sentenced federal prisoners could challenge the sentences only under 28 U.S.C. section 2255 — not under section 2254, the primary vehicle for *state* prisoners to challenge *state* criminal judgments in federal court. By referring to section 2254 in the act's counsel provision, Congress appears to have intended to create a counsel guarantee in federal habeas corpus review of *state*-imposed death sentences as well.[177] According to the ABA task force's report, "both the Administrative Office of the United States Courts and the Judicial Conference Committee on Defense Services are treating the Act in

174. Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988) (to be codified at 21 U.S.C. § 848).

175. *Id.* at 4387-88. The act also provided for expedited procedures for the Senate to consider the report and recommendations of the Powell committee's report. *Id.* at 4467-68. In addition, the act provided that "[t]he House of Representatives shall give fair, appropriate, and expeditious consideration to the report of the Special Committee." *Id.* at 4468.

176. *Id.* at 4393-94 (emphasis added).

177. *See* Coyle, *The Drug Bill's Secret Provision*, Nat'l L.J., Feb. 20, 1989, at 3, col. 1.

this manner."[178] As of this writing, no court has construed the provision.

It is by no means clear, however, that the Anti-Drug Abuse Act of 1988 ultimately will be interpreted to provide for a general right to counsel for state prisoners at the federal habeas stages of litigation. We therefore believe that the Powell committee's recommendations should be treated on their own terms, as a proposal that would impose a six-month time limit on unrepresented death row inmates as well as on represented condemned prisoners.

2. *Pro Se Capital Post-Conviction Litigation: The Realities Missed by the Powell Committee*

a. *Reality: Condemned Pro Se Inmates*

In a recent article,[179] one author attempted to demonstrate that the idea of meaningful pro se capital post-conviction litigation is an oxymoron. The discussion here draws upon and summarizes that earlier treatment. Anyone who has represented condemned inmates, or who has read their pro se papers, must recognize the absurdity of such people preparing meaningful habeas petitions and supporting memoranda.

At the outset, many condemned inmates are illiterate, uneducated, mentally impaired, or any combination of the three. In 1982 a federal district court, following extensive evidentiary hearings, found that more than half of Florida's prison inmates were functionally illiterate.[180] The court also found that twenty-two percent of the total prisoner population had an IQ of less than eighty,[181] which is considered to be borderline retarded.[182] One witness at the hearing testified that "for more than 50 percent of the inmates . . . attempting to read a law book would be akin to attempting to read a book written in a foreign language."[183]

This reality is not limited to Florida. Intelligence and educational levels among prisoners as a group are very low.[184] A 1968 study of federal and state prisons found that in most states the average prisoner had only eight years of

178. ABA TASK FORCE REPORT, *supra* note 19, at 80 n.114 (citing Letter from Meryl A. Silverman, Senior Staff Attorney, Administrative Office of the United States Courts (Apr. 6, 1989); Interview with John M. Greacen, Clerk, United States Court of Appeals for the Fourth Circuit (Apr. 1, 1989); Telephone interview with John M. Greacen (Apr. 5, 1989)).

179. Mello, *supra* note 10.

180. Hooks v. Wainwright, 536 F. Supp. 1330, 1337 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986).

181. *Id.* at 1338.

182. *Id.* at 1343.

183. *Id.* at 1344.

184. *See* Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 508-09 (1970). According to statistics compiled in 1974 by the U.S. Department of Justice, 36% of all state prisoners had no more than a high school education and only 26% had a high school diploma when they entered prison. About 10% earned a high school diploma while in prison. NATIONAL CRIMINAL JUSTICE INFORMATION & STATISTICS SERVICE, U.S. DEP'T OF JUSTICE, PROFILE OF STATE PRISON INMATES: SOCIODEMOGRAPHIC FINDINGS FROM THE 1974 SURVEY OF INMATES OF STATE CORRECTIONAL FACILITIES 9-13 (1979).

education.[185] In states with large death row populations, the figures were even more troubling: forty-eight percent of Florida inmates completed less than nine years of education;[186] Louisiana inmates averaged six years of schooling;[187] and Texas inmates had an average educational level of just over five years.[188] The average inmate IQ in Alabama and Louisiana was eighty, while in Texas it was eighty-six.[189] Thirty percent of South Carolina inmates had IQs of less than eighty, while forty-nine percent of North Carolina inmates had IQs of less than ninety.[190] The study found that prisoners are three times more likely to be mentally disabled than members of the general population.[191]

Between 1976, when the death penalty was reinstated, and 1986, at least five of the 120 prisoners executed had serious mental deficiencies.[192] Two of the inmates fit into the current definition of mentally retarded with IQs under seventy, and the other three were "borderline" retarded with IQs ranging from seventy to the low eighties.[193] Accurate figures do not exist on how many mentally retarded inmates are currently on death row. One advocacy group suggests that there were at least 250 such inmates nationwide out of the 1900 prisoners on death row at the time of the estimate in 1986.[194] One noted expert on corrections and retardation estimated that 3.5 to 5% of the national prison population, amounting to between 17,000 and 24,000 inmates, are mentally retarded.[195]

The mentally retarded prisoner is usually not capable of assisting her attorney in conducting post-conviction litigation, much less litigating on her own.[196] Often the inmate is unable to recall crucial details about events. Her

185. Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 347-48.

186. *Id.* at 360 app.

187. *Id.*

188. *Id.* at 361.

189. *Id.* at 360-61.

190. *Id.* at 361.

191. *Id.* at 348.

192. CLEARINGHOUSE ON GEORGIA PRISONS AND JAILS, FACT SHEET ON EXECUTION OF THE MENTALLY RETARDED (Nov. 3, 1986).

193. Reid, *Unknowing Punishment*, 15 STUDENT LAW. 18, 23 (May 1987). Leon Brown, executed in Virginia in 1985, had an IQ of 66 and a mental age of eight. *Id.* at 18. Jerome Bowden, executed in Georgia in 1986, had an IQ that ranged from 59 to 65. *Id.* James Terry Roach, executed in South Carolina in 1986, had an IQ that ranged from 69 to the low 70s. *Id.* James Dupree Henry, executed in Florida in 1984, had an IQ in the low 70s. *Id.* at 23. Ivon Stanley, executed in Georgia in 1984, had an IQ that ranged from 61 when he was younger to 81 at the time of his trial. *Id.* The Court held in Penry v. Lynaugh, 109 S. Ct. 2934, 2954 (1989), that the Constitution provides no blanket prohibition against the execution of people who are not profoundly mentally retarded.

194. CLEARINGHOUSE ON GEORGIA PRISONS AND JAILS, PRELIMINARY SURVEY (1986); *see also* Blume & Bruck, *Sentencing the Mentally Retarded to Death*, 41 ARK. L. REV. 725, 726 n.4 (1988).

195. Reid, *supra* note 193, at 18 (quoting Miles Santamour, a Los Angeles-based consultant on corrections and mental retardation).

196. *See generally* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO.

inability to communicate a complex chain of events prevents her from explaining to her attorney her role, if any, in crimes.[197] Moreover, in order to camouflage the fact that she is mentally retarded, or acting defensively about her disability, "the mentally retarded defendant may boast about how tough [s]he is or how [s]he outsmarted a victim, when in fact [s]he accomplished neither feat."[198] Finally, the ability of the mentally retarded defendant to present legal or factual arguments is questionable; when "verbally or physically challenged, most retarded persons will go to great lengths to please their challengers, thereby hoping to avoid the antagonistic situation."[199]

A mentally retarded death row inmate may not comprehend the gravity of her situation or truly understand evidentiary criminal justice proceedings, let alone the complexities of the capital post-conviction process. The attorney for Morris Odell Mason, an inmate with an IQ of sixty-five who was executed in 1985, said that Mason did not understand what it meant to be executed.[200] Denied a new trial or sentence reduction to life in prison, death row inmate Limmie Arther, who had an IQ of sixty-five, answered in response to his attorney's question about how he felt, "I ain't too sure . . . I feel good anyway . . . [I] got a new trial."[201] In an interview, Arther was asked what it would mean if he were executed. He answered: "What happens? That's a rough one. . . . For one thing, that learning what I just learned, what I learned in [the penitentiary] that wouldn't amount to nothing . . . and my GED [high school equivalency degree], I wouldn't see no GED. I wouldn't get my GED."[202]

Further, a substantial number of death row inmates suffer from mental illness.[203] While many of these prisoners were mentally ill prior to being condemned, others became that way while on death row,[204] in part due to the

---

WASH. L. REV. 414, 452-60 (1985) (describing difficulties facing mentally retarded defendants at trial); Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365, 387-401 (1981) (enumerating essential mental abilities for any defendant to stand trial and noting mentally retarded defendants' inability to reach these capacities).

197. Ellis & Rice, *Retarded Inmates Imprisoned in Legal Limbo*, Dallas Times Herald, Mar. 31, 1985, at 20-A, col. 2.

198. Ellis & Luckasson, *supra* note 196, at 430. Mentally retarded inmates sometimes confess to crimes they did not commit in order to gain the approval of police interrogators or other perceived authority figures, or because they do not understand, and may be incapable of understanding, the ramifications of a confession and the right not to confess. *Id.*

199. Mickenberg, *supra* note 196, at 397 (citing R. EDGERTON, THE CLOAK OF COMPETENCE 2-4 (1967)).

200. Reid, *supra* note 193, at 23.

201. Marcus, *Retarded Killer's Sentence Fuels Death-Penalty Debate*, Wash. Post, June 22, 1987, at A1, col. 1.

202. *Id.* at A5.

203. Lewis, Pincus, Feldman, Jackson & Bard, *Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840-44 (1986); Lewis, Pincus, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988).

204. For a graphic illustration, see the Supreme Court's account of the gradual mental deterioration of the condemned inmate in Ford v. Wainwright, 477 U.S. 397, 402-05 (1986).

intense physical and psychological pressures caused by death row confinement.[205] One layperson experienced with death row inmates estimated that half of Florida's death row population may become intermittently insane.[206] These mental disorders can directly affect an inmate's ability to proceed pro se. Two commentators, for example, have found that death row inmates minimize the gravity of their legal situation as a psychological defense mechanism.[207] Another researcher has found in condemned prisoners a pattern of shock, denial, and depression, coupled with "a fatalistic belief that the person is a pawn in the process that will coldly and impersonally result in his death."[208]

Further, many condemned inmates are prohibited from gaining physical access to the prison law library, which itself is often inadequate. In Florida, for example, death row inmates must request specific legal materials from their cells[209] and are generally limited to one request per week and three citations per request.[210] Such limited access makes it practically impossible for a condemned inmate to keep current with the highly nuanced and rapidly changing law of death penalty and habeas corpus, much less to research issues such as jurisdiction, exhaustion of remedies, and types of relief available.[211]

As one court noted in the non-capital context:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of

205. For discussions of the mental and physical effects of death row confinement, see Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting); Groseclose *ex rel.* Harries v. Dutton, 594 F. Supp. 949, 961 (M.D. Tenn. 1984); Radelet, Vandiver & Berardo, *Families, Prisons and Men With Death Sentences*, 4 J. FAM. ISSUES 593, 595-600 (1983); Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 867-69 (1983); West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 694-95 (1975); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 826-31 (1972).

206. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35, 42 (1986) ("[Death row inmates] go in and out. Like most people with mental illness, they have crisis periods, and other periods when they can function. A lot depends on stress, bad diet, lack of medication, lack of exercise . . . . Unless you can manipulate the environment, they can only deteriorate[.]") (quoting Sherrill, *In Florida, Insanity is No Defense*, THE NATION, 551, 555-56 (Nov. 24, 1984) (quoting Scharlette Holdman, then Director, Florida Clearinghouse on Criminal Justice)).

207. Bluestone & McGahee, *Reactions to Extreme Stress*, 119 AM. J. PSYCHIATRY 393, 395 (1962).

208. R. JOHNSON, CONDEMNED TO DIE 94 (1981).

209. Hooks v. Wainwright, 536 F. Supp. 1330, 1339 n.16, 1341 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986).

210. *Id.* at 1342.

211. *See* Note, *Trial Court and Prison Perspectives on the Collateral Post-Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 507-09 (1969) (discussing prisoners' lack of knowledge of preparation of habeas corpus proceedings).

> unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.[212]

Another court underscored the inadequacy of existing prison law library programs:

> In this court's view, access to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. The bulk and complexity [of the law] have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special tools, such as . . . computer research systems . . . . To expect untrained laymen to work with entirely unfamiliar books [to which they have only limited access and] whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of the constitutional duty.
>
> Access to full law libraries makes about as much sense as furnishing medical services through books like: "Brain Surgery Self-Taught," or "How to Remove Your Own Appendix," along with scalpels, drills, hemostats, sponges, and sutures.[213]

The various alternatives to attorney assistance, including assistance by prison inmate writ-writers, paralegals, and law clerks,[214] cannot take the place of attorneys in providing effective representation for the condemned in post-conviction proceedings. The initial problem facing a petitioner seeking the assistance of an inmate writ-writer is one of access.

> Lacking a legal education, a writ-writer must devote a large portion of his time plunging aimlessly through a jungle of constitutional law, criminal law and procedure, extraordinary remedies, and countless other details before he is able intelligently to prepare and present his case to the courts. The average writ-writer is left with little free time and is therefore unable to assist others.[215]

Moreover, courts and commentators have noted a tendency of many writ-writ-

212. Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979); *see also* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 130 (S.D.N.Y. 1977) (describing inadequacies of prison library facilities), *aff'd*, 573 F.2d 118 (2d Cir. 1978), *rev'd on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

213. Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982).

214. Federal courts have stressed that without the aid of trained paralegals or law librarians, prison libraries cannot be used adequately. Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980); Battle v. Anderson, 457 F. Supp. 719, 736-37 (E.D. Okla. 1978) (enumerating alternative methods for assuring inmate access to courts, including training inmates as paralegals).

215. Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343, 356 (1968).

ers to condition their services on receiving favors from fellow inmates.[216]

Even if every condemned inmate were guaranteed access to an inmate writ-writer, there is no assurance that inmates who claim to be able to prepare pleadings have adequate legal ability, or that they will have their clients' interests rather than their own interests as their primary objective.[217] While some inmate writ-writers may genuinely believe themselves to be competent, many merely pretend to have extensive knowledge and "play upon the false hopes of naive inmates."[218] Some writ-writers may deliberately misstate facts so that it appears the petitioning inmate might get relief, while other writ-writers may employ tricks or fabricate citations.[219] Whether well intending or unscrupulous, inmate writ-writer pleadings are "heavily larded with irrelevant legalisms — possessing the veneer but lacking the substance of professional competence."[220] In short, writ-writers often times are incompetent,[221] and several cases indicate that the advice of such inmates may be useless or damaging to a prisoner's suit.[222]

Further, writ-writers labor under the same logistical problems that disable pro se litigants. They cannot conduct factual investigations, interview witnesses, appear in court, or even make long-distance telephone calls.[223] They may have limited access to the prison law library and may have to rely on antiquated law books.[224]

The above discussion should also make it clear why assistance by paralegals or law students is an inadequate substitute for attorney representation. Paralegals receive only limited legal training and are not intended to replace lawyers, but merely to assist them in practicing law.[225] Because of time constraints and rapid turnover, law student programs often are not equipped to handle the subtle complexities of large-scale capital post-conviction litiga-

216. Johnson v. Avery, 393 U.S. 483, 499 (1969) (White, J., dissenting); G. ALPERT, LEGAL RIGHTS OF PRISONERS 7-8 (1978); Spector, *A Prison Librarian Looks at Writ Writing*, 56 CALIF. L. REV. 365, 365-66 (1968).

217. *See* Hooks v. Wainwright, 536 F. Supp. 1330, 1348 (M.D. Fla. 1982) (discussing obstacles to inmate law clerks such as inability to craft logical arguments and draw legal conclusions), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986); Johnson v. Avery, 393 U.S. at 499 (White, J., dissenting) (stating that inadequate inmate assistance in writ-writing is as useless as receiving no help at all).

218. Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 174 (1972).

219. Larsen, *supra* note 215, at 355.

220. Bounds v. Smith, 430 U.S. 817, 836 (1977) (Stewart, J., dissenting).

221. *Hooks*, 536 F. Supp. at 1348; G. ALPERT, *supra* note 216, at 7-8; Jacob & Sharma, *supra* note 184, at 591; Larsen, *supra* note 215, at 351-56.

222. Storseth v. Spellman, 654 F.2d 1349 (9th Cir. 1981); *In re* Green, 586 F.2d 1247, 1249-50 (8th Cir. 1978), *cert. denied*, 440 U.S. 922 (1979); Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1312 (1983).

223. *Hooks*, 536 F. Supp. at 1348.

224. Larsen, *supra* note 215, at 354.

225. Voorhees, *Paralegals: Should the Bar Employ Them?*, 24 VAND. L. REV. 1151, 1158-59 (1971).

tion.[226] We do not mean to suggest that paralegals, law clerks, investigators, or law students ought to be excluded from the process of capital post-conviction litigation. On the contrary, these individuals can provide critical and indispensable support for the lawyer directing the post-conviction effort. The ideal capital litigation team should include non-lawyers as well as lawyers. Still, attorneys trained in capital post-conviction practice must direct the litigation. But under the regime envisioned by the Powell committee's proposals, even lawyers will not be enough.

b. Reality: Not Even Lawyers Would Cure the Constitutional Defect in the Time Limits

The foregoing subsection demonstrated that the Powell committee's proposals — no lawyers at the federal habeas stage *and* a six-month time limit — would, as a practical matter, preclude adequate and effective federal habeas review and therefore constitute a suspension of the writ. The requirement of attorney assistance would be an improvement. But the six-month time limit would still constitute an effective suspension of the writ even with lawyers representing the condemned. To see why this is so requires inquiry into the complexities of capital habeas litigation.

The former chief judge of the Eleventh Circuit has written that capital habeas litigation "is the most complex area of the law I deal with."[227] Part of the difficulty lies in the complexity and changing standards governing substantive capital punishment doctrine. The Supreme Court's ambivalence over the death penalty has resulted in murky standards and an inability to predict with any precision where the Court will go next. In 1971, the Court held that the due process clause of the fourteenth amendment did not mandate standards to guide a capital sentencer's discretion.[228] One year later, the Court held that the eighth amendment's cruel and unusual punishment clause did require such standards.[229] Then, in 1976, the Court approved the standards adopted in Georgia,[230] Florida,[231] and Texas,[232] even though these standards were more

226. Bounds v. Smith, 430 U.S. 817, 831 (1977); ABA Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363, 402-04 (1974); Jacob & Sharma, *supra* note 184, at 493; Note, *supra* note 222, at 1312.

227. Mikva & Godbold, *You Don't Have to be a Bleeding Heart*, 14 HUM. RTS. 22, 24 (1987) (former Chief Judge Godbold).

228. McGautha v. California, 402 U.S. 183 (1971).

229. Furman v. Georgia, 408 U.S. 238 (1972). The effect of *Furman* was to hold the death penalty, as it was then administered in the United States, unconstitutional. In response, the states enacted two kinds of capital punishment statutes: mandatory statutes requiring the death penalty for certain classes of crimes, and guided-discretion statutes calling for comparison of specified aggravating and mitigating factors. Lockett v. Ohio, 438 U.S. 586, 599-600 (1978). In 1976, the Court held mandatory capital punishment statutes unconstitutional, except in the most extraordinary situations. Woodson v. North Carolina, 428 U.S. 280 (1976).

230. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (death sentence imposed by jury after considering aggravating and mitigating factors).

231. *See* Proffitt v. Florida, 428 U.S. 242 (1976) (following the jury's sentencing recom-

cosmetic than real by affording great discretion to the deciding body.[233] The "standards" of Georgia[234] and Florida[235] contained exceptions that threatened to consume the guidelines with unlimited discretion.[236]

In 1978, despite Justice Rehnquist's charge that the Court was going from "pillar to post,"[237] and despite Chief Justice Burger's recognition that the Court's death penalty decisions were far from consistent,[238] the Court held that the sentencer must be permitted to consider any relevant evidence proffered in mitigation,[239] a notion reaffirmed in subsequent cases.[240] The Court has since fine-tuned the capital system it approved in 1976, sometimes vacating death sentences[241] and, more frequently since the 1982 Term,[242] upholding

---

mendation, the trial judge may weigh eight aggravating factors against mitigating factors to determine if death penalty should be imposed).

232. *See* Jurek v. Texas, 428 U.S. 262 (1976) (jury given three questions to decide, and if all three questions answered in the affirmative, death sentence results).

233. *See* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 111-34 (2d ed. 1981).

234. The Georgia statute authorized the death penalty if the crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1 (b)(7) (Supp. 1975); *see also* Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (reversing death sentence when defendant's crime "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder" because victims were killed instantaneously, their deaths caused defendant extreme emotional trauma, and defendant admitted responsibility shortly after crimes).

235. Florida's statute authorized the death penalty if the crime was "especially heinous, atrocious, or cruel." FLA. STAT. § 921.141(5)(h) (Supp. 1976-77); *see* Mello, *Florida's "Heinous Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984) (arguing that on its face and as applied, section (5)(h) is arbitrary).

236. The Texas statute had its own problems. *See* C. BLACK, *supra* note 233, at 114-25 ("dissecting this statute with the aim . . . of giving some scientific precision to its plain shabbiness, to its self-speaking insufficiency as law").

237. Lockett v. Ohio, 438 U.S. 586, 629 (1978) (Rehnquist, J., concurring in part & dissenting in part).

238. *Id.* at 597-602 (opinion of Burger, C.J.).

239. *Id.* at 604-05 (opinion of Burger, C.J.) (holding that although individualized sentencing was a matter of public policy in noncapital cases, consideration of all relevant mitigating factors is constitutionally required for the "profoundly different" sentence of death).

240. For examples of Supreme Court decisions vacating death sentences because the sentencer was precluded from considering mitigating factors, see Sumner v. Shumann, 483 U.S. 66 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986).

241. *See* Booth v. Maryland, 482 U.S. 496 (1987) (use of victim impact statement, including family's emotional reaction to and characterization of the murderer and his crime not allowed); Ford v. Wainwright, 477 U.S. 399 (1986) (mere cursory review used to determine inmate's sanity prior to execution constitutionally insufficient); Caldwell v. Mississippi, 472 U.S. 320 (1985) (prosecutor's comments to jury indicating that appeals court would correct any errors by jury held constitutionally impermissible); Enmund v. Florida, 458 U.S. 782 (1982) (death sentence for felony murder unconstitutional when defendant did not himself kill, attempt to kill, or intend that killing take place or lethal force be used); Bullington v. Missouri, 451 U.S. 430 (1981) (state's request for death penalty on retrial violated double jeopardy clause when jury had previously refused to impose capital punishment); Godfrey v. Georgia, 446 U.S. 420 (1980) (no showing of "consciousness materially more 'depraved' than that of any person guilty of murder" when victims were killed immediately, defendant suffered extreme emotional distress as a result of their deaths, and defendant admitted responsibility shortly after crimes);

them.[243]

Habeas procedures have come to resemble a maze of mirrors. The habeas litigator must understand the intricacies of the exhaustion doctrine, as codified by Congress[244] and construed by the Court.[245] The doctrine can "operate as a

Lockett v. Ohio, 438 U.S. 586 (1978) (limitation on sentencer's consideration of mitigating factors held unconstitutional); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty unconstitutionally disproportionate sentence for crime of rape of an adult woman).

242. In all but one of the 15 fully argued capital cases decided between 1976 and the end of the 1981 Term, the Court reversed or vacated the death sentence. Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305. The Court rendered four capital cases at the end of the 1982 Term, all of which found against the condemned inmate. *See* California v. Ramos, 463 U.S. 992 (1983) (rejecting challenge that jury instruction which stated that the governor may commute life sentence without parole was speculative or impermissibly shifts focus from defendant); Barclay v. Florida, 463 U.S. 939 (1983) (finding no constitutional violation in sentencer's consideration of nonstatutory aggravating circumstances); Barefoot v. Estelle, 463 U.S. 880 (1983) (upholding procedures for expedited consideration of capital habeas cases and allowing use of psychiatric testimony on future dangerousness of defendant at capital sentencing proceeding even when based on hypothetical questions); Zant v. Stephens, 462 U.S. 862 (1983) (holding that invalidity of one aggravating circumstance did not render death sentence unconstitutional when two other valid aggravating factors were present).

243. For examples of cases when the Supreme Court has upheld imposition of the death penalty, see Ricketts v. Adamson, 483 U.S. 1 (1987) (no double jeopardy bar to retrial for first degree murder when defendant breached plea bargain to second degree murder); McCleskey v. Kemp, 481 U.S. 279 (1987) (no constitutional violation merely on showing of statistical disparity between imposition of death penalty in cases of black defendants with white victims and cases of white defendants with black victims); Tison v. Arizona, 481 U.S. 137 (1987) (upholding death sentence resting on felony-murder conviction on showing of "major participation" in felony and "reckless indifference to human life"); California v. Brown, 479 U.S. 538 (1987) (affirming death sentence following instruction that jury should not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"); Smith v. Murray, 477 U.S. 527 (1986) (refusing to grant relief on procedurally defaulted constitutional claim concerning psychiatric testimony); Darden v. Wainwright, 477 U.S. 162 (1986) (finding no constitutional violation in exclusion of juror who would categorically refuse to impose death penalty or in prosecutor's improper remarks in the closing arguments); Lockhart v. McCree, 476 U.S. 162 (1986) (no constitutional error in removal of jurors who would not impose death sentence under any circumstances); Poland v. Arizona, 476 U.S. 147 (1986) (when appeals court finds evidence insufficient to support sole aggravating factor on which sentencing judge relied but not insufficient to support death sentence because judge misconstrued availability of another aggravating factor, there is no double jeopardy bar to further capital sentencing proceedings); Heath v. Alabama, 474 U.S. 82 (1985) (no double jeopardy bar to successive prosecutions when defendant is tried for murder by one sovereign (Alabama) after having pled guilty to offense arising from same occurrence in prosecution by another sovereign (Georgia)); Baldwin v. Alabama, 472 U.S. 372 (1985) (jury instruction error treated as harmless because jury's sentencing recommendation was given no deference whatsoever); Wainwright v. Witt, 469 U.S. 412 (1985) (no constitutional violation in exclusion of juror who would not vote for death penalty regardless of circumstances of crime); Spaziano v. Florida, 468 U.S. 447 (1984) (no constitutional violation when judge sentences defendant to death despite jury's recommendation of life sentence); Pulley v. Harris, 465 U.S. 37 (1984) (no eighth amendment requirement that states conduct proportionality review of the sentences imposed in capital cases).

244. 28 U.S.C. section 2254(b) provides that a habeas corpus petition by a person in state custody "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

245. *See* Rose v. Lundy, 455 U.S. 509, 510 (1982) (adopting a total exhaustion rule requir-

trap for the uneducated and indigent pro se prisoner-applicant."[246] It is "[o]ne of the most difficult procedural obstacles for state prisoners to overcome when seeking federal habeas corpus relief."[247]

Under the Powell committee's proposals, inmates would be required to file their federal habeas petitions within six months of the time counsel was appointed to conduct state post-conviction litigation. The six-month clock would be stopped during the time that any state post-conviction proceeding is *pending*. The clock presumably would be running during the time that newly appointed counsel *prepared to* initiate state post-conviction litigation.

Most likely, the bulk of the allotted six months would be spent preparing to initiate the state post-conviction litigation. This would be so because of the demands of such litigation. The first step, of course, is to obtain, read, and digest the trial transcript and record from the direct appeal; these routinely run several thousand pages. But mastering the transcript is only the first step in the process of constructing a proper post-conviction litigation.

Post-trial investigation almost always discloses important factual information not discovered by trial attorneys, who often work with extremely limited resources. Sometimes new evidence of innocence is found. Sometimes factors beyond the inmate's control, such as mental illness, or a childhood of extreme abuse or neglect, may explain the crime. Invariably, evidence of the prisoner's positive qualities is found, making it less simple to reduce her to an object with no right to live.

Effective post-conviction litigation requires a complete reinvestigation of the case, with a focus on material *not* in the trial transcript. What evidence was *not* presented and why? What evidence was *not* investigated and why? The trial transcript provides clues, but these clues mark only the beginning of

---

ing dismissal of mixed habeas petitions containing both exhausted and unexhausted claims). The exhaustion doctrine requires that the prisoner present the substance of her federal claim to the state courts; it is not, however, necessary to exhaust "book and verse" of the claim. Picard v. Connor, 404 U.S. 270, 278 (1971). It is also unnecessary to exhaust when recourse to state remedies would be futile. *Ex parte* Hawk, 321 U.S. 114, 118 (1944); Piercy v. Black, 801 F.2d 1075, 1077-78 (8th Cir. 1986). The presentation of new facts in federal court does not abridge the exhaustion requirement. Vasquez v. Hillery, 474 U.S. 254, 257-58 (1986). The exhaustion rule, though strictly enforced, is not jurisdictional. Strickland v. Washington, 466 U.S. 668, 684 (1984). It is a doctrine of comity. Thompson v. Wainwright, 714 F.2d 1495, 1503-08 (11th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984).

The exhaustion doctrine probably does not require states to fashion reliable procedures to vindicate federal rights. *See* Note, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 COLUM. L. REV. 1143, 1147-50 (1953) (arguing that, although the Supreme Court has jurisdiction to do so, it has not required states to create post-conviction procedures). The exhaustion doctrine does mandate plenary federal review in the absence of reliable state procedures. However, given that sufficient state procedures may generate fact-findings that are generally presumed correct in federal court, states have a strong incentive to create reliable procedures for the vindication of federal rights. *See, e.g.*, Jones v. State, 446 So. 2d 1059, 1062-63 (Fla. 1984) (encouraging state trial courts to hold evidentiary hearings in state post-conviction matters, because fact-findings generated by such proceedings would be entitled to presumption of correctness in subsequent federal habeas corpus litigation).

246. Rose v. Lundy, 455 U.S. at 522 (Blackmun, J., concurring).

247. Allen, Schachtman & Wilson, *supra* note 48, at 690.

the post-conviction litigator's task. Even with access to a prison law library, inmates have little or no access to vital outside sources, such as expert witnesses (ballistic, forensic, medical psychiatric), fact witnesses, and prior counsel. Inmates seeking post-conviction relief also have difficulty pursuing claims of ineffective assistance of trial counsel.[248] To establish this claim, an inmate must produce evidence of the "background, character and reputation of appointed trial counsel and of what [counsel] did and failed to do," evidence which confined death row inmates have no way of obtaining.[249] In fact, inmates may have difficulty even obtaining a copy of their own trial transcripts.[250]

The person preparing the state post-conviction case must review the trial court docket sheets, files, and records that are maintained in the trial court, including physical evidence, exhibits, and notes of the court clerk about proceedings not designated as part of the formal record on direct appeal. Witnesses must be located and interviewed, including co-defendants and prior counsel. Records of proceedings relevant to co-defendants must be obtained and reviewed. Media coverage must be gathered and reviewed.[251] Often, collateral litigation must be initiated to obtain discovery of these matters.[252] In most cases, a post-conviction psychiatric examination must be arranged and efforts must be made to ensure that such examination is conducted properly.[253] In addition, any prior conviction that played a role at the trial or penalty phase must be reinvestigated for validity.[254]

Because capital post-conviction litigation often turns on trial counsel's failure to investigate mitigating evidence,[255] the post-conviction investigation requires not only an informed evaluation of trial counsel's performance, but also a complete background investigation of the inmate's life.[256] This investigation often requires counseling with the inmate's family members, loved ones, and friends in order to reveal intimate information often critical to the litigation. Such an investigation must cover the inmate's upbringing, education, relationships, important experiences, and overall psychological make-

248. *See* Gibson v. Jackson, 443 F. Supp. 239, 245 (M.D. Ga. 1977), *vacated on other grounds*, 578 F.2d 1045 (5th Cir. 1978).

249. *Id.*

250. Testimony of Johnny Watkins, Trial Transcript at 125-26, Giarratano v. Murray, 668 F. Supp. 511 (E.D. Va. 1986) (No. 85-0655-R), *rev'd on other grounds*, 109 S. Ct. 2765 (1989).

251. *See, e.g.*, Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985) (discussing influence of media publicity on fair trial).

252. *See, e.g.*, Fla. Stat. Ann. § 119.07 (Harrison Supp. 1987) (inspection of public records).

253. *See* State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987) (an evidentiary hearing is necessary to address due process/equal protection claims arising from failure of psychiatrists appointed before trial to conduct competent and appropriate evaluations).

254. *See* Johnson v. Mississippi, 486 U.S. 578 (1988).

255. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 345 (1983).

256. The inmate's conduct on death row must also be investigated, because good behavior is admissible evidence in mitigation at a resentencing hearing. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).

up.[257] Many crucial witnesses, such as childhood friends, teachers, religious advisors, and neighbors may be "scattered like a diaspora of leaves along the tracks of the defendant's travels,"[258] yet they must be located and interviewed within a short period of time if they are to offer favorable post-conviction evidence. Throughout this process, the inmate's lawyer at trial must be treated with care and sensitivity.[259] It is virtually impossible for a condemned inmate to handle this crucial potential witness properly.

Following proper exhaustion of state remedies, the inmate has the balance of the six months within which to initiate federal habeas litigation. Now, at the threshold of federal review, sit the retroactivity cases discussed at the outset of this article[260] — an analysis that must precede any treatment of the merits of the constitutional claims. Is the petitioner in fact asserting a "new rule" of law? Was the constitutional entitlement to relief sufficiently clear at the time that the petitioner's case became final? When does a case become final, at least as to issues cognizable in state post-conviction: is it when the state post-conviction litigation becomes final, or is direct appeal the only benchmark? How ought the "new rule" exceptions be defined in practice? Like procedural default before them, the retroactivity cases promise to be a cottage industry for confusion.

The inmate also faces the ever-increasing intricacies of federal habeas corpus law, including the rule of *Stone v. Powell*,[261] with its extensions, lack of extensions,[262] and exceptions.[263] The inmate also faces the legislative and ju-

257. Goodpaster, *supra* note 255, at 324.

258. *Id.* at 321.

259. *See generally* Sevilla, *Investigating and Preparing an Ineffective Assistance of Counsel Claim*, 37 MERCER L. REV. 927, 931 (1986) (discussing proper treatment of trial counsel in deciding whether to raise claim of ineffective assistance of trial counsel).

260. *See supra* notes 3-5 and accompanying text.

261. 428 U.S. 465 (1976). The Court in *Stone* held that fourth amendment search and seizure claims were not cognizable in habeas if the habeas petitioner had a full and fair opportunity to litigate the claims in the state courts. *Id.* at 481-82.

262. To date, the Court has not extended the principles of *Stone* beyond the fourth amendment setting. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545, 559-64 (1979); Jackson v. Virginia, 443 U.S. 307, 321-24 (1979); Brewer v. Williams, 430 U.S. 387, 395-97, 406 (1977). *Stone*, however, "may only be a sleeping giant, and not a dead one." Robbins, *Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 292 (1986). Four Justices would extend *Stone* to certain confession claims and to claims of racial discrimination in grand jury selection. Vasquez v. Hillery, 474 U.S. 254, 277-83 (1986) (Powell, J., dissenting, joined by Burger, C.J., & Rehnquist, J.); *id.* at 266-67 (O'Connor, J., concurring); Maine v. Moulton, 474 U.S. 159, 190-92 (1985) (Burger, C.J., dissenting, joined by White, Rehnquist, & O'Connor, JJ.).

263. The decision in *Stone* does not bar a claim if the petitioner did not have "an opportunity for full and fair litigation of [the]. . . claim" in the state courts. *Stone*, 428 U.S. at 495 n.37; *see, e.g.*, Riley v. Gray, 674 F.2d 522, 525-27 (6th Cir.) (finding no full and fair opportunity when state appeals court failed to remand to establish defendants' standing to bring claim), *cert. denied sub nom.* Shoemaker v. Riley, 459 U.S. 948 (1982); Doescher v. Estelle, 616 F.2d 205, 207 (5th Cir. 1980) (holding no full and fair opportunity when state procedure subsequently was declared unconstitutional); Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (en banc) (noting there is no full and fair opportunity if no state procedures exist or if state procedures break down), *cert. denied*, 434 U.S. 1038 (1978).

dicial rules of federal court deference to certain types — but only *certain* types — of state court fact finding.[264] The standards governing a petitioner's right to an evidentiary hearing have their own complexity,[265] as do the rules on burdens of proof at such hearings.[266] Obtaining a certificate of probable cause to appeal is no simple matter.[267] If the post-conviction petition is not the inmate's first, then federal principles precluding successive petitions must be addressed.[268] The court will consider whether the ends of justice require relitigation.[269]

Finally, there is the procedural default doctrine of *Wainwright v. Sykes*,[270] which is fatal even to many death row inmates represented by counsel.[271] Justice Stevens has described the *Sykes* doctrine as a "procedural maze of enormous complexity," which has caused the Court to lose its way.[272]

The Court in *Sykes* held that if a state court relies upon an adequate and independent state procedural ground to bar a federal claim, then a federal court in habeas, in general, may not consider the merits of the claim, unless the habeas petitioner can show "cause" for and "actual prejudice" resulting from the default.[273] While the Court in *Sykes* declined to define the parameters of this cause and prejudice standard,[274] it has done so in subsequent cases.

---

264. 28 U.S.C. § 2254(d) (1988) (provides that a state court's findings of historical fact are entitled to a presumption of correctness unless the state fact-finding procedure was deficient in one of eight specified respects). For examples of the application of 28 U.S.C. section 2254(d), see Ford v. Wainwright, 477 U.S. 399 (1986); Miller v. Fenton, 474 U.S. 104 (1985); Wainwright v. Witt, 469 U.S. 412 (1985). Subsection (d) was added to the habeas statute in 1966. *See* S. REP. NO. 1797, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3663. The amendment is best understood as supplementing the standards enunciated in Townsend v. Sain, 372 U.S. 293 (1963), which govern when a federal evidentiary hearing is mandatory in habeas proceedings. *Townsend* controls when an evidentiary hearing is required, while subsection (d) controls the burden of proof at such a hearing. *See* Thomas v. Zant, 697 F.2d 977, 980-86 (11th Cir. 1983). On federal evidentiary hearings generally, see Wright & Sofaer, *Federal Habeas Corpus and State Prisoners: The Allocation of Fact-finding Responsibility*, 75 YALE L.J. 895 (1966).

265. *See Townsend*, 372 U.S. at 310-14.

266. *See Thomas*, 697 F.2d at 986-89 (applying *Townsend* principles to habeas claim of ineffective assistance of trial counsel).

267. *See* Barefoot v. Estelle, 463 U.S. 880, 892-894 (1983) (discussing the procedural guidelines for obtaining a certificate of probable cause); Robbins, *supra* note 262, at 315-29.

268. *See* McCleskey v. Zant, 111 S. Ct. 1454 (1991); Federal Rules Governing Habeas Corpus Cases, Rule 9(b), 28 U.S.C. § 2254 (1988); Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 378-89 (1985).

269. Kuhlmann v. Wilson, 477 U.S. 436 (1986).

270. 433 U.S. 72 (1977).

271. For examples of capital cases in which procedural defaults in the state system barred federal habeas relief, see Straight v. Wainwright, 772 F.2d 674, 678 (11th Cir. 1985) (no cause), *cert. denied*, 475 U.S. 1099 (1986); Francois v. Wainwright, 741 F.2d 1275, 1283 (11th Cir. 1984) (no prejudice). *See also* Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177, 1198-205 (1985).

272. Murray v. Carrier, 477 U.S. 478, 497 (1986) (Stevens, J., concurring).

273. *Sykes*, 433 U.S. at 87, 91.

274. *Id.* at 87 ("We leave open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard and note here only that it is narrower than the standard set forth in dicta in Fay v. Noia, 372 U.S. 391 (1963).").

The Court has explained that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[275] The failure of an attorney to raise a federal claim in state court in a timely manner will not constitute cause unless the attorney error rises to the level of violation of the sixth amendment right to the effective assistance of counsel.[276] These claims are best treated under an ineffective assistance of counsel analysis rather than under a cause and prejudice *Sykes* analysis.[277]

Novelty of a federal constitutional claim constitutes cause for a failure to timely raise a claim in state court,[278] but only if the constitutional tools for framing the claim were unavailable at the time.[279] In proving prejudice, at least as to jury instructional error, a habeas petitioner must "shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[280]

To further complicate matters, the standards established in *Sykes* are not the exclusive analysis that a federal court confronted with a state procedural default must undertake. The Supreme Court, in *Smith v. Murray*,[281] made it clear that determining whether a petitioner satisfies the cause test "does not end our inquiry."[282] "In appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration."[283] This fundamental fairness exception to *Sykes* is satisfied if a petitioner makes a colorable claim of innocence. "Where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[284] Although a petitioner in this circumstance presumably satisfies the prejudice test of *Sykes*, the fundamental fairness inquiry is best treated as an analysis separate from *Sykes*; one that is triggered only upon a conclusion that *Sykes* has not been satisfied. The Court took this approach in *Sykes*[285] and in at

275. *Carrier*, 477 U.S. at 488.

276. *Id.* at 488-89, 492.

277. *Id.* at 486-88.

278. Reed v. Ross, 468 U.S. 1, 12-16 (1984). Of course, a "new rule" will forgive a default, but then federal review would be foreclosed under the Court's recent retroactivity decisions. *See supra* text accompanying notes 3-5.

279. Engle v. Isaac, 456 U.S. 107, 133-34 (1982).

280. United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original).

281. 477 U.S. 527 (1986).

282. *Id.* at 537.

283. Murray v. Carrier, 477 U.S. 478, 495 (1986) (quoting *Engle*, 456 U.S. at 135).

284. *Carrier*, 477 U.S. at 496; *see also Smith*, 477 U.S. at 537 (discussing burden of proving fundamentally unjust incarceration); *Frady*, 456 U.S. at 171 (noting that petitioner would have had a different case had he presented "affirmative evidence indicating wrongful conviction of crime").

285. Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

least one case since then.[286]

Other inquiries could obviate the need to undertake the cause and prejudice inquiry. Generally, if the state court addressed the federal claim on its merits, then the federal courts must do so as well.[287] If the state court possessed the discretion and the power to forgive the default, that alone should permit federal review even though the state court declined to exercise such discretion in the capital case at hand.[288] A claim is cognizable in habeas if the state court rejects a claim without supplying a reason,[289] and perhaps if the state court simply resolves it in the alternative by finding both a procedural default and a lack of merit;[290] a strong case can be made for entertaining the

286. *Engle*, 456 U.S. at 135 (stating that victims of fundamental miscarriage of justice will meet cause and prejudice standard of *Sykes*).

287. *See* Wainwright v. Greenfield, 474 U.S. 284, 289 n.3 (1986) (reaching merits of claim because state appellate court addressed issue on merits); *Engle*, 456 U.S. at 135 n.44 (where state court declined to exercise its discretion to waive state procedure and consider claim, federal review was barred); *Sykes*, 433 U.S. at 87 (dealing only with contentions of federal law which were not resolved on merits in state proceeding due to prisoner's failure to raise them); *see also* Ulster County Court v. Allen, 442 U.S. 140, 149 (1979); Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976); Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); Lockett v. Arn, 728 F.2d 266, 270 (6th Cir. 1984), *cert. denied*, 478 U.S. 1019 (1986); Burger v. Zant, 718 F.2d 979, 983 n.3 (11th Cir. 1983); Ross v. Hopper, 716 F.2d 1528, 1537 (11th Cir. 1983); Booker v. Wainwright, 703 F.2d 1251, 1256 (11th Cir. 1983); Darden v. Wainwright, 699 F.2d 1031, 1034 n.4 (11th Cir. 1983); Lowery v. Estelle, 696 F.2d 333, 342 n.28 (5th Cir. 1983); Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir.), *cert. denied*, 466 U.S. 1268 (1984); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); Sassoon v. Stynchombe, 654 F.2d 371, 374 (5th Cir. 1981); Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

288. Robson & Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intracacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CALIF. L. REV. 87, 115 (1988).

289. Harris v. Reed, 489 U.S. 255 (1989) (since appellate state court addressed the merits of the claim, and did not clearly and expressly rely on procedural bar as a ground for rejecting claim, federal habeas review not precluded).

290. The First, Second, Third, Fourth, and Seventh Circuits have held that a state court's alternative reliance on a procedural bar is sufficient to trigger a *Sykes* cause and prejudice analysis. *See* Davis v. Allsbrooks, 778 F.2d 168, 176 (4th Cir. 1985); McCown v. Callahan, 726 F.2d 1, 3 (1st Cir. 1984); Farmer v. Prast, 721 F.2d 602, 606 (7th Cir. 1983); Phillips v. Smith, 717 F.2d 44, 47 (2d Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982). However, the Sixth and Eighth Circuits have held that the state court must place primary reliance on the procedural default for it to serve as a bar for federal habeas review. *See* Dietz v. Solem, 640 F.2d 126, 131-32 n.1 (8th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981). For the Ninth and Fifth Circuits, the state court must rely exclusively on the procedural default rule. *See* Lowery v. Estelle, 696 F.2d 333, 342 n.28 (5th Cir. 1983); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F.2d 1294, 1295 (9th Cir. 1979). The Eleventh Circuit's cases are conflicting. *Compare* Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1981) (citing Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981), for the proposition that when state courts have not relied exclusively upon procedural default, *Sykes* does not prevent federal habeas corpus review) *and* Dobbert v. Strickland, 718 F.2d 1518, 1524-25 (11th Cir. 1983) (concluding that federal court could consider the merits since state court had done so, even if ambiguity existed as to whether the merits of the procedural bar served as the state court's actual ground of decision) *with* Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984) (stating

claim under these circumstances, at least in capital cases.[291]

Even where the state court explicitly relied upon a procedural ground to deny relief, the *Sykes* cause and prejudice analysis still may not apply. Before making a cause and prejudice examination, the federal court must make a threshold determination that the state procedural rule being invoked is both an adequate and an independent state ground that would bar direct United States Supreme Court review of the federal constitutional claim.[292]

Thus, to understate, habeas is complex. Congress acknowledged the daunting complexity of capital collateral jurisprudence when it passed the Anti-Drug Abuse Act of 1988, which arguably requires federal courts to appoint counsel for state and federal death row inmates seeking habeas relief.[293] Significantly, the act mandated that at least one attorney representing the inmate be a member of the bar for at least five years and have at least three years felony litigation experience.[294] In their concurring opinion in *Murray v. Giarratano*,[295] Justices O'Connor and Kennedy also recognized that the complexity of capital cases "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[296]

---

that state court is entitled to express its views on federal constitutional issues without waiving its procedural default rules) *and* Smith v. Wainwright, 777 F.2d 609, 614 (11th Cir. 1985) (noting that because state courts denied relief on grounds of procedural default and lack of merit, federal court is unable to address issue on merits).

291. Robson & Mello, *supra* note 288, at 120.

292. Harris v. Reed, 498 U.S. 255 (1988) (adequate and independent state ground test applies to federal habeas corpus proceedings); Johnson v. Mississippi, 486 U.S. 578 (1988) (the procedural bar invoked by the state court, which was not consistently applied, did not serve as an adequate or independent state ground to preclude federal habeas review); Mann v. Dugger, 817 F.2d 1471, 1484 (11th Cir.) (holding that novel, unexpected, and inconsistent application of Florida's procedural default rule rendered it inadequate to bar federal review), *aff'd by en banc court*, 844 F.2d 1446, *cert. denied*, 109 S. Ct. 1353 (1988); Oliver v. Wainwright, 795 F.2d 1524, 1529-30 (11th Cir. 1986) ("unfair surprise" or inconsistent application of state procedural default could not bar federal review of petitioner's constitutional claims); Wheat v. Thigpen, 793 F.2d 621, 627 (5th Cir. 1986) (state procedural default rule deemed inadequate because it was not clearly announced or strictly followed).

293. *See supra* notes 174-78 and accompanying text.

294. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 4393-94 (Nov. 18, 1988) (to be codified at 21 U.S.C. § 848).

295. 109 S. Ct. 2765 (1989).

296. *Id.* at 2772. Concerning the difficulties of capital cases, former Chief Judge Godbold of the Eleventh Circuit Court of Appeals has observed that

> [t]aking a habeas case is not something most lawyers want to do. In the first place, it's hard. It is the most complex area of the law I deal with. In the second place, it's often done on an emergency basis. Third, the penalty just isn't imposed anymore on people for trivial things. The community is often inflamed. The press is often inflamed. The state trial judge is often inflamed if you question what he did. The trial counsel is often inflamed if you must question what he did. Your client seldom appreciates what you do and may end up accusing you of being ineffective counsel.

Mikva & Godbold, *supra* note 227, at 24.

c. The Constitutional Consequences of Reality

Some attorneys, legislators, and judges have recognized the obvious: that capital habeas cases are complex and difficult. Because of this inherent difficulty, capital habeas cases require hundreds of hours of preparation.[297] The effect of the Powell committee's proposed six-month statute of limitations on an uncounseled death row inmate's access to federal habeas would be devastating. Six months is a completely inadequate time for proper preparation of capital habeas proceedings. Besides not providing enough time for preparation and litigation, the ABA task force report criticized the Powell committee's proposed statute of limitations because it

> could deter capable counsel from agreeing to represent an indigent inmate and severely and unnecessarily constrain even the most conscientious counsel who do take on such cases. [Furthermore], the Powell committee's limitations proposal does not contain any tolling provisions for exigencies such as illness to counsel, or lack of counsel to prepare the federal habeas corpus petition. Such fortuities will occur, but should not irrevocably bar a capital petitioner's access to federal review.[298]

The six-month statute of limitations should be held to violate the suspension clause. When compared to the federal writ of habeas corpus that has no time limit, the statute of limitations would create a federal post-conviction remedy completely "inadequate and ineffective" for testing the legality of a death row inmate's conviction. In effect, this extremely short time limit would bar access to federal habeas for the majority of death row inmates, i.e., those who cannot obtain counsel or whose counsel cannot prepare their cases within the prescribed period.

In the past, the Supreme Court has considered the real world effects of regulations on an inmate's access to the courts and access to habeas review and has struck down procedures that unduly burden this access. The Court struck down regulations that prohibited "jail-house lawyering,"[299] regulations that restricted lawyers who represent prisoners from using legal assistants,[300] and regulations that restricted inmates' access to legal research materials.[301]

Specifically concerning a prisoner's access to habeas corpus, the Court observed in *Smith v. Bennett*[302] in 1961 that "no higher duty" existed than to maintain the federal writ of habeas corpus for state prisoners "unimpaired"

297. ABA TASK FORCE REPORT, *supra* note 19, at 39-41 (survey of the time and expense required for capital habeas cases).

298. *Id.* at 40-42.

299. Johnson v. Avery, 393 U.S. 483, 490 (1969).

300. Procunier v. Martinez, 416 U.S. 396, 419-21 (1974).

301. Bounds v. Smith, 430 U.S. 817 (1977). The Court in *Bounds* held that a prisoner's interests in "habeas corpus and civil rights actions" are liberty interests that command "affirmative" measures to protect them. *Id.* at 827-28.

302. 365 U.S. 708 (1961).

and "unsuspended, save only in the cases specified in our Constitution."[303] The Court reasoned that if a state granted a right similar to the federal writ of habeas corpus, then "financial hurdles must not be permitted to condition its exercise."[304] Based on this reasoning, the Court in *Smith* invalidated a state rule requiring indigent prisoners to pay a fee before filing their petition for a state writ of habeas corpus.[305] To hold otherwise would have essentially denied indigent prisoners access to habeas corpus, the Great Writ that "has been the shield of personal freedom insuring liberty to persons illegally detained."[306]

Like the filing fees in *Smith*, the proposed six-month statute of limitations would create an insurmountable hurdle that would prevent adequate preparation of a capital habeas case and would deny most death row inmates access to federal habeas corpus. Since the 1800's the federal writ of habeas corpus has been maintained as a guarantee that every person subjected to serious sanctions by reason of a state criminal conviction will have a federal judicial hearing on the constitutionality of that conviction and those sanctions. The six-month statute of limitations would, in effect, "suspend" the writ of habeas corpus for death row inmates in peace time and, therefore, should be held unconstitutional.

IV.
CONCLUSION

We have suggested that whether measured against history, legal doctrine, or real world consequences, the Powell committee's proposed time limits, combined with the failure to provide for legal representation in federal habeas proceedings, should be held to violate the suspension clause. We again wonder, however, whether this article has been largely an academic exercise. A court willing to create a good faith exception to habeas — as the Supreme Court recently did in its retroactivity cases — is hardly a receptive audience to explorations based on history, doctrine, or real world consequences. This article therefore ignored perhaps the most salient aspect of the issue: the Rehnquist Court's relentless determination to deny condemned access to the federal courts, and the larger issue of the Court as a political institution. Hope springs eternal.

303. *Id.* at 713.
304. *Id.*
305. *Id.* at 714.
306. *Id.*