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FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS

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Federal review of state court convictions is a point of conflict between state and federal courts and has been for some time. It has been called:

The most controversial and friction-producing issue in the relation between the federal courts and the states. Commentators are critical of its present scope, federal judges unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a single federal district judge. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations.¹

Some state judges resent the presumption of state court incompetence implicit in federal review.² Looking at habeas corpus petitions filed over a forty year period, it is clear that the federal court review of state convictions began in earnest in 1963 when the U.S. District Courts, rather than the U.S. Supreme Court, became the primary means of federal court review of state court judgments.³ Even though the number of state prisoners has nearly quadrupled in the past twenty-five years, the rate of habeas filings per prisoner has declined steadily. The Federal Courts Study Committee attributes the decline to Supreme Court decisions that make habeas more difficult to obtain.⁴ The volume of habeas petitions from state prisoners is generated largely by convictions in nine states. These petitions generate work for magistrates and district court judges because they must be reviewed for constitutional violations, but the petitions represent only a small portion of civil cases filed in U.S. District Courts, and the vast majority are dismissed. In 1992, for example, habeas petitions from state prisoners terminated by U.S. District Courts (10,688) represented four and seven-tenths percent of civil cases terminated (226,596). Ninety-four percent of these were denied.⁵

Despite the fact that many of the important and interesting debating points about habeas corpus are empirical questions, the amount of data brought to bear on this topic are almost nonexistent. David L. Shapiro

1. CHARLES A. WRIGHT ET AL., 17A FEDERAL PRACTICE AND PROCEDURE § 4261 (2d ed. 1988).

2. Tension between state and federal judges is engendered when "a single federal judge may overturn the judgment of the highest court of a state" *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981). On the other hand, some state judges have testified as to the necessity of federal oversight. Justice Garter, a former state judge, noted to us that the very existence of the federal writ has resulted in state court improvements. See also *Withrow v. Williams*, 113 S. Ct. 1745, 1755 (1993).

3. The U.S. Supreme Court changed criteria for review of state criminal cases in 1963. See *Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia* 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963).

4. FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 471 (July 1, 1991). The Committee also notes that lack of prisoner success in obtaining habeas review combined with the liberalizing of 42 U.S.C. § 1983 prisoner petitions, which may also have "deflected" prisoner attention from habeas corpus petitions to civil rights suits, are other reasons for the decline in petitions per prisoner.

5. The authors are indebted to David Cook, Administrative Office of the U.S. Courts for providing this data.

decried the lack of empirical studies on habeas corpus twenty years ago,⁶ and only two empirically-based works have been written since that time.⁷ This is *only* the second multisite study of habeas corpus ever completed and the only one to include data from state courts as well as federal courts.

By presenting some recent empirical data on habeas corpus, this paper seeks to reduce the number of issues in contention and hence focus the debate more clearly. Part I of the article presents the research design, Part II the characteristics of petitioners, Part III the types of claims raised, Part IV the success rates of petitioners by claims raised, and Part V the conclusions.

I. THE RESEARCH DESIGN

Ideally, it would be desirable to track the same set of cases from state court to federal court. This would permit a comparison of the claims raised in federal court with those raised earlier in state court. The problem with this design is that it is not possible to obtain a pure sample of cases not appealed to federal court because there is currently no time limit governing when a state prisoner may file a habeas corpus petition in federal court. Thus, there is always the potential for a person to file in federal court. Besides this, the time required to track cases through state and federal courts would be prohibitive. Consequently, separate state and federal samples were drawn.

A. The Sample

The Advisory Committee to this research effort recommended that staff use states, rather than federal districts, as units of analysis and set the criteria for site selection. Criteria included:

- The absolute number of habeas petitions filed in federal court. In effect this criterion mandated the selection of larger states which would have sufficient petitions filed from which to draw a representative sample;

6. David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973). Shapiro's research was conducted in the U.S. District Court for the District of Massachusetts for the years ending June 30, 1970, 1971, and 1972.

7. These are Paul H. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* (Washington, D.C.: Federal Justice Research Program, Office for Improvements in the Administration of Justice, 1979) and Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N. Y. U. REV. L. & SOC. CHANGE 637, 650 (1990-91). The Faust, Rubenstein, and Yackle research was based upon data from the U.S. District Court, Southern District of New York for the time periods 1973-75 and 1979-81. A study by Robinson for the Department of Justice, completed in 1979, was the only study prior to this one to use data from more than one U.S. District Court. None of the previous empirical studies included a comparison group of state court habeas petitions. U.S. Districts included in his sample included the Central District of California, the Northern District of Illinois, the Eastern District of Virginia, and the District of New Jersey. The Southern District of California was added to determine if there were differences between large and small districts within the same state.

- The proportion of habeas petitions to state prisoner populations;
- The geographic diversity among sites chosen to represent different regions of the country;
- The states with a death penalty and states without the death penalty;
- The states having the court records necessary to complete the study.⁸

Given these parameters, the four states chosen for the study were California, New York, Texas, and Alabama. All had sufficient numbers of petitions filed in federal courts and, considered collectively, represent geographic diversity. Alabama had the highest ratio of habeas corpus petitions filed to prisoner population and was included in the four states studied.⁹

Samples of habeas petitions were drawn from the state's highest criminal courts to ensure a sample that was representative of petitions filed in the entire state. The exception was New York where the Court of Appeals had very few petitions filed, so the sample was drawn in the intermediate appellate courts and one trial court. Staff had expected to find many habeas petitions filed in the densely populated Manhattan and Brooklyn areas and were surprised at the relative small number of petitions filed in this area. Court personnel suggested that the reason few petitions were filed may be that very few prisons are located within the city and that prisoners may be

8. Data supporting the selection criteria are as follows:

	Sufficient Number of Habeas Corpus Filings U.S. District Courts by State- 1990	Habeas Corpus Petitions as Percentage of Prisoners	Death Penalty	Prisoners Under Sentence of Death, April 1991
California	1,070	1%	yes	299
New York	663	1%	no	0
Texas	918	2%	yes	335
Florida	589	1%	yes	295
Pennsylvania	590	3%	yes	132
Michigan	411	1%	no	0
Ohio	303	1%	yes	99
Missouri	539	4%	yes	73
Indiana	356	3%	yes	53
Tennessee	303	4%	yes	85
Louisiana	462	3%	yes	34
Alabama	562	5%	yes	109
Kentucky	281	4%	yes	27

9. Michigan and Pennsylvania were actively considered as well. Michigan was attractive because of the ready access of staff already working there and because Michigan does not have a death penalty. Examination of records on site, however, revealed that too few cases were filed in state court to warrant inclusion in the study. For example, our on-site research in Wayne County established that only 46 habeas petitions were filed in 1991, and only 24 were filed in Ingham County, the state capital. Habeas cannot be used to challenge a conviction in Michigan and there is virtually an automatic right to appeal to the Court of Appeals. MCL § 750.321, MSA § 28.553. Consequently, there were only six cases appealed to the Court of Appeal in 1989, 12 in 1990, and 12 in 1991. Pennsylvania is similar to Michigan in that the vast majority of habeas petitions are brought under the Post Conviction Relief Act. There are few habeas petitions per se and records kept in trial courts to not identify habeas petitions separately.

filing petitions in the locations where they are incarcerated. Wyoming County is the location of Attica Prison, however, and very few petitions were filed there either. This may indicate that New York state courts do not receive an abundance of habeas filings. This conclusion seems logical, for in California, Alabama, and Texas, the staff had no problem collecting over three hundred state habeas claims from the targeted years of 1990 and 1992. This was surprising considering New York's large prison population. The finding may be partially explained by the fact that New York was the only non-death penalty state in this study.¹⁰ The courts participating in the research and sample sizes are listed as follows:

Table 1
Sample Sizes

<u>State Courts</u>	<u>Number of Petitioners</u>	<u>Federal Courts</u>	<u>Number of Petitioners</u>
Alabama Court of Criminal Appeals	381	Middle District of Alabama	258
		Southern District of Alabama	45
Supreme Court of California	507	Northern District of California	152
		Eastern District of California	156
Supreme Court of the State of New York, Appellate Division, First Judicial Department	35	Southern District of N.Y.	213
Second Judicial Department	243	Eastern Division of N.Y.	274
Supreme Court of N.Y., Wyoming County	29		
TX Court of Criminal Appeals	640	Northern District of Texas	136
		Southern District of Texas	392
Totals			1,626

Creating a comparison group of state habeas cases was more difficult than anticipated. In California and Texas, writs of habeas corpus are the primary post-judgment remedies.¹¹ In New York and Alabama, however, many of the actions brought in federal courts as habeas corpus petitions are brought in other state court writs. To facilitate meaningful comparisons

10. Prisoner population in New York was 53,359 in 1990. The rate of habeas filings was one percent in New York; the same rate as in California, but lower than the two percent in Texas and the five percent rate in Alabama.

11. In Texas, the petitions granted by the state Court of Criminal Appeals were oversampled, because granted petitions were stored separately from petitions that were denied or dismissed. The rate of granting petitions is so low in all courts that a larger than usual sampling of granted petitions was coded to facilitate analysis of the reasons why petitions were granted. The number of habeas corpus petitions filed in death penalty cases before the California Supreme Court was oversampled for similar reasons.

among sites, data were collected on Rule 440 petitions in New York¹² and Rule 32 petitions in Alabama¹³ as well as habeas petitions filed in all courts.

II. PETITIONER CHARACTERISTICS

What type of prisoners file habeas corpus petitions? Prior research shows that most petitioners filing habeas petitions have been convicted of a serious offense.¹⁴ The percentages differ somewhat, because prior studies recorded multiple offenses, and, thus, do not equal one hundred percent.

12. In New York, this research found that the habeas petition itself is used primarily to challenge bail. Other procedures are used to make claims that would be habeas claims in other states. Some of these grounds (e.g., failure to seek continuances), may entitle petitioners to a new trial, but not to be released as a habeas corpus remedy would provide. Rule 440 motions were collected in the research sites also to enable the coders to pick up the equivalent of habeas petitions in other states. N.Y. CRIM. PROC. LAW § 440 (Consol. 1970). (Ineffective assistance of counsel may also be raised in a *coram nobis* application). Section 440.10 motions to vacate judgment provides that the court may vacate the judgment upon the motion of the defendant if: 1) the court did not have jurisdiction of the action or of the person of the defendant; 2) the judgment was procured by duress, misrepresentation or fraud on the part of the court, prosecutor, or a person acting on behalf of the court or a prosecutor; 3) material evidence adduced at the trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecution or by the court to be false; 4) material evidence presented by the prosecution at trial was procured in violation of the defendant's rights under the New York Constitution or the United States Constitution; 5) during the proceedings which resulted in judgment against the defendant, the defendant was incapable of understanding or participating in such proceedings; 6) improper and prejudicial conduct not appearing in the record occurred during the trial which resulted in the judgment, if this conduct had appeared in the record it would have required a reversal of judgment upon an appeal therefrom; 7) new evidence has been discovered since the entry of the guilty judgment, which could not have been produced by the defendant at the trial even with due diligence on his part and if the evidence had been received at trial the verdict would have been more favorable to the defendant; provided that a motion based upon this ground must be made with due diligence after the discovery of such alleged new evidence; or 8) the judgment was obtained in violation of a right of the defendant under the New York state Constitution or the United States Constitution. N.Y. CRIM. PROC. LAW § 440.10 (Consol. 1970). There is no statute of limitations on any of the 440 motions. *Id.*, Practice Commentary by Joseph W. Bellacosa at 320. Joseph W. Bellacosa, *Practice Commentary in N.Y. CRIM. PROC. LAW*, *supra* at 320. Many petitioners used the Rule 440 motion to argue ineffective assistance of counsel. See *People v. Prentice*, 459 N.Y.S.2d 194 (1983), where the court states that any claim that the defendant was deprived of effective assistance of counsel should be resolved by the trial court on motion to vacate judgment. Every defendant has one automatic appeal, therefore many issues raised in habeas petitions in other states can be addressed on direct appeal here.

13. Alabama also has an alternative post-conviction remedy in Rule 32, which is a slight modification to former Rule 20. ALA. CT. C.P.R. 32. Any defendant convicted of a criminal offense may seek relief if the sentence imposed exceeds the maximum authorized by law, if the court was without jurisdiction to render judgment, if the petitioner is being held in custody after the petitioner's sentence has expired, if newly discovered material facts exist that were not known at the time of trial or sentencing and if known would have changed the result, or if the United States Constitution or Alabama Constitution requires a new trial, a new sentence proceeding, or other relief. ALA. CT. C.P.R. 32.1. Rule 32 forbids successive petitions, thus, many Rule 32 petitions tend to raise multiple claims. ALA. CT. C.P.R. 32.2 (3).

14. Robinson, *supra* note 7, at 7; Faust et al., *supra* note 7, at 678.

Table 2
Habeas Petitioners by Original Offense

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

This study counts only the most serious offenses the petitioners committed. Nevertheless, the study confirms the conclusion of prior work that habeas petitioners were likely to be convicted of serious offenses. It includes more categories of offenses than prior studies so that burglary/theft, for example, is separated from robbery convictions, because robbery includes physical harm as well as theft.

Habeas petitioners are more likely than other prisoners to have been convicted by jury trial. Research in twenty-six urban areas reveals that the jury trial rate for felony convictions averages six percent,¹⁷ yet the majority of habeas petitioners in our study were convicted by jury trial (sixty-two percent of the state court sample and sixty-six percent of the federal court sample). Our study indicates that convictions by jury trial are much higher than convictions by bench trial (only four percent of petitioners in the state sample and eight percent of the federal sample), guilty pleas (thirty-two percent of the state samples and twenty-four percent of the federal sample), or *nolo contendere* (three percent of the state petitioners and two percent of the federal). Considering the fact that a high proportion of convictions are achieved by guilty pleas, a greater representation of guilty pleas among habeas petitioners may have been expected. Guilty pleas obviously do not prevent prisoner's filing of a habeas petition, but may reduce the number of issues about which the petitioner may complain. Robinson also suggests that petitioners may believe their chances of successful habeas petition are less after a guilty plea because it is less convincing to maintain innocence after pleading guilty.¹⁸ In any event, it is clear that habeas petitions are *not* used

15. The Faust figures are total percentages, obtained by combining the 1973-1975 and 1979-1981 percentages.

16. The sexual assault category includes rapes, molestation, and any other sexual types of offense.

17. J. GOERDT, NATIONAL CENTER FOR STATE COURTS, EXAMINING COURT DELAY (1989). These figures comport well with the state figures in Court Statistics Project, NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1988 Williamsburg, Va., which reports felony jury trial rates from 12 states. These rates range from 2.1 percent in Texas to 6.9 percent in Alaska.

18. Robinson, *supra* note 7, at 8.

by a representative sample of all convicted state prisoners, but rather by the smaller proportion of prisoners who are generally imprisoned as a result of a jury trial for committing serious offenses.

Only prisoners sentenced to a longer term have time to complete the lengthy procedures prerequisite to filing a habeas corpus petition.¹⁹ As a consequence of being convicted of a serious offense after a jury trial, it is not surprising that our research indicates that the length of the sentences of habeas petitioners is long. Our study indicates that the median sentences in state courts range from a minimum sentence of twenty-four years to a maximum of thirty years and sixteen to twenty-four years for petitioners in federal courts.

Perhaps also as a consequence of the seriousness of the offense, petitioners were likely to have been represented in state court during the trial. Data on the type of attorney, however, was the single most difficult characteristic to find in the transcripts, and half of the habeas records reviewed had no information on the type of representation the convicted individual received at trial. The data that were available (894 petitioners out of 1,835 in the state sample) reveals that sixty-four percent of the prisoners received court-appointed counsel, nine percent had public defenders, nineteen percent had contract attorneys, and eight percent represented themselves. Of the 1,093 petitioners in federal court for whom data were available, seventy-eight percent had court-appointed counsel or public defenders in the trial court, twelve percent had contract attorneys, and six percent represented themselves. Fewer than one percent of petitioners in either state or federal court had retained counsel at trial.

Although the overwhelming number of petitioners were represented by counsel for their initial offense, most were *not* represented by counsel in filing of the habeas corpus petitions. States are not obligated to provide counsel for collateral attacks.²⁰ Three-quarters of the petitioners in state court and ninety-one percent of the petitioners in federal court represented themselves. The number of pro se petitioners in federal court seems to have increased since the 1970s when Robinson found seventy-nine percent of the petitioners filing without an attorney.²¹ For the petitioners who were represented by counsel in state court, twelve percent had court-appointed counsel and seven percent had privately retained counsel. The remaining six percent were represented by counsel but the records did not make it clear as to how the counsel were obtained. Of the nine percent of the petitioners represented by counsel in federal court, five percent of the petitioners were represented by court-appointed counsel, three percent by retained counsel,

19. See, e.g., JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1988).

20. *Murray v. Giarratano*, 492 U.S. 1 (1989), discusses representation in capital cases, and *Pennsylvania v. Finley*, 481 U.S. 551 (1987) discusses representation in noncapital cases; but most state courts and all federal district courts can provide counsel to indigents if their claims show merit. 28 U.S.C. § 1915(d) (1988).

21. Robinson, *supra* note 7, at 9.

and the remaining one percent were represented by counsel whose appointment status was unknown.

Of the state petitioners in the sample, thirty-five percent were filing their first petition, fifteen percent had filed one previous petition, seventeen percent had filed two prior petitions, and the remainder filed three or more prior habeas petitions. Of the federal petitioners, forty-six percent were filing their first petition, eighteen percent their second, seventeen percent their third, while the remainder had previously filed three or more petitions.

Using both the 1990 and 1992 data from habeas corpus petitions filed in *both* state court and federal court, this research has confirmed earlier findings that habeas petitioners have been convicted of serious offenses at jury trial and have received long sentences. It makes sense that habeas petitioners have longer sentences, because it takes such a long time to go through state court proceedings to make it to the habeas corpus phase. More than half of the federal petitioners have filed more than one habeas petition and roughly sixty-five percent of state petitioners filed two or more habeas petitions. Although most petitioners were represented by counsel at trial, most filed habeas corpus petitions *pro se*.

III. TYPES OF CLAIMS RAISED

Which claims are raised by petitioners and against whom are they raised? Before this important question is discussed, a couple of caveats are in order. Claims are often handwritten by prisoners which were sometimes hard to decipher. Although some petitions filed by prisoners were as concisely drawn and specified claims as clearly as those prepared by an attorney, others were difficult to read and contained claims difficult to identify. Moreover, petitions selected were in very different stages of the process, for example, some petitioners were filing their first petitions while others had already filed multiple claims in state and federal court.

A question commonly asked is how many petitioners tend to file multiple claims? Multiple claims are difficult to compare because what may be one claim to one petitioner may be multiple claims to another. Some claims raised were very specific whereas other were more general. For example, one petitioner may claim counsel was ineffective for failure to call witnesses (one claim), another would list failure to call each specific witness as a separate claim, and a third would make the general claim of ineffective assistance as well as several specific claims, (e.g., failure to call witnesses, failure to communicate with the client etc.). To make these claims comparable, all prisoner complaints were placed into the eight standard categories shown in Table 4. By using petitioner as unit of analysis, any claim of ineffective assistance of counsel, whether general or specific, presented one time or repeated several times, was counted as one claim of ineffective assistance of counsel. In other words, the response was dichotomized as: Did the petitioner raise the claim in any form or did he not? Consequently, the following number of claims shown in Table 3 is likely to be conservative.

Table 3
Number of Claims Raised by Petitioners

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

This analysis is based upon the number of individual petitioners making claims rather than the number of claims raised. Most petitioners (sixty-seven percent of state petitioners and seventy-three percent of federal petitioners) raise more than one claim per petition.

Claims made were categorized by the institution against whom the claim was made, and also by amendment. For example, petitioners tended to find fault with police for their arrest, prosecutors for their conduct during trial, trial courts for their decisions made during the course of the trial, and their attorneys for ineffective representation.²²

Many claims classified under the amendments may also have been included in other categories. Claims regarding evidentiary decisions, procedural errors, and judge bias were included in the trial court error category, but claims like insufficient evidence to convict were classified as Fourteenth Amendment concerns because conviction is not the sole decision of the trial court. Often it is the jury who votes to convict and the prosecutor who decides to bring charges against the defendant. For example, certain Sixth Amendment rights could have been classified as trial court error as well. Speedy trial violations and denial of assistance of counsel are usually the responsibility of the trial court judge. Because these claims are expressly provided for in the Sixth Amendment, they were classified separately.

22. Classifying claims was very difficult and time consuming, because every petitioner had a different story to tell and a different way to tell it. Although approximately 60 potential claims were listed on coding instructions, still a high number of claims were placed in the "Other" category. It was important to classify and then categorize the claims for analysis. Classification issues are discussed throughout the claims section of this paper.

Table 4
Types of Claims Raised

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners Raising Claims</u>			
	State		Federal	
Ineffective Assistance of Counsel	756	41%	736	45%
Trial Court Error	495	27%	474	29%
Prosecutorial Misconduct	209	11%	259	16%
Police Misconduct	84	5%	214	13%
Fifth Amendment	343	19%	372	23%
Sixth Amendment	233	13%	275	17%
Eighth Amendment	593	32%	351	22%
Fourteenth Amendment Concerns	656	36%	579	36%

No significant difference exists between claims raised in federal and state court. Prisoners tend to raise the same claims in both types of court, and to the extent that a trend exists, a slightly smaller proportion of claims are raised in state court. The sole exception is in alleged errors at sentencing and punishing phase of the proceedings—thirty-two percent of these Eighth Amendment claims were raised in state court, compared to twenty-two percent in federal court. This difference is partially explained by the fact that the errors at sentencing and punishing include the excessive bail claim, which in New York is the primary reason a petitioner files a state habeas claim.²³ The high number of excessive bail claims in New York state habeas petitions made the state court proportion higher.

A. Ineffective Assistance of Counsel Claims

Challenges to the competency of attorney representation were the most commonly raised claim in both state and federal court. The Sixth Amendment guarantees the right to counsel for criminal defendants, and the Supreme Court has also recognized the right to effective assistance of counsel.²⁴ In one sense, this claim is a precondition for all others because ineffective assistance of counsel is a reason given for not previously raising claims. Despite recent U.S. Supreme Court decisions, petitioners still have an incentive to raise the issue of ineffective assistance of counsel or else they cannot raise other issues not raised earlier or argue new evidence.²⁵

23. See *supra* note 12.

24. *Strickland v. Washington*, 466 U.S. 668 (1984); see also Mark Peake, *Hoots v. Allsbrook: The Fourth Circuit's Application of the Strickland Test for Determining Ineffective Assistance of Counsel Claims*, 44 WASH. & LEE L. REV. 505, 599 (1987).

25. See *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Coleman*, the Supreme Court held that a defense counsel's failure to file timely notice of appeal with regard to petitioner's state court appeal did not constitute 'cause' that excused procedural default to permit federal habeas review. *Id.* at 752-54. The court held there is no constitutional right to pursue an appeal in state habeas, thus, any attorney error that lead to the default of Coleman's claims in state court cannot constitute cause to excuse default in federal habeas. *Id.* at 755-57.

Of the 146 applications examined by Shapiro in Massachusetts, about a quarter (twenty-six percent) claimed ineffective assistance of counsel.²⁶ Of the total 467 petitions in the Faust, Rubenstein, and Yackle study covering all three years, sixty-seven (fourteen percent) claimed ineffective assistance of counsel.²⁷ The multi-site study of Robinson reported that 1,270 of 2,225 claims were attacks on convictions, as opposed to challenges to sentences, conditions of confinement, or other claims.²⁸ Of the attacks on conviction, forty-two percent included ineffective assistance of counsel as one of the grounds. Accordingly, about twenty-three percent of all claims included ineffective assistance of counsel.

This study found that the number of ineffective assistance claims has greatly increased. Of the 1,835 petitioners in the state sample, 755 (forty-one percent) raised the claim either generally or specifically.²⁹ Of these 755 petitioners, 319 raised the general claim only, and another 317 raised a particular claim of ineffective assistance of counsel. The remaining 119 petitioners raised a particular claim in conjunction with the general claim (Note that these were only counted once in arriving at the total claims made). Of the 1,626 petitioners in the federal sample, 736 (forty-five percent) claimed ineffective assistance of counsel. Of these 736 petitioners, 408 raised the general claim only, 200 raised specific claims only, and another 128 raised the general claim in conjunction with one or more particular claim. General claims included such allegations as the attorney lacked experience, violated the attorney-client privilege, failed to file a claim or discovery motion, did not meet with the defendant on a regular basis, or otherwise failed to prepare adequately.

Jeffries and Stuntz conclude that most ineffective assistance of counsel claims are not based on the counsel's failure to raise a federal claim or defense, but rather involve the attorney's decision that affected the development of facts at trial.³⁰ They cite as examples the failure to offer a character witness or alibi and to uncover and present exculpatory evi-

26. Shapiro, *supra* note 6, at 331.

27. Faust et al., *supra* note 7, at 688.

28. Robinson, *supra* note 7, at 12.

29. This percentage may be an underestimate. In California and Texas where habeas corpus is the primary post-conviction remedy the proportion of ineffective assistance claims is 46 percent and 45 percent respectively. In Alabama and New York, the proportion ineffective assistance claims is partially dependent on the relative portion of Rule 32 and Rule 440 petitions in the respective samples. Of the 223 habeas petitions in Alabama, only 53 (24 percent) contained claims of ineffective assistance of counsel, whereas 109 of the 158 Rule 32 petitions in the sample (69 percent) contained those claims. Together then 43 percent of the Alabama petitions contained ineffective assistance claims, a proportion close to the 45 percent and 46 percent represented in Texas and California. In New York, however, only seven petitions of the habeas sample of 115 contained a claim of ineffective assistance of counsel and these were filed inappropriately. If the sample of 155 Rule 440 petitions is considered separately, the proportion of claims increases to 41 percent.

30. John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990).

dence.³¹ In essence, the defendant argues that the evidence or a claim was never properly presented due to the inadequate counsel received.

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

Table 5
Specific Ineffective Assistance of Counsel Claims

Claims Raised	Number/Percentage of Petitioners Raising Claims ³²			
	State		Federal	
Failure to Investigate	167	9%	125	8%
Failure to object to admissibility/sufficiency of evidence	153	8%	128	8%
Failure to appeal or raise important issues on appeal	125	7%	49	3%
Failure to call witnesses	42	2%	31	2%
Misled defendant	40	2%	30	2%
Failure to raise an affirmative defense	26	1%	13	1%
Failure to cross examine	26	1%	41	3%
Conflict of interest	25	1%	10	1%

These numbers should be interpreted cautiously. Specific ineffective assistance of counsel claims raised are probably underestimated because some petitioners did not raise specific claims, but just claim general ineffective assistance of counsel. A great many general ineffective assistance of counsel claims were raised for a variety of reasons. For instance, the claims argued that the attorney lacked experience, the attorney failed to file motions for discovery, the counselor violated the attorney-client privilege, the attorney failed to ask for proper jury instructions, did not meet with the defendant on a regular basis, or otherwise failed to adequately prepare. Therefore, a review of the specific claims raised may be instructive.

In both state and federal courts, failure to investigate was the most commonly specified claim, followed by failure to object to admissibility or the insufficiency of evidence. These two claims were also the claims most likely to be raised together. The claim that the attorney(s) misled the defendant was often raised in the context where the attorney failed to explain adequately the plea agreement and the consequences of the plea to the defendant. Forty-three percent of the 152 petitioners in the state sample and fifty percent of the 128 petitioners in the federal sample who claimed a coerced guilty plea, also claimed ineffective assistance of counsel.

31. *Id.* at 722.

32. These percentages are based upon multiple claims.

Ineffective assistance was by far the largest claim made in Alabama, Texas, and California with over forty percent of each state's claims being for ineffective assistance of counsel. In New York, however, only twenty-two percent of all claims were for ineffective assistance of counsel, still a large percentage of claims, but a proportion noticeably lower than found in the other three states. This low percentage is explained by the fact that most state court petitioners in New York do not raise ineffective assistance of counsel claims in state habeas petitioners, but raise them in Rule 440 petitions.³³ Only one percent of the New York state habeas petitioners filed ineffective assistance of counsel claims, while forty-one percent of New York state petitioners filing Rule 440 petitions raised ineffective assistance of counsel claims.

One possible explanation for the high ineffective assistance of counsel claims may be that petitioners often claim ineffective assistance of counsel to bypass certain procedural bars. For example, if an attorney failed to object at trial, the petitioner will most likely be barred from raising that claim at a later date because he or she did not preserve the record for appeal. However, a claim that the counsel was ineffective for not objecting to the trial judge may be permitted.

Ineffective assistance of counsel was by far the most common claim raised by both state and federal petitioners. Even so, most of these claims are denied. Thus, it is important to articulate and understand the standard one must satisfy to prove that petitioners have received ineffective assistance of counsel. *Strickland v. Washington* articulates a two-prong test that the courts are to apply in evaluating claims of ineffective assistance of counsel.³⁴ First, a defendant must show that counsel's trial performance was deficient (the "cause" prong).³⁵ The cause prong of the test is satisfied by actual ineffective assistance of counsel or by some other factor that impeded counsel's effort to comply with the state's procedural rules.³⁶ Next, the defendant must illustrate that the counsel's deficient trial performance so prejudiced the defense as to deprive the defendant of a fair trial (the "prejudice" prong).³⁷

The purpose of the Sixth Amendment right to effective assistance of counsel is to ensure that the defendant receives a fair trial.³⁸ The U.S. Supreme Court asserts that in judging any claim of ineffective assistance of counsel, one must examine whether counsel's conduct undermined the proper functioning of the adversarial process to such an extent that the trial did not

33. See *supra* note 12.

34. 466 U.S. 668 (1984).

35. *Id.* at 687.

36. IRA P. ROBBINS, HABEAS CORPUS CHECKLISTS 12-11 (1994).

37. *Strickland*, 466 U.S. at 687.

38. See generally *Powell v. Alabama*, 287 U.S., 45 (1932); *Betts v. Brady*, 316 U.S. 455 (1942); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

produce a fair and just result.³⁹ The proper measure of attorney performance is "reasonable" under the prevailing professional norms and the defendant must show that the representation received fell below the objective standard of reasonableness.⁴⁰ For the petition to succeed, the strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance must be overcome.⁴¹ It is not clear, however, whether the court should examine the counselor's errors individually or cumulatively when determining whether deficient performance prejudiced the defense.⁴² Applying the deficient performance standard cumulatively would lead to more courts concluding that the counsel provided was ineffective.⁴³

A losing defendant can point to a list of evidentiary decisions by counsel that could have been resolved differently: Did the counselor have enough meetings with the defendant? Was the defendant adequately prepared for trial? Was the counselor prepared? Should the attorney have called additional witnesses or perhaps not have called certain witnesses? Should the attorney have asserted an affirmative defense? Did the attorney fail to cross-examine properly or should he or she have objected to the prosecution's questions or evidence? The Supreme Court in *Strickland* seemed to recognize this problem by stressing that the reasonableness of the counsel's challenged conduct must be judged on the basis of facts known at the time of trial, not on the basis of hindsight.⁴⁴

B. Trial Court Error

Whereas the previous set of claims asserted error on the part of the attorney, this set of claims asserts error on the part of the trial court. Nearly thirty percent of both state court and federal court petitioners claimed trial court error. Unlike the claims of ineffective assistance of counsel, which were likely to be general, the claims against trial courts were quite specific. Few petitioners, eighty-six state petitioners and forty-seven federal petitioners, asserted the claim of trial court error without further specification. Many of the general claims of trial court error included the claim that the

39. *Id.*

40. *Id.* at 687-88.

41. *Id.* at 690.

42. The Fourth Circuit has applied the standards in *Strickland* to each individual error of counsel to determine whether counsel's performance prejudiced the defendant. Peake, *supra* note 24, at 601. In *Roach v. Martin*, the Fourth Circuit examined the defendant's ineffective assistance of counsel claims individually and concluded that the defendant did not receive deficient counsel. 757 F.2d 1463 (4th Cir. 1985). Mark Peake's article noted that the Fifth Circuit applied the *Strickland* standard individually, whereas the Second, Third, and Sixth Circuits applied the standard individually and cumulatively.

43. However, in *McNeil v. Cuyler*, 782 F.2d 443 (3d Cir. 1986); *Wilson v. McMacken* 786 F.2d 216 (6th Cir. 1986); and *United States v. Cruz*, 785 F.2d 399 (2d Cir. 1986) the courts examined the errors individually and cumulatively and still concluded that the defendants failed to satisfy the burden of proving deficient performance and prejudice under the *Strickland* standard.

44. *Strickland*, 466 U.S. at 690.

judge failed to explain the charges to the defendant. Most of the remaining claims raised specific aspects of trial court error, including those from the thirty-seven petitioners who made a particular claim in conjunction with the general claim. Many of the general claims of trial court error included the claim that the judge failed to explain charges to the defendant. The following table summarizes our findings on trial court error.

Table 6
Specific Trial Court Error Claims

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>			
	State		Federal	
Detrimental procedural error	200	11%	136	8%
Improper jury instructions	129	7%	156	10%
Failure to suppress improper evidence	85	5%	171	11%
Excluded excludatory/mitigating evidence	27	2%	25	2%
Improper joinder/failure to serve	16	1%	11	<1%
Biased judge	15	1%	17	1%
Abuse of discretion	12	1%	1	---
Denied motion for self representation	6	<1%	6	<1%
Petitioners	490		522	

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

C. Sixth Amendment Claims

Ineffective assistance of counsel was previously discussed above. Additional Sixth Amendment claims are discussed separately here, although some of these may be related to trial court error as well.⁴⁵ Most of the claims classified in this category relate to jury challenges.

Only fourteen general claims were raised in state court and only ten were made in federal court. The general Sixth Amendment category was claimed a total of twenty-four times and can be used to support the theory that the petitioner often does not understand the criminal justice system. For instance, one petitioner claimed that every time his or her attorney was called up to the bench during trial, his or her Sixth Amendment right to be present was violated. The following table details our findings pertaining to the allegations classified as "Specific Sixth Amendment Claims":

45. See *supra* Part III.B.

Table 7
Specific Sixth Amendment Claims

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>			
	State		Federal	
Jury improperly selected	64	4%	73	5%
Speedy trial	35	2%	53	3%
Denied assistance of counsel	33	2%	35	2%
Juror impartiality	31	2%	37	2%
Confrontation/cross examination	25	1%	41	3%
Challenge to lineup	11	1%	17	1%
Invalid waiver of jury trial	9	<1%	4	<1%
Petitioners	208		260	

Sixth Amendment claims made in federal and state courts were similar. Furthermore, the confrontation category was often used when the defendant was improperly identified.

1. Errors at the Sentencing and Punishment Phase (Eighth Amendment)

Most Eighth Amendment claims could be considered a form of trial court error because they deal with sentence and detainment issues. In addition to the general claims made in state and federal court,⁴⁶ the following specific claims were made:

Table 8
Specific Eighth Amendment Claims

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>			
	State		Federal	
Excessive sentence	175	10%	149	9%
Excessive bail	142	8%	22	1%
Challenge to sentence enhancement	127	7%	68	4%
Probation/parole issue	117	6%	35	2%
Cruel and unusual punishment	43	2%	57	4%
Sentence inconsistent with plea bargain	29	2%	15	1%
Conditions of confinement	30	2%	44	3%
Petitioners	663		390	

The most common Eighth Amendment claim raised was that the sentence imposed was excessive. The difference between the eight percent of

46. *Id.*

excessive bail claims raised in state court and the only one percent raised in federal court is explained by almost exclusive use of habeas corpus for excessive bail claims in New York.⁴⁷

Notwithstanding the excessive bail claims, most of the Eighth Amendment claims are raised by approximately the same proportion of federal and state petitioners. The challenge to sentence enhancement claims are asserted when the petitioner believes a prior conviction should not have been used for sentence enhancement. Sentence inconsistent with a plea bargain includes claims that the prosecutor, defense counsel, or judge had broken a plea agreement.

D. Prosecutorial Misconduct

Prosecutorial misconduct was claimed by eleven percent of the state petitioners and sixteen percent of the federal petitioners. Nearly four percent of the state claims (118) and six percent of the federal claims (seventy-five) were general claims of prosecutorial misconduct. The specific claims raised by petitioners refers to the prosecutor's conduct at trial and surprisingly does not mention the prosecutor's decision to bring the charges against the petitioner in the first place. The specific claim made most often by both state and federal prisoners was failure to disclose. The types and number of specific claims raised are listed as follows:

Table 9
Specific Prosecutorial Misconduct Claims

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>			
	State		Federal	
Failure to disclose	70	4%	84	5%
Excessive bail	37	2%	26	2%
Improper comments	23	1%	36	2%
Inflammatory summation	18	1%	17	1%
Improper cross-examination	6	<1%	7	<1%
Petitioners	154		170	

E. Police Misconduct

In *Stone v. Powell*,⁴⁸ the U.S. Supreme Court held that prisoners are precluded from using federal habeas corpus proceedings to assert illegal search and seizure claims if provided a full and fair opportunity to be heard in state court.⁴⁹ This may explain the low number of Fourth Amendment

47. See *supra* note 12 for a discussion of the habeas petition in New York state.

48. 428 U.S. 465 (1976).

49. *Id.* at 494

habeas claims raised. Claims of alleged police misconduct were raised by five percent of the petitioners from the state court sample and by thirteen percent of the petitioners in the federal court sample. This finding is contrary to the expectation from the *Stone v. Powell* decision that more petitioners would raise the Fourth Amendment in the state court than in the federal court. Most often the claim was specific—either unlawful arrest (forty-six claims in state court (three percent) and 137 claims in federal court (eight percent)) or illegal search and seizure (forty-seven claims in state court (three percent) and 104 in federal court (six percent)). Only two general Fourth Amendment claims were made in state court and only twenty-seven in federal court.

F. Fifth Amendment

Petitioners raised only a few general Fifth Amendment claims (eleven in state court and twelve in federal court):

Table 10
Specific Fifth Amendment Claims

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>			
	State		Federal	
Invalid/coerced guilty plea	152	8%	128	8%
Improper/defective indictment ⁵⁰	73	4%	80	5%
Double jeopardy	48	3%	59	4%
Self-incrimination	30	2%	40	3%
Coerced confession	23	1%	6	4%
Grand jury issue	10	<1%	6	<1%
Petitioners	506		549	

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

G. Fourteenth Amendment Concerns

The Fourteenth Amendment prohibits the deprivation of liberty without due process of law. This guarantee grants prisoners the right to challenge their criminal conviction resulting from fundamentally unfair trial proceed-

50. This category includes improper amendment to the indictment.

ings.⁵¹ The claims included in this category could have been classified as due process because they all involve claims that fundamental fairness was denied. In addition to the general Fourteenth Amendment claims made (forty-eight in state court and nine in federal court), the specific claims raised are listed in Table 11.

Table 11
Specific Fourteenth Amendment Concerns

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>			
	State		Federal	
Due process/equal protection	243	13%	254	16%
Challenge to prison administration	180	10%	48	3%
Burden of proof/insufficient evidence	160	9%	220	14%
New evidence	78	4%	7	<1%
Denial of appeal	35	2%	53	3%
Petitioners	696		582	

Due process claims and equal protection claims are ambiguous, but many more of the former were raised. Equal protection claims were relatively easy to identify, e.g. petitioner was housed in a segregated and deficient housing unit. In contrast, due process claims raised tended to be general rather than specific. Due process claims can be raised at any stage of processing, arrest, pre-trial activities, trial, or appeal: whenever procedures employed by the government denied the petitioner fundamental fairness.⁵² Some of the claims classified as due process include failure to preserve evidence, denial of a hearing, and failure to receive notice of charges.

One reason for the large number of due process claims is that many petitioners claim their Due Process Clause through the Fourteenth Amendment to incorporate a provision of the Bill of Rights to the states.⁵³ Petitioners need to assert this due process claim, because the states cannot breach the guarantees of the first ten amendments directly.⁵⁴ The states are only capable of violating those amendments insofar as those provisions are incorporated into the Fourteenth Amendment and applied to the states.⁵⁵

51. See Leslie R. Stern, Note, *Constitutional Law—Less Onerous Harmless Error Standard Applies on Habeas Corpus Review—Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), 28 SUFFOLK U. L. REV. 172, 174 (1994).

52. See *Fay v. Noia*, 372 U.S. 391 (1963); *Brown v. Allen*, 344 U.S. 443 (1953).

53. 2 RONALD D. ROTUNDA & JOHN E. NOWACK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.2 (2d ed. 1986); see also *Duncan v. Louisiana*, 391 U.S. 145 (1968).

54. See ROTUNDA & NOWACK, *supra* note 53, at § 14.2.

55. The Supreme Court has explicitly held that all of the provisions of the Bill of Rights have been incorporated against the states, with the exception of the Second Amendment guarantee of the right to bear arms, the Fifth Amendment right to prosecution only upon a grand jury indictment, and the Seventh Amendment right to a jury trial in civil cases. *Id.*

Therefore, if a state violates the Fifth Amendment right against self-incrimination, the state would be abridging the Fifth Amendment as applied to it through the Fourteenth Amendment. It would be technically incorrect to refer to the state as violating the Fifth Amendment without noting its application to the states through the Fourteenth Amendment.⁵⁶

The challenge to prison administration, ruling, or procedure commonly involves the assertion that the prison administrator miscalculated or denied the petitioner "good time" credits. It is interesting that petitioners tended to raise this ten percent of the time in state court, but only three percent of the time in federal court. This may be partially explained by the fact that petitioners were complaining about "good time" credit which would facilitate an earlier release. Thus, if petitioners are counting their "good time" credit they may have been released before they would have reached federal court with their habeas petition.

The categories of burden of proof not met or insufficient evidence to convict also illustrate the petitioner's unfamiliarity with the criminal system. For instance, defendant might have agreed to a plea agreement and then raise a claim under insufficient evidence to convict.

H. Conclusions about Claims Raised

By far the largest category of claims raised by habeas petitioners was ineffective assistance of counsel. This is not surprising considering that it is natural to blame the lawyer when one has been convicted. Also, as mentioned in the ineffective assistance of counsel section, it is easy to second guess a lawyer's strategic decisions; such as calling or not calling a particular witness. Petitioners may also raise ineffective assistance of counsel as an excuse for not raising different claims either on appeal or in a prior writ. Even though ineffective assistance of counsel claims were raised more than any other claim, the stringent standard articulated by the Supreme Court in *Strickland v. Washington*⁵⁷ makes it difficult for a petitioner to prove actual ineffective assistance of counsel.⁵⁸

Because most habeas corpus petitions are raised without counsel and claims raised are not always clear, it is difficult to classify claims. It is often difficult to know how to categorize petitions when some are very general (e.g., due process was violated), and some are very specific. Petitioners often assert that their rights have been violated when it is clear that they do not understand the right guaranteed them under the Constitution. For instance, petitioners claim insufficient evidence to convict when they plead guilty (twenty-five of the 137 petitioners in state court and thirteen of the 199 petitioners who claimed insufficient evidence in federal court were convicted

56. *Id.*

57. 466 U.S. 668 (1984).

58. See *supra* notes 34-37 and accompanying text.

by guilty plea) or they assert bias on the part of the judge when he calls the defendant's attorney to the bench during trial, because the defendant was not allowed to approach the bench along with his attorney.

Petitioners raise similar claims in state and federal court, except for Fourth and Eighth Amendment claims. One reason may be that claims are fixed at the state court phase and do not need to be reiterated at the federal court level. Nevertheless, this fact strengthens the case of those who argue that federal review of state court convictions are redundant.

Petitioners tend to raise the same type of claims on subsequent petitions that they raise in the initial petitions, but experienced petitioners tend to raise more claims. The exception is that petitioners raising subsequent claims in federal court are more likely to claim ineffective assistance of counsel.

IV. COMPARATIVE SUCCESS OF CLAIMS

A. *Petitioner Success Rates*

Do petitioner success rates vary by the claims raised? Before that question is answered, the point must be emphasized that very few petitions in either the state or the federal courts were granted. Thus, any conclusions drawn from success rates of petitioners must be tenuous. Of the 1,626 federal petitions in the sample, only seventeen were granted (two in California, three in Alabama, five in New York, and seven in Texas). Of the petitions filed in state courts; only one was granted in California and only three were granted in Alabama. In New York, forty-eight petitions were granted, however, of those granted forty-one were for excessive bail. In Texas, granted petitions are filed in a separate location from petitions denied or dismissed, therefore, it was possible to oversample granted petitions to facilitate the comparison between petitions granted and denied. The proportion of petitions granted in the sample is double the actual proportion granted and so must be analyzed separately.⁵⁹

The following table shows overall petitions granted, including the Texas sample, by the types of claims made:

59. In the fiscal year 1992, the Texas Court of Criminal Appeals disposed of 2,244 habeas corpus petitions. Of the petitions disposed, 116 were sent back to trial courts for additional hearings, 152 were filed and set for hearings, and eight were granted with orders. The remaining petitions were denied (56 with an order 1,812 without), dismissed (55), dismissed summarily for abuse of the writ (43), or dismissed with no action necessary (two). Even assuming that all of the petitions filed and set would eventually be granted, the petitioner success rate in the Texas Court of Criminal Appeals would be less than eight percent. Figures contained in this footnote courtesy of Thomas Lowe, Clerk of Court, and Texas Judicial Council and Office of Court Administration. TEXAS JUDICIAL SYSTEM, ANNUAL REPORT 16, 150-52 (1992).

Table 12
Rates at Which Petitions Are Granted

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>	
	State	Federal
Ineffective Assistance of Counsel	733 8%	707 <1%
Trial Court Error	483 6%	458 2%
Prosecutorial Misconduct	200 3%	248 <1%
Fourth Amendment	79 1%	209 <1%
Fifth Amendment	330 5%	362 <1%
Sixth Amendment	221 1%	264 <1%
Eighth Amendment	582 10%	340 <1%
Fourteenth Amendment	639 6%	557 1%

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

Ineffective assistance of counsel, trial court error, and Fourteenth Amendment concerns, are granted at higher rate in state courts. In order to specify the particular claims responsible for this high success rate, individual claims were examined separately. Moreover, the claims from the Texas Court of Criminal Appeals must be separated from the others, because petitions granted in Texas were over-sampled in an attempt to enlarge the sample of granted petitions. Consequently, the rate at which petitions in state courts were granted will be compared with the rate at which federal petitions were granted without the confounding influence of the Texas sample. Table 13 lists both the number of petitions granted and the percentage granted, because at times a large percentage change can be the result of a relatively small number of petitions. The percentage refers to the number of petitioners who raised that particular claim and had their petition granted. For instance, four petitioners who raised ineffective assistance of counsel as a claim had their petitions granted (three percent).

Table 13
Prisoner Petitions Granted by Specific Claims Raised

<u>Claims Raised</u>	<u>Number/Percentage of Petitioners</u>					
	<u>Texas</u>		<u>State Courts</u>		<u>Federal Courts</u>	
Ineffective Counsel	4	3%	3	1%	3	1%
Failure to Investigate	4	6%	2	2%	1	1%
Failure to Object to Admissibility	2	4%	1	1%	0	0
Failure to Appeal	43	68%	0	-	1	2%
Trial Court Error						
Improper Jury Instruction	2	5%	0	-	4	3%
Failure to Suppress						
Improper Evidence	2	7%	1	2%	1	1%
Detrimental Procedural Error	23	29%	1	1%	3	2%
Eighth Amendment						
Excessive Sentence	0	-	2	17%	0	-
Challenge to Sentence Enhancement	1	4%	2	1%	1	1%
Conditions of Confinement	2	5%	0	-	0	-
Cruel and Unusual Punishment	0	-	0	-	0	-
Excessive Bail	0	-	1	3%	0	-
Excessive Bail	3	30%	41	32%	0	-
Sentence Not Consistent with						
Plea Bargain	4	4%	0	-	0	-
Probation / Parole Issue	2	2%	2	4%	0	-
Fourteenth Amendment						
Burden of Proof	2	4%	1	2%	0	-
Denial of Appeal	2	2%	0	-	2	4%
Denial of Appeal	20	77%	0	-	2	4%
New Evidence	0	-	1	1%	0	-
Challenge to Prison Administration	0	-	0	-	0	-

Table 13 illustrates that failure to appeal, denial of appeal claims and to a lesser extent detrimental procedural error were the claims most likely to be granted by the Texas Court of Criminal Appeals, but these were not significant issues in the other state courts. Often, denial of appeal and attorney failure to appeal were raised together—as in where a court refused to grant an appeal because that the attorney failed to file an appeal on time. Only the excessive bail claims in New York were granted in significant numbers.

Only prisoners with relatively long sentences have time to complete the entire habeas process, because petitioners must appeal their convictions to state courts and then exhaust state remedies before they can proceed to federal court.⁶⁰ There is no way of knowing from the data gathered here the extent to which early release dates resulted in the dismissal of habeas petitions. It is clear, however, from the state sample that petitioners filing a first petition claim had a better chance of having claims from that petition

⁶⁰ Exhaustion will be discussed further in the section on Denying Habeas Petitions, *see infra* Part IV.E.

granted (fifteen percent) than did prisoners who had filed claims before. Perhaps meritorious claims are recognized and granted the first time they are raised. This again weakens the argument that federal review is essential to correct errors made in state courts.⁶¹

B. Does having counsel provide greater success in habeas proceedings?

Faust, Rubenstein, and Yackle found that professional representation was “[t]he single most important predictor of success in federal habeas corpus” and recommended legislation providing counsel in non-capital cases.⁶² Courts, however, often screen habeas petitions for merit and only those with promise will have counsel assigned or appointed.⁶³ Conclusions are also hard to draw because of the very few habeas corpus petitions granted, and information on counsel was not available in all of these. Nevertheless, of the 103 petitions granted by state courts where representation was known, petitioners had counsel in sixty percent of them (sixty-two); of the 1,452 petitions dismissed or denied twenty-two percent of the petitions had counsel. These numbers would seem to support the Faust, Rubenstein, and Yackle argument that counsel should be appointed for habeas petitioners. However, these numbers can be misleading because a number of the state petitions granted were excessive bail claims which are made before trial with counsel and are more likely to be granted.

Of the 444 habeas petitions by state prisoners denied in federal court, for which information on counsel was available, ninety-four percent (417) did not have legal representation. Only seventeen habeas corpus petitions were granted by federal courts. This small number of federal petitions granted make it very hard to draw any firm conclusions about counsel. Of the seventeen petitions granted, information on counsel was available on sixteen of these and of these, six had counsel, and ten did not. Given the small number of petitions granted, it would not be prudent to appoint a lawyer for every habeas petitioner. The practice of having the court appoint an attorney only after screening identifies a meritorious claim should be continued.⁶⁴ Because habeas claims are often filed *pro se*, they burden federal court staff, especially magistrate judges, who must try to identify claims raised and to determine whether or not counsel should be appointed. If no limits are

61. See, e.g., Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988).

62. Faust et al., *supra* note 7, at 707.

63. “The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.” 28 U.S.C. § 1915(d) (1988). There is no statutory or constitutional right for an indigent to have counsel appointed in a civil case, the district court may request an attorney to represent any person unable to employ counsel. *Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971).

64. Most habeas petitions are filed *pro se*, but virtually all prisoners sentenced to death have petitions prepared by attorneys. Hence the shortage of attorneys who represent petitioners is a more serious problem in capital cases. See David Margolick, *Texas Death Row is Growing, But Fewer Lawyers will Help*, N.Y. TIMES, Dec. 31, 1993, at A1, A23.

placed upon federal review of habeas corpus cases, perhaps more pro se law clerks and staff attorneys should be added to staff.

C. *Conclusions about Success Rates and Petitioners' Claims*

In conclusion, the number of petitions granted by claim appears to be rather uniform between state and federal courts, when the exceptions of particular claims in Texas and New York are taken into account. Additionally, it must be stressed that even granted petitions may provide only limited relief. There seems to be a common misconception that when habeas petitions are granted, a petitioner is set free. In reality, granted petitions may mean that bail is reduced for a petitioner, that the petitioner can appeal his conviction, or the petitioner may be granted a new trial. The fact that first petitions often have a better chance of being granted than subsequent petitions tends to support the argument that subsequent review by either state or federal courts is redundant.⁶⁵

D. *Court Reasons for Denying Habeas Petitions*

In federal court, petitions are not only denied, but sometimes withdrawn by the petitioner (often to enable claims to be exhausted), dismissed by the court, or remanded. State courts often deny habeas petitions (less than ten percent of state habeas petitions are dismissed). The term "denied" is construed broadly here to include all petitions not granted.

In state courts, about seventy-five percent of the petitions were dismissed or denied summarily without a reason whereas reasons for the denial were given in almost three-quarters of the federal petitions. What are the primary reasons' courts give for denying writs of habeas corpus? When state courts articulate a reason for denial, they usually deny petitions on the merits or for procedural default. The reasons are similar in federal courts, with the addition of failure to exhaust state remedies. This was one of the primary reasons for dismissing or denying petitions for relief, despite the fact that prisoners filing habeas petitions in federal court often uses a standard form that advises petitioners to exhaust state remedies. In a sense, this latter reason is not a denial, but a postponement, because petitioners can raise these claims again in federal court after the unexhausted claims are raised in state courts.

65. See, e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); *Schneckloth v. Bustamonte*, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring); *Stone v. Powell*, 428 U.S. 465 (1976).

Case law is divided as to which reason takes precedence for denials when several alternatives are available.⁶⁶ The major reasons for denial are discussed in more detail below.

E. Failure to Exhaust

The exhaustion doctrine was established by the Supreme Court in *Ex Parte Royall*,⁶⁷ which held that state prisoners should seek state court remedies for their federal claims before presenting those claims in a petition for federal habeas relief. The Court stated that the exhaustion doctrine is fundamental in preventing unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.⁶⁸ At the time of the *Ex Parte Royall* decision, exhaustion was not considered a jurisdictional bar and could be relaxed in circumstances justifying immediate federal adjudication.⁶⁹ Presently, the exhaustion doctrine routinely applies as a prerequisite to addressing the merits of every federal habeas claim.⁷⁰

The Supreme Court in *Darr v. Burford* stated that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."⁷¹ To solve this tension, the courts apply the doctrine of comity. This doctrine "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereign with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."⁷² Federal prisoners must first present their claims in state court in the manner prescribed by state law.⁷³ Although this requirement may create delay in adjudicating a prisoner's federal habeas claim, it does serve to further the interests of federalism and comity. The exhaustion requirement that is codified in 28 U.S.C. § 2254(b) and (c)⁷⁴ serves to minimize tension between federal and state systems of justice

66. See generally *Wise v. Fulcomers*, 958 F.2d 30 (3rd Cir. 1992) (preferring abuse of the writ over failure to exhaust); *Smith v. Black*, 970 F.2d 1383 (5th Cir. 1992) (retroactivity should dominate procedural default); but see *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992), (concluding that procedural default trumps retroactivity).

67. 117 U.S. 241 (1886).

68. *Id.* at 251.

69. Faust et al., *supra* note 7, at 251-53 (citing *Ex parte Royall*, 117 U.S. 254 (1884)).

70. See *Granberry v. Greer*, 481 U.S. 129 (1987); *Pickard v. Connor*, 404 U.S. 270 (1971).

71. 339 U.S. 200, 204 (1950).

72. *Id.*

73. See *Granberry*, 481 U.S. 129; *Rose v. Lundy*, 455 U.S. 509 (1982).

74. Title 28 U.S.C. § 2254 (1988) provides in pertinent part:

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

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

by allowing the state an initial opportunity to examine and rectify any alleged violations of prisoners' federal rights.⁷⁵ "An exception is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."⁷⁶

In the early 1970's, the Supreme Court handed down decisions that established the exhaustion doctrine as a barrier to federal adjudication. The standards for exhaustion became much more stringently applied. The Supreme Court in *Picard v. Connor* announced that the substance of a federal habeas corpus claim must be fairly presented to the state courts before being raised in federal court.⁷⁷ Not only must the petitioner have been through the state courts, but the states must have had the first opportunity to hear the claim.⁷⁸ In this case, Connor did not bring up the equal protection claim until he reached the United States Supreme Court, and therefore the state courts never had a fair opportunity to consider and act upon this claim.⁷⁹ The Court of Appeals held that respondent had exhausted available state judicial remedies, because he had presented the state court with an opportunity to apply legal principles to the facts bearing upon his constitutional claim.⁸⁰

The Supreme Court rejected this view and held that the state courts need more than an opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.⁸¹ The exhaustion doctrine is not satisfied if all the facts necessary to support a federal claim were before the state courts, or even if the petitioner raised a somewhat similar state claim.⁸² The petitioner must raise the same constitutional issues in the state courts that he or she wants the federal courts to address. Thus, it is not enough for a petitioner to merely pass through the state court system on the way to federal court—the state court must have considered every claim.

In *Pitchess v. Davis*, the Court reiterated the need for exhaustion of state remedies and stated more clearly what it considered to be an exhausted claim.⁸³ The Supreme Court held that the defendant did not exhaust state remedies available to him as long as he had a right under state law to raise that question presented.⁸⁴ In this case, the denial of an application for a

State to raise, by any available procedure, the question presented.

Id.

75. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).

76. *Id.*

77. *Picard v. Connor*, 404 U.S. 270, 278 (1971).

78. *Id.* at 276.

79. *Id.* at 276-77.

80. *Id.* at 271-72.

81. *Id.* at 276-77.

82. *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

83. 421 U.S. 482 (1975).

84. *Id.* at 487.

writ of prohibition did not constitute an adjudication on the merits of the claim presented.⁸⁵ Denial of an application for an extraordinary writ by state appellate courts does not serve to exhaust state remedies where the denial is not viewed as an adjudication of the merits of claims presented, and where normal state remedies are available.⁸⁶ To satisfy the exhaustion doctrine, the state courts must have looked at the merits of the claims presented.⁸⁷

In *Rose v. Lundy*, the Supreme Court held that a federal district court must dismiss mixed petitions containing both exhausted and unexhausted claims.⁸⁸ This furthers the exhaustion doctrine that protects the state court's role in enforcement of federal law and prevents disorder of state judicial proceedings.⁸⁹ This exhaustion requirement is designed to encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition.⁹⁰ The Court stated that both the courts and prisoners should benefit, because as a result, the district court will be more likely to review all of the prisoner's claims in a single proceeding, therefore providing for a more focused and thorough review.⁹¹

If the petition contains both exhausted and unexhausted claims, the petitioner has the option of returning to state court to exhaust his claim or amending his habeas petition to present only his exhausted claims to the district court.⁹² If the prisoner desires speedy federal relief of the habeas claims, the prisoner can easily amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims.⁹³ If the petitioner chooses to amend his claim, however, he is running the risk of forfeiting consideration of his unexhausted claims in federal court. Under 28 U.S.C. § 2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those new grounds in a prior petition constituted an abuse of the writ."⁹⁴

[I]f a petitioner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if . . . the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to

85. *Id.* at 488.

86. *Id.* (citing *Ex parte Hawk*, 321 U.S. 114, 116 (1944)).

87. *Granberry v. Greer*, 481 U.S. 129 (1987). See also LARRY YACKLE, POST CONVICTION REMEDIES §§ 52, 59-61 (1981).

88. 455 U.S. 509 (1982).

89. *Id.* at 518.

90. *Id.* at 520.

91. *Id.*

92. *Id.* at 520-21.

93. *Id.* at 520.

94. *Id.* at 520-21.

tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.⁹⁵

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

In *Granberry v. Greer* the Court held that when the state raises a non-exhaustion defense for the first time at the United States Court of Appeals, an appellate court is neither required to dismiss for non-exhaustion, nor under any obligation to regard the state's omission as an absolute waiver of the claim.⁹⁶ The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.⁹⁷

In *Castille v. Peoples*, the Supreme Court revisited the issue of the extent to which a petitioner who seeks federal habeas must exhaust state remedies before resorting to the federal court.⁹⁸ Justice Scalia writing for the majority stated that the Court has previously rejected a finding that state court remedies are not exhausted if there is any possibility of further state court review available. In *Brown v. Allen*, the Court held that once the state courts have ruled upon a claim, it is unnecessary for a petitioner "to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review."⁹⁹ The Court stated that it would be inconsistent with the principle announced in section 2254 (b)¹⁰⁰ and with the principles of comity, "to mandate recourse to state collateral review whose results have effectively been predetermined, or permanently to bar from federal habeas prisoners in States whose post conviction procedures are technically inexhaustible."¹⁰¹ Where the state court has already ruled upon the claim or ignored the right presented, it would be useless to require further state court proceedings.¹⁰² Where the claim, however, is represented for the first time in a procedural context in which the merits will not be considered unless "there are special and important reasons therefore," this does constitute "fair presentation" and fails to satisfy the exhaustion requirement.¹⁰³

The exhaustion doctrine plays a very pertinent role in the denial of federal habeas corpus petitions. Our study reveals that of the 3,346 federal petitions, thirty-two percent (1,058 petitions) were denied or dismissed for

95. *Id.* at 521 (quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963)).

96. 481 U.S. 129 (1987).

97. *Id.* at 136.

98. 489 U.S. 346, 349-50 (1989).

99. *Id.* at 350 (quoting *Brown v. Allen*, 344 U.S. 443, 449 (1953)).

100. *See Darr v. Buirrord*, 339 U.S. 200, 204 (1950).

101. *Castille*, 489 U.S. at 350.

102. *Id.* at 351.

103. *Id.*

failure to exhaust state remedies. Before a district court judge or federal magistrate will examine the merits of the habeas case to determine if a constitutional violation exists, the judge scrutinizes the procedural history to determine whether the petitioner has exhausted his or her state remedies. The judge will not examine the claims raised in the habeas petition if the petitioner has not previously raised all of the issues in it at the state court level. The Court wants to make sure that the state has a fair opportunity to apply controlling legal principles to the facts bearing on his or her constitutional claims.¹⁰⁴

Presently, satisfaction of the exhaustion doctrine occurs when the petitioner presents all disputed claims to the state court before asking the federal court to examine these claims,¹⁰⁵ the petition does not include both unexhausted and exhausted claims,¹⁰⁶ and the merits of the petitioner's habeas claim were reviewed by the state court.¹⁰⁷ The state courts must have had the opportunity to contemplate the issues raised in the petition that is presently before the federal court.

F. Procedural Default

"A procedural default occurs in the habeas corpus context when a state prisoner has exhausted his state remedies without obtaining any decision on the merits of his federal constitutional claim, because he failed to comply with state procedural rules on how the claim must be raised."¹⁰⁸ The consequence of a procedural default is that the petitioner's federal claim will never be heard in state court.¹⁰⁹ The procedural default area in the habeas corpus context presents two significant and conflicting government interests: providing a federal forum to hear alleged constitutional rights violations and reinforcing the procedural integrity of state court systems.¹¹⁰

The U.S. Supreme Court, in *Francis v. Henderson*, addressed the issue of whether a state prisoner who failed to make a timely challenge to the composition of the grand jury that indicted him could challenge such grand jury composition in a post-conviction federal habeas corpus proceeding.¹¹¹ Under Louisiana law, any objection to the composition of the grand jury that indicts a defendant must be made in advance of the trial. Otherwise, all such

104. *Picard v. Connor*, 404 U.S. 270, 278 (1971).

105. *Id.*

106. *Rose v. Lundy*, 455 U.S. 509 (1982).

107. *Ex parte Hawk*, 321 U.S. 114, 116-17 (1944).

108. Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263 (1989) (quoting 17A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 4266 (2d. ed. 1988)). For a summary of reasons used to decline review based on procedural default, see Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. OF L. & SOC. CHANGE (1987-1988).

109. Dest, *supra* note 108, at 266.

110. *Id.*

111. 425 U.S. 536 (1976).

objections are waived and thereafter not heard.¹¹² Francis never made any objection to the composition before or during trial, and was found guilty. He also never appealed the conviction.¹¹³

The Supreme Court held that the defendant could not challenge his conviction in a habeas proceeding. The Court recognized that the federal district court had the jurisdiction and power to consider the habeas writ, but the Court attempted to discuss the appropriate exercise of this power.¹¹⁴ In some circumstances, considerations of comity and concerns for orderly administration of criminal justice require a federal court to exercise discretion and refrain from exercising the courts' habeas corpus power.¹¹⁵ The Court concluded that *Davis v. U.S.*, which stated that a federal prisoner who failed to make a timely challenge to the allegedly unconstitutional composition of his indicting grand jury could not attack the grand jury's composition after his conviction in an action for collateral relief under 28 U.S.C. § 2255, applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state conviction due to an allegedly unconstitutional grand jury indictment.¹¹⁶ Delays make it hard to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction and memories may lose their sharpness. Moreover, the decision may affect other convictions based on indictments returned by the same grand jury.¹¹⁷

Further, in *Wainwright v. Sykes*, the Supreme Court held that failure to comply with a state procedural rule will bar habeas corpus review by a federal court unless the defendant can show "cause" for his failure to comply with the state rule and actual "prejudice" created by the default.¹¹⁸ Sykes presented a habeas corpus challenge based upon a *Miranda* claim that he had not raised in his state trial.¹¹⁹ At the defendant's murder trial, the prosecution introduced evidence of an incriminating statement that Sykes had given to the police after having been warned of his *Miranda* rights. In his habeas challenge, Sykes claimed that he had not understood the *Miranda* warnings, and thus any statements made were involuntary, even though neither he nor his counsel raised that claim prior to trial nor during the trial.¹²⁰ Florida's state procedural rule required that such claims be raised by a pretrial motion to suppress, but it also granted the trial court discretion to entertain an objection at trial.¹²¹

112. *Id.* at 537.

113. *Id.* at 537-38.

114. *Id.* at 538-39.

115. *Id.* at 539.

116. *Id.* at 541-42 (discussing *Davis v. U.S.*, 411 U.S. 233 (1973)).

117. *Id.*

118. 433 U.S. 72, 87 (1977).

119. *Id.* at 75.

120. *Id.*

121. *Id.* at 76.

Did Sykes' failure to challenge his confession in compliance with Florida's procedural rules bar federal habeas corpus review? The Supreme Court decided that federal habeas review is procedurally barred when a petitioner has waived objection to the admission of a confession at trial absent a showing of "cause" and "prejudice."¹²² The "cause" and "prejudice" exception ensures that a federal habeas court will still hear the federal constitutional claim of a petitioner who, in the absence of such an adjudication, would be the victim of a miscarriage of justice.¹²³ Sykes did not advance any explanation for his failure to object at trial, and therefore did not satisfy the cause and prejudice standard.¹²⁴

The U. S. Supreme Court left open for resolution in future decisions the precise definition of the "cause" and "prejudice" standard and noted only that it was narrower than the standard set forth in dicta in *Fay v. Noia*.¹²⁵ *Murray v. Carrier* is an important case in defining the "cause" and "prejudice" standards.¹²⁶ *Murray* addresses whether a federal habeas petitioner can show "cause" for a procedural default by claiming that defense counsel inadvertently failed to raise a substantive claim of error rather than deliberately withholding it for tactical reasons.¹²⁷

The Supreme Court, in reaching their decision that *Carrier* failed to establish "cause" for the procedural default, stated the Constitution guarantees criminal defendants a fair trial and a competent attorney. It does not, however, insure that defense counsel will recognize and raise every conceivable claim.¹²⁸ The mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim, does not constitute "cause" to excuse a procedural default.¹²⁹ The Court stated that the question of "cause" for procedural default is not decided on the question of whether the attorney erred or on the kind of error counsel may have made.¹³⁰ As long as the defendant does not receive ineffective assistance of counsel, there is no unfairness in requiring the defendant to bear the risk of attorney error that results in procedural default. The Court states that "cause" for a procedural default is dependent on whether the prisoner can show that some objective factor external to the defense impeded counsel's

122. *Id.* at 87.

123. *Id.* at 90-91.

124. *Id.* at 91.

125. *Id.* at 87 (citing *Fay v. Noia*, 372 U.S. 391 (1963)). *Fay* promulgated the deliberate bypass rule which would make federal habeas review generally available to state petitioners absent a knowing and deliberate waiver of the federal constitutional contention. *Id.*)

126. 477 U.S. 478 (1986).

127. *Id.* at 481-82.

128. *Id.* at 486 (citing *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982)). *Engle* states that the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it does not constitute cause for procedural default. *Id.*)

129. *Id.*

130. *Id.* at 488.

efforts to comply with the state's procedural rule.¹³¹ Possible examples of "cause" under this standard may include showing that the factual or legal basis for a claim was not reasonably available to counsel, that some interference by officials made compliance impracticable, or that counsel was clearly ineffective.¹³²

Additionally, the habeas petitioner must establish that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.¹³³ It is not enough that any errors by counsel had the possibility of prejudice. In conclusion, the Court held that petitioner never alleged any external obstacle that may have prevented counsel from raising his claim and disallowed any claim that counsel was ineffective.¹³⁴ More broadly, two scholars summarizing recent Supreme Court decisions on habeas corpus concluded that "After a decade and a half of extensive litigation, "cause" has come to mean, roughly, ineffective assistance of counsel (defined as gross incompetence) or some serious misconduct by the state (such as active concealment of information) that would have given rise to the claim."¹³⁵ Although the definition of "prejudice" is also unclear, commentators conclude that "[i]t appears to mean something akin to a reasonable probability that, had the claim been timely raised, the outcome of the state proceeding would have been different."¹³⁶

Federal and state courts apply the procedural default doctrine with some regularity. In state courts, over seventy-three percent of the claims were denied without giving any reason for the denial. Twenty-seven percent of the petitions contained reasons, and seven percent of those (241 petitions) were denied on procedural default grounds. In federal court, seventy-six percent of all petitions contained reasons for their denial. Of the 3,346 federal petitions surveyed, 207 petitions or a little over six percent were denied on procedural default grounds. Of the procedural defaults where representation was known, eight-two percent of state court petitions and ninety-one percent of federal court petitions were filed without benefit of counsel.

G. Successive Petitions and Abuse of the Writ

Successive petitions and abuse of the writ are related reasons for denying habeas corpus petitions. A successive petition is a second or subsequent habeas corpus petition that raises the same claims that were previously raised

131. *Id.* The standard for ineffective assistance of counsel was articulated in *Strickland v. Washington*. See *supra* note 34 and accompanying text.

132. *Id.* However, the exhaustion doctrine would require that a claim of ineffective assistance of counsel be presented to state courts as an independent claim before it may be used to establish cause for procedural default.

133. *Id.* at 494 (citing *U.S. v. Frady*, 456 U.S. 152, 170 (1982)).

134. *Id.* at 497.

135. Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution* 1993 SUP. CT. REV. 65, 112 (1994).

136. *Id.* at 113.

and rejected in an earlier petition. An abusive petition is a second or subsequent petition that raises a new claim that could have been raised in an earlier petition.¹³⁷

The U.S. Supreme Court set forth the rules governing successive petitions in *Sanders v. United States*.¹³⁸ In essence, courts entertain successive petitions unless to do so would constitute an abuse of the writ. In turn, an abuse is found where a petitioner deliberately withheld the claim from a previous federal petition or where the successive petition was clearly filed in bad faith.¹³⁹ The U.S. Supreme Court has taken some steps to limit multiple petitions. *In re McDonald* was decided in 1989 and the Court denied a petitioner the opportunity to file a habeas corpus petition because the prisoner had filed seventy-five "frivolous" petitions over a ten year period.¹⁴⁰ Dissenters noted that in this division, the Court "bars its door to a litigant prospectively."¹⁴¹ State courts do not have limits on successive petitions.

Observers differ on the need to restrict prisoner access to court. Robbins contends that prisoner cases are not causing the burden on courts, but are the easiest group of cases to eliminate, whereas Alan Slobodin of the Washington Legal Foundation assess that cases barred are factually specific and involve excessive filings of an almost "recreational" nature.¹⁴² The American Bar Association recommends restrictions on filing successive federal habeas corpus petitions.¹⁴³ Second or successive claims would be dismissed summarily unless a new federal right was applicable retroactively,¹⁴⁴ new facts not previously discovered were introduced,¹⁴⁵ or evidence of actual innocence or a miscarriage of justice was produced.¹⁴⁶ In other words, they attributed successive petitions not to "sandbagging" their claims, but to peer lawyering, mixed petition rules, execution-date practices, new counsel at later stages of the proceedings, and changes in the law.¹⁴⁷

The Federal Courts Study Committee's conclusion that the problem of successive petitions is "overstated" is supported by this study.¹⁴⁸ Only

137. ROBBINS, *supra* note 36, at 16-3.

138. 373 U.S. 1 (1963). For a discussion of the application of *Sanders*, see FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS, July 1, 1990, at 475-77 [hereinafter FEDERAL COURTS STUDY COMMITTEE].

139. See *Williams v. Holbrook*, 691 F.2d 3, 12-13 (1st Cir. 1982); see also *Green v. Carlson*, 649 F.2d 285, 286 (5th Cir.), cert. denied 454 U.S. 1087 (1981) (single prisoner filed over 500 habeas corpus petitions).

140. 109 S. Ct. 993 (1989). See Alexander Wohl, *Barred from Court*, 8 A.B.A. J. 44, 45 (Feb. 1994).

141. Wohl, *supra* note 140, at 45.

142. *Id.* at 45.

143. Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 48 (1990).

144. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *McCleskey v. Zant*, 499 U.S. 467 (1991).

145. *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992); *Townsend v. Sain* 372 U.S. 293 (1983).

146. *Kuhlman*, 477 U.S. 436; *McCleskey*, 499 U.S. 467.

147. Robbins, *supra* note 143, at 170-88.

148. FEDERAL COURTS STUDY COMMITTEE, *supra* note 138, at 471.

seventeen state habeas petitions and sixty-seven federal petitions were denied because they were successive petitions. The numbers involving an abuse of the writ were similar: only eleven state habeas petitions and eighty-eight federal petitions were denied for this reason. All of the petitions denied because they were successive petitions or abuses of the writ in state courts were filed pro se. Similarly in federal court, of the cases where representation status was available, twenty-seven of the twenty-eight petitions denied on the grounds that they were successive petitions and thirty-four of the thirty-seven petitions that were denied on the grounds of abuse of the writ were filed by prisoners who did not have the benefit of counsel. The proportion of petitions granted by type of claim appears to be very low and rather uniform between state and federal court, when the exceptions of particular claims in Texas and New York are taken into account. Petitioners, however, are filing multiple petitions, and data provided in Section II above show that over half of the federal petitioners in the sample filed more than one habeas petition and roughly sixty-five percent of state prisoners filed two or more petitions. Nevertheless, the courts, both state and federal, are not generally using abuse of the writ and successive petitions as reasons to deny habeas petitions.

H. Summary

State courts typically do not give reasons for denial. When state courts articulate a reason for denial, it is most likely to be procedural default or denial on the merits. Reasons for denying habeas petitions are more often given by federal judges. Federal judges overwhelmingly deny petitions on the basis of failure to exhaust state remedies and denied on the merits. A good portion of federal petitions are also denied for procedural default reasons. Comparatively few habeas petitions are denied based upon successive petitions or abuse of the writ.

CONCLUSION

Robbins argues that the U.S. Supreme Court has not consistently applied a single overarching theory of habeas corpus review.¹⁴⁹ He lists three competing theories: “the constitutional model” which focuses on the importance of habeas corpus as the remedy for constitutional violations, “the process model,” which emphasizes the importance of habeas as a remedy to correct flaws in lower court processes, and “the innocence theory,” which stresses the importance of habeas as a remedy for constitutional violations that are supplemented with a claim of factual innocence.¹⁵⁰

149. ROBBINS, *supra* note 36, at 3-1.

150. *Id.*

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

The findings from noncapital cases in this research should reduce tensions between state and federal courts. Federal courts are simply not overturning state court convictions by granting a large number of habeas corpus petitions. Indeed, so few petitions from state prisoners were granted by federal courts that a planned separate analysis of characteristics of petitions granted versus those denied had to be abandoned. Without that analysis, it is not possible to make recommendations on which aspects of state court process or procedure need to be reformed to avoid federal oversight. This finding can be interpreted to mean that state courts are largely effective in protecting federal constitutional rights and weakens the argument that federal review is a necessary safeguard against errors made in state courts.¹⁵¹ Proponents of expanded federal review, however, could use this same evidence to weaken the argument that federal review is a challenge to finality. After all, in an overwhelming number of cases, the judgment of the state trial court is affirmed. The public perception that prisoners are being released on “technicalities,” such as habeas corpus, is simply not accurate.

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

The argument that federal review of state convictions is a duplication of effort¹⁵² is given support here. A comparison of claims raised in state court with claims raised in federal court shows great similarity between the two. With a few minor exceptions, notably with Fourth Amendment and Eighth Amendment claims, similar claims are raised in both state and federal courts. Ineffective assistance of counsel, and general due process concerns overall were claims raised by most petitioners in both state and federal courts. This result is not unexpected, as not only is it common to blame the lawyer for a loss, but in some instances, it is necessary to give ineffective assistance of counsel as a reason for not raising particular claims earlier in the process or in a timely manner.

Claims raised do vary by state. For example, habeas is often used to challenge pleas where the defendant claims a failure to be informed about:

151. See, e.g., Friedman, *supra* note 61.

152. See *supra* note 65.

the habitual offender statute in Alabama; sentence enhancements in California; excessive bail in New York; and appellate processes in Texas. Overall, however, not only are new claims not raised in federal court, but the chance of having petitions granted is slim indeed. Less use was made of the "successive petitions" or "abuse of the writ" as reasons for denial of the petitions than was anticipated, perhaps because the relevant decisions of the U.S. Supreme Court are so recent. Prisoners stand the best chance of having their petitions granted the first time a habeas corpus petition is presented to a state court. Subsequent petitions are less likely to be granted, regardless if they are filed in state or federal court.

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

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

These general conclusions are intended to focus discussion on habeas corpus reform in general and do not apply necessarily to habeas corpus reform in capital cases. As Hoffman and Stuntz note, "Because the federal constitutional rights that are unique to death penalty litigation . . . may substantially differ from the rights that exist in non-capital cases, habeas law should perhaps differ as well."¹⁵³ A separate study to track the legal

153. Hoffman & Stuntz, *supra* note 135, at 119.

history of all prisoners sentenced to death is needed to determine how frequently these prisoners use habeas corpus as part of their overall defense strategy.

