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FEDERAL HABEAS CORPUS — A NEED FOR REFORM

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In 1963, the Supreme Court of the United States decided two cases involving the scope of federal habeas corpus relief to state prisoners under 28 U.S.C. sections 2244-2255.[1] The Court divided five-to-four in both cases and each contained sharp dissents.

In *Townsend v. Sain*, Justice Stewart in dissent observed that even under the test enunciated by the majority, the Court should have affirmed the appellate court's denial of relief. He stated his main concern, however, in the last paragraph of his opinion:

> To require a federal court now to hold a new trial of factual claims which were long ago fully and fairly determined in the courts of Illinois is, I think, to frustrate the fair and prompt administration of criminal justice, to disrespect the fundamental structure of our federal system, and to debase the Great Writ of Habeas Corpus . . . .[2]

In *Fay v. Noia*, the Court upheld the power of a federal court to grant habeas corpus relief notwithstanding the petitioner's decision not to appeal his conviction out of fear that if he were successful he might face retrial and a possible death sentence. Justice Brennan set forth the requirement that, in order to forfeit his right to a consideration of his federal claim, there had to be a "deliberate by-pass" of state court procedures by the applicant. This deliberate by-pass had to be "an intentional relinquishment or abandonment of a known right or privilege" by the applicant after consultation with competent counsel.[3] Justice Clark dissented because the decision dealt a "staggering blow" to the effective administration of criminal justice and jeopardized the finality of state convictions. He opined that "[a]fter today state judgments will be relegated to a judicial limbo, subject to federal collateral attack—as here—a score of years later despite a defendant's willful failure to appeal."[4] Jus-

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1 Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

2 372 U.S. at 334.

3 *Id.* at 439.

4 *Id.* at 446 (Clark, J., dissenting).

tice Harlan in his lengthy dissent suggested that the majority opinion failed to understand the function of counsel and that the "effect [of the decision] on state procedural rules may be disastrous . . . ."[5]

The history of federal habeas corpus since 1963 has demonstrated that *Townsend* and *Fay* have not withstood the test of time and that the Justices who dissented in those cases perceived correctly the abuses which would result and the effect they would have upon the administration of justice. Indeed, the decision in *Wainwright v. Sykes*[6] vindicated the position espoused by Justice Harlan in *Fay* and undercut the basic premise of *Townsend* that state courts were not competent to dispose of and protect the federal constitutional rights of persons tried in state courts.

Although recent Supreme Court decisions have constricted the scope of habeas corpus relief by strengthening the rule of *Wainwright v. Sykes*,[7] and have recognized the legitimate need for finality in the administration of justice,[8] congressional reform of the habeas corpus act is essential to curb existing abuses. It was for this reason that, as Attorney General of the State of Florida, I proposed certain amendments to 28 U.S.C. sections 636(b)(1)(B), 2244, and 2254(d), filed last year as S. 653 and H.R. 3416.[9]

I. THE REVIEW BY FEDERAL MAGISTRATES OF STATE COURT CRIMINAL CONVICTIONS

Currently, 28 U.S.C. section 636(b)(1)(B) authorizes United States magistrates to conduct evidentiary hearings on habeas corpus applications for post-trial relief by individuals convicted in state court of criminal offenses. The magistrate submits to the judge proposed findings of fact and recommendations for disposition of the case, which the judge may accept or reject.

The proposed amendment to 28 U.S.C. section 636(b)(1)(B) contained in section 1 of H.R. 3416 would prohibit United States magistrates from conducting evidentiary hearings in state habeas corpus cases without consent of the parties. The states have no interest in how much authority Congress confers upon magistrates with respect to federal

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[5] *Id.* at 471 (Harlan, J., dissenting).

[6] 433 U.S. 72 (1977). *See also* Stone v. Powell, 428 U.S. 465 (1976).

[7] Engle v. Isaac, 102 S. Ct. 1558 (1982).

[8] United States v. Frady, 102 S. Ct. 1584 (1982).

[9] H.R. 3416, 97th Cong., 1st Sess., 127 CONG. REC. H1791 (1980); S. 653, 97th Cong., 1st Sess., 127 CONG. REC. S1981 (1981). I explained the necessity for finality in the administration of justice in a memorandum to the House and Senate Judiciary Committees. J. Smith, Memorandum in support of S. 653 and H.R. 3416 Reforming Federal Habeas Corpus Procedures Concerning Challenges to State Criminal Convictions (June 12, 1981)(submitted to Senate and House Judiciary Committees).

criminal proceedings. Some states are of the position, however, that magistrates should not have the authority to make findings of fact that, in practical effect, overrule decisions rendered by state trial judges and even state supreme courts. A federal district judge should overrule state decisions only if the judge's appointment comes under article III of the United States Constitution.

Although the Supreme Court has upheld Congress' power to authorize a magistrate to conduct evidentiary hearings, this does not mean that Congress must grant such authority or that the present law should not be overturned. If one views federal habeas corpus as an essential requisite to insuring the protection of individual freedoms, then it would seem that an experienced judicial officer should hear the disputed facts. If Congress were to eliminate the magistrates' role in conducting evidentiary hearings, leaving it up to federal judges alone to perform such a fact finding function, Congress would avoid duplicative evidentiary hearings and would prevent judges from merely "rubber stamping" the magistrate's factual findings. Under my proposal, federal magistrates would still handle all aspects of habeas corpus petitions except evidentiary hearings, over which a magistrate would have jurisdiction only if the parties consent to it.

II. THE FEDERAL LITIGATION OF ISSUES NOT PROPERLY RAISED IN STATE COURT PROCEEDINGS

The proposed amendment to 28 U.S.C. section 2244, contained in section 2 of H.R. 3416, codifies the Supreme Court's decision in *Wainwright v. Sykes*[10] that the federal courts will not consider issues not properly raised at the state level unless a petitioner demonstrates "cause and prejudice" for failure to comply with state court procedures. The requirement that a petitioner must raise his claims in the state courts, absent special circumstances, is the only approach consistent with traditional notions of federalism. It gives the state system an opportunity to correct constitutional errors and to resolve factual disputes while witnesses' memories are still keen. It also protects the defendants by ensuring that their rights are promptly vindicated at the trial or on direct appeal, rather than after many years of incarceration. Moreover, the *Wainwright* requirement is essential to the fair administration of justice because it prevents the defendant from "sandbagging" state courts by deliberately refusing to raise claims in state court so that they can later raise them for the first time in federal court. Finally, the proposed legislation also specifically defines the Supreme Court requirement of "cause."

[10] 443 U.S. at 72.

Two decisions demonstrate the need for the proposed amendment to 28 U.S.C. section 2244. In *Holzapfel v. Wainwright*,[11] for example, defendant Holzapfel entered pleas of guilty in 1960 to the first degree murders of a judge and his wife. Holzapfel told the court that he made his plea freely, voluntarily, and with knowledge of the consequences which would follow. He acknowledged that his earlier confession before a county judge was an accurate statement of the events leading to the deaths, and the court accordingly made the confession part of the record.

Nine years later, Holzapfel petitioned a state court to vacate the judgments and sentences he received. He claimed (1) that his plea was involuntary, (2) that the government did not inform him of his right to appeal, (3) that he made his confession before intelligently waiving his right to counsel, and (4) that the trial court lacked jurisdiction over his case because the victims drowned in the Atlantic Ocean. The state court held an evidentiary hearing in 1970 and denied Holzapfel's motion. The appellate court subsequently affirmed the lower court's decision.[12]

In 1978, Holzapfel filed a second motion to vacate in the state trial court, reiterating his prior assertions and also claiming his court appointed counsel was ineffective. The state court held an additional evidentiary hearing on the newly raised claim in 1979 and again denied the defendant's motion. The state appellate court affirmed.[13] In 1981, Holzapfel filed a petition for a writ of habeas corpus in federal district court. Holzapfel renewed the claims he had made earlier in state court, and at present this case still awaits disposition by the magistrate.

Under the proposed amendment to 28 U.S.C. section 2244(d), a petitioner would have to raise these claims in the initial state court proceedings or, alternatively, he would have to establish that neither he nor his attorney then had knowledge of the material and controlling facts upon which he is basing his claim and that they could not ascertain such facts by the exercise of due diligence.

Holzapfel, for example, had long been aware of the facts which gave rise to his claims. He should have raised these issues in the original state proceedings when the facts were readily ascertainable and when the state court could correct any legitimate errors. Since delay prejudices the state, Holzapfel should have to demonstrate why he could not have raised the issues in the original proceeding. If he cannot demonstrate such cause under the factors enumerated in this amend-

[11] No. 81-8038-Civ-JCP (S.D. Fla. filed 1982).

[12] Holzapfel v. State, 247 So. 2d 754 (Fla. Dist. Ct. App. 1971).

[13] Holzapfel v. State, 392 So. 2d 86 (Fla. Dist. Ct. App. 1980).

ment, the federal court should bar his claim.[14]

In *Tyler v. Phelps*,[15] a Louisiana state court tried and convicted Gary Tyler of first degree murder and sentenced him to death. On direct appeal, Tyler attempted to raise the impropriety of a jury instruction to which his attorney had failed to object at trial. The state supreme court declined to entertain the argument because counsel had failed to comply with the state's "contemporaneous objection rule" which requires counsel to object at trial when the alleged error occurred.[16]

Tyler immediately filed a habeas petition in federal district court, claiming that the jury instruction made the state judgment and sentence constitutionally infirm. The federal district court denied relief because of Tyler's failure to object to the charge at trial and his failure to establish "cause" as required by *Wainwright v. Sykes*. The federal court rejected Tyler's claim of ineffective assistance of counsel as baseless.

On appeal, the fifth circuit noted that *Wainwright v. Sykes* had held that a petitioner must establish cause and prejudice but reversed the district court's order denying the writ of habeas corpus. The court decided that the Supreme Court's decision in *Mullaney v. Wilbur*[17] made the instruction in *Tyler* improper.[18] After finding that this charge prejudiced Tyler, the court decided that the ignorance of counsel was sufficient to satisfy the *Sykes* requirement of "cause."[19]

The court thus concluded in *Tyler* that oversight or ignorance of counsel satisfies the cause requirement and that failure to comply with the state's legitimate procedural rules did not preclude federal habeas corpus relief. The court did note that *Sykes* would still require denial of the writ if the state could *prove* that the defendant's counsel attempted to "sandbag" the trial judge or to build error into the record.

One thing the court failed to acknowledge, however, is that it is unlikely that any defense lawyer will ever admit that he deliberately attempted to take such actions. The state, therefore, will have great difficulty proving the subjective intent of defense counsel. As Justice

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[14] This case also illustrates the need for the statute of limitations on habeas corpus actions. Two key witnesses, attorneys Hal Ives and Harry Hausen, died prior to the 1979 evidentiary hearing. Both attorneys could have testified as to the voluntariness of Holzapfel's confessions and guilty pleas. Holzapfel's assertion that now deceased law enforcement officials made promises to him is also difficult, if not impossible, to refute. Thus Holzapfel may be able to prevail not because his cause is meritorious, but because the state is unable at this late date to contradict his testimony. If Holzapfel is granted a new trial, it would be difficult to prove anew his guilt 26 years after the murders and 20 years after the entry of his plea.

[15] 622 F.2d 172 (5th Cir. 1980).

[16] State v. Tyler, 342 So. 2d 574, 590 (La. 1977).

[17] 421 U.S. 684 (1975).

[18] 622 F.2d at 172.

[19] *See* Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), *cert. denied*, 449 U.S. 1004 (1980).

Burger observed in *Estelle v. Williams*, "[i]t is not necessary, if indeed it were possible, for us to decide whether this [failure to object] was a defense tactic or simply indifference . . . ."[20] Under the test established by the panel in *Tyler*, the rule of *Wainwright v. Sykes* cannot protect the orderly procedure of state courts.[21]

The rule barring federal consideration of claims because of procedural defaults was supported by the recent Supreme Court decisions in *United States v. Frady*[22] and *Engle v. Isaac*.[23] In *Engle*, Justice O'Connor noted that "counsel might have overlooked or chosen to omit . . . [a] due process argument while pursuing other avenues of defense . . . ."[24] She also remarked that the constitutional guarantee of competent counsel "does not insure that defense counsel will recognize and raise every conceivable constitutional claim . . . ."[25]

Congress should establish an objective definition of what constitutes "cause" so as to end the continued confusion. Such a definition would prevent the lower federal courts from warping the *Sykes-Engle* doctrine in order to reach the merits of a case years after the trial when the "[p]assage of time, erosion of memory, and dispersion of witnesses . . . render retrial difficult, even impossible."[26]

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20 425 U.S. 501, 512 n.9 (1978)(emphasis added).

21 *See supra* note 9 and accompanying text. The fifth circuit, in Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977), and the second circuit, in Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1977), *cert. denied*, 445 U.S. 933 (1980), both perceived the analytical deficiencies of the *Tyler* decision. In *Indiviglio*, the second circuit followed *Lumpkin v. Ricketts* by stating that "a mere allegation of error by counsel is insufficient to establish 'cause' to excuse a procedural default." 612 F.2d at 631. The court decided that "the interests of finality in judgments required such a holding."

Significantly, on rehearing the *Tyler* case, the fifth circuit receded from its original position and held that *Sykes* barred consideration of Tyler's claim. 643 F.2d 1095 (5th Cir. 1980). In a subsequent case, the fifth circuit recognized that its later *Tyler* decision was the correct treatment of the habeas corpus issue and it cited with approval the *Indiviglio* decision. Washington v. Estelle, 648 F.2d 276 (1981).

22 102 S. Ct. 1584.

23 102 S. Ct. 1558.

24 *Id.* at 1574.

25 *Id.*

26 *Id.* at 1571. *See also Hanna v. Wainwright*, No. 77-8401-Civ-CF (S.D. Fla. July 31, 1978) where the federal district court held a hearing on Hanna's fourth habeas petition, which raised an issue that Hanna had earlier decided not to appeal. The court should not have considered Hanna's habeas petition on its merits because of his deliberate bypass of state remedies. An inmate should have an obligation to pursue his state appeal so that any error in the state trial court can be remedied promptly. The district court ultimately denied Hanna's petition on the merits. *Id.*

In *Martin v. Wainwright*, 533 F.2d 270 (5th Cir. 1976), the fifth circuit affirmed the district court's denial on the merits of Martin's habeas petition, which raised an issue which Martin had not appealed in state court. Under the amendment proposed in section 2 of H.R. 3416, the district court would not have reached the merits of this petition because of Martin's failure to present the issue in a state appeal.

III. A THREE YEAR STATUTE OF LIMITATIONS FOR HABEAS CORPUS PETITIONS

The proposed amendment to 28 U.S.C. section 2244 contained in section 2 of H.R. 3416 provides for a statute of limitations in habeas corpus cases. Such a provision is essential to ensuring finality of criminal judgments, since prisoners frequently wait many years to bring a habeas corpus action seeking to set aside a judgment and sentence. If the habeas petition raises an issue which the prisoner had not raised at the state level, and the record does not resolve it, the state is often incapable of refuting the prisoner's testimony and, as a consequence, the petitioner prevails. Such a system has hardly contributed to public confidence in the judicial system. The rules of habeas corpus cases do permit the dismissal of a petition on the equitable basis of laches. Yet, courts dismiss few cases on this ground. In any event, a trial on the issue of laches is as burdensome as a trial on the merits and accordingly affords no real relief from stale claims. The proposed three year statute of limitations would begin to run after the state court conviction and any direct appeal has become final.

Walker v. Wainwright[27] illustrates the need for a statute of limitations in habeas corpus cases. In *Walker*, the defendant raped a female child in 1937. Since a number of citizens had witnessed the rape, Walker entered a guilty plea and received a life sentence. In 1968, after revocation of his parole and his reincarceration, Walker filed a petition for writ of habeas corpus in federal court alleging that the state had not provided him with an attorney in the original trial and that the arresting officer had coerced him into pleading guilty. The federal court ordered an evidentiary hearing even though the records showed that Walker did have an attorney at the time he entered the plea and thirty years had passed since the entry of the plea.

Fortunately, the state located the sheriff who had arrested Walker. The sheriff was the only living witness to the events besides Walker, since both the defense lawyer and trial judge had died years earlier. At the hearing, the sheriff denied threatening Walker and testified that the charge was absurd because the state had numerous witnesses who caught Walker raping the child. The district judge denied the writ of habeas corpus, finding that Walker was not credible[28] and the fifth circuit affirmed the order.[29]

One year later, Walker filed a second petition for a writ of habeas corpus in which he alleged that his attorney in the original trial was

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[27] Walker v. Wainwright, 430 F.2d 936 (5th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971).
[28] Walker v. Wainwright, 350 F. Supp. 916 (M.D. Fla. 1970).
[29] 430 F.2d at 936.

ineffective. The state raised laches as an affirmative defense to an issuance of the writ, because trial counsel had died and, without his testimony, the state could not refute the defendant's testimony. The federal district judge held a second evidentiary hearing and, on the basis of Walker's uncontradicted testimony, granted the writ of habeas corpus. The court presumed that counsel had prejudiced Walker by pleading Walker guilty shortly after he agreed to represent him.

Due to the death of key witnesses, the state could not establish several possible explanations for Walker's guilty plea. The state could not prove that the trial judge had opposed the death penalty or that counsel had entered a guilty plea to avoid the possibility of a death sentence being returned by the jury.[30]

While the law allows dismissal of habeas corpus petitions on grounds of laches or inexcusable delay,[31] the federal courts have been

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30 Several other cases illustrate the need for the statute of limitations section of H.R. 3416. In Griffith v. Wainwright, No. 79-6387-Civ-JLK (S.D. Fla. 1977), Griffith was convicted of second-degree murder. Ten years after his conviction was affirmed in the state courts, Griffith filed a petition for a writ of habeas corpus in federal district court. Griffith's petition raised seven grounds for relief, most of which were evidentiary in nature. The federal district court denied all seven claims Griffith raised in his petition. Griffith's appeal is now pending in the Fifth Circuit Court of Appeals, no. 80-5989.

When Griffith's case was before the state courts, he was aware of all the issues he subsequently raised in the habeas corpus petition. The proposed statute of limitations would bar such litigation of issues which could have been raised before state courts.

In Maxwell v. Wainwright, No. 77-371-Orl-Civ-Y (M.D. Fla. Dec. 6, 1977) Maxwell was convicted in 1964 of second-degree murder and assault with intent to commit murder. In 1971, Maxwell filed a habeas corpus petition in federal district court claiming ineffective assistance of trial counsel. It was dismissed for failure to exhaust state remedies. In 1973, Maxwell was paroled, but in 1977 his parole was revoked. He then filed another habeas corpus petition again complaining of ineffective assistance of counsel at his 1964 trial. The court again dismissed, without prejudice, for failure to exhaust state remedies.

It is now seventeen years since Maxwell's conviction and he has never challenged the effectiveness of his trial counsel in state courts. The federal court, rather than dismissing his case without prejudice and thereby allowing Maxwell to refile his claims again, could have barred Maxwell's 1971 and 1977 petitions under the proposed statute of limitations. Because of the passage of time, there is little likelihood the state could now successfully retry Maxwell if he were to secure a reversal of his judgment.

In Scarborough v. State, No. 80-1082-Civ-T-M (M.D. Fla. filed 1979), the defendant pled guilty on November 16, 1970 to two counts of rape. In 1979, he filed for habeas corpus relief in federal district court. The court dismissed the petition so that Scarborough could pursue another remedy in state court. In early 1980, Scarborough then filed a motion in state court alleging his incompetence due to "mental fatigue." After Scarborough appealed form the denial of this motion, he again filed a petition for writ of habeas corpus in federal court. As a ground for relief, Scarborough alleged his incompetence at the time of his pleading.

In the interim between his inital pleading in 1970 and Scarborough's latest petition, the assistant state attorney who had handled his case passed away. Without the principal witness to Scarborough's demeanor at the time of his pleading, the state is prejudiced by the nine year delay. The proposed statute of limitations would bar this stale claim.

31 28 U.S.C. § 2254 (1976).

quite reluctant to dismiss petitions for these reasons.[32] For example, *Paprskar v. Estelle*[33] reversed a district court's dismissal of a habeas petition on these grounds. Judge Coleman concurred specially in the reversal with the following observation:

> Of course, the Constitution is supreme and must be obeyed. I do not quarrel with that. I do find it to be painfully incongruous that he who defies all civilized notions of due process in the summary theft of human life is allowed, years after the event and years after his conviction has become final, to raise all kinds of constitutional claims which, if they existed, could have been raised at trial or, at least, soon thereafter.
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> The fault, of course, is not with the Great Writ. It lies in the manner in which it is allowed belatedly to be invoked. While Congress has commendably made some effort to limit jurisdiction for the entertainment of these eleventh hour attacks on state court convictions *it is readily apparent to one regularly dealing with the subject that those efforts have not met with much success.*
>
> Very few belated applications of habeas corpus claim that the petitioner is innocent. The fundamental purpose of the Writ has been distorted. *The confidence of the general public in the ability of state courts to bring criminals to justice has been eroded. The deterrent effect of law prohibiting criminal conduct has been seriously damaged. The decisions say that the Writ may not be used as a second appeal, but from experience the outlaws know better.* Instead of being a bulwark of freedom for the citizen it has been allowed to become a last, and too often a sure, refuge for those who have respected neither the law nor the Constitution.
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> I would not limit the Writ, if I could, but I most assuredly would limit its application in situations such as we encounter in this case.
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> As I do here, I must follow the law as it exists. I do not understand, however, that I am not allowed to mention serious defects in the law.[34]

Judge Coleman eloquently states the need for some type of statute of limitations to extinguish stale claims of prisoners that sometimes succeed, not because they are meritorious, but because the passage of time prevents the state from refuting the claims.

IV. STATE EVIDENTIARY HEARINGS

Section 3 of H.R. 3416 modifies 28 U.S.C. section 2254(d) to prevent federal courts from holding an evidentiary hearing on a factual dispute when a state court had already conducted an evidentiary hearing which fully and fairly resolved the merits of the issue. The Supreme Court and Congress agree that when a state court makes a finding of fact after a full and fair hearing, the Constitution does not guarantee

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[32] *See e.g.*, Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980); Jackson v. Estelle, 570 F.2d 546 (5th Cir. 1978); Hamilton v. Watkins, 436 F.2d 1323 (5th Cir. 1970).

[33] 612 F.2d 1003 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980).

[34] *Id.* at 1008 (emphasis added).

another hearing in federal court.[35]

In *Townsend*, Chief Justice Warren decided that a federal district judge had the discretion to hold a new hearing even when the judge concludes that "the habeas applicant was afforded a full and fair hearing by the state court . . . ."[36] Justice Frankfurter, in his concurring opinion in *Brown v. Allen*,[37] recognized that there must be some guidelines governing the necessity of hearings in district courts because, without such rules, district judges would be "free to misuse the writ by either being too lax or too rigid in its employment."[38] The proposed amendment embodied in section 3 of H.R. 3416 provides not only that a federal court need not hold a duplicative hearing but that it *shall* not hold such a hearing if the appropriate factual determination was previously made. The amendment repeals subsections (6) and (7) of 28 U.S.C. section 2254(d) to eliminate a redundancy, since subsections (1), (2), and (3) of section 2254 (d) already incorporate the same concept. The amendment rewrites subsection (6) to codify the *Jackson v. Virginia*[39] standard of review of state factual findings.

Unfortunately, many federal courts apparently regard existing legislation as permissive and insist upon holding evidentiary hearings regardless of the care of the state courts. There is no rational reason for a second hearing to determine issues of fact if the state court procedures adequately develop the facts and resolve the issues. As Justice Frankfurter noted in *Brown*, where the state court records affirmatively show no violation of an accused's rights, "[i]t certainly would make only for *burdensome* and useless repetition of effort if the federal courts were to rehear the facts in such cases."[40] Additionally, Justice Stevens in his concurring opinion to *Jackson* voiced his complaint against the unproductive labor expended in an attempt to redetermine facts—a process which amounts to nothing more than second guessing the first factfinder.[41] Of course, if the state court hearing was not a full and fair hearing, the federal district courts should intervene and determine the factual issues anew. Justice requires nothing more.[42]

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35 Townsend v. Sain, 372 U.S. at 312-13.

36 *Id.* at 318.

37 344 U.S. 443, 497 (1953) (Frankfurter, J., concurring).

38 *Id.* at 513.

39 443 U.S. 307 (1979). *Jackson* declares that an applicant is entitled to habeas corpus relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

40 344 U.S. at 504.

41 443 U.S. at 337 (Stevens, J., concurring).

42 *See e.g.*, Allen v. McCurry, 449 U.S. 90 (1980); Townsend v. Sain, 372 U.S. 293 (1963).

Jurek v. Estelle,[43] illustrates the need for a limit on federal court discretion to hold evidentiary hearings in habeas cases. Jurek was indicted for the 1973 murder of a ten year old child. At his state court trial, Jurek filed a motion to suppress confessions that he had given to the authorities shortly after his arrest. Although the Texas trial court conducted a suppression hearing, Jurek elected not to testify. The Texas trial judge found that Jurek had given the confessions voluntarily. The judge also allowed the jury to determine the voluntariness, weight, and credibility of the confessions. The jury found Jurek guilty and sentenced him to death, whereupon Jurek instituted an appeal to the Texas Court of Criminal Appeals. Jurek raised several issues including the admissibility of his written confessions. The court found that the record supported the trial judge's finding that the confessions were voluntary, and affirmed the judgment and sentence.[44] The Supreme Court of the United States also affirmed the decision after upholding Texas' death penalty statute.[45]

Jurek then filed a petition for a writ of habeas corpus in federal district court, in which he again claimed that his confessions were involuntary and thus inadmissible. The federal district judge, after reviewing the state court records and other evidence presented by the parties, ruled against Jurek, who then appealed to the United States Court of Appeals for the Fifth Circuit. In 1979, in a two-to-one decision, the court held that "under all the circumstaces, Jurek's confessions were involuntary."[46] The panel never addressed the ramifications of section 2254(d) nor was there any evidence that the state trial court did not conduct a full and fair hearing. It ordered a new trial and held that the state could not use the confessions given by Jurek in a subsequent trial.[47] Judge Coleman remarked in a vigorous dissent:

> We have never seen Jurek; we have not seen or heard any of the witnesses. The majority disagrees with the findings of all the judges and jurors who have done so and it follows its own notions of what the evidence should have established. In my opinion, such 'independent findings' are unjustified.[48]

The State of Texas filed a petition for rehearing en banc, which the court granted on June 5, 1979. On August 11, 1980, seven years after the crime, a sharply divided Court of Appeals rendered a forty-five page decision also reversing the district court's denial of the writ of habeas

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[43] 593 F.2d 672 (5th Cir. 1979), *reh'g granted*, Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, Estelle v. Jurek, 450 U.S. 1001 (1981).

[44] Jurek v. State, 522 S.W.2d 934 (Tex. 1975).

[45] Jurek v. Texas, 428 U.S. 262 (1976).

[46] 593 F.2d at 676.

[47] *Id.* at 679.

[48] *Id.* at 686 (Coleman, J., dissenting).

corpus.[49] A majority of the court found the first confession voluntary but the second confession involuntary.

This case illustrates the absolute need for a modification of section 2254(d). If federal courts are free to make an "independent determination" of questions of fact without regard to the findings made by the judges and juries who heard and saw the witnesses and notwithstanding the fact that the record supports those findings, then one must wonder why the state courts should go through the trouble of holding hearings and whether the state can ever deem any judgment as final.[50]

Beach v. Backburn[51] also illustrates the need for section 3 of H.R. 3416, particularly as it changes the wording of subsection (2) from "material facts *were not* adequately developed" to *"could not be* adequately developed." Beach was under indictment for first-degree murder and armed robbery. At his trial, Beach moved to suppress a statement he had given to the authorities in Louisiana, after his arrest in North Carolina and return to Louisiana. A hearing showed that he received his *Miranda* warnings and waived his rights to counsel and to remain silent. He then made a written admission. Beach, who did not testify at the suppression hearing, was convicted and he appealed to the Louisiana Supreme Court. On appeal, he claimed that the statement was inadmissible because he was misinformed as to when the court would appoint counsel for him. The Louisiana Supreme Court disagreed and concluded that the record of the hearing on the motion to suppress "fully support[s] the ruling that defendant understood his Fifth Amendment rights and voluntarily waived the same when he gave the oral and written statements."[52]

After he lost his appeal in the state court, Beach filed for a writ of habeas corpus in federal district court. The petition claimed that his confession was involuntary because his treatment in North Carolina rendered him incompetent to waive his rights on arrival in Louisiana. The federal district court denied the petition without conducting an evidentiary hearing because there was no support in the record for Beach's claim of mistreatment in North Carolina. The Fifth Circuit reversed the federal district court and ordered an evidentiary hearing because the state courts did not determine the effect of the alleged mistreatment of Beach upon the voluntariness of his statement.[53]

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49 623 F.2d at 929.

50 See Montes v. Jenkins, 581 F.2d 609 (7th Cir. 1978), where the court effectively refused to give a state court's findings of fact the weight intended by 28 U.S.C. § 2254 and shifted the burden of showing sufficiency to the state. *See also* McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

51 631 F.2d 1168 (5th Cir. 1980).

52 State v. Beach, 320 So.2d 143, 145 (La. 1975).

53 631 F.2d at 1168.

This case demonstrates what occurs in most habeas corpus cases filed by state prisoners. They originally attack the admissibility of a statement and receive a hearing. The state court makes a finding upon the facts presented at that time and, as here, the defendant frequently does not testify. Years later—for Beach it was six years—the petitioner alleges the statement was inadmissible and presents a new version of the facts, even though he knew or could have known of these facts at the time of the initial hearing. Since the petitioner did not present his version of the facts at the original hearing, the state court finding, which is otherwise correct, will not support a summary dismissal under section 2254(d) as it is now written. In short, the state court prisoner can always allege "new" facts and thus force the court to hold a hearing, thereby burdening the court and the state—especially when there are few, if any, witnesses remaining who remember the facts and who can refute the defendant's allegations.

This is a weakness in existing law which Congress and the courts must address. Justice and finality demand that when the state court first affords a defendant an opportunity to present all known facts relevant to the disposition of an issue, he or she must present them at that time. Thus, the habeas corpus statute should provide that a federal court's review of a habeas corpus petition should defer to the state court findings if the defendant could have developed the material facts at the trial, even if he or she actually did not develop those facts at trial. As the Supreme Court commented in *Wainwright v. Sykes*, which involved an attack an a confession not challenged in the state courts:

> A defendant has been accused of a serious crime, and this [the state trial] is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. *To the greatest extent possible all issues which bear on this charge should be determined in this proceeding*: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.
>
> We believe the adoption of the Francis rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "try out on the road" for what will later be the determinative federal habeas hearing. *There is nothing in the Constitution or in the language of §2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings*. If a criminal defendant thinks that an action of the state trial court is

> about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.[54]

Section 2254(d) will be meaningless and never ensure the finality of criminal convictions so long as a defendant can avoid it by simply not presenting factual testimony that is available and which he could have presented.

Even Chief Justice Warren, in *Townsend v. Sain*, recognized that if the habeas petitioner could have developed facts but did not, the petitioner has no right to another plenary hearing. He said: "Where newly discovered evidence is alleged in a habeas application, *evidence which could not reasonably have been presented to the state trier of facts*, the federal court must grant an evidentiary hearing . . . . If, *for any reason not attributable to the inexcusable neglect of petitioner*, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled."[55]

When Congress enacted section 2254(d) to codify *Townsend*, it created problems by leaving out of the language of section 2254(d) the qualification of *Townsend*, to wit: whether the facts "could have been developed" rather than whether the "facts were not adequately developed at the state court hearing."[56] The proposed amendment to section 2254(d) corrects this deficiency and prevents the injustices discussed above.

V. CONCLUSION

Justice Jackson perceived the abuses that would flourish if the courts did not confine the scope of the writ of habeas corpus and noted in his concurrence to *Brown v. Allen*: "The writ has no enemies so deadly as those who sanction the abuse of it, whatever their intent."[57] In the same case, Justice Frankfurter cautioned that the writ had the potential for evil as well as for good and that abuse of the writ could undermine the orderly administration of justice.[58] In the last twenty years, both the expansion of the writ and the manner in which the inferior federal courts have utilized it to review *de novo* state court judgments have demonstrated the truth of those predictions.

The problem with federal habeas corpus today is not so much that federal courts want to continue "reviewing" state court judgments, but that they feel obliged to do so because of the language of section 2254, which has remained unchanged over the years. The United States

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54 433 U.S. at 90 (emphasis added).

55 372 U.S. at 317 (citation omitted)(emphasis added).

56 *Id.*

57 344 U.S. at 544 (Jackson, J., concurring).

58 *Id.* at 512 (Frankfurter, J., concurring).

Supreme Court, prone to adhering to *stare decisis*, is reluctant to redefine the scope of the writ. *Congress* is the appropriate body to define the limits of federal habeas corpus review of state court judgments. This legislative body must address the abuses and assist the Court by clarifying its intent. The Court is aware of the abuses and has attempted, within the limits of its proper function, to eliminate them. If the Congress does not recognize its responsibility, then Congress, not the Court, must take the blame for the lack of finality of judgments and the continuance of current abuses.