

Federal Habeas Corpus Review

Challenging State Court Criminal Convictions

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September 1995, NCJ-155504

U.S. Department of Justice
Bureau of Justice Statistics

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The research for this report was supported by a grant from the Bureau of Justice Statistics to the National Center for State Courts (92-BJ-CS-KO26). The views expressed and the conclusions drawn in this paper do not necessarily reflect the views or policies of the Bureau of Justice Statistics or the Department of Justice.

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Highlights

State prisoners can challenge the validity of their convictions and sentences by filing habeas corpus petitions in a Federal court. These petitions allege that the police, prosecutor, defense counsel, or trial court deprived the prisoners of their Federal constitutional rights, such as the right to refuse to answer questions when placed in police custody, the right to a speedy and fair trial, and the right to effective assistance of counsel. Because these petitions must have been presented to the State courts for review, the prisoners are relitigating previously resolved issues. Nevertheless, if these petitions are successful in Federal courts, Federal judges can issue writs of habeas corpus ordering the prisoners to be released from custody, their sentences reduced, or their cases remanded for retrial or resentencing.

These petitions raise basic questions about the respective institutional roles of the Federal and State courts, the finality of the criminal legal process, and the efficiency of Federal review. Is a Federal examination of issues already adjudicated in the State courts necessary to preserve individual constitutional rights? Is swift and sure punishment, a goal of the criminal justice system, compromised or maintained by review? Are the courts in control of habeas corpus litigation or do these cases take on lives of their own? These kinds of questions are part of a perennial debate among national and State policymakers, judges, and attorneys concerning the appropriate scope of review, with one side seeking to restrict the scope of Federal review and the other side seeking to maintain or to expand the scope.

The current research reports the results of inquiry by the National Center for State Courts, with the support of the Bureau of Justice Statistics, into the processing of habeas

corpus petitions in 18 Federal district courts located in 9 selected States (Alabama, California, Florida, Indiana, Louisiana, Missouri, New York, Pennsylvania, and Texas), which comprise approximately half of the Nation's 10,000 petitions filed each year.

What do habeas corpus petitions involve?

The petitions are challenges from prisoners primarily convicted of violent offenses and given correspondingly severe sentences. The issue most frequently raised is that the prisoner received ineffective assistance of counsel (such as the defense counsel's not cross-examining a prosecution witness or not objecting to a denial of the court's continuance motion); fewer issues claim constitutional violations by the trial court, prosecutor, or the police.

Less than 1% of the sentences are death-penalty sentences. Most sanctions are custodial sentences, although 21% are life sentences. Case processing times vary considerably, with the fastest 10% taking less than a month to resolve and the slowest 10% taking over 2 years to resolve.

Because assumptions about timeliness underlie almost all of the various positions in the policy debate, this research seeks to explain case processing time.

Why do some petitions take longer than others to resolve?

The evidence suggests that case complexity determines processing time. If cases fail to satisfy the basic procedural requirements of habeas corpus, the petitions are dismissed expeditiously. The greater the number of issues in the petition, the longer the time it takes to resolve the petition.

Moreover, other factors related to case complexity, such as the appointment of counsel and the holding of evidentiary hearings, add their effects by increasing case processing time. Case processing time is affected only to a limited extent by case characteristics like most serious offense at conviction, underlying trial court proceeding, sentence, and type of issue. Consequently, the Federal review appears to be an efficient process shaped by relevant legal factors.

The report ends with a brief discussion of the possible implications of the research for the national policy debate. One implication is that the debate might be focusing too narrowly on petitions challenging death-penalty sentences. These petitions are less significant in determining case processing time than petitions arising from life sentences. Because habitual offender and related statutes like three-strikes-and-you're-out are likely to increase the proportion of prisoners with life sentences among State prison populations, a broader focus in the debate seems prudent.

Second, there is a need to refocus on the question of whether there should be greater deference to the State courts. U.S. Supreme Court Associate Justice Sandra Day O'Connor raised this issue several years ago, but its relevancy seems at least as appropriate now as then. As shown in this nine-State study, the validity of State court convictions remains intact with the granting of very few petitions despite careful and extensive Federal review. Concrete steps toward greater deference can and should be made through the adoption of specific legislation pending before Congress. A more complete and coherent policy of deference toward the State courts should also be encouraged through a renewed dialogue among Federal and State judges on potential changes in key legal doctrines.

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Introduction

State prisoners can petition Federal courts to review the validity of their convictions and sentences. They seek to relitigate collaterally Federal constitutional issues already adjudicated in State court. These petitions, commonly called habeas corpus petitions, allege that the criminal proceedings and the resultant convictions and or sentences involved violations of the prisoners' Federal constitutional rights by the police, prosecutor, defense counsel, or State court. If a prisoner's petition is successful, a Federal court can issue a writ of habeas corpus, ordering that the prisoner be released from custody, have the sentence reduced, or the case remanded for further proceedings such as retrial or resentencing.

These petitions are important to understand for three fundamental reasons. *First*, they highlight the complex interrelationship between the State and Federal courts in a Federal system of government. Despite a State appellate court's having devoted considerable resources in determining whether reversible error occurred at the trial where a prisoner was convicted, lower Federal courts have the jurisdiction to review the State court criminal proceedings for possible violations of Federal constitutional provisions, based on both U.S. statute¹ and subsequent Supreme Court decisions.² Many commentators disagree over whether the Federal collateral review of State criminal proceedings is necessary to preserve national uniformity in individual constitutional rights. This conflict will never be settled completely because the disagreements reflect divergent positions on basic values, such as Federal oversight and

¹Act of February 5, 1867, Ch. 28 § 1 14 Sta. 385, 385-86 (codified at 28 U.S.C. 2241).

²*Brown v. Allen*, 344 U.S. 443 (1953).

individual liberty. Yet, systematic information on how Federal courts handle habeas corpus petitions can help reduce friction between the two sets of court systems by replacing inaccurate images or untested assumptions about the Federal review process.

Second, policy proposals concerning the scope of Federal court review arise perennially in the U.S. Congress and among judges, lawyers, and legal scholars. Specific changes in legal doctrines expanded the scope of review in the 1960's,³ while later changes restricted it.⁴ Because new proposals to modify the review process are likely to emerge, empirical knowledge of the effectiveness of the current review process should contribute to a firmer set of assumptions to inform the policy debates.

Third, the volume of habeas corpus petitions warrants inquiry into case processing efficiency and administration. While habeas corpus is a civil writ about a criminal case, the Administrative Office of the U.S. Courts counts habeas corpus petitions in its civil caseload. For the past several years the number of habeas corpus petitions filed in the Nation's Federal district courts has equaled or slightly exceeded 10,000 cases. This volume translates into about 4% of the entire Federal district court civil caseload. Despite the size of the body of litigation, there are only four systematic investigations into the handling of habeas corpus petitions: Shapiro (1973); Robinson (1979); Faust, Rubenstein, and Yackle (1990-91); and Flango (1994).

³*Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 745 (1963).

⁴*Stone v. Powell*, 428 U.S. 465 (1976); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Issac*, 456 U.S. 107 (1982); *Marshall v. Longberger*, 259 U.S. 422 (1983); *Teague v. Lane*, 489 U.S. 288 (1990); *McCleskey v. Zant*, 111 § Ct. 1454 (1991).

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These studies are valuable contributions to understanding the landscape of habeas corpus petitions. They give an account of the relative frequency of different issues raised in the petitions, the nature of legal representation for the prisoners, the outcomes of the petitions (dismissed, denied, or granted), and the offenses and sentences being challenged. However, Shapiro focuses only on U.S. District Court in the District of Massachusetts, while Faust, Rubenstein, and Yackle analyze only the U.S. District Court for the Southern District of New York. The general application of their findings is limited. Robinson's study, which includes five Federal district courts, along with Flango's examination of two Federal district courts in each of four States, offer the most complete empirical treatments of the subject. Yet none of the studies addresses basic questions about the processing and processing time of habeas corpus petitions.

How much time do the Federal courts take to complete their reviews? Is there considerable variation among courts or by type of case? If so, are there identifiable determinants, such as complexity, of why some petitions take longer to be resolved than other petitions?

Timeliness is a factor that underlies the divergent views about the institutional role, efficiency, and administration of the Federal review process. Much of the concern about the basic role of Federal review stems from the amount of time taken to resolve petitions. If excessive, time in review could undermine the criminal justice system's goals of finality and swift punishment. Some in the debate over the value of Federal review also assert that the Federal process is driven by prisoners who have a lot of time on their hands. Are the Federal courts helpless to control the process, or are there identifiable and understandable determinants of the pace of litigation? Finally, timeliness is an element in the discussion of how well managed the process

is. To what extent do the Federal courts differentiate meritorious cases from those that lack an adequate basis in law or fact?

While the pace of litigation is not the only factor pertinent to the key assumptions made by participants in the national debate over habeas corpus policies and procedures, it is the factor that can best be addressed with systematic data, which provide findings with broader policy implications. The guiding perspective to be tested empirically is that Federal court review is responsive to case complexity and that complexity is more important in determining processing time than case characteristics, such as the prisoner's sentence (life imprisonment or death penalty), manner of conviction (jury trial or guilty plea), or the most serious offense at conviction. This perspective is not novel in studies of civil litigation, but in its first application to habeas corpus litigation, it produces some important, unexpected findings.

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A preview of the discussion sections

The section on the study design provides background information on the conduct and organization of the inquiry. How were research sites selected? What information was collected on individual habeas corpus petitions?

The section describing briefly the landscape of habeas corpus asks the following: What sorts of challenges to convictions do the prisoners raise? Are the challenges directed toward the police, prosecutors, defense counsel, or the court? Are the prisoners' underlying offenses serious and are the sentences severe? What percentage of petitions arise from capital convictions?

The section on Federal review processing time analyzes how and why some petitions take longer to be resolved than others. Are there identifiable factors that help to explain case processing time?

The final section concludes the report with an effort to provide cohesion between the findings and the larger debate surrounding Federal habeas corpus litigation.

Study design

The scope of this paper encompasses the handling of habeas corpus petitions in 18 Federal district courts in 9 selected States. Alabama, California, Florida, Indiana, Louisiana, Missouri, New York, Pennsylvania, and Texas were chosen because they have about half of the Nation's habeas corpus petitions while representing a range of habeas corpus litigation rates. (See the tables on pages 8 and 9.) These States also vary geographically and are affected by decisions of seven different U.S. Circuit Courts of Appeals. To ensure sufficient death-penalty cases in the study sample, the States, except for New York, were chosen from the 37 States that have the death penalty as a criminal sanction. However, because the States were not chosen randomly, the sample of cases is not necessarily a representative one for making measurable generalizations about all habeas cases nationwide.

The research staff attempted to collect 300 cases per State from U.S. district court closed caseloads.⁵ Cases were randomly selected from lists provided by the Administrative Office of the U.S. Courts. A team of senior researchers and law students examined individual case files and recorded information on data collection forms. Data entry

⁵The actual number of cases per district is as follows: Alabama Southern District (55), Alabama Middle District (144), California Eastern District (77), California Northern District (93), Florida Central District (223), Florida Southern District (46), Indiana Northern District (183), Indiana Southern District (122), Louisiana Eastern District (138), Louisiana Middle District (72), Missouri Eastern District (165), Missouri Western District (165), New York Southern District (101), New York Eastern District (120), Pennsylvania Eastern District (187), Pennsylvania Western District (112), Texas Northern District (139), Texas Southern District (195).

staff translated the coded information into databases for analysis.

The data include the number and type of issues raised in the petition, the most serious offense and the sentence imposed at conviction, the underlying State trial court proceeding, the key procedural events in the case and the dates of those events, the manner of disposition, the reason for a court dismissal, and whether the petition was appealed.⁶

The inquiry is acknowledged to be limited in scope in two respects. First, the samples consist of cases disposed of in a single year, 1992. A longitudinal database might yield different results, although those in this study comport remarkably with Robinson's findings in 1979. Limited time and resources precluded a more extensive investigation. Second, all of the information presented is limited to that available in the closed case files. No inquiry was made into the views of the participants in the cases. Moreover, cases were not tracked to determine their entire history at the State court level prior to being filed at the Federal

⁶The types of issues raised in habeas corpus petitions were coded into the following categories: ineffective assistance of counsel (failure to object to admissibility/sufficiency of evidence, failure to call witnesses, failure to cross-examine, and failure to object to denial of a continuance notion), trial court errors (failure to suppress improper evidence, improper jury instructions), prosecutorial misconduct (failure to disclose, use of perjured testimony, and inflammatory summation), 4th amendment (unlawful arrest), 5th amendment (coerced confession, improper/defective indictment, and invalid/coerced guilty plea), 6th amendment (denial of speedy trial and improper jury selection), 8th amendment (excessive sentence and improper application of a habitual offender statute), 14th amendment (violation of due process and equal protection), and other types of issues (conditions of confinement).

district court or on a subsequent appeal to the Federal circuit court. The data can only enrich the understanding of what takes place in Federal district courts at a particular time and are not a complete history of habeas corpus

Number of habeas corpus petitions in U.S. district courts per 1,000 prisoners, by States with an average or higher filing rate, 1991

Jurisdiction	Habeas corpus filings	State prisoner population	Number of habeas filings per 1,000 State prisoners
Total	10,310	752,565	14
Missouri	582	15,897	37
North Dakota	18	492	37
West Virginia	62	1,502	35
Indiana	416	13,006	32
Pennsylvania	618	23,388	26
Arkansas	197	7,766	25
Alabama	421	16,760	25
Tennessee	273	11,474	24
Kentucky	228	8,799	23
Montana	34	1,478	23
Nebraska	56	2,495	22
Nevada	115	5,503	21
Arizona	273	15,415	18
Louisiana	354	20,003	17
Oklahoma	231	13,340	17
New Mexico	54	3,119	17
Iowa	71	4,145	17
Washington	153	9,156	16
Mississippi	146	8,904	16
Wisconsin	126	7,849	15
Maine	24	1,579	15
New Hampshire	23	1,533	15
Virginia	290	19,829	15
Wyoming	16	1,099	15
Florida	673	46,533	14
Hawaii	39	2,700	14
Oregon	95	6,732	14
Delaware	52	3,717	14
Texas	711	51,677	14

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petitions. However, as will be demonstrated, the data are sufficiently rich to address a variety of important questions with considerable precision and confidence.

Number of habeas corpus petitions in U.S. district courts per 1,000 prisoners, by States with a below average filing rate, 1991

Jurisdiction	Habeas corpus filings	State prisoner population	Number of habeas filings per 1,000 State prisoners
Total	10,310	752,565	14
South Dakota	18	1,374	13
Idaho	27	2,143	12
Vermont	13	1,118	11
Colorado	96	8,392	11
California	1,162	101,808	11
Kansas	67	5,903	11
New York	647	57,862	11
Michigan	385	36,423	11
Minnesota	35	3,472	11
Alaska	27	2,706	10
Maryland	180	19,291	9
Illinois	262	29,156	9
New Jersey	188	23,483	8
Utah	21	2,625	8
South Carolina	142	18,269	8
Ohio	269	35,744	8
Georgia	165	23,644	7
North Carolina	123	18,903	7
Massachusetts	51	9,155	6
Connecticut	51	10,977	5
Rhode Island	10	2,771	4
Dist. of Columbia	30	10,455	3

The landscape of habeas corpus

The landscape of Federal habeas corpus petitions has been examined most thoroughly in a 1994 four-State study by Flango. Data from the current research support much of what emerged in that study. Confirmation of the four-State landscape is not the main purpose of the current research in part because four of the States in this nine-State study were used in the previous study.⁷ Furthermore, while it is interesting to know what the landscape looks like, the landscape does not indicate how different factors are related to each other and what their combined effect is on the timeliness of Federal review. Hence, the purpose of this section is to document familiar landmarks to set the stage for the analysis.

⁷Flango's study, which was supported by a grant from the State Justice Institute to the National Center for State Courts, focused on State and Federal court reviews of habeas corpus petitions in Alabama, California, New York, and Texas disposed of in 1990 and 1992. The Bureau of Justice Statistics, in a grant to the National Center for State Courts, separately funded the analysis of habeas corpus petitions in five additional States, as well as a study of Section 1983 lawsuits in nine states. Finally, the Bureau of Justice Statistics funded the collection of particular case characteristics, such as the underlying trial court proceedings, the most serious offense, and the sentence imposed at conviction.

Most prisoners filing habeas corpus petitions in Federal court have been convicted of violent crimes by State trial courts and have been given a severe sentence.⁸

<u>Most serious offense (1,976 petitions)</u>	
Homicide	23%
Other violent crimes (rape, sexual abuse, robbery, kidnaping)	39
Burglary/theft/drug trafficking or possession/weapons	27
Other offenses	12
<u>Sentence (1,895 petitions)</u>	
Prison/jail term of years	78%
Life	21
Death	1

Approximately two-thirds of the sampled prisoners had been convicted of homicide or other serious, violent crimes against the person. Furthermore, more than 1 in every 5 prisoners had received a life sentence. Life sentences included life with parole, life without parole, and life with an additional number of years.

The observed sentencing patterns are related to the pattern of violent offenses, but they also reflect the application of habitual offender laws, which impose lengthy periods of

⁸In all tables the data have been aggregated into a single sample rather than maintained as nine distinct State samples for two reasons. First, the similarities among the States are more striking than the differences. Statistically significant differences between States in variables such as the relative frequency of issues, timeliness, or sentence patterns do not emerge. Second, there is a limited number of State-by-State observations for variables like court-appointed attorneys and death penalty sentences. Much of the analysis required a larger number of observations.

incarceration or life sentences for individuals convicted of three felony offenses. Another factor that accounts for the heavy representation of lengthy custodial sentences and the noticeable number of life sentences in the sample is the time required to exhaust State remedies in order to file a habeas corpus petition in the Federal district courts. Individuals with relatively short sentences are often out of prison before they can arrive at the Federal habeas doorstep.

Prisoners have to file a direct appeal in the State court and to undergo a review by the State courts of the same habeas corpus issues before filing a habeas corpus petition in the Federal court. Failure to do so results in a dismissal by the Federal court. This requirement takes considerable time to complete. For the sampled cases the average elapsed time between the date of conviction and the filing of a habeas corpus petition in Federal court was 1,802 days or nearly 5 years.⁹ Given that most offenders convicted of felonies are sentenced to 5 years or less, in all likelihood the process of getting to the Federal courts takes almost as long as most offenders will serve.¹⁰ Hence, habeas corpus litigation is a legal action most likely to be taken by more serious offenders who are incarcerated long enough to complete available

⁹Robinson's study in 1979 found that the time from conviction in the State trial court to the filing of the habeas petition in Federal district court took 1½ years. Clearly, the increase in the time for this interval over the past decade and a half might be evidence of the extent to which State courts are devoting more and more resources to dealing with direct and collateral challenges to criminal convictions. It might also reflect other factors, such as the larger phenomena of increased criminal caseloads across all State appellate jurisdictions. The National Center for State Courts (1995) reports that from 1985 to 1993 the Nation's State intermediate appellate courts experienced a 37% increase in the number of mandatory criminal appeals.

State direct appeals and collateral challenges and proceed to the Federal arena. One consequence of these various factors is that Federal judges are confronted with “high stakes” litigation because most petitioners are serving long prison sentences.

The relatively low incidence of death-penalty sentences (1%) is noteworthy. Common among policy debates over habeas corpus litigation is the question of whether to broaden or limit the scope of Federal habeas corpus review for the specific purpose of acknowledging the unique and special circumstances of death-penalty cases. The effort to limit habeas corpus litigation in death-penalty cases attempts to put an end to what is now almost a ceaseless process. The effort to preserve all avenues of redress in death-penalty cases recognizes the extreme nature of the punishment.

The one assumption common to both sides is that numerous habeas petitions from death-penalty cases take a disproportionate amount of time to resolve, consuming the preponderance of attention that the Federal courts devote to habeas corpus litigation, seemingly to the detriment of noncapital habeas petitions. The data call that viewpoint into question. It is difficult to conceive how 1% of the habeas caseload, 100 out of 10,000 cases, can dominate the entire processing of Federal habeas corpus. Death-penalty cases may receive a great deal of attention, but it is an empirical question whether they require longer case processing time than cases with life or custodial sentences.

In addition to the background characteristics of the prisoner, the habeas corpus landscape includes the types of issues (claims) raised in the petitions. Information on issues was obtained from the final order in the case (or a magistrate judge's report) rather than from the prisoner's petition

submitted to the court. The court's view of the number and type of issues was considered to be a more valid statement of the allegations.

One reason for relying on the court's statement of the number and types of issues raised is that few prisoners proceed with the benefit of legal counsel. In 93% of the sampled habeas corpus cases, the prisoner was without legal counsel (pro se). Courts appointed attorneys in 4% of the cases, although there is no constitutional right to an attorney in civil litigation. Generally, the court will request private attorneys to represent a prisoner in situations where the legal issues are complex and an evidentiary hearing might be necessary to determine the validity of the petitioner's allegations. In the remaining 3% of the cases, the prisoners either retained private counsel or were represented by the American Civil Liberties Union or a prisoners' rights group.

Types of issues raised in habeas corpus petitions	
Ineffective assistance of counsel	25%
Trial court errors	15
14th amendment	14
5th amendment	12
6th amendment	7
8th amendment	7
Prosecutorial misconduct	6
4th amendment	5
Other	9

Number of issues 5,167

About two-thirds of the issues in the sampled cases fell into one of four categories: defense counsel in the State trial court provided ineffective assistance (25%), trial court error (15%), violation of due process or a related right

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protected by the 14th amendment (14%), or a violation of a right protected by the 5th amendment (12%). As might be expected, issues claiming a violation of the fourth amendment were the least frequent, as the U.S. Supreme Court's has ruled that assertions of illegal search and seizure are precluded from Federal habeas corpus proceedings if provided a full and fair opportunity to be heard in the State court.¹¹

Generally, more issues were focused on the conduct of defense counsel and the State court rather than on the police or the prosecutor. For example, the number of allegations of ineffective assistance of defense counsel was much greater than the number of prosecutorial misconduct allegations. This difference reflected the viewpoint of prisoners in the habeas cases examined, but it may or may not have reflected the actual sources of constitutional violations. Additional information is needed on the outcomes of the petitions to assess the validity of the allegations. Nevertheless, it is important to recognize who are the targets of habeas corpus petitions and to understand that there are clear differences in their relative frequency.

¹¹*Stone v. Powell* (1976). However, search and seizure issues may be raised if defense counsel failed to object to the denial of a suppression motion. *Kimmelman v. Morrison*, 106 U.S. 2574 (1986).

The type of allegation is not the only information available on habeas corpus issues. The number of issues also is a distinguishable factor. Although the majority of sampled petitions were single-issue cases, most issues were ac-

Number of issues per habeas corpus petition	Percent of issues
Single issue	31%
2 issues	26
3 issues	30
4 or more issues	11
Number of issues	5,167

counted for in multiple issue cases. Because the nature of issues is defined in terms of the court's perspective, the number of issues takes on special significance. A court is likely to define issues more parsimoniously than prisoners. Where a prisoner believes that there are three separate allegations of ineffective assistance of counsel, the court may believe that there is only one issue. A court is not likely to see more issues than are stated in the petition.

Because courts commonly include the number of issues in a case when screening for case complexity, this practice is incorporated into the analysis. More issues means greater case complexity. The number of issues is considered to be a proxy measure of complexity, providing a quantifiable factor for complexity, which cannot be observed directly.

Few of the dispositions for the sampled cases indicated outcomes favorable to the prisoners. A large majority of the petitions were dismissed. Sixty-three percent of the issues were dismissed either by the court or by the petitioner.

Manner of disposition of habeas corpus issues	Percent of issues
Dismissed	63%
Denied on merits	35
Granted on merits	1
Remanded to State courts	1
Number of issues	5,167

Virtually all other issues were denied on their merits. The court granted 1% of the issues and remanded another 1% to the State courts for further proceedings.

The reasons for the dismissals further illuminates the landscape. The majority of the dismissals were for failure to exhaust State remedies prior to filing the habeas corpus

Reason for dismissal of habeas corpus issues	Percent of issues
Failure to exhaust State remedies	57%
Procedural default	12
Failure to meet court deadlines or court rules	7
Issues not cognizable	6
Abuse of the writ	5
Government's motion to dismiss granted	4
Prisoner not in custody	3
Successive petition	3
Jurisdictional bar	1
Petition is moot	1
Other reasons (such as prisoner moves to dismiss)	3
Number of issues	3,068

petition in Federal court (57%). Failure to exhaust is a main procedural foundation of habeas corpus litigation.

The exhaustion doctrine requires the prisoner to present the same issues to a State court for its review before seeking Federal review. All issues in a habeas corpus petition must have had State review. If some issues have been exhausted but others have not, the Federal court shall dismiss the entire petition.¹² A prisoner might amend the petition and delete the unexhausted claims instead of returning to State court. However, by taking this action, the prisoner runs the risk of having any unexhausted claims that are eventually filed in Federal court dismissed by the court because such “piece-meal litigation” is considered an “abuse of the writ.”¹³ Yet, as the above data show, dismissals for abuse of the writ were a small percentage of dismissals (5%), and the risk from presenting claims separately was only theoretical, not actual.

In addition to the exhaustion doctrine, there are other indications that many petitions do not meet basic substantive and procedural requirements of habeas corpus. Five reasons together accounted for approximately 18% of the dismissals: failure to comply with court rules, failure to raise a cognizable issue, failure of the prisoner to be in custody, failure to raise issues that are within the court's jurisdiction, and the moot character of the issues presented.

Other doctrines that limit the scope of Federal review include the doctrines of procedural default, successive petition, and abuse of the writ. A procedural default occurs

¹²*Rose v Lundy*, 455 U.S. 509 (1982).

¹³*Rose v. Lundy* (1982). See also 28 U.S.C. § 2254 (Rule 9(b)).

when the prisoner has failed to comply with State procedural rules on how the issues must be raised.¹⁴ The U.S. Supreme Court has decided that unless the prisoner can show “cause” and “prejudice,” procedural default in State court will bar Federal review. Failure to comply with State procedures must have been due to more than inadvertent error and the failure must have had serious negative consequences to the prisoner.¹⁵

These three doctrines are believed to be more restrictive than the exhaustion doctrine: procedural defaults accounted for the 12% of dismissals; successive petitions, 3%; and abuse of the writ, 5% of dismissals. The successive petition doctrine bars a petition that raises the same issues that were raised, and rejected, in a previous petition.¹⁶ Neither this doctrine nor the abuse of writ doctrine, which was discussed above, affected a large number of petitions.

Finally, once a case reaches the Federal district court, there are substantial differences in the pace at which habeas corpus petitions are processed by the Federal district courts (figure 1). The median case processing time for all sampled habeas petitions was about 6 months. Ten percent of the petitions were disposed of in 29 or fewer days, and 10% took more than 761 days, or more than 2 years, to resolve.

¹⁴*Francis v. Henderson*, 114 U.S. 233 (1976).

¹⁵*Wainwright V. Sykes*, 433 U.S. 72 (1977).

¹⁶*Sanders v. U.S.* (1963).

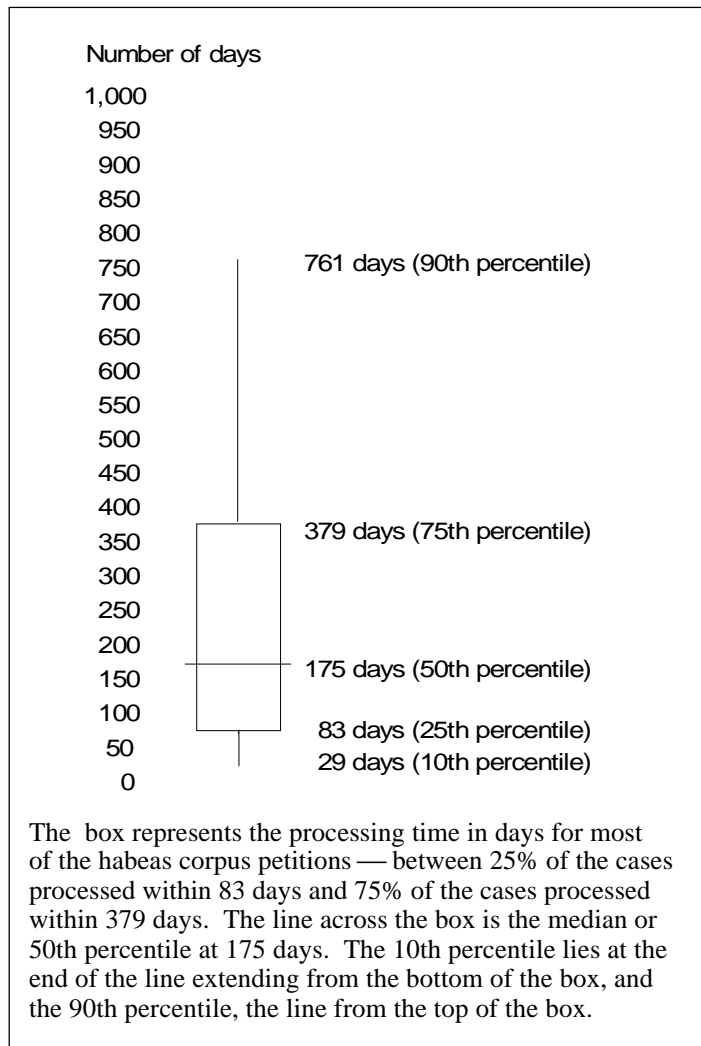


Figure 1. Processing time for habeas corpus petitions

Federal review processing time

Timeliness is an underlying issue in the debates over the institutional role, efficiency, and administration of Federal review. Differences of opinions concerning timeliness are captured in three sets of explanations for the time that the Federal district courts take to review State court convictions.

One explanatory perspective rests, to a large measure, on the belief that most challenges to criminal convictions lack merit and are frivolous because the prisoner has virtually nothing to lose and something to gain by raising legal challenges endlessly (such as Carrington, Meador, Rosenberg, 1974; Wold, 1978). A popular extension of this perspective is that habeas corpus litigation comprises cases that acquire lives of their own, and that the Federal district courts are powerless to intercede and influence positively the pace at which cases move toward disposition.

A second explanatory perspective is that particular characteristics of habeas petitions influence case processing time. The assumption that certain characteristics delimit case complexity and influence processing time is a working hypothesis in studies of civil litigation. The characteristics frequently examined are the areas of law, number of parties, amount of controversy, and so forth. In the particular context of habeas corpus litigation, the case characteristic generally believed to be the most important factor is the sentence imposed on the prisoner.

Specifically, the prevailing view is that death-penalty cases consume the most time and that almost all noncapital habeas petitions are treated routinely. Proponents of this perspective believe that other case characteristics commonly

associated with death-penalty sentences (that is, jury trials and homicide offenses) add their influence. This contention has dominated policy discussions about habeas corpus petitions. Both liberals and conservatives focus on the uniqueness and time consuming nature of capital habeas corpus cases. While they may disagree on whether to expand or restrict the scope of Federal habeas corpus review, liberals and conservatives appear to agree that death-penalty cases take more time to resolve than other cases.

Finally, there is the perspective grounded in basic principles of court administration. Variation in the case processing time reflects substantial differences in case complexity, and courts should devote their time in proportion to that complexity (Solomon and Somerlot, 1987). This principle rests on the assumption that the routine cases involve issues of settled law and uncomplicated facts. Other cases are considered complex because the issues require detailed interpretation of existing laws or call for interpretations in areas of unsettled law or are based on complicated and disputed facts.

According to this approach, the Federal courts respond to the complexity and subtlety of legal issues and facts arising from the type of claim, the underlying trial proceeding, or sentence. Courts purposively devote the amount of time required (that is, ordering the government to prepare special reports, appointing counsel, scheduling and holding evidentiary hearings, and taking matters under advisement) to resolve unsettled issues or uncomplicated facts. This perspective, which guides the current research, is difficult to measure directly. However, in the context of habeas corpus litigation, indirect measures include the number of issues in the petition, whether the petition reaches a basic threshold and is decided on the merits, whether evidentiary hearings are held, and whether the court requests counsel

to represent the prisoner. Single-issue petitions that are dismissed are hypothesized to take less time to review than multiple-issue cases decided on the merits with the appointment of counsel and the holding of evidentiary hearings adding their influence.

Three factors that are generally believed to have a determinative effect on case processing time in other areas of civil litigation — the type of issues, the manner of disposition, and the number of issues per petition — also affect case processing time in Federal habeas litigation. For example, among the sample cases, issues of prosecutorial misconduct (608 days), fifth amendment claims (560 days), trial court error (559 days), and ineffective assistance of counsel (555 days) took the longest mean processing time to process. Cases that met all procedural requirements and were

Type of habeas corpus issue	Average (mean) number of days to resolve habeas corpus cases
Prosecutorial misconduct	608 days
5th amendment	560
Trail court error	559
Ineffective assistance of counsel	555
6th amendment	547
4th amendment	533
Other	498
8th amendment	494
14th amendment	493
Manner of disposition	
Considered on the merits	477 days
Not considered on the merits	268
Number of issues	
Single issue	211 days
Two	270
Three or more	359

considered on the merits took longer, on average, to process than cases that failed to meet the threshold requirements (477 versus 268 days). Petitions with three or more issues took longer, on average (359 days), to dispose of than one- (211 days) or two- (270 days) issue petitions.

The findings regarding the type of issue and the number of issues per case confirm both the experience of practitioners and prior research on the pace of civil litigation. The impact on processing time of the threshold factor of dismissed versus decided-on-the-merits seems no less intuitive. Yet, despite the independent and significant impact of the type of issue, it appears that the effect of the number of issues per petition and the threshold factor produce greater differences in case processing time than does the type of issue. The types of issues and the manner of disposition have an independent effect on the pace of Federal habeas litigation when the number of issues per petition are taken into account. Three-issue petitions took longer to resolve, on average, than one- or two-issue petitions for all of the issue

Type of habeas corpus issue	Average (mean) number of days to resolve habeas corpus cases, by the number of issues raised		
	Single	2 issues	3 or more
Ineffective assistance of counsel	276 days	313 days	415 days
Trial court error	296	303	421
Prosecutorial misconduct	208	292	450
4th amendment	126	207	332
5th amendment	256	250	368
6th amendment	230	248	375
8th amendment	165	218	330
14th amendment	183	242	358
Other	172	279	392
Manner of disposition			
Considered on the merits	178 days	217 days	303 days
Not considered on the merits	291	369	532

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categories. For example, petitions with three separate ineffective assistance of counsel issues took, on average, 415 days, compared to 313 days for those with two issues and 276 days for those with one issue.

The determinants of the pace of Federal review include not only the number and types of issues. The most serious offense at conviction also affects case processing time. Generally, the more serious the offense, the longer the time taken by the Federal courts to resolve the petition. For the sampled cases, habeas corpus petitions arising from homicide convictions involving three or more issues took an average 436 days. Those habeas petitions arising from "Other" offenses and involving only one issue took, on average, 185 days to resolve.

Type of offense	Average (mean) number of days to resolve habeas corpus cases, <u>by the number of issues raised</u>		
	Single	2 issues	3 or more
Homicide	251days	334 days	436 days
Other violent crimes	260	305	369
Burglary/Drugs/Weapons	222	240	349
Other offenses	185	260	247

Both the number of issues per petition and the type of sentence have independent effects on case processing time. Multiple-issue habeas petitions involving a death-penalty sentence took 925 days, on average. Whereas single-issue

Issues per petition	Average (mean) processing time		
	Term of years	Life	Death
One	224 days	299 days	184 days
Two	270	364	157
Three or more	344	424	925

petitions involving a prison sentence took an average of 224 days to resolve and single issue petitions involving a life sentence took 299 days, single issue death-penalty petitions took 184 days to resolve. This suggests that habeas petitions involving death-penalty cases are not uniformly different from other habeas petitions that involve other types of sentences.

Petitions involving each of the three basic types of sentences are similar in that some of each type are disposed of either in a short time or after a long period. This pattern suggests that Federal district courts do not focus exclusively on cases with a particular sentence, but rather, that all petitions, whether or not they involve death-penalty sentences, receive individual attention and that this attention is governed by the complexity of the case.

This specific finding is worth noting in view of the policy debate about Federal review of habeas corpus. Policymakers, judges, and lawyers rightly are concerned about the handling of death-penalty petitions. However, the idea that petitions arising from death-penalty sentences acquire lives of their own and consume disproportionately more Federal district court time and resources is not supported by the information gathered from the nine selected States. Factors other than the nature of a prisoner's sentence have greater significance in influencing the length of Federal review, at least at the Federal district court level. With respect to the impact of the sentence itself among the sampled cases, moreover, whether a sentence was for life affected case processing time more than if it were a death sentence.

More generally speaking, the analysis of data supports a contention that the Federal review process is responsive to case complexity and that the courts use their discretion to allocate resources, such as the holding of evidentiary

hearings and the appointment of counsel, where the need exists to resolve complex or unclear issues of fact and law. Petitions that lack an adequate basis in law or fact are dismissed early in the review process. Those petitions satisfying basic substantive and procedural requirements are resolved on the merits according to their degree of complexity.

Finally, what accounts for case processing time when all of the possible determinants are taken into account simultaneously? The answer from a statistical analysis of the data collected in the nine selected States is that measures of case complexity — number of issues, whether the petition is decided on the merits, the appointment of counsel, and the holding of an evidentiary hearing — far outweigh the influence of case characteristics — the most serious offense at conviction, whether the sentence was death, life in prison, or a term of years, and whether the trial court proceeding was a jury trial or a guilty plea.

Hence, the best explanation, fitting the data most closely, is that variation in case processing time occurs because Federal district courts devote time in proportion to the demands of individual cases. The data do not support the contentions that the Federal courts are responding primarily to case characteristics and that the Federal courts lack control over the resolution of habeas corpus petitions. (Specific results from a regression analysis of case processing time data are available from the authors. Those results are also expected to appear in future publications.)

Conclusions

Debate and discussion concerning the Federal review of State court criminal convictions will continue long after publication of this report because issues of federalism, finality, and individual constitutional rights are unlikely to be settled completely. However, the current research provides three contributions to a fuller understanding of the Federal review process. They are —

(1) The Federal courts appear to be devoting time according to the complexity of the issues brought before them. All cases might receive individual attention, but the amount of attention is proportionate to what attention the petitions require.

(2) Petitions that are given the least amount of time are those that fail to meet basic requirements (that is, exhaustion of State remedies or procedural default) which account for two-thirds of the petitions.

(3) For petitions that are decided on the merits, the time of the Federal courts is driven by case complexity, which is not necessarily related to objective factors, such as the type criminal offense, the nature of the sentence, underlying trial court proceeding, or type of issue. As a result, the significance of death-penalty sentences in determining case processing time may be less than commonly believed.

Three implications for broader policy discussion and future research emerge from these findings. One implication concerns the efficiency of the Federal review process. Without subscribing to a particular point of view on the scope of Federal review, systematic evidence implies that the existing process meets fundamental standards of fairness and efficiency. Federal court responsiveness to case complexity

comports with established court performance standards that every case receives individual attention without regard to legally irrelevant factors.¹⁷

A second implication concerns the attention given to death-penalty litigation. Attention rightly is given, but the findings are a note of caution against an exclusive focus on death-penalty appeals in habeas corpus reform. In the nine selected States, which all have the death penalty as a criminal sanction, the case processing time is longer for petitions arising from life imprisonment sentences than from petitions arising from death-penalty sentences. With wider adoption of habitual offender laws, even more petitions should be expected from the type of prisoners whose petitions are currently driving the elapsed time of Federal review. Consequently, policymakers, judges, and lawyers might want to take this broader view of litigation into account as they fashion reforms in court procedures and doctrines.

The third implication concerns the basic institutional role of Federal court review. Evidence from the nine States suggests that Federal review is neither disruptive of State court convictions nor is it a chaotic process that is out of control. State court convictions are not overturned routinely even though the Federal review process gives individual attention to all cases in conformity with basic standards of court performance. Furthermore, while Robinson found in 1979 that the average time from conviction to the filing of a Federal habeas was a year and a half, the present finding of upwards of 5 years for the average elapsed time from the date of conviction to the filing of a Federal habeas (while possibly reflecting several trends

¹⁷See Standard 3.3. National Center for State Courts (1992).

in the State courts over the last 15 years) suggests that the amount of resources States devote to direct appeals and other post-conviction litigation is hardly trivial. These observations imply that State trial courts properly adjudicate all Federal claims that arise during State criminal proceedings and that the States expend a significant amount of resources providing forums for direct and collateral challenges to trial court outcomes.

The thoroughness of the Federal review process affirms the correctness of the State actions being challenged. Police, prosecutors, defense counsel, and State courts appear to be fulfilling their criminal detection, prosecutorial, and adjudicatory functions without abridging individual Federal constitutional rights. However, such a finding is not cause for asserting that the work of the Federal courts is unnecessarily duplicative. The present debate surrounding Federal habeas corpus review reflects the acceptance of the extensive constitutional rights for criminal defendants that the Supreme Court created in the 1960's, which are the basis for the issues raised in habeas corpus petitions. Few policymakers advocate broad, nonsymbolic attempts to alter this body of constitutional rights.

Yet, it seems in the interest of both the State and Federal judiciaries to seek some substantive balance that can simultaneously avoid unnecessary court review and protect individual constitutional rights. As Supreme Court Associate Justice Sandra Day O'Connor (1981) said, the concept of deference to adequate State court processes that provide full and fair adjudication should be an appropriate item on the agenda of habeas corpus reform.

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Acknowledgments

Many individuals contributed to the research reported in this discussion paper. Cooperation from Federal court officials enabled the project staff of the National Center for State Courts (NCSC) to gather information from individual case files. Among the many people in each court that provided assistance, special thanks go to the following:

Lois S. Bloom Senior Pro se Staff Attorney Southern District of New York	James Parkinson Clerk of Court, Southern District of New York
Robert C. Heinemann Clerk of Court, Eastern District of New York	Emily Patt, Luis Hernandez, and Marie Louise Caro, Staff Attorneys, Northern District of California
Thomas C. Caver Clerk of Court, Middle District of Alabama	The Honorable Charles S. Coody U.S. Magistrate Judge, Middle District of Alabama
Deborah S. Hunt Clerk of Court, Southern District of Alabama	David M. Baldwin Staff Attorney, Northern District of Texas
Nancy Doherty Clerk of Court, Northern District of Texas	David J. Bradley Chief Deputy Clerk, Southern District of Texas
David L. Edwards Clerk of Court, Middle District of Florida	Sheila F. McNeill Staff Attorney, Middle District of Florida
Richard T. Martin Clerk of Court, Middle District of Louisiana	Geraldine J. Crockett Clerk of Court, Northern District of Indiana
A. Victoria Thevenow Clerk of Court, Southern District of Indiana	Robert D. St. Vrain Clerk of Court, Eastern District of Missouri
Judy Carter Staff Attorney, Western District of Missouri	Michael E. Kunz Clerk of Court, Eastern District of Pennsylvania
Joseph Rodgers Administrative Supervisor, Eastern District of Pennsylvania	Alfred L. Wilson Clerk of Court, Western District of Pennsylvania
Robert Barth Operations Manager, Western District of Pennsylvania	T.G. Cheleotis Clerk of Court, Southern District of Florida

Additionally, a cadre of advanced law students provided skillful and thoughtful assistance in reviewing case files in each of the U.S. district court sites. Charles Rohde, Thomas Johnson, and Thomas Joss were the researchers that every project director yearns to recruit and rely on.

Colleagues at the NCSC critiqued the report. Appreciation is extended to Victor Flango, Brian Ostrom, and David Rottman for willingness to read successive drafts. Lisa Ghee is also thanked for cheerfully preparing the drafts.

The Bureau of Justice Statistics is thanked for its financial support and editorial assistance. Carol Kaplan and Steve Smith were project monitors, and Tom Hester was editor. Yvonne Boston, under supervision of Marilyn Marbrook, produced the report.

Finally, very few studies of litigation can be accomplished without the help of David Cook, Chief of the Analytical Services Office, Administrative Office of the U.S. Courts. Mr. Cook enabled the project staff to draw samples of cases based on computerized lists of all disposed cases in every U.S. district court. He is valued more than he knows.