U.S. Department of Justice
Washington, D.C. 20350

An Empirical Study of Federal Habeas Corpus Review of State Court Judgments

by Paul H. Robinson

Federal Justice Research Program
Office for Improvements in the Administration of Justice
July 1979

FJRP-79/005

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Support for this project was provided by the Federal Justice Research Program under contract number JADAG-79-C-0002. Points of view or opinions expressed in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

United States Department of Justice

OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE
WASHINGTON, D.C. 20530

The use of the federal writ of habeas corpus by state prisoners to challenge their convictions has generated a significant amount of controversy in recent years. Serious thought about the problems posed by this area of the law, however, has been impeded by an absence of data on the substance of petitions filed pursuant to 28 U.S.C. §2254 and the ways in which courts process these petitions.

As a step toward creating a body of data upon which policy decisions can be based, the Office for Improvements in the Administration of Justice and the Federal Justice Research Program of the United States Department of Justice commissioned Professor Paul Robinson of Rutgers-Camden Law School to study the petitions filed in six district courts and one court of appeals.

The report that follows presents a brief description and preliminary analysis of the extensive data generated by the study. It alters and enlightens our understanding of habeas corpus in several ways, but it does not attempt a comprehensive analysis of the subject, nor does it exhaustively describe or analyze the findings of the study. Much work remains to be done and it is hoped that this initial document will stimulate the additional analysis that this subject warrants.

ACKNOWLEDGEMENTS

I would like to thank all those persons who assisted and encouraged this project, especially Pamela P. Killman of the Pennsylvania and New Jersey Bars, Edward M. McHugh of the Rutgers-Camden Center for Computer and Information Services, Thomas E. Kopil of Rutgers Law School-Camden, class of 1981, Sheila B. Gruner of Rutgers Law School-Camden, Professor Larry Yackle of the University of Alabama Law School, and Dean Russell N. Fairbanks of Rutgers Law School-Camden, as well as the judges and court personnel in the courts we studied who generously gave their time and energy out of an interest in furthering our understanding of federal habeas corpus. Special thanks are due to James P. Lynch and William R. Yeomans of the United States Department of of Justice for their undying interest in the project. Any mistakes in this work are, of course, my own.

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INTRODUCTION

There are two ways by which a state criminal conviction can reach the federal judiciary for review. One method is by direct review of the judgment of the highest state court by the United States Supreme Court. Only a handful of state convictions are reviewed by this method every term. The other procedure by which federal courts review state court judgements is through petitions for writs of habeas corpus filed pursuant to 28 U.S.C. § 2254 by individuals in state custody.

Since the Supreme Court's decision in Brown v. Allen, [1/] the latter method has become the principal avenue for federal review of state convictions. In Brown, the Court held that federal district courts were empowered to redetermine the merits of constitutional issues arising in the course of state criminal prosecutions. The decision in Brown, in combination with subsequent Supreme Court decisions expanding the constitutional rights of the accused, has resulted in federal district court review of thousands of state court convictions every year. [2/]

The influx of these petitions into the federal court system has raised numerous criticisms. The present system

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1/ 344 U.S. 443 (1953).

2/ In 1953 only 548 habeas corpus petitions were filed in federal district courts by state prisoners. By 1978, the number had grown to 7,033. Although the number of habeas petitions has declined by 22.4% since 1970, it rose slightly from 1977 to 1978. See Annual Report of the Director of United States Courts - 1978.

is inefficient. Collateral review by its very nature is repetitive since it deals with issues which, according to the requirement of exhaustion of state remedies, have already been raised either at the original trial or on direct appeal. Because many meritorious claims have been remedied during this prior consideration and because many petitions can be pursued pro se and without cost to the petitioner, a high percentage of the petitions are frivolous. Though many of the petitions can, therefore, be treated summarily, the task of processing such a large number of complaints drains judicial resources. This drain is particularly troublesome in light of the very few constitutional violations discovered.

Additionally, the system is in conflict with our traditional belief in the value of finality in criminal adjudication.[3/] The continuing availability of a forum in which to challenge a conviction may delay unnecessarily the point at which the convicted and the society can accept a verdict and look toward fulfilling the purposes of a criminal sentence. Furthermore, allowing collateral review of convictions long after commission of the crime and the initial adjudication of guilt results in the determination of issues after evidence is no longer available and witnesses have disappeared or forgotten crucial details.

The existing system of federal review of state convictions also increases the points of contact and, presumably, conflict

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3/ See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963).

between the state and federal systems. Federal district courts frequently review the considered decisions of the states highest courts when they pass on petitions for habeas corpus. Reversal by a single district court judge may breed resentment.

On the other hand, these criticisms confront important values served by the present system. The notion that a federal forum should exist to consider federal claims has become deeply engrained in our system of justice. The institutional independence guaranteed to federal judges by the Constitution may not be as strong in some state systems, where local judges may be subjected to community pressures and biases, particularly in criminal proceedings. In addition, federal judges may have greater familiarity with federal law and, specifically, with federal constitutional law.

The need for a federal forum is further supported by the desire to assure uniformity in the application of federal law. Implicit in the Supreme Court's decisions beginning with Brown v. Allen has been its confession that it could not adequately police, through direct review, the application of federal law in state courts and that it was, therefore, authorizing the district courts to perform that function through collateral review.

Federal collateral review has also been the vehicle by which new constitutional rulings have been developed and, perhaps most importantly of all, by which individual injustices

have been remedied. It has also provided a means for system-wide enforcement of federal guarantees.

Finally, the availability of the writ and the access to a judicial forum which it provides may serve valuable functions simply by providing prisoners with hope during their incarceration and by acting as a safety valve that prevents destructive and violent behavior.

In recent years, numerous proposals for changes in the law have been suggested and the Supreme Court has undertaken a reconsideration of the proper scope of the federal habeas remedy available to state petitioners. The Court has narrowed the availability of habeas in cases in which there was a procedural default in the state court [4/] and has narrowed the range of issues cognizable pursuant to a habeas petition.[5/]

It immediately becomes clear to anyone who approaches these questions that the lack of hard information on petitions filed pursuant to 28 U.S.C. § 2254 prevents rational decision-making. In response to this dearth of information, the Office for Improvements in the Administration of Justice and the Federal Justice Research Program commissioned this empirical examination of the petitions filed in six district courts and one Court of Appeals. It is my hope that the information collected will form the basis for a fresh consideration of many of the issues described above.

4/ Wainwright v. Sykes, 433 U.S. 72 (1977).
Francis v. Henderson, 425 U.S. 536 (1976).

5/ Stone v. Powell, 428 U.S. 465 (1976).

SUMMARY OF FINDINGS

The data reveal that a majority of those who filed habeas petitions had been convicted of a serious violent offense and that over 80% of the filers had pled not guilty, compared to approximately 15% of all convicted offenders.

Over 80% of the petitions attacked convictions or challenged sentences, while 5.7% were used to challenge probation or parole revocation and only 5.3% attacked the conditions of confinement.

The most common interval between conviction and the filing of the federal petition was 1 1/2 years, indicating that most filers file soon after the writ becomes available to them. Many, however, do not stop after one petition. Over 30% of the petitioners in the study had filed at least one previous federal petition. More than one ground for relief was offered in 78.2% of the petitions and three or more grounds were presented in 51.6% of the petitions. Over 40% of all petitions attacking convictions included a claim of ineffective assistance of counsel. Not surprisingly, a high percentage of petitioners filed *in forma pauperis* (81.8%) and *pro se* (79.2%).

A rough composite of the typical petitioner, therefore, emerges as one who was convicted of a serious, violent offense, pled not guilty, is attacking his conviction, is filing 1 1/2 years after his conviction, is offering multiple grounds for relief and is filing *pro se* and *in forma pauperis*.

The most striking feature of court processing of the petitions is that 55% of the petitions were never considered on the merits because of procedural defects. Of these defective petitions, 60% were dismissed for failure to exhaust state remedies. On the whole, therefore, it appears that the existence of the exhaustion requirement does little to deter defective filings and may result in a waste of judicial resources, since many defective petitioners will return to the federal courts after exhausting their state remedies. The study revealed that some courts ignore the exhaustion requirement, perhaps in recognition of its inherently repetitive nature. Where the court adopts a strict policy on exhaustion, it significantly deters the filing of procedurally defective petitions. Contrary to expectations, the data reveal that the presence of counsel does not always reduce the number of petitioners who file without exhausting state remedies, though in districts with a strict policy, counsel appears to promote exhaustion of state remedies.

The data support the beliefs that the actual processing of most petitions is performed with less investment of judicial time and resources than would be required in a traditional lawsuit, but that the sheer act of processing such a large number of complaints has an impact upon courts. Magistrates were used to screen and to recommend disposition in approximately 45% of the petitions. The incidence of court acceptance of the magistrate recommendation was very high.

Hearings were rare. Magistrates held some form of hearing in 3.2% of their cases, and the district court judges held hearings in another 6.2% of the cases. These hearings ranged from the exceptional evidentiary hearing to a legal argument or case conference.

A summary look at the petitions in which petitioners were successful in gaining some relief yields some startling insights. First, only 3.2% of the petitions resulted in any relief. Various factors, however, enhanced the petitioner's chances for success. Principal among these was the presence of counsel. Petitioners represented by counsel were successful in 13.7% of their cases while the success rate for persons filing pro se was 0.9%. Counsel appointed by the court fared better than retained or prison project counsel. The former were successful in 17.5% of their cases compared to 7.9% for retained counsel and 8.3% for clinic or prison project counsel. The higher success rate for court appointed counsel may reflect the fact that the court appoints counsel only for the more meritorious petitions. However, even in the group of cases in which counsel was privately retained or was provided by a clinic or prison project, the success rate was dramatically higher than for pro se filers.

In addition, the district in which the petition was filed proved to be an important determinant of success or failure. For example, only 1.7% of the petitioners were granted relief in the Eastern District of Virginia, whereas 8.7% were successful in the Northern District of Illinois. The judge to whom the

petition was assigned was also often a significant factor. Three judges, of the 51 who handled petitions in the study, accounted for approximately 30% of all the petitions granted.

Magistrate involvement negatively effected the petitioner's chances of success. A petition was twice as likely to be granted in a court in which a magistrate had not screened the petition as in one where magistrates were used.

The report that follows provides a more detailed description of the extensive data generated by this study.

PRESENTATION AND ANALYSIS OF SELECTED DATA

The findings presented below are based upon the total number of habeas petitions filed (1899) between July 1, 1975 and June 30, 1977 in six federal district courts and one Court of Appeals.[6/] The districts were selected to include a variety of district courts in terms of size, geographical region, and organizational structure. Although the courts are not a representative sample in any statistical sense, they do represent the range of problems confronting district courts and the range of court responses. Collecting data on habeas petitions in a number of districts is an important advance over previous studies in the area.[7/] Including information from several districts permits a more accurate discussion of habeas processing nationally and it provides an opportunity to test the effects of policies and practices that are unique to certain types of districts.

As has been noted above, this report is not intended to be an exhaustive analysis of habeas processing, but rather a means of introducing this data to scholars and practitioners interested in improving the handling of habeas petitions in district courts. The findings and interpretations presented here are designed to

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6/ The Eastern District of Pennsylvania, District of New Jersey, Eastern District of Virginia, Northern District of Illinois, Central District of California and Southern District of California were selected for study. The Seventh Circuit Court of Appeals was also chosen. For description of the cases excluded from one study, see Appendix 1 page 3.

7/ See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harvard Law Rev. 321, 355-61 (1973).

show how these data may be used toward a more informed consideration of policy questions in the area of habeas reform. A number of relationships have been investigated in addition to those presented below, and the specific cross-tabulations and correlations are available on request. Those interested in more extensive analysis of the data may request a copy of the original data set on magnetic tape.

1. The Petitioners

The data provides a rough profile of those persons filing petitions in federal court complaining of unlawful state custody. The majority have been convicted of serious, violent offenses. 21.4% have been convicted of a homicide offense; 23.1% of a robbery offense; and 13.2% of other assault offenses.[8/] This may reflect the fact that persons convicted of such serious offenses tend to get terms of imprisonment, rather than probation, and to receive longer sentences than other offenders, and therefore have greater opportunity and motivation to file habeas corpus petitions.

Only 18.2% of those filing have pled guilty even though 80 to 90% of all convictions result from guilty pleas and approximately 64% of sentenced prisoners have pled guilty.[9/] The difference may reflect the fact that the guilty plea reduces the number of issues about which a convicted person may complain; but this does not entirely explain the difference since a guilty plea does not prevent the filing of a habeas corpus petition. And further, as will be discussed later, the likelihood of success for a petitioner who has pled not guilty is not significantly greater than the likelihood for a petitioner who has pled guilty.[10/] Perhaps the more persuasive

8/ These percentages, like others to be cited, may overlap, and thus cannot properly be added to give a combined percentage. Here, for example, a petitioner may have a robbery conviction and an independent assault conviction, and thus be included in both those percentages.

9/ See L.E.A.A., Survey of Inmates in State Correctional Facilities - 1974, p. 8; INSLAW, A Cross-City Comparison of Felony Case Processing, p. 35.

10/ See Appendix pages X241 and F19. Appendices F and X are not attached to this report, but they are described in Appendix 2. Those appendices on any pages thereof are available upon request.

explanations for the difference are first, that petitioners believe their chances of success are less after a guilty plea, or, second, that having already admitted guilt, the opportunity (or, indeed, psychological obligation) for a continuing declaration of innocence which collateral attack provides is not so attractive.[11/] In any case, this statistic significantly changes a common perception of the institution of habeas corpus. It is not used by a representative cross-section of the persons in custody, but rather is used primarily by that small percentage of the population in custody that had a trial.

Of those petitioners who went to trial, 51.9% had a jury trial while 36.8% had a judge trial. Again, these statistics vary from the nationwide averages where a greater proportion[12/] of defendants elect a jury trial, especially those charged with serious offenses common among habeas corpus petitioners. One might expect there to be fewer petitions in the case of a judge trial since that does foreclose the presentation of many common complaints relating to the jury. On the other hand, a judge

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11/ It would be interesting to know whether there is a difference in habeas corpus petitioning rate between those defendants who were offered a plea agreement and rejected it and those who went directly to trial. Some habeas filing may be partially inspired by a convicted defendant's perception that he gambled and lost in an earlier tactical decision and would now like to undo his gamble and regain what he "lost."

12/ Reliable statistics on this for states are difficult to find. In the federal system 65% of trials were jury trials in fiscal year 1976. L.E.A.A., Sourcebook of Criminal Justice Statistics - 1977, p. 562.

trial may appear less fair, at least in retrospect, to a defendant who has been convicted. Where a defendant has waived a right to a jury trial and then been convicted by a judge, he may look back on the decision as a fatal tactical error which prevented him from presenting his best case.

As one might expect, at the time of filing 98.3% of petitioners are in state custody, as required by §2254. A petitioner may be in federal custody, however, and properly file under this section if he is complaining of concurrent or future state custody.[13/]

The nature of the custody varied. It was most often -- in 89.9% of the cases -- imprisonment after conviction; but in 3.9% it was imprisonment before conviction; in 2.7% it was custody other than physical detention, as with a petitioner on parole, probation, or bail; and in 0.5% there was no custody. These last cases, of course, fail to meet the custody requirement of §2254 and, as expected, none of the petitions in these cases were granted in whole or in part.[14/]

On the average, the petitioner's conviction, for which he is now in custody, occurred just over two years before the filing of the current petition. The most common interval from conviction to filing, however, was 1-1/2 years.

Also as one might expect, 81.8% of the petitioners filed in forma pauperis and 79.2% filed pro se. A request to file in

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13/ For example, a federal prisoner may file when he has a state detainer lodged against him.

14/ See Appendix page X245.

forma pauperis was denied in only 12 (0.6%) cases and these were generally cases where the petitioner had been found to have abused the writ by filing a series of successive petitions. Counsel was retained in 8.0% of the cases and state or federal counsel appointed in 8.3%. Legal advice, in some cases only from supervised paralegals or law students, was available in another 2.6% of the cases.

TABLE 1: NATURE OF CLAIMS PRESENTED

Claim	Number	Percentage of Total Cases Including a Specific Claim.*
Attack on Conviction	1270	66.9%
Challenge of Sentence	254	13.4%
Prob. or Parole Rev.	108	5.7%
Cond. of Confinement	101	5.3%
Delay	91	4.8%
Excessive Bail	62	3.3%
Parole Denial	46	2.4%
Improper Appeal Proc.	43	2.3%
Other**	250	13.2%

Source: Appendix pages F83-91.

* The proportions in this table indicate the relative frequency with which a particular claim appeared in a petition, but more than one claim can appear in a petition and therefore the proportions need not add to 100%.

** For a more detailed breakdown of claims contained in the 'other' category, see appendix 1 page 13.

II. The Petitions

The kinds of claims presented by petitions are shown in Table 1. These figures are not surprising. Two-thirds of the state habeas petitions in federal court are collateral attacks on state convictions and another 13.4% challenge sentences. The 5.3% of the cases which offered complaints about the conditions of confinement are not inappropriate for habeas corpus consideration -- as long as the petitioner is seeking release from custody -- but many are no doubt more properly § 1983 actions, filed by petitioners as § 2254 petitions in ignorance. Since § 1983 has no exhaustion requirement, it is particularly useful and attractive to most petitioners. Only two of these petitioners were given partial relief (but not released).[15/]

Where the nature of the claim was an attack on conviction, the grounds offered to support that claim are shown in Table 2. As has been noted previously, it was common for petitioners to list more than one ground to support a claim attacking their convictions. 78.2% offered more than one ground; 51.6% offered three or more. Two grounds were the most common number, although some offered over nine. There are those who believe that § 2254 as now used would reduce the need for reliance upon the vague ineffective assistance of counsel claim as a substitute for considering the real underlying issue. They may be disappointed to find that 42.1% of all petitioners attacking their convictions offered this claim. In all probability the petitioner offered a number of other claims as well, the most popular of which were

15/ See Appendix page X470.

TABLE 2: GROUNDS OF CLAIM ATTACKING CONVICTION

Ground	No. of Petitions Including the Ground	Percentage of Total Cases Attacking Conviction**
Ineff. Assist. Counsel	508	42.1%
Evid. Rulings	290	24.0%
Insuff. Evid. of Guilt	285	22.4%
Search and Seizure	197	15.5%
Improper Guilty Plea	167	13.1%
Jury Instructions	153	12.7%
Self Incrimination	156	12.3%
Prej. Statement	129	10.7%
Invalid Ident.	127	10.5%
Misc. Trial Errors	120	9.9%
Unlawful Arrest	116	9.6%
Denial of Counsel	94	7.8%
Speedy Trial	94	7.8%
Non-Disclosure of Fav. Evidence	88	6.9%
Unconst. Jury	69	5.7%
Right of Appeal Denied	68	5.6%
Coerced Confession	67	5.1%
Double Jeopardy	65	5.1%
Denial of Severance	31	2.6%
Unconst. Crim. Stat.	27	2.2%
Lack of Transcript	20	1.7%
New Interpret. of Law	5	0.4%
Other*	568	47.0%

Source: Appendix pages F92-114.

* The 'other' category is large, larger than other statistical studies of habeas (See Shapiro op. cit. p. 2). Each court, however, has its own idiosyncracies and it is difficult to group these unique claims in any coherent way. When seven different courts are involved the group of unclassifiable claims becomes greater. See Appendix 1, page 14, for a more complete listing of grounds included in 'others'.

** The percentages given here represent that percent of petitioners attacking their convictions who listed the ground indicated. A petitioner may have listed more than one ground. For example, item 9 means that 42.1% of all petitioners attacking their convictions offered, among others, an ineffective assistance of counsel claim.

complaints about evidentiary rulings (24.0%), claims that there was no, or insufficient evidence, of guilt (22.4%), objections to searches and seizures (15.5%), and allegations of the impropriety of a guilty plea (13.1%).

The statistics on the nature of the grounds offered to attack a conviction also have implications for a legislatively or judicially created bar to grounds of attack relying upon the exclusionary rule rather than claims of innocence. Such a limitation in the writ might cause a significant, but not an overwhelming reduction in the number of potentially invalid grounds offered. However, it might not significantly reduce the number of petitions filed, since many petitioners are still likely to offer (invalid) exclusionary rule grounds. Further, the need to classify the claim as one involving the exclusionary rule may make the consideration of each petition more complex.

Perhaps the most revealing statistic about the petitions filed is that most of them -- 55.0% -- were, in the view of the courts, so procedurally defective as to never be given consideration on the merits. Among other defects, 37.1% of all petitions filed were denied for failure to exhaust state remedies, 15.1% were denied for failure to state a claim for which relief could be granted, and 1.2% were denied for failure to use the proper form. In fact, a much larger percentage of petitions were defective, but in many districts, for example, it was common practice to return petitions which did not use the form provided by the court without ever filing them. 16/

16/ The study was unable to include these cases, however, since no court file was created for them and often no record of their receipt was retained.

This high proportion of cases never given consideration on the merits, points to one obvious area in which reforms -- e.g., providing better filing instructions or assistance -- can reduce the judicial burden without reaching the availability of meaningful review.

Of the 854 cases that were considered on the merits, 794 (93.0% of those so considered) were denied on the merits, 27 more (3.2%) were granted in part but the defendant was not released, and the remaining 33 (3.9%) were ordered released. Thus while the overall success rate (in whole or in part) is only 3.2%, if the procedurally defective petitions never considered on the merits are excluded, the success rate of those petitions that were considered is 7.0%. If the Court of Appeals cases are excluded (they have a higher than average success rate, as would be expected), the overall success rate is 2.7% and the success rate of petitions considered on the merits is 7.3% (see Table 13).

III. The System of Review

A. Previous Judicial Review

Information on the previous judicial review obtained by a petitioner reveals the extent of the duplication of effort in our current collateral attack system. Petitioners had already had (or were having) some sort of direct appellate review of their convictions by the state in 81.9% of the cases.[17/] Of the appeals, 98.6% had previously had state appellate review of their convictions. Additionally, 44.2% of the petitioners had previously presented a habeas corpus petition to the state court, including 20.9% who had filed two or more (up to 13) previous state petitions. Further, 30.6% of the petitioners had filed a previous federal habeas corpus petition, including 12.8% who had filed two or more previous federal petitions.

These statistics suggest either that the state courts are doing a poor job of spotting and remedying irregularities in their criminal adjudication system or that federal courts are engaged in what is often a repetitive and wasteful process when they review state prisoner petitions. The fact that the federal district courts grant some form of relief in only 2.7% of the cases in the study (7.3% of the cases considered on the merits) suggests that it may be the latter. The pattern of previous state petitions in relation to successive federal petitions, set out in Table 3, presents some interesting facts on this issue.

17/ See Appendix pages F21, F23, X8-9.

TABLE 3: PREVIOUS STATE PETITIONS BY FEDERAL PETITIONS.

Previous State Petitions	Federal Petitions: First	Federal Petitions: Successive	
None	80.4 (713)	19.6 (174)	56.1 (887)
One	59.9 (217)	40.1 (145)	22.9 (362)
2 or More	53.5 (178)	46.5 (155)	21.0 (333)
	70.0 (1108)	30.0 (474)	100.0 (1582)

Source: Appendix page X447.

As Table 3 shows, while 19.6% of petitioners who have not filed a state petition file successive federal petitions, 40.1% of those with one previous state petition and 46.5% of petitioners with two or more prior state petitions file successive federal petitions. Thus, those persons who have filed previous state petitions are more likely to file successive federal petitions. There is no apparent reason why previous state petitions should be related to successive petitions. While it does not prove the point, it is consistent with a conclusion that it may be the litigious nature of the petitioner, not the quality of state judicial review, which is the determinative factor in whether a federal habeas corpus petition is filed.

There is some variation in the percentage of prisoners within a state filing a habeas corpus petition in federal court, but the states where the percentage of filings was higher are not the states where the federal courts have found the most cases of illegal state custody. Of course, the resources expended on federal review of state convictions might be justified not on the basis of the number or proportion of injustices corrected, but upon the symbolic value of perpetual availability of a federal forum. It is intriguing, however, to consider the possibility that there may be a type of petitioner who for any variety of reasons -- he is innocent, he incorrectly believes he is innocent, he believes he can challenge his custody even though he is guilty, he finds petitioning a pleasant or at least useful diversion -- is of a particularly litigious nature.

A petitioner's previous filing history provides some valuable information on the extent to which petitioners conformed to exhaustion requirements and the extent to which they overuse or abuse the writ. Generally, petitioners who have filed one or more federal habeas corpus petitions without filing a state habeas corpus petition have not adhered to the exhaustion requirements ("procedural defectives").[18/] Petitioners who have filed one previous state habeas petition and are now filing their first federal petition have generally conformed to the exhaustion requirement ("correct filers"). Those who have filed more than

18/ It is possible that a defendant can satisfy the exhaustion requirement if he has presented the same claim on direct appeal in the state without filing a state habeas corpus petition). The data suggest, however, that this is not commonly the case. Note, for example, that approximately 40% of petitioners attacking their convictions are making an ineffective assistance of counsel claim that generally cannot properly be raised on direct appeal. Similarily, the 35% of petitioners who are attacking their convictions generally cannot have previously raised the claim on direct appeal.

one previous state petition and one or more previous federal petitions might be generally regarded as abusing the writ ("litigious filers"). Table 4 presents the proportion of all filers who fall in each of these types.

TABLE 4: TYPES OF PETITIONERS AS PERCENTAGE OF PETITIONERS

"Procedural defectives" (1 or more previous federal petitions without filing any state petition)	56.1
"Correct filers" (1 state petition before filing the current federal petition)	13.7
"Litigious filers" (more than 1 state petitions or 1 or more previous federal petitions or both)	30.2

Source: Appendix page X447.

According to this typology, more than 56% of all petitioners have failed to exhaust their state remedies and only 13.7% have adhered to the exhaustion requirement without filing additional petitions in either the state or federal courts. More than 30% of all petitioners seem to abuse the writ by filing more than one petition in the state or federal courts. These findings suggest that a great deal of the court's time is absorbed processing petitions from persons who have not exhausted state remedies or who have had previous state and federal review of their convictions.[18a/]

One might argue that multiple petitions do not necessarily mean litigiousness, but rather, for example, that such petitioners offer the same number of grounds attacking their conviction but

18a/ This figure may suggest that the problem of the litigious petitioner is not as large as some people may have thought. Further, many of these 30% no doubt result from petitions initially denied for failure to meet the exhaustion requirement rather than the litigious personality of the petitioner.

present each in a separate petition. The petitioners who do not file multiple petitions, the argument might continue, offer the same multiple grounds in a single petition. But the statistics suggest that the petitions of the multiple-petition "litigious" group tend to contain more grounds than others. Indeed, it is the first-time filers, the "procedural defectives" who have not filed even a state petition, who tend to offer fewer grounds than usual.[19/]

The relationship between these groups and disposition by the district court and between these groups and the nature of counsel shall be further considered in the sections on disposition of petitions and counsel, respectively, later in this report.

While litigious petitioners may account for much of the heavy, yet unproductive, habeas caseload, the system of review itself contributes much inefficiency. Concerns for comity between federal and state courts, for example, may significantly aggravate the inefficiency inherent in federal review of state judgments. Of the 56.1% of the petitioners to federal court who had not filed a state habeas corpus petition, many were denied relief by the federal courts because of their failure to exhaust state remedies only to return to the same federal court one state petition later. In practice it appears that the determination as to whether state remedies have been exhausted is as burdensome as a determination on the merits, so this show of comity can add substantial and independent cost to the collateral review process. The exhaustion

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19/ Apparently, between the time these petitioners are first denied for failure to exhaust and by the time they return, having exhausted state remedies, they have acquired a few additional claims.

requirement is an inherently inefficient rule, but again might be justified by its symbolic value.[20/]

The inefficiency of the process is not restricted to federal repetition of state review. The separation of direct appeal and collateral attack within the same jurisdiction may be supported by arguable conceptual distinctions, but there is little doubt that it creates inefficient repetition which could be eliminated with little or no loss of, and even the enhancement of, meaningful judicial review.[21/]

Still further inefficiency stems from multiple petitions from the same petitioner. For example, while the rules attempt to restrict successive petitions (Rule 9(b), Rules Governing Section 2254 Cases in the United States District Courts), 30.6% of the state prisoners petitioning in federal court had previously filed a federal petition, including 12.8% who had filed two or more (up to 12) previous federal petitions. To dismiss these successive petitions the court must first find that the petition "fails to allege new or different grounds for relief" and that "the prior determination was on the merits" or, if new and different grounds are alleged, that "the failure of the petitioner to assert those

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20/ Because of these concerns, some federal district courts do not enforce the exhaustion requirement. This relaxation of the exhaustion requirement does seem to reduce repetitious petitions. In grouping districts into those that strictly enforce the exhaustion requirement (4,6,9) and those that are more lenient (1,2,3,5,8) we find that, although the lenient districts receive more "procedurally defective" petitions (60.5%) than the strict districts (54.4%), they have fewer (24.3%) of the "litigious" types than the strict districts (32.9%).

21/ See, e.g., Robinson, Proposal and Analysis of a Unitary System for Review of Criminal Judgments, 54 Boston Univ. L. Rev. 485 (1974).

grounds in a prior petition constituted an abuse of the writ." (Rule 9(b) Successive Petitions).[22] This determination can require not only a review of the current petition but comparison to previous ones. Thus the judicial resources needed to determine that a petition should be dismissed as repetitive are commonly not significantly less than those required to consider the petition on the merits, leaving the rule essentially useless in restricting the cost in judicial resources of such petitions once they are filed. The existence of the rule, however, may deter some prisoners from filing successive petitions and, therefore, conserve resources.

B. Expenditure of Resources

Eliminating inefficiency in operation may be an appropriate administrative goal in the day to day operation of the courts, but it may not justify judicial or legislative reform unless the costs of such inefficiency are significant. In the present context, the issue is whether the process of habeas corpus review generally, and federal review of state court judgments specifically, demands sufficient resources to make its possibly duplicative and inefficient character a matter of concern.[23]

There are certain costs which apply to every petition. The

22/ This rule became effective just after the period covered by the study. Before that time similar determinations were required by Sanders v. United States, 373 U.S. 1, 150 (1963).

23/ On the issue of substituting a "unitary system of review" for independent appeal and collateral attack systems, the resources expended under current habeas corpus review are particularly relevant.

court clerk's office must process and create a court file for each petition. The court must consider and dispose of each petition.

In addition, in approximately 44.9% of the cases in the study a magistrate reviewed the petition and wrote a report and recommendation for the court's consideration. In at least 16.5% of the cases the magistrate also drafted an opinion for the court. In approximately 1.4% of all cases filed the magistrate held a hearing (evidentiary, legal argument, a combination, a case conference, or other).

In many cases the greatest expenditure of resources may be by the state and its counsel. In 52.8% of all cases the government was asked to send records concerning the case. In 61.1% of the cases, it filed factual responses to allegations of the petitioner and in 55.1% it filed a legal brief. In 2.2% of all cases filed, it appeared at one or more evidentiary hearings held either by the magistrate or the court; in 2.3% it appeared for legal arguments; and in 0.9% for a conference with the court. In 8.3% of the cases, the state or federal government also bore the expense of appointed defense counsel.

The court may hold a hearing instead of or in addition to the magistrate. It held some sort of hearing in approximately 6.2% of the cases filed. The district court wrote a memorandum or opinion in 38.7% of all cases. It then considered requests for probable cause to appeal in at least 39.5% of the cases.

More than 25% of the cases were then appealed (see Table 14), all of which had to be considered by the court of appeals.

In at least 24.9% of these cases the court of appeals heard legal argument. In 42.2% the court wrote either an opinion or a memorandum opinion. These appeals also require, of course, further expenditure of resources by defense counsel and the state.

IV. Disposition of Petitions

A. The Stages of Review and Disposition

This section includes some selected statistics describing the review and disposition process in the district court.[24/] The process begins when petitions are received by the court. As has been noted earlier, it is common in many districts for petitions to be reviewed by the court clerk's office and returned to the petitioner without filing when certain procedural defects are apparent. The general lack of recordkeeping at this stage prevents a reliable estimate of how many petitions are actually received and what proportion are returned without being filed.[24a/]

Of those state habeas cases filed (1,899), 39.3% were referred directly to a magistrate for review, report, and recommendation. Another 3.2% were referred at a later stage by the court. The magistrates recommended that 90.4% of the petitions be denied, that 2.3% be given relief of some sort, and that the remaining 7.7% have some other disposition. The actual dispositions by all district courts, show that 84.6% of all petitions were denied (for one or more reasons); 3.2% were granted some relief and the

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24/ A more detailed description of district and appellate court dispositions are provided at the end of this section in Tables 13a, 13b, 14a and 14b.

24a/ Under now Rule 2(e) of Rules Governing Section 2254 Cases, effective Feb. 1, 1977, courts are directed to keep a copy of the petition initially received by the court.

remaining 12.2% were disposed of in some other way.[25/]

It is clear that many district court judges regularly follow the recommendation of the magistrate. Of 1217 categorizable magistrate recommendations for disposition[26/] ("other" cases excluded), the district court's final disposition of the case cited the identical result and reason as the recommendation in 961 instances or 73.9% of the time.[27/] In the 26.1% of the petitions in which the disposition differed from the recommendation, the court usually reached the result recommended but for a different reason, or cited only one of two or more reasons given by the magistrate. In fact, in only two cases (0.2%) did the court grant relief when the magistrate had recommended denial (on the merits, in both cases). In eight instances (1.0%), the magistrate's recommendation to grant some relief was not followed by the district court (which denied six on the merits and two for procedural defects).[28/] This seems to suggest, although weakly, that district court judges -- at least those using magistrates -- may be less likely than the magistrates to grant relief.

25/ The disposition figures for district courts and magistrates would be much closer if we examined only those district courts that had magistrate recommendations before them since in an overwhelming majority of the cases the district court reaches the result recommended by the magistrate and, as we shall discuss later "non-magistrate courts" dispositions tend to be much more favorable to petitioners than those of the courts with magistrates (see p. 26).

26/ There could be more than one in a single case, as in recommending denial for failure to exhaust state remedies and denial on the merits.

27/ See Appendix page X465.

28/ See Appendix page X465.

TABLE 5: DISTRICT COURT DISPOSITION BY MAGISTRATES RECOMMENDATION

Magistrates Recommendation	District Court Disposition: Denied Procedures	Denied Merits	Granted In Part or Whole	Other	
Denied Procedures	80.7 (473)	15.2 (89)	0.0 (0)	4.1 (24)	42.0 (586)
Denied Merits	13.5 (87)	83.3 (532)	.3 (2)	2.9 (19)	46.3 (645)
Granted in Part of Whole	4.0 (1)	28.0 (7)	52.0 (13)	16.0 (4)	1.9 (25)
Other	20.3 (28)	37.7 (52)	2.9 (9)	39.1 (54)	9.9 (138)
	42.3 (589)	49.1 (685)	1.4 (19)	7.2 (101)	100.0 (1394)

Source: Appendix page X465.

On the other hand, the statistics suggest that a court is more likely to grant relief when there is not a magistrate involved than when there is. In Table 6, district court dispositions are divided into those where a magistrate recommendation is made and all other cases. When a magistrate is involved, the district court is more likely to deny the petition for some procedural defect. This may occur because magistrates notice procedural defects in petitions more often than judges considering the petition alone, or because district courts are more likely to overlook a procedural defect when it has not been presented to them by a magistrate. In any case, the court without a magistrate is more likely to dispose of a petition on the merits. Further, the non-magistrate - court's

disposition is twice as likely to be favorable (in whole or in part) to the petitioner as the magistrate court's disposition. This relationship exists even when the nature of counsel, which as we shall see is an influential variable, is controlled for.[29/] This finding is also supported by an examination of the success rates of petitions in different districts (Table 13). For example, district 6 (N.D. Ill.) , which has a significantly higher success rate of petitions, is also a district that uses magistrates sparingly.

TABLE 6: DISTRICT COURT DISPOSITION BY INVOLVEMENT OF MAGISTRATES

	District Court Disposition			
Magistrate Involved	Denied Procedure	Denied Merits	Granted	
Yes	39.9 (413)	57.9 (599)	2.1 (22)	63.6 (1034)
No	32.6 (190)	61.9 (367)	6.1 (36)	36.4 (593)
	37.1 (603)	59.4 (966)	3.6 (58)	100.0 (1627)

Source: Appendix page X468.

29/ The exception to this is that when counsel is appointed the success rate is highest, but it is even higher (23.7%) for magistrate cases than non-magistrate cases (19.3%). No clear explanation appears for why magistrates (or at least judges with magistrates) should be significantly more favorable toward appointed counsel cases.

This finding contrasts with the earlier observation that where magistrates are used, they are more likely than the court to recommend relief. It is not inconsistent, however. There may be certain aspects of the magistrate-court interaction which explain the difference; or, the two factors -- presence of magistrates and success rate -- may not be causally related, but both dependent on a third variable, such as the press of the state habeas caseload. The court that may choose to use magistrates for state habeas may also, for the same reasons, whatever they may be, choose to be unreceptive to petitions for release.

The statistics suggest, however, that there is a direct relationship between disposition and the use of magistrates. Magistrates increase the rate of denials on procedural grounds, primarily for the "procedural defectives" described earlier in Table 5 and "litigious filers". Magistrates do not have the same effect on the district court disposition for those petitioners who have satisfied exhaustion and other procedural requirements.[30/] This suggests that when magistrates are used, procedural defects, such as exhaustion, are less often overlooked than they are in nonmagistrate cases. This is so even though, where magistrates are used the number of "procedural defective" petitions is reduced. Indeed, it is no doubt the more stringent policy on procedural correctness that causes the "procedural defectives" to stay away.[31/]

30/ See Appendix page X600.

31/ Different districts seem to have different policies on this procedural correctness issue. See Table 13, item 5a.

The new rules Governing Section 2254 cases invite greater reliance on magistrates for disposition of habeas petitions. See Rule 10 and amended Rule 10 effective August 1, 1979. The complexity of the magistrate court interaction makes it difficult to predict the effect of greater and more independent magistrate involvement.

But the use of magistrates is not without its disadvantages. The statistics confirm that presence of magistrates also seems to coincide with an increase in the "litigious" group.[32] The obvious explanation is that the increased litigiousness is created by the strict adherence to an exhaustion requirement. In other words, the "litigious" are partly the previously denied "procedural defectives" coming back one state petition later.[33]

TABLE 7: DISTRICT COURT DISPOSITION BY MAGISTRATES INVOLVEMENT BY TYPE OF PETITIONER

Type of Petitioner	Magistrate's Involvemement	District Court Disposition: Denied-Procedural	Denied Merits	Granted	
Procedural Defective	Yes	44.0 (224)	55.2 (281)	.8 (4)	63.0 (509)
	No	35.1 (105)	59.5 (178)	5.4 (16)	37.0 (299)
		40.7 (329)	56.8 (459)	2.5 (20)	100.0 (808)
Correct Filers	Yes	34.6 (47)	61.8 (84)	3.7 (5)	67.0 (136)
	No	34.3 (23)	59.7 (40)	3.9 (4)	33.0 (67)
		34.5 (70)	61.1 (124)	4.4 (9)	100.0 (203)
Litigious Filers	Yes	36.8 (122)	60.7 (201)	2.6 (8)	76.1 (331)
	No	26.9 (28)	69.2 (71)	3.8 (4)	23.9 (104)
		34.5 (150)	62.8 (273)	2.8 (12)	100.0 (435)

Source: Appendix page X600-601.

32/ See Appendix page X635.

33/ A comparison of the districts strict on exhaustion of state remedies and those that are more lenient seems to bear out this conclusion. The strict districts do in fact have a greater percentage of litigious petitioners (32.9%) than the lenient districts (24.3%).

Whether or not this strict adherence is more efficient depends on the relative expenditure in judicial resources of denying a petition on procedural grounds and considering it again later on the merits, accounting for an inevitable dropout rate for those who will not return again, compared against the expenditure in considering each petition on the merits the first time.[34/] For a single petition, multiple consideration undoubtedly costs more, but this may be offset by the fact that many petitioners do not return. From Table 3 one may grossly speculate that between 15.1% (cell 1 minus cells 4, 5 and 6) and 26.1% (cell 1 minus cells 5 and 6) of the total, or one-third to over one-half of all first time "procedurally defectives" will not return.

There are, of course, other perhaps more important interests at stake. Denial of petitions that have not exhausted state remedies may be a necessary price of comity. On the other hand, the expense of this comity may be not only inefficiency but also considerable delay and aggravation to the petitioner which may cause many petitioners to give up without fulfilling the state exhaustion requirement and returning to federal court.

34/ At first it would seem that one must also take into account the expenditure for petitioner appeal of a petition denied on exhaustion grounds, but the statistics suggest that such petitioners are much less likely to file an appeal, 16.1% of the time, than those denied on the merits, 38.4%, for example. (The overall appeal rate is 25.2%. Table 15).

Indeed, it seems a particularly hard-hearted system that relies upon this very dropout rate to make it efficient enough to operate.

Perhaps the most significant point about the interrelationship between the use of magistrates, the reduction of "procedural defectiveness", and the increase of "litigious filers" is that the effect is within the control of the district courts and requires no statutory or rule revision.

District court disposition of different types of claims are described in Table 8. Table 9 sets out the disposition of claims attacking conviction according to the ground offered to support the claim. Perhaps the most significant finding about the unsuccessful claims is that the claims other than those attacking convictions were more likely to be denied for procedural difficulties than on the merits. This may be because many petitioners who make these claims are unfamiliar with the scope of § 2254, thus submitting complaints about conditions of confinement for example, and are equally unknowledgeable about the procedural requirements such as exhaustion of state remedies. (25.6% of these claims were denied for failure to state a claim for which relief could be granted.) Predictably, exhaustion was a significant problem for claims about the state's appeal procedure and about delay (before trial or on appeal).

TABLE 8: DISTRICT COURT DISPOSITION BY NATURE OF CLAIM*

Nature of Claim	District Court Disposition: Denial Procedure	Denial No Claim	Denial Merits	Granted In Whole or Part	Other	
Attack on Conviction	35.0 (533)	10.6 (162)	43.6 (663)	2.6 (39)	8.2 (115)	57.0 (1522)
Challenge to Services	40.7 (126)	12.3 (38)	34.6 (107)	3.9 (12)	8.5 (26)	11.6 (309)
Improper Appeals Practice	60.7 (34)	12.5 (7)	19.6 (11)	1.8 (1)	5.4 (3)	2.1 (56)
Excessive Bail	39.0 (32)	18.3 (15)	23.2 (19)	2.4 (14)	17.1 (14)	3.1 (82)
Condition of Confinement	45.6 (57)	25.6 (32)	12.0 (15)	1.6 (2)	15.2 (19)	4.7 (125)
Probation or Parolet Revocation	41.6 (50)	15.0 (18)	29.2 (35)	3.3 (4)	10.9 (13)	4.5 120)
Parole Denial	37.3 (19)	29.4 (15)	23.5 (12)	-	9.8 (5)	1.9 (51)
Delay	68.3 (71)	6.7 (7)	6.7 (2)	1.0 (1)	17.3 (18)	3.9 (104)
Other	41.9 (126)	19.6 59)	16.6 (50)	4.0 (12)	17.9 (54)	11.2 (301)
	39.25 (1048)	13.2 (353)	34.4 (919)	2.7 (73)	10.4 (277)	100.0 (2670)

Source: Appendix page X466

* This table is based upon the total number of claims rather than the total number of petitions as was the case in previous tables. A single petition may include several claims.

TABLE 9: DISTRICT COURT DISPOSITION BY NATURE OF GROUNDS ATTACKING CONVICTION

Grounds for Claim Attacking Conviction

District Court Disposition	Improper Guilt Plea	Coersed Confession	Search and Seizure	Unlawful Arrest	Self Incrimination	Nondescl. Fav. Evid.	Double Jeopardy	Uncon. Jury	Ineff. Assist Counsel	Right of Appeal	Invalid Ident.	Insuff. Evid. Guilt
Denied - Improper form	2.0 (4)	- -	1.3 (3)	2.0 (3)	.5 (1)	.9 (1)	- -	- -	1.9 (7)	1.3 (1)	- -	1.9 (7)
Denied - failure to Exhaust	39.7 (79)	34.1 (28)	30.0 (72)	27.8 (40)	32.8 (63)	27.8 (30)	48.0 (36)	24.1 (21)	27.0 (99)	58.2 (46)	23.7 (37)	27.0 (99)
Denied - other proc defect	3.5 (3)	- -	2.5 (6)	2.7 (4)	3.6 (7)	2.8 (1)	1.3 (1)	- -	1.9 (7)	1.3 (1)	.6 (1)	1.9 (7)
Denied - no claim	4.5 (19)	9.8 (8)	14.2 (34)	14.2 (21)	8.9 (17)	4.6 (5)	10.7 (8)	17.2 (15)	9.0 (33)	6.3 (5)	10.3 (16)	9.0 (33)
Denied - Merits	39.2 (70)	47.6 (30)	41.3 (99)	43.9 (65)	42.2 (81)	40.1 (52)	32.0 (24)	52.9 (46)	50.4 (105)	30.4 (24)	52.6 (82)	50.4 (105)
Granted in Part	2.5 (5)	4.9 (4)	.8 (2)	2.7 (4)	2.6 (5)	1.9 (2)	1.3 (1)	- -	.5 (2)	- -	2.6 (4)	.5 (2)
Ordered released	- -	1.7 (4)	9.5 (4)	- -	- -	1.9 (2)	- -	- -	.8 (3)	- -	.6 (1)	.8 (3)
Dismissed with consent	.5 (1)	- -	2.7 (5)	.7 (1)	- -	.9 (1)	- -	1.1 (1)	1.1 (7)	- -	.6 (1)	.8 (3)
Other	5.1 (10)	3.6 (3)	6.1 (15)	6.8 (10)	9.4 (18)	11.1 (12)	6.7 (5)	4.7 (4)	7.0 (45)	2.5 (2)	9.0 (14)	7.7 (28)
Total	4.7 (199)	1.9 (82)	5.6 (240)	3.5 (148)	4.5 (192)	2.5 (108)	1.9 (75)	2.0 (87)	15.0 (639)	1.8 (79)	1.0 (156)	8.6 (367)

TABLE 9: Continued

Grounds for Claim Attacking Conviction

District Court Disposition	Uncon. Crim Statute	Denial of Counsel	Denial of Severence	Speedy Trial	Prejudice Stat.	Lack of Transcript	Jury Institutions	Evid. rulings	Mich. Trial Errors	New Interp. Laws	Other
Denied - improper form	- -	- -	2.9 (1)	.9 (1)	.6 (1)	- (1)	.5 (1)	.8 (3)	.7 (1)	- -	16.7 (7)
Denied - failure to Exhaust	14.3 (5)	40.7 (44)	20.0 (7)	38.2 (42)	28.9 (40)	60.0 (15)	25.9 (51)	25.2 (90)	11.5 (46)	50.0 (3)	14.8 (246)
Denied - other proc. defect	- -	3.7 (4)	2.9 (1)	.9 (1)	1.2 (1)	4.0 (1)	1.0 (2)	1.4 (5)	- -	- -	2.8 (20)
Denied - no claim	14.3 (5)	4.6 (5)	8.6 (3)	7.3 (8)	12.7 (21)	8.0 (2)	10.2 (20)	11.8 (42)	7.5 (11)	33.3 (2)	11.2 (79)
Denied - Merits	45.6 (16)	40.7 (44)	37.0 (13)	43.6 (48)	51.2 (85)	24.0 (6)	49.7 (98)	49.6 (117)	48.6 (71)	- -	30.4 (271)
Granted in part	2.9 (1)	3.7 (4)	8.6 (3)	- -	.6 (1)	- -	2.0 (4)	2.8 (10)	1.4 (2)	- -	1.3 (9)
Ordered released	5.7 (2)	- -	5.7 (2)	1.8 (2)	.6 (1)	- -	2.0 (4)	.8 (3)	.7 (1)	- -	1.4 (10)
Dismissed with consent	2.9 (1)	1.9 (2)	- -	- -	1.8 (3)	- -	2.0 (4)	.6 (2)	.7 (1)	- -	1.1 (7)
Other	14.3 (5)	4.7 (5)	14.3 (5)	7.3 (8)	3.0 (5)	4.0 (1)	6.7 (13)	7.0 (25)	8.9 (11)	16.7 (1)	8.1 (57)
Total	.8 (35)	2.5 (108)	.8 (35)	2.6 (110)	3.9 (166)	.6 (25)	4.6 (197)	8.4 (357)	3.4 (146)	.1 (6)	16.7 (706)

Source: Appendix page X464.

At least 24.8% of the cases filed in district court are appealed by the defendant. Another 1.4% are appealed by the government. The process of appeal from the district court disposition has some peculiar aspects. Rule 22(b) of the Federal Rules of Appellate Procedure requires that a defendant request of the district court a certificate of probable cause to appeal. This requirement does not work effectively to reduce the number of non-meritorious cases appealed. While it is true that in 371 cases where probable cause was denied the petitioner did not appeal, the petitioner appealed anyway in 275 cases (61.1% of all cases appealed to the circuit court). In another 73 cases (or 16.2%) the petitioner appealed without requesting a probable cause determination from the district court. Of the cases appealed without a probable cause certification by the district court, available data suggests that approximately 86.5% were denied probable cause by the circuit court of appeals. Table 10 presents, by district, the data on the probable cause determination by the district court and the court of appeals.

Such a probable cause determination by the court of appeals can, of course, be costly in judicial resources. In light of the high percentage of probable cause denials by the court of appeals, together with the fact that in all cases it heard, the court of appeals reversed or modified a district court denial of relief in only 4.0% (Table 11), it may well be appropriate to consider making a district court denial of probable cause a bar from seeking further review by the court of appeals.

TABLE 10: DECISIONS ON PROBABLE CAUSE ON APPEAL

Decision in District Court		Decision in Appeals Court	
a. P.C. Granted (D.C.)	21.3% (102)	Denied	42.8% (205)
b. P.C. Denied (D.C.)	57.4% (275)	Granted	6.7% (32)
c. No P.C. Request	15.2% (73)	P.C. Already granted	21.3% (102)
d. Other	6.1% (29)	Other and d.n.a.	20.2% (140)

Source: Appendix pages X28,29,32,33.

TABLE 11: DISPOSITION ON APPEAL

Denial of pet. Affirmed	28.2% (135)
Pet. Granted in Whole or Part	4.0% (19)
Dismiss at Pet. Req.	1.9% (9)
Remanded, Pending, d.n.a., and Other (including P.C. denied.	65.9% (316)

Source: Appendix pages X30-31.

Alternatively, one might consider whether the probable cause determination in the district court should be dispensed with to conserve that court's limited resources. This alternative may well be the more desirable. As the table below illustrates, when

probable cause was granted by the district court, the likelihood of having relief granted on appeal was 10.2%, but when the district court denied probable cause and the petitioner nonetheless appealed, his chance of success on appeal rose to 17.9%.[35/]

TABLE 12: APPEALS OUTCOME BY PROBABLE CAUSE IN DISTRICT COURT

Probable cause by District Court	Court of Appeals Disposition: Denied	Granted	
Denied	82.1 (31)	17.9 (7)	36.4 (39)
Granted	89.7 (61)	10.2 (7)	63.6 (68)
	86.9 (93)	13.1 (14)	100.0 (107)

Source: Appendix page X437.

The Court of Appeals granted relief to petitioners in only 4.0% of the 479 cases in which the prisoner appealed.

35/ However, the data was available in only 40.0% of the cases appealed.

TABLE 13: SUMMARY OF DISTRICT COURT DISPOSITIONS

Districts

	Total	7th Circuit C.of.A.	E.D. Pa.	D. N.J.	E.D. Va. Alex.	E.D. Va. Rich.	E.D. Va. Norfolk	E.D. Va. Total	N.D. Ill.	C.D. Calif	S.D. Calif
1. Petitions Received											
2. Petitions Filed (and % of Total 2.)	1899 (100%)	106 (5.6%)	236 (12.4%)	176 (9.3%)	126 (6.6%)	180 (9.5%)	221 (11.6%)	525 (27.7%)	219 (11.5%)	564 (29.7%)	71 (3.7%)
3. Mag. Recs. (% of 2.)	851* (44.8%)	5 (4.7%)	207 (87.7%)	45 (25.6%)	– (0.0%)	40 (22.2%)	– (0.0%)	40 (7.6%)	2 (0.9%)	552 (97.9%)	– (0.0%)
4. Mag. Recs. (and % of 3.)											
a. Deny, Total	769 (90.4%)	4 (80.0%)	180 (87.0%)	44 (97.8%)	– (0.0%)	36 (90.0%)	– (0.0%)	36 (90.0%)	2 (100%)	503 (91.1%)	– (0.0%)
+Fail. Exhaust	384 (45.1%)	– (0.0%)	98 (47.3%)	22 (48.9%)	– (0.0%)	9 (22.5%)	– (0.0%)	9 (22.5%)	1 (50.0%)	254 (46.0%)	– (0.0%)
+Fail. St. Claim	128 (15.0%)	– (0.0%)	18 (8.7%)	5 (11.1%)	– (0.0%)	4 (10.0%)	– (0.0%)	4 (10.0%)	1 (50.0%)	100 (18.1%)	– (0.0%)
+On Merits	337 (39.6%)	4 (80.0%)	93 (44.9%)	25 (55.5%)	– (0.0%)	30 (75.0%)	– (0.0%)	30 (75.0%)	1 (50.0%)	184 (33.3%)	– (0.0%)
b. Grant in Part or Ordered Released	20 (2.3%)	1 (20.0%)	7 (3.4%)	1 (2.2%)	– (0.0%)	2 (5.0%)	– (0.0%)	2 (5.0%)	– (0.0%)	9 (16%)	– (0.0%)
c. Transfer	28 (3.3%)	– (0.0%)	9 (4.3%)	– (0.0%)	– (0.0%)	1 (2.5%)	– (0.0%)	1 (2.5%)	– (0.0%)	18 (3.3%)	– (0.0%)
d. Dismiss with Consent	8 (0.9%)	– (0.0%)	3 (1.4%)	– (0.0%)	– (0.0%)	– (0.0%)	– (0.0%)	– (0.0%)	– (0.0%)	5 (.9%)	– (0.0%)

TABLE 13 continued

	Total	7th Circuit C of A.	E.D. Pa.	D. N.J.	E.D. Va. Alex	E.D. Va. Rich.	E.D. Va. Norfolk	E.D. Va. Total	N.D. Ill.	C.D. Calif	S.D. Calif
5. D.C. Disp. (and % of 2.)											
a. Denials Total	1606 (84.6%)	75 (70.8%)	204 (86.4%)	162 (92.0%)	116 (92.1%)	128 (71.1%)	200 (90.5%)	444 (84.6%)	156 (71.2%)	507 (89.9%)	58 (81.7%)
+Fail. Exhaust	704 (37.1%)	13 (12.3%)	107 (45.3%)	75 (42.6%)	51 (40.5%)	49 (27.2%)	92 (41.6%)	192 (36.6%)	47 (21.5%)	254 (45.0%)	16 (22.5%)
+Fail. St. Claim	286 (15.1%)	8 (7.5%)	19 (8.1%)	28 (15.9%)	27 (21.4%)	30 (16.7%)	20 (9.0%)	77 (14.7%)	46 (21.0%)	100 (17.7%)	8 (11.3%)
+On Merits	794 (41.8%)	61 (57.5%)	106 (44.9%)	86 (48.9%)	52 (41.3%)	73 (40.6%)	119 (53.8%)	244 (46.5%)	66 (30.1%)	189 (33.5%)	42 (59.2%)
b. Granted in Part or in Whole	60 (3.2%)	13 (12.3%)	8 (3.4%)	3 (1.7%)	2 (1.6%)	6 (3.3%)	1 (.5%)	9 (1.7%)	19 (8.7%)	7 (1.2%)	1 (1.4%)
c. Transferred	55 (2.9%)	-	9 (3.8%)	-	-	19 (10.6%)	-	19 (3.6%)	4 (.5%)	21 (3.7%)	2 (2.8%)
d. Dismiss with Consent	39 (2.1%)	-	9 (3.8%)	5 (2.8%)	1 (.8%)	4 (2.2%)	1 (.5%)	6 (1.1%)	10 (4.6%)	6 (1.1%)	3 (4.2%)
e. Other	204 (10.3%)	18 (17.0%)	20 (8.5%)	14 (8.0%)	10 (7.9%)	31 (17.2%)	29 (13.1%)	70 (13.3%)	35 (16.0%)	36 (6.4%)	11 (15.5%)

*Indicates a minimum figure. Data was not available in a significant number of cases.

+Pet. could be denied for more than one reason. These figures show the number and % of petitions in which these most common reasons for the denial were given. Other reasons were given for denial but are not tabulated on this chart.

Source: Appendix pages X220-229,X654,X662-682; Appendix F 1.

TABLE 14: SUMMARY OF DISPOSITIONS ON APPEAL

Districts

	Total	7th Circuit C of A.	E.D. Pa.	D. N.J.	E.D. Va. Alex.	E.D. Va. Rich.	E.D. Va. Norfolk	E.D. Va. Total	N.D. Ill.	C.D. Calif.	S.D. Calif.
6. D.C. final decision appealed by petitioners (and % of 2.)	479 (25.2%)	78	43 (18.2%)	46 (26.1%	(23.8%	36 (20.0%	102 (47.5%	168 (32.0%)	54 (24.7%)	71 (12.6%)	19 (26.8%
a. P.C. Granted (D.C.) (and % of 6.)	102 (21.3%)	44 (56.4%)	6 (14.0%)	2 (4.3%)	-	2 (5.6%)	1 (.9%)	3 (1.8%)	29 (53.7%)	9 (12.7%)	9 (47.4%)
b. P.C. Denied (D.C.) (and % of 6.)	275 (57.4%)	8 (10.3%)	37 (86.0%)	41 (89.1%)	2 (6.7%)	2 (5.6%)	99 (97.1%)	103 (61.3%)	22 (40.7%)	54 (76.1%)	10 (52.6%)
c. No P.C. Request (and % of 6.)	73 (15.2%)	0	0	0	28 (93.3%)	32 (88.8%)	2 (2.0%)	62 (36.9%)	3 (5.6%)	8 (11.2%)	0
d. Other (and % of 6.)	29 (6.1%)	26 (33.3%)	0	3 (6.6%)	0	0	0	0	0	0	0

TABLE 14: continued

	Districts										
	Total	7th Circuit C.of A.	E.D. Pa.	D. N.J.	E.D. Va. Alex.	E.D. Va. Rich.	E.D. Va. Norfolk	E.D. Va. Total	N.D. Ill.	C.D. Calif.	S.D. Calif.
8. Disp. on Appeal: (and % of 6.) (from X30-31)											
a. Denial of pet. Affirmed	135 (28.2%)	63 (80.8%)	10 (23.3%)	2 (4.3%)	8 (26.7%)	7 (19.4%)	15 (14.7%)	30 (17.9%)	21 (38.9%)	4 (5.6%)	5 (26.3%)
b. Pet. Granted in Whole or Part	19 (4.0%)	10 (12.8%)	1 (2.3%)	3 (6.5%)	0	0	4 (3.9%)	4 (2.4%)	1 (1.9%)	0	0
c. Dismiss at Pet. Req.	9 (1.9%)	5 6.4%)	0	0	0	0	1 (1.0%)	1 (.6%)	2 (3.7%)	0	1 (5.3%)
d. Remanded, Pending, d.n.a., and Other (including P.C. denied, 7a. so no further consid. on merits).	316 (65.9%)	0	32 (74.4%)	41 (89.2%)	22 (73.3%)	29 (80.6%)	82 (80.4%)	133 (79.1%)	30 (55.5%)	67 (94.4%)	13 (68.4%)

Source: Appendix pages X28-33.

TABLE 14 continued

7. P.C. by C of A: (and % of 6.)	Total	7th Circuit C of A	E.D. Pa.	D. N.J.	E.D. Va. Alex.	E.D. Va. Rich.	E.D. Va. Norfolk	E.D. Va. Total	N.D. Ill.	C.D. Calif.	S.D. Calif.
a. Denied	205 (42.8%)	1 (1.3%)	27 (62.8%)	40 (87.0%)	15 (50.0%)	17 (47.2%)	56 (54.9%)	88 (52.4%)	8 (14.8%)	35 (49.3%)	6 (31.6%)
b. Granted	32 (6.7%)	6 (7.7%)	7 (16.3%)	4 (8.7%)	1 3.3%)	0	6 (5.9%)	7 (4.2%)	5 (9.3%)	-	3 (15.8%)
c. P.C. Already granted (from 6a)	102 (21.3%)	44 (56.4%)	6 (14.0%)	2 (4.3%)	0	2 5.6%)	1 (1.0%)	3 (1.8%)	29 (53.7%)	9 (12.7%)	9 (47.4%)
d. Other and d.n.a.	140 (29.2%)	27 (34.6%)	3 (6.9%)	0	14 (46.7%)	17 (47.2%)	39 (38.2%)	70 (41.6%)	12 (22.2%)	27 (38.0%)	1 (5.2%)

B. Timing of Dispositions

Table 15 sets out, by district, the mean values for various intervals in the petition process. The interval from conviction to filing averaged about three years, although this mean includes some very long intervals (as much as 40 or more years). One and one half years is the most common interval and nearly half of all petitions are filed within three years. Considering that some time must pass before a prisoner can become eligible for federal review by habeas corpus -- e.g., exhaustion of state remedies may cause considerable delay -- it appears that many prisoners may be filing as soon as they are eligible. From this perspective, federal review of state convictions through habeas corpus seems more another step in the routine appeals process than an extra-ordinary writ. This may be desirable, of course, but it is not our traditional perception of the intended role of the federal writ. At the same time, this data refutes the common notion that defendants tend to delay filing claims until the passage of time has made successful retrial impossible.

Table 15, column 1 illustrates that there is a significant difference in the conviction-to-filing interval between districts. The difference seems intriguing, but has no apparent explanation.

Columns 2 through 6 of table 15 give some idea of the time district courts take in disposing of habeas petitions. The average petition appears to take about four and one half months to be disposed of by the district court. As noted below, however, this figure may in fact be five or five and one half months. There are again some significant differences between districts.

TABLE 15: INTERVAL MEANS BY DISTRICT

(in days)

District	Intervals					
	1. Conviction to Filing	2. Filing* to Disp.	3. Ref. to Mag. Rec.	4 Mag. Rec. to D.C. Disp.	5 Notice Appeal to C.A. Disp.***	6 Filing to D.C. or C.A Disp.
Overall	1045	139	122	28	311	214
0: 7th Cir.	1175	291	-	-	305	609**
1: E.D. Pa	1213	101	58	43	-	117
2: D.N.J.	1296	227	-	46	-	273
3, 4 + 5: E.D. Va.	766	99	74	80	338	214
3: - Alex.	669	44	-	-	345	138
4: - Rich.	675	156	74	79	322	228
5: - Norf.	870	82	-	225	342	248
6: N.D. Ill.	1333	193	92	55	223	237
8: D.C. Ca.	1062	123	146	9	224	142
9: S.D. Ca.	872	101	-	-	423	207

Source: Appendix pages F169-174; Appendix pages X474-491.

* But see Table 16: Delay from Receipt to Filing.

** This figure is very high in comparison to the others because, of course, all the cases in this group had the additional appeal period.

*** See discussion in text.

The district court means will not include the appeals which take longer than two or three years since the district court cases in the study were filed in district court between July 1, 1975 and June 30, 1977 and may not have completed their appeals (or at least have not had their completion date recorded in the district court file). The Seventh Circuit cases, on the other hand, were filed in the court of appeals during this period and most are now complete. Thus the most reliable mean here is the 305 days from the Seventh Circuit cases. This also appears to be the most common interval.

The average time it took a magistrate to evaluate a petition and write a report and recommendation for the court was about four months. However, this figure results from the combination of the Central District of California intervals of about five months, and the other districts where two or three months was more typical. In the Central District, however, judges appear to have disposed of the cases much more quickly than other districts once the report and recommendation were received. These statistics are not entirely reliable, however, since they might be affected by the way the court records the dates involved. Some courts, for example, hold the magistrate's report without filing it until they prepare and file the order in the case. Unfortunately, for a similar reason, several of the values shown in Table 15 are misleading. Many district courts routinely do not file a petition until it has been reviewed by a magistrate and the magistrate has made his report and recommendation to the judge. It is not uncommon as well for

districts to file a petition only after the court has prepared its order disposing of the case. These practices cause many of the values in Table 15, columns 2, 3, 4 and 6 to be misleadingly low for certain districts. They also make the column 1 figures slightly higher than they should be for the same districts.

Table 16 gives statistics on the delay from receipt to filing that could be obtained from the files. In most cases the data was obtained by noting the date stamped "received" on the petition when different from the "date filed" entered on the court's docket. Since the date received was not always available, it can be assumed -- and has been assumed in the last column of Table 16 -- that the delay in filing apparent in cases where the information was available is representative of the delay present in most cases.[35a/]

This delay in filing may not be a significant problem in the average case but it is a matter of some concern because, first, the length of delay can be considerable -- nearly a year in a few cases -- and, second, it is a practice with great potential for unforseen, undesirable ramifications. What is the status of a received, but unfiled petition? Does the petitioner have a federal action pending?

35a/ The new Rules Governing Section 2254 cases, effective Feb 1, 1977, appear to permit return of a petition without filing it. See Rules 2 & 3.

TABLE 16: DELAY FROM RECEIPT TO FILING

(in days)

District	# of Cases of Verified Delay (& % of Dist.)	Mean Delay, Receipt to Filing	Apparent Interval (from Table 9, Col.2)	Adjusted Interval: Filing To Disposition
Overall	904	16.1	-	-
7th Cir.	*	-	-	-
1. E.D. Pa.	-	-	101	101
2. D.N.J.	-	-	227	227
3,4,5.E.D.Va	381 (72.3%)	21.8	99	121
3. -Alex	102 (81.0%)	16.1	44	60
4. -Rich.	70 (38.9%)	27.9	156	184
5. -Norf.	209 (94.6%)	22.6	82	105
6. N.D.Ill.	118 (53.9%)	10.7	193	204
8. C.D. Ca.	368 (65.2%)	12.1	123	115
9. S.D. Ca.	34 (47.9%)	14.8	101	116

Source: Appendix page X474-491.

* Data was not available in a significant number of cases.

C. The Successful Petition

Successful petitioners are in some ways distinguishable from the unsuccessful petitioners. Such petitioners are more likely to have pled guilty than the average petitioner. Of all petitioners, 3.8 had pled not guilty for every 1 that had pled guilty. Of successful petitioners, 5.5 had pled not guilty for every 1 that had pled guilty.[36/] Considering that a plea of guilty forecloses many, if not most, issues for attack, it is surprising that the ratio for successful petitioners is not much greater.

They are more likely to have had a jury (rather than a judge) trial than the average petitioner -- 71.4% of all successful petitioners compared to only 51.9% of all petitioners.

The successful petitioner is slightly more likely to be in custody after conviction than the average petitioner. Of the successful petitioners, 93.1% were in custody after conviction compared to 89.9% of all petitioners.

Interestingly, successful petitioners are more likely than the average petitioner to have had appellate review, perhaps, in part, because they are more likely to avoid dismissal for failure to exhaust state remedies. Of such petitioners, 6.8 have had appellate review for every 1 that has not, compared to a ratio of 4.6:1 among all petitioners. Of course none of these statistics show a causal relation between these factors and success. Indeed, they may well represent the fact that both success and the other factor are influenced by a third factor or group of factors.

36/ See Appendix page X241.

Compared to the average petitioner, the successful petitioner is more likely to have had previous state collateral review. Of the successful federal petitioners, 47.6% had not previously filed any state habeas petition, compared to 55.8% of all petitioners. This finding is, of course, consistent with an exhaustion of state remedies requirement. One would expect that many of the unsuccessful petitioners were unsuccessful because they had not raised the claim previously in a state court. Every state jurisdiction in the study had some kind of collateral attack procedure available.

On the other hand, successful petitioners are more likely than the average not to have filed a previous federal petition. Of all petitioners 69.4% are first-time filers. In comparison, 81.5% of successful petitioners are filing their first federal petition, which suggests that if the federal court is likely to see a valid claim, it will see it in the first petition presented. Of the successful petitions ultimately granted relief, many of the previous federal petitions were no doubt denied for procedural defects and never considered on the merits -- as is the case with probably over half of all petitions.

The nature of the claims made in successful petitions are set out in Table 17.

TABLE 17: NATURE OF CLAIMS IN SUCCESSFUL PETITIONS*

Nature of Claim	# Filed	# Successful	% of Claim of that Nature is Successful
Prob. or Parole Revoc.	108	4	3.7%
Attack on Conviction	1270	35	2.8%
Challenge to Sentence	254	4	1.6%
Improp. Appeal	43	0	-
Excessive Bail	62	0	-
Condition of Confinement	101	0	-
Parole Denial	46	0	-
Delay	91	0	-
Other+	250	10	4%

Source: Appendix page X470.

* While the comparison here is between a multiple-answer factor and a single answer factor, it is probably generally reliable because it is unlikely that two claims of a different nature in the same petition were both successful.

+ For a further breakdown of this "other" category see Appendix 1, page 13.

TABLE 18: GROUNDS ATTACKING CONVICTION IN SUCCESSFUL PETITION

Nature of Ground	# Filed	# Successful	% of Ground of that Nature that is Successful
Denial Severance	31	2	6.4%
Unconst. Crim. Stat.	27	1	3.7%
Improper Guilty Plea	167	5	3.0%
Non-Discl. of Fav. Evi.	88	2	2.3%
Speedy Trial	94	2	2.1%
Search & Seizure	197	4	2.0%
Unlawful Arrest	116	2	1.7%
Ineff. Asst. Counsel	508	6	1.2%
Prejud. Statement	129	1	0.8%
Invalid Indentif.	127	1	0.8%
Evid. Rulings	290	1	0.3%
Jury Instructions	153	1	0.7%
Self Incrimination	156	1	0.6%
Other +	568	11	1.9%

Source: Appendix page F92-114.

+ For a further breakdown of this "Other" category see Appendix 1 page 14.

The number of grounds offered in successful petitions has an interesting distribution. The success rate for petitions decreases steadily from 3.5% to 1.7% as the number of grounds increases from one to four. But the success rate jumps to 6.8% for five grounds and declines again to 4.3% for seven grounds. 37/

There appears to be some significant variation between districts in the rate of granting relief. Table 19 gives the percentage of successful petitions for each district.

TABLE 19 SUCCESS RATE OF PETITIONS BY DISTRICT

District	# Petitions in District	# Successful	% Successful
Overall	1899	60	3.2%
Seventh Circuit Ct. of Appeals	106	13	12.3%
1. E.D. Penn	236	8	3.4%
2. D. New Jersey	176	3	1.7%
3. E.D. Vir.	527	9	1.7%
6. N.D. Ill.	219	19	8.7%
8. C.D. Calif.	564	7	1.2%
9. S.D. Calif	71	1	1.4%

Source: Appendix page X262-63.

37/ See Appendix pages X647-648.

The cases in the Seventh Circuit Court of Appeals, have a relatively high success rate -- 12.3% -- which is what one would expect when looking only at cases appealed (presumably fewer frivolous cases are appealed than are filed). The Northern District of Illinois, has a surprising 8.7% rate of granting relief of some sort, compared to 0.5% for the Norfolk Office of the Eastern District of Virginia (which handled almost the identical number of cases). Both of the districts contained about 11.5% of the petitions filed, but the Illinois District accounted for 31.7% of all successful petitions, while the Norfolk Court accounted for only 1.7%. The variation does not seem dependent on caseload. For example, the largest district -- Central District of California -- and the smallest district -- Southern District of California -- did not have significantly different rates.[38/]

TABLE 20: AVERAGE SUCCESS RATE BY DISTRICT AND SUCCESS RATES FOR JUDGES

	Overall District Success Rates	Variation in Success Rates for individual Judges	
District		Minimum Rate	Maximum Rate
E.D. Penn	3.4%	0.0%	18.2%
D. New Jersey	1.7%	0.0%	8.7%
E.D. Va.	1.7%	.5%	3.7%
N. D. Ill.	8.7%	0.0%	36.8%*
C.D. Calif.	1.2%	0.0%	6.7%
S.D. Calif.	1.4%	0.0%	4.3%

Source: Appendix pages F2-7, X338.

* One judge in this district was assigned only two petitions and granted one, producing an insignificant 50% rate.

38/ One may speculate that the differences in district success rates here may be related to magistrates. The Northern District of Illinois, as has been noted, does not generally use magistrates, while the magistrate in Norfolk is relatively unsympathetic to habeas petitioners generally.

There appears to be some variation in success rates between judges, as shown in Table 20. Since the overall rate of granting petitions (in whole or in part) by district court judges is so small -- 2.6% -- the failure to grant any petition is not necessarily significant. At a rate of 2.6%, a court is, statistically, only likely to grant 1 petition in 38 or 39 cases. For a judge with a habeas caseload less than this number (and this is most judges), who does not grant any petitions, one cannot say he is less likely than average to grant a petition. The percentage of petitions granted can be significant, however, where the habeas caseload is substantial or where a judge with a low habeas caseload grants a number of petitions. Considering these cases, one can see a good deal of difference in the rate of granting petitions.

Three judges (5.9% of the 51 judges who handled state habeas petitions) accounted for 29.9% of all petitions granted. Twelve judges (23.5%) accounted for over two-thirds of all petitions granted. On the other hand there were a number of judges, with large habeas caseloads, who had very low rates of granting petitions. The rate of granting petitions does not seem to be related (at least directly), as some had speculated, to the overall civil caseload of a judge or to the proportion of his caseload made up of habeas petitions. (See Table 21.)

The single most significant factor for the success of a petition may be the nature of counsel, which is discussed in the next section.

TABLE 21: PETITIONS AND SUCCESS RATES ACCORDING TO JUDGE

District and Judge	# Civil Findings	# State Habeas Petition	% of Civil Findings	# Pet. Granted	% Pet. Granted
E.D. Pennsylvania (District)	8,845	236	2.7	8	2.4%
Judge					
1	510	19	3.7	2	10.5%
2	490	11	2.2	1	9.1%
3	480	17	3.5		
4	473	13	2.7	1	7.7%
5	516	14	2.7		
6	462	9	1.9		
7	471	15	3.2		
8	510	11	2.2		
9	436	12	2.8		
10	456	13	2.9	1	7.7%
11	473	11	2.3	2	18.2%
12	520	4	.8		
13	470	12	2.6		
14	417	16	3.8		
15	29	6	20.7		
16	491	14	2.9	1	7.1%
17	242	11	4.5		
18	472	9	1.9		
19	437	7	1.6		
20	449	10	2.2		
21		1			
22	30				
23	11				
D. New Jersey (District 2)	4,983	176	3.5		1.7%
1	557	13	2.3		
2	559	12	2.1		
3	603	19	3.2		
4	593	23	3.9	2	8.7%
5	301	11	3.7		
6	574	21	3.7		
7	591	10	1.7		
8	607	31	5.1		
9	598	35	5.9	1	2.9%
10		1			
E.D. Virginia (Districts 3, 4&5)	5,165	527	10.2	9	1.7%
E.D. Va. - Alexandria (District 3)	1,870	126	6.7	2	1.6%
1&2	1,870	125	6.7	2(1 ea.)	1.6%
Miscellaneous		1			
E.D. Va. - Richmond (District 4)	1,391	180	12.9	6	3.3%
1	695	107	15.4	4	3.7%
2	896	69	9.9	2	2.9%
E.D. Va. - Norfolk (District 5)	1,904	221	11.6	1	0.5%
1, 2&3	1,904	219	11.5	1	0.5%
Miscellaneous		1			

TABLE 21: (con't)

District and Judge	# Civil Findings	# State Habeas Petition	% of Civil Findings	# Pet. Granted	% Pet. Granted
N.D. Illinois (District 6)	7,853	219	2.8	19	8.7%
Judge					
1	668	12	1.8	2	16.7%
2	663	20	3.0	2	10.0%
3	721	19	2.6	7	36.8%
4	712	18	2.5	3	16.7%
5	710	19	2.7	2	10.5%
6	697	22	3.2	1	4.5%
7	309	12	3.9		
8	241	8	3.3		
9	114	4	3.5		
10	709	19	2.7		
11	304	12	3.9		
12	218	4	1.8		
13	709	8	1.1		
14	343	9	2.6		
15	343	14	4.1		
16	346	10	2.9	1	10.0%
17	40	4	10.0		
18		1			
19		2		1	50.0%
20	6				
C.D. California (District 8)	7,716	564	(7.3)	7	1.2%
1	495	15	3.0	1	6.7%
2	114	17	14.9		
3	474	68	14.3	1	1.5%
4	483	129	26.7	1	7.8%
5	482	4	.8		
6	517	3	.6		
7	489	1	.2		
8	456	1	.2		
9	524	2	.4		
10	491	71	14.5	2	2.8%
11	523	185	35.4	2	1.1%
12	493	2	.4		
13	499	58	11.6		
14	465	2	.4		
15	459	3	.7		
16	263				
17	489				
C.D. California (District 9)	2,393	71	2.9	1	1.4%
1	346	23	6.6	1	4.3%
2	305	13	4.3		
3	313	14	4.5		
4	1,142	8	.7		
5	287	13	4.5		
TOTAL	36,955	1,793	4.9		

Source: Appendix pages F2-7, X338.

D. Assistance of Counsel

Increasing access to counsel is seen as a means of both increasing the legal protections afforded prisoners and eliminating inappropriate petitions. Presumably, attorneys can state claims more clearly and thereby ensure that petitioners will receive more complete and thorough consideration of their petitions. In addition, attorneys are expected to perform a screening function by refusing to file groundless petitions or those in which basic procedural requirements have not been met. The following section presents data on the general availability of counsel, the effect of counsel on the disposition of petitions, and the extent to which counsel performs a screening function.

More than 78.7% of all petitioners did not have the assistance of counsel. 8.3% had appointed counsel and 8.0% had retained counsel sometime during the process. Another 1.4% had counsel through some sort of prisoner assistance project, and another 1.2% had access to legal or paralegal advice through a legal clinic.[39/]

In 58.6% of the cases where counsel was available, he or she was retained or appointed before the petition was filed.

39/ There was some variation between districts in the frequency with which counsel was appointed. See Appendix pages X20, X21.

Such pre-filing representation included every category of counsel except federally-appointed counsel. Federal courts most often made such appointments after considering a petition which appeared to justify appointment of counsel in the district court or in the court of appeals.[40/]

Persons in prison after conviction were less likely to have counsel (83.0% were pro se compared to 78.5% pro se overall) than persons on probation, parole or bail, or those not in custody. Of these groups only 42.4%, 0.0%, 3.6%, and 44.4%, respectively, were pro se compared to 83.0% overall.[41/]

TABLE 22: REPRESENTATION BY COUNSEL BY CUSTODY

Custody	Representation by Counsel %No	%Yes	
Prison-After Conviction	83.0 (1339)	17.0 (274)	96.6 (1613)
Probation	42.4 (6)	57.6 (8)	.9 (14)
Parole	0.0 (0)	100.0 (5)	.3 (5)
Bail	3.6 (1)	96.4 (27)	1.7 (28)
Not in Custody	44.4 (4)	55.6 (5)	.5 (9)
	80.8 (1350)	19.2 (319)	100.0 (1669)

Source: Appendix page X180.

40/ See Appendix page X448.

41/ These statistics rely upon significantly fewer cases, 8.4%, than those for persons in prison, 91.6% of the sample.

Persons not in physical custody were also more likely to have counsel involved before filing. Involvement of counsel for these groups began before filing in 87.5%, 60.0%, 96.4%, and 100.0% of the cases, respectively, compared to 54.0% for persons in prison after conviction.

Petitioners who are represented by counsel are much more likely to be successful than those who file pro se. Table 23 indicates that 45.8% of petitions filing pro se are denied relief on procedural grounds while only 19.2% of petitions with counsel are similarly rejected. More importantly, only .9% of those filing pro se have their petition granted in whole or in part and 12.6% of those with counsel have their petitions granted. Counsel considerably enhances the probability of success.

TABLE 23: DISPOSITION IN DISTRICT COURT BY NATURE OF COUNSEL

Nature of Counsel	%Denied Procedural	%Denied No Claim	%Denied Merits	%Granted	
Pro Se	45.8 (713)	15.3 (239)	38.0 (592)	.8 (13)	82.3 (1557)
With Counsel	19.2 (64)	13.2 (44)	55.1 (184)	12.6 (42)	17.7 (334)
	41.1 (777)	14.9 (283)	41.0 (776)	2.9 (55)	100.0 (1891)

Source: Appendix page X250.

It is possible that the effect of counsel on the disposition of petitions is actually due to other factors found to be important in the deposition of petitions. The higher success rate of counsel could be due to the fact that fewer petitioners are represented by counsel

in districts without magistrates. Another possible explanation is that counsel does not represent persons who have not exhausted state remedies and, therefore, counsel is less likely to press procedurally defective petitions. The effect of counsel persists, however, even when the presence of magistrates and the types of filer are controlled for. In all types of districts and for all types of filers, those with counsel are more likely to have a favorable disposition than those without representation.

The higher success rate for petitions with counsel has a number of alternative explanations. First, it may be the result of a court screening process in which the court appoints counsel in cases where there seems to be a valid claim as suggested by the high rate of success for court appointed counsel (See Table 24). However, non-court appointed counsel, i.e., retained, or provided by a clinic or prison project, also have a higher success rate than those who file pro se which indicates that counsel independently of court screening does improve the probability of success.

TABLE 24: DISPOSITION IN DISTRICT COURT BY NATURE OF COUNSEL

	Disposition In District Court				
Nature of Counsel	Denied Procedural	Denied No Claim	Denied Merits	Granted in Whole or Part	
Pro Se	45.8 (713)	15.3 (239)	38.0 (592)	.8 (13)	82.4 (1557)
Retained	23.9 (34)	17.1 (24)	50.0 (70)	8.6 (12)	7.5 (140)
Clinic or Prison Project	22.4 (11)	14.3 (7)	55.1 (27)	8.2 (4)	1.6 (49)
State or Fed. Appointed	13.1 (19)	9.0 (13)	60.0 (87)	17.9 (26)	8.4 (145)
	41.1 (777)	14.9 (283)	41.0 (776)	2.9 (55)	100.0 (1891)

Source: Appendix page X250.

TABLE 25: TYPE OF PETITIONER BY NATURE OF COUNSEL

Type of Counsel	Type of Petitioner: Procedural Defective	Correct Filers	Litigious Filers	
Pro se	55.4 (718)	12.6 (163)	32.1 (416)	83.1 (1297)
With Counsel	56.8 (150)	20.05 (54)	22.7 (60)	16.9 (264)
	55.6 (868)	13.9 (217)	30.5 (476)	100.0 (1561)

Source: Appendix page X619.

It, therefore, appears that counsel provides the legal background and skills to successfully present a claim that would otherwise be denied. This conclusion is supported by independent evidence. In addition to a greater likelihood of ultimate success, petitioners with counsel are more likely than the average petitioner to get a hearing of some sort in the district court, to have an opinion written by the district court, to have the court of appeals hear argument on appeal, write an opinion on appeal, and dispose of the case faster.[42/]

A third explanation, and one consistent with all these facts is that the presence of counsel causes the court to treat the case more seriously. Such a phenomenon was observed in the field.

A fourth explanation suggests that counsel dissuade petitioners from filing frivolous petitions. This screening effect may result primarily from elimination of procedurally defective petitions.

42/ See Appendix pages X192, X214, X450, X451, and X456.

TABLE 26:

REPRESENTATION BY TYPES OF PETITIONER BY DISTRICT POLICY ON EXHAUSTION

Types of Petitioner	District Policy on Exhaustion: Strict — Nature of Counsel: Pro Se Counsel	Strict — Counsel	Strict — Totals	Lenient — Pro Se Counsel	Lenient — Counsel	Lenient — Totals
Procedural Defectives	87.5 (562)	12.5 (80)	54.4 (642)	74.9 (155)	25.1 (52)	60.5 (207)
Correct Filers	82.1 (124)	17.8 (27)	12.8 (151)	73.1 (38)	26.9 (14)	15.2 (52)
Petitions Filers	90.2 (350)	9.8 (38)	32.8 (388)	77.1 (64)	22.9 (19)	24.3 (83)
	87.7 (1036)	12.3 (145)	100.0 (1181)	75.1 (257)	24.9 (85)	100.0 (342)

Source: Appendix page X644-45.

At first glance it appears that the data do not support the assertion that counsel screens out procedurally defective petitions. Table 25 indicates that petitions with counsel are just as likely not to have exhausted their state remedies as petitioners filing pro se. Approximately 55% of those filing pro se had not exhausted state remedies ("procedural defective") and 56.8% of those with counsel had not exhausted state remedies.

Although counsel in and of itself does not appear to eliminate procedurally defective petiiions, the data suggest that counsel does perform a screening function in most districts with a strict policy toward exhaustion of state remedies.[43/] Table 26 indicates that 25.1% of procedural defectives are represented by counsel in districts with a lenient exhaustion policy while only 12.5% of procedural defectives are represented by counsel in districts with a strict policy on exhaustion. This suggests that increasing the availability of counsel will not reduce the filing of procedurally defective petitions without a strict, exhaustion policy in the district court. Counsel seems to take its lead from the court.[44/]

In summary, only one fifth of habeas petitioners are represented by counsel and approximately 40% of those with counsel retain their own attorneys. Counsel considerably increases the chances of success regardless of a petitioner's adherence to procedural rules or the presence or absence of a magistrate, two factors shown to be important in the forgoing analysis of success. This might well be due in

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43/ Districts that denied more than 30% of habeas petitions on procedural grounds were considered strict while those denying less than 30% procedural grounds were classified as lenient.

44/ The less frequent association of counsel with procedurally defective petitions in strict districts has two explanations. On the one hand, one might speculate that counsel do not accept cases where a petitioner has not exhausted his state remedies. This seems highly unlikely still, if for no other reason than that Counsel usually do not know whether a perspective client has exhausted state remedies before he takes the case. The more plausible explanation is that counsel screen out procedurally defective petitions by dissuading clients from filing, or what is more likely, by persuading clients to file in the state first.

part to a court screening through the appointment of counsel only for meritorious petitions. On the other hand, the effect of counsel on success may also be directly attributable to the greater skill of the attorney in preparing the petition, to the more serious consideration afforded counsel petitions by the court, or to the screening out of procedurally defective petitions by counsel. This last effect, however, only seems to operate where courts adopt a policy to adhere to procedural requirements.

APPENDIX 1 - DESCRIPTION OF DATA COLLECTION PROCEDURES

This appendix provides a brief description of the data collection procedures used to obtain the information that forms the basis of this report. Specifically, this discussion includes the selection of sample districts, the sampling of petitions in each district, the forms and procedures used in collecting the data from court files, and the extent of missing or unusable data.

Selection of Sample districts

Judicial districts were chosen which would comprise a fairly representative sample of the United States while still being quickly accessible to researchers. An original proposal included the Central District of California, the Northern District of Illinois, the Middle District of Florida and the Court of Appeals for the Seventh Circuit. However, preliminary research indicated that the Middle District of Florida had been without its full complement of judges for several years and had an unusually large backlog of open habeas cases. Also because the case files in that district are stored in several offices, with no central index of prisoner filings, it was decided that the district was neither a representative nor efficient one to sample. The Eastern District of Virginia was eventually substituted for Florida as a southern district, for several reasons. There is an unusually high number of habeas filings in this district and the district is divided into three offices, which are maintained without centralization of clerking or judicial functions -- creating in essence three separate courts within one district. It is a large district with a diverse population and geographic area.

The Southern District of California was added in an effort to determine whether any of the factors included in the study vary from a large (600 petitions for our two year period in the C.D. Ca.) to a small district (80 petitions for the same two year period for the the S.D. Cal.), within the same state criminal justice system.

The Eastern District of Pennsylvania was chosen as the pilot study for the project, partly because of its proximity to our office and partly because of its similarity to the Northern District of Illinois. It is, like Illinois, a large urban district in a centralized location, with almost the same number of filings for our two year period. In contrast, the District of New Jersey was chosen because it is not centralized (judges are located in three cities across the state) and the same number of filings are handled by one third the number of judges.

The only court of appeals studied in depth was the Seventh Circuit but the choice of district courts allowed us to record fairly equal numbers of cases within the Third Circuit (500), the Ninth Circuit (680) and the Fourth Circuit (600).

Choice of Study Sample Within Districts:

The chosen sample was 100 percent of the habeas cases filed in each district and the Court of Appeals for a two year period. The cases were identified with the help of printouts from the Administrative Office of the U.S. Courts, whose computer stores the monthly reports (of cases filed and cases terminated) by each district and court of appeals. Since most courts do not keep records of habeas filings, accurate prisoner filing indexes, or store habeas cases separately from other civil filings, our only alternative

would have been to search the civil docket books for each district and identify each §2254 petition. In the large districts this would have been prohibitively time consuming and would not have been possible while planning the study. The Administrative Office printouts are included in the reports on each district. Many of the cases listed by the Administrative Office as a §2254 were, in reality, §1983 or §2255 petitions or others. It is logical to assume, therefore, that there are a number of §2254 cases which were likewise miscoded as other kinds of cases and which we did not and could not identify. We encountered this problem mainly in the Alexandria and Richmond offices of the Eastern District of Virginia.

Table 1 summarizes case attrition in each of the sample districts.

TABLE 1: CASES IN STUDY

	Total	7th Cir. CofA	ED Pa	D. NJ	ED Va Alx	ED Va Rch	ED Va Nfk	ED Va Total	ND IL	C.D. CA	S.D. CA
1. Overall Filings listed on A.O. Sheet (and % of Total 1.)	2102 100%	113 514%	244 11.6%	207 9.8%	166 7.9%	204 9.7%	229 10.9%	599 28.5%	260 12.4%	601 28.6%	78 3.7%
2. Excluded Cases (and % of 1.)	203 9.6%	7 6.2%	11 4.5%	31 15.0%	42* 25.3%	24 11.8%	10 4.4%	76 12.7%	41 15.8%	37 6.2%	7 9.0%
a §2255 Exclusion (and % of 1.)	77 3.6%	1 0.9%	6 2.5%	8 3.9%	6 3.6%	13 6.4%	1 0.4%	20 3.3%	10 3.8%	28 4.7%	4 5.1%
b §1983 Exclusion (and % of 1.)	40 1.9%	1 0.9%	2 0.8%	2 1.0%	15 9.0%	7 3.4%	7 3.1%	29 4.8%	3 1.6%	3 0.5%	-
3. Added Cases	-	-	3	-	2	-	2	4	-	-	-
4. Cases Analyzed (and % of Total 4.)	1899 100%	106 5.6%	236 12.4%	176 9.3%	126 6.6%	180 9.5%	221 11.6%	527 27.7%	219 11.5%	564 29.7%	71 3.7%

*Includes exclusion of 15 Lorton cases. Lorton is the District of Columbia prison facility, but is located in the Eastern District of Virginia. These "federal" prisoners may not appropriately file §2254 petitions in E.D. Va.

In order to ascertain what percentage of cases from any given year were not yet terminated, it was necessary to compare the filing printouts with the termination printouts for each district from 1975 through 1978. It was evident that a significant number of 1978 cases were still open in the district courts or on appeal and that a number of later 1977 cases were still on appeal. It was of concern that these cases might be the more complicated or unusual cases which would be particularly appropriate for inclusion in the study. It was, therefore, decided to survey the fiscal years of 1976 and 1977 (fiscal at that time being July 1 through June 30). It was necessary to balance the concern that as many cases as possible be closed, against the desirability of relatively recent data. Thus we were willing to tolerate the fact that a few of the cases in our study are still pending in various courts of appeals or still on remand in the district courts. The cases still pending in the courts of appeals or on remand are identified in the summaries for individual districts and in our data factor 31, items "(6) pending" or "(7) remand". There are a very few (between 5 and 10 cases) which are still pending in the district courts and these will be identified with each district.

Data Collection Method

It was first planned to use a single person to collect the data by reading each case and transferring the information onto the collection form. The original form included only three pages of questions but during the pilot study in E.D. Penn., this was doubled in order to include other information which seemed necessary. The

final form reproduced below includes forty-one questions, some with multiple answer possibilities. These answers were then key punched onto computer cards. After the amount of information to be collected was so dramatically increased, it was no longer possible for one person to complete all 2,100 cases in the time available. As a result, one second year law student with experience in data collection was employed and trained to assist with the districts in Pennsylvania, New Jersey, Illinois and Virginia and two other third year law students were employed and trained to assist in collecting data in the Central District of California. Each form was checked by the chief researcher to control possible variations in coding.

Before arriving at the collection site each court was contacted by letter and phone to explain the purpose and timetable of our study. Before beginning any collection an interview was conducted with the Clerk's Office employee who exclusively or primarily handled prisoner petitions. This preliminary explanation of the court's particular procedure helped in making coding decisions for that district -- i.e., if and how magistrates were involved in the process, how cases were returned to petitioners for procedural reasons, etc.

After receiving an explanation of the filing system, an arrangement was made for the pulling, reading and refiling of cases. In every district except the Southern District of California it was necessary for the researchers to pull and refile the cases and to transport them to the work area supplied. In that district, the Clerk's Office does not allow non-employee access to the files.

The filing clerk there agreed to supply a specified number of cases each day.

Each completed form was subsequently checked against the court's docket sheet for that case, and a double check against any errors of information transferral. In all districts except the Central District of California and the Northern District of Illinois all the cases were checked against the dockets by the chief researcher in order to eliminate any variations in coding particular items. In those two districts all cases were checked but only half were checked by the chief researcher because of time constraints.

Each completed form was then checked against either the court's index of prisoner petitions or the court's general index in order to cross-check information the petitioner had to give about previous federal petitions.

Interviews were held at some time during this collection process with a judge in each district and a magistrate or staff law clerk, depending on who was responsible for reviewing the habeas corpus cases. In districts where only the judges handled these cases, their law clerks were not interviewed except on an informal basis.

Additional information on procedures and statistics were obtained from the Clerk of the Court. This information is included in the data collection report on each district.

Data Collection Form

1 (Card sequence number)

CASE DATA SHEET

If data not available, leave blank; if not applicable, enter "--"

A. District Code: _ (0) (1) (2) (3) (4) (5) (6) (8) (9)

B. Case No.: _ _ - _ _ _ _ C. Case Name: _ _ _ _ _ _

D. Date of filing: _ _/_ _/_ _

E. Filed in forma pauperis: _
(1) Yes, requested and granted.
(2) No in forma pauperis request.
(3) Requested, but denied.
(9) Other. Explain: _____

F. Best estimate of the number of previous federal petitions filed by this petitioner: _ _

G. Best estimate of the number of previous state petitions filed by this petitioner: _ _

H. Status of petitioner at filing:

a. Custody by: _
(1) State.
(2) Federal.
(9) Other. Explain: _____

b. Nature of custody: _
(1) Imprisonment after conviction.
(2) Imprisonment before conviction.
(3) Parole.
(4) Probation.
(5) No custody (collateral consequences)
(6) Mental institution.
(7) On bail.
(9) Other. Explain: _____

I. Treatment of initial petition before final disposition: _/_
(List up to 2 actions according to code below)
(1) Returned to petitioner without being filed for failure to use proper form.
(2) Returned to petitioner without being filed for other procedural error.
(3) - - - - - - - - - -
(4) Transfer from another district.
(9) Other. (incl. Time lapse between receipt and filing) Explain: _____

J. Nature of claim made by petitioner: _/_/_/_ (List up to 4 claims)
(1) Attack on conviction.
(2) Challenge to sentence.
(3) Denial of proper appeal procedure. Explain: _____
(4) Excessive bail or denial of bail.
(5) Conditions of confinement.
(6) Probation or parole revocation.
(7) Parole denial.
(8) Delay (of trial, sentencing, appeal, or other).
(9) Other. (Incl. any claim against federal action). Explain: _____

K. Date of conviction challenged (J.1-3 only): _ _/_ _/_ _

L. Type of offense: ___/___/___/___/___ (List up to 5 offenses).
(1) Homicide (murder, manslaughter, etc.).
(2) Assault offenses (incl. kidnapping).
(3) Robbery.
(4) Property offenses (incl. theft, burglary, arson).
(5) Drug offenses.
(6) Sex offenses.
(7) Weapons offenses.
(8) Conspiracy.
(9) Other. Explain: _____

M. Type of trial (N.2 or 3): ___
(1) Jury.
(2) Judge only.
(9) Other. Explain: _____

N. Nature of plea: ___
(1) Guilty.
(2) Not guilty.
(3) Mixed plea to multiple counts.
(4) Nolo contendere.
(9) Other. Explain: _____

O. Was there appellate review of the conviction challenged: ___
(1) Yes. (3) Pending.
(2) No. (9) Other. Explain: _____

P. If nature of claim is attack on conviction (J.1), what was the ground: ___/___/___/___/___/___/___/___/___ (List up to 9 grounds)
(01) (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(02) (b) Conviction obtained by use of coerced confession.
(03) (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).
(04) (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).
(05) (e) Conviction obtained by a violation of the privilege against self-incrimination (incl. information used after failure to give Miranda warnings).
(06) (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(07) (g) Conviction obtained by a violation of the protection against double jeopardy.
(08) (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(09) (i) Denial of effective assistance of counsel.
(10) (j) Denial of right of appeal.
(11) Invalid identification procedure.
(12) Insufficient evidence of guilt.
(13) Unconstitutionality of the criminal statute.
(14) Denial of counsel at _____
(15) Denial of severance or prejudice resulting from trial with codefendant.
(16) Denial of speedy trial.
(17) Prejudicial statements by prosecutor, judge or witness.
(18) Failure to supply transcript.
(19) Erroneous jury instructions.
(20) Erroneous evidentiary rulings.
(21) Miscellaneous trial errors.
(22) New interpretation of applicable law.
(99) Other. Explain: _____

Q. Nature of counsel: __

(1) Retained counsel.
(2) State-appointed counsel.
(3) Federal-appointed counsel.
(4) Pro se.
(5) Paralegal or clinic assistance.
(6) Prison project counsel (private, but not paid by defendant).
(9) Other. Explain: _____

R. Counsel involvement began: __

(1) Before initial filing.
(2) After initial filing, before refiling.
(3) After filing, before hearing.
(4) After hearing, before disposition in District Court.
(5) After disposition in District Court, before request for Certification or before appeal.
(6) After appeal, before disposition in the Court of Appeals.
(9) Other. Explain: _____

S. Magistrate involvement: __/__/__/__ (List up to 4 items).

(1) No involvement of Magistrate.
(2) Petition assigned directly to Magistrate by Clerk's Office and report and recommendation filed.
(3) Petition referred to Magistrate by Court and report and recommendation filed.
(4) Assigned to Magistrate but apparently no action taken.
(5) Assigned to Magistrate, draft opinion written for Judge.
(9) Other. Explain: _____

T. Magistrate Code: __ (1-9)

U. Magistrate recommendation on final disposition: __/__/__/__/__ (Up to 5 items)

(0) Transfer to another district.
(1) Deny for failure to use proper form.
(2) Deny for failure to exhaust state remedies.
(3) Deny for other procedural defect.
Explain: _____
(4) Deny for failure to state a claim (includes mootness and not a federal question).
(5) Deny on the merits.
(6) Grant in part, but petitioner not to be released.
(7) Order petitioner released.
(8) Petition to be dismissed at request or with consent of petitioner.
(9) Other. Explain: _____

2/ __ __ __ __ __ __

V. Hearing(s) held by Magistrate: __/__/__/__ (List up to 4 items; can repeat items)

(1) No hearing held.
(2) Evidentiary hearing (Duration, if known _____/_____).
hours minutes
(3) Argument (Duration, if known _____/_____).
(4) Combination (Duration, if known _____/_____).
(5) Hearing of unknown nature (Duration if known _____/_____).
(6) Conference (Duration, if known _____/_____).
(9) Other. Explain: _____

W. Date of assignment or referral to Magistrate: __ __/__ __/__ __

X. Date of final report and recommendation by Magistrate: __ __/__ __/__ __

Y. Government involvement at District Court __/__/__/__/__ (List up to 5 items)

(1) No involvement by Government.
(2) Government sends records of prior proceedings.
(3) Government files response to factual allegations.
(4) Government files response to legal issues.
(5) Government appears at evidentiary hearing.
(6) Government appears at hearing on legal issues.
(7) Government attends conference.
(8) Government involvement in interlocutory appeal.
(9) Other. Explain: _____

Z. Judge Code (within district): __ __ (2 digit number: 01-20).

AA. Date of final disposition by District Court: __ __/__ __/__ __ (date on order)

BB. Final disposition by District Court: __/__/__/__/__ (List up to 5 items).

(0) Transfer to another District.
(1) Denied for failure to use proper form.
(2) Denied for failure to exhaust state remedies.
(3) Denied for other procedural defect. Explain: _____
(4) Denied for failure to state a claim (including mootness and not a federal question).
(5) Denied on the merits.
(6) Granted in part, but petitioner not released.
(7) Petitioner ordered released.
(8) Petition dismissed at request or with consent of petitioner.
(9) Other. Explain: _____

CC. Hearing(s) held in District Court: __/__/__/__ (List up to 4 items, repeat.)

(1) No hearings held in District Court.
(2) Evidentiary. (Duration, if known _____ hours / _____ minutes).
(3) Argument. (Duration, if known _____ hours / _____ minutes).
(4) Combination. (Duration, if known _____ hours / _____ minutes).
(5) Hearing of unknown nature. (Duration, if known _____ hours / _____ minutes).
(6) Conference. (Duration, if known _____ hours / _____ minutes).
(9) Other. Explain: _____

DD. Opinion in District Court: __

(1) No opinion.
(2) Opinion written, not published.
(3) Opinion written and published (Citation: _____).
(4) Opinion written, no information on publication.
(5) Memorandum.
(9) Other. Explain: _____

EE. Appeal of final disposition: __

(1) No request or consideration of Cert. of P.C. — No appeal taken.
(2) Certificate of P.C. denied and no appeal.
(3) Certificate of P.C. denied and appeal taken (treated as request for Cert. of P.C. by C. of A.)
(4) Certificate of P.C. granted and appeal taken.
(5) Court notes probable cause for appeal but no appeal taken.
(6) Any government appeal of final order by District Court.
(7) No request or consideration of Cert. of P.C. — Appeal taken.
(8) Any interlocutory or intermediate appeal. Explain: _____
(9) Other. (incl. Cross-Appeals). Explain: _____

FF. If the petition was considered on the merits of claim (BB.6 or 7) what was the nature of the successful claim: ___

(1) Attack on conviction.
(2) Challenge to sentance.
(3) Denial of proper appeal procedure. Explain: _____
_____
(4) Excessive bail.
(5) Conditions of confinement.
(6) Probation or Parole revocation.
(7) Parole denial.
(8) Delay (including speedy trial and sentencing).
(9) Other. Explain: _____

GG. If granted in whole or in part on merits of claim attacking conviction (FF.1) what was the ground of the successful claim: ___/___/___ (Up to 3 grounds).

(01) (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(2) (b) Conviction obtained by use of coerced confession.
(3) (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).
(04) (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).
(05) (e) Conviction obtained by a violation of the privilege against self-incrimination.
(06) (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(07) (g) Conviction obtained by a violation of the protection against double Jeopardy.
(08) (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(09) (i) Denial of effective assistance of counsel.
(10) (j) Denial of right of appeal.
(11) Invalid identification procedure.
(12) Insufficient evidence of guilt.
(13) Unconstitutionality of the criminal statute.
(14) Denial of counsel at _____
(15) Denial of severance or prejudice resulting from trial with codefendant.
(16) Denial of speedy trial.
(17) Prejudicial statements by prosecutor, judge or witness.
(18) Failure to supply transcript.
(19) Erroneous jury instructions.
(20) Erroneous evidentiary rulings.
(21) Miscellaneous trial errors.
(22) New interpretation of applicable law.
(99) Other. Explain: _____
_____

Specification of Residual Categories for Selected Variables

In any quantitative study of the courts a certain amount of judgment must be used in categorizing court information. The categorizing for most of the factors discussed above was not problematic since the vast majority of the information could be grouped in a few district and internally homogeneous categories. However, two factors -- the nature of the claim and the grounds for attack on conviction -- posed a difficult coding problem. Each court had several unique claims or grounds that defied classification with more commonly found responses and this information was coded in the residual category for purposes of statistical analysis. The specified contents of these residual categories are described in the following tables.

Appendix 1 Table 2:

Tabulation of Factor 24: 'Other' Responses

"Other' Explanations	Over-all	Districts: 7th Cir. CA	E.D. Pa.	D. NJ	E.D. Va.	N.D. Ill.	C.D. CA.	S.D. CA.
Computation of Sentence	38	3			6	3	23	3
Dispute over Good Time	13		1		8	3		1
Claim Concerning Detainer	42	1	7	4	17	9	3	1
Extradition	14	1	2	2	5	2		2
Civil Commitment	4	2			1	1		
Illegal Detention Gen'ly	13		1	2	3	2	5	
Misc.	53							
Attack on Convict.	11	1	1	3	2	2	1	1

Appendix 1 TABLE 3:

Tabulation of Factor 25: 'Other' Responses

Districts

'Other' Responses	7th Circuit	E.D. PA.	D. NJ.	E.D. VA.	N.D. Ill.	C.D. CA.	S.D. CA.
Judicial Misconduct	2	8	0	12	1	13	3
Prosecutorial Misconduct	9	7	6	15	4	12	2
Failure to Charge of Venue	7	5	3	8	2	3	0
Due Process Violat.	8	8	0	10	1	3	3
Irregularities Jury	9	11	3	19	5	21	0
Misc. Challenge to Conduct of Counsel	2	1	0	4	0	13	2
Improper Indictment	1	1	3	16	2	8	1
Failure to Honor Plea Bargain	1	1	3	7	2	4	3
Confirmation Claims	3	0	1	8	2	24	2
Witness Testimony	0	3	1	22	9	25	0
Misc. Trial Errors	9	9	3	14	7	37	1
Attack on Court Jury	0	2	0	6	0	3	2
Police Misconduct	0	1	1	6	3	15	1
Misc.	6	16	8	82	19	86	11

CONTINUED

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APPENDIX 2- DESCRIPTION OF ADDITIONAL DATA AVAILABLE

This report does not include all of the information collected in the course of this project nor does it attempt to exhaust the analytical potential of the data presented. A number of appendices, too lengthy to include in this printing of the report contain additional data which will be of interest to those wishing to undertake further analysis. A fuller description of the data collected is given in this appendix for those interested in additional research on federal review of state court judgments. All appendices are described below. Any of the information described here is available upon request.

Appendix A describes the selection of district courts. One sample of petitions and other methodological issues contained in Appendix 1 of this report. In addition, Appendix A included extensive descriptions of the organization and procedures in each district court and specifically descriptions of procedures in clerks' offices, composition of the courts, interviews with court personnel, and various irregulaties and peculiarities in the sample of petitions.

Appendix C lists in numerical order the 39 data items (factors) which were analyzed and lists the possible answers for each one as it appears in the data collection form. It then describes in detail what court information has been coded in specific answer categories. This information would be extremely helpful for those interested in further statistical analysis of the data since it describes fully the content of each response category.

Appendix F presents the frequency distribution for each of the 39 factors that were included in the statistical analysis.

Specific pages of the appendix were referenced in this report where it seemed that more complete information would be of interest to the reader. Each of the 39 factors and the page location of their frequency distribution is listed below. Anyone interested in specific frequency distributions can identify them by factor name and appendix page number, e.g., F14.

Appendix X contains selected cross tabulations between the factors 1-33, as well as summary statistics for selected compositions of the interval factors (factors 34-39). The following matrix identifies pages in Appendix X on which specific cross tabulations can be found. To locate the desired page, find the name of the one factor in the columns across the top of the page and find the name of the second factor in the rows down the side of the page. The cross tabulation demonstrating the relationship between the two factors can be found at the intersection of the row and the column.

APPENDIX F: FREQUENCY COMPILATIONS

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APPENDIX X: CROSS TABULATIONS

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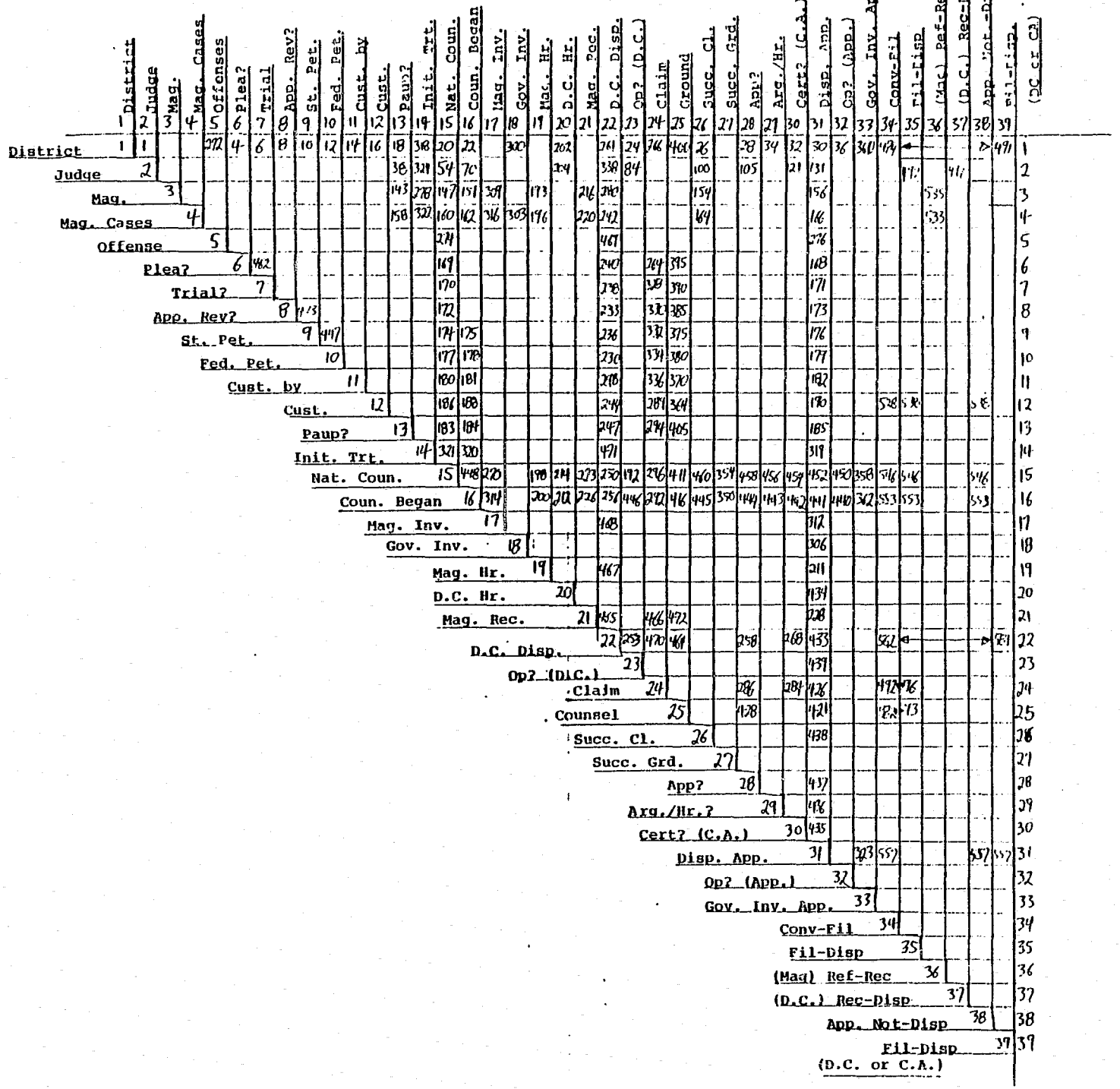

Finally, the raw data are available on machine readable magnetic tape for those interested in more extensive reanalysis. All requests for data should be addressed to Professor Paul H. Robinson, Rutgers Law School, Fifth and Penn Street, Camden, New Jersey 08102.

END