2012

State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between the State and Federal Governments Can Improve the Criminal Justice System Nationally

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Barring some shock that seriously rearranges the legal landscape, a salient development in the years ahead will be an intensified focus on the adequacy of state post-conviction review systems. If state and federal policy makers perform their respective roles appropriately, this development will prove to be good news for the entire criminal justice system.

To be sure, an omnipotent policy maker facing a blank computer screen might consider abolishing state post-conviction review altogether. Perhaps petitioners' relatively low success rate might not justify the costs in money and case-resolution time that those proceedings consume. Perhaps one might split the resources instead between improvements in the state trial and direct appeal system and the federal habeas corpus regime.

But we have no omnipotent policy makers and we are not typing on a blank screen. State post-conviction review is not going away.

The states have sound reasons for not abandoning their systems of collateral attack. Historically such systems have proved their value as protectors of liberty at least from the time of conflicts over slavery before the Civil War. Practically they provide convenient fora for the examination of claims (e.g., ineffective assistance of trial counsel, prosecutorial withholding of exculpatory evidence) that would be awkward to examine as part of the initial proceedings. Indeed the experimental efforts of some large states in recent years to set up unitary review processes in order to speed up cases, particularly capital cases, have proved to be a resounding failure.[1]

From the viewpoint of the federal government, quite apart from whatever genuine weight officeholders may give to notions of comity, the more work that is done at the state level, the less needs to be done at the federal level.

These considerations have previously led me to urge the Supreme Court to articulate a constitutional right to counsel in capital state post-conviction proceedings[2] and to suggest that the states should proceed down this path in advance of the Court.[3] That body is slated to render a decision in the area during 2012[4] in a non-capital case where the petitioner raises a disturbing issue. Under state law his only opportunity to assert his undoubted Sixth Amendment right to the effective assistance of counsel at trial[5] is in a state post-conviction proceeding. But since he is not provided an effective lawyer there to assert the claim and since the federal courts will nonetheless consider the claim defaulted if not properly presented there,[6] how is the state to be held to its Sixth Amendment duty?

Regardless of the Court's answer, it has already made a decision during 2011 that insures that the adequacy of state post-conviction proceedings will be a centrally contested issue in the years ahead.

In *Cullen v. Pinholster*[7] the Court construed Section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which bars federal habeas relief in many circumstances unless the state courts' adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." It ruled that the federal habeas petitioner seeking to meet this threshold burden was limited to the record of the state court proceedings and was not entitled to a federal hearing until he had crossed the threshold. Critically, however, the holding was limited to a context in which petitioner did not contest the fact that he had been given a full and fair opportunity to develop the claim in the state post-conviction proceedings.

Had the fact been otherwise the ruling would certainly have been otherwise as well. Textual constructions of various parts of AEDPA would have provided the rationale,[8] but all would have occurred in the shadow of the powerful canon that a statute should be construed so as to avoid plausible doubts as to its constitutionality.[9] And if AEDPA were construed so as to deny a petitioner one full and fair opportunity to attack the constitutionality of his conviction in some court it would be unconstitutional under a line of cases stretching back a century or more[10] as well as more recent precedent under the Suspension Clause.[11]

Moreover, the Court has in the past few years again made clear that once a state creates a state post-conviction system, that system must provide due process or be subject to a structural attack under Section 1983.[12]

Stepping back, then, and taking the policy maker's perspective, the path ahead is clear enough.

The incentives for states to have robust systems of post-conviction review have increased. If the states create such systems the federal courts will treat their individual

Federal Sentencing Reporter, Vol. 24, No. 4, pp. 298–299, ISSN 1053-9867 electronic ISSN 1533-8363.
 DOI: 10.1525/fsr.2012.24.4.298.

outcomes with greater respect than before, but if the states do not create such systems the failure is more vulnerable to structural attack than before.

The federal government's interests, both in enforcement of the Bill of Rights and in the reduction of its own courts' workloads, lie in the direction of insuring full examination of each petitioner's federal constitutional claims at the state post-conviction level.[13] For example, if a state summarily dismisses a post-conviction petition pleading facts that if true would warrant relief the federal petitioner is entitled to a federal court hearing, which would not be the case if the state adjudicated the factual merits.[14]

Those states that have not already done so (and a number have[15]) should provide for effective assistance of counsel on state post-conviction review as the simplest method of responding to the new pressure to ensure that their systems provide a full and fair opportunity for the litigation of prisoners' constitutional claims. From the states' viewpoint, the law regarding effective assistance of counsel is well-established and government-friendly. Any attempt to meet their due process obligation by some other means is extremely unlikely to succeed, just as no system of pro se representation, however many resources it provided, could realistically fulfill the state's due process obligation to furnish counsel at a criminal trial.[16]

It is easy to see how a state might provide lawyers and still maintain an unfair post-conviction system (e.g., by denying discovery), but it is hard to see how a state might maintain a fair post-conviction system and not provide lawyers.

The federal government for its part does itself no favors by lax enforcement of the states' obligations to provide meaningful state post-conviction proceedings. On the contrary, it only imposes on itself the burden of taking up the slack.

The confluence of pressures now centered on state post-conviction proceedings could yield genuine benefits to the entire criminal justice system and all of its stakeholders. If the state and national governments each discharge their duties responsibly, the federal system will be working as it should: efficiency will be furthered while at the same time "a double security arises to the rights of the people."[17]

Notes

1 *See, e.g.*, Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendations on the Administration of the Death Penalty in California 51 (2008), *available at* http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf.

2 Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Post-conviction Proceedings*, 91 Cornell L. Rev. 1079 (2006).

3 Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases,* 4 Ohio St. J. Crim. L. 183 (2006).

4 The case is *Martinez v. Ryan*, No. 10-1001 (argued Oct. 4, 2011).

5 Gideon v. Wainwright, 372 U.S. 335 (1963).

6 *See* Coleman v. Thompson, 501 U.S. 722 (1991).

7 131 S. Ct. 1388 (2011).

8 *See* Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Litigation,* 61 Hastings L.J. 1, 57–64 (2010). Other statutory possibilities are noted in Freedman, *supra* note 3, at 189–90.

9 *See* Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So:* Ex Parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 Ala. L. Rev. 531, 584–86 (2000).

10 *See* Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 Wash. & Lee L. Rev. 85, 139–40 (2012).

11 *See* Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. Rev. __ (forthcoming May 2012) (*draft available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947341).

12 *See* Skinner v. Switzer, 131 S. Ct. 1289, 1296 (2011); Dist. Atty's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009).

13 *See* Case v. Nebraska, 381 U.S. 336, 340 (1965) (Brennan, J., concurring).

14 Morris v. Thaler, 425 F. App'x 415, 422–24 (5th Cir. 2011).

15 For one list, see Freedman, *supra* note 2, at 1086 n.46.

16 Powell v. Alabama, 287 U.S. 45 (1932).

17 The Federalist No. 51 (James Madison).