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

Eric M. Freedman
Maurice A. Deane School of Law at Hofstra University

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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 proceedings in order to speed up cases, particularly capital cases, have proved to be a resounding failure.

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 and to suggest that the states should proceed down this path in advance of the Court. That body is slated to render a decision in the years ahead.

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

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ERIC M. FREEDMAN
Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra Law School
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. 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.

Those states that have not already done so (and a number have) 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.

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 could realistically fulfill the state’s due process obligation to furnish counsel at a criminal trial.

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.”

Notes
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.
15. For one list, see Freedman, supra note 2, at 1086 n.46.
17. THE FEDERALIST No. 51 (James Madison).