THE GREAT WRIT ENCUMBERED BY GREAT LIMITATIONS: IS THE THIRD CIRCUIT'S NOTICE REQUIREMENT FOR HABEAS RELIEF A STRUCTURAL BIAS AGAINST "PERSONS IN CUSTODY?"

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I. Introduction

The great writ of habeas corpus[1] allows any individual who is in

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[1] The "great writ" is a popular term for the writ of habeas corpus. *Ex parte* Bollman, 4 Cranch 75, 95 (1807). Habeas corpus is a Latin term that literally means "the body be

custody[2] in violation of the Constitution, laws, or treaties of the United

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delivered." BADSHAH K. MIAN, AMERICAN HABEAS CORPUS: LAW, HISTORY, AND POLITICS 29 (1984); RONALD P. SOKOL, FEDERAL HABEAS CORPUS (2d ed. 1969). According to Black's Law Dictionary:

> It is the name given to a variety of writs, (of which these were anciently the emphatic words), having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are usually understood to mean the *habeas corpus ad subjiciendum*. . .The primary function of the writ is to release from unlawful imprisonment.

BLACK'S LAW DICTIONARY 709 (6th ed. 1990). *See infra* note 42 for other types of the writ of habeas corpus.

Due to the ambiguous manner in which the Constitution referred to the writ of habeas corpus in Art. I, § 9, cl. 2, finding a coherent body of legal doctrine to govern habeas relief has ceaselessly preoccupied academics. *See, e.g.*, Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477 (1996); Eric M. Freedman, *Milestones in Habeas Corpus: Part I: 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 (2000); Larry W. Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REFORM 685 (1990); John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271 (1996); Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 AM. J. CRIM. L. 99 (1995); John B. Oakley, *Legislating Federal Crime and its Consequences: The Myth of Cost-Free Jurisdictional Reallocation*, 543 ANNALS 52 (1996); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203 (1998); Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994); Phillip Allen White, Comment, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. L. REV. 65 (1997).

[2] The use of the terminology "persons in custody" as opposed to "prisoners" has raised several questions about the scope of habeas relief. Andrea G. Nadel, *When is a Person in Custody of Governmental Authorities for Purpose of Exercise of State Remedy of Habeas Corpus—Modern Cases*, 26 A.L.R.4th 455, §§ 2b-3a (2000) (referring to different cases where persons who were not physically confined in jail were considered to be in "constructive custody" and as such entitled to habeas relief); Kerri L. Arnone, Note, *Megan's Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief*, 42 ARIZ. L. REV. 157 (2000). Custody could mean any individual whose freedom is inhibited by a judgment of any court in the United States. *Id.* Following that definition, individuals under house arrest, people on probation, and people who are required to register as sex offenders in any neighborhood that they move into could argue that they are in custody for purposes of habeas corpus relief. *Id.* Probation is another area that may be considered as satisfying the custody requirement. *Id.* Several courts have held that a prisoner released on bail or on personal recognizance qualifies to seek habeas relief to determine the legality of his or her restraint. *See, e.g., In re* Smiley, 427 P.2d 179 (Cal. 1967); Mello v. Superior Court, 370 A.2d 1262 (R.I. 1977); Jacobson v. State, 510 P.2d 856 (Nev. 1973); Commonwealth v. Orman, 408 A.2d 518 (Pa. 1979); *Ex parte* Arms, 582 S.W.2d 434 (1979); Kan-Henderson v. Schenk, 631 P.2d 246 (Kan. 1981). These decisions may not be valid because the United States Supreme Court in 1989 held that "collateral legal

States to challenge the legality of his or her confinement.[3] Habeas corpus was a significant expression of the concern of the Framers of the Constitution[4] for liberty.[5] To ensure minimal legislative interference[6] with the availability of habeas corpus, the Framers wrote the Suspension Clause into the Constitution to safeguard individual liberty from abuses of political power.[7] The writ of habeas corpus underscores the fundamental need for fairness in the administration of justice.

Congress, however, has been able to tamper with the great writ by instituting numerous procedural requirements for habeas relief.[8] Such

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consequences" are not sufficient to meet the custody requirement. Maleng v. Cook, 490 U.S. 488, 492 (1989).

[3] The habeas petitioner must claim that his or her imprisonment violates federal law. 28 U.S.C.A. § 2241 (West 1997); Fay v. Noia, 372 U.S. 391, 423 (1963).

[4] The Framers of the Constitution debated vigorously about the Suspension Clause. *See infra* note 5. The Constitution did not explicitly delineate the scope of the writ of habeas corpus and which branch of government has the power to suspend the great writ.

[5] The idea of liberty resounded in the Framers' arguments about the Suspension Clause. *See* THE FEDERALIST Nos. 84, 85 (Alexander Hamilton). Even though the United States Supreme Court has not precisely defined liberty, the Court agrees that liberty involves more than physical restraint. *See e.g.*, Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833 (1992); Poe v. Ullman, 367 U.S. 497, 523 (1961). Most habeas cases, however, involve prisoners. *See, e.g.*, United States v. Miller, 197 F.3d 644 (3d Cir. 1999).

[6] The Framers were concerned about government interference with the writ of habeas corpus more than they were about the details of its operation. *See infra* note 7.

[7] U.S. CONST. art. 1, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Suspension Clause does not declare the existence of the writ of habeas corpus. *Id.* Furthermore, the Constitution does not protect the Suspension Clause from legislative assaults. Thus, it remains a subject of controversy whether the Constitution provides affirmatively for a writ of habeas corpus. Professor Freedman suggests that the Framers simply assumed the existence of the great writ and therefore found it appropriate to protect the writ from legislative interference. Freedman, *supra* note 1, at 538 n.20. Despite these conflicts, academics agree that the unanimity of the Framers during the constitutional debates on the importance of protecting this writ from political assaults indicates their belief that habeas relief was of paramount importance. Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952); ROLLIN C. HURD, TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS (2d ed. 1972).

[8] In *Ex parte* Bollman, 8 U.S. 75 (1887), Chief Justice John Marshall interpreted the Judiciary Act of 1789 as excluding state prisoners from invoking the privilege of the federal writ of habeas corpus. *See* First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789). Marshall's interpretation has been severely criticized. Freedman, *supra* note 1, at 540. On the other hand, some commentators who agree with Marshall's position assume that state prisoners originally had no right to the federal writ of habeas corpus. *See, e.g.*, Michael O'Neill, Esq., *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1512 (1996).

procedural barriers minimize the availability of habeas relief. This proves significant in cases where it is the prisoner's last hope for justice.[9] Furthermore, the courts have aided Congress in putting greater burdens on habeas petitioners by adding their own procedural requirements.[10] The effect of the combined actions of Congress and the courts in creating numerous procedural hurdles for the habeas petitioner thwarts the constitutional concern for fairness in habeas proceedings.[11] Remarkably, Congress expressed that the equitable foundations of the writ have been threatened by "unnecessary delay" and "abuse of the writ," so Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[12] This statute became a habeas petitioner's nightmare despite Congress' intent.[13]

The plight of the habeas petitioners in overcoming these hurdles is significant because most habeas petitioners are *pro se*.[14] In modern times, more prisoners are aware of the existence of the great writ but

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[9] Waley v. Johnston, 316 U.S. 101, 105 (1942) (stating that in some cases, habeas is the only recourse for the prisoner).

[10] *See* Rose v. Lundy, 455 U.S. 509 (1982) (establishing that a state habeas petitioner must first exhaust his or her claims in state court before seeking relief in federal court). Even though the Court did not hold that failure to fulfill the exhaustion requirement destroys federal jurisdiction, as a practical matter, the Court leans strongly in favor of the petitioner exhausting his or her state remedies to gain access to federal court. Granberry v. Greer, 481 U.S. 129, 131 (1987).

[11] Petitioners are forced to satisfy various requirements as a condition to pursuing their constitutional claims. Rose v. Lundy, 455 U.S. 509 (imposing the total exhaustion requirement). At certain times, however, the Court has not followed the example of Congress in making habeas relief more difficult to obtain. For example, in Sanders v. United States, 373 U.S. 1, 8 (1963), the Court emphasized that res judicata does not apply in a habeas proceeding.

[12] Pub. L. No. 104-132 (1996); 28 U.S.C.A. § 2244 *et seq*. According to Congress, AEDPA will eliminate "unnecessary delays" in habeas proceedings. *See infra* note 22. It is, however, difficult to see how AEDPA can achieve this objective given the ambiguous language of the statute. Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1117, 1123-25 (1998). Furthermore, it took four years for the United States Supreme Court to clarify how to apply the standards of AEDPA. *See* Williams v. Taylor, 529 U.S. 362 (2000).

[13] Congress stated that the purpose of the statute was to eliminate "unnecessary delays" and curb "abuse of the writ." *See infra* note 22. One example of the consequences of AEDPA is the notice requirement discussed in Part IV. Even though Congress' intent points to an attempt to safeguard the writ, the Third Circuit believes that two provisions of AEDPA pose a danger of habeas petitioners losing the opportunity to assert valid habeas claims. *See infra* Part IV.

[14] VICTOR E. FLANGO, NATIONAL CENTER FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 37 (1994).

the complex procedural hurdles prevent them from fully using it.[15] Additionally there is no requirement that the government provide an attorney in collateral hearings such as habeas.[16]

Due to great concern for fairness, common law courts construed habeas petitions liberally, especially for *pro se* petitioners.[17] Most courts are able to unilaterally construe any petitioner's post-conviction pleading as a habeas petition through liberal construction.[18] This form of assistance by the courts enhanced the constitutional privilege of the great writ.[19]

Courts in the Third Circuit, however, cannot unilaterally construe petitioners' post-conviction pleadings as habeas applications.[20] The Third Circuit follows the Second Circuit,[21] permitting habeas petitioners to circumvent AEDPA's statute of limitations and its bar on successive applications.[22] In place of traditional liberal construction, the Third

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[15] Procedural issues pose serious difficulties for the average litigant. Symposium, *Restucturing Federal Courts: Habeas: Elected Judges and the Death Penalty in Texas: Why Full Habeas Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1807 (2000). For example, a habeas petitioner must comply with the prohibition on successive applications and verify that the statute of limitations has not rendered his or her petition moot. *Id.* It is noteworthy that even attorneys encounter problems with the complex nature of procedural rules. *Id.*

[16] A collateral hearing is a post-appeal process that provides an avenue for litigants to attack a final judgment. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.1 (2d ed. 1999). Usually petitioners are not entitled to the assistance of counsel at this stage of the judicial proceeding because they have fully availed themselves of the normal judicial process. *Id.* However, individuals on death row have a right to counsel in a federal habeas proceeding. 21 U.S.C. § 848(q)(4)(B).

[17] Angela Carson, Note, Lonchar v. Thomas*: Protecting the Great Writ*, 13 GA. ST. U. L. REV. 809, 816-17 (1997) (explaining that the liberal characterization of the writ of habeas corpus stems from the concept of liberty). Numerous procedural rules, similar to the Third Circuit's notice requirement, do not reflect the constitutional concern for liberty.

[18] *See infra* Part IV.

[19] *Id.*

[20] United States v. Miller, 197 F.3d at 652 (barring district courts from automatically construing any post-conviction motion under AEDPA § 2255 as a habeas application); Mason v. Meyers, 208 F.3d 414, 418 (3d Cir. 2000) (extending the bar to post-conviction motions under AEDPA § 2254). *See infra* part III for a distinction of AEDPA §§ 2254 and 2255.

[21] Adams v. United States, 155 F.3d 582 (2d Cir. 1998).

[22] *Miller*, 197 F.3d at 652. The Third Circuit's reasoning deviates from the legislative intent of AEDPA. In enacting that statute, Congress intended to provide for a speedy and more efficient habeas review. H.R. CONF. REP. NO. 104-518, at 111; Pub. L. No. 104-132 (1996). According to the Conference Committee report:

> This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of *unnecessary delay* and *abuse* in

Circuit has a notice requirement.[23] The Third Circuit reasoned that this will protect the petitioner from a bar of his habeas claims if the district court misconstrues his petition.[24] In this way, the Third Circuit hopes to protect petitioners' constitutional privilege of habeas relief.

The notice requirement uses the court's time and resources and may not yield any positive results. Furthermore, it involves complicated legal decisions that *pro se* petitioners may not fully comprehend. To put into a petitioner's hands crucial procedural decisions that sometimes prove difficult even for attorneys is a recipe for disaster. Moreover, different regulations between jurisdictions defy uniformity, which is essential for fair administration of habeas relief. The consequences of the Third Circuit's decision run afoul of the express purpose of AEDPA.[25] Additionally, they defeat efforts to

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> capital cases. It sets a one-year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court. It provides for the exhaustion of state remedies and requires deference to the determinations of state courts that are neither "contrary to," nor an "unreasonable application of," clearly established federal law.
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> The revision in capital habeas practice also sets a time limit within which the district court must act on a writ, and provides the government with the right to seek a writ of mandamus if the district court refuses to act within the allotted time period. Successive petitions must be approved by a panel of the court of appeals and are limited to those petitions that contain newly discovered evidence that would seriously undermine the jury's verdict or that involve new constitutional rights that have been retroactively applied by the Supreme Court.

Id. (emphasis added). Obviously, AEDPA is another burden on the administration of habeas relief. *See generally* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 383 (1996); Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477, 1489 (1996). AEDPA falls among the numerous congressional assaults on the great writ. *Id.* The Conference Committee's note is cited to underscore the point that the Third Circuit's presumption in *Miller* that the notice requirement will assist habeas petitioners in escaping the harsh effects of AEDPA cannot withstand analysis in the light of the expressed purpose of Congress. *See infra* Part IV.

[23] *Miller*, 197 F.3d at 653. In the Third Circuit, for a court to construe a petitioner's post-conviction pleading as a habeas application, the court must notify the petitioner and give the petitioner the opportunity to transform, withdraw or file a new petition. *Id.*

[24] *Id.* The Third Circuit reasoned that in some cases, a court's liberal characterization of a post-conviction application might adversely affect a habeas petitioner. *Id.* Even though this appears to be advantageous to habeas petitioners, a closer examination demonstrates that the Third Circuit's new rule will slow down habeas relief. *See infra* Part IV.

[25] This note does not suggest that AEDPA is more beneficial to the habeas petitioner than the "notice requirement." Both have the same effect of complicating the habeas process and making it less available to persons in custody. This note, however, contends that the notice requirement is an additional burden that worsens the existing procedural hurdles that have haunted habeas petitioners for years. *See infra* Part IV.

achieve efficiency and preserve judicial economy.

This Note will examine the practical effects of the Third Circuit's notice requirement in a habeas corpus proceeding. Part II of this Note sets forth the nature of the problem and outlines the procedural hurdles that encumber habeas corpus.[26] Part III of this Note discusses the legislative history of habeas corpus relief and the recent United States Supreme Court decision that establishes the standard for habeas review.[27] Part IV analyzes the Third Circuit case that announced the notice requirement.[28] This Note concludes in Part V that the notice requirement constitutes a major obstacle to *pro se* habeas petitioners in the Third Circuit.[29]

II. Background

A. *Identifying the Issues*

Two years after the Constitutional Convention of 1787, Congress addressed the constitutional scope of habeas corpus review.[30] State defendants were deemed unable to benefit from this constitutional privilege.[31] Widening the scope of habeas review to include state

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[26] This note focuses on "the exhaustion doctrine" and "the successive petitions and abuse of writ doctrine" because those two AEDPA provisions form the basis for the Third Circuit's rule establishing the notice requirement. *See infra* Part II.

[27] *See infra* Part III.

[28] *See infra* Part IV.

[29] *See infra* Part V.

[30] First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789). This Act, according to the United States Supreme Court's dictum in *Bollman*, 4 Cranch at 95, prohibits state prisoners from invoking habeas corpus. Professor Freedman criticized this position as wrong. *See* Freedman *supra* note 1. It was not until 1867 that Congress extended the writ to state prisoners. The 1789 statutory exclusion of state prisoners raises a double standard that is contrary to the fundamental notion of liberty contained in the Constitution. It is difficult to see why the Framers would grant a privilege under the national Constitution to federal defendants and not to state defendants who also happen to be citizens of the United States. *Accord* Freedman, *supra* note 1. Furthermore, determining the scope of habeas relief stirs the controversial debates about "federalism, separation of powers, the purposes of the criminal justice system, and the nature of litigation." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.1 (3d ed. 1999).

[31] *Bollman*, 8 U.S. at 95. Due to the unavailability of federal habeas relief, state defendants had recourse only to various forms of post-conviction remedies based on statutory provisions or the common law. 1 JAMES LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 3.5(a), 6.1 (3d ed. 1998). State post-conviction remedies continue to be relevant for state defendants because even when federal habeas corpus has been extended to them, state defendants have to show

defendants' claims raises the question of finality of judgment, which is an important concept in our jurisprudence for several reasons.[32] It protects the expectations of the state in prosecuting criminals so that trials do not continue endlessly,[33] and the state can focus its resources on other endeavors. Finality also promotes speedy trials because it allows courts to dispose of older cases and move on to newer ones. Lastly, it conserves judicial resources.[34]

The long history of the availability of federal habeas review to state petitioners fuels the debate between proponents of states' rights and individual constitutional rights. As the judicial system developed, it became clear that state defendants may not be locked out of federal habeas proceedings. Congress yielded to state defendants' access to federal habeas relief,[35] and opened wide the doors of habeas relief.[36] Therefore, courts determined how to curtail misuses of habeas corpus relief.[37]

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that they exhausted all available state remedies. *Rose*, 455 U.S. at 509.

[32] Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 441 (1963); James D. Hopkins, *Easing the Tension Between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660 (1970); Paul C. Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DEPAUL L. REV. 740 (1972). These commentators argue in favor of finality, thereby implying their support for restricting the scope of the writ. On the other hand, some argue that Congress has effectively widened the scope of habeas review. Still others hold the view that whereas Congress has broadened the definitional scope of the writ, Congress has simultaneously blocked access to habeas corpus relief through numerous procedural obstacles.

[33] *See supra* note 32.

[34] These advantages inherent in the finality of judgment principle are very important in the judicial process. The overarching question, however, is whether it is appropriate to consider finality of judgment as more important than the fairness principle embedded in the habeas process. This debate is highlighted by some academics who have argued that habeas relief is essential in order to preserve individual rights. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985). Others argue that it enhances federal-state dialogue. R.M. Cover & T.A. Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

[35] *See* Act of February 5, 1867, ch. 28, 14 Stat. 385 (1867).

[36] *Ex parte* McCardle, 73 U.S. 318, 325-26 (1867).

[37] Sanders v. United States, 373 U.S. 1, 17 (1963). In order to maximize their chances of being granted habeas relief, some petitioners either "deliberately withheld" some grounds for relief or "abandoned" those grounds only to reassert them in a subsequent habeas application, if the prior application was unsuccessful. Whether the standard of habeas review should be different in death penalty cases has been an issue of various opinions between the Supreme Court Justices and academics. Chief Justice Rehnquist does not see any difference. *See* Murray v. Giarratano, 492 U.S. 1 (1989). On the other hand, Justice Brennan expressed the opposite view. *See* Murray v. Carrier, 477 U.S. at 526 (1986)

When state death penalty cases are involved, the problems inherent in the habeas process become more acute. There federal habeas review becomes a decisive factor between the life or death of an innocent defendant.[38] In most death penalty cases, the Supreme Court considers policy questions simultaneously with legal questions.[39] The policy considerations focus on ameliorating the harsher dictates of the law because when human life is taken, reversal is impossible. Nevertheless the trend is to portray the habeas process as a tactical delay on execution. Habeas petitions are seen as frivolous attempts to prolong the judicial process.[40] It is, however, pertinent to underscore the

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(Brennan, J., dissenting); *see also* Angelone v. Bennett, 519 U.S. 959, 959 (1996) (Stevens, J., dissenting) ("Given the irreparable consequences of error in a capital case, I believe we should steadfastly resist the temptation to endorse procedural shortcuts that can only increase the risk of error."). *But see* Kyles v. Whitley, 514 U.S. 419, 457-58 (1995) (Scalia, J., dissenting). Justice Scalia's skeptical opinion criticizes any attempt by the Court to pay greater attention to capital habeas petitions. Justice Scalia perceives this seemingly special treatment as pretence. According to the Justice:

> perhaps it has been randomly selected as a symbol, to reassure America that the United States Supreme Court is reviewing capital convictions to make sure that no factual error has been made. If so, it is a false symbol, for we assuredly do not do that...we do nothing but encourage foolish reliance to pretend otherwise.

Id. (Scalia, J., dissenting). The Court simply refused to be predictable on what standard it would apply in a death penalty habeas corpus petition. Congress, however, recognizes a significant difference between the application of habeas relief in capital and non-capital cases. 1 LIEBMAN & HERTZ, *supra* note 31, § 2.6 (explaining the different provisions of AEDPA for capital and non-capital cases).

Depending on the position that one takes, these arguments boil down to whether the Court should open its doors wider to habeas petitioners. Those who argue that habeas corpus relief is a means of endless litigation want to restrict access to the courts for habeas petitioners. Yet those who argue that care should be taken to examine the constitutional claims of habeas petitioners want to open the doors of the courts wider to habeas petitioners. *See generally* Joseph Hoffman, *Starting From Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133 (1992); Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in this Corpus?*, 27 LOY. U. CHI. L.J. 523 (1996); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990); Robert S. Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177 (1985).

[38] FLANGO, *supra* note 14, at 87.

[39] *See* Stanford v. Kentucky, 492 U.S. 361 (1989); McCleskey v. Kemp, 481 U.S. 279 (1987). The Supreme Court considers questions of federalism, judicial restraint, deference to elected officials, and costs simultaneously with the law. *Id.* This signifies that there is a strong reason to argue that there should be a difference between capital and non-capital cases.

[40] Death penalty cases are described as catalysts for numerous habeas corpus petitions. *See, e.g.*, Donald P. Lay, *The Writ of Habeas Corpus, A Complex Procedure for a Simple*

importance of habeas corpus review in safeguarding the due process rights of state defendants and assuring that the guilty verdicts pass constitutional muster. This important role of the writ of habeas corpus is especially useful in a capital case because there is a clear difference between an execution and a life sentence.[41]

B. *Nature of the Great Writ*

Habeas corpus jurisprudence can be traced to common law where different forms of the writ existed.[42] Habeas corpus *ad subjiciendum* was the most common form of the writ, usually referred to as "habeas corpus."[43] Habeas corpus relief focuses on the legality of a prisoner's confinement. Procedurally, it is not always necessary to grant the writ before granting the remedy,[44] because in some cases, the legality of confinement can be determined without producing the prisoner.[45] In a habeas review, a court does not inquire into the defendant's guilt or

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Process, 77 MINN. L. REV. 1015, 1016 (1993).

[41] Calderon v. Thompson, 523 U.S. 538, 568 (1998) (Souter, J., dissenting) ("Surely it is nonetheless reasonable to resort to en banc correction that may be necessary to avoid a constitutional error standing between a life sentence and an execution.").

[42] The different types of the writ of habeas corpus at common law were: *habeas corpus ad respondendum, ad deliberandum et recipiendum, ad faciendum et recipiendum* (also referred to as *cum causa*), *ad prosequendum, ad respondendum, ad satisfaciendum, ad testificandum*, and *ad subjiciendum*. HURD, *supra* note 7, § 1 at 129.

[43] *Bollman*, 8 U.S. at 95. There is a distinction between the writ itself and the relief that the petitioner seeks. In ordinary parlance, this distinction is blurred. However, granting the writ is the first step that commands the person to whom it is directed to produce the body before the court hearing the petition. SOKOL, *supra* note 1, § 3. Next, "the court then inquires into the lawfulness of the detention. If the detention is found to be illegal, the relief requested in the petition will be granted." *Id.*

Even though the writ of habeas corpus arises out of criminal cases, it is a civil remedy:

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings.

Ex parte Tom Tong, 108 U.S. 556, 559 (1883). This classification of habeas relief as a civil remedy comes with a myriad of advantages for the petitioner. For example, in a civil case as opposed to a criminal case, the plaintiff controls the technical strategies of the lawsuit. Kurtz v. Moffitt, 115 U.S. 487 (1885); *see also* 1 LIEBMAN & HERTZ, *supra* note 31, § 2.2 (explaining the details of the procedural advantages to petitioners and to the judicial system arising from the habeas process being a civil remedy).

[44] *See supra* note 43.

[45] SOKOL, *supra* note 1, § 3.

innocence. The results of a habeas proceeding appear similar to those of a direct appeal and the common law writ of error,[46] which involve appellate review of a lower court's verdict to determine its correctness. Yet, the inquiry in habeas is whether the defendant's confinement is justifiable under the Constitution, laws, and treaties of the United States.[47] Habeas corpus does not review ordinary errors of a lower court, unless such errors lead to illegal confinement in violation of the Constitution or federal law. Furthermore, courts employ general principles of equity in the disposition of habeas corpus petitions, despite the legal nature of habeas relief.[48]

The ambiguity of the Suspension Clause leaves no textual basis to clarify the problems in administering habeas corpus.[49] The problems of efficient judicial management of caseloads in the face of overwhelming habeas petitions encourage strictly regulating the availability of habeas

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[46] A writ of error is:

> A writ issued from a court of appellate jurisdiction, directed to the judge or judges of a court of record, requiring them to remit to the appellate court the record of an action before them, in which a final judgment has been entered, in order that examination may be made of certain errors alleged to have been committed, and that the judgment may be reversed, corrected, or affirmed, as the case may require.

BLACK'S LAW DICTIONARY, *supra* note 1, at 1610. As a practical matter, a habeas petition may have the effect of either an appeal or a writ of error. Yet, habeas review is an entirely different procedure that is not interchangeable with either the appeals process or the writ of error.

[47] *See supra* note 3.

[48] *See Sanders*, 373 U.S. at 17. Habeas corpus proceedings are not based on the original action that led to the petitioner's confinement. Additionally, the writ of habeas corpus is rooted in the idea of fairness.

[49] *See supra* note 1. This ambiguity has led to various interpretations by the three branches of government. On the part of the Judicial Branch, Chief Justice Marshall held that it is the province of Congress to suspend the writ of habeas corpus. *Bollman*, 8 U.S. at 95 (interpreting the Judiciary Act of 1789). In the Executive branch, President Abraham Lincoln suspended habeas corpus eight times between April 27, 1861 and December 2, 1861. MIAN, *supra* note 1, at 124-25. Consequently, Congress vigorously condemned President Lincoln's actions, but on March 3, 1863, authorized the President to suspend the great writ in appropriate cases. *Id.* at 124. Even though President Lincoln insisted that he was correct, it appears that Congress' action was a means of reasserting the authority of Congress over the Suspension Clause. *Id.* It is interesting that the President maintained that he was acting under the law. *Id.* Traditionally, Congress has exercised statutory power over habeas corpus by enacting statutes that authorize federal courts to administer the writ of habeas corpus. *See infra* Part III.A. Congress has enacted various habeas corpus acts that withstood constitutional attacks: Judiciary Acts of 1789, 1867, and 1948 and AEDPA of 1996. There is a general agreement of constitutional law scholars that the focus of the Suspension Clause is on fundamental fairness. Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947 (2000).

corpus relief.[50] The Court's wavering stance on the scope of the writ further complicates the law.[51]

C. *Procedural Obstacles to Obtaining Habeas Relief*

The uniqueness of the habeas process and the underlying constitutional principles are complicated, especially for the prisoners who have the greatest need for habeas relief. The regulations either go too far or yield interpretations leading to "sub-rules" obscuring where the line has been drawn.[52] Even though a petitioner cannot escape the rigmarole of judicial procedure, it can still be tailored to meet societal needs without necessarily abridging constitutional guarantees. The solution is not creating more rules, but a simplification of existing rules so that petitioners can better understand and apply them. Apart from satisfying the requirements arising from the plain language of the statute, the habeas petitioner must satisfy both the exhaustion requirement and the successive petition doctrine.[53]

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[50] Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367 (1983) (arguing that habeas corpus relief is a manifestation of the fundamental notion that any conviction in violation of the United States Constitution is not sustainable). The problem is balancing efficiency in our judicial system and the protection of the individual's constitutional right.

[51] The Warren Court expanded the scope of the great writ and the Burger and Rehnquist Courts narrowed it. CHEMERINSKY, *supra* note 30, § 15.2.

[52] *See infra* Part IV. An example is the Third Circuit's notice requirement, which is supposed to protect the rights of habeas petitioners from the harshness of AEDPA. The notice requirement is one rule too many, further complicating the habeas process.

[53] The statute, on its face, requires that a habeas petitioner be in custody. The scope of the custody requirement is an issue that raises serious debates in academic circles. *See supra* note 2. The "in custody" requirement should not be considered an obstacle as devastating as the other requirements because it can be considered as delineating the special nature of habeas corpus relief. *See infra* Part II.C. Furthermore, modern Supreme Court cases have withdrawn from the Court's earlier narrow interpretation of the "in custody" requirement. Jones v. Cunningham, 371 U.S. 236 (1963) (overturning a Fourth Circuit dismissal of the habeas petition of one who was on parole because the Court concluded that he was "in custody" because parole imposed restrictions on his liberty). Thereafter, the Supreme Court has consistently maintained that certain restraints that are not necessarily physical confinements satisfy the "in custody" requirement of the great writ. *See, e.g.*, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984). As a practical matter, a habeas corpus petition satisfies the "in custody" requirement if a person's liberty is restricted whether physically or otherwise. *See* Yackle *supra* note 34, at 1000.

The Suspension Clause is a textual limitation on the great writ. The controversy is in determining who is the proper authority to suspend the writ. *See supra* note 50. A pertinent issue is whether the Suspension Clause is addressed only to federal authorities. It seems obvious that if federal authorities administer the remedy, the constitutional limits to its operation are addressed to them too. If, however, this position is taken to the extreme it

1. The Exhaustion Requirement

The exhaustion requirement underscores the importance of state post-conviction remedies in the habeas process.[54] The Supreme Court in *Ex parte Royall* set forth the policies of the exhaustion doctrine.[55] The Court announced that state prisoners must first exhaust state remedies to challenge their confinement before initiating a habeas proceeding.[56] The exhaustion requirement, since then, has remained an indispensable prerequisite for habeas corpus relief.[57]

The development of the exhaustion doctrine at common law reveals a gradual narrowing of its terminology.[58] This has led to the disqualification of a substantial number of habeas petitions.[59] This may also account for some court opinions that have erroneously interpreted the exhaustion doctrine as a jurisdictional requirement to enable a federal court to entertain a habeas petition.[60]

The exhaustion doctrine hinges purely on a strict policy of enhancing comity between federal and state courts. Application of exhaustion is, however, in the discretion of the reviewing court,[61] but the

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might lead to a constitutional crisis whereby the federal authorities suspend the writ and a particular governor or state legislature rejects the suspension within their own territory.

[54] CHEMERINSKY, *supra* note 30, § 15.1.

[55] 117 U.S. 241, 251 (1886) (underscoring the fundamentals of federalism and the need to consider habeas petitions with the aim of maintaining a meaningful comity between state and federal courts).

[56] Urquhart v. Brown, 205 U.S. 179, 181 (1907).

[57] *Ex parte* Hawk, 321 U.S. 114 (1944); *see also* AEDPA, 28 U.S.C.A. §§ 2254, 2255 (West 1997) (codifying the exhaustion requirement).

[58] The Court changed the terminology in applying the exhaustion doctrine from "custody under a state's procedure" to "custody pursuant to a state court's judgment." SOKOL, *supra* note 1, § 22. While the terminology appeared to show a narrow application of the writ, there was no change. *Id.* The limitations on the state habeas petitioner are greater than on federal petitioners. For example, the exhaustion requirement applies only to state habeas petitioners.

[59] *See, e.g.*, David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 333-34 (1973). A study conducted in Massachusetts shows that the exhaustion doctrine accounted for a dismissal of approximately half of the habeas petitions filed in federal courts. *Id.*

[60] *See, e.g.*, Monroe v. Director, 227 F. Supp. 295 (D. Md. 1964); Peters v. Dillon, 227 F. Supp. 487 (D. Colo. 1964). This view is contrary to the clearly stated position of the Supreme Court that the exhaustion requirement does not impose any kind of limits on federal courts. The Court has insisted that the exhaustion requirement is discretionary. *See, e.g.*, Bowen v. Johnston, 306 U.S. 19, 27 (1939); Giles v. Maryland, 386 U.S. 66, 81 (1967).

[61] *Giles*, 386 U.S. at 81.

Supreme Court has consistently maintained a tough position in applying this requirement. For example, in *Rose v. Lundy*, when faced with exhausted and unexhausted claims, the Court decided that the policy behind the exhaustion doctrine was important enough to warrant strict application.[62]

Even though the rationale behind the exhaustion doctrine appears simple, applying the doctrine raises several complications for the habeas petitioner. A *pro se* habeas petitioner must realize that once an issue has been raised and adjudicated in state court either in a collateral proceeding or on direct appeal, the issue is exhausted.[63] However, exhaustion will not apply to cases where there is no state remedy available to the petitioner at the time that petitioner files the complaint, so requiring exhaustion is meaningless if those remedies are not available.[64]

Additionally, a *pro se* habeas petitioner must be able to distinguish between exhausted and unexhausted claims to withstand dismissal as a mixed petition.[65] When mixed petitions are dismissed, it becomes difficult for the petitioner to make choices that will protect his or her privilege to pursue habeas relief. If the petitioner chooses to return to state court and exhaust his or her remedies first, then he or she risks

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[62] 455 U.S. 509 (1982). Exceptions to the doctrine prove that it is a discretionary issue for the court. 6 LAFAVE ET AL., *supra* note 16, § 28.5(a). Claims containing exhausted and unexhausted claims are known as mixed petitions. *Rose*, 455 U.S. at 509. In *Rose*, the Court outlined how strict enforcement of the exhaustion doctrine will enhance comity between federal and state courts. *Id.* First, strict enforcement will encourage petitioners to seek all available state remedies before coming to a federal court. *Id.* Second, a large number of petitioners going through the entire state procedure increases the frequency with which state judges handle federal constitutional issues and as such helps improve their knowledge of federal constitutional issues. *Id.* Third, satisfying the exhaustion requirement distills the facts making it easier for the federal courts to apply the law to those facts. *Id.*

[63] Brown v. Allen, 344 U.S. 443, 450 (1953). This prevents petitioners from presenting the same issue on both direct appeal and collateral proceeding in order to satisfy the exhaustion doctrine. *Id.* For example, if P, a habeas petitioner, did not raise the issue of insufficiency of counsel on direct appeal, then P must raise it in any available state collateral proceeding in order to satisfy the exhaustion requirement on that issue. *Id.* Thus, the exhaustion doctrine does not require repetition of the same claims in all post-conviction proceedings in state court. It suffices to raise a claim once in any state post-conviction proceeding to satisfy the exhaustion requirement. *Id.*

[64] Fay v. Noia, 372 U.S. 391, 399 (1963).

[65] CHEMERINSKY, *supra* note 30, § 15.2. The difficulty in deciphering exhausted and unexhausted claims is that it involves complex legal issues, which may be difficult for a habeas petitioner to sort out without the aid of counsel. *Id.* Therefore, that step in satisfying the exhaustion requirement practically impairs the ability of the habeas petitioner to take advantage of the great writ of liberty. *Id.*

waiting endlessly in custody for relief from constitutional harm. Alternatively, the petitioner may want to refile his or her habeas petition by eliminating the unexhausted claims. A habeas petitioner's meritorious claims may not be considered because the petitioner could not separate exhausted and unexhausted claims. A further consequence is that if the court has already entertained his or her habeas petition, the subsequent petition may not be sustained as a valid habeas petition.[66] The petitioner may unknowingly file duplicative and frivolous petitions, contributing to judicial backlogs. It is for this reason that courts created the abuse of writ doctrine.

2. Successive Petitions and Abuse of Writ doctrine

Even though res judicata does not apply to the writ of habeas corpus, federal courts dismiss a habeas petition under the abuse of the writ doctrine when the petition contains repetitive claims or when the petitioner brings several habeas petitions.[67] This doctrine is administered by adhering to the principles of equity.[68] A federal court will entertain a repetitious habeas petition based two inquiries. The first is whether there is an "abuse of the writ," which is a petition containing the same claims that have been litigated on the merits in a previous petition.[69] But if the second or successive petition is based on

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[66] *Rose*, 455 U.S. at 521 (O'Connor, J., plurality opinion); *see also infra* Part II.C.ii.

[67] *Sanders*, 373 U.S. at 15, 18. The Court found that the rules for successive applications apply equally to federal and state habeas petitioners. Remarkably, the non-application of res judicata does not make a difference because employing the abuse of writ doctrine to dismiss successive habeas petitions has basically the same effect—the claims are precluded. *In re* McDonald, 489 U.S. 180, 185 (Brennan, J., dissenting) (1989).

[68] *See Sanders*, 373 U.S. 1 (noting trial judge discretion in equity).

[69] 6 LAFAVE ET AL., *supra* note 16, § 28.5(c). In *Sanders*, 373 U.S. 1, the Supreme Court attempted to make a distinction between successive applications and abuse of writ. *Id.* In a successive application, the petitioner alleges the same claims that have been adjudicated on the merits. *Id.* In an abuse of the writ, the petitioner files a second or successive habeas application alleging new grounds that were not raised in a previous application. *Id.* This distinction is not clear because the only basis for dismissing a successive habeas application is because it amounts to an abuse of the writ. *Id.*; *see* McClensky v. Zant, 499 U.S. 494 (1991). It is clearer to understand a successive application as one of the two situations in which the court will dismiss a habeas application because it is tantamount to an abuse of the writ of habeas corpus. The other situation is when a new claim is raised, which then requires the court to determine whether the omission of the new claim in a previous petition is excusable. FLANGO, *supra* note 14, at 78; *see also supra* Part II.C.ii. The Court alludes to this manner of understanding the abuse of writ doctrine by qualifying its opinion in *Sanders* with the responsibility of federal trial judges in applying their discretion to decide when a successive habeas application should be

new allegations, then the court will inquire into whether the omission is excusable.[70] This requires the petitioner to demonstrate cause and prejudice:[71] the cause for failing to raise the claims earlier and the prejudice resulting therefrom.[72] The Supreme Court adopted the cause and prejudice standard from the state procedural default cases.[73] The Court compared the abuse of writ doctrine with the procedural default rule, applicable to only state prisoners, and found that the same standard should apply because the "unity of structure and purpose" in both

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dismissed. *Sanders*, 373 U.S. at 18-19.

A habeas petitioner wishes to bring habeas petitions as many times as he or she can under various types of claims because there is a possibility that one of those grounds might succeed. This was the practice at common law. *See Sanders*, 373 U.S. at 7 (citing Cox v. Hakes, 15 A.C. 506, 527 (H.L. 1890)); *Zant*, 499 U.S. at 479 (citing W. CHURCH, WRIT OF HABEAS CORPUS § 386, at 570 (2d ed. 1893)). Notwithstanding the arguments about efficiency that this strategy necessarily raises, the effect of the abuse of writ rule when it involves a new claim is to deny access to federal courts to habeas petitioners whose claims have not been adjudicated for the first time in any court. *In re* McDonald, 489 U.S. at 185 (Brennan, J., dissenting).

[70] SOKOL, *supra* note 1, § 25.1.

[71] *Zant*, 499 U.S. at 490-93. After discussing at length the need to curtail second or successive petitions in order to preserve judicial economy, respect the finality of judgments, avoid impeding the speedy resolution of primary disputes, and dissuade petitioners from withholding claims, the Court acknowledged that the importance of habeas corpus review surpasses these principles of judicial review. *Id.* at 492. In *Sanders*, 373 U.S. at 8, the Court underscored the status of habeas relief over other considerations: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Id.* Irrespective of that concession, the Court established the cause and prejudice standard for determining whether, under the abuse of writ doctrine, a habeas petition should not be adjudicated because a petitioner failed to allege a claim at the proper time. *Zant*, 499 U.S. at 493. To satisfy the cause and prejudice standard, a petitioner must show cause for the default and further demonstrate the prejudice that he or she will suffer from the court's refusal to entertain the habeas petition. *Id.*

[72] *Zant*, 499 U.S. at 494. Cause and prejudice is an objective standard. The following factors constitute cause as determined in the state-procedural default cases:

> "Interference by officials" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "ineffective assistance of counsel. . .is cause." Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse procedural default.

Id. at 493-494 (citing Murray v. Carrier, 477 U.S. 478, 486-88 (1986)). "Once the petitioner has established cause, he must show 'actual prejudice' resulting from the errors from which he complains." *Zant*, 499 U.S. at 494 (citing United States v. Frady, 456 U.S. 152, 168 (1982)).

[73] Harris v. Reed, 489 U.S. 255, 255-56 (1989). The procedural default rule prevents a federal court from entertaining a state petitioner's habeas application if a state court relied on a state-procedural rule to dismiss the petitioner's claims. The state court must "clearly and expressly" state that its judgment is based on a procedural bar.

contexts is the same.[74]

The Supreme Court has recognized that the government bears the burden of proving that the writ has been abused.[75] The burden, however, shifts back to the petitioner to prove that he or she has not abused the writ once the government responds.[76] As a practical matter, the burden on the government is nothing more than a specific and clear assertion that the government opposes habeas review because the petitioner has abused the great writ.[77]

Even if a habeas petitioner fails the cause and prejudice standard, the court may still hear the petition if the petitioner shows that refusal to adjudicate the claim will result in a fundamental miscarriage of justice.[78] In making this determination, the trial judge has a duty to reach the merits to fulfil the demands of justice.[79] Discretion in hearing these petitions is appropriate because the cause and prejudice standard is "familiar to federal courts and well-defined in case law."[80] In the end,

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[74] *Zant*, 499 U.S. at 519-20. The dissent strongly disagreed with this position by distinguishing the functions of both rules:

> The abuse-of-the-writ doctrine clearly contemplates a situation in which a petitioner. . .has complied with the applicable state-procedural rules and effectively raised his constitutional claim in state proceedings; were it otherwise, the abuse-of-the-writ doctrine would not perform a screening function independent from that performed by the procedural-default doctrine. . .Because the abuse-of-the-writ doctrine presupposes that the petitioner has effectively raised his claims in state proceedings, a decision by the habeas court to entertain the claim notwithstanding its omission from an earlier habeas petition will neither breed disrespect for state-procedural rules nor unfairly subject state courts to federal collateral review [these are reasons for establishing the state-procedural default rule] in the absence of a state-court disposition of a federal claim.

Id.

[75] *Sanders*, 373 U.S. at 10-11. The Court, however, recognizes that the government only bears the burden of pleading an abuse of the writ. It appears that the only reason the Court employed the word "proof" to explain the government's burden was to re-emphasize the role of equitable principles in applying the abuse of writ doctrine. *Id.*

[76] Price v. Johnston, 334 U.S. 266, 292 (1948). The Court's emphasis on applying equitable principles to help the habeas petitioner is counter-productive because the Court effectively pits *pro se* habeas petitioner against a seasoned government attorney. While the Court does not directly impose on *pro se* petitioners the same standards as attorneys, the Court indirectly requires such petitioners to match the arguments and legal skills of these attorneys.

[77] *Sanders*, 373 U.S. at 10-11.

[78] *Zant*, 499 U.S. at 494-95.

[79] *Sanders*, 373 U.S. at 18-19 (citing Townsend v. Sain, 372 U.S. 293, 312, 318 (1963)).

[80] *Zant*, 499 U.S. at 496. The dissent disagrees that the prejudice standard is well-

the Supreme Court believes that this standard drastically reduces multiple habeas applications that culminate in abuse of the great writ and in so doing maintains the integrity of the habeas process.[81]

III. Legislative History of AEDPA

A. *Statutory Development of the Writ of Habeas Corpus*

The writ of habeas corpus traces its origin to pre-Revolution times.[82] The history of oppressive governments demonstrates that one branch of government, without proper limitations, may lose control, become abusive, and hold people in custody in contravention of the law.[83] Notwithstanding its ambiguity, the Suspension Clause clearly attempts to secure personal liberty within the United States.[84]

Despite efforts to clarify this constitutional ambiguity, Congress put habeas corpus jurisprudence in constant flux. The result is a

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defined in case law. The dissent argues that the Court has always left the standard for determining the prejudice standard as an open question. Further, the dissent noted that the Court in Wainwright v. Sykes, 433 U.S. 72, 91 (1977), expressly refused to define the term "prejudice." *Id.* at 511 n.3. The Court believed that the cause and prejudice standard will yield certainty and stability in habeas corpus jurisprudence. Additionally, it will clarify the application of the phrase "inexcusable neglect" in deciding cases that implicate the abuse of writ doctrine.

[81] *Zant*, 499 U.S. at 496.

[82] Habeas corpus relief existed at common law. *Supra* Part II.

[83] The framers' debate focused on the abuse of power and oppression. FREEDMAN, *supra* note 1, at 552 nn.51-52.

[84] *See supra* note 5; *see also* THE FEDERALIST NO. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The constitutional debates centered on how to avoid governmental interference with personal liberty. This could explain why the Suspension Clause does not provide for the scope of the writ but rather was concerned about its suspension. Another explanation for focusing on the limitation is that the framers were very concerned about delving into excessive details that may lead to dangerous exceptions. THE FEDERALIST, *supra* at 513. A related argument is about the exclusion of the bill of rights:

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.

Id. Subsequently, Congress in habeas statutes continued to ensure, at least in form, that the privilege of habeas corpus was available to all persons without exception. Ira Bloom, *Prisons, Prisoners and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 416 (1998). The statutory text expressly uses the term "persons in custody" to denote who can invoke the privilege. *See* 28 U.S.C.A. §§ 2254, 2255 (West 1997).

complicated combination of statutes and constitutional provisions.[85] As a first step to defining the scope of the writ of habeas corpus, the first Congress in 1789 enacted the Judiciary Act, allocating the power to grant habeas corpus relief to federal courts,[86] signifying Congress' understanding of federal courts' power to administer the writ of habeas corpus.[87] In 1833, Congress for the first time extended the scope of the writ to state petitioners, albeit to a limited group.[88] It was not until 1867 that Congress extended the writ to "any person who may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States."[89] Next, in 1948, Congress adopted the existing habeas corpus doctrine as a statute.[90] Then, in 1966, Congress amended the habeas corpus statute to extend federal habeas jurisdiction simultaneously, in applicable states, to the place of the person's confinement and place of conviction.[91] Thereafter there was no substantial change to habeas corpus statutes until AEDPA was enacted in 1996.

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[85] Stahlkopf, *supra* note 12, at 1118.

[86] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789).

[87] First, it shows that Congress did not believe that federal courts were constitutionally empowered to grant the writ. Therefore, it was necessary to enact the statute specifically giving federal courts that power. 6 LAFAVE ET AL., *supra* note 16, § 28.2(a). Second, it shows that Congress understood that the Suspension Clause did not extend habeas relief to state defendants. *Id.*; *see also* Judiciary Act, ch. 20, § 14, 1 Stat. 73 (1789).

[88] *See* Judiciary Act of March 2, 1833, ch. 57, § 7, 4 Stat. 632, 634. Congress used this extension of the writ to free federal officials in the New England states who may have been arrested and detained for enforcing federal revenue legislation. *Id.*

[89] Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. This statute had the broadest habeas corpus provision so far. The country's social and political atmosphere played a great role in Congress' expansion of the scope of the writ. 6 LAFAVE ET AL., *supra* note 16, § 28.2(b). Arguably, Congress adopted the 1867 Act to protect the newly freed slaves from state violation of their civil and Thirteenth Amendment rights. CHEMERINSKY, *supra* note 30, § 15.2. An even broader view that influenced the Court's decisions in the 1860s is that Congress was apprehensive of the reaction of the southern states to Reconstruction legislation. *Id.* Specifically, Congress may have wanted the courts to oversee an enforcement of the "1866 Civil Rights Act and the Fourteenth Amendment to the U.S. Constitution." *Id.* On the other hand, an argument in support of a narrow reading of the statute is that in the 1970s the Court abandoned a broad interpretation of the same statute and started reading it narrowly. *Id.* These competing interpretations, at the very least, signify the unsettled nature of what was the legislative intent behind the habeas corpus act of 1867. Carole J. Yahofsky, Note, Withrow v. Williams*: The Supreme Court's Surprising Refusal To Stone Miranda*, 44 AM. U.L. REV. 323 n.7 (1994).

[90] Judiciary Act of June 25, 1948, Part VI, Ch. 153, §§ 2241-2255 (1948).

[91] SOKOL, *supra* note 1, § 25.2.

B. *AEDPA*

The practical effect of AEDPA, contrary to the expectations of Congress and the President, was to impose very stringent restrictions on habeas petitioners.[92] While the Act passed constitutional muster, it introduced sweeping changes in habeas corpus jurisprudence.[93] AEDPA affects state and federal petitioners.[94] In enacting AEDPA, Congress

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[92] *See supra* note 22 for Congress' express purpose of the amendment. President Clinton in signing the bill into law on April 24, 1996, wrote:

> Section 104(3) provides that a Federal district court may not issue a writ of habeas corpus with respect to any claim adjudicated on the merits in State court unless the decision reached was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. Some have suggested that this provision will limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact that come before them on habeas corpus.
>
> In the great 1803 case of *Marbury v. Madison*, Chief Justice John Marshall explained for the Supreme Court that "it is emphatically the duty and province of the judicial department to say what the law is." Section 104(3) would be subject to serious constitutional challenge if it were read to preclude the Federal courts from making an independent determination about "what the law is" in cases within their jurisdiction. I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section 104 to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.

32 WEEKLY COMP. PRES. DOC. 719 (April 29, 1996).

Indeed, AEDPA was thought to deprive individuals access to federal habeas corpus relief. Stahlkopf, *supra* note 12, at 1117.

> In enacting the AEDPA, Congress has gone too far in restricting access to the writ of habeas corpus. What was purportedly intended to limit federal claims so as to avoid "abuse of the writ" will in practice do much more. The AEDPA will serve to eliminate habeas corpus relief entirely for several types of claims. Not only is it doubtful that this was the intent of Congress in enacting the AEDPA, but intent aside, there are serious constitutional problems with such restrictions on the writ of habeas corpus.

Id.

[93] Felkner v. Turpin, 518 U.S. 651, 662, 664 (1996); *see also* David Blumberg, Note, *Habeas Leaps from the Pan and Into the Fire:* Jacobs v. Scott *and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557 (1997); Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414 (1998); Jordan Steiker, *Restructuring Federal Courts: Habeas: Habeas Exceptionalism*, 78 TEX. L. REV. 1703 (2000).

[94] 28 U.S.C.A. § 2254(d) provides for federal adjudication of a state habeas petitioner's claim stating:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to

codified many common law provisions applicable to the habeas process.[95] AEDPA also included a one-year statute of limitation[96] and a limit on successive petitions,[97] which had to be interpreted by the federal

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any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. 28 U.S.C.A. § 2255 deals with federal petitioners who are in custody pursuant to a federal court's judgment:

A prisoner in custody under the sentence of court established by Act of Congress [referring to federal district courts] claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Id.

[95] For example, "the contrary to or unreasonable application" language of § 2254 codifies the Court's decision in Teague v. Lane, 489 U.S. 288, 309 (1989). It also codified exhaustion and the abuse of writ doctrine.

[96] 28 U.S.C.A. § 2244(d)(1) (West 1997) reads:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Similarly, 28 U.S.C.A. § 2255 provides for persons in custody pursuant to the judgment of a federal court.

[97] 28 U.S.C.A. § 2244(b) (West 1997) reads:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed. (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in

courts of appeal and the Supreme Court.[98] In general, the courts struggled to correctly interpret the provisions of AEDPA, but particularly how much federal courts should defer to state courts' decisions in view of § 2254(d)(1), which deals exclusively with the circumstances under which a federal court should grant a state petitioner's habeas application.[99]

C. *The Deferential Standard of Habeas Review: Williams v. Taylor*

Four years after AEDPA, the Supreme Court delivered a deferential standard of review in *Williams v. Taylor*.[100] Writing for the Court, Justice O'Connor expanded on the "contrary to" and "unreasonable application" language of 2254(d)(1).[101] The Justice distinguished between the two clauses based on the canons of statutory construction.[102] According to the statute, a federal court may grant a state petitioner's habeas corpus request if the state-court decision was

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light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals. (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection. . .A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Petitioners under federal confinement have a similar provision under 28 U.S.C.A. § 2255 (West 1997).

[98] Those two provisions are the reasons that the Third Circuit demands that federal courts abide by the notice requirement. The Third Circuit believes that prohibiting federal courts from unilaterally construing petitioners' post-conviction pleadings as habeas applications will protect petitioners from the harsh effects of those two provisions. *See infra* Part IV.

[99] 1 LIEBMAN & HERTZ, *supra* note 31, § 3.2. A correct interpretation is crucial to guide federal courts in handling state habeas petitions.

[100] 120 S. Ct. 1495 (2000).

[101] *Williams*, 120 S. Ct. at 1519.

[102] Justice O'Connor stated: "we must give effect, if possible to every clause and word of a statute." *Id.* (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)) (internal quotations omitted).

"contrary to" or "involved an unreasonable application of" clearly established federal law.[103] In interpreting this statutory language, the Court approved of the Fourth Circuit's approach in interpreting the "contrary to" and "unreasonable application" clauses as separate tests.[104] Justice O'Connor summarized the Fourth Circuit's interpretation of the "contrary to" test.[105] The Fourth Circuit found that a state-court decision can become "contrary to" federal law[106] either when a state court reaches a conclusion that contradicts a Supreme Court's holding on a question of law or arrives at a contrary conclusion on facts identical to a Supreme Court case.[107]

The Fourth Circuit also stated that a state court can "unreasonably apply" federal law when a state court applies the correct legal rule unreasonably to a particular set of facts or when the state court either unreasonably broadens the scope of a legal principle to cover a new set of facts or unreasonably refuses to broaden such a principle to cover a new situation where it should apply.[108] It is not sufficient for federal

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[103] *See Williams*, 120 S. Ct. at 1519; *see also supra* note 97.

[104] *Id.*

[105] The Court, citing Webster's Third New International Dictionary 495 (1976), identified the following synonyms for the word "contrary": "diametrically different," "opposite in character or nature," or "mutually opposed." *Williams*, 120 S. Ct. at 1519. Justice O'Connor summarized the two possible ways that a state-court decision could be substantially different from Supreme Court precedent: "if the state court applies a rule that contradicts the governing law set forth in our cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 1519-20. Justice O'Connor explained that a case may be "materially indistinguishable" from another if the legal implications of both are clearly the same, despite factual differences. Ramdass v. Angelone, 120 S. Ct. 2113, 2127 (2000) (O'Connor, J., concurring). Additionally, the Court noted that the Fourth Circuit's interpretation accurately fits the textual meaning developed in the *Williams* case. *Id.* at 1519.

[106] *Id.* The Fourth Circuit relied on its decision in Green v. French, 143 F.3d 865 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999).

[107] *Williams*, 120 S. Ct. at 1519. Justice O'Connor summarized the meaning of the "contrary to" clause: "a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 1523.

[108] *Id.*; *see also Williams*, 120 S. Ct. at 1521. The Court decided not to deal with the problem that derives from this "extension of principle" notion under § 2254(d)(1), although the Court recognized the difficulties in distinguishing between the two situations that might arise under the "extension of principle" standard. *Id.* In Ramdass v. Angelone, 120 S. Ct. 2113, 2120 (2000), the Supreme Court decided that a state court's judgment may be vacated if "under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have

courts to determine that the state court, in its decision, incorrectly or erroneously applied a Supreme Court precedent.[109] In such a situation, the federal court must also find that the state court's incorrect application of federal law was unreasonable.[110]

The Supreme Court found that the Fourth Circuit's construction of the "contrary to" clause reflects the textual meaning of the statute and that its interpretation of the "unreasonable application" clause was generally correct. The Court, however, expressly rejected the Fourth Circuit's "all reasonable jurists" standard[111] as being difficult, too subjective, and misleading.[112]

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) still pose interpretation difficulties after the *Williams* case.[113] The "contrary to" test involves complications only when deciphering which set of facts are materially indistinguishable from decisions of the

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controlled." Additionally, a state court decision does not have to be well-reasoned to avoid classification as "unreasonable application" of a Supreme Court precedent. *Id.* The only requirement is that the state court decision be "at least minimally consistent with the facts and circumstances of the case." Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997). As long as the state court decision meets that standard, a reviewing court will not presume any constitutional violation. *Id.*

[109] *Williams*, 120 S. Ct. at 1522.

[110] The court effectively interprets the statute as allowing wrong state court decisions to stand as long such decisions are reasonable. Symposium, *Restructuring Federal Courts: Habeas: Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1705 (2000) ("the Court read the new provision to require habeas courts to leave undisturbed reasonable but wrong state court decisions.").

[111] *See infra* note 112; *see also Williams*, 120 S. Ct. at 1521. The Fourth Circuit relied on its decision in *Green v. French* and concluded that the unreasonable application standard would be satisfied in any given situation if a state court's application of federal law is done "in a manner that reasonable jurists would all agree is unreasonable." Green v. French, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999). The Court summarized the effect of the unreasonable application clause: "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 120 S.Ct. at 1523.

[112] *Id.* at 1521-22. The Court described the "all reasonable jurists" standard as erroneous and further declared:

> Defining an "unreasonable application" by reference to a "reasonable jurist," however, is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. . .The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case.

Id.

[113] *Williams*, 120 S. Ct. at 1521.

Supreme Court. The Supreme Court also underscored the inherent difficulty with the "unreasonable application" standard in any given situation.[114] The Court, however, relied on the experience of federal judges in correctly applying the term "unreasonable."[115] Nevertheless finding an "unreasonable application" of federal law may never be clear.[116]

IV. Analysis of the Third Circuit's Notice Requirement in United States v. Miller

Amid the complications of AEDPA and the circuit courts' divergent views, the Third Circuit decided *United States v. Miller*, further complicating the habeas process in that circuit.[117] The *Miller* court decided that a federal court may not recharacterize a petitioner's post-conviction motion as a habeas application,[118] based on the provisions of AEDPA for second and successive habeas applications.[119]

AEDPA allows a habeas petitioner in federal court a single opportunity to file a habeas application, which can only be refiled if a court of appeals grants the required certification.[120] A court's recharacterization of a petitioner's application to regard it as a habeas petition seizes the petitioner's sole opportunity for federal habeas review irrespective of the petitioner's wishes or strategy. In an attempt to eliminate the possibility of depriving habeas petitioners an opportunity for habeas review due to an improper recharacterization of their motions, the Third Circuit established the notice requirement in the *Miller* case.[121]

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[114] *Id.* at 1522 ("the term unreasonable is no doubt difficult to define.").

[115] *Id.*

[116] *See id.*

[117] United States v. Miller, 197 F.3d 644 (3d Cir. 1999).

[118] *Id.* at 652. This decision is a sharp break with common law practice. *See, e.g.*, United States v. Jordan, 915 F.2d 622, 624-25 (11th Cir. 1990) (under which federal courts "have an obligation to look behind the labels of *pro se* litigants' motions and determine whether the motion is, in effect, cognizable under a different remedial statutory framework"); Haines v. Kerner, 404 U.S. 519, 520 (1972) ("Allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence."); Zilich v. Lucht, 981 F.2d 694, 694 (3d Cir. 1992) ("When. . .plaintiff is a *pro se* litigant, we have a special obligation to construe his complaint liberally.").

[119] *Miller*, 197 F.3d at 652 n.7. The Third Circuit argues that AEDPA sharply restricts the availability of second or successive habeas applications.

[120] 28 U.S.C.A. § 2244(b)(3)(A) (West 1997).

[121] United States v. Miller, 197 F.3d 644 (3d Cir. 1999).

The *Miller* case arose from a drug trafficking conspiracy in Pennsylvania.[122] After the grand jury indictment, Miller pled to the conspiracy charge with the assistance of counsel.[123] Before his sentencing, Miller, appearing *pro se*, attempted to withdraw his guilty plea by filing a motion with the district court.[124] The district court refused to grant Miller's motion and the Third Circuit affirmed.[125]

Miller, still appearing *pro se*, filed two post-conviction motions with the district court.[126] The first motion attacked the grand jury proceedings, alleging that the prosecutor knowingly presented perjured testimony.[127] Thus, Miller sought the dismissal of the underlying indictment.[128] The second motion requested a new trial pursuant to Fed. R. Crim. P. 33, again relying on the allegation of perjury.[129] These two motions were untimely because they could not be filed after the defendant's guilty plea and appeal.[130] To circumvent the time bar, the district court construed both motions as one motion under 28 U.S.C. § 2255. Subsequently, the district court rejected this recharacterized motion on the merits.[131] Because Miller utilized his sole opportunity for federal habeas review, he could no longer file a habeas petition in a federal court as a result of the recharacterization.

To appeal, Miller needed to obtain an appealability certificate as required by AEDPA.[132] Miller reasserted his allegation that his indictment was based on perjured testimony and attacked the district court's unilateral recharacterization of his motions as a § 2255 petition.[133] He argued that the district court's action effectively deprived him of the opportunity to raise other substantive issues in a properly filed § 2255 petition.[134] He then requested the court to reverse the

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122 *Id.* at 646.

123 *Id.* at 646-47. Miller was indicted on two counts: distributing over fifty grams of crack cocaine and conspiring to do so.

124 *Id.* at 647.

125 *Id.* (citing United States v. Miller, 118 F.3d 1579 (3d Cir. 1997) (denying Miller's appeal of the district court's decision not to grant his motion to withdraw his guilty plea)).

126 *Id.*

127 *Id.*

128 *See id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 28 U.S.C.A. § 2255 (West 1997).

133 *Miller*, 197 F.3d at 647.

134 *Id.*

district court's order recharacterizing his motion to dismiss and motion for a new trial as a single § 2255 motion.[135]

The Third Circuit decided whether it was proper for the district court to construe Miller's two motions as a § 2255 petition.[136] The court began by restating the traditional principle of liberal construction in habeas cases.[137] The application of this judicial principle echoes the courts' persistent interest in efficiency and fairness in the administration of justice.[138] By virtue of the recharacterization method, district courts were able to reach the merits of *pro se* petitioners' claims and simultaneously eliminate the extra time and cost involved in ordering petitioners to file new petitions. In the absence of recharacterization, the district court would have had to dismiss Miller's petitions because they were both untimely.

Accordingly, the Third Circuit noted that in construing Miller's two post-conviction motions as a § 2255 petition, the district court followed a common law practice.[139] In *Miller*, the court, for the first time, discovered a problem with this common law practice and decided to eliminate it in the Third Circuit. According to the court, AEDPA is the only reason that unilaterally construing Miller's motions as a habeas petition now poses a problem.[140] Specifically, the Third Circuit identified "twin procedural bars that AEDPA has created": the prohibition of second or successive habeas petitions unless in exceptional circumstances when an appellate court grants the required certification[141] and the one-year statute of limitations.[142] These severe

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 648. The most compelling reason for liberal construction is the need for fairness in dealing with *pro se* litigants. This protects them from the harsh consequences of the law simply because they do not have assistance of counsel. *Id.*

[138] Several cases demonstrate that judicial recharacterization of motions results in speedy proceedings. In some cases the petitioner's allegations cannot be heard under any other procedure apart from that dictated by the court. This appears to be the closest a *pro se* habeas petitioner will get to obtaining professional legal assistance. The judges will most likely be able to determine what the appropriate legal proceeding should be better than *pro se* petitioners. *See id.*; *see also* Tedford v. Hepting, 990 F.2d 745, 749-50 (3d Cir. 1993).

[139] *Miller*, 197 F.3d at 648-49 ("The District Court's recharacterization of Miller's two post-conviction motions comports with the above mentioned practices [of liberally construing *pro se* petitioners' motions].").

[140] *Id.* at 649 ("Had AEDPA not been enacted, the District Court's handling of Miller's motions in this case would pose no problem. AEDPA, however, dramatically altered the form and timing of habeas petitions filed in the federal courts.").

[141] *Id.* ("To avoid making successive claims, petitioners must marshal in one § 2255 writ

limitations signified to the Third Circuit that the rule of liberal construction, formerly an advantage to *pro se* petitioners, can become a tool of exclusion for numerous habeas applicants.[143] Hence, the Third Circuit found that a cautionary or educational measure is the only remedy that *pro se* post-conviction petitioners have in the face of this looming danger.[144]

In determining the specific measures necessary to protect habeas petitioners from the harsh consequences of the rule of liberal construction arising from the application of AEDPA, the Third Circuit adopted the Second Circuit's position in *Adams v. United States*.[145] The

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all the arguments they have to collaterally attack their convictions."); *see also supra* note 122.

[142] *Miller*, 197 F.3d at 649 ("to avoid being time barred, they [habeas petitioners] must take care to file this one all-inclusive petition within one year of the date on which the judgment of conviction becomes final.").

[143] *Id.* ("If each *pro se* post-conviction filing is treated as a § 2255 writ, as was once the case, inept petitioners face losing potentially valid constitutional claims at the hands of judges who are applying a rule of liberal construction that was created to benefit *pro se* claimants."). This statement seems to be a sweeping generalization because the court, in describing the rule of liberal construction, noted earlier that "district courts have routinely converted post-conviction motions of prisoners who unsuccessfully sought relief under some other provision of law into motions made under 28 U.S.C. § 2255 and proceeded to determine whether the prisoner was entitled to relief under that statute." *Id.* at 648 (citing Adams v. United States, 155 F.3d 582, 583 (2d Cir. 1998)).

[144] *Id.* at 649 ("With the AEDPA in place, the practice of liberally construing post-conviction motions as § 2255 petitions can, in the absence of cautionary or educational measures, impair the ability of inmates to challenge their convictions on collateral review.").

[145] *Id.* at 650 (citing Adams v. United States, 155 F.3d at 582). The Third Circuit in *Miller* compared the approaches to post-AEDPA motion reconstruction from the Second and Fifth Circuits, the only circuits to address the issue at the time:

> We find *Adams* persuasive. First, we recognize that the practice of recharacterizing *pro se* post conviction motions as § 2255 motions developed, in part, as an attempt to be fair to habeas petitioners. . .The line of pro-se-petitioner-friendly cases endorsing liberal recharacterizations should not be applied woodenly in such a way as to deprive habeas petitioners of their only opportunity to seek collateral relief. Second, the *Adams* approach seems legitimately to advance Congress's purposes in enacting AEDPA. . .

Id. at 651 (citations omitted). The court, however, criticized the Fifth Circuit's approach for lacking depth, stating, "In reaching this holding [in *Tolliver*], the court [the Fifth Circuit] said nothing about the fairness concerns raised in Adams regarding such unilateral recharacterizations or AEDPA's impact on the general practice of construing *pro se* petitioners' pleadings liberally." *Id.* at 650-51. The Third Circuit continued:

> Put differently, the *Tolliver* rule can act as a trap for unwary petitioners who do not know that a single post-conviction motion might bar an intended habeas writ. This result is contrary to the notion that AEDPA's "modified res judicata rule" and "gatekeeping" mechanism are directed toward "screening" previously litigated issues, not toward foreclosing a petitioner's ability to raise all potential

Third Circuit concluded from its analysis that district courts should no longer apply the rule of liberal construction when dealing with *pro se* post-conviction motions.[146] The court then issued a new rule that requires district courts to issue a notice to a *pro se* petitioner challenging his or her conviction or confinement.[147] The notice should constitute a prophylactic measure to inform petitioners that they can either have their motion "ruled on as filed," or recharacterized as a habeas petition while losing their ability to file successive petitions unless certified, or they can withdraw their motion and file a single all-inclusive habeas petition within the statutory period.[148]

The Third Circuit's decision raises several questions of efficiency, access to the courts, and of interpretation.[149] A petitioner's option to have his or her motion "ruled upon as filed" is not clear, and the Third Circuit did not explain its meaning.[150] The phrase is susceptible to at least three different interpretations.[151] First, "ruled upon as filed" could mean that a district court has the power to recharacterize a post-conviction application as long as the petitioner received the court's prophylactic warning about the consequences of recharacterizing

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arguments in a single claim.

Id. at 651 (citations omitted).

146 *Id.* at 652.

147 *Id.*

148 *Id.* The court's breakdown of this notice requirement replicates the Second Circuit's holding in *Adams*, stating:

> District courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized.

Adams, 155 F.3d at 584. *Miller* extended the notice requirement to state habeas petitioners: "Although the issue is not before us, we observe that a district court might see fit to take similar prophylactic steps before recharacterizing such a filing as a petition for habeas corpus under 28 U.S.C. § 2254, because, under AEDPA, state prisoners face similar restrictions on filing second or successive petitions." *Miller*, 197 F.3d at 649. The court properly reached the state petitioner's problem in Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000).

149 *Miller*, 197 F.3d at 651 ("The Adams approach comports with AEDPA's gatekeeping mechanisms by forcing federal inmates to litigate all of their collateral claims in one § 2255 hearing—either at the time the motion is first filed or when it is first refiled after the Adams notice and within the statutory time limit.").

150 *See id.* at 652.

151 Hernandez v. Beeler, 2001 U.S. Dist. LEXIS 846, *10-11 (D.N.J. Jan. 30, 2001).

petitioner's application.[152]

Additionally, this interpretation includes the court's ability to dismiss the application or transfer it to a court of competent jurisdiction.[153] The District of New Jersey in *Hernandez v. Beeler*[154] arrived at that interpretation partly because the *Miller* court presented the petitioner with the choice of withdrawing the application to avoid the court's unilateral recharacterization.[155] Hence, the *Hernandez* court perceived this availability of choice as adequately addressing the fairness concern discussed in *Miller*.[156]

Second, "ruled upon as filed," as the petitioners in *Hernandez* argued, could mean that the district court should not reconstruct any post-conviction application, not filed as such, as a section 2254 or 2255 motion.[157] According to the *Hernandez* court, an acceptance of this interpretation could lead to the conclusion that if a petition cannot be adjudicated as filed, the district court should dismiss the case instead of recharacterizing it without the petitioner's consent.[158] The *Hernandez* court criticized the *Miller* Notice as deficient because the Third Circuit did not define the meaning of "ruled upon as filed."[159]

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[152] *Id.* at *10

[153] *Id.* at *11 ("'ruled upon as filed' means that a district court should treat the pleading as what it really is, which involves recharacterizing the pleading as a § 2255 motion if the petitioner is attacking his conviction or sentence.").

[154] *Id.*

[155] *Id.* ("The language of *Adams* seems to indicate that, recharacterization is proper when a movant chooses not to have his motion recharacterized, as long as he has had the opportunity to withdraw the motion before recharacterization."); *see also Miller*, 197 F.3d at 652.

[156] *Hernandez*, 2001 U.S. Dist. LEXIS 846, at * 12.

[157] *Id.* at *13.

[158] *Id.* at *13-*14 (citing Welles v. Guzik, 2000 WL 62305, at *1 n.1 (E.D. Pa. Jan. 11, 2000)) ("If the court does not recharacterize Mr. Welles' original pleading (which he has characterized as a § 2241 petition) as a § 2255 motion, the court will dismiss his original pleading because. . .Mr. Welles should have filed a § 2255 motion, not a § 2241 petition."). There is good reason to adopt the *Miller* opinion which quoted the Seventh Circuit in stating: "The district court is not authorized to convert a § 1983 action into a § 2254 action, a step that carries disadvantages (exhaustion and the certificate of appealability only two among many) for litigants. . .When a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice." Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck v. Humphrey, 512 U.S. 477 (1994)).

[159] *Hernandez*, 2001 U.S. Dist. LEXIS 846, at *16 ("Both efficiency and fairness justifications can be addressed with a simple adjustment to the *Miller* Notice that this court has been issuing."). Having determined that the prophylactic notice needed to be clearer, the *Hernandez* court constructed its peculiar form of a *Miller* Notice:

Lastly, "ruled upon as filed" could be understood to mean that once a petitioner files a post-conviction application, the district court is mandated to render a judgment regardless of jurisdictional issues.[160] Even though the court found this third interpretation to be implausible, it is conceivable that a *pro se* habeas petitioner understands the words to have this meaning.[161]

Apart from the problem of interpretation, the Third Circuit's notice requirement severely slows down the pace at which district courts decide habeas applications.[162] There is no doubt that satisfying the notice requirement forces district courts to divert energy and resources to implement a new rule that imposes excessive burdens on district courts.[163] The First Circuit recognized this problem and refused to

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> (1) You may choose to have your pleading recharacterized as a petition filed pursuant to 28 U.S.C. § 2255 ('Section 2255') and heard as such. If you do, however, you will lose your ability to file a second or a successive Section 2255 Motion absent Certification by the Court of Appeals. Additionally, your pleading may be dismissed if it has not been filed within the one-year period described is Section 2255; (2.) You may withdraw your pleading and file an all-inclusive Section 2255 Motion subject to the one-year period described in Section 2255; (3.) You may have your pleading ruled upon as filed. If you do and the Court determines that your pleading can only be considered pursuant to Section 2255, then your pleading will be recharacterized and adjudicated as such.

Id. at *16-*17. Nothing in *Miller* prevents the district court from readjusting the form notice as directed by the Third Circuit as long as the district court determines that readjustment is necessary to address the questions of fairness and efficiency as in the *Hernandez* case. *See id.* In addition the problem of uniformity and potential confusion that the possibly different forms of notices will create pervades habeas corpus jurisprudence. *Id.* This makes it all the more dangerous to create new rules that actually contribute to the existing confusion. *See supra* note 5. In another case, the district court enforcing the notice requirement lamented the amount of delay that is inherent in this manner of proceeding. Koch v. Schuylkill, 94 F. Supp. 2d 557, 565 (M.D. Pa. 2000).

[160] *Hernandez*, 2001 U.S. Dist. LEXIS 846, at *11 n.6.

[161] Some of the habeas petitions filed in federal courts demonstrate that some *pro se* petitioners are barely literate. Even if habeas petitioners are literate, the fact remains that they are not well-versed in the law and will definitely have difficulties. FLANGO, *supra* note 14, at 39-43.

[162] There is necessarily a waiting period and a process of going back and forth that is not limited. When, for example, a habeas petitioner chooses one of the options in the *Miller* Notice and on refiling mischaracterizes that same application. Under the *Miller* rule, district courts have no clear direction about how to approach this situation. In *Adams*, however, even if the district court determines that a motion can only be considered under either § 2254 or § 2255, it must offer the petitioner an opportunity to withdraw the petition instead of unilaterally recharacterizing it. *Adams*, 155 F.3d at 584.

[163] The notice requirement is unwarranted as a means of achieving fairness and efficiency. The Third Circuit insisted on fairness, and rarely mentioned efficiency, as the

follow *Miller*'s example.[164] While the First Circuit recognized that the notice requirement may do some good, it is not worth the risks that necessarily flow from its application.[165]

Furthermore, the Third Circuit's acknowledgment that petitioners will have difficulties complying with the response aspect of the notice requirement signifies that the entire structure of *Miller*'s prophylactic rule eventually fails.[166] *Pro se* petitioners may not take the notice very seriously because they may have no knowledge of what it demands them to do, they may not know what procedure to follow in order file an all-inclusive habeas petition or, quite simply, they may not understand the requirements of the notice.[167] The result of this confusion is that habeas dockets will endlessly recycle cases.

V. Evaluation and Conclusion

The notice requirement may be intended to scrupulously apply fairness in the administration of post-conviction relief. Unfortunately, the application of the notice requirement necessarily leads to unintended results. The rule of liberal construction recognized the need for the judge to have broad discretion in habeas petitions. The Third Circuit, however, circumscribed the application of fairness in the

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basis for the *Miller* prophylactic rule. *See Miller*, 197 F.3d at 652. It is obvious that the *Miller* rule does not provide for efficiency and the preservation of judicial resources. Inefficiency and imprudent management of judicial resources will invariably lead to lack of fairness in the administration of justice. *See Koch*, 94 F. Supp. 2d at 565.

164 Raineri v. United States, 233 F.3d 96, 100 (1st Cir. 2000).

165 *See id.* The liberal construction rule does have the potential to do good:

> With respect, we believe that *Adams* and *Miller* sweep more broadly than the exigencies of this situation require [in the *Raineri* case]. Those decisions not only ameliorate the problem but also burden the district courts with a new protocol. We are reluctant to emulate that example. After all, there are times, even after AEDPA, when recharacterization will be to a *pro se* litigant's benefit, or in the interests of justice, or otherwise plainly warranted. Consequently, we do not think that we should discourage overburdened district courts from pursuing a sometimes useful practice by forcing them to jump through extra hoops. Doing so might well result in losing the baby along with the bath water.

Id.

166 *See Miller*, 197 F.3d at 652 n.7 ("We anticipate that in some cases the petitioner will fail to respond at all to this form notice or fail to respond within the prescribed time. In such instances, the District Court should rule on the pleadings before it, as captioned."). The court did not address what happens if the pleading is wrongly captioned, and the petition can only be adjudicated as a habeas application. Undoubtedly, the court's only option will be to dismiss the motion.

167 *See supra* note 99.

habeas process by eliminating the ability of district courts to reconstruct petitioners' applications when warranted. It is difficult to postulate how the notice requirement will hold up among the circuits that have not dealt with it.[168]

By establishing the notice requirement, the Third Circuit relegates the *pro se* petitioners to the background. In habeas proceedings, the *pro se* petitioner should be the focus of the fairness inquiry. The court should have recognized the level of literacy of *pro se* petitioners and considered how well *pro se* petitioners can comprehend legal rules. Some *pro se* habeas applications, even though written in English, must be closely read in order to transcribe the petition into both legible and comprehensible wording. Had the *Miller* prophylactic rule been based on statistics, then the Third Circuit's decision would have been established on a stronger foundation. The problem of interpretation inherent in the phrase "ruled upon as filed" alone renders the notice counterproductive. In effect, petitioners are in a worse situation than they would have been had the notice requirement not existed. Even though courts have argued that AEDPA is replete with ambiguities, the requirement is not a solution because the ambiguity of the *Miller* Notice only adds another problem to an already existing one. Thus, the notice requirement fails to redeem a habeas petitioner from AEDPA's restrictions on access to the writ of habeas corpus.

Finally, the notice requirement causes confusion and leads to the same result as recharacterization. The main point of the *Miller* prophylactic rule is notice to the petitioner informing him or her about the consequences of recharacterization as a result of AEDPA. While notice is important, the notice requirement goes too far. It completely eliminates the power of district courts to exercise any type of discretion

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[168] United States v. Seesing, 234 F.3d 456, 464 (9th Cir. 2000) (following *Adams* and *Miller*); United States v. Kelly, 235 F.3d 1238, 1242 (10th Cir. 2000) (following *Adams* and *Miller*); Raineri v. United States, 233 F.3d 96 (1st Cir. 2000). The First Circuit disagreed with the broad scope of *Adams* and *Miller* and adopted a method that does not allow districts courts to recharacterize post-conviction applications without the petitioner's informed consent. *Id.* The First Circuit, however, does not "throw away the water with the baby" by holding that whenever a recharacterization occurs, "the recharacterized motion ordinarily will not count as a 'first' habeas petition sufficient to trigger the AEDPA's gatekeeping requirements." *Id.* The First Circuit therefore abandoned the formalistic patterns of the Second and Third Circuits. The Fifth Circuit took the opposite approach in a case decided before the Second Circuit's decision in *Adams*, so the Fifth Circuit had no opportunity to address *Adams*. *See In re* Tolliver, 97 F.3d 89 (5th Cir. 1996). However, the Fifth Circuit sent a strong signal in supporting the judicial tradition of recharacterization. *See In re* Tolliver, 97 F.3d at 90.

in construing *pro se* habeas applications. Courts have been familiar with this process of liberal recharacterization and, as such, have a well-developed common law to apply it. Furthermore, the help it has accorded *pro se* habeas petitioners is beyond dispute. In this regard, the notice requirement leans towards a self-defeating formalism.

Presently only the Third Circuit and three other circuits have adopted a notice requirement, while the First and the Fifth Circuits have rejected the notice requirement. The notice requirement is a bad solution to a serious problem because it creates more problems than it actually solves. The difficulties that have already surfaced from its application indicate the potential for more problems. The remaining circuits should, therefore, avoid creating the same problems by rejecting the notice requirement.