FEDERAL HABEAS CORPUS REVIEW OF STATE CONVICTIONS: AN INTERPLAY OF APPELLATE AMBIGUITY AND DISTRICT COURT DISCRETION*

PETITIONERS seeking release from state custody through a federal writ of habeas corpus receive dissimilar treatment under the nebulous standards set by the federal judiciary. The power of a United States court to issue writs against state officials is derived from the Habeas Corpus Act,[1] which Congress passed to implement the fourteenth amendment's "due process" and "equal protection" clauses,[2] and which authorizes the issuance of a writ whenever a state detains an individual "in violation of the Constitution or laws or treaties of the United States."[3] As the meaning of due process has expanded to provide wider protection from state abuses, the number of habeas corpus petitions alleging a denial of federal rights has likewise grown.[4] The result has been federal-

*United States *ex rel.* Rogers v. Richmond, 252 F.2d 807 (2d Cir.), *cert. denied*, 357 U.S. 220 (1958), *reversing* United States *ex rel.* Rogers v. Cummings, 154 F. Supp. 663 (D. Conn. 1956), *applied on remand*, Civil No. 6294, D. Conn., Oct. 13, 1958.

1. Habeas Corpus Act, 28 U.S.C. §§ 2241-55 (1952).

2. See WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 464-82 (rev. ed. 1937); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1237 (1953). The clauses are in U.S. CONST. amend. XIV, § 1.

3. Habeas Corpus Act, 28 U.S.C. § 2241(c)(3) (1952). At common law, the writ was solely a collateral inquiry into the *jurisdiction* of the sentencing court. *Ex parte* Yarbrough, 110 U.S. 651, 654 (1884); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830). The Habeas Corpus Act enlarged the scope of the writ by permitting United States courts to overturn convictions which violate federal law. See Darr v. Burford, 339 U.S. 200, 204 (1950); Johnson v. Zerbst, 304 U.S. 458, 466 (1938); Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26, 41 (1945). The theory supporting this expanded scope of the writ is that a state court loses its jurisdiction when it violates an individual's constitutionally guaranteed rights. Johnson v. Zerbst, *supra* at 468; Henley v. Ellis, 228 F.2d 657, 664-65 (5th Cir. 1956). Since the unconstitutional, prior conviction is a nullity for want of jurisdiction, the prisoner may be retried. Note, 61 HARV. L. REV. 657, 662 n.45 (1948). In contrast, under English practice the issuance of a writ acts to prohibit retrial. *Ibid.*

4. "A conflict between State and federal authorities in relation to the administration of criminal justice [has resulted from the Habeas Corpus Act and] . . . has become intensified during the last twenty years because of the increasing subjection of State convictions to federal judicial review through the expanded concept of due process." Darr v. Burford, 339 U.S. 200, 221 (1950) (dissenting opinion). For an indication that habeas corpus petitions invariably are grounded on the due process clause of the fourteenth amendment, see Brown v. Allen, 344 U.S. 443, 520 (1953) (appendix to concurring opinion of Frankfurter, J.). See generally Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953); Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings*, 41 CALIF. L. REV. 672 (1953). In 1936, the Supreme Court first reversed a conviction because the state had used a confession extracted through physical coercion. Brown v. Mississippi, 297 U.S. 278 (1936). The due process doctrine

state friction occasioned by petitioners invoking their constitutionally guaranteed rights and local officials who are overzealous in enforcing state laws.[5] State officers resent having a lower federal court overturn a conviction affirmed by their highest tribunals,[6] and take offense at attacks on the integrity of their

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was later extended to encompass psychological intimidation. Fikes v. Alabama, 352 U.S. 191, 197 (1957). See generally Bader, *Coerced Confessions and the Due Process Clause*, 15 BROOKLYN L. REV. 51 (1948).

For the increasing number of petitions, see Report of the Habeas Corpus Committee of the Conference of Chief Justices, Aug. 14, 1954, in H.R. REP. No. 1200, 84th Cong., 1st Sess. 7 (1955) ("[U]nder the expanded concept of the use of the writ, the dockets of the Federal district courts had become clogged with thousands of groundless, if not fraudulent claims . . . ."); Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 315 (1948). "[H]abeas corpus petitions now average about 500 petitions per year as compared with less than 150 petitions in the years immediately preceding the [Second World] war." Testimony of Joseph Spaniol, Jr., Attorney, Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, in H.R. REP. No. 1200, *supra* at 26. In the twelve-year period 1943-1954 a total of 590 habeas corpus appeals were commenced in the United States courts of appeals. *Id.* at 32.

For the view that federal judges should, irrespective of clogged dockets, consider every habeas corpus petition, see Potter v. Dowd, 146 F.2d 244, 249 (7th Cir. 1944) (concurring opinion) ("Even though there were thrice this increase in number [of habeas corpus petitions], the argument that we are too busy to hear applications like this, leaves me cold. Enforcement or protection of the rights of an individual is surely not adequate if it turns on the amount or increase of the judicial labors in the Federal courts."); Sunal v. Large, 332 U.S. 174, 189 (1947) (dissenting opinion); *Ex parte* Rosier, 133 F.2d 316, 332 (D.C. Cir. 1942); United States *ex rel.* Wade v. Jackson, 144 F. Supp. 458, 459-60 (N.D.N.Y. 1956); *cf.* N.Y. Times, June 17, 1958, p. 22, col. 4; *id.*, June 18, 1958, p. 24, col. 1 (United States Attorney General and federal district judge acknowledge need for expanded federal judiciary to relieve clogged dockets).

5. See, *e.g.*, Chessman v. Teets, 354 U.S. 156, 165 (1957) ("The proponent before the Court is not the petitioner but the Constitution of the United States."). For an earlier discussion of this conflict, see Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

For representative statements expressing state hostility to federal habeas corpus review of state convictions, see testimony of Hon. Carl V. Weygandt, Chief Justice, Ohio Supreme Court, and Ralph Moody, Assistant Attorney General of North Carolina, in *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess. 14, 53 (1955) [hereinafter cited as *Hearings*]. See also note 4 *supra*; Pollak, *Proposals to Curtail Federal Habeas Corpus For State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956).

Some federal judges also disapprove of the exercise of federal habeas corpus jurisdiction over the states. Statement of Judge John J. Parker, Chief Judge of the Fourth Circuit, in *Hearings* 5. See Stonebreaker v. Smyth, 163 F.2d 498 (4th Cir. 1947) (Parker, J.); United States *ex rel.* Rooney v. Ragen, 173 F.2d 668, 672 (7th Cir.), *cert. denied*, 337 U.S. 961 (1949); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 981 (7th Cir. 1948) ("Federal courts are being used to invade the sovereign jurisdiction of the States.... [W]e are in effect trying the States."). See generally Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948).

6. See letter to the Speaker of the House from Henry P. Chandler, Director, Judicial Conference of the United States, in *Hearings* 2; testimony of Judge Parker in *Hearings* 5.

judges and themselves.[7] One possible resolution of this federal-state conflict is found in a recent congressional proposal to circumscribe the powers of federal judges by emasculating the Habeas Corpus Act.[8] The federal appellate courts have also sought to eliminate the conflict.[9] Their attempted accommodation of the act and the states' interests has resulted in divergent and unclear rules which, unless reconciled and clarified, will continue to frustrate uniform habeas corpus protection and to furnish inadequate criteria for disposing of petitions.

But see Brown v. Allen, 344 U.S. 443, 510 (1953) (concurring opinion of Frankfurter, J.): "[I]t is a baseless fear, a bogeyman, to worry lest State convictions be upset by allowing district courts to entertain applications for habeas corpus on behalf of prisoners under State sentence".

In overturning state convictions, the lower courts are not functioning in an appellate capacity. "It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law . . . . The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted." *Ibid.*

7. For a statement illustrating this attitude, see that of Congressman James Murray in *Hearings* 68:

> In Illinois, we have had our most distinguished criminal lawyers charged with being incompetent, without opportunity to defend such a charge. We have had some of our finest State prosecuting officials charged with knowingly using perjured testimony and required to defend such charges. We have had some of our most distinguished judges required to appear before Federal district judges in response to groundless charges of State prisoners . . . . I think this body should now act to protect the dignity of State courts.

But see testimony of Talbot Jennings, an inmate at Joliet State Penitentiary, in *Hearings* 127 (challenging Congressman Murray's assumptions).

8. H.R. 8361, 85th Cong., 1st Sess. (1957). The bill provides that federal courts may entertain an application for a writ of habeas corpus in behalf of a state prisoner only if the alleged constitutional violation was not raised and previously determined by state authorities and cannot subsequently be so determined, or if the petitioner had no fair and adequate opportunity to raise the issue. The bill would also deprive the courts of appeals of their supervisory powers over the disposition of habeas corpus cases, since it provides that a person denied a writ can seek review only by petitioning the Supreme Court for certiorari. The bill passed the House last March, 104 CONG. REC. 4154 (daily ed. Mar. 18, 1958), but died in the Senate when the 85th Congress adjourned. For criticism of this bill as originally introduced in 1955, see Pollak, *supra* note 5.

9. See, *e.g.*, Brown v. Allen, 344 U.S. 443, 447 (1953) (opinion of Reed, J.); *id.* at 500 (Frankfurter, J., concurring).

Confusion has attended the appellate courts' efforts. See notes 44-46 *infra* and accompanying text; Sunal v. Large, 332 U.S. 174, 184 (1947) (dissenting opinion) ("untidy area of our law"). The confusion is illustrated by the misstatement of habeas corpus procedure in Morton v. Steele, 179 F.2d 956, 957 (8th Cir.), *cert. denied*, 339 U.S. 969 (1950): "Petitioner has the mistaken notion that on a proceeding for a writ of habeas corpus he is entitled to retry questions of fact and law which were raised and decided at the trial in which he was convicted."

Hostility to the statute has been engendered primarily by federal court re-examination of the findings of state tribunals.[10] Such re-examination is possible because the writ constitutes a collateral attack and thus renders the traditional doctrines of collateral estoppel and res judicata inapplicable.[11] Moreover, the act itself supports the re-opening of adjudicated issues by directing United States courts to "hear and determine the facts";[12] hence, by implication, an inquiry into alleged constitutional violations should not be subordinated to the policy of terminating litigation.[13] Federal appellate tribunals have nonetheless recognized the desirability of avoiding the relitigation of factual issues, and have therefore directed the district judges to accord state determinations as much weight as is consistent with giving effect to the statute.[14] Specifically, the appellate courts have enunciated rules designed to guide a trial judge in his decisions on whether to examine the record of a state proceeding, and whether to hold a hearing de novo.

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10. "The point on which we are urged to overrule state courts almost invariably is in their appraisal of facts . . . . The jury and the trial judge below believed one set of witnesses whose testimony showed [the prisoner's] guilt; he wants us to believe the other and to hold that he has been convicted by perjury. That is the type of factual issue upon which this Court and other federal courts are asked to intervene and upset state court convictions." Brown v. Allen, 344 U.S. 443, 545 (1953) (Jackson, J., concurring).

11. Collingsworth v. Mayo, 173 F.2d 695, 697 (5th Cir. 1949); see Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26, 49 (1945).

12. 28 U.S.C. § 2243 (1952). See Johnson v. Zerbst, 304 U.S. 458, 466 (1938); Moore v. Dempsey, 261 U.S. 86, 92 (1923). The applicable portion of the section reads: "The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." The more explicit original version of this section directed the court to "proceed . . . to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." Quoted in Walker v. Johnston, 312 U.S. 275, 283-84 (1941). The revisers' notes indicate that the change was one of "phraseology" and not of substance. H.R. REP. No. 308, 80th Cong., 1st Sess. A178 (1947).

13. The doctrines of collateral estoppel and res judicata subordinate the search for truth to the policy of ending litigation. Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942). The policy against incarcerating or executing an innocent man, however, should far outweigh the desired termination of litigation. See statement of Thurgood Marshall in *Hearings* 83; Pollak, *supra* note 5, at 65. See also Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948) (criticizing res judicata in general); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 221, 250 (1954).

14. See, *e.g.*, Brown v. Allen, 344 U.S. 443, 501 (1953) (Frankfurter, J., concurring); Application of Burwell, 236 F.2d 770, 771 (9th Cir. 1956).

Before *Brown v. Allen*, the Supreme Court had not indicated that a state's findings of fact should be given significant weight. In *Ex parte* Quirin, 317 U.S. 1, 24 (1942), the Court observed that, when an application for a writ of habeas corpus was presented to a federal district court, the court usually would "issue the writ and on the return . . . hear and dispose of the case . . . ." Compare McCrea v. Jackson, 148 F.2d 193, 195 (6th Cir. 1945): "[P]etitioner must be afforded the right plainly accorded him by the statute of testifying before the judge."

Currently, the district judge has flexibility in disposing of habeas corpus petitions. When a petition is filed, the judge may (1) deny the writ on the ground that the allega-

United States ex rel. Rogers v. Richmond, a Second Circuit decision, is the most recent case dealing with a petitioner's right to federal re-examination of the facts established in a prior state adjudication.[15] Rogers had been convicted of murder largely on the basis of his confessions, which, he claimed, were obtained through coercion.[16] At the trial in a Connecticut court, the judge

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tions if true are insufficient to establish illegal incarceration; (2) grant the writ without further investigation; (3) issue an order requiring the state to show cause why the writ should not be granted and, on the basis of the petition and answer, deny the writ; (4) grant the writ; or (5) hold a hearing to determine disputed issues. See Dorsey v. Gill, 148 F.2d 857, 865-67 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945). In practice, federal courts summarily deny almost one half of all habeas corpus petitions solely on the basis of the application. In 126 cases, orders to show cause were issued in 48 and hearings held in 44. Brown v. Allen, *supra* at 528 (appendix to concurring opinion of Frankfurter, J.).

15. 252 F.2d 807 (2d Cir.), *cert. denied*, 357 U.S. 220 (1958), *reversing* United States *ex rel.* Rogers v. Cummings, 154 F. Supp. 663 (D. Conn. 1956), 58 COLUM. L. REV. 895 (1958).

16. While Rogers was being held in jail on a charge of robbery, the police discovered that a gun in his possession at the time of his arrest had been used two months earlier in a fatal shooting. The gun had been stolen prior to the murder from the home of Rogers' niece.

> On the order of the state's attorney he [Rogers] was removed from the jail without court order for questioning at the state's attorney's office. Until he confessed he was kept unavailable to his counsel. He claims that he was denied a request to see his counsel, which request the state's witnesses deny was made. That he made such a request seems most probable, and the Court finds that it was made. He was not warned of his right to say nothing or that what he said could be used against him. Questioned intermittently for some eight hours by the county detective, . . . [and four] police in relays, during which the gun was on the table before him, he steadfastly denied implication in the [fatal] shooting. He was handcuffed, but was allowed to smoke. He was given coffee and hamburg, one hand being released from the cuffs, which were then fastened to the chair arm, while he smoked and ate. He was taken to the men's room when he requested it. No physical violence or threats of physical violence were used. When the interrogators were unable to obtain any admission in the eight hour questioning, Captain Eagan of the . . . police was called in. After questioning for some time, Captain Eagan threatened to bring in for questioning Rogers' wife if Rogers did not confess. He threatened to send the two foster children of the Rogerses, who were state wards, to an institution meanwhile. Mrs. Rogers suffered from arthritis, but was able to attend the trial. Eagan made a pretended telephone call on a dead wire to hold a car and officers in readiness to get Mrs. Rogers and the children. He then gave Rogers an hour to make up his mind whether to confess. At the end of that time he took the phone to pretend to order Mrs. Rogers and the children brought in. At this point Rogers gave in and made a confession, completed at 1 a.m., 13 hours after the beginning of the questioning. He was then returned to the jail. The next morning, . . . the coroner gave an oral order that Rogers be held incommunicado. His counsel called at the jail, but on orders of the state's attorney was denied access to him. Rogers was taken to the coroner's office where he was for the first time warned of his rights not to make a statement and to have counsel, but still fearing that the threat to take into custody his wife and children would be carried out if the original confession was repudiated, he repeated

had heard testimony in the jury's absence and found the confessions voluntary and admissible.[17] After the conviction had been affirmed by Connecticut's highest court [18] and certiorari denied by the United States Supreme Court,[19] Rogers sought a writ of habeas corpus in a federal district court on the theory that his conviction rested on a violation of the due process clause of the fourteenth amendment.[20] The district judge did not call for the record of the Connecticut proceedings [21] but held a hearing, took testimony from Rogers and other witnesses, decided that the contested confessions were involuntary, and issued the writ.[22] On appeal, the writ was vacated and the case remanded.[23] The Second Circuit instructed the district judge to obtain a record of the state proceedings and to dispose of the petition without hearing witnesses unless he found "in the record . . . material which he deems to constitute 'vital flaws' and 'unusual circumstances' . . . ."[24] The Supreme Court subsequently issued a denial of certiorari accompanied by a single sentence which, in effect, overruled the most important aspect of the court of appeals' decision. The Court construed the Second Circuit's opinion to mean that the district judge may take testimony even in the absence of a "vital flaw" in the trial record.[25] On remand, the district judge attempted to reconcile the Second Circuit's reversal with the Supreme Court's statement and read them to mean that, absent a "vital

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> it for the coroner. One or two days thereafter, the order that he be held incommunicado was rescinded. On his trial the confessions were admitted in evidence. . . . The confessions were the result of pressure overcoming Rogers' powers of resistance and were not voluntary on his part.

United States *ex rel.* Rogers v. Cummings, 154 F. Supp. 663, 665 (D. Conn. 1956).

17. "[T]he confessions were admitted in evidence, the court . . . submitting to the jury the question of the weight to be given them [the confessions], but refusing a requested instruction that the jury might disregard them in whole or in part if it found them involuntary." *Ibid.*

18. State v. Rogers, 143 Conn. 167, 120 A.2d 409, *cert.* denied, 351 U.S. 952 (1956). The court said that "the question is whether [the allegedly coercive] . . . conduct induced the defendant to confess *falsely* that he had committed the crime being investigated. Unless it did, it cannot be said that its illegality vitiated his confessions." *Id.* at 173, 120 A.2d at 412. (Emphasis added.) The dissenting opinion framed the constitutional issue as whether the confession was voluntary—not whether it was true. *Id.* at 181, 120 A.2d at 415. The dissent was correct. See, *e.g.*, Rochin v. California, 342 U.S. 165, 173 (1951): "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause *even though statements contained in them may be independently established as true.* Coerced confessions offend the community's sense of fair play and decency." (Emphasis added.) See generally Zeldes, *The Rogers Opinion: Confusion in the Involuntary Confession Area*, 30 CONN. B.J. 221 (1956).

19. Rogers v. Connecticut, 351 U.S. 952 (1956).

20. Brief for Appellee, pp. 21-37.

21. See 252 F.2d at 811.

22. United States *ex rel.* Rogers v. Cummings, 154 F. Supp. 663 (D. Conn. 1956).

23. 252 F.2d at 808.

24. *Id.* at 811.

25. 357 U.S. 220 (1958), quoted at note 47 *infra.*

flaw" in the state transcript, the only testimony that he could take would be new evidence not considered by the state judge.[25a]

In ruling that the lower court should have examined the record, the Second Circuit departed from the reasoning which underlies the leading Supreme Court decision of *Brown v. Allen*.[26] In that case, a majority of the Court, having postulated that habeas corpus petitions can be most justly and effectively disposed of by permitting district judges to exercise wide discretion,[27] concluded that, if a state transcript is not filed, the district judge need request one only when he deems it efficient and useful to do so.[28] The Second Circuit in *Rogers*

25a. "The sense of the Supreme Court's interpretation of the language of the Court of Appeals is that while the District Judge may take additional testimony not considered by the state court on constitutional issues, . . . and make an independent determination of the facts, . . . and must independently determine whether the conviction may constitutionally stand, he may not substitute his judgment on factual issues fairly tried (i.e. where no vital flaw exists) before the state court, on similar evidence. If the issues were not fairly tried, or if important evidence exists which the trial court did not have before it, grounds would exist for the exercise of discretion to re-try the factual issues." United States *ex rel.* Rogers v. Richmond, Civil No. 6294, D. Conn., Oct. 13, 1958.

Repeating that the evidence obtained at the federal hearing would warrant the issuance of the writ, the district judge nonetheless denied the writ on remand because he could find no "vital flaw" in the state record justifying a rehearing. "Subsequent disagreement with his [the state trial judge's] weighing of essentially similar evidence is not in itself sufficient under the limitations now imposed in the interest of proper balance in our dual court system, to permit consideration of the matter heard at the trial of the issue de novo here." *Ibid.*

26. 344 U.S. 443 (1953).

27. "[E]xperience cautions that the very nature and function of the writ of habeas corpus precludes the formulation of fool-proof standards which the 225 District Judges can automatically apply. Here as elsewhere we must attribute to them the good sense and sturdiness appropriate for men who wield the power of a federal judge. Certainly we will not get these qualities if we fashion rules to the contrary." *Id.* at 501 (Frankfurter, J., concurring). A majority of the Court joined in Frankfurter's views just quoted. See *id.* at 488, 513, 463, 464, 496, 500, 503, 507. See also Coggins v. O'Brien, 188 F.2d 130, 144 (1st Cir. 1951) (concurring opinion).

28. "If the record of the State proceedings is not filed, the judge is required to decide, with due regard to efficiency in judicial administration, whether it is more desirable to call for the record or to hold a hearing." 344 U.S. at 503 (Frankfurter, J., concurring) (joined by a majority of the Court, see note 27 *supra*). The Second Circuit approved similar reasoning in United States *ex rel.* Cooper v. Denno, 221 F.2d 626 (2d Cir.), *cert. denied*, 349 U.S. 968 (1955), by affirming Cooper v. Denno, 129 F. Supp. 123 (S.D.N.Y. 1955). The district court had said that "in conducting the habeas corpus proceeding, *Brown* [sic] makes it very clear that the Federal District Court Judge has discretion as to whether he will decide the issue solely on the printed record (if the record is ample) or on the basis of a plenary hearing with witnesses." *Id.* at 125. The Third Circuit gave substantially the same reading to *Brown v. Allen*. United States *ex rel.* De Vita v. McCorkle, 216 F.2d 743, 747 (3d Cir. 1954).

A useful record is one which reveals that the issues raised in the habeas corpus petition were raised and examined in a lower state court and that an appeal was made to a state appellate court which wrote an opinion thoroughly discussing these issues. See Beverly, *Federal-State Conflicts in the Field of Habeas Corpus*, 41 CALIF. L. REV. 483, 491-93 (1953).

nonetheless reversed the district judge because he had failed to call for a readily available state transcript.[29] Although the record of the state proceedings may be of value, a trial judge could reasonably find from a petition alone or together with an answer that the resolution of the allegations necessarily requires a hearing.[30] The Second Circuit's opinion may therefore be construed to mean that, as a matter of law, acquiring a record (if one exists) is a condition precedent to holding a hearing. Such a construction of *Rogers* would be buttressed by the court's two announced reasons for requiring the record—"the delicate balance of federal-state relations" and the difficulty of detecting a coerced confession [31]—since the former issue is common to all habeas corpus proceedings and the latter to many.[32] In any event, neither of these reasons is compelling. The Supreme Court felt that it had adequately considered the problems posed by federalism when it held that district judges may in their discretion decide whether to call for the record.[33] Moreover, if (as in *Rogers*) the district court must pass on an allegedly involuntary confession, the expense and delay involved in procuring a record may outweigh any benefits to be gained by scrutinizing it, for the relevant testimony is likely to be contradic-

29. 252 F.2d at 810.

30. The *Rogers* district court, in deciding to hold a hearing after examining the petition, apparently followed language in the opinion of the Court in *Brown v. Allen*. "In § 2243 and § 2244 [of the Habeas Corpus Act] we think ["entertain"] . . . means a district court's conclusion, *after examination of the application with such accompanying papers as the court deems necessary*, that a hearing on the merits, legal or factual, is proper." 344 U.S. at 460. *But see id.* at 505 (Frankfurter, J., concurring) ("entertain" does not refer to decision on need for hearing).

A district judge could have reasonably decided that a hearing was required on the basis of the *Rogers* petition alone, because the petition was a comprehensive document drafted by the public defender, who had been Rogers' counsel in the state proceedings, Appendix to Brief for Appellant, p. 167; because the petition had excerpts from and cites to the decision of the Supreme Court of Errors, *id.* at 157; because it alleged new evidence not heard in the state proceeding and therefore not in the transcript, *id.* at 154; and because portions of the state record were included in the petition, *id.* at 155, 156.

In general, when the issue is the credibility of testimony regarding a coerced confession and no disinterested witnesses testified at the state trial, a federal judge could decide that only live testimony at a new hearing would prove adequate guidance for disposing of the petition. See notes 54, 55 *infra*.

31. See 252 F.2d at 810. The court's exact language—"the nature of the issues presented"—presumably refers to the problems presented by an alleged coerced confession.

32. Of 46 habeas corpus cases alleging state violations of due process that are reported in 33 FED. DIG. *Habeas Corpus* § 85.5 (Supp. 1958), 12 involved claims of coercion. See also note 34 *infra*.

33. See 344 U.S. at 447, 451 n.5, 497-98, 500, 508-09. Added, if dim, light was recently cast on the views of the Supreme Court and Second Circuit with respect to federal habeas corpus hearings. Farnsworth v. Murphy, 27 U.S.L. WEEK 3110 (U.S. Oct. 14, 1958), *vacating per curiam* 254 F.2d 438 (2d Cir. 1958). The New York prisoner—attempting to reduce his sentence as a four-time offender— alleged the invalidity of a 1929 Maryland felony conviction on the grounds that state officials had misled him into pleading guilty, and that he had been denied counsel.

tory.[34] Furthermore, if the petitioner is forced to bear the cost of providing a record, habeas corpus proceedings may be effectively foreclosed.[35]

In every habeas corpus case, the problem of when a federal judge should examine the prior record can best be solved by letting the respondent state decide whether or not to file a transcript of the state proceedings. Were the record not furnished, the federal court could proceed satisfactorily through hearings. Conversely, by submitting the transcript, local officials could frequently obviate a federal hearing, since a district judge, after receiving a record, would rarely need to corroborate it with testimony.[36] Thus, granting the state

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34. A defendant from whom a confession has skillfully been extorted is generally without practical remedy. The only witnesses to the coercive practices are those who participated in and encouraged them. The issue, if raised on the trial, is one of credibility between the defendant, an interested witness, whose only salvation lies in nullifying the confession, and officers sworn to uphold the law. This issue is almost universally resolved against the defendant.

Bader, *Coerced Confessions and the Due Process Clause*, 15 BROOKLYN L. REV. 51, 70 (1949). See McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239, 250 (1946).

A habeas corpus hearing will often be cheaper and more expeditious than a mandatory call for an unprinted or unavailable record. The Administrative Office of the United States Courts found that out of 24 federal habeas corpus hearings only one lasted more than four hours, and 16 took one hour or less. Brown v. Allen, 344 U.S. 443, 529 (1953) (appendix to concurring opinion of Frankfurter, J.).

For the prevalent use of coercive techniques by local law enforcement officers, see Haley v. Ohio, 332 U.S. 596, 605 (1948) (concurring opinion); United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955); FRANK, IF MEN WERE ANGELS 320 (1942); HOPKINS, OUR LAWLESS POLICE (1931); NATIONAL COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REP'T NO. 11, *Lawlessness in Law Enforcement* (1931). See generally Hall, *Police and Law in Democratic Society*, 28 IND. L.J. 133 (1953). Since many state judges are loath to resolve disputed testimony against local officials, note 54 *infra*, allegedly coerced confessions often merit careful scrutiny of habeas corpus petitions.

"The question of whether or not a confession is coerced involves a complex judgment upon the facts inevitably entangled with assumptions and standards which are part and parcel of the ultimate issue of constitutionality . . . . 'Facts', except the most rudimentary, are not like members of a lodge who identify themselves by badges." Stroble v. California, 343 U.S. 181, 202-03 (1952) (Frankfurter, J., dissenting).

35. In *Rogers*, the state argued that it was petitioner's duty to present the prior record at the time he filed his habeas corpus petition. Brief for Appellee, p. 15.

36. Hearings are relatively uncommon anyway. Of 532 habeas corpus petitions from state prisoners disposed of in 86 federal district courts in 1953, hearings were held in 29 cases, an average of 5.5%. In 1954, 615 petitions were disposed of by these same 86 courts and hearings were held in 20 cases, or 3.3%. Over the 14 year period 1941-1954 86 federal district courts disposed of 6,404 petitions and held hearings in 465, or 7.3%. H.R. REP. No. 1200, 84th Cong., 1st Sess. 29 (1955). No statistics are available distinguishing cases in which records were available from cases in which they were not. However, of 112 habeas corpus cases disposed of by district courts from October 1950 to May 1952, transcripts of the state proceedings were available in three cases. Brown v. Allen, 344 U.S. 443, 519 (1953) (appendix to concurring opinion of Frankfurter, J.).

an option to file should minimize federal-state discord by enabling the states to eliminate the need for federal hearings. Placing the burden on the states would also be equitable because, if a transcript exists, the state is the party most likely to have a copy or best able to procure one.[37] Furthermore, in keeping with sound precedent, a state's failure (as in *Rogers*) to make a timely submission of the transcript should be deemed a waiver of the right to protest the record's absence.[38]

Once a transcript is filed, the district judge still must decide whether a hearing is needed—a fundamental question which the Supreme Court attempted to resolve in *Brown v. Allen*.[39] Writing for the Court, Mr. Justice Reed said that a hearing may be held whenever a district judge thinks that one would be "proper" or "would serve the ends of justice."[40] Taking issue with the word "proper"[41] and expressing views concurred in by a majority of the Court,[42] Mr. Justice Frankfurter said that district judges should "probe the federal question," that is, presumably, should exercise diligence in investigating a petitioner's allegations.[43] The several criteria suggested by the Reed and Frankfurter opinions have confused the lower courts. One circuit would hold a hearing if the state had not given "fair consideration to the issues raised . . . [or] had [not] arrived at a satisfactory conclusion . . . ."[44] Another requires the judge to take testimony if the petition and exhibits aver facts establishing a

37. The state could file the original transcript if federal courts followed the Supreme Court's practice of returning state records when proceedings terminate. See Brown v. Allen, *supra* note 36, at 464 n.19.

38. In *Rogers*, the appellant-petitioner neglected to argue to the Second Circuit that, because the state had introduced evidence and otherwise participated in the district court proceedings without protesting the judge's failure to read the record, the state was estopped from raising such a protest on appeal. Had the argument been made, the Second Circuit might have affirmed the lower court's grant of the writ.

> [T]he [federal] government [respondent] . . . treated the hearing as one de novo . . . . Having by this course of conduct induced the court below to decide the application on the merits in the first instance, it does not now lie in the mouth of the government to complain of the court's action in doing what it was so invited to do. We therefore sustain the action of the District Court in entering upon a hearing de novo and deciding the case upon the merits upon the evidence adduced on the hearing of the habeas corpus proceeding.

United States v. Ruiz, 203 Fed. 441, 443-44 (5th Cir. 1913) (petitioner seeking release from immigration authorities).

39. 344 U.S. at 460, 497.

40. *Id.* at 461, 464.

The Ninth Circuit interpreted "proper" to mean that "it is likewise within the discretion of the district court not only to receive new evidence, but to hold a hearing and determine the merits for itself . . . ." Cranor v. Gonzales, 226 F.2d 83, 92 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956).

41. 344 U.S. at 505.

42. See *id.* at 488, 513.

43. *Id.* at 501.

44. United States *ex rel.* De Vita v. McCorkle, 216 F.2d 743, 747 (3d Cir. 1954).

"prima facie case of merit."[45] And the court of appeals in *Rogers* interpreted *Brown v. Allen* to mean that, absent a "vital flaw" or "unusual circumstances" in the state proceedings, constitutional determinations must be made exclusively from the state trial record (if available).[46] In denying certiorari in *Rogers*, the Supreme Court further confused the lower courts by reading the Second Circuit's opinion to mean that if a "vital flaw" is found a federal hearing *must* be held but, absent such a flaw, testimony *may* still be taken in the district court.[47] Although this language comports with *Brown v. Allen*, the denial of certiorari leaves the Court's position unclear.[48]

45. Wiggins v. Ragen, 238 F.2d 309, 312 (7th Cir. 1956). Previously, the Seventh Circuit apparently held that a hearing was always necessary. "[I]t is the law of this circuit that in granting or denying a writ of habeas corpus, the judge or court should make findings of fact and state conclusions of law thereon." Tucker v. Howard, 177 F.2d 494, 497 (7th Cir. 1949), citing Wood v. Howard, 157 F.2d 807, 808 (7th Cir. 1946). See also Galloway v. Dowd, 204 F.2d 524 (7th Cir. 1953), *cert. denied*, 347 U.S. 1017 (1954).

46. The Second Circuit apparently derived its "vital flaw" test from Mr. Justice Frankfurter's concurring opinion in *Brown v. Allen*. "When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts . . . have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District judge may accept their determination in the State proceeding . . . ." 344 U.S. at 506. This language would seem to mean that if the district judge finds a "vital flaw" in the record he must take testimony, but, absent such a finding, he may still take testimony if he desires. See notes 47, 48 *infra* and accompanying text.

The Second Circuit's "unusual circumstances" test evidently is a gloss on the following language in the opinion of the Court in *Brown v. Allen*. "Where the record . . . affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required." 344 U.S. at 463 (opinion of Reed, J.). Manifestly, this language does not remove from the trial judge's discretion the decision as to whether the record "affords an adequate opportunity to weigh the sufficiency of the . . . evidence."

47. "We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding and may take testimony." 357 U.S. 220 (1958).

48. Technically, a denial of certiorari cannot be construed as an "expression of opinion on the merits." United States v. Carver, 260 U.S. 482, 490 (1923). Moreover, the Supreme Court in *Rogers* did not have to indicate when a district judge can properly hold a hearing, since the court of appeals had reversed the district judge solely because he had failed to call for the state record. In any event, the sentence accompanying the Supreme Court's denial of certiorari would seem on its face to overrule that part of the Second Circuit's opinion dealing with when the district judge should hold a hearing. Since the Court went out of its way to explain how it read the court of appeals' decision, the Court evidently intended to overrule the "vital flaw" dictum and to reaffirm *Brown v. Allen*. On remand, however, the district judge read the denial of certiorari another way and concluded that, in the absence of a "vital flaw" in the state transcript, he could re-examine state findings of fact only in the event that important new evidence was available. See note 25a *supra*. This interpretation is valid only if the Supreme Court construed the Second Circuit's opinion to mean that the absence of relevant testimony is not a "vital flaw." No language in the Second Circuit's decision appears to warrant such a restricted interpretation. In fact, the Second Circuit specifically approved dictum in Brown v. Allen, 344 U.S. 443, 478 (1954),

The criteria articulated in and derived from *Brown v. Allen* are so imprecise as to invite divergent interpretation and to preclude their practical application.[49] The Second Circuit's "vital flaw" and "unusual circumstances" tests are especially unsound, for conditioning a hearing on the discovery of an imperfection in the record may permit violations of the Constitution which are not self-evident to escape federal detection.[50] Accordingly, the higher federal courts should abandon the formulation of vague, comprehensive tests, and should direct their attention to isolating and enumerating those specific elements which weigh for and against a federal hearing. This approach would provide the district judges with effective guides for exercising the wide discretion reserved to them by the Supreme Court.[51]

A federal hearing is necessary if the record reveals that the petitioner's claim of unconstitutionality was rejected on the basis of incomplete proceedings or untenable conclusions in the state tribunals.[52] Thus, the district judge, after examining the record, may decide that the state courts failed to consider or resolve testimony which he deems essential to the constitutional issue. If, for example, the state denied allegations that the selection of jurors was biased, but did not set forth the actual method used to choose the jury, supplemental testimony should be required. Similarly, if a finding of fact central to the constitutional claim is inconsistent with uncontradicted evidence in the record, the finding is logically untenable and necessitates the presentation of further evidence in a federal court.[53]

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stating that the district courts have discretion to take testimony with respect to evidence which the trial court had excluded or not passed on. 252 F.2d 807, 812 (1958).

49. The *Brown* court warned that "vague, undefined directions permitting the District Court to give 'consideration' to a prior State determination fall short of appropriate guidance for bringing to the surface the meritorious case." 344 U.S. at 501 (Frankfurter, J., concurring). See also Darr v. Burford, 339 U.S. 200, 225 (1950) (dissenting opinion). Nonetheless, the Court's own criteria have engendered dissimilar standards among the circuits. See notes 44-46 *supra* and accompanying text. Ironically, the Court sought to "preclude individualized enforcement of the Constitution in different parts of the Nation." 344 U.S. at 501 (Frankfurter, J., concurring).

50. For example, on remand in *Rogers,* the district judge interpreted "vital flaw" to mean that the record of the state proceedings must reveal that the constitutional issues were not fairly tried. United States *ex rel.* Rogers v. Richmond, Civil No. 6294, D. Conn., Oct. 13, 1958. See note 25a *supra.* If this reading of the "vital flaw" test is correct, a hearing to determine credibility would rarely be possible, for the record could not reveal whether the state judge had reasonably assessed demeanor evidence. See note 55 *infra.*

51. "[D]iscretion must be judicial discretion. It must be subject to rational criteria, by which particular situations may be adjudged . . . . [I]f left at large in disposing of applications for a writ of habeas corpus, they [district judges] would necessarily be thrown back upon their individual judgments, and that would be the exercise not of law but of arbitrariness." Brown v. Allen, 344 U.S. 443, 496-97 (1953) (Frankfurter, J., concurring).

52. See Lisenba v. California, 314 U.S. 219, 238 (1941). Factual determinations made by state courts may be accepted unless "so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process." *Ibid.*

53. In *Rogers,* for example, the state court found that he did not ask for counsel. Brief for Appellee, p. 12, citing Record, pp. 59, 64, 66, 70. Yet "Rogers' testimony in the

In addition, a redetermination of findings of fact is indicated whenever the record reveals that the state's resolution of the constitutional issue against the petitioner turned on evidence of doubtful credibility. The district judge should, for instance, hear live testimony if the uncorroborated statements of interested witnesses and the defendant's evidence conflict with respect to a question of constitutional significance which was answered in the state's favor.[54] Credibility cannot be determined from a printed record.[55] Even if, quantitatively, the evidence is overwhelmingly unfavorable to the petitioner, in the absence of prior, disinterested testimony, state findings may be properly re-examined, for just results are not reached simply by counting witnesses. Also, if a petitioner brings forward new evidence which was unavailable or inadvertently omitted at trial, and which buttresses a previously asserted claim that his constitutional rights were violated, a federal hearing may be necessary to resolve the claim.[56] At common law, a convict with newly discovered evidence could petition the sentencing court to reopen its judgment through a writ of coram nobis.[57] But

state tribunal in regard to his requests for counsel . . . was uncontradicted." *Ibid.* The state finding was therefore inconsistent with uncontradicted testimony in the record, and warranted federal re-examination.

54. In coerced confession cases, the testimony is usually that of the defendant and the law enforcement officers present at the time of the confession. See note 34 *supra.* The testimony of police may raise credibility questions "because an officer who is willing to use methods which he knows are unlawful is frequently (by no means always) willing to deny the wrong under oath. The end justifies perjury if it justifies brutality." McCormick, *Some Problems and Developments in the Admissibility of Confessions,* 24 TEXAS L. REV. 239, 250 (1946).

55. [T]here are things of pith that cannot be preserved in or shown by the written page . . . . [O]ne witness may give testimony that reads in print . . . as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

Yutterman v. Sternberg, 86 F.2d 321, 324 (8th Cir. 1936), quoting Creamer v. Bivert, 214 Mo. 473, 479, 113 S.W. 1118, 1120 (1908). See Untermeyer v. Freund, 37 Fed. 342, 343 (C.C.S.D.N.Y. 1889); Rhodes v. The State, 128 Ind. 189, 196, 27 N.E. 866, 868 (1890) ("no one who can not see the expression of faces, nor observe deportment and demeanor, can justly weigh testimony").

56. The Ninth Circuit, for example, interpreted *Brown v. Allen* to permit the district judge, in his discretion, to receive new evidence supporting a previously alleged denial of due process. Cranor v. Gonzales, 226 F.2d 83, 92 (9th Cir. 1955), *cert. denied,* 350 U.S. 935 (1956).

Nonetheless, a defendant cannot intentionally withhold possible defenses at trial or on appeal and subsequently use them as a basis for habeas corpus proceedings. See Glasgow v. Moyer, 225 U.S. 420, 430 (1912). Failure to make timely objection to constitutional violations may constitute a waiver of that defense. See Yakus v. United States, 321 U.S. 414, 444 (1944), cited in Michel v. Louisiana, 350 U.S. 91, 99 (1955); Patton v. United States, 281 U.S. 276, 308 (1930) (waiver of jury trial). See generally United States *ex rel.* Jackson v. Brady, 133 F.2d 476, 481 (4th Cir. 1943).

57. Huffman v. Alexander, 197 Ore. 283, 253 P.2d 289 (1952); FRANK, CORAM NOBIS 1 (1953).

this and other post-conviction remedies have proved ineffective in some states.[58] Consequently, if a petitioner has exhausted his remedies by bringing forward his newly acquired evidence in the state courts without success,[59] the district judge should rehear the relator's constitutional allegations in the light of all available data.[60]

Finally, the proper disposition of habeas corpus petitions dictates that federal judges examine the competing considerations which may render a hearing inappropriate. State adjudications following plenary hearings, for instance, are entitled to greater weight than findings contained in per curiam opinions of appellate courts or in summary denials of state writs of habeas corpus.[61] The utility of a federal hearing will also vary with the length of time which has elapsed subsequent to the original trial, for important witnesses may be unavailable or their recollections dulled.[62] Moreover, to prevent abuses which

58. See Briggs, *"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy To Test Constitutionality in Criminal Proceedings?*, 17 MONT. L. REV. 160 (1956).

In some states the statutory remedy of a motion for a new trial has supplanted the writ of coram nobis. People v. Reid, 195 Cal. 249, 232 Pac. 457 (1924); State *ex rel.* Burford v. Sullivan, 86 Okla. Crim. 364, 193 P.2d 594 (1948). Courts, however, are reluctant to grant a new trial on the basis of newly discovered evidence. People v. Mandell, 48 Cal. App. 2d 806, 818, 120 P.2d 921, 927 (Dist. Ct. App. 1942), cited in People v. Merrill, 104 Cal. App. 2d 257, 268, 231 P.2d 573, 581 (Dist. Ct. App. 1951); Fields v. State, 212 Ga. 652, 94 S.E.2d 694, 695 (1956); Moore v. Commonwealth, 186 Va. 453, 42 S.E.2d 871 (1947). See cases collected in 23 C.J.S. *Criminal Law* § 1453 n.98 (1958).

Illinois post-conviction proceedings have been particularly inadequate in vindicating alleged violations of defendants' rights. See Marino v. Ragen, 332 U.S. 561, 563-70 (1947) (concurring opinion); Note, *A Study of the Illinois Supreme Court*, 15 U. CHI. L. REV. 107, 120-31, 173 (1947). Attempting to remedy this situation, Illinois enacted a new Post-Conviction Hearing Act in 1949. ILL. REV. STAT. ch. 38, §§ 826-32 (1957). *But see* Seidensticker, *The Illinois Post-Conviction Hearing Act: A Survey*, 1 DE PAUL L. REV. 243, 244 (1952) (act inadequate). See also Note, *Operation of Appellate Procedure in Pennsylvania Criminal Cases*, 100 U. PA. L. REV. 868, 890 (1952) (Pennsylvania system of post-conviction relief archaic).

59. "[A] writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State," or that there is no adequate remedy available in such courts. 28 U.S.C. § 2254 (1952). See Darr v. Burford, 339 U.S. 200, 205-14 (1950).

60. See United States *ex rel.* Alvarez v. Murphy, 246 F.2d 871 (2d Cir. 1957) (new testimony should be heard by district judge after state denial of coram nobis). When the prisoner is under sentence of death, federal courts should be especially alert to examine allegedly new evidence which the state refuses to hear. *Cf.* Powell v. Alabama, 287 U.S. 45 (1932); Griffin v. Illinois, 351 U.S. 12, 28 (1956) (dissenting opinion) ("There is something pretty final about a death sentence."); United States *ex rel.* Farnsworth v. Murphy, 254 F.2d 438 (2d Cir. 1958) (refusal to re-examine 1929 conviction), *vacated per curiam*, 27 U.S.L. WEEK 3110 (U.S. Oct. 14, 1958).

61. See Simpson v. Teets, 239 F.2d 890, 894 (9th Cir. 1956) (dissenting opinion). See also Collingworth v. Mayo, 173 F.2d 695, 697 (5th Cir. 1949).

62. The importance of the time elapsed should not be overemphasized, however. Ignorance, lengthy procedures and previous lack of a valid constitutional objection may all preclude prompt petition for federal relief. In some cases, United States courts have re-

can flow from repeated applications for a writ, testimony should rarely be taken if the petitioner's claim has been previously heard in a federal court.[63]

In sum, once the respondent state has submitted a record of the state proceedings in response to a petition for a federal writ of habeas corpus, the district court should hold a hearing if specific questions of incompleteness, inconsistency, credibility or newly discovered evidence suggest the likelihood of improperly resolved constitutional issues, and if, in the context of the particular case, federal intervention appears justified. Identical criteria could also govern in the absence of a record, although the district court's relative lack of evidence would then more frequently necessitate federal hearings. In either event, so long as the determination of whether to hold hearings is objectively made, the states cannot legitimately protest. Any greater deference to local interests would subordinate constitutional rights to improper methods of law enforcement.[64] Of course, the proposed standards, while useful in determining whether a hearing should be held, are not exhaustive, for constitutional violations not only differ but the postures in which they arise are also varied. Appellate rulings, however specific, can only focus a district judge's attention on relevant points; the weight to be given the various elements and omissions in each case must be left to judicial discretion. In the final analysis, therefore, the solution to the problems raised by the *Rogers* case is, as the Supreme Court has indicated, a federal judiciary capable in its discretion of detecting those habeas corpus petitions which merit a federal hearing.

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leased petitioners after extraordinary delay. See United States *ex rel.* Wade v. Jackson, 256 F.2d 7 (2d Cir. 1958) (17 years after conviction); Henley v. Ellis, 228 F.2d 657 (5th Cir. 1956) (26 years after conviction).

63. A federal district court is not required to entertain an application for habeas corpus if it appears that "the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus." 28 U.S.C. § 2244 (1952). See Salinger v. Loisel, 265 U.S. 224, 231-32 (1924); Bales v. Lainson, 244 F.2d 495, 496 (8th Cir. 1957).

64. See United States *ex rel.* Caminito v. Murphy, 222 F.2d 698, 704 (2d Cir. 1955) (federal habeas corpus proceedings may raise local standards of law enforcement).