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Speedy Criminal Appeal: A Right without a Remedy

Marc M. Arkin

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"If it were done, when 'tis done, then 'twere well it were done quickly."[1]

INTRODUCTION

John Doe has been convicted after trial of one count of felony robbery, larceny, and related crimes. A state trial court sentences him to a term of from four-and-one-half to nine years. Because of this sentence, his probation on a prior guilty plea is revoked and he is sentenced to an additional one to three years in prison, to run consecutively to the first term. Doe files notices of appeal both to the conviction and to the revocation of probation and, because he is indigent, the court assigns counsel to handle his appeals. Then, his case seems to become lost in the state court system. First one attorney and then another is relieved from the case. Counsel fails to answer Doe's letters. The clerk's office tells counsel to resign because another attorney has been assigned to the second appeal. Counsel is relieved and then reassigned to both appeals. Extensions are granted. Counsel resigns again. Three-and-one-half years pass. John Doe has served more than half of his minimum sentence and his appeals still have not been heard.[2]

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1. W. SHAKESPEARE, THE TRAGEDY OF MACBETH, act I, scene VII, lines 1-2 (A. Reimer ed. 1980).

2. This illustration is drawn from Hampton v. Kelly, No. 88 Civ. 0528 (E.D.N.Y. Nov. 29, 1988) (LEXIS 13999, Genfed library, Dist file), *summarily dismissed on appeal*, 876 F.2d 890 (2d Cir. 1989). The author served as appointed counsel for Mr. Hampton on appeal from the district court decision in his petition for habeas corpus relief. The district court ordered Mr. Hampton's release unless the New York state courts heard his direct appeal within 180 days of the issuance of the district court opinion. The New York appellate

As speedy trial problems were the bane of the 1960s,[3] so appellate delay portends to be the issue of the 1990s. Over the past ten years, "the volume of state criminal appeals has increased at a rate far exceeding that of crimes, arrests, and trials."[4] Not surprisingly, the problems of appellate delay have grown apace, as has concern regarding the failure of courts to keep up with the mounting appellate load.[5] In New York's First and Second Departments, delays are so serious that prisoners frequently serve their sentences before their appeals are even heard.[6] Delays of six years, while "shocking," are not "unusual."[7] Even after delay reduction procedures were instituted in Rhode Island, recent statistics show a median of more

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court subsequently decided Mr. Hampton's direct appeal within the 180 day period, reducing one count of his conviction from a felony to a misdemeanor, and leaving his sentence unchanged. Although the Second Circuit dismissed Mr. Hampton's appeal as moot, it also discussed and agreed with the district court's reasoning in granting the conditional release.

3. *See, e.g.*, Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 525 (1975) (asserting that "mere manipulation of legal doctrine will not solve the problem of trial delay"); Gobold, *Speedy Trial — Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 265 (1972) (describing trial delay as a problem of national magnitude); *see also infra* note 10 (listing contemporaneous cases and commentary concerning speedy trial right).

4. Chapper & Hansen, *Managing the Criminal Appeals Process*, 12 STATE CT. J., Summer 1988, at 4 (citing BUREAU OF JUSTICE STATISTICS BULLETIN, THE GROWTH OF APPEALS (Feb. 1985)).

5. *See, e.g.*, COMMITTEE ON CRIMINAL ADVOCACY OF THE BAR OF THE CITY OF NEW YORK, THE CRISIS IN INDIGENT APPEALS IN THE FIRST AND SECOND DEPARTMENTS (1985); Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 603 (1985) (remarking that "[n]ew methods of recordkeeping have led to a wealth of statistics about court processes. . . . [which] in turn, increased concern about burgeoning litigation rates and the limits of judicial and litigants' resources. . . . resulting [in] perceptions of congestion and of systemic malfunctioning" (footnote omitted)); Christian, *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 STAN. L. REV. 676, 676 (1971) (describing delay as "a growing threat to the effective administration of justice" and noting "much has been written about this problem in recent years"). *Cf.* ABA STANDING COMM. ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 3-4 (1989) (discussing caseload overflow in federal appellate system); Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 761-62 (1983) (noting 400% increase in federal appeals between 1960 and 1981).

6. COMMITTEE ON CRIMINAL ADVOCACY OF THE BAR OF THE CITY OF NEW YORK, *supra* note 5, at 1. This pattern of delay is all the more appalling because in 1984, 23% of defendants convicted at trial in the First and Second Departments who were represented by the Legal Aid Society on appeal gained a reversal or other sentence modification. *Id.*

7. Mathis v. Hood, 851 F.2d 612, 614 (2d Cir. 1988).

than a year from the filing of a notice of appeal to decision in criminal cases.[8] Almost one quarter of the reported appeals linger more than a year and a half.[9]

The problem of trial delay forced itself upon the consciousness of the legal community in the late 1960s and early 1970s, as urban courts proved unable to keep up with their increasingly heavy caseloads.[10] The lower courts first struggled to articulate a standard for measuring trial delay based on sixth amendment norms.[11] The Supreme Court then fleshed out those norms and developed both a standard for measuring trial delay and an absolute remedy — dismissal of the indictment — once delay crossed the constitutional barrier.[12] Nevertheless, judicial manipulation of legal doctrine by itself proved ineffective in cop-

8. Chapper & Hansen, *supra* note 4, at 7 (chart). Chapper and Hansen discuss the result of various procedural reforms aimed at meeting the increased volume of appeals in the first-level appellate courts with a mandatory jurisdiction. *Id.* at 10; *see also id.* at 11 n.4 (citing several commentaries stemming from this increased attention).

9. *Id.* at 7 (chart).

10. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 519-23 (1972) (noting problems caused by delay, and citing several contemporary commentaries); Widman, *The Right to a Speedy Trial: Pre-Indictment and Pre-Arrest Delay*, 7 AM. CRIM. L.Q. 248, 251 (1969) (discussing pre-arrest rights under due process); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 866 (1957) [hereinafter Note, *Speedy Trial*] (arguing for dismissal and bar of future prosecutions for same offense as remedies for excessive delay); Comment, *The Convict's Right to a Speedy Trial*, 61 J. CRIM.L. CRIMINOLOGY & POLICE SCI. 352, 352 (1970) (noting "manifold harms" caused by delay); Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1590-91 (1965) (arguing the need for Supreme Court ruling on the speedy trial right, given restrictive lower court rulings and incomplete statutes).

11. *See, e.g.*, United States v. Simmons, 338 F.2d 804, 806-07 (2d Cir. 1964) (setting out a four factor test for determining sixth amendment speedy trial violations), *cert. denied*, 380 U.S. 983 (1965); United States v. Mann, 291 F. Supp. 268, 269-70 (S.D.N.Y. 1968) (following the *Simmons* analysis). The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.

12. *E.g.*, Strunk v. United States, 412 U.S. 434, 438 (1973) (noting that a "flexible standard based on practical consideration" is appropriate to determine a claim for denial of speedy trial right, but ruling that dismissal is not an "unsatisfactorily severe" remedy); *Barker*, 407 U.S. at 522 (adopting four factor test and stating that dismissal is the only remedy for unconstitutional delay); United States v. Marion, 404 U.S. 307, 321, 325 (1971) (holding that speedy trial right does not apply prior to arrest, and ruling against dismissal when defendant does not claim or prove actual prejudice); Smith v. Hooey, 393 U.S. 374, 383 (1969) (holding that the state has a duty to bring a prisoner in another jurisdiction to an in-state court for trial); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (holding state practice permitting suspension of a prosecution with automatic leave to reinstate violated defendant's speedy trial right).

ing with the delays.[13]

As a result, the American Bar Association proposed legislative and procedural reforms requiring that a criminal defendant be offered a trial within a specific time period.[14] This proposal led to the passage of the federal Speedy Trial Act of 1974[15] and to the adoption of similar state legislation or rules of court ensuring that, absent permissible cause, a criminal defendant will see trial in a set period of time.[16] The result, predictably, has been a shift from the amorphousness of constitutional litigation to the relative certainty of legislative enforcement. The final outcome is a more effective protection of the right to a speedy trial.[17]

History appears to be repeating itself. The scenario of appellate delay is being played out in the state courts.[18] Cases involving alleged violations of due process through delayed

13. Amsterdam, *supra* note 3, at 525.

14. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft 1968). *See* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 11-12 (1980) (discussing the role of the ABA's proposal in development of the Speedy Trial Act).

15. 18 U.S.C. §§ 3161-3174 (1974) (amended 1979).

16. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 18.3(c), at 692-94 (student ed. 1985) (discussing mechanics of various laws granting additional time); *see, e.g.*, New York Speedy Trial Act, N.Y. CRIM. PROC. LAW §§ 30.10-.30 & Practice Commentary (McKinney 1983 & Supp. 1990) (amended in 1972 to define the right to a speedy trial in terms of time periods). Justice Joseph Bellacosa of the New York Court of Appeals, author of the practice commentary, was then Chief Clerk of the New York Court of Appeals. *Id.* at p. III.

17. Within 10 years of the Supreme Court's leading decision in the area of sixth amendment speedy trial rights, Barker v. Wingo, 407 U.S. 514 (1972), more than two-thirds of the states, as well as the federal government, had enacted legislation that set time limits on pretrial delay. R. MISNER, SPEEDY TRIAL: FEDERAL AND STATE PRACTICE §§ 19.1-.51 (1983) (discussing each state's statutory and case law between the Court's decision in *Barker* and July 1, 1982). Although the acts may be more effective than sixth amendment litigation in protecting speedy trial rights, experience unfortunately has shown that statutes hardly ensure prompt adjudication of criminal cases. *Id.* § 17.13, at 303.

18. STANDARDS RELATING TO APPELLATE COURTS § 3.70 (1977) (commentary); see also the following sources, which take a structural rather than a doctrinal approach to the problem of delay: P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL v (1976) (presenting various structural measures to mitigate delays); J. MARTIN & E. PRESCOTT, APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY 77 (1981) (suggesting incremental adoption of delay-reducing techniques, subject to rigorous evaluation); S. WASBY, T. MARVELL & A. ARKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 5 (1979) (discussing "reforms designed to add to or restructure appellate resources").

appeals are making their way into the lower federal courts.[19] Each time the dismal spectacle unfolds, three questions recur: Is there a federal constitutional right to a speedy criminal appeal? If so, what does that right look like? And, if the right is violated, what remedies will make that right effective?

This Article considers answers to those questions. At the outset, it is only fair to say that, although a doctrinal approach can provide structure and — if adopted by the courts —urgency to the public discussion of speedy appeals, it cannot break the log jam that afflicts state appellate courts. Constitutional doctrine alone cannot bring about the fair and prompt handling of criminal appeals. As Anthony Amsterdam once said, with the right to a speedy trial in mind, "[r]ealistically considered, the content of [constitutional] law bears the same relationship toward an expeditious administration of the criminal justice machinery that man's aspiration to the stars bears toward efficient conduct of the space program."[20] Nevertheless, to the extent we rely on constitutional guarantees to effectuate a defendant's interest in receiving a prompt hearing of his criminal appeal and to articulate our aspirational goals, we should have a consistent body of legal doctrine and remedies. This Article concludes that, at present, we do not.

To date, the Supreme Court has not faced the question of whether the United States Constitution guarantees a speedy criminal appeal. The lower federal courts, however, regularly encounter litigation arising from delayed state criminal appeals, and almost as regularly declare that criminal defendants possess a constitutional right to a speedy criminal appeal. Unfortunately, those courts have failed to consider carefully the constitutional foundations of that right and have disagreed on the standard by which to measure its violation. This Article examines whether present Supreme Court doctrine regarding the application of federal constitutional guarantees to state appellate process supports the right to a speedy appeal in criminal cases. After arguing that such a right is logically dictated by

19. *See, e.g.*, Wheeler v. Kelly, 639 F. Supp. 1374, 1375 (E.D.N.Y. 1986) (granting conditional writ of habeas corpus on due process claim), *aff'd*, 811 F.2d 133 (2d Cir. 1987); United States *ex. rel.* Hankins v. Wicker, 582 F. Supp. 180, 185 (W.D. Pa. 1984) (finding that a 33 month delay raises a prima facie question of due process violation), *aff'd mem.*, 782 F.2d 1028 (3d Cir.), *cert. denied*, 479 U.S. 831 (1986); Speight v. Whiddon, 516 F. Supp. 905, 909 (M.D. Ga. 1980) (granting habeas corpus relief on question of bond, partly due to alleged due process violation).

20. Amsterdam, *supra* note 3, at 526.

Supreme Court decisions applying the due process and equal protection clauses to state criminal appeals, the Article discusses the appropriate standards defining the right to a speedy criminal appeal and the correlative remedies for its violation.

Part I considers the application of federal constitutional provisions to state criminal appellate procedure, beginning in 1956 with the Supreme Court's decision in *Griffin v. Illinois*,[21] which held that due process and equal protection require states to provide free trial transcripts to indigent criminal appellants,[22] and culminating in the Court's 1985 opinion in *Evitts v. Lucey*,[23] which held that the due process clause guarantees not only the right to counsel on a first appeal-as-of-right, but the right to the effective assistance of counsel.[24] Supreme Court doctrine establishes that, once in place, a first appeal-as-of-right entails a constitutional right to an effective hearing of appellate claims. Undue delay frustrates that right by erecting a barrier to consideration of appellate claims, and accordingly, violates existing constitutional norms.

Part II discusses the historical development of the right to a speedy criminal appeal in the lower federal courts. The Article demonstrates that the procedural posture of lawsuits alleging appellate delay has retarded analysis of the contours of the right. Part II also considers the lower federal courts' adoption of the sixth amendment speedy trial standard in cases involving appellate delay, and concludes that this standard is ill-suited to evaluating appellate delay. The inadequacy of the speedy trial standard is largely due to its requirement that the defendant demonstrate prejudice arising from the delay in order to establish a constitutional violation. As a practical matter, it is virtually impossible for the defendant to prove appellate prejudice both because he already has been adjudicated guilty and because the appeal itself depends primarily on a cold record, not on the memories of live witnesses. As a conceptual matter, the prejudice requirement confuses factors relating to whether the defendant's right to a prompt appeal has been violated with factors relating to the appropriate remedy for that violation.

Part III considers the remedies for a violation of the right to a speedy criminal appeal. The Article contends that as matters now stand, the defendant's right to a speedy criminal ap-

21. 351 U.S. 12 (1956) (plurality opinion).
22. *Id.* at 19.
23. 469 U.S. 387 (1985).
24. *Id.* at 396.

peal lacks an effective remedy. Current doctrine precludes the effective use of civil suits to remedy violations of the right to a speedy appeal. In habeas corpus actions, use of the speedy trial standard has created an incoherent situation: those few defendants who demonstrate that delay has impaired their appeals receive that delayed appeal as a remedy for the violation.

Part IV proposes a revised standard for evaluating appellate delay. One problem underlying current law is that all speedy appeal violations are treated as being of equal moment and as meriting virtually identical remedies. Instead, Part IV argues that courts should use the full potential of their habeas corpus jurisdiction to fashion remedies suited to the severity of the individual constitutional violations. To do this, courts first must recognize the flexible remedial powers of habeas corpus; then, they must develop a sliding scale of remedies. At the low end of the scale, courts could grant a conditional order of release release if the defendant's appeal were not heard within a set time. At the high end of the scale, courts might order the immediate release of a defendant, for example, who has shown an impaired ability to present a possibly meritorious appeal. In between, courts could consider such remedies as release on bail pending appeal or sentence reduction by a factor proportional to the delay suffered by the defendant.

I. APPLICATION OF FEDERAL CONSTITUTIONAL GUARANTEES TO STATE CRIMINAL APPELLATE PROCEDURE

A. CURRENT SUPREME COURT DOCTRINE

It is axiomatic that the United States Constitution does not require the states to afford defendants a right to appellate review of criminal convictions.[25] Like many axioms, however, this particular truism is not as true as it once was. All states presently provide defendants some form of appeal from a criminal conviction.[26] Moreover, once a state provides an appeal-as-of-right, that appeal must meet federal constitutional guaran-

25. *E.g.*, McKane v. Durston, 153 U.S. 684, 687-88 (1894) (holding that a state need not provide appellate review as of right); *see also* Ross v. Moffitt, 417 U.S. 600, 611 (1974) (citing *McKane* for the same proposition); W. LAFAVE & J. ISRAEL, *supra* note 16, § 18.5(c), at 703 (same).

26. Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion); *see* Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 n.2 (1985) (noting that although Virginia and West Virginia provide exceptions, Virginia's petition hearing is "difficult to distinguish" from full appellate review, and even West Virginia grants an absolute right to petition for review).

tees of due process and equal protection.[27]

State criminal appeals were not always the subject of federal constitutional scrutiny. Indeed, *Griffin v. Illinois*,[28] a 1956 case, marks the Supreme Court's first serious application of federal constitutional guarantees to state criminal appellate procedure.[29] Although a number of earlier Supreme Court cases considered errors of constitutional magnitude in the reso-

27. *Griffin*, 351 U.S. at 20; *see also* Douglas v. California, 372 U.S. 353, 356-57 (1963) (requiring state to provide counsel for indigents' first appeal-as-of-right).

There has been much dispute about the respective roles played by due process and equal protection analyses in the resolution of the appeal cases. The Court's most direct answer appears to be that "[d]ue process and equal protection principles converge in the Court's analysis in these cases." Bearden v. Georgia, 461 U.S. 660, 665 (1983) (citing *Griffin*, 351 U.S. at 17); *see also* Ross v. Moffitt, 417 U.S. 600, 608-09 (1974) (observing that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment." (footnote omitted)). In a recent pronouncement on the issue, the Court once again held that both clauses are implicated in appeals cases: due process concerns arise when the primary question is that of fairness between the state and the individual, regardless of how other individuals are being treated; equal protection concerns arise when the inquiry concerns disparity in treatment by the state of individuals whose situations are arguably indistinguishable. Evitts v. Lucey, 469 U.S. 387, 405 (1985) (citing *Moffitt*, 417 U.S. at 609). At the same time, the Court has analyzed the due process concerns as being those of "fundamental fairness," and the equal protection concerns as being those of "meaningful access." Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987).

28. 351 U.S. 12 (1956) (plurality opinion).

29. Allen, Griffin v. Illinois: *Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 154 (1957). Allen points out that the relatively recent application of federal constitutional protections to state appellate procedures results from the relatively late development of the criminal appeal itself. As Allen notes, the criminal appeal is largely a product of the nineteenth century. Although state court appellate procedures were in place somewhat earlier, it was not until 1879 that the federal circuit courts were authorized to issue writs of error in criminal cases. Even then, such writs were issued solely on a discretionary basis. *Id.* Indeed, there was no right of appeal from federal convictions until 1889, when Congress granted the right of direct review by the Supreme Court for capital cases. Carroll v. United States, 354 U.S. 394, 400 n.9 (1957). In 1891, Congress extended this right to include "otherwise infamous" crimes. *Id.*; *cf.* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 325 (1896) (observing that Congress affirmatively must grant appellate jurisdiction).

Because of this, Allen argues, there is no common law body of precedent and practice to guide in the framing and application of constitutional standards to the criminal appeal. Allen, *supra*, at 154. Moreover, the much-cited statement in *McKane* that there is no due process right to a criminal appeal must be judged against this background. Allen, *supra*, at 154-55. *See McKane*, 153 U.S. at 687-88. *See generally* Resnik, *supra* note 5, at 606-07 (noting Supreme Court's steadfast refusal to recognize a constitutional right to appeal, and discussing shortcomings of resulting system).

lution of state criminal appeals,[30] few dealt specifically with deficiencies in state appellate procedure.[31] *Griffin* involved an indigent defendant's challenge to Illinois appellate procedures. Although Illinois provided an appeal-as-of-right in criminal cases, the appellant could receive full appellate review only by supplying the appellate court with a trial transcript.[32] A trial transcript, however, was furnished free only to indigent defendants sentenced to death.[33] Writing for the plurality,[34] Justice Black held that due process and equal protection together required Illinois to provide a free transcript of trial court proceedings to all indigent defendants if that were essential to "adequate and effective appellate review."[35] Noting that Illinois had chosen to make an appeal an "integral part" of its trial

30. *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915). Affirming the defendant's conviction, the Court stated that:

> while the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases . . . it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state.

Id. at 327 (citation omitted).

See also Cole v. Arkansas, 333 U.S. 196, 202 (1948) (reversing conviction upheld by Arkansas Supreme Court because the state convicted the defendant under a section of a statute different from the one charged in the information and under which the case was submitted to the jury).

31. Notable exceptions are Dowd v. Cook, 340 U.S. 206, 207 (1951), and Cochrane v. Kansas, 316 U.S. 255, 256 (1942). In both cases, prison rules preventing inmates from filing petitions in court precluded prisoners incarcerated in state penitentiaries from pursuing appeals of their state court convictions. *Dowd*, 340 U.S. at 207; *Cochrane*, 316 U.S. at 256. In *Dowd*, the Supreme Court held that rules denying some prisoners access to the courts, which might be had by wealthier prisoners who could afford retained counsel to pursue their appeals, violated the equal protection clause of the fourteenth amendment. 340 U.S. at 208-09.

32. *Griffin*, 351 U.S. at 13-15. Illinois required that the defendant provide the appellate court with either a bill of exceptions or a trial transcript to obtain full review. *Id.* at 13. The state conceded that it was sometimes impossible to prepare a bill of exceptions without a transcript. *Id.* at 14. In certain cases raising constitutional issues, Illinois procedure provided for free transcripts. Appellants in such cases, however, were unable to raise non-constitutional claims. *Id.* at 15.

33. *Id.* at 14.

34. Justices Black, Warren, Douglas, and Clark constituted the four vote plurality. *Id.* at 13. Justice Frankfurter provided the fifth vote, concurring separately in the judgment. *Id.* at 20. There were also two separate dissents in *Griffin*, one by Justices Burton and Minton, *id.* at 26-27, the other by Justice Harlan. *Id.* at 29.

35. *Id.* at 18, 20. The Court left open the possibility of other solutions to the problem. *Id.* at 20.

system for final adjudication of the defendant's guilt or innocence,[36] the Court stressed that any other result would impermissibly condition the right of appellate review on a defendant's financial means.[37]

Griffin was the first in a line of cases in which the Supreme Court, relying jointly on the due process and equal protection clauses, struck down state appellate rules that impeded the initiation of appeals by indigent defendants. Many of the cases simply applied the *Griffin* holding to other state rules restricting indigent defendants' access to trial transcripts.[38] The Court also extended the *Griffin* rationale to strike down rules requiring indigent defendants to pay filing fees prior to appeal.[39] These "barrier" cases established that if a state offered criminal defendants an appeal-as-of-right, it could not erect wealth-based obstacles to that appeal.[40] These cases also demonstrated that once a state granted an appeal-as-of-right, defendants had a due process right to an "adequate and effec-

36. *Id.* at 18 (noting that "[a]ppellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant").

37. *Id.* at 18-19 (stating that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has").

38. *See, e.g.*, Mayer v. Chicago, 404 U.S. 189, 197-98 (1971) (holding that a state cannot deny an indigent defendant a record of sufficient completeness to permit proper consideration of his claims because he was convicted of violations punishable only by a fine rather than by imprisonment); Draper v. Washington, 372 U.S. 487, 499-500 (1963) (invalidating state procedure providing free transcript only to a defendant who could convince the trial judge his appeal was not frivolous); Lane v. Brown, 372 U.S. 477, 485 (1963) (invalidating procedure whereby meaningful appeal was possible only if public defender requested a transcript); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 215-16 (1958) (per curiam) (striking down state rule giving free transcripts only to defendants who could convince trial judge that "justice will thereby be promoted"); *see also* Gardner v. California, 393 U.S. 367, 369-70 (1969) (requiring state to provide indigent prisoner with a free transcript of lower court habeas corpus proceeding for use in filing a new habeas proceeding before a higher state court, even though the second application need only contain a brief statement of prior proceedings and need not assign error or refer to testimony in the earlier state proceeding); Long v. District Court, 385 U.S. 192, 194-95 (1966) (per curiam) (holding that state must furnish indigent with a free transcript of a state habeas corpus hearing for use on appeal from the denial of habeas corpus even though availability of a transcript is not a sine qua non of access to the appellate courts).

39. Burns v. Ohio, 360 U.S. 252, 257-58 (1959) (holding that state may not require an indigent defendant to pay a filing fee before permitting him to appeal); *cf.* Smith v. Bennett, 365 U.S. 708, 712-13 (1961) (extending ban on filing fees to state habeas corpus proceedings).

40. *See* cases cited *supra* note 39.

tive" appellate hearing.[41]

Seven years after *Griffin*, the Court moved beyond review of barrier rules to consider what was necessary to make an appeal "adequate and effective."[42] This logical extension of *Griffin* marked the Court's first significant foray into scrutinizing state management of criminal appeals. In *Douglas v. California*,[43] the Court held that the principles enunciated in *Griffin* required any state providing a criminal appeal-as-of-right to supply an indigent defendant with counsel; without counsel, the Court opined, the appeal would constitute nothing more than a "meaningless ritual."[44] The *Douglas* Court thus invalidated California's rule, which required an appellate court finding that an attorney would be of value either to the defendant or to the court as a prerequisite to appointment of counsel.[45] As Justice Douglas wrote, the indigent defendant denied counsel faced a dual handicap: first, the defendant was forced to "shift for himself" in preparing the appeal, and second, his ability to receive a fair hearing was "burdened by a preliminary determination that his case is without merit."[46] The Court concluded that an appeal without a right to counsel was not the full and effective hearing envisioned by *Griffin*.[47]

The Supreme Court focused on the defendant's due process right to a full hearing of appellate claims as it elaborated on the right to counsel in state criminal appeals. Primarily viewing the issue through cases involving indigent appellants,[48] the Court held that an attorney must assist in preparing and submitting the appellant's brief[49] and must serve as an active advocate, not as a mere friend of the court rendering a detached

41. *Griffin*, 351 U.S. at 20.

42. *Id.*

43. 372 U.S. 353 (1963). Justice Douglas wrote the opinion for a six vote majority over the dissents of Justices Clark, Harlan, and Stewart. *Id.* at 358-67.

44. *Id.* at 358; *cf.* Evitts v. Lucey, 469 U.S. 387, 393 (1985) (reasoning that "[j]ust as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits").

45. *Douglas*, 372 U.S. at 358.

46. *Id.*

47. *Id.*

48. Rules defining when the right to counsel attaches obviously will apply to retained and appointed counsel alike. Such cases, however, generally arise when the defendant has appointed counsel due to indigency, rather than in situations involving defendants able to pay for retained counsel.

49. Swenson v. Bosler, 386 U.S. 258, 259 (1967) (per curiam).

evaluation of the appellant's claims.[50] Recognizing the peculiar difficulties associated with the defense of indigents, the Court also established stringent requirements for permitting withdrawal of appointed counsel.[51]

Douglas appeared to indicate the Court's willingness to follow the *Griffin* reasoning to its logical conclusion. With its 1974 decision in *Ross v. Moffitt*,[52] however, the Court signalled that *Griffin* was not an infinitely expanding vehicle for criminal defendants' rights. In *Moffitt*, the Court rejected the contention that the full panoply of protections found in its right to counsel decisions applied to every state post-conviction proceeding.[53] The Court previously had extended *Griffin* to require the provision of transcripts to indigent defendants in collateral attacks on state convictions[54] and to strike down state filing fees in collateral proceedings.[55] Thus, *Moffitt* marked a serious retrenchment.

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50. Anders v. California, 386 U.S. 738, 744 (1967); *see also* Entsminger v. Iowa, 386 U.S. 748, 751 (1967); *cf.* Ellis v. United States, 356 U.S. 674, 675 (1958) (ruling that counsel in the circumstances outlined in *Johnson, infra,* must be an advocate and not merely amicus curiae); Johnson v. United States, 352 U.S. 565, 566 (1957) (holding that federal appellate courts must provide counsel to a defendant challenging the trial court's certification that the appeal is not in good faith).

51. *Anders*, 386 U.S. at 744. In *Anders*, the Supreme Court noted the special circumstances surrounding the withdrawal of counsel for an indigent defendant; an indigent could not simply enter the marketplace and retain another attorney who might believe the case had merit. *Id.* at 745. The Court imposed additional procedural requirements to ensure that counsel could not withdraw unless the case on appeal was truly lacking in merit: 1) counsel must file, along with the request to withdraw, a brief referring to anything in the record which might arguably support the appeal, 2) the defendant must be furnished with a copy of the brief and be permitted to raise any additional points, and 3) the reviewing court must, after full consideration of the lower court proceedings and the submissions of the parties, conclude that the appeal would be frivolous. *Id.* at 744. The Court reaffirmed the importance of the *Anders* protections in two recent decisions, Penson v. Ohio, 109 S. Ct. 346, 350-51 (1988), and McCoy v. Court of Appeals, 108 S. Ct. 1895, 1903-05 (1988). Counsel, however, need not advance every argument, regardless of merit, urged by the appellant. Jones v. Barnes, 463 U.S. 745, 754 (1983).

52. 417 U.S. 600 (1974).

53. *Id.* at 603-11.

54. Gardner v. California, 393 U.S. 367, 369-71 (1969) (requiring the provision of transcript from state habeas proceeding for use in second state habeas proceeding); Long v. District Court, 385 U.S. 192, 194-95 (1966) (holding that transcript must be provided in state habeas proceeding); Lane v. Brown, 372 U.S. 477, 485 (1963) (requiring provision of transcript in state coram nobis proceeding).

55. Smith v. Bennett, 365 U.S. 708, 711-14 (1961) (invalidating filing fee for state habeas corpus petition).

Moffitt involved a challenge to North Carolina's tiered system of appellate procedure in which appointed counsel was provided for indigent defendants at the first, as-of-right appeal to the Court of Appeals, but not in subsequent discretionary appeals to the North Carolina Supreme Court.[56] Writing for the majority, Justice Rehnquist reasoned that because North Carolina need not provide an appeal at all, unfairness — and a concomitant violation of due process — could not be presumed from North Carolina's refusal to provide counsel at every stage of the defendant's appeal.[57] On the other hand, it clearly was crucial to the Court's decision that the defendant received assistance of counsel in preparing his first direct appeal-as-of-right.[58] As the Court explained, as long as the defendant received assistance of counsel in formulating his claims in the first tier of review, the defendant was not "denied meaningful access" to the second tier; the same materials prepared by counsel for first tier review, supplemented by pro se submissions, would adequately present the defendant's case for discretionary review.[59]

The *Moffitt* majority obviously was influenced by the function of the second tier of appellate review in North Carolina. According to the majority, the first, as-of-right, level of appellate review examined whether the trial resulted in a "correct adjudication of guilt."[60] The second, discretionary, level of appellate review, on the other hand, had a more limited function. It considered only cases that presented questions of significant legal moment to the state or conflicts between an appellate court decision and a prior North Carolina Supreme Court decision.[61] Given this restricted role, the majority reasoned that discretionary review was not an "integral part"[62] of North Carolina's adjudicatory system and that, accordingly, due process did not require North Carolina to furnish counsel during discretionary review.[63] The Court's conclusion was bolstered by

56. *Moffitt*, 417 U.S. at 612-14.
57. *Id.* at 611.
58. *Id.* at 614.
59. *Id.* at 614-15.
60. *Id.* at 615 (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion)).
61. *Id.* at 615.
62. *Griffin*, 351 U.S. at 18.
63. *Moffitt*, 417 U.S. at 616. Justice Douglas, joined by Justices Brennan and Marshall in dissent, disputed the majority's characterization of North Carolina's system of discretionary review, arguing that it was likely to be "the most meaningful review the conviction will receive," and implying that it was

the presence of appointed counsel in the as-of-right appeal so that the submissions of counsel to the lower appellate court could provide the basis for appellant's pro se petition to the North Carolina Supreme Court, thereby preserving access to the appellate process.[64]

Two years after *Moffitt*, a closely divided Supreme Court in *United States v. MacCollom*,[65] upheld a federal statute requiring judicial certification that the defendant's collateral attack on a federal conviction is not frivolous, and that the trial transcript is necessary to decide the issues presented, before the defendant is furnished with a free transcript.[66] The Supreme Court thus endorsed the very condition it already had struck down when applied to the provision of trial transcripts in state court direct appeals.[67] The *MacCollom* decision underscored the Court's dividing line between appeals-as-of-right and discretionary review.[68] Furthermore, the combination of *Moffitt* and *MacCollom* signalled the end of the Warren Court's relatively hospitable atmosphere for criminal defendants' rights.

In 1985, however, the Supreme Court revisited the *Griffin-Douglas* line of cases with its decision in *Evitts v. Lucey*.[69] The *Evitts* Court reaffirmed that the defendant must be accorded a full and effective hearing in his first appeal-as-of-right because that appeal is integral to the state's adjudication of guilt or innocence.[70] As part of the defendant's due process right to be heard, the Court held that the Constitution guarantees, in addition to the right to appellate counsel recognized in *Douglas*,[71] the right to the effective assistance of appellate counsel.[72] As

part of the adjudicatory mechanism for guilt determination. *Id.* at 619-20 (Douglas, J., dissenting).

64. *Id.* at 614-15.

65. 426 U.S. 317 (1976) (5-4 decision).

66. *Id.* at 324.

67. *See, e.g.*, Draper v. Washington, 372 U.S. 487, 499-500 (1963) (emphasizing that state cannot condition provision of free transcript to indigent defendant on trial court ruling that appeal is non-frivolous); Lane v. Brown, 372 U.S. 477, 485 (1963) (holding that state must provide free copy of transcript to indigent defendant for appeal from denial of writ of error coram nobis); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (per curiam) (requiring state to provide free copy of transcript to indigent defendants for first direct appeal-of-right).

68. 426 U.S. at 324.

69. 469 U.S. 387 (1985).

70. *Id.* at 403-04.

71. Douglas v. California, 372 U.S. 353, 357 (1963).

72. Justices Brennan, White, Marshall, Blackmun, Powell, Stevens, and O'Connor made up the *Evitts* majority. Justice Rehnquist and Chief Justice Burger dissented. 469 U.S. at 405-11.

the *Evitts* Court concluded, a defendant whose counsel does not provide effective representation is "in no better position than one who has no counsel at all."[73]

The Court's first hurdle in *Evitts* was to establish, in the face of Justice Rehnquist's somewhat quixotic dissent,[74] that the due process clause applies to state appellate procedures. Drawing analogies to other areas of state activity, such as the provision of welfare payments, the *Evitts* Court explained that a state must comply with constitutional requirements — and the due process clause in particular — when it opts to act in a field involving significant discretionary elements.[75] Accordingly, the majority found that criminal appeals, although not constitutionally required, must satisfy the dictates of due process.[76]

After establishing that due process applies to state appeals-as-of-right, the Court identified two critical due process interests in those appeals.[77] The first, drawn directly from *Griffin*, was the defendant's right to an "adequate and effective" appeal.[78] This right ensures the defendant of a full and complete hearing of his appellate claims. The second is the state's interest in ensuring that only validly convicted defendants have their freedom curtailed.[79] Echoing *Griffin*,[80] the *Evitts* majority stated that once a state grants the defendant a right to appeal, that appeal-as-of-right becomes a critical part of the state's

73. *Id.* at 396.

74. *Id.* at 408-11 (Rehnquist, J., dissenting). Justice Rehnquist argued that the *Griffin-Douglas* line of cases stood solely for the principle that equal protection precluded barriers to appeals that unduly affected the poor and maintained that these cases included little or no due process component. *Id.* at 409.

75. *Id.* at 401 (citing Goldberg v. Kelly, 397 U.S. 254, 262 (1970)).

76. *Id.* Subsequently, in Smith v. Murray, 477 U.S. 527 (1986), the Court held that the standard established in Strickland v. Washington, 466 U.S. 668, 687-701 (1984), for judging ineffectiveness of counsel at trial, also applied at the appellate level. *Smith*, 477 U.S. at 536. *Strickland* established a two-pronged inquiry for determining ineffectiveness. First, the defendant must show that counsel's performance was deficient. *Strickland*, 466 U.S. at 688-91. Second, the defendant must show that the deficient performance prejudiced the defense, *id.* at 691-96, by demonstrating that counsel's errors were so serious as to lead to a trial whose result is unreliable. *Id.* at 693. At the trial level, prejudice is proven if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

77. *Evitts*, 469 U.S. at 400-01.

78. *Id.* at 392 (citing Griffin v. Illinois, 351 U.S. 12, 20 (1956)).

79. *Id.* at 399-400.

80. *Griffin*, 351 U.S. at 18.

adjudicatory system.[81]

Implicit in the Court's finding that an appeal-as-of-right is an integral part of the adjudicatory process is the recognition that the trial, the first tier of adjudication, is incomplete without appellate review. Although certain trial level findings — most notably jury findings of fact — may remain beyond appellate review, other first tier judgments require appellate review to achieve both legitimacy and finality.[82] The state's decision to grant an appeal-as-of-right reflects not only a judgment regarding the accuracy of first tier outcomes but, inter alia, a judgment regarding the allocation of power among decisionmakers.[83] Furthermore, providing defendants with additional opportunities to present their claims increases the likelihood that those affected by the ultimate judicial outcome will accept it as fair.[84] Put another way, if no opportunity existed for appellate review of trial findings, a state might well alter its pretrial and trial procedure to reflect the finality of the trial level adjudication. Granting an appeal-as-of-right reflects both a concern for procedural fairness and for accuracy of outcome, areas in which due process concerns are self-evident.[85] Adequate access to the appellate court — which, for the average lay person, entails the services of competent counsel — is an intrinsic part of this due process concern.

Although the scope of the *Evitts* holding appears to be relatively modest, it provoked a spirited dissent from Justice Rehnquist.[86] The dissent contended that existing Supreme Court decisions did not support the defendant's right to effective assistance of counsel on appeal because that right was funda-

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81. *Evitts*, 469 U.S. at 403-04.

82. This is true even if the state permits a defendant to waive his right to appeal; legitimacy also is a function of consent. If the defendant freely and publicly consents to the fairness of the judgment by waiving his appeal, the legitimacy of the judgment can be said to be established.

83. Resnik, *supra* note 5, at 609-10; *cf.* Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1415-20 (1979) (discussing relationship between procedural fairness and accuracy of outcome in litigant perceptions of fairness in legal dispute resolutions).

84. *Cf.* Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (stating that "[w]hen the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence," not before).

85. I am indebted in these insights to Resnik, *supra* note 5, at 603-10 (discussing values protected by appeals, and various models of appellate systems); Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1005-30 (1984) (analyzing Supreme Court's value judgments on merits of appeals).

86. *Evitts*, 469 U.S. at 406 (Rehnquist, J., dissenting). Chief Justice Burger joined in Justice Rehnquist's dissent. *Id.* at 405.

mentally grounded in due process.[87] Rather, Justice Rehnquist argued that the *Griffin-Douglas* line of cases was based wholly on equal protection; thus, the only procedural requirement imposed on state criminal appeals by the federal constitution was a bar against procedures that operated to accord indigents a narrower scope of appellate review than non-indigents.[88]

Justice Rehnquist's dissent in *Evitts* is rather puzzling at first glance. It is, after all, somewhat illogical to contend that although the equal protection clause may require states to provide counsel in an appeal-as-of-right, the Constitution has nothing to say about the conduct of that attorney once appointed. On one level, the *Evitts* dissent can be read as another expression of Justice Rehnquist's view that the Constitution should not be construed to require that an indigent defendant receive the identical procedural opportunities available to a defendant who can afford to retain private counsel.[89] On a more profound level, Justice Rehnquist's dissent reflects a view that, although the states have granted the defendant an appeal-as-of-right, that appeal can not be regarded as — and does not become — a constitutionally necessary part of the adjudicative process.[90]

87. The dissent argued that decisions "requiring that indigents be afforded the same basic tools as those who are not indigent in appealing their criminal convictions" and cases interpreting the "Sixth Amendment's guarantee of the 'assistance of counsel' at a criminal *trial* — simply are not equal to the task they are called upon to perform." *Id.* at 406 (emphasis in original).

88. *Id.* at 406-07. Whatever the merits of Justice Rehnquist's argument that all previous Supreme Court decisions reviewing state criminal appellate procedures in the light of the federal Constitution were restricted to an equal protection analysis, and they seem slight, the Court appears to have settled the issue once and for all, sub silentio, in Smith v. Murray, 477 U.S. 527 (1986); *see also supra* note 76. In that case, Justice O'Connor, without comment, applied the sixth amendment standard of *Strickland* to claims of ineffectiveness of counsel in state criminal appeals. *Smith*, 477 U.S. at 535.

89. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 616 (1974). Justice Rehnquist continued to press this position in his dissent in Penson v. Ohio, 109 S. Ct. 346, 354-55 (1988) (Rehnquist, J., dissenting). In *Penson*, Justice Rehnquist more or less conceded defeat on the issue of effective assistance of counsel on appeal, but continued to argue that equal protection cannot provide the same legal protections to an indigent that are available to a defendant able to retain private counsel. *Id.* at 355.

90. Justice Rehnquist is generally skeptical of the role of appeals in the judicial process. In a speech at the 75th anniversary of the University of Florida College of Law and the dedication of Bruton-Geer Hall (Sept. 15, 1984), Justice Rehnquist commented that "we have an obsessive concern that the result reached in a particular case be the right one." *See* Resnick, *supra* note 5, at 605-06 (quoting Justice Rehnquist's speech). Arguing that the costs "in terms of lawyers' time, speedy disposition and finality" are too great, he urged that "perhaps, speaking of the federal system, the time has come to abolish appeal as a matter of right from the district courts to the courts of appeals, and

In *Ewitts*, Justice Rehnquist argued that the defendant's right to effective assistance of counsel derives only from the sixth amendment and thus properly applies only to trial level proceedings.[91] At trial, the defendant needs an attorney to protect him from being unfairly stripped of the presumption of innocence.[92] Once convicted, the defendant has no such constitutionally protected interest. Although Justice Rehnquist agreed that states must provide appellate counsel to enable indigents to present their claims on equal footing with non-indigent defendants,[93] he refused to extend to any defendant the right of effective assistance of counsel on appeal.[94] Instead, Justice Rehnquist conjured up a parade of horribles in which armies of justly convicted defendants challenge their state criminal appeals in federal habeas corpus proceedings, clogging the federal courts with review of yet another layer of state process, and impeding state courts in enforcing their own appellate procedures.[95]

The majority opinion in *Evitts* is nothing less than a flat rejection of Justice Rehnquist's position, holding, as it does, that an appeal-as-of-right is assimilated into the process for determining guilt or innocence and becomes an integral part of that process.[96] Although Justice Rehnquist has not retreated from his view, he apparently conceded key elements of his *Evitts* position in a recent case considering whether capital defendants have a right to counsel in state collateral proceedings. Writing for a plurality in *Murray v. Giarratano*,[97] Justice Rehnquist argued that the additional eighth amendment safeguards at the trial level in capital cases were sufficient to ensure the reliability of the proceeding that imposed the death penalty. Accord-

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allow such review only when it is granted in the discretion of a panel of the appellate court." *Id.*

91. *Evitts*, 469 U.S. at 408 (Rehnquist, J., dissenting).

92. *Id.* at 408-09 (citing *Moffitt*, 417 U.S. at 610-11).

93. *Id.* at 407.

94. *Id.* at 408.

95. *Id.* at 411.

96. *See id.* at 402.

97. 109 S. Ct. 2765 (1989) (plurality opinion). Chief Justice Rehnquist was joined by Justices White, O'Connor, and Scalia in the plurality opinion. *Id.* at 2767. Justice Kennedy, joined by Justice O'Connor, concurred separately in the holding. *Id.* at 2772. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented. *Id.* at 2773. *See* Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455, 456-57 (1989) (discussing the right of access to the courts and procedural due process in the context of the issues raised by *Murray*).

ingly, capital defendants, like other defendants, have no right to counsel in state collateral proceedings.[98] Critical to the plurality opinion — and also key to the *Evitts* holding — is the recognition that appeal and trial are symbiotic, so that greater safeguards in one may allow lesser review in the other.

Perceiving that the crucial issue in *Murray* was the interdependence of the trial and post-trial proceedings, Justice Kennedy, in his concurrence, criticized the plurality's conclusion that eighth amendment trial protections were sufficient in capital cases.[99] He argued instead that "collateral relief proceedings are a central part of the review process for prisoners sentenced to death," pointing out — with the dissent — that a substantial number of capital defendants win reversal in habeas corpus proceedings.[100] Justice Kennedy chose to analyze the problem as one of meaningful access to the courts, and accordingly declined to find that current Virginia procedures were constitutionally infirm because no Virginia death row inmate had been unable to obtain counsel in post-conviction proceedings.[101] Justice Stevens, in dissent, picked up Justice Kennedy's theme of meaningful access, asserting that post-conviction procedures entail a right of access that requires particular solicitude on behalf of capital defendants, a solicitude the Virginia procedures failed to demonstrate.[102]

The entire Supreme Court thus acknowledged the interrelatedness of trial and post-trial procedures and agreed that, if appellate procedures are central to the state system of criminal adjudication, due process protections apply to those procedures. The major difference between Justice Rehnquist and the Court's prevailing position rests in the Chief Justice's refusal to acknowledge the constitutional effect of a state's decision to grant an appeal-as-of-right;[103] which is to say that the appeal-

98. *Murray*, 109 S. Ct. at 2770-72. Pennsylvania v. Finley, 481 U.S. 551 (1987), established that neither due process nor equal protection require the state to provide appointed counsel for petitioners pursuing state collateral post-conviction remedies. *Id.* at 555-59.

99. *Murray*, 109 S. Ct. at 2772. (Kennedy, J., concurring).

100. *Id.*

101. *Id.* at 2773. Justice Kennedy noted that the ability of Virginia death row inmates to obtain counsel in post-conviction proceedings was due, in part, to the fact that the state prison system itself employed lawyers to aid death row inmates. *Id.*

102. *Id.* at 2773-82 (Stevens, J., dissenting).

103. But see Justice Rehnquist's discussion in Pennsylvania v. Finley:

> [T]he substantive holding of *Evitts* — that the State may not cut off a right to appeal because of a lawyer's ineffectiveness — depends on a constitutional right to appointed counsel that does not exist in state

as-of-right by its very nature becomes an integral part of the state's adjudicatory mechanism. The next question to consider is whether, having granted an appeal-as-of-right, the state has a due process obligation to make that right effective by resolving the appeal promptly.

B. Deriving the Right to A Speedy Appeal

The building blocks supporting a constitutional right to a speedy appeal are present in current Supreme Court doctrine. The task is to assemble them. To do so requires an argument that goes something like this: Once the state grants an appeal-as-of-right in a criminal case, due process guarantees apply.[104] Due process includes, first and foremost, the defendant's right to present appellate claims to the reviewing tribunal in such a way as to receive effective review of these claims.[105] This right reflects both the defendant's own interests and the state's independent interest in ensuring that only validly convicted defendants are deprived of liberty.[106]

As a corollary, the state's decision to grant an appeal-as-of-right reflects its judgment that second tier adjudications are necessary to ensure both the correct outcome and the procedural fairness of the state's first tier process.[107] The appeal becomes an integral element of the state's criminal adjudicatory process; without it, the state's judgment lacks both finality and legitimacy.[108]

> habeas proceedings. More important, however, is the fact that . . . the prisoner in *Evitts* . . . was actually deprived of a state-created right to appeal. . . .

481 U.S. 551, 558 (1987).

104. *E.g.*, Evitts v. Lucey, 469 U.S. 387, 400-01 (1985) (holding that "when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord . . . with the Due Process Clause").

105. *E.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956) (noting that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay costs in advance").

106. *E.g.*, *Evitts*, 469 U.S. at 399-400 (holding that "[a] system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed").

107. *See* Resnik, *supra* note 5, at 609-12 (arguing that "[l]egitimacy is derived from conferring decisionmaking authority over certain issues to special subsets of decisionmakers").

108. *E.g.*, *Griffin*, 351 U.S. at 18 (noting that "[a]ppellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant"); *cf.* Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (holding that conviction and sentence gain presumption of finality and

As a second corollary, due process entails that a defendant who is entitled to an effective review deserves whatever "lesser included" rights are necessary to effectuate the right to be heard. For example, the defendant has a right to counsel on appeal, a right that derives jointly from due process concerns regarding a full and fair hearing of appellate claims and equal protection concerns regarding the relative disadvantage of indigents in securing that hearing.[109] The defendant's right to counsel on appeal entails the right to effective counsel, because anything less would render the right to appellate counsel a nullity.[110]

Thus, if a state grants an appeal-as-of-right, due process requires that the criminal defendant receive an opportunity to present his claims fully to the appellate tribunal.[111] The defendant is entitled to an effective review because the appeal is an integral phase of the state's adjudicatory system ensuring both the accuracy and the legitimacy of the trial court judgment.[112] This right to receive an effective hearing must, by any logical construction, entail the right to a timely resolution of the defendant's appeal. Timeliness is necessary to effectuate the right of access.[113] Moreover, the first tier judgment remains inconclusive until determination of the appeal. For appellate process to be meaningful, it must promptly correct or vindicate first tier judgments; otherwise the purpose of an appeal — correction of illegitimate judgments and the prevention of unjust incarceration — is thwarted.

Similar interests are raised by federal habeas corpus review of state court judgments. In this context, the Supreme Court has, in fact, stressed the importance of timely review. For example, in *Peyton v. Rowe*,[114] the Court held that prisoners incarcerated under consecutive sentences could challenge the second sentence while still serving the first.[115] Before *Peyton*, the Court allowed prisoners to challenge their second sentence

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legality after direct appeal); *see also* Woo, *The Right to a Criminal Appeal in the People's Republic of China*, 14 YALE J. INT'L L. 118, 134-53 (1989) (containing an interesting discussion of the function of a criminal appeal and its perceived importance in another legal system).

109. Douglas v. California, 372 U.S. 353, 357 (1963).

110. *Evitts*, 469 U.S. at 396.

111. *Griffin*, 351 U.S. at 18.

112. *Id.*; *see also Douglas*, 372 U.S. at 356-57 (same).

113. *Cf.* Resnik, *supra* note 85, at 854-55 (discussing value of finality in appeals).

114. 391 U.S. 54 (1968).

115. *Id.* at 62-64.

only when they began to serve it, after completing the first sentence.[116] The *Peyton* Court concluded that the rule of delay was inimical to common sense and to the writ's purpose of preventing unconstitutional incarceration.[117] In doing so, the Court found that habeas corpus statutes often contained provisions requiring "*prompt* adjudication of the validity of the challenged restraint."[118] The *Peyton* Court reasoned that this emphasis on prompt adjudication had two sources: First, the frequent use of evidentiary hearings involving live testimony in habeas corpus proceedings renders those proceedings sensitive to delay.[119] Second, delay extends the time prisoners entitled to release must remain incarcerated. In this last regard, the Court noted that if the conviction ultimately is overturned, each day the defendant is incarcerated while his case sits in the courts constitutes time the defendant should have enjoyed as a free person.[120] The *Peyton* decision indicates that any rule should not be judged from the standpoint of individual cases — which may raise claims unaffected by delay[121] — but by the possibility that the rule may unjustifiably increase improper incarceration.[122]

If timeliness is necessary to ensure that federal collateral attack on state convictions — a proceeding in which the issues raised are considerably more limited than in a direct state appeal-as-of-right[123] — achieves its end of preventing unconstitutional incarceration, then, a fortiori, timeliness must be necessary to ensure that an appeal-as-of-right fulfills its purpose of preventing improper decisions and unjust outcomes.

116. McNally v. Hill, 293 U.S. 131, 138-40 (1934).

117. *Peyton*, 391 U.S. at 64.

118. *Id.* at 59 (citations omitted) (emphasis in original).

119. *Id.* at 62. The Court stated that the claims frequently requiring factual determinations in live hearings include, inter alia, ineffective assistance of counsel, coerced confessions, lack of competency to stand trial, and lack of a fair trial. *Id.*

120. *Id.* at 64.

121. The decision overruled by *Peyton*, McNally v. Hill, 293 U.S. 131, 140 (1934), arguably was such a case because it concerned only a facial challenge to the indictment.

122. *Peyton*, 391 U.S. at 64-65.

123. It is commonplace, of course, that only federal rights are cognizable in federal habeas corpus petitions attacking state convictions. Errors of state law or violations of state constitutional rights may not form the basis for federal habeas corpus relief. 28 U.S.C. § 2241(c)(3) (1982). *See* Rose v. Hodges, 423 U.S. 19, 22 (1975). As a practical matter, courts generally consider only deprivations of federal constitutional rights on habeas. Townsend v. Sain, 372 U.S. 293, 312 (1963).

Accordingly, timeliness must be part of the due process guarantees under the effectuating principle discussed earlier.[124] After all, giving the criminal defendant an appeal-as-of-right but imposing procedures that make it difficult for the defendant's appeal to be heard is the same as giving the defendant the right to counsel on appeal but allowing appellate counsel to provide ineffective assistance in preparing that appeal.[125] Both are equivalent to no right at all.

The contrary argument is fairly straightforward and has some rhetorical appeal: if due process does not compel a state to grant an appeal in the first place, why should due process require that the appeal be heard promptly? The prospect of individuals remaining incarcerated after conviction without the prospect of appellate review does not offend due process. After conviction, the defendant no longer benefits from the presumption of innocence. Why then should due process be offended if the state grants a right to post-conviction review which, although not promptly administered, is evenhandedly administered?[126]

This argument depends for its force on the mistaken view that, because due process does not require states to provide criminal appeals, state enactment of an appeal-as-of-right does not alter the balance between the layers of adjudication in a constitutionally significant manner. It assumes that the mechanism and significance of first tier adjudication remains unchanged even though the state grants a right to second tier review. The Supreme Court rejected this view in *Evitts* when it determined that an appeal-as-of-right becomes an integral part of the state's adjudicative system.[127] Moreover, the argument takes an improperly straitened view of the significance of appellate process because it contains the suppressed premise that accuracy of outcome is the primary adjudicative value. In a system of procedural justice, however, accuracy of outcome is not

124. *See supra* notes 109-10 and accompanying text.

125. *See* Evitts v. Lucey, 469 U.S. 387, 404-05 (1985).

126. This is, in effect, Justice Rehnquist's argument in his *Evitts* dissent. *Id.* at 406-10 (Rehnquist, J., dissenting). The crucial question is what rights, if any, other than those already enumerated by the Supreme Court, does due process require for a state court criminal appeal to pass constitutional muster? For example, does every appellant have a right to oral argument on appeal? If not, does every appellant have a right to submit a brief on the merits? And so on, down the slippery slope.

127. *Id.* at 403-04 (citing Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion)).

the sole value. Legitimacy of outcome is equally important.[128] Otherwise, devices that are frequently conducive to legitimacy but not to accuracy, such as the exclusionary rule, would not be part of the judicial system.[129]

Legitimacy in a system of procedural justice can be defined as the result of fair procedure.[130] Under current constitutional doctrine, if a state retains only first tier adjudication in criminal cases, such a procedure is, by definition, fair. Once a state grants a right to second tier review of the first tier judgment, however, the procedural outcome of the first tier standing alone is no longer legitimate. The first tier judgment becomes legitimate only after litigants either receive review or explicitly waive their right to review. Indeed, the appeal's legitimating function helps explain the legal community's discomfort with judgments left unreviewed as a result of defense failure to comply with a procedural requirement, such as the timely filing of a notice of appeal, rather than because of a conscious client decision.

Under due process, the right to an appeal entails the right to an effective appeal, which in turn entails a prompt appeal. Practices that delay or fail to speed appeals are inimical to the purpose of appellate review.[131] Delaying the second tier of review casts doubt on the legitimacy of both levels of adjudica-

128. *Cf.* Walker, Lind & Thibaut, *supra* note 83, at 1402-03, 1412-14 (discussing the difference between procedural justice, which entails a belief that the techniques used for dispute resolution are fair, and distributive justice, which entails a belief that the outcome is fair, and indicating that parties are more likely to view an outcome as fair and satisfying when it is the result of adversary process).

129. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained through unconstitutional searches or seizures is inadmissible in state prosecutions); Miranda v. Arizona, 384 U.S. 436, 479 (1966) (holding that evidence obtained through unconstitutional interrogation of defendants may not be used against them in court).

130. Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) (arguing that constitutional guarantee of effective counsel functions not only to reduce the chance that innocent persons are convicted but "to ensure that convictions are obtained only through fundamentally fair procedures").

131. *Cf.* Peyton v. Rowe, 391 U.S. 54, 63-64 (1968) (finding delay inimical to the nature of habeas review). To understand this, consider the following hypothetical: a state enacts an appellate rule mandating that each convicted defendant has a right to a direct appeal of his conviction, but no appeal may be heard until the defendant has served half the minimum sentence. The intuitive response is that such a rule is inappropriate, because the appeal only serves its legitimating function if it promptly resolves doubts about the first tier judgment.

tion; the first tier because it remains open to adjustment in the second tier, and the second tier because it has not performed its function of resolving doubts about the first tier.[132]

II. THE RIGHT TO A SPEEDY CRIMINAL APPEAL

A. FEDERAL COURT TREATMENT OF EXCESSIVE APPELLATE DELAY IN STATE CRIMINAL PROCEEDINGS

Although the Supreme Court has not yet considered whether a convicted defendant has a constitutional right to a speedy appeal, lower federal courts regularly have entertained claims alleging that excessive delays in state post-conviction proceedings violated a defendant's right to due process.[133] Defendants initially raised excessive post-conviction delay as a ground for excusing the exhaustion requirement in federal habeas corpus actions.[134] In response, federal courts often con-

132. There also may be an argument that appellate delays implicate equal protection guarantees because those individuals denied a prompt appeal are almost uniformly indigent. The factors causing appellate delays in the reported cases are difficulties in the provision of free transcripts, the failure of appointed counsel adequately to pursue the appeal, and similar matters. Appellants who can afford to pay for transcripts and who can afford to retain and monitor their counsel by taking their business elsewhere do not face the same lengthy delays as do indigent appellants. Moreover, the burden of such delays is apt to be less onerous because non-indigents are more likely able to make bond pending appeal, if the court is willing to set bail. If a wealthy individual's criminal appeal were delayed until he had served his entire sentence, however, his right to a speedy appeal would be violated. Therefore those lower federal courts that recognize a right to a speedy appeal rely exclusively on the due process clause and not on equal protection considerations.

133. *See* cases cited *infra* note 138.

134. Prisoners must demonstrate either that they have exhausted their state judicial remedies before applying for federal collateral relief or that exhaustion would be futile. Exhaustion is a complicated doctrine and has been the subject of much commentary. *See* D. WILKES, FEDERAL AND STATE POST-CONVICTION REMEDIES AND RELIEF § 8-15, at 147 n.1 (1983). Since 1966, the exhaustion of state remedies requirement has been codified at 28 U.S.C. § 2254(b) & (c) (1988), which state, in pertinent part:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court 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 either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner . . . .
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.

Id.

cluded that the delay amounted to "an absence of available State corrective process or . . . circumstances rendering such process ineffective to protect the rights of the prisoner,"[135] and excused the defendant from exhausting state remedies. Encouraged by this judicial reception, petitioners began to allege that state appellate delay, in itself, was a substantive constitutional violation. Although federal courts generally agreed with that proposition in the abstract, they were uncertain how to extend their newly enunciated rule from habeas corpus actions to these constitutional challenges.

The history of the judicial treatment of excessive delay claims is worth considering in greater detail. As a result of a variety of factors, state appellate caseloads became increasingly unwieldy during the 1960s, resulting in a backlog of appeals.[136] Consequently, in the late 1960s, prisoners bringing habeas corpus petitions in federal court began asserting that excessive delays in state post-conviction proceedings excused them from exhausting their state remedies. Despite the fact that exhaustion is a judicially crafted doctrine based on comity and not on due process,[137] the prisoners contended that the ineffectiveness of state appellate process violated their due process rights. Their aim apparently was to bolster their claim that the federal courts should proceed directly to the merits of their habeas corpus petitions.

The habeas exhaustion requirement mandates that prisoners exhaust *all* state court remedies, including those available on direct appeal and on state collateral attack. Thus, the earliest federal cases typically involved claims of excessive delay in state collateral attack proceedings rather than in direct appeals.[138] Once federal courts proved receptive to these

135. 28 U.S.C. § 2254(b) (1988).

136. *See* Resnik, *supra* note 5, at 603-05 (examining effect that increased caseloads have had on the development of expansive preclusion doctrines and the increase in alternate forms of dispute resolution).

137. *E.g.*, Picard v. Connor, 404 U.S. 270, 275 (1971) (stressing that exhaustion was a federal "policy" adopted because " 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity for the state courts to correct a constitutional violation' " quoting Darr v. Burford, 339 U.S. 200, 204 (1950)); *see* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973); *cf.* Peller, *In Defense of Federal Habeas Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 635-43 (1982) (arguing that the exhaustion requirement evolved to permit the federal courts some remedy short of outright release for lesser violations of a petitioner's rights by allowing state courts the opportunity to correct their own errors).

138. For example, in Smith v. Kansas, 356 F.2d 654 (10th Cir. 1966), *cert. denied*, 389 U.S. 871 (1967), Smith pled guilty to state charges of burglary and

claims,[139] petitioners asserted the same challenges against excessive delays in direct state criminal appeals.[140] Again, the lower federal courts were inclined to excuse exhaustion. In doing so, however, the courts used language implying that exhaustion was excused because the state appellate delays violated the petitioners' right to due process of law.[141]

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grand larceny in April, 1964. In September, 1964, Smith filed a motion under the Kansas post-conviction statute seeking to withdraw his plea, alleging it had been coerced. In March, 1965, the motion was denied and Smith filed a notice of appeal. The trial court appointed the same attorney to represent Smith on appeal. Smith objected, and the attorney moved to withdraw. In December, 1965, the Kansas court filed an order granting the attorney's motion to withdraw and appointing new counsel. During the interim, Smith filed a federal habeas corpus petition alleging that the delay in the Kansas post-conviction procedure denied him due process. *Id.* at 656.

The district court dismissed the petition on the ground that Smith had failed to exhaust state remedies. *Id.* The Tenth Circuit reversed, holding that exhaustion was excused and noting that the delay of more than a year in the state post-conviction processes presented a colorable claim of unconstitutional restraint. *Id.* at 657. It then remanded the case to the district court with orders to "take such steps as it deems necessary to secure petitioner's right to a prompt hearing on his claim of unconstitutional restraint." *Id.*; *see also* United States *ex rel.* Senk v. Brierly, 471 F.2d 657, 660 (3d Cir. 1973) (holding that three-and-one-half year delay in post-conviction proceedings was unjustifiable and petitioner therefore would not have to exhaust his state remedies); St. Jules v. Beto, 462 F.2d 1365, 1366 (5th Cir. 1972) (per curiam) (questioning 17-month delay in state habeas corpus proceedings); Dixon v. Florida, 388 F.2d 424, 425 (5th Cir. 1968) (remanding case to determine if 19-month delay in post-conviction relief was justifiable); Jones v. Crouse, 360 F.2d 157, 158 (10th Cir. 1966) (remanding case to determine whether 18-month delay in appeal from denial of motion for post-conviction proceedings violated defendant's due process rights).

139. *See* cases cited *supra* note 138.

140. *E.g.*, Way v. Crouse, 421 F.2d 145, 146-47 (10th Cir. 1970) (per curiam) (questioning whether 18-month delay in docketing petitioner's appeal was justifiable); *see also* Odsen v. Moore, 445 F.2d 806, 806 (1st Cir. 1971) (requiring evaluation of petitioner's claim that 34-month delay in direct appeal was unreasonable); Dozie v. Cady, 430 F.2d 637, 638 (7th Cir. 1970) (remanding case for inquiry concerning 17-month delay in direct appeal). This dynamic also may reflect a "trickling down" of the problem of delay through the levels of state appellate review.

141. For example, the Tenth Circuit stated in *Way*:

> Just as a delay in the adjudication of a post-conviction appeal may work a denial of due process, so may a like delay in the determination of a direct appeal. The question presented here is in what court should petitioner seek vindication of his asserted constitutional grievance. In our view, Way properly resorted to the federal court, which should not, without knowing the facts and circumstances of the eighteen month delay, have required him at this late date to commence a completely new and independent proceeding through the very courts which are responsible, on the face of the pleadings, for the very delay of which he complains.

421 F.2d at 146-47; *see also* Shelton v. Heard, 696 F.2d 1127, 1128 (5th Cir. 1983)

After excusing the petitioner from exhausting state remedies, the federal court usually proceeded to the merits of the habeas corpus petition.[142] Even if the federal court found as a threshold matter that the petitioner stated a colorable claim of due process violation arising from state appellate delay, the court did not decide whether a due process violation had occurred. Instead, the district court generally decided the merits of the petitioner's underlying claim of constitutional violation — for example, such claims as coerced confessions or constitutionally defective jury charges — without considering whether the delay deserved any remedy other than waiving the exhaustion requirement.[143] Thus, the federal courts were led to proclaim a due process right to a prompt appeal in sweeping

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(per curiam) (reasoning that "[t]he forbearance of the federal courts is based upon the assumption that the state remedies available to petitioner are adequate and effective to vindicate federal constitutional rights. When those state procedures become ineffective or inadequate, the foundation of the exhaustion requirement is undercut . . . ." (citation omitted)).

142. If the case reached the federal appellate courts, the procedural result normally was a remand to the district court for further proceedings. *See, e.g.*, Smith v. Kansas, 356 F.2d at 655 (remanding case to district court to determine whether one year delay between motion for relief and entry of appealable order constitutes a denial of the "swift and imperative remedy" to which petitioner was entitled); *supra* note 138 (discussing *Smith*).

143. *See, e.g.*, Ralls v. Manson, 375 F. Supp. 1271, 1281-85 (D. Conn.) (remedying excessive state delay by proceeding directly to the merits of petitioner's constitutional claim), *rev'd on other grounds*, 503 F.2d 491 (2d Cir. 1974); *see also infra* note 147 (discussing *Ralls*). This pattern also occurred in cases in which courts considered claims of undue delay in state post-conviction proceedings other than direct appeals. For example, in United States *ex rel.* Johnson v. Rundle, 286 F. Supp. 765 (E.D. Pa. 1968), the prisoner petitioned for federal habeas corpus relief after he had suffered a delay of 19 months in a post-conviction proceeding following a state court conviction for rape. The district court held that petitioner should not be required to exhaust his state remedies, stating:

> Of course, the theoretical premise assumes that the states will allow the individual to present his claims without overly burdensome procedural snarls and to render decisions on them with reasonable dispatch. If the state does not act so, then the effect of the 'exhaustion doctrine' would be 'to shield an invasion of the citizen's constitutional rights.'

Id. at 767 (quoting Jordan v. Hutcheson, 323 F.2d 597, 601 (4th Cir. 1963)).

In *Johnson*, the court found that the delay was "so inordinate" that it simply proceeded to hear the merits of the petitioner's case, that is, his claim not of delay but of the introduction into evidence at trial of an involuntary confession. The court then ruled in the petitioner's favor and granted the writ. *Id.* at 767-70; *see also* United States *ex rel.* Lusterino v. Dros, 260 F. Supp. 13, 16-17 (S.D.N.Y. 1966) (granting conditional release on the ground that petitioner's conviction was obtained as a result of illegal seizure in violation of Mapp v. Ohio, 367 U.S. 643 (1961), after excusing exhaustion requirement due to delays in coram nobis proceeding).

language, while the fact that these issues arose in the context of excusing the exhaustion requirement retarded serious analysis of that right.

The presentation of speedy appeal rights in habeas corpus actions also raised a problem for defendants. Although defendants generally requested that federal courts proceed directly to the merits of their habeas petitions, with rare exceptions only federal constitutional claims are cognizable in habeas corpus.[144] Any non-constitutional appellate claims would be lost unless the defendant could obtain review in state court. Accordingly, prisoners had an incentive to claim that failure to hear the appeal itself violated due process. Moreover, by showing that the state's appellate delay violated due process, prisoners apparently hoped to establish that they were being held in violation of the Constitution and therefore were entitled to release. These additional interests further confused the federal courts' analysis of state appellate delay.

For example, in one relatively early series of cases, petitioners challenged delays arising from Connecticut's criminal appellate procedures, requesting that the federal courts consider on habeas corpus the constitutional claims presented in their much-delayed direct appeals. In the first case, *Ralls v. Manson*,[145] the petitioner, Ralls, had been convicted of murder and attempted a direct appeal, arguing that various trial errors denied him due process. While his state appeal was still pending, Ralls raised his substantive constitutional claims in a federal habeas corpus petition, contending that the federal court should excuse exhaustion of state remedies due to excessive delay in the resolution of his direct state appeal.[146] The district court excused exhaustion, concluding that the pattern of appellate delay in Connecticut courts constituted a lack of an effective state remedy against unconstitutional convictions.[147] The

144. *See supra* note 123 and accompanying text.

145. 375 F. Supp. 1271 (D. Conn.), *rev'd on other grounds*, 503 F.2d 491 (2d Cir. 1974).

146. *Id.* at 1274.

147. *Id.* at 1282-85. Connecticut appellate procedure at the time required that both the government and the defendant file draft findings of the facts each party offered evidence to prove, questions of law, and, in the case of rulings on evidence, the specific portion of the trial transcript in which the ruling was made. The trial court then had to file its finding, which was then subject to correction by the parties. Only after all this could the appellant file assignments of error. After filing assignments of error, the parties could proceed to brief the case. *Id.* at 1279-80.

The *Ralls* trial court noted that although Connecticut's appellate proce-

court then considered the three-and-one-half-year delay suffered by Ralls himself, finding it to be "by no means unique," but "clearly inordinate and excessive."[148] In effect, the court found that exhaustion could be excused only on a showing of both a pattern of delay that negated the possibility of effective state process and inordinate delay in the individual petitioner's own case.[149]

The Second Circuit reversed the district court in a brief per curiam opinion, [150] which simply concluded that Ralls' case did not present a clear denial of constitutional rights sufficient to justify federal intervention.[151] The Second Circuit flatly asserted that Connecticut's delay in processing Ralls' direct appeal did not constitute a complete absence of effective state appellate process and therefore did not excuse Ralls' failure to exhaust state remedies.[152] Thus, the *Ralls* decision did not provide much guidance to district courts faced with a constitutional challenge to state appellate delay. In concurrence, moreover, Judge Lumbard further clouded the issue by arguing that had Ralls' guilt been open to serious question, the state's delay would have raised sufficient due process issues to justify excusing the exhaustion requirement.[153]

Shortly after *Ralls*, the Second Circuit decided *Roberson v. Connecticut*.[154] *Roberson* squarely presented the issue skirted by *Ralls*: whether Connecticut appellate delays deprived the

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dures theoretically provided for a final determination of a direct appeal within about six months, the procedure worked very differently in practice. Reviewing the 70 direct criminal appeals decided by the Connecticut Supreme Court between 1970 and 1973, the court found that no criminal appeal had been decided less than 13 months after the filing of the notice of appeal and almost 40% of the appeals were pending for more than 30 months. *Id.* at 1280. The district court attributed this delay largely to the time consumed by court reporters in preparing trial transcripts, and to the Connecticut requirement that defense counsel, the prosecution, and the court all draw up findings to frame the issues for appeal. *Id.* at 1279-80.

148. *Id.* at 1282.

149. The court noted that "[w]hether the delay in the direct appeal in any particular case has been excessive and unjustified will depend, of course, upon the specific circumstances presented." *Id.* at 1279. Having found exhaustion unnecessary, the district court then reached the constitutional claims presented in the direct appeal, found them to be meritorious, and ordered that the writ of habeas corpus be granted unless Connecticut gave Ralls a new trial within 60 days. *Id.* at 1297-98.

150. Ralls v. Manson, 503 F.2d 491, 493 (2d Cir. 1974) (per curiam).

151. *Id.* at 492-93.

152. *Id.* at 493.

153. *Id.* at 494, 499 (Lumbard, J., concurring).

154. 501 F.2d 305 (2d Cir. 1974).

petitioner of his due process rights and merited relief in their own regard.[155] Roberson had been convicted of heroin possession and sentenced to probation. Subsequently, he was convicted of robbery and, as a result, his probation was revoked. Roberson then filed a petition for a federal writ of habeas corpus alleging that Connecticut violated due process by revoking his probation based on criminal convictions still pending on direct appeal.[156] The district court dismissed Roberson's petition on its merits.[157]

Roberson next filed a second habeas corpus petition, which repeated his claim regarding the revocation of his probation.[158] Roberson raised a new claim in that petition, however, arguing that Connecticut's excessive delay in processing his appeals — at that point, some two years — violated his constitutional rights.[159] The district court sought refuge in the recent *Ralls* decision and found that Roberson had failed to exhaust his state remedies.[160]

While awaiting the outcome of his Second Circuit appeal on the exhaustion issue, Roberson returned to the Connecticut courts and presented his claim of appellate delay. Aware of this, the Second Circuit held that dismissal of Roberson's petition for failure to exhaust was "unduly technical."[161] Instead, the court recognized that Roberson might be able to establish a claim that the state appellate delays violated his federal constitutional rights.[162] The Second Circuit therefore remanded the case, suggesting that the district court make a "substantial" record concerning whether the delays were "isolated occurrences or predictable products of Connecticut appellate procedures."[163]

Apparently, the Second Circuit confused the findings relevant to excusing a petitioner from the habeas exhaustion requirement with the findings necessary to prove that the delay violated the petitioner's constitutional rights. Although the former — as in *Ralls* — might require the showing of a pattern of delay to indicate the total absence of effective state appellate process, the latter simply should require a showing that the de-

155. *Id.* at 306.
156. *Id.*
157. *See id.*
158. *Id.*
159. *Id.*
160. *Id.* at 309.
161. *Id.*
162. *Id.*
163. *Id.*

lay was excessive in this petitioner's particular instance. For example, if Roberson's appeal had been pending for twelve years, it could be argued that his personal rights had been violated even if every other appeal in Connecticut had been heard in a prompt and timely fashion. The Second Circuit apparently overlooked this distinction and, as a result, burdened each petitioner alleging unconstitutional appellate delay with proving that the state appellate process was structurally deficient.

In a separate opinion, concurring in part and dissenting in part, Judge Mansfield characterized the threshold question — neither asked nor answered by the majority opinion — as whether Roberson enjoyed a right to a speedy appeal in the first place.[164] Although Judge Mansfield recognized the analogy to the recently decided sixth amendment speedy trial case, *Barker v. Wingo*,[165] he was skeptical about the application of speedy trial reasoning to criminal appeals. As he reflected, the denial of a speedy appeal might not violate due process because:

> the reasons advanced in favor of a speedy trial (e.g. the express terms of the Sixth Amendment, the presumption of innocence, the risk of loss of evidence) are not persuasive in determining whether the Constitution requires an appeal to be heard within a prescribed period of time, or indeed, at all.[166]

The most noteworthy aspect of *Ralls* and *Roberson* is that the Second Circuit was able to hear and consider at least two serious challenges to state appellate delays without deciding whether those delays violated the Constitution, or developing a standard for measuring the gravity of appellate delays. The only lesson a district court might draw from the *Ralls* and *Roberson* decisions was to avoid the issue entirely by insisting on

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164. *Id.* at 310 (Mansfield, J., concurring in part and dissenting in part). Judge Mansfield took issue with the Second Circuit's decision to remand the case, arguing that Roberson already had established a sufficient record to enable the federal appellate court to decide whether he was entitled to a more prompt disposition of his appeals "than that permitted by Connecticut's procedure." *Id.*

165. 407 U.S. 514 (1972). In *Barker*, the Court articulated a four factor balancing test for determining whether a defendant's sixth amendment right to a speedy trial had been violated. The four factors are 1) length of the delay, 2) the reason for the delay, 3) whether and when the defendant asserted his right to a speedy trial, and 4) whether any actual prejudice to the defendant resulted from the delay due to destruction or staleness of evidence, oppressive pretrial incarceration, or in the creation of excessive anxiety. *Id.* at 530. The Court derived this standard from an analysis of the interests implicated by the speedy trial right, and explained that no one factor was to be determinative, but that each was to be weighed against the others. *Id.* at 533.

166. *Roberson*, 501 F.2d at 310 (Mansfield, J., concurring in part and dissenting in part).

strict compliance with the exhaustion requirement. As *Roberson* illustrates, however, even that lesson was not always apposite.

While the Second Circuit wrestled with appellate delays in Connecticut, other federal courts faced similar problems.[167] Although some of these federal court decisions contained broad assertions that excessive delay violated due process, none treated the issue with any clarity. Then, the Fifth Circuit confronted the inability of Texas court reporters to keep up with the preparation of transcripts for state criminal appeals, and the refusal of local governments to provide adequate funding to remedy the delays.[168] Initially the Texas state courts attempted to grapple with the problem,[169] but when state suits proved in-

167. Delays in providing transcripts necessary for the preparation of direct appeals had caused appellate courts in the First and Tenth Circuits to find violations of due process caused by appellate delay. These decisions, however, were every bit as nebulous as *Roberson*. *See* Rivera v. Concepcion, 469 F.2d 17, 19-20 (1st Cir. 1972) (admitting prisoners to bail pending resolution of excessively delayed appeal); Tramel v. Idaho, 459 F.2d 57, 58 (10th Cir. 1972) (remanding for a decision whether delay in resolution of appeal amounted to a denial of due process); *cf.* McLallen v. Henderson, 492 F.2d 1298, 1299-1300 (8th Cir. 1974) (reviewing a suit for money damages under § 1983, alleging that court reporter violated prisoner's civil rights by unreasonably delaying the preparation of a transcript. The appellate court reversed the district court, finding the reporter immune from suit due to judicial immunity, and implying, but not deciding, that such a claim stated a cause of action under the Civil Rights Act); Odsen v. Moore, 445 F.2d 806, 807 (1st Cir. 1971) (holding due process violated when a state prisoner, over a period of months, complained to the clerk of the court that his court appointed counsel was doing nothing to forward his appeal and was told that all complaints of inaction must be taken up with counsel of record).

168. Under then existing Texas criminal procedure, the necessary record on appeal consisted of the "transcript," containing all the pleadings and other court papers, and a "statement of facts," consisting of a transcription of the court reporter's notes taken at the trial. Rheuark v. Shaw, 628 F.2d 297, 300 n.2 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

169. The Texas Court of Criminal Appeals itself indicated that an excessive delay in the preparation of a criminal appellant's statement of facts could constitute a denial of due process. Colunga v. State, 527 S.W.2d 285, 288 (Tex. Crim. App.) (stating that although the court did not condone delay in preparing the record, such delay did not amount to denial of due process), *cert. denied*, 421 U.S. 951 (1975); Zanders v. State, 515 S.W.2d 907, 909 (Tex. Crim. App. 1974) (stating that the delay in preparing statement of facts was not "inexcusable" and did not deprive defendant of due process); Cunningham v. State, 484 S.W.2d 906, 910 (Tex. Crim. App. 1972) (holding that delayed appeal did not violate due process); *cf.* Guyton v. State, 472 S.W.2d 130, 130 (Tex. Crim. App. 1971) (failing to address constitutionality of delay when record did not reach the appellate court until more than five years after trial while appellant was ineligible for bail because he had received a life sentence.); Dues v. State, 456 S.W.2d 116, 118 (Tex. Crim. App. 1970) (involving an appellant con-

efficacious, litigants sought relief in the federal courts.

In 1977, John Doescher petitioned for habeas corpus, claiming that excessive delay in his Texas appeal provided grounds both for excusing exhaustion and for substantive relief.[170] The federal district court agreed that a year's delay in completing and forwarding Doescher's record on appeal from trial to appellate court was excessive.[171] The district court, however, found that the Texas appellate court might yet resolve Doescher's appeal promptly enough to offset this delay, and accordingly dismissed Doescher's petition for failure to exhaust state remedies.[172] At the same time, the district court granted Doescher leave to refile his habeas petition if the Texas Court of Criminal Appeals acted with undue delay.[173]

In *Doescher v. Estelle*,[174] the district court attempted to provide guidance regarding excessive appellate delay by adapting the Supreme Court standard for measuring sixth amendment speedy trial violations as enunciated in *Barker v. Wingo*[175] to situations involving delayed appeals. The district court thus found that a case by case weighing of four factors defined unconstitutional delay: length of delay, reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[176] Although the *Doescher I* court did little more than repeat the Supreme Court's opinion in *Barker v. Wingo*, *Doescher I* represents the first sustained attempt to inject some structure into what previously had been a largely ad hoc determination.

Predictably, Doescher's first petition for habeas corpus did not end the matter. Doescher next joined with two other Texas prisoners to file suit under 42 U.S.C. section 1983,[177] claiming that the excessive delays in preparation of their trial transcripts deprived them of due process.[178] After the Texas Court of

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fined to jail for three and one-half years from the end of his trial until the record reached the appellate court, which then reversed his conviction).

170. Doescher v. Estelle, 454 F. Supp. 943, 945 (N.D. Tex. 1978) (*Doescher I*), *appeal dismissed as moot*, 597 F.2d 281 (5th Cir. 1979).

171. *Id.* at 952.

172. *Id.* at 953.

173. *Id.*

174. 454 F. Supp. 943 (N.D. Tex. 1978) (*Doescher I*), *appeal dismissed as moot*, 597 F.2d 281 (5th Cir. 1979).

175. 407 U.S. 514, 530-33 (1972); *see supra* note 165.

176. *Doescher I*, 454 F. Supp. at 947.

177. 42 U.S.C. § 1983 (1982); *see infra* note 248 (reprinting text of statute).

178. Rheuark v. Shaw, 628 F.2d 297, 299 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

Criminal Appeals unfavorably decided his appeal, Doescher refiled his individual petition for federal habeas corpus, again alleging appellate delay and other constitutional violations as grounds for relief.[179] Both cases were heard by the same district court that had decided Doescher's first petition for habeas corpus. The court issued two interdependent opinions in the cases, the more detailed one in *Rheuark v. Shaw*, the Section 1983 case.[180] In *Rheuark*, the court unequivocally held that delays of nine, twenty, and twenty-three months in preparing trial transcripts violated due process and the "constitutional commitment to speedy justice for all."[181] Although the district court repeated its adherence to the *Barker* standard for measuring delays, it made little use of *Barker* and avoided altogether any discussion of the *Barker* element of prejudice.[182]

The federal district court's disposition of Doescher's renewed petition for habeas corpus relief relied heavily on its decision in *Rheuark*, and accordingly was framed largely in conclusory terms. In the habeas action, however, the federal district court explicitly found that prejudice was not a necessary element to prove a due process violation.[183] Nevertheless, the court found that Doescher's incarceration while awaiting the determination of his appeal showed he had been prejudiced by the unconstitutional delay.[184]

Both sides appealed the unfavorable elements of the *Rheuark* decision to the Fifth Circuit, which utilized the case as a vehicle for a major statement regarding appellate delay. The Fifth Circuit announced that "any substantial retardation" of the appellate process can violate due process, including excessive delay in furnishing a transcript of testimony necessary to complete the appellate record.[185] The court also proclaimed that the Supreme Court's approach in *Barker v. Wingo* was an "appealing" standard for determining whether appellate delay

179. Doescher v. Estelle, 477 F. Supp. 932, 933 (N.D. Tex. 1979) (*Doescher II*), *aff'd in part and vacated in part*, 616 F.2d 205 (5th Cir. 1980).

180. 477 F. Supp. 897 (N.D. Tex. 1979), *aff'd in part and rev'd in part*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

181. *Id.* at 910.

182. *Id.* at 908-10. Rather, the opinion largely was taken up with a discussion of the possible remedies for the violation.

183. *Doescher II*, 477 F. Supp. at 934 (citing *Doescher I*, 454 F. Supp. at 950-51).

184. *Id.* at 934 n.1.

185. Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

reached constitutional proportions.[186]

Echoing the district court's original opinion in *Doescher I*,[187] the Fifth Circuit explained that *Barker* entailed an ad hoc weighing of four factors: the length of the delay, the reason behind the delay, the defendant's assertion of his right, and the prejudice to the defendant.[188] Recognizing that the most problematic factor was prejudice, the court attempted to adapt speedy trial prejudice to speedy appeal prejudice. The Fifth Circuit stated that, for sixth amendment purposes, prejudice was evaluated in light of the interests the speedy trial right was designed to protect: the prevention of oppressive pretrial incarceration, the minimization of anxiety and concern of the accused, and limitation of the possibility that the accused's defense might be impaired.[189] Translating this catalogue of interests into the appellate context, the Fifth Circuit suggested that prejudice be measured in light of the interests in preventing oppressive incarceration pending appeal: minimizing anxiety and concern pending the outcome of the appeal and limiting the possible impairment of a convicted defendant's grounds for appeal, as well as his ability to mount a defense in the event of a reversal.[190]

Unfortunately, the *Barker* standard lost something in the

186. *Id.* at 303.

187. Doescher v. Estelle, 454 F. Supp. 943 (N.D. Tex. 1978) (*Doescher I*), *appeal dismissed as moot*, 597 F.2d 281 (5th Cir. 1979).

188. *Rheuark*, 628 F.2d at 303 n.8. (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

189. *Id.*

190. *Id.* As an example of prejudice, the Fifth Circuit mentioned that court reporters have more difficulty transcribing older shorthand notes and therefore are apt to make more mistakes in transcribing stale notes, possibly impairing grounds for appeal in the process. *Id.*

In relying on the *Barker* speedy trial standard, the Fifth Circuit expressly declined to apply the rule set forth in United States v. Lovasco, 431 U.S. 783 (1977), a case dealing with pre-indictment delay. In *Lovasco*, the Supreme Court found that the due process clause played a limited role in protecting defendants against oppressive delay, preferring to rely on legislatively enacted statutes of limitation to provide limits on pre-indictment delay. *Id.* at 788-89 (citing United States v. Marion, 404 U.S. 307, 322-24 (1971)). As the Fifth Circuit noted, no such legislative limits exist in the case of appellate delays. *Rheuark*, 628 F.2d at 303 n.9. Moreover, the court pointed out that the reasons for constraining appellate delay are similar to those constraining pretrial delay: defendants generally are incarcerated pending the outcome of appeal. *Id.* at 303. If the appeal is not frivolous, a defendant may receive punishment when he has not been properly proven guilty. Conversely, if the defendant is released on bail pending appeal, the court argued that the guilty may be walking the streets free to commit other crimes. *Id.* at 304 (citing Reese v. State, 481 S.W.2d 841, 843 (Tex. Crim. App. 1972)).

translation. On one level, the Fifth Circuit failed to perceive that the thrust of *Barker* was directed at distinguishing delay helpful to and possibly encouraged by the defendant from delay that actually harmed him. Having committed itself to the structure of the *Barker* standard, the Fifth Circuit also failed to recognize the more immediate differences between the appellate and trial context. For example, the Fifth Circuit's discussion in *Rheuark* did not consider that, because the appeal relies on a cold record and not on live witnesses, the defendant might have more difficulty proving impairment of his ability to present his appeal than impairment of his ability to mount a defense at trial. The court also did not appreciate the differences between pretrial and post-conviction incarceration. Furthermore, the *Rheuark* court did not even refer to *Barker*'s specific insistence that none of its four factors be deemed necessary to establish a due process violation, a point scrupulously observed by the district court in the *Doescher* cases.[191] These failures sowed the seeds of future difficulties.

B. THE INADEQUACY OF THE *BARKER V. WINGO* STANDARD

The analogy between the speedy trial right and the speedy appeal right is a seductive one. At first glance, the two rights appear to involve the same interests and have a similar rationale.[192] Delay, however, has a different significance at the trial level than at the appellate level. At the trial level, delay is a double-edged sword; defendants can as readily profit from delay as be harmed by it. Witnesses whose memories have been dulled by time, for example, may hamper the prosecution in establishing its case, just as they may impair a defendant's ability to present his defense. As a result, a defendant may seek to delay his trial in order to take advantage of the hoped-for favorable effects of delay. The *Barker* factors explicitly reflect the Supreme Court's recognition of this difficulty and its concern for distinguishing delay that benefits the defendant and which is courted by him from delay that harms him; the Court

191. *Doescher I*, 454 F. Supp. at 950 (stating that the court need not find actual prejudice to find a denial of due process); *Doescher II*, 477 F. Supp. at 934 (same).

192. Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980) (reasoning that defendants have similar interests in obtaining both speedy trials and prompt appeals), *cert. denied*, 450 U.S. 931 (1981); *Burkett v. Cunningham*, 826 F.2d 1208, 1222 (3d Cir. 1987) (stating that " 'the right to avoid unreasonable delay in the appellate process is similar to the right to a speedy trial,' " quoting DeLancy v. Caldwell, 741 F.2d 1246, 1247 (10th Cir. 1984)).

permits the finding of a constitutional violation only if delay actually harms the defendant.[193]

Conversely, appellate delay is not beneficial to the criminal defendant. Certainly, it does not increase the likelihood that he will secure a favorable outcome.[194] In fact, appellate delay is always harmful to the defendant to the extent that it postpones finality of judgment and increases the likelihood of unjust incarceration. *Barker* — and any other conceivable speedy trial standard — must focus on sorting beneficial from harmful trial delay, entailing issues neither appropriate nor necessary in the appellate context.

Largely because of this fundamental disjunction, application of the *Barker* speedy trial standard to appellate delay creates as many difficulties as it solves. On the one hand, *Barker* preserves all the uncertainties of a standard based solely on an ad hoc consideration of the length of the delay. On the other hand, *Barker* injects problematic factors into the calculus that determines whether state appellate delay rises to the level of a constitutional violation. Furthermore, courts have tended to apply *Barker* mechanically, establishing an emphasis on prejudice as the key element of the constitutional violation. Although prejudice is not essential to a violation of the *Barker* speedy trial standard itself,[195] this insistence on a prejudice requirement in the appellate context has led to a great deal of analytical and practical confusion in assessing unconstitutional appellate delay.

In order to determine whether a delay has violated a defendant's constitutional rights, *Barker* advises a case-by-case balancing of four factors: 1) length of delay, 2) the reason for the delay, 3) defendant's assertion of his constitutional right, and 4) prejudice to the defendant arising from the delay. On its face, this standard appears to lend a fair amount of structure to a court's deliberations; in reality, that structure is largely illusory. For example, in evaluating the gravity of the length of appellate delay, courts face essentially the same determination as if they were making an unguided ad hoc decision, because

193. Barker v. Wingo, 407 U.S. 514, 521 (1972).

194. It could be argued that the defendant might benefit during the delay by favorable developments in the law or a change in the composition of the appellate court, rendering it more receptive to the appellant's claims. Both of these arguments are so speculative that they cannot be properly cognizable by the courts.

195. *Barker*, 407 U.S. at 533 (stating that "[i]n sum, these [four] factors have no talismanic qualities").

Barker does not provide a benchmark for measuring delay. Rather, lower federal courts must rely on their own innate sense of fairness, an attribute they presumably possessed prior to the adoption of *Barker*.

Courts already have begun to chafe at the inadequacy of *Barker* for evaluating the constitutional import of the length of appellate delay.[196] One frustrated court, applying the *Barker* standard, suggested a rule of thumb that a delay of one-half of a convicted defendant's minimum sentence would amount to a constitutional violation.[197] This approach, however, favors prisoners with short sentences while penalizing those with longer sentences, even if their appeals are simpler or more meritorious. Moreover, once delay reaches fifty percent of the minimum sentence, the other *Barker* considerations become irrelevant because the court automatically must find a constitutional violation. Noting the shortcomings of the fifty percent approach, another court suggested that the reasonableness of the length of delay should be viewed as a function of the complexity of the litigation, the parties' behavior, and the court's activity in monitoring its calendar. Although this suggestion avoids some of the pitfalls of the fifty percent rule, it asks courts to weigh two of the remaining three *Barker* factors — the reasons for the delay and the petitioner's assertion of the right — twice.[198] Neither alternative is particularly helpful; both point out *Barker*'s deficiencies when applied to appellate delay.

Inclusion of *Barker*'s "demand rule" in the appellate context is equally unhelpful, although in a different way. The demand rule apparently originated in speedy trial cases to ensure

196. *E.g.*, Wheeler v. Kelly, 639 F. Supp. 1374, 1378 (E.D.N.Y. 1986) (applying *Barker*, but noting "[t]here is no formula for determining if a delay is excessive"), *aff'd*, 811 F.2d 133 (2d Cir. 1987).

197. Harris v. Kuhlman, 601 F. Supp. 987, 993 (E.D.N.Y. 1985) (noting that "[w]here the delay between conviction and the hearing of an appeal exceeds 50 percent of a petitioner's ten year minimum sentence, the court can assume that the delay is prejudicial"); *cf.* Shelton v. Heard, 696 F.2d 1127, 1129 (5th Cir.) (per curiam) (asserting that a delay of one-half of a prisoner's sentence is sufficient to excuse exhaustion), *on sua sponte reconsideration*, 696 F.2d 1127 (per curiam), *on further sua sponte reconsideration*, 707 F.2d 200 (1983) (per curiam); Guam v. Olsen, 462 F. Supp. 608, 613 (D. Guam App. Div. 1978) (holding two-year delay in preparation of transcript prejudicial per se, entitling defendant to outright release).

198. *See Wheeler*, 639 F. Supp. at 1378-79 (citing Cousart v. Hammock, 745 F.2d 776, 778 (2d Cir. 1984), for the proposition that length of sentence is a factor in deciding whether a delay is excessive, but arguing that the length of sentence should not be dispositive).

that a defendant requested a speedy trial while the court was still able to give him one.[199] One would assume, therefore, that the demand rule should perform a similar role in the context of delayed appeals; that is, to act as a device to ensure that the defendant resorted to effective means of expediting the appeal to avoid possible abridgement of the right to a speedy appeal. The exhaustion requirement in habeas corpus, however, effectively performs this screening function in cases involving appellate delay. Accordingly, the demand rule is largely redundant when applied to delayed appeals. Even if the demand rule were not redundant, it is incoherent to transform a device for avoiding unnecessary violations into a factor for determining whether a violation actually occurred. If excessive delay impaired the defendant's ability to present his appeal — as through the loss of the trial transcript, for example — it is nonsensical to say that the defendant's claim of a constitutional violation depends on whether he demanded a speedier appeal or not. To argue that a defendant implicitly may waive his right to a fair appeal-as-of-right, or to a remedy for the violation of that right, by failing to demand a speedier appeal, is unattractive at best.[200]

Similar criticisms may be made concerning the inclusion of the parties' conduct as a factor in determining whether delay reaches the level of a constitutional violation. Consideration of the defendant's conduct essentially imposes a second demand rule, ensuring that the defendant has not slept on his rights.[201] Laches, however, is an equitable defense, not an element of the defendant's claim. Requiring the petitioner to prove he has not

199. Note, *Speedy Trial*, *supra* note 10, at 853 (noting courts reasoned that the demand doctrine would "lead to a trial on the merits and not to a technical evasion of the charge").

200. *See* Amsterdam, *supra* note 3, at 540-41 (stating that waiver of right to a speedy trial due to defendants' failure to demand a speedier trial places defendants "in the unconscionable position of having to choose between insisting on a speedy trial and gambling on the incalculable possibilities of speedy trial dismissal").

201. The requirement is less problematic if the delay is caused by the defendant. Such cases appear to be rare, evidencing that delay on appeal is not beneficial to defendants. Rather, courts interpret the rule to see whether the defendant insisted on his rights. It should be noted that failure of appointed defense counsel to pursue an appeal in a prompt manner is attributable to the state, not to the defendant, as long as the defendant made reasonable efforts to prod counsel. *See, e.g.*, Wheeler v. Kelly, 639 F. Supp. 1374, 1378 (E.D.N.Y. 1985) (stating that "the failure to correct deficiencies of assigned counsel constitutes state action"); *Harris*, 601 F. Supp. at 992 (reasoning that "ineffective assistance of counsel and failure of the state to correct the deficiency constitute state action").

slept on his rights is rather like making the plaintiff in equity disprove a defense as part of his case in chief.

As to the government's conduct, certain delays are so long or so prejudicial that every averment of governmental good faith is irrelevant. More troubling, however, is the tendency of courts to transform the factor of government conduct into a requirement that the defendant demonstrate governmental bad faith or bad motive.[202] Although governmental bad faith in delaying an appeal may sufficiently delineate a constitutional violation, it should hardly be a necessary element of the petitioner's claim.[203] An inadvertent delay can be as serious as an intentional one.

By far the most problematic aspect of the *Barker* standard is the inclusion of prejudice as an element of the constitutional violation. Whatever may be meant by prejudice in the appellate context, the *Barker* factors do not adequately measure it. The more important point, however, is that prejudice is not necessary to show a constitutionally cognizable violation of a procedural right that focuses on access to the judicial system. Prejudice may be relevant to the court's selection of a remedy; it is not requisite to finding a constitutional violation.

Because appellate delay does not benefit the defendant, the emphasis on a finding of prejudice is misplaced. Prejudice, as drawn from *Barker*, is a factor aimed at distinguishing delay favorable to the defendant from delay harmful to him; otherwise the speedy trial defendant could enjoy the benefits of pretrial delay and then, if convicted, be released based on the sixth amendment violation.[204] The need for a speedy trial court to make this assessment, however, obscures the fact that procedural rights stressing access to the courts — such as the right to

202. *See Cousart*, 745 F.2d at 778 (refusing to find constitutional violation although delay in hearing the appeal was lengthy, because there was "no showing of bad faith or improper motive in the appointment of counsel or in their delayed discovery of disqualifying factors"). This is particularly troubling because it is very difficult for the defendant to gain access to evidence demonstrating governmental bad faith.

203. *See, e.g.*, Guam v. Olsen, 462 F. Supp. 608, 610, 613-14 n.7 (D. Guam App. Div. 1978) (implying governmental bad faith in delay of transcript and ordering release of prisoner). *But see* United States v. Loud Hawk, 474 U.S. 302, 316 (1986) (a sixth amendment speedy trial case in which the Court, applying *Barker*, could find no governmental bad faith in a series of pre-trial interlocutory appeals that were largely responsible for a 44-month delay between indictment and trial, and ultimately found no sixth amendment violation).

204. Barker v. Wingo, 407 U.S. 514, 521, 532 (1972).

a speedy appeal — generally should be measured by the denial of process. For example, in *Peyton v. Rowe*,[205] the Court invalidated a federal rule that prohibited habeas petitioners serving consecutive sentences from challenging a subsequent sentence until the first sentence actually was served, because the rule would increase unjust incarceration.[206] A prisoner serving consecutive sentences need only show that a court rejected his petition because he was not yet serving the challenged sentence to establish a violation of *Peyton*. The prisoner does not need to show that he was prejudiced by this denial; nor need he show as a logical antecedent to prejudice that he would prevail on the habeas claim.[207]

The right to a speedy appeal entails a cluster of concerns similar to those enunciated in *Peyton* regarding access to the courts, finality, and prevention of unjust incarceration. The right of access to the courts generally is violated when access is denied.[208] Accordingly, the right to a speedy appeal is violated when the appeal unreasonably is delayed and access to the courts impaired. Prejudice may affect the severity of the violation or its remedy, but it is not necessary to establish whether a violation has occurred. The right to a speedy appeal is a right to receive certain process. The right is prophylactic and, thus, its violation should not be measured by considering whether the denial was prejudicial. The appropriate inquiry is not whether denial of a speedy appeal was prejudicial, but whether, as a rule, denial tends to increase unjust incarceration.

As an obvious corollary, and despite the *Rheuark* court's analysis,[209] appellate prejudice cannot be measured by the same factors as speedy trial prejudice. Courts tend to be unmoved by the prospect of convicted defendants remaining incarcerated pending appeal, particularly because many defendants already have been deemed to present too great a risk of flight to be admitted to bail.[210] Similarly, the convicted defendant's anxiety

205. 391 U.S. 54 (1968).

206. *Id.* at 64-67.

207. *Id.* at 67.

208. *Cf.* Fuentes v. Shevin, 407 U.S. 67, 87 (1972) (stating that the "right to be heard does not depend upon an advance showing that one will surely prevail at the hearing").

209. Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980) (applying *Barker* standard to both speedy trials and appeals), *cert. denied*, 450 U.S. 931 (1981).

210. *Cf.* 1984 Bail Reform Act, 18 U.S.C. § 3143(b) (Supp. 1987). At least in the federal system, the Bail Reform Act requires individuals seeking bail pending appeal to demonstrate, inter alia, that they do not pose a risk of flight,

regarding the outcome of his appeal carries little weight, in part because of the inherently subjective nature of such a factor, favoring the sensitive individual over the sanguine one with no regard for the inherent constitutional merits of either defendant's position.[211] Pretrial incarceration and anxiety are inherently oppressive because the prisoner still is cloaked in the presumption of innocence.[212] Although courts may assume that prisoners have a due process right to a speedy appeal and finality of judgment, they view the conviction as dissipating the presumption of innocence so that post-conviction incarceration and anxiety are not presumptively prejudicial.

Courts thus focus on whether the delay compromised the defendant's ability to present his appeal or his ability to mount his defense in a possible retrial. A defendant whose trial is unjustly delayed can show that witnesses' memories were dimmed by time or that witnesses have become unavailable to testify on his behalf.[213] Such prejudice is straightforward. A defendant whose appeal is delayed has a much heavier burden. Because appeals generally depend only on the written trial record — the "cold record" — it is difficult, in all but the most unusual case, to show that the defendant's ability to present his appellate arguments has been impaired. Although some issues raised on appeal may require an evidentiary hearing, such proceedings are extremely rare and courts seldom, if ever, take cognizance of the possibility of such a hearing when evaluating the prejudicial nature of appellate delay. In fact, short of mistranscription of the record or loss of segments of the record on appeal, it is difficult to conceive how passage of time could impair the defendant's ability to present his appeal.[214]

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are not appealing for purposes of delay, and have some likelihood of success on the merits. *Id.*

211. Courts deem it pointless to consider the anxiety suffered by an individual who is incarcerated pursuant to a justly imposed sentence, apparently believing that the guilty are not anxious. Therefore, at most courts might consider as prejudicial the anxiety suffered by a prisoner whose appeal is likely to be successful. Moreover, if the prisoner already is incarcerated on a concurrent sentence, as is frequently the case, courts are unwilling to see how the prisoner could suffer such anxiety.

212. *See, e.g.*, Strunk v. United States, 412 U.S. 434, 439 (1973) (recognizing prejudice from delayed trial even in the case of a prisoner already confined on another charge). Moreover, the Constitution permits incarceration of presumptively innocent individuals without deeming it oppressive. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 748-50 (1987) (accepting constitutionality of pretrial "preventive detention" of accused).

213. Barker v. Wingo, 407 U.S. 514, 532 (1972).

214. Intuitively, it seems reasonable to argue that the longer an appeal has

If delay rarely prejudices the defendant's ability to present his appeal, the sole remaining avenue to demonstrate prejudice is whether, realistically speaking, the delay harmed the defendant's ability to present his claims on retrial. The defendant's ability to present claims on retrial, however, can be impaired only if there is a retrial. Whether there is a retrial, in turn, depends on the merits of the defendant's appeal.

This exposes the heart of the matter: under the *Barker* standard, only a defendant who can convince the court he was unjustly convicted can prove prejudice.[215] It is, after all, enticing to argue that an appellant whose appeal is without merit cannot be prejudiced regardless of how badly his ability to present that appeal is compromised, and regardless of how badly his ability to present his defense at a retrial might be impaired. Similarly, incarceration pending appeal does not prejudice an individual serving a justly imposed sentence; anxiety pending appeal does not prejudice a justly imprisoned individual because he should realize his appeal is without merit and his conviction final.

The problem with this analysis is twofold: first, it involves the court in decisions it should not be making, and second, it means that although every defendant ostensibly has a due process right to a speedy appeal, only an unjustly convicted defendant may enforce that right. As to the first, merit — or the lack of it — cannot be a barrier to a state appeal-as-of-right.[216] The factors that may prejudice the defendant's appeal also may cause the appeal to appear unmeritorious.[217] Furthermore, it is

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been moldering, the more likely it is that the courts will affirm the underlying conviction rather than face the situation in which a prisoner has been unjustly incarcerated for a long time. For obvious reasons, it is impolitic to raise this type of indeterminate prejudice before a court. Moreover, even if an appellant were to raise the issue, it is very difficult to see how such a claim might be demonstrated successfully, no matter how intuitively appealing it might be.

215. *See* United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir.) (per curiam) (reasoning that "delay in appeal is not truly prejudicial except in case of reversal"), *cert. denied*, 393 U.S. 987 (1968); *see also* Anarah v. Kriele, No. 88 Civ. 4917, slip op. at 11, 14-15 (S.D.N.Y. March 3, 1989) (LEXIS 1964, Genfed library, Dist file) (citing *Cifarelli* and holding that a three-and-one-half year appellate delay was not prejudicial).

216. *Cf.* Draper v. Washington, 372 U.S. 487, 497-99 (1963) (finding a due process violation in requiring an indigent to convince the judge that his appeal is not frivolous in order to receive transcript); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (per curiam) (finding a due process violation in requiring an indigent to convince the judge that justice would be promoted by the appeal in order to receive transcript).

217. *Cf.* Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) (emphasizing that "[t]he difficulties of estimating prejudice after

unclear whether federal courts should judge the merits of state court appeals. If federal courts decide the merits sub silentio, as is most likely the case, the defendant may never get an opportunity to present his side of the case. Indeed, this scenario presents many unattractive options, including the prospect of federal courts deciding state law issues even before they are presented to the state courts.

As to the second problem, a defendant who cannot prove he was unjustly convicted may enjoy a "right" to a speedy appeal, but it is difficult to ascribe any content to that right. Simply put, a right that cannot be violated is not very much of a right at all. Part of the difficulty lies in the courts' measurement of a speedy appeal violation from the perspective of the wrong moment in time. Although courts recognize that every individual enjoys a right of prompt access to the appellate process, they determine whether a violation of that right has occurred by looking at the probable outcome of the process. This position is intrinsically illogical and unjust. Once the right to be heard in the courts is recognized, it cannot be made to depend — even after the fact — on a showing that the defendant would have prevailed on the merits. As the Supreme Court recognized in *Peyton*, the proper inquiry is whether the failure to grant timely access will lead to an overall increase in unjust incarceration. Once that determination is made by the courts — as it has been in the case of speedy appeals — the determination in any individual case must focus on access and not on outcome.

III. A RIGHT WITHOUT A REMEDY: THE DIFFICULTY OF DEVELOPING A REMEDY FOR VIOLATIONS OF THE RIGHT TO A SPEEDY APPEAL

Courts have chosen to define the right to a speedy appeal by using the standard defining the sixth amendment right to a speedy trial. The analogy between speedy trials and speedy appeals breaks down entirely, however, when courts attempt to fashion a remedy for a violation of the right to a speedy appeal. The sole constitutional remedy for a violation of the sixth amendment speedy trial right is dismissal of the indictment.[218] As one commentator astutely observed, this restricted choice of

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the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel").

218. Strunk v. United States, 412 U.S. 434, 440 (1973).

remedy has turned "the right of every criminal defendant to have a speedy trial into a very different sort of right: the right of a few defendants, most egregiously denied a speedy trial, to have the criminal charges against them dismissed on that account."[219] Shrinking from this extreme remedy, courts refused to find speedy trial violations except in the most outlandish cases;[220] the remedy effectively gutted the right.

Wary of such a result, courts consistently have attempted to fashion limited remedies for speedy appeals violations.[221] The end product has been unsatisfactory in the extreme. Reasoning that the harm rests in the state court's failure to hear the defendant's appellate claims, federal courts fashion a remedy that ensures the state court will hear the already delayed appeal soon after the federal judgment is entered.[222] Unfortunately, in so doing the federal courts have ignored the practical application of the *Barker* standard. The result, to the extent that courts follow *Barker*, is that the defendant must prove that delay has prejudiced his appeal in order to receive as relief the very appeal on whose efficacy he has cast doubt.

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219. Amsterdam, *supra* note 3, at 525.

220. *Barker* was arguably such a case. The Supreme Court found that Barker's sixth amendment rights were not violated by a delay of more than five years between arrest and trial. Barker v. Wingo, 407 U.S. 514, 533-36 (1972).

221. Burkett v. Cunningham, 826 F.2d 1208, 1222 (3d Cir. 1987).

222. The right to a speedy trial entails the right to a timely resolution of defendant's appeal; the interests of finality, legitimacy, and prevention of unjust incarceration all require that the defendant's appeal be decided with reasonable promptness. In most cases raising successful claims of appellate delay, however, the federal court merely requires that the state appellate court hear the case within a reasonable period of time, thereby focusing on argument of the case or submission of briefs by the parties. Federal courts appear loathe to require that state courts decide an appeal within a set amount of time, despite the fact that, for the defendant, winning the right to present briefs to the court without a prompt decision on the merits is the very definition of a pyrrhic victory. This reluctance to demand that a sister court decide an issue within a set period of time results from concerns of comity and from a fear that interference in the decisional process of another court might give rise to new claims of due process violation if a defendant subsequently felt that his case had not received proper consideration because of a court-imposed decisional deadline. Although this problem tends to blur the reasoning in speedy appeals cases, the ultimate interest at stake is a prompt resolution of the appeal even though the courts articulate the analysis in terms of access rights and the relief in terms of presentation of the appellate argument to the court. The underlying assumption appears to be the (possibly naive) belief that once the argument is before the state appellate court, the court will resolve the appeal with appropriate dispatch in light of the complexity of the issues involved and the demands of the case.

As if recognizing that an appeal is inadequate relief for a delayed appeal, courts often refer to the existence of alternative remedies for appellate delay, particularly in the form of civil rights actions.[223] When the same courts face civil rights claims by defendants alleging a denial of the right to a speedy appeal, however, they find principles of governmental immunity and comity prevent them from awarding effective relief. Thus, while the constitutional speedy trial remedy is so draconian that it eviscerates the right, the speedy appeals remedies are so inadequate that there is no meaningful redress for a violation of the right. As a result, states have little incentive to remedy appellate delay.

A. THE INEFFECTIVENESS OF FEDERAL HABEAS CORPUS RELIEF AS A REMEDY FOR VIOLATIONS OF THE RIGHT TO A REASONABLY SPEEDY APPEAL

Speedy appeals cases generally reach the federal courts as petitions for habeas corpus. This procedural posture imports problems of its own. Relief under habeas corpus is restricted to remedies affecting custody.[224] If a habeas corpus petitioner is able to show that state court appellate delay has reached the level of a constitutional violation, federal district courts generally grant a conditional order of release. This "conditional writ" takes the form of an order discharging the prisoner from custody if the state court fails to meet a specified condition — in these cases, hearing the appeal — within a specified time.[225]

223. *E.g.*, Simmons v. Reynolds, 708 F. Supp. 505, 510-11 (E.D.N.Y. 1989) (suggesting that habeas corpus petitioner's appropriate remedy is under § 1983); Doescher v. Estelle, 477 F. Supp. 932, 934 n.2 (N.D. Tex. 1979) (discussing various remedies available when substantial delay occurs in appellate process, including relief under civil rights statutes), *aff'd in part and vacated in part*, 616 F.2d 205 (5th Cir. 1980).

224. *E.g.*, Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973); see discussion of conditional discharge from custody in D. WILKES, *supra* note 134, § 8-34, at 190-91.

225. The Supreme Court first recognized the "conditional release" order in 1894. *In re* Bonner, 151 U.S. 242, 261-62 (1894). After *Bonner* the constitutionality of such orders has been affirmed repeatedly by the Court. *See, e.g.*, Hilton v. Braunskill, 481 U.S. 770, 775 (1987) (noting that "[i]n construing § 2243 and its predecessors [the federal habeas corpus statute], this Court has repeatedly stated that federal courts may delay the release of a successful petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court" (citations omitted)). By the 1940s or 1950s, the conditional release order had virtually replaced the unconditional release order as the preferred form of relief in all but a limited category of habeas corpus cases. *See* 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 8.5, at 108-12 (1988).

If a petitioner satisfies the *Barker* requirement that he show prejudice, this conventional choice of remedy is both inadequate and incoherent. Moreover, it is unclear whether a conditional discharge adequately redresses unconstitutional appellate delay, no matter how courts construe the violation.

1. The Formal Problem: The Use of the Conditional Order of Release

The deep reluctance of federal courts to interfere in state court criminal process permeates their consideration of appellate delay, particularly affecting habeas corpus actions.[226] Thus, once the district court finds a constitutional violation, the conditional order of release usually gives state courts thirty, sixty, or ninety days to hear the delayed appeal before the prisoner will be discharged.[227] In rare cases, federal courts have allowed

226. *See, e.g.*, Wheeler v. Kelly, 639 F. Supp. 1374, 1381 (E.D.N.Y. 1986) (noting that "[c]omity assumes that the state court will decide the case with dispatch and that the federal court should not intervene if an act of this Court will not accelerate disposition of the appeal"), *aff'd*, 811 F.2d 133 (2d Cir. 1987); Harris v. Kuhlman, 601 F. Supp. 987, 994 (E.D.N.Y. 1985) (reasoning that "[i]t would be inappropriate to foreclose the state appellate courts from deciding the case now that petitioner's counsel has filed a brief apparently raising the appropriate issues on appeal and the matter is sub judice in the state court"); Morales Roque v. Puerto Rico, 558 F.2d 606, 607 (1st Cir. 1976) (per curiam). In *Morales Roque*, the district court ordered that the prisoner be released on bail while awaiting a delayed appeal in a commonwealth court, despite the fact that the offense of which the prisoner had been convicted was nonbailable under Puerto Rican law. 558 F.2d at 607. The circuit court reversed the decision, holding that the lower court:

> should balance the Commonwealth's interest in not admitting a convicted defendant to bail against the petitioner's due process right to a reasonably prompt appeal, and weigh the actions of the Commonwealth and the defense which have contributed to the delay.
>
> In this case, we believe the district court should initially have limited itself to entering a conditional order giving the Commonwealth a period of time, for example six months, to provide petitioner with a transcript and take other designated steps assuring prompt disposition of his appeal, after which period of time, if adequate progress were still not observed, an order admitting defendant to bail would issue.

Id. (citation omitted).

227. In case of appellate delay, the length of time chosen by the court to permit the state to remedy the violation seems to reflect the federal court's assessment of the severity of the constitutional violation before it. *E.g.*, Brooks v. Jones, 875 F.2d 30, 30 (2d Cir. 1989). In *Brooks*, the Second Circuit overturned a district court finding that the habeas corpus petitioner had not exhausted his state remedies, and ordered that the prisoner be released if the state did not hear his appeal within 60 days from the date of the decision, refusing to stay its mandate the customary three weeks. Brooks was serving a total of 11 to 22 years for two state convictions on assault and weapons

state courts up to six months to hear an appeal, reasoning that the challenged delay was insufficiently severe to warrant a more speedy remedy.[228] The formal nature of the conditional order of release presents troubling issues that are worth considering before turning to the substantive problems presented by granting an appeal as a remedy for appellate delay.

The ostensible purpose of the conditional writ is to demonstrate deference to state institutions by allowing the state to remedy its own failings.[229] The filing of the habeas corpus petition itself, however, gives the state notice of a possible constitutional violation. At the same time that the state is responding to the petition, it could act to remedy the alleged constitutional violation.[230] In fact, the district court often expects the state to take remedial measures while the habeas corpus petition is pending.[231] It therefore is unclear why federal courts, after finding the delay already has reached constitutional magnitude, regularly give the states an additional few months to hear the appeal.[232] An advocate might argue that these grace periods merely extend the period of constitutional violation. As a detached observer, one can only say that the lengthy grace period illustrates the federal courts' fundamental ambivalence toward post-conviction relief directed at state court proceedings.

The federal briefing schedule on appeal or in habeas corpus

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charges. *Id.* at 30. His appeal was delayed some eight years, a delay that the court found "makes a mockery of the right to appeal and cannot be overlooked." *Id.* at 32.

228. *E.g.*, Hampton v. Kelly, No. 88 Civ. 0528, slip op. at 5-6 (E.D.N.Y. Nov. 29, 1988) (LEXIS 13999, Genfed library, Dist file), *appeal dismissed*, 876 F.2d 890 (2d Cir. 1989). This, of course, raises the question of whether a violation existed in the first place. To find a due process violation but then to order a remedy permitting the violation to continue for six months because the violation was not a very serious infringement of the appellant's rights is peculiar, to say the least.

229. *See, e.g.*, cases cited *supra* note 226.

230. *See, e.g.*, *Wheeler*, 639 F. Supp. at 1381 (noting that "[i]t is unquestioned that the mere filing of the petition accelerated the resolution of Wheeler's appeal"); *cf.* Guam v. Olsen, 462 F. Supp. 608, 610 (D. Guam App. Div. 1978) (noting "cause-and-effect" relationship between preparation of delayed transcript and filing of motion claiming appellate delay).

231. *See* Jacob v. Henderson, No. 86 Civ. 3450, slip op. at 6-7 (E.D.N.Y. Feb. 20, 1987) (LEXIS 14137, Genfed library, Dist file) and Thomas v. Harris, No. 86 Civ. 4214 slip op. at 6-7 (E.D.N.Y. Feb. 20, 1987) (LEXIS 14137, Genfed library, Dist file) (*Jacob* and *Thomas* are consolidated cases). In discussing the state's responsibility for the delay of the appeals Judge Korman remarked that "[t]hese include . . . the failure of the Appellate Division to take effective action on delays brought to its attention either by petitioners or by myself (in an informal effort to secure the filing of the briefs)." *Id.*

232. *See supra* note 222.

actions rarely is less than two months, and decisions seldom issue promptly on the filing of the state's brief. It is worth asking, then, why states do not "moot out" cases of appellate delay by expediting the state court briefing schedule after receiving the prisoner's habeas corpus petition.[233] It is indicative of the intractable nature of the problem of appellate delay that this is not the typical result. The failure of the states to redress cases of appellate delay militates in favor of more drastic remedies than merely setting a briefing schedule that allows the state an additional sixty days to hear an already delayed appeal.

Another peculiar issue raised by the conditional order of release is whether the court actually has found a constitutional violation or merely has found that a constitutional violation would exist at the end of the grace period if the state does not comply with the condition attached to the district court's order. If no constitutional violation exists when the district court issues its opinion, it would seem the court has issued an advisory opinion on facts not yet before it. On the other hand, if a constitutional violation does exist and the district court is merely giving state courts a reasonable amount of time to remedy that violation, it would seem any grace period merely compounds the existing constitutional violation.[234]

2. The Substantive Problem: The Choice of the Appeal as a Remedy for a Prejudicially Delayed Appeal

To prevail under the *Barker* standard as applied to appeals, the habeas corpus petitioner must show that delay has prejudiced his appeal. After requiring the petitioner to demonstrate that the delay rendered his appeal constitutionally infirm, it is ironic that the courts respond with an order that the prisoner receive that very appeal, with the prejudice and irony compounded by a further delay. The federal courts' preference for granting the appeal as a remedy reflects several concerns. The first, born of comity, is a desire to permit the state to clean

233. Simmons v. Reynolds, 708 F. Supp. 505, 510-11 (E.D.N.Y. 1989) (although holding that a six year delay in hearing appeal violated due process, the district court was unable to grant relief because the state court heard the appeal and affirmed the conviction during pendency of petition. The court suggested that the prisoner could bring a civil rights action for damages).

234. *See* LaFrance v. Bollinger, 487 F.2d 506, 507 (1st Cir. 1973) (holding that when petitioner served most of his sentence at the time of his successful challenge to delayed appeal, immediate release was appropriate); United States *ex rel.* McMullen v. Meyers, 257 F. Supp. 812, 814 n.5 (E.D. Pa. 1966) (same).

its own house.[235] The second is a desire for a more limited remedy than discharge, the fundamental remedy in habeas corpus. The aim of the federal courts is simply "to counteract any resulting prejudice demonstrated by a petitioner."[236] According to conventional wisdom, because the prejudice arises from the denial of the appeal, the appeal should be granted. Anything more would be a windfall.

The logic of this position rests on an ambiguity in the federal courts' application of *Barker* to appellate delay. If the prejudice inheres simply in the delay of the appeal, ordering the state to discharge the prisoner unless the appeal is heard within a reasonable time may well be the appropriate remedy. If the delay alone is insufficient to demonstrate prejudice, however, and almost all courts hold that it is, granting the prisoner an appeal is inadequate to counteract the prejudice.

Consider this rather extreme case: Appellate counsel discovers that the court clerk's office has no record of a notice of appeal. The state appellate court almost certainly will find that the defendant has waived his right to appeal and he therefore will be unable to present his claims, however meritorious, to the state court. The defendant is certain that trial counsel properly filed the notice of appeal. The delay is so long, however, that trial counsel no longer has an independent recollection of filing the notice of appeal and no longer retains records of the case. All counsel can aver is that it is his practice to file a notice of appeal after every sentencing. As likely as not, the clerk's office misfiled the notice of appeal, but because of the delay the defendant has no way to prove this. Obviously a conditional order of release is inadequate in this case. Even if the state hears the defendant's appeal, the delay precludes the defendant from presenting his case to the court in the same way as without the delay.[237]

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235. *See supra* note 226 (listing cases).

236. Burkett v. Cunningham, 826 F.2d 1208, 1222 (3d Cir. 1987).

237. The difficulties are equally patent in cases in which the petitioner has shown that delay will adversely affect his retrial. To show that delay impaired his ability to present his case on retrial, the petitioner must demonstrate that he is likely to succeed on appeal. All the missing witnesses and faulty memories in the world are not prejudicial if they will never be called on in a retrial. Having found both that the petitioner's appeal is likely to be successful and that a retrial would be distorted by the delay, however, it is perverse for a court to presume that granting the petitioner his appeal will dispel the prejudice.

It may be argued that not all successful appeals result in retrials; some may result in resentencing or other limited outcomes. It also can be claimed

Ordering a relatively prompt appeal after prejudicial delay cannot put the prisoner in as favorable a position as if the appeal had been heard promptly. The petitioner only receives what he was constitutionally entitled to receive from the outset, a direct appeal of his conviction. Nothing in the remedy compensates the petitioner for the prejudicial effects of the delay.[238] If the remedy is designed to counteract the prejudicial violation, a sort of constitutional zero-sum game, merely ordering the state to hear the appeal leaves prisoner's position substantially below the zero starting point.[239]

The inadequacy of conditional orders of release to remedy violations of the right to a speedy appeal is even more obvious when the jurisdiction suffers from a pattern of appellate delay.[240] The possibility that a particular petitioner will be released if his appeal is not heard within a few months after he wins a federal case does not provide a meaningful incentive for

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that the prosecution is unlikely to retry a defendant whose appeal has been so long delayed. Although this may be true, once the district court has required the prisoner to demonstrate that his appeal is prejudiced by the impairment of his ability to present his defense on retrial as a threshold to obtaining a remedy, it is logically inconsistent to disregard that finding for purposes of granting the remedy.

238. Even in the speedy trial context, the trial is a remedy only before the delays become prejudicial. Once the petitioner proves prejudice and demonstrates a subsequent constitutional violation, dismissal is the only remedy. Strunk v. United States, 412 U.S. 434, 440 (1973).

239. The successful appellant has been improperly incarcerated during the length of the delay. Even if a court merely modifies a sentence or reduces a count from a felony to a misdemeanor, a prisoner still is prejudiced by the incarceration pursuant to such a conviction during the time in which the appeal has been improperly delayed. For example, the overall length of the prisoner's sentence may affect his eligibility for parole and the prison to which he is assigned. Similarly, the severity of the crime may have affected the sentencing judge in his initial imposition of sentence, and also may have an impact on the privileges the prisoner may receive while incarcerated. In the federal system, a sentence with several counts running concurrently or consecutively is viewed as a "package." When one element of the package is modified, the entire sentence is vacated and is remanded for resentencing. *E.g.*, McClain v. United States, 643 F.2d 911, 913 (2d Cir.), *cert. denied*, 452 U.S. 919 (1981). This is not always the case in state courts. *See, e.g.*, People v. Jones, 111 A.D.2d 264, 267, 489 N.Y.S.2d 536, 537 (1985) (following New York practice permitting court to modify judgment and vacate sentence for two counts of a three count conviction, without vacating entire sentence or resentencing defendant).

240. Although showing a pattern of delay is neither a necessary nor a sufficient condition for demonstrating a constitutional violation in any individual case, courts should entertain different considerations when a petitioner demonstrates that his case is part of an ongoing pattern of constitutional violations. In this situation, it is not enough simply to address the individual violation; the court must consider the systemic effects of its decision.

states to remedy systemic problems of appellate delay. State courts and justice departments turn their attention to appeals that face a deadline imposed by a conditional order of release, and hear the appeals in time to keep the prisoners incarcerated.[241] Thus, the state faces no penalty for appellate delay from a conditional order of release. As numerous federal courts have learned with dismay, the real measure of the right to a speedy appeal is the length of time it takes for the federal courts to issue a conditional order of release, plus the grace period granted in the conditional order.[242] Because the conditional order of release does not require the state to do anything beyond what it otherwise would have done, the remedy does not induce the state to correct the deficiencies causing appellate delay.

The Third Circuit recognized the weaknesses of the conditional order in *Burkett v. Cunningham*,[243] identifying three situations in which any remedy short of discharge might be inadequate: (1) "where attempting an alternate remedy would not vitiate the prejudice of the fundamental unfairness or would itself violate a petitioner's constitutional rights," (2) in "exceptionally egregious circumstances" in which the delay violated the "'fundamental conceptions of justice which lie at the base of our civil and political institutions,'" and (3) "where lesser remedies prove ineffective in curbing a continuing due process violation."[244] This last exception apparently refers to situations in which the state courts have failed to meet the terms of a lesser remedy than discharge.[245]

Arguably, the *Barker v. Wingo* standard causes every unconstitutionally delayed appeal to fall within the exceptions de-

241. *Cf.* Rivera v. Concepcion, 469 F.2d 17, 20 (1st Cir. 1972) (holding that delay of two years in preparation of trial transcript is not "overcome by a present exercise of diligence and treated as if it had not occurred. Any such rule would mean that a defendant may be freely given improper consideration until the system, or the parties at fault, are caught out").

242. *See, e.g.*, Brooks v. Jones, 875 F.2d 30, 32 (2d Cir. 1989) (emphasizing that "[t]he federal courts should not be the place where incarcerated defendants must go in order to call attention to the neglect they face and the denial of their right to have their appeals heard before they have spent a substantial amount of time in jail. We hope that the time will not come when the situation must be dealt with by prompt action in federal district court whenever it is clear that state prisoners' requests are being ignored.").

243. 826 F.2d 1208 (3d Cir. 1987).

244. *Id.* at 1222 (citing, inter alia, United States v. Lovasco, 431 U.S. 783, 790 (1977)).

245. *Id.*

lineated by the Third Circuit in *Burkett*.[246] This result is perhaps the clearest indication of the lack of fit between right and remedy in the speedy appeal context. If appellate delay is serious enough to merit a remedy under *Barker*, the appeal is an inadequate remedy because it cannot vitiate the prejudice. Conversely, courts outraged at long appellate delays are tempted to pay lip service to the *Barker* standard, presume prejudice, and order conditional release. In either event, only outrageous cases of delay receive a remedy and in neither event does the court recognize that it is the delay itself that merits a remedy.

B. THE INEFFECTIVENESS OF RELIEF UNDER 42 U.S.C. SECTION 1983

Indicating some uneasiness with the results of habeas corpus actions, federal courts have suggested that prisoners may seek damages to compensate them for the suffering caused by state appellate delay.[247] The chief vehicle for such damages is a suit under 42 U.S.C. section 1983.[248] Indeed, section 1983 is the major alternative to habeas corpus for defendants complaining of state appellate delay. A defendant suing under section 1983 may demand either monetary or injunctive relief. Under current law, however, a defendant is apt to receive neither.

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246. For example, the *Burkett* court recognized that "[o]nce the time that constitutes the delay has elapsed no remedy can call it back. Where delay is so extreme as to assume constitutional proportions, discharge thus becomes less of an unlikely remedy." *Id.* It seems, then, that once delay is long enough to trigger a serious inquiry into whether a due process violation has occurred, under the *Burkett* calculus, the presumption shifts away from simply ordering that an appeal be granted.

247. *E.g.*, Doescher v. Estelle, 477 F. Supp. 932, 934 n.2 (N.D. Tex. 1979), *aff'd in part and vacated in part*, 616 F.2d 205 (5th Cir. 1980).

248. Section 1983 provides in pertinent part:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982). States and their subdivisions, however, are not "persons" within the meaning of § 1983 and accordingly may not be sued under that statute. Kenosha v. Bruno, 412 U.S. 507, 513 (1973). Thus, a suit naming only a state probation department for delaying a pre-sentence report would be barred. *See* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2308-12 (1989) (holding that neither states nor state officials acting in their official capacities are "persons" under § 1983).

The *Barker* standard notwithstanding, unless an appellant demonstrates significant prejudice, he is entitled only to nominal damages in a civil rights action.[249] Such prejudice is, at the very least, difficult to show in cases of appellate delay. On the other hand, even if a prisoner demonstrates prejudice to the court's satisfaction, he still faces significant barriers to monetary relief. The eleventh amendment bars compensatory damages out of state treasuries in such cases, despite permitting some forms of prospective relief to compel state compliance with federal law.[250] Even in suits against municipalities and other government entities, plaintiffs encounter major barriers to relief. First, section 1983 does not override traditional common law immunities such as sovereign immunity or judicial immunity.[251] Second, although plaintiffs may sue municipal

249. *See* Carey v. Piphus, 435 U.S. 247, 266-67 (1978). *Carey* recognizes that traditional tort concepts apply to the calculation of damages under § 1983. *Id.* at 257-58. Accordingly, a plaintiff who cannot prove that he has been prejudiced by a violation of his rights is not entitled to monetary relief under § 1983, even on a theory of exemplary damages. *Id.* at 262-64. The Court, however, did recognize that a plaintiff who was denied due process but was not prejudiced by the denial might be entitled to nominal damages. *Id.* at 266-67.

250. *Ex Parte* Young, 209 U.S. 123, 159-60 (1908). The eleventh amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The eleventh amendment does not forbid suit in federal court by a citizen against a self-governing political subdivision of a state, such as a city or a county. State immunity under the eleventh amendment also does not preclude a federal court from taking jurisdiction over an action against a state officer to enjoin him from enforcing an unconstitutional state statute, even though the court's decree will impose a burden on the state's treasury. Milliken v. Bradley, 433 U.S. 267, 288-90 (1977). In such actions, the officer is regarded as having acted without the lawful authority of the state, because the state has no power to violate the federal Constitution. The action thus is not one against the state but against the officer in an individual capacity. *Ex Parte* Young, 209 U.S. at 159-60.

The eleventh amendment also does not bar federal court actions to recover damages against state officials for past wrongs when the judgment is against the state officer personally. Edelman v. Jordan, 415 U.S. 651, 666-69 (1974) (limiting relief available under *Ex Parte* Young to remedies without significant direct financial impact on the state). In such actions, however, an executive officer may claim immunity from personal liability if he acted in good faith and under the reasonable belief that the actions taken were justified. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). Judges, prosecutors, and legislators enjoy an absolute common law immunity from personal liability for their official actions. Imbler v. Pachtman, 424 U.S. 409, 417, 422, 423 n.20 (1976).

251. The Supreme Court has been concerned that the threat of monetary liability in § 1983 actions for damages would deter public officials from the execution of their official duties. Accordingly, the Court has held that prosecu-

entities under section 1983, they may receive relief only if they demonstrate that the conduct complained of "implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated" by government officers.[252] Moreover, the plaintiff must demonstrate that the official policy or regulation exhibits "deliberate indifference" to the rights of citizens, and is very closely linked to the constitutional violation.[253]

This patchwork of rules and immunities virtually excludes any award of monetary relief for appellate delay under section 1983. For example, in *Rheuark v. Shaw*, the three Texas prisoners sued under section 1983 for both injunctive and monetary relief, claiming damages against the court reporters, the supervising judge, the county in which the court was situated, and various officials charged with allocating money to pay the court reporters. The Fifth Circuit held that the judge enjoyed absolute judicial immunity and that the court reporter enjoyed qualified immunity as long as he acted in good faith and within the scope of his official duties.[254] Because the local court had authority to appoint additional court reporters even if the appointments caused budget overruns, the Fifth Circuit also reasoned that the county and its officials were not the proximate cause of the delay. Without proximate cause, the county defendants were relieved of liability, and the blame for the delays was fixed wholly on the judicially immune supervising judge.[255]

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tors are absolutely immune from liability for damages under § 1983, *Imbler*, 424 U.S. at 431, and that executive officials have a qualified immunity, *Scheuer*, 416 U.S. at 247-48 (holding that immunity is based on good faith coupled with reasonable grounds to believe the action was legal). The scope of that qualified immunity was defined further in Wood v. Strickland, 420 U.S. 308, 317-22 (1975), in which the liability of state executive officers for violations of § 1983 was limited to acts that were known, or should have been known to be unconstitutional, or that were maliciously intended to cause injury. The Supreme Court recently has reaffirmed its commitment to the application of common law immunities to actions framed under § 1983. *See, e.g.*, *Will*, 109 S. Ct. at 2309 (citing, inter alia, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)); Malley v. Briggs, 475 U.S. 335, 339-40 (1986) (stating that "[o]ur initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts").

252. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978).

253. City of Canton v. Harris, 109 S. Ct. 1197, 1204 (1989).

254. Rheuark v. Shaw, 628 F.2d 297, 304-05 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981). The district court found that the officials enjoyed legislative immunity, a ground that the circuit court opinion did not discuss. Rheuark v. Shaw, 477 F. Supp. 897, 921-22 (N.D. Tex. 1979), *aff'd in part and vacated in part*, 616 F.2d 205 (5th Cir. 1980).

255. *Rheuark*, 628 F.2d at 305-07 (citing *Monell*, 436 U.S. at 691).

In the end, there was no one left for the plaintiffs to sue.[256]

Injunctive relief under section 1983 is even less likely than monetary relief in cases alleging state appellate delay.[257] An extensive body of Supreme Court doctrine counsels against injunctive intervention in state court criminal proceedings.[258] The Supreme Court has advised repeatedly that "principles of equity, comity, and federalism . . . must restrain a federal court when asked to enjoin a state court proceeding."[259] In particular, the Court has warned against any injunction that would require "continuous supervision by the federal court" over a state criminal justice system.[260] Even periodic reporting by state courts to federal courts would be "antipathetic to established principles of comity."[261] Faced with this precedent, it is unlikely that a federal court would enter an injunction against the state courts in order to remedy systemic problems of appellate delay.[262]

Framing the lawsuit as a class action does not alleviate these problems. Although a class action has the virtue of addressing systemic problems on a systemic basis, courts seem relatively inhospitable to class certification motions involving underlying claims of appellate delay. For example, in a recent

256. The Fifth Circuit partially overturned the district court opinion that found the county liable for damages and awarded two of the prisoners a nominal award of one dollar each. The third prisoner, whose conviction was overturned on appeal and who was able to show that he had been improperly incarcerated for three months, was awarded $3000. The district court required that each prisoner show prejudice in order to be entitled to an award of compensatory damages. In a somewhat baffling move, however, the court also followed conventional harmless error analysis, and required defendants to show lack of prejudice as well, by showing that 1) plaintiff's conviction was affirmed on appeal, or 2) that on retrial plaintiff was convicted again. *Rheuark*, 477 F. Supp. at 917.

257. Injunctive relief is limited in that any action challenging the custody of an individual defendant must be brought as an action for habeas corpus. O'Shea v. Littleton, 414 U.S. 488, 496 (1974) (citing Preiser v. Rodriguez, 411 U.S. 475 (1973)).

258. *E.g.*, Younger v. Harris, 401 U.S. 37, 42, 53 (1971) (counseling both restraint with interference with state court criminal actions and careful scrutiny of plaintiffs' standing in cases requesting injunctive relief that would affect state criminal proceedings).

259. Mitchum v. Foster, 407 U.S. 225, 243 (1972).

260. *O'Shea*, 414 U.S. at 501.

261. *Id.* at 501 (citing Greenwood v. Peacock, 384 U.S. 808 (1966)). In fact, *O'Shea* alleges racial bias, arguably an even more compelling constitutional violation than that of a delayed appeal. *Id.* at 490-93.

262. Section 1983 falls within the expressly authorized exceptions to the absolute bar against federal court injunctions directed at state court proceedings provided by 28 U.S.C. § 2283 (1982).

section 1983 case arising in New York, an indigent prisoner sought class certification for equal protection and due process claims arising from the state courts' failure to supervise assigned counsel and from the delay in providing transcripts to indigent criminal appellants.[263] The putative plaintiff class consisted of all presently incarcerated state criminal appellants represented by appointed counsel on whose behalf briefs had not been submitted within one year of the filing of a notice of appeal, or whose appeals had not been decided within two years of the notice of appeal. The district court found that the factual differences underlying each claim of delay precluded class certification and that, in any event, *Barker* demanded a case-by-case determination of whether appellate delay violated the Constitution.[264] Indeed, the district court flatly rejected the claim that the appellate delay itself prejudiced the plaintiff class, explaining that an individualized showing of prejudice was the "essence" of the *Barker* standard.[265]

Even if a criminal appellant were to prove a constitutional violation, section 1983 does not provide a realistic remedy for state appellate delay. If he seeks monetary damages, the eleventh amendment and immunity doctrines, as well as the requirement that he prove substantial prejudice, render relief unlikely. If he seeks an injunction ordering his release from custody, he will be told that such relief is unavailable under section 1983, and that challenges to individual custody must be brought as petitions for habeas corpus.[266] If he seeks any other

263. Mathis v. Bess, 692 F. Supp. 248, 254 (S.D.N.Y. 1988).

264. *Id.* at 255-56. The court contended that:

> *Barker* expressly provides that an analysis of whether any given delay rises to the level of a constitutional violation is to be done on a case-by-case basis. Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974) (*Barker* expressly rejects the notion that the right to a speedy trial can be quantified into a specific time period). *Barker* specifically anticipates that a 'delay' may constitute a constitutional violation in one case but not in another. Thus, under *Barker* questions of fact or law as to appellate delays remain individual considerations. *Wallace*, 499 F.2d at 1350 (2d Cir. 1974) (absent a specific showing of prejudice to the defense, a relatively long period of delay may not be transformed into a constitutional violation).

Id. at 256.

265. *Mathis*, 692 F. Supp. at 256. The district court properly, if shortsightedly, applied conventional analysis. The result, however, underlines the weakness of the *Barker* standard as a judicial tool for dealing with claims of appellate delay.

266. There also are significant problems of standing. For example, one prisoner, frustrated by a delay of nearly two years, sued his assigned counsel under § 1983 requesting, inter alia, certain documents. In part because the

form of injunctive relief, he will learn that comity bars virtually any federal oversight of or interference in state criminal processes. Although a plaintiff may prevail under section 1983, he will have precious little to show for his victory.[267]

IV. AN EFFECTIVE RIGHT TO A SPEEDY APPEAL

Once a state grants a defendant a direct appeal-as-of-right, due process dictates that the appeal meet certain standards, including that the defendant's appeal be heard with reasonable speed. Current doctrine defining this right to a speedy appeal, however, is in a remarkably immature state. The prevalence of the *Barker* standard is as much a result as a cause of this difficulty. The interaction of available remedies with the *Barker* standard has created a perverse situation: the standard for demonstrating a violation of the right to a speedy appeal is impossibly high, and once a violation is proven, courts lack an effective remedy. The federal courts' relentless focus on whether the defendant has suffered prejudice from appellate delay is inappropriate as a matter of logic and constitutional doctrine. Moreover, this focus diverts the courts from the more critical issue of fashioning meaningful remedies for delayed appeals.[268]

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prisoner received the record, the suit was dismissed. The delay then continued for six more years. Brooks v. Jones, 875 F.2d 30, 31 (2d Cir. 1989). *But see* Delancy v. Caldwell, 741 F.2d 1246, 1248 (10th Cir. 1984) (per curiam) (holding that receipt of delayed transcript did not moot claim; prisoner entitled to pursue claim for damages).

267. Some courts suggest that court reporters and attorneys who are found to be responsible for appellate delays ought to be referred to professional discipline. *See, e.g.*, Rogers v. Kroger Co., 669 F.2d 317, 322 n.6 (5th Cir. 1982) (indicating that attorney discipline would be "the most just initial sanction where the attorney is primarily to blame in the delay"). These proceedings should be in addition to, and not a substitute for, remedies directly addressing the constitutional violation. A defendant whose attorney has given ineffective assistance is not told to accept a grievance hearing before the local bar or a malpractice suit as a substitute for a hearing on the merits of his constitutional claim on either direct appeal or habeas corpus. *E.g.*, Smith v. Murray, 477 U.S. 527, 537 (1986). The same principles should apply to violations of the right to a speedy appeal.

268. For an example of the inadequacy of current remedies, see, e.g., Claytor v. Hoke, No. 87 Civ. 2918, slip op. at 10 (E.D.N.Y. Dec. 7, 1987) (LEXIS 12385, Genfed library, Dist file), in which a prisoner served eight years, more than half his minimum sentence, while waiting for his appeal to be heard. During this period, a co-defendant's conviction was overturned, yet the defendant's only relief was a conditional order of release if his appeal were not decided in three months. *Id.*

A. A Revised Standard for Evaluating Appellate Delay

The starting point for any effort to rationalize the jurisprudence of appellate delay must be the development of a more workable standard for measuring unconstitutional delay. In this regard, the Supreme Court's decision in *Barker* can be instructive. The *Barker* Court cautioned against attempting to develop an unduly rigid standard in an area in which the interests of speed and fair treatment are not always in harmony.[269] Noting that a right involving speed of process has an "amorphous quality," the Court stated that such rights require "a functional analysis . . . in the particular context of [each] case."[270] Thus, the Court explained that the essential task in developing such a standard was to identify factors that courts should weigh to determine whether a constitutional violation had occurred, while balancing the interests that the right seeks to protect.[271]

The chief interests promoted by the right to a speedy appeal are finality, legitimacy of judgments, and the prevention of unjust incarceration.[272] These factors are preferable to those enunciated in *Barker*[273] because they reflect the purpose of appellate review. The *Rheuark*[274] adaptation of *Barker* simply transfers legitimate pretrial concerns, prevention of excessive pretrial incarceration, minimization of the accused's anxiety, and limitation of the potential for impairment of the accused's defense,[275] into a post-conviction setting in which these concerns lose much of their force and create significant anomalies. Focusing on factors going to the purpose of appellate review, rather than on some of its ancillary effects, avoids these difficulties. Moreover, the interests of finality, legitimacy, and prevention of unjust incarceration are interests shared by defendant and society alike. This last point is particularly sig-

269. Barker v. Wingo, 407 U.S. 514, 521 (1972) (reasoning that "[i]t is . . . impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.").

270. *Id.* at 522.

271. *Id.* at 530.

272. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 710-11 (1984) (Marshall, J., dissenting); Peyton v. Rowe, 391 U.S. 54, 63 (1968) (discussing federal habeas corpus); Resnik, *supra* note 5, at 609-13.

273. *Barker*, 407 U.S. at 530-32.

274. Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

275. *Id.* (citing *Barker*, 407 U.S. at 532).

nificant in selecting the factors to be weighed in finding a violation of the speedy appeal right.

Close examination of decisions applying the right to a speedy trial reveals only two elements that clearly are relevant to finding a constitutional violation. The first and foremost factor is the length of the delay, which acts as a "triggering mechanism" for further constitutional inquiry.[276] The second is the circumstances leading to the delay.[277] This latter element includes an examination of the complexity of the case, the appellate issues present, and the responsibility of the various parties for causing the delay.[278] As to the last consideration, courts generally consider pertinent the conduct of the prosecution, court personnel, court reporters, and appointed counsel, as well as the state court's activity in monitoring its own calendar.[279] Although courts have dwelled on the defendant's own conduct, as opposed to that of his counsel, this concern largely is an artifact of the "demand" element of *Barker*.[280] Courts may give some weight to the defendant's own efforts to speed the appeal, particularly when he has appointed counsel, but courts should not view the defendant's conduct as a separate and necessary factor as they do under the present *Barker* dictated analysis.[281]

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276. *Barker*, 407 U.S. at 530.

277. This two factor model is best seen in decisions such as Wheeler v. Kelly, 639 F. Supp. 1374, 1378-81 (E.D.N.Y. 1986), which applied the *Barker* standard but proposed that the delay element be viewed as a function of the "complexity of the litigation, the advocacy of the parties, and the institutional vigilance of the Court." *Id.* at 1378. At the same time, the *Wheeler* court engaged in a detailed but strained effort to find prejudice from the delay. *Id.* at 1381; *see also* Doescher v. Estelle, 477 F. Supp. 932, 933-34 (N.D. Tex. 1979) (*Doescher II*) (discussing the *Barker* standard), *aff'd in part and vacated in part*, 616 F.2d 205 (5th Cir. 1980). *But see* Gimenez v. Leonardo, 702 F. Supp. 43, 45-46 (E.D.N.Y. 1988) (focusing on length of delay first, court found that three year delay does not trigger further inquiry and denied relief).

278. *See, e.g.*, Wheeler, 639 F. Supp. at 1378.

279. *See, e.g.*, Claytor v. Hoke, No. 87 Civ. 2918, slip op. at 6 (E.D.N.Y. Dec. 7, 1987) (LEXIS 12385, Genfed library, Dist file) (discussing ineffective state calendar control); Harris v. Kuhlman, 601 F. Supp. 987, 992-93 (E.D.N.Y. 1985) (discussing failure of appointed counsel and failure of state courts to exercise proper calendar control); Guam v. Olsen, 462 F. Supp. 608, 609-10 (D. Guam App. Div. 1978) (releasing defendant due to court reporter's failure to provide transcript); Odsen v. Moore, 445 F.2d 806, 807 (1st Cir. 1971) (per curiam) (ordering district court to hold hearing regarding petitioner's allegations that court clerk ignored his protests regarding inaction of appointed counsel).

280. See discussion in *Wheeler*, 639 F. Supp. at 1378-81, and *Harris*, 601 F. Supp. at 992-93.

281. *See Claytor*, No. 87 Civ. 2918, slip op. at 3 (calling a situation "Kafkaesque" in which appellant was unable to obtain assistance in expediting his appeal from either appointed counsel or the court's oversight mechanism).

In effect, the appropriate test for unconstitutional appellate delay is whether the delay is reasonable under the circumstances of the case, weighing all the relevant factors.

Because appellate delay does not implicate many of the considerations relevant to evaluating pretrial delay, some of the *Barker* factors are irrelevant at the appellate stage. In particular, *Barker*'s emphasis on the defendant's "demand" for a speedier trial and on a showing of prejudice were designed to sift constitutionally impermissible pretrial delay from delay that was courted by the defendant or favored a defense verdict.[282] Requiring the defendant to show prejudice does not advance the interests of finality and legitimacy and creates unworkable distinctions when applied to post-trial incarceration. Indeed, elimination of the prejudice factor will do much to clarify and effectuate the right to a speedy appeal. By emphasizing prejudice in a way not even envisioned by the *Barker* decision, courts have created an ineffective standard for appellate delay, under which appellants can prove prejudice only in the most freakish case. Eliminating prejudice as an element of unconstitutional appellate delay permits the federal courts to take seriously the right to a speedy appeal without engaging in strained analysis.

B. THE SLIDING SCALE OF REMEDIES

One of the greatest difficulties in sixth amendment speedy trial doctrine is that the sole remedy for a violation of the right is dismissal.[283] Because the remedy is so drastic, constitutional speedy trial violations rarely were found in any but the most egregious case. To avoid this problem, courts applying *Barker* to state appellate delays recognized that due process, even in the context of habeas corpus actions, required a remedy tailored to counteract the harm proven by the defendant. Courts therefore selected the remedy that superficially appeared to counteract the lack of an appeal: they made sure that the defendant received his appeal. Unfortunately, this remedy did not redress the prejudice arising from the delay or the more specific prejudice required under *Barker*. Thus, the courts saved the right to a speedy appeal by sacrificing both the efficacy of the remedy and the consistency of the standard.

Both constitutional speedy trial and speedy appeals cases

282. *Barker*, 407 U.S. at 521.
283. *Id.* at 552; Amsterdam, *supra* note 3, at 534, 539, 543.

share the same troubling deficiency.[284] Once the constitutional line is crossed, courts treat all violations as being of equal moment, and thus deserving of the same remedy, distorting the relationship of right and remedy. Instead, in assessing speedy appeals questions, courts should weigh the severity of the violation and craft a remedy suited to its extent and nature.[285] To do this, the federal courts must make full use of their flexible powers under the habeas corpus statute and create a sliding scale of remedies.

Federal court power under the habeas corpus statutes is far more flexible and, hence, more conducive to a sliding scale of relief than is commonly recognized by the judiciary. Section 2243 of the Judicial Code requires the federal courts to "dispose of [habeas corpus petitions] . . . as law and justice require."[286] The Supreme Court early recognized that this language conferred judicial authority of the "most comprehensive character," which is "impossible to widen."[287] Until the late 1960s, federal courts held the view that the requirement that a petition for habeas corpus be entertained only on behalf of an individual in custody[288] limited their consideration to questions that, if determined in the prisoner's favor, would lead to release from custody.[289] In 1968, however, the Supreme Court over-

284. Amsterdam, *supra* note 3, at 534-37 (discussing this problem in the context of speedy trial jurisprudence).

285. Courts already make judgments regarding the differing severity of the speedy appeal violations when framing conditional orders of release. After finding a constitutional violation, the courts proportion the length of time given the states in which to hear the prisoner's appeal according to what they perceive to be the severity of that violation. *See supra* note 227.

286. 28 U.S.C. § 2243 (1982).

287. *Ex parte* McCardle, 73 U.S. 318, 325-26 (1867). Historically, federal courts confined the relief available in habeas corpus proceedings to unconditional discharge from custody. If the legal error shown by the petitioner did not render his custody at that moment illegal, no remedy was available; if the error did render his custody illegal, the courts assumed that they lacked the ability to order a retrial and had no choice but to order the prisoner released unconditionally.

This rigid position began to erode by the end of the nineteenth century. For example, in *In re* Bonner, 151 U.S. 242, 261 (1894), the Court recognized conditional orders delaying the release of successful habeas petitioners in order to give the state the time to remedy the constitutional violation. In so doing, the Court found that the habeas corpus statute vested federal courts "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*." *Id.* at 261.

288. 28 U.S.C. § 2241 (1982) (defining writ as extending only to prisoners in custody).

289. *See, e.g.*, McNally v. Hill, 293 U.S. 131, 136-37 (1934), *overruled by*, Peyton v. Rowe, 391 U.S. 54 (1968).

ruled this line of authority in a pair of cases that stressed the flexible nature of the habeas remedy and the fact that the habeas statute, both historically and as revised in 1966, contemplated a range of relief other than physical discharge from custody.[290]

These decisions stress that federal courts possess broad equitable jurisdiction when entertaining a habeas corpus petition. As part of that jurisdiction, federal courts may fashion whatever remedy affecting the terms of custody is necessary to remedy the constitutional violation.[291] Following this broad mandate, courts have entered orders modifying the terms, length, or conditions of confinement.[292] In addition, courts have entered declaratory judgments, injunctions affecting procedures for awarding good time credits or parole,[293] orders requiring specific performance of a plea bargain,[294] withdrawal of a guilty plea,[295] and expunging of criminal records.[296] Indeed, in one recent case,[297] the Supreme Court suggested, albeit in dicta, that federal courts have the power directly to alter state

290. In *Peyton v. Rowe*, the Court held that a prisoner serving consecutive sentences could challenge the second while still serving the first. 391 U.S. at 67. In the *Peyton* opinion, the Court reminded the judiciary that "the [habeas] statute does not deny the federal courts power to fashion appropriate relief other than immediate release." *Id.* at 66. Similarly, in Carafas v. LaVallee, 391 U.S. 234 (1968) (overruling Parker v. Ellis, 362 U.S. 574 (1960)), the Supreme Court found that the collateral consequences of a conviction were sufficient to justify continuing federal jurisdiction over a petition for habeas corpus even after the petitioner had served his sentence in full. *Id.* at 237-40. The Court explained that the habeas statute does not limit the relief that may be granted to discharge of the applicant from physical custody, remarking that the "1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody" because the new § 2244(b) speaks in terms of " 'release from custody or other remedy.' " *Id.* at 239 (citing amended statute).

291. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

292. *See generally* 1 J. LIEBMAN, *supra* note 225, § 8.5, at 113-14 (citing examples); D. WILKES, *supra* note 134, § 5-8, at 85-86 (same).

293. *See, e.g.*, Dennis v. Solem, 690 F.2d 145, 146-47 (8th Cir. 1982) (per curiam) (permitting state parole board to remedy its noncompliance with sentencing procedures); Welsh v. Mizell, 668 F.2d 328, 329 (7th Cir. 1982) (remanding to prison review board for a determination of parole application); Horton v. Irving, 553 F. Supp. 213, 219 (N.D. Ill. 1982) (remanding to prisoner review board for new parole hearing in compliance with due process requirements).

294. *See, e.g.*, Bercheny v. Johnson, 633 F.2d 473, 477 (6th Cir. 1980) (per curiam) (remanding for prisoner resentencing following plea bargained psychiatric examination).

295. *See, e.g.*, Grant v. Wisconsin, 450 F. Supp. 575, 579 (E.D. Wis. 1978).

296. Woodall v. Pettibone, 465 F.2d 49, 53 (4th Cir. 1972).

297. Wood v. Georgia, 450 U.S. 261, 274 n.21 (1980).

court judgments rather than relying on injunctions or conditional orders of release to effect the desired relief.

Given this background, federal courts should face few difficulties in creating a sliding scale of relief for speedy appeal violations. For example, if a petitioner demonstrates constitutionally impermissible delay but can neither show prejudice nor egregiously long delay, the court may simply, as now, order that the petitioner be released if the state does not hear the appeal within a brief period. Although this remedy entails all the difficulties of the conditional writ discussed earlier[298] and creates no particular incentive for the states to remedy systemic problems of delay, it may be an adequate remedy in the least severe cases of appellate delay.

If the jurisdiction has a pattern of appellate delay or if the constitutional violation is more severe, however, the courts should release the defendant on bail pending resolution of his appeal.[299] This approach has several virtues. First, it eliminates any prejudice accruing to the defendant from incarceration during the grace period that accompanies a conditional

298. *See supra* Part III. A. 1.

299. If the federal court orders the state to release a habeas corpus petitioner unless the state retries him within a specific period of time, the district court may admit the petitioner to bail pending the retrial. United States *ex rel.* Thomas v. New Jersey, 472 F.2d 735, 743 (3d Cir.) (dicta) (reasoning that release on bail is proper when the district court order of release is conditioned on a new trial but the "district court concludes that enlargement is proper"), *cert. denied*, 414 U.S. 878 (1973). The district court's power to admit a state habeas petitioner to bail "derives from the power to issue the writ itself." Marino v. Vasquez, 812 F.2d 499, 507 (9th Cir. 1987) (citations omitted); *cf.* FED. R. APP. P. 23(b) & (c) (concerning bail pending habeas corpus appeals).

Because the state exhaustion requirement entails a thorough review of a prisoner's claims prior to bringing a federal habeas corpus action, most petitioners are considered unlikely to prevail on retrial and therefore present a poor risk for bail. *See, e.g.*, Hilton v. Braunskill, 481 U.S. 770, 772-79 (1987). Federal habeas courts rarely use the power to grant bail, *e.g.*, Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985) (arguing that federal courts must use this power sparingly), despite authority to the effect that the petitioner, being in possession of a final order that his custody violates federal law, reverts to a position very much like a pretrial detainee. 2 J. LIEBMAN, *supra* note 225, § 31.4, at 496. A recent district court case has, in fact, shown the courts willing to be somewhat more adventuresome in using their unquestioned power to admit petitioners to bail in the speedy appeal context. In the consolidated petitions of Jacob v. Henderson, No. 86 Civ. 3450, slip op. at 1 (E.D.N.Y. Feb. 20, 1989) (LEXIS 14137, Genfed library, Dist file), and Thomas v. Harris, No. 86 Civ. 4214, slip op. at 2 (E.D.N.Y. Feb. 20, 1987) (LEXIS 14137, Genfed library, Dist file), the district court granted the prisoners release on bail pending resolution of their appeals if the appeals were not decided within approximately three months. The court also did not preclude further relief should the delays continue beyond the three months. *Id.* at 5-6.

grant of release. Second, it removes any federal court complicity in an ongoing constitutional violation. Third, it induces the state courts to hear appeals promptly during the pendency of habeas corpus proceedings rather than waiting until the district court issues a conditional order, thereby limiting the number and degree of delayed appeals. Finally, it enables the court to compensate the petitioner for the effects of a lengthy delay that has not prejudiced him apart from incarceration.[300]

Courts may object to the setting of bail on the ground that it would eliminate any incentives for the appellant or his attorney to speed the appeal along. Instead, courts might argue the best approach for appellate counsel representing a client released on bail pending appeal would be to stall proceedings for as long as possible. This danger is more apparent than real. Courts can always revoke the appellant's bond if such abuses take place. Moreover, states could avoid the problem altogether by expediting the appeal during the pendency of the habeas action. Even after federal relief is ordered, if the state courts were to enforce their appellate briefing schedules with the same alacrity as the federal courts, defense attorneys could not delay cases, particularly if government attorneys also acted with appropriate diligence.

If a defendant establishes a more serious claim of appellate delay, including an egregiously long delay, a pattern of severe and unremedied delay in a jurisdiction, or prosecutorial bad faith, the courts should fashion a more drastic remedy. For example, the courts may reduce the defendant's sentence by a factor proportional to the length of the delay or the severity of the violation. Such relief could take the form either of a reduction in the prisoner's maximum sentence, rendering the prisoner eligible for parole and other benefits at an earlier date than under his original sentence, or of a reduction in his minimum sentence, rendering the prisoner eligible for release at an earlier date but not affecting his maximum term.

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300. It must be admitted that the incentives to flight are considerably enhanced after a guilty verdict even if the petitioner seeks to contest that verdict on appeal. This is reflected in the relative difficulty of securing bail pending appeal in the first instance. On the other hand, the community takes the risk inherent in the outright release of those adjudicated guilty at trial in the service of a variety of other constitutional values, such as the fourth amendment right to be free of unreasonable search and seizure or the sixth amendment right to a speedy trial. *E.g.*, Strunk v. United States, 412 U.S. 434, 439 (1973) (determining that dismissal remains the "only possible remedy" for deprivation of the right to speedy trial).

Of all the suggested uses of the remedial powers of habeas corpus, relief in the form of sentence reduction presents the greatest difficulty. In general, federal habeas corpus relief modifying sentences is aimed at granting the petitioner the sentence he would have received absent the constitutional violation.[301] For example, in the death penalty context, federal courts have ordered conditional relief commuting the petitioner's sentence to life imprisonment without parole unless the state retried the penalty phase of the capital trial.[302] Extending this reasoning somewhat, as a remedy for what it found to be a state's invalid sentencing procedure, a federal court has ordered a prisoner released after serving the minimum possible sentence for his offense unless the state resentenced him under procedures that complied with the eighth amendment.[303]

None of these cases, however, show courts reducing a sentence in a way not contemplated by the proper application of state law. On the other hand, it is clear that the courts have not yet "defined the precise contours" of what is meant by their power to dispose of habeas petitions as "law and justice require."[304] Moreover, there appears to be no clear reason why federal courts cannot reduce the sentence of a petitioner whose rights have been violated by appellate delay. Relying on the principle that the greater power includes the lesser, the power to release altogether, the fundamental power under federal habeas corpus, ought to include the power to reduce the petitioner's sentence. Indeed, following the pattern of the conditional order of release, the federal court might even consider framing its order reducing the petitioner's sentences as a delayed order of release.[305]

In the most serious cases of appellate delay, as when a petitioner has cast doubt on his ability to receive an unimpaired appeal or when the delay in the individual case is outrageous and

301. *See, e.g.*, Jago v. Van Curen, 454 U.S. 14, 21 n.3 (1981) (per curiam).

302. *E.g.*, Cabana v. Bullock, 474 U.S. 376, 392 (1986); Collins v. Lockhart, 754 F.2d 256, 268 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

303. Britton v. Rogers, 476 F. Supp. 1036, 1043 (E.D. Ark. 1979), *rev'd on other grounds*, 631 F.2d 572 (8th Cir. 1980).

304. 1 J. LIEBMAN, *supra* note 225, § 8.5, at 114.

305. Traditionally, federal courts have been reluctant to issue orders directly modifying state sentences, preferring instead to work through conditional orders of release and other procedural devices. Supreme Court dicta, however, suggests that the federal courts have the power to alter state court judgments directly. Wood v. Georgia, 450 U.S. 261, 274 n.21 (1981). In any event, framing the order as one granting delayed release of the prisoner appears to circumvent this difficulty altogether.

the state has proven unwilling to remedy a longstanding pattern of delays, the courts should not hesitate to order a prisoner discharged from custody.[306] This is a particularly important point because the institutional aspect of appellate delay has proven intractable to the ordinary judicial remedies.[307] The more obvious avenues of judicial intervention and change, such as class actions for injunctive relief, fail to reach state appellate delays because of the bar against ongoing federal supervision of a state criminal justice system.[308] Moreover, because habeas corpus petitions must be brought on behalf of an individual petitioner, systemic abuses rarely figure in the federal court's deliberations except when considering the habeas requirement of exhaustion of state remedies.[309]

Under these circumstances, discharge is a proper remedy for the most serious cases of appellate delay.[310] Discharge is

306. *Cf.* Burkett v. Cunningham, 826 F.2d 1208, 1222 (3d Cir. 1987) (specifying egregious conditions warranting discharge); *see* Rivera v. Concepcion, 469 F.2d 17, 19-20 (1972) (denying motion to stay order granting bail); *supra* notes 243-46 and accompanying text (discussing *Burkett*); *see also supra* note 203.

307. *E.g.*, Mathis v. Hood, 851 F.2d 612, 615 (2d Cir. 1988) (noting that even if state remedy existed, circumstances rendered state corrective process ineffective); see also contemporaneous cases arising from state courts' inability to monitor appointed counsel, such as Brooks v. Jones, 875 F.2d 30, 32 (2d Cir. 1989); Claytor v. Hoke, No. 87 Civ. 2918, slip op. at 9 (E.D.N.Y. Dec. 10, 1987) (LEXIS 12385, Genfed library, Dist file) (noting that the state was responsible for the breakdown in the appellate system); Jacob v. Henderson, No. 86 Civ. 3450, slip op. at 5-6 (E.D.N.Y. Feb. 20, 1987) (LEXIS 14137, Genfed library, Dist file) (noting failure of appellate division to monitor unperfected appeals and take effective action in delays) and Thomas v. Harris, No. 86 Civ. 4214, slip op. at 5-6 (E.D.N.Y. Feb. 20, 1987) (LEXIS 14137, Genfed library, Dist file) (same); Wheeler v. Kelly, 639 F. Supp. 1374, 1376-77 (E.D.N.Y. 1986) (noting the "staggering" volume of pending unperfected appeals in the appellate division). *Cf.* Chapper & Hanson, *supra* note 4, at 4 (noting that "[t]he general pattern of appellate reform is, however, uneven. Many courts have considered making changes, often at length, but have not acted on any proposal. Other courts enter into experiments which never become institutionalized.").

308. *See supra* notes 259-61 and accompanying text.

309. *See supra* note 265 and accompanying text.

310. Finally, federal courts may face cases in which the defendant has served his entire sentence before the state courts decide his appeal. In such cases, the usual forms of habeas relief are inadequate because the defendant no longer is in custody. Although the courts may continue to entertain the habeas petition under the rule of Carafas v. La Vallee, 391 U.S. 234, 239-40 (1968), the relief affecting custody is a moot point. In such situations, particularly when the appeal appears to have been colorable, the courts should consider vacating the defendant's criminal conviction or even expunging the defendant's criminal record altogether. Such relief clearly is within the court's power, *see, e.g.*, Bromley v. Crisp, 561 F.2d 1351, 1363-64 (10th Cir. 1977), Bentley v. Florida, 285 F. Supp. 494, 498 (S.D. Fla. 1968), and may well be necessary to vindicate the constitutional values at issue. Courts also may

apt to serve as a prophylactic against further state appellate delays. Moreover, the interests of judicial economy and, in the final analysis, of federalism and comity, are advanced if the federal courts are not pressed over and over to consider the problems of state appellate delay and to intervene in state court process. Repeated claims of delay and repeated conditional grants of release, no less than injunctive relief, constitute intrusive and ongoing supervision of a state court system.

CONCLUSION: THE NEED FOR STATE SPEEDY APPEAL ACTS

The remedies just outlined, although providing a fairer and more consistent pattern of relief for violations of the right to a speedy appeal than now exists, still present serious deficiencies. Availability of these remedies is likely to yield a further increase in federal habeas corpus petitions, increasing the burden both on the states, which must defend against these petitions, and on the federal courts, which must hear them. Moreover, such an ad hoc approach leads to rough justice at best; the balancing test is necessarily inexact, the fit between rights and remedies even more so. States may be forced to hear and resolve appeals on the basis of length of delay, not probable merit. Moreover, on the principle that the squeaky wheel is greased first, the right to a speedy appeal may turn into the right — after delay has reached constitutional proportions — to have a federal court issue an order granting discharge from custody if the appeal is not heard within a specified time.

These implications are not attractive. This Article began with a discussion of the speedy trial experience of the 1960s and 1970s. That experience demonstrated that constitutional litigation is an ineffective tool to vindicate an unquestioned right;[311] this Article has shown that the same is true of the right to a speedy appeal. Constitutional litigation, with serious teeth in it,

consider declaratory relief. *See, e.g.*, Mizell v. Attorney General, 586 F.2d 942, 948 (2d Cir. 1978) (noting possibility of declaratory relief). Similarly, if a prisoner has been paroled prior to the resolution of his appeal, the court either may order his immediate release from the terms of parole or, in cases more closely resembling that of the defendant who has served his entire sentence prior to the resolution of his appeal, the court may vacate the defendant's conviction. Any other approach will leave some of the most patently offensive violations of the right to a speedy appeal without any meaningful remedy.

311. *See* Amsterdam, *supra* note 3, at 526 (concluding that sixth amendment doctrines and enforcement procedures do not protect defendants' interests against undue delay).

however, is a necessary tool to inform the public debate and to spur states to action.

Although a detailed discussion of speedy appeals legislation is beyond the scope of this Article, it is clear that a speedy appeal act specifying a set time line for briefing and hearing an appeal would effect a marked improvement. Modeled on speedy trial acts, such legislation would inject some certainty into amorphous standards. Federal courts no longer would face the difficult task of balancing a variety of intangible factors to ascertain where delay leaves off and constitutional violation begins. Rather, state courts would implement legislatively determined timetables for calculating impermissible delay with clearly defined remedies attached. Federal courts would merely ensure that state courts followed their own laws and that these laws met constitutional standards — a much simpler task. Speedy appeals legislation would firmly demonstrate the states' commitment to the values of speedy justice for all. For although it is axiomatic that states are not constitutionally required to grant the right to a criminal appeal, it is even more fundamentally true that justice delayed is justice denied.