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WHAT HAS HAPPENED TO HABEAS CORPUS?

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Let me begin by thanking the Baltimore Bar Library for inviting me to come and speak about a topic that concerns all of us: the current status of habeas corpus in our criminal justice system. I approach this topic with diffidence, well aware that people have been bemoaning the state of habeas corpus at least since the Supreme Court's transformative decision in *Brown v. Allen*,[1] which sixty years ago adopted an understanding of the writ as something that could address not only executive detentions and a lack of jurisdiction in the convicting tribunal, but also detentions resulting from criminal convictions tainted by fundamental flaws. But what has been the payoff, either to the criminal justice system or to those who seek relief, from *Brown*'s broader approach to the writ? Less than the Court may have anticipated at the time *Brown* was decided, I suggest, despite access to the courthouse that even today remains relatively generous. Federal and state courts alike devote substantial resources to the adjudication of collateral attacks on criminal judgments, but these efforts are overwhelmingly unsuccessful for the petitioners. That fact should give us pause. Are we sending the prisoners off on a fool's errand, implying that some form of relief is

[1] 344 U.S. 443 (1953).

available when it really is not? Are we participating in a charade that not only misleads petitioners, but also burdens both the states and the federal government with heavy litigation costs? In our efforts to address misuses of collateral relief, have we undermined the legitimate functions habeas corpus should play? Is the writ being granted in the right cases, assuming that we are able to discern what the right cases are? And finally, does "right" mean procedural perfection, or does "right" mean the final, accurate sorting between the guilty and the innocent?

For our purposes this evening, I will be focusing only on the subset of cases in which habeas corpus (or the substitute procedure for federal prisoners made available by 28 U.S.C. section 2255) is sought by a person who is incarcerated after criminal proceedings. The Great Writ also reaches people detained solely by executive fiat – think of those in immigration proceedings who are detained prior to removal, or enemy combatants, or mentally unstable persons who are a danger to themselves or others. But the need of the latter group of persons for access to a procedure through which they can challenge the legality of their detention is much different from that of those who already have had a day in court. Since the policy considerations are so different for those who have been convicted of a crime in either state or federal court, and since the great bulk of cases in the federal courts come from either state or federal prisoners, it is appropriate to restrict our attention to that group.

For them, the picture that emerges is not a pretty one. Efforts to reform habeas corpus have focused too much on the symptoms and too little on the underlying problems. As a result, all participants in the system – bench, governments, defense bar, and applicants – must thread their way through a byzantine system that only haphazardly serves the serious purposes that habeas corpus is supposed to serve. Improvements will be possible, I suspect, only at the legislative level, and only if all stakeholders are willing to take a fresh look at federal collateral relief. In the time that I have, I'll explain how and why I've reached this gloomy position.

I. Judge Friendly and Actual Innocence

I am not the first to question whether our system of collateral relief for those who have been convicted in criminal proceedings is operating properly. Judge Henry Friendly was probably not the first either, but his brilliant 1970 article in the University of Chicago Law Review, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,"[2] serves as the best starting point for this topic that I can imagine. He began with the lament that criminal procedure had lost any sense of closure – as he put it, "[a]fter trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, ... the criminal process, in Winston Churchill's phrase, has not reached

[2] 38 U. Chi. L. Rev. 142 (1970) (cited as "Innocence").

the end, or even the beginning of the end, but only the end of the beginning."[3] In ever-increasing numbers, the process moved on to the collateral-attack stage. Justice Jackson, he noted, had worried about the "floods of stale, frivolous, and repetitious petitions" for federal habeas corpus relief sought by state prisoners in his concurring opinion in *Brown.* But Justice Jackson was talking about a measly 541 cases -- a drop in the bucket by today's standards. By the time Judge Friendly was writing, the number had increased to 7,359 petitions filed by state prisoners and another 2,817 petitions filed by federal prisoners, for a total of more than 10,000 cases. And even that number looks manageable by today's standards. Despite such drastic measures as the Anti-terrorism and Effective Death Penalty Act of 1996 (commonly called AEDPA), the numbers are still growing. Data from the Administrative Office of the U.S. Courts show that in 2012 there were 2,922 habeas corpus cases in the "U.S." category (meaning the 2255 cases), another 744 "habeas corpus alien detainee" cases (filed under 28 U.S.C. section 2241), and 15,929 "private" cases (meaning those brought by state prisoners under 2254 against their custodians). Excluding the alien detainee group that I've put aside, there were nearly 19,000 habeas corpus proceedings in the federal district courts that year. I will have more to say in a moment about the make-up of those cases, but for now, let's return to Judge Friendly.

[3] *Id.* at 142.

He began by reviewing the costs of a system in which finality does not occur upon conviction, or upon affirmance by the highest tribunal, but instead must await in addition (for a state prisoner) the completion of a full round of state post-conviction review, and then another full round of federal habeas corpus proceedings. This can, and often does, involve nine separate courts: three levels for the original criminal proceeding; three levels for state post-conviction proceedings; and three levels in the federal system. Judge Friendly endorsed Professor Paul Bator's concern that this drawn-out process undermines both the educational and deterrent functions of the criminal law. The convicted person is unlikely to accept the judgment of society if he is busy attacking the judgment, nor is any rehabilitation likely to take root while the entire process is up in the air. Delay also imposes costs if the petitioner is successful. More often than not, "success" means only that the prisoner *might* go free; he will not, however, if the state elects to retry him. That option for the state is common if the writ is granted because of a fundamental procedural flaw in the original trial. Any new trial, however, will be hampered (Judge Friendly argued) by the passage of time. He also highlighted the "drain upon the resources of the community -- judges, prosecutors, and attorneys appointed to aid the accused" created by the existing system. Running through almost all of these points was what he called "the human desire that things must sometime come to an end."

Judge Friendly's answer to these points was to suggest that actual innocence should play a greater role in the availability of habeas corpus relief than it was doing at the time he wrote. He did not, as is sometimes supposed, propose that actual innocence was a *sine qua non* in every case. His list of proper candidates for habeas corpus relief was more generous. He identified three categories of eligible cases. The first one represents what I'll call classic habeas corpus. It covers two groups of cases: first, those in which the tribunal lacks jurisdiction, either as a formal matter or because the statute under which the defendant was prosecuted is unconstitutional; and second, those in which the sentence is one that the court may not lawfully impose. The second of Judge Friendly's categories is for cases in which there has been a fundamental breakdown in the criminal process. This group includes claims that a jury was subjected to improper influences by a court officer; destructive publicity overwhelming the jury; the total lack of counsel in violation of the 6th Amendment and *Gideon*[4]; convictions on guilty pleas obtained by improper means that can be shown only by facts outside the trial record; convictions based on evidence known by the prosecutor to be perjured; and convictions of persons who were incompetent to stand trial. And that's not all. Judge Friendly was also willing to permit habeas corpus in cases where the state deprives the accused of the ability to raise a constitutional defense at trial, and in cases where the Supreme Court

[4] Gideon v. Wainwright, 372 U.S. 335 (1963).

has made a new rule of constitutional procedure retroactively applicable to cases on collateral review.

You might think that the topics just described cover a great deal of territory, and you would be right. But, at the time Judge Friendly was writing, habeas corpus (both of the 2254 and 2255 varieties) extended much further. The problem, as he saw it, could be traced back to the Habeas Corpus Act of 1867, which provided that the writ may issue "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." This language has never been taken at face value, or at least Judge Friendly so argued. If an innocent man sat in prison because of a "simple" misinterpretation of a law, then, he asserted, that man had to stay where he was unless or until he was released by an act of executive clemency. Most constitutional errors, he argued, should be no different, if they did not cast doubt on actual innocence. Thus, the Fourth Amendment's prohibition against unreasonable searches and seizures, the right to a Speedy Trial, the Fifth Amendment right not to be compelled to testify against oneself, the right to a jury trial, Confrontation Clause rights, and many others, ought in Judge Friendly's view to be treated differently. If the constitutional procedural right that was violated does not cast itself doubt on the defendant's guilt or innocence – he gives the example of the case in which a constitutionally incorrect confession of homicide leads to the discovery of a body

bearing pieces of the defendant's hair, nails, or clothing, or of weapons covered with the defendant's fingerprints – Judge Friendly proposed that an additional requirement should be imposed before a habeas corpus case could go forward: the defendant should be compelled to make a colorable showing of actual innocence in his petition.

What would he count as the required "colorable showing"? It would not be enough to show that a conviction was unlikely if the problem had not existed. That could be said in practically every Fourth Amendment case, where the violation typically leads to the discovery of evidence highly relevant to the defendant's guilt. (In fact, you will recall that the Supreme Court solved this subset of cases in a different way, when it decided in *Stone v. Powell*[5] that Fourth Amendment claims would no longer be cognizable in habeas corpus unless the state court had failed to provide a full and fair hearing.) Instead, he wrote, "the petitioner for collateral attack must show a fair probability that, in light of all the evidence, *including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial*, the trier of the facts would have entertained a reasonable doubt of his guilt."[6]

[5] 428 U.S. 465 (1976).
[6] "Innocence," supra note 2, at 160, emphasis added.

Provocative as Judge Friendly's suggestions were, they were never adopted in the form he proposed. Instead, as *Stone v. Powell* illustrates, the Supreme Court in the post-Warren Court era chose instead to cut back on many of the doctrines to which Judge Friendly was objecting. The focus on procedural regularity, however, continued, as did the concern about finality. In the case of petitions from state prisoners, the Court also gave renewed emphasis to federal-state comity. These changes, coupled with the relentless flow of petitions from state and federal prisoners, led to the enactment in 1996 of AEDPA, to which I now turn.

II. Post-AEDPA Habeas Corpus: the Obstacle Course

A. Review of AEDPA

Most lawyers by now are familiar with the broad outlines of AEDPA, insofar as it structures habeas corpus petitions under both 2254 and 2255. It was openly designed to bring under control both the volume of petitions and the delays that were plaguing the system, at least insofar as those delays could be laid at the feet of the federal courts. As we'll see, the primary way in which volume was addressed was through the incentive structure (or more accurately, the disincentive structure): it was thought that if the bar for winning relief were set high enough, prisoners would realize that a petition was hopeless and would refrain from filing. And, difficult though it was to get a second bite of the apple under the pre-AEDPA regime, AEDPA has made second or successive

petitions virtually impossible to pursue. I'll spend a few minutes elaborating on each of these points.

AEDPA addressed the delay problem by imposing a one-year statute of limitations on petitions[7]; that period usually begins to run in state cases after state post-conviction proceedings are finished, although if the prisoner allows too much countable time to build up before he institutes those proceedings, he may find himself already too late for the federal court. State prisoners must also exhaust their state-court remedies,[8] and in so doing, they must fairly present their federal claims to the state courts.[9] If they fail to comply with state law, they will find themselves procedurally defaulted in the federal court.[10] It is possible to overcome procedural default, if good cause can be shown for the misstep, but a great number of habeas corpus petitions are tossed out the door on this ground alone, before we even reach the substantive standards set forth in AEDPA.

The core provision of AEDPA for state-prisoner cases reads as follows:

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[7] 28 U.S.C. § 2244(d) (persons in state custody); § 2255(f) (federal prisoners).

[8] 28 U.S.C. § 2254(b) (state prisoners); compare § 2255(e) (for federal prisoners, requiring the person first to apply for relief by motion to the sentencing court).

[9] See Baldwin v. Reese, 541 U.S. 27 (2004). The "presentment" must be fairly clear: the Court held in *Baldwin* that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.* at 32.

[10] See Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that claims barred by a failure to satisfy independent and adequate state procedural rules may be pursued only if cause for the failure and prejudice can be shown).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[11]

That brief excerpt is packed with phrases that have been litigated over the last 18 and a half years. What does it means to say that a person is in custody "pursuant to the judgment of a State court," especially if the habeas corpus petition has been filed by a state prisoner who is not challenging his state conviction or sentence, but instead is complaining only about a loss of good-time credits after a prison disciplinary hearing?[12]

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[11] 28 U.S.C. § 2254(d).

[12] Compare Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) (holding that an extension of custody following a prison disciplinary proceeding is not one that results from the judgment of a state court, nor are the facts that the hearing board found comparable to those found in a state court), with, *e.g.*, Medberry v. Crosby, 351 F.3d 1049 (11th Cir. 2003) (disagreeing with *Walker* and aligning the court with four other courts of appeals).

What does it mean to say that a claim was "adjudicated on the merits," if the last state court to consider the matter said nothing about the point, or ruled that it was procedurally barred but in the alternative lost on the merits?[13] What is a decision "contrary to" Supreme Court precedent?[14] What is an "unreasonable" application of law, or an unreasonable determination of the facts, as opposed to something that is just wrong?[15] The Supreme Court's answer in *Williams v. Taylor* attempts to answer these questions:

> [A] state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.
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> * * *
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> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. … A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are

[13] See Ylst v. Nunnemaker, 501 U.S. 797 (1991) (holding that earlier state procedural bars are immaterial if the last state court to be presented with a particular federal claim reaches the merits). See also Cullen v. Pinholster, 131 S. Ct. 1388 (2011) (holding that section 2254(d) applies even where the state court resolves a case with a summary denial of relief).

[14] See Williams v. Taylor, 529 U.S. 362, 405-06 (2000).

[15] *Id.*

materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

It would be hard to overstate what a demanding standard this is. As the Supreme Court stressed in *Harrington v. Richter*,[16] an "unreasonable" application of federal law is different from an "incorrect" application of the law. It admonished that "if this standard is difficult to meet, that is because it was meant to be."

AEDPA thus establishes a regime that is highly deferential to whatever the state court did. It also makes it clear that state courts are not accountable to the lower federal courts. If a federal court of appeals has interpreted *Miranda* in a certain way, but the Supreme Court of the United States has not yet embraced that ruling, then the state courts are under no obligation to follow what the court of appeals said. To the contrary, they have a co-equal right and responsibility to interpret the federal Constitution, and habeas corpus can be granted only if they fail to follow the rulings of the United States Supreme Court.

One consequence of this strong comity principle is that, for the most part, federal courts must evaluate habeas corpus petitions solely on the basis of the facts that were

[16] 562 U.S. 86, 131 S. Ct. 770, 786 (2011).

before the state courts. The state court's determination of the facts is presumed to be correct (though this rule can be difficult to apply if the state court did not say much about the facts); that presumption can be overcome by the habeas corpus applicant only with clear and convincing evidence.

In small number of cases, AEDPA does allow for an evidentiary hearing in the federal court. But no such hearing is permitted unless the applicant can show one of three things: either there is a new rule of constitutional law that the U.S. Supreme Court has made retroactively available to cases on collateral review; or the applicant is prepared to show a factual predicate for relief that was not discoverable earlier with the exercise of due diligence; or "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[17]

All of these rules pertain to the first petition for federal habeas corpus relief that the prisoner has submitted. What happens if the law changes, or new evidence emerges, at some point after that first petition? Under the pre-AEDPA regime, this problem was addressed by a concept called "abuse of the writ." It essentially reached the "frequent

[17] 2254(e)(2)(B).

filer" group – prisoners who bombard the courts with petition after petition, typically with nothing new to say. Normally even before AEDPA those petitions were dismissed promptly, but in a small number of cases they were allowed to go forward.

AEDPA formalizes the rules for second or successive petitions. No such petition can be filed directly in the district court. Instead, the applicant must go first to the court of appeals and seek permission to bring a new petition. I am not exaggerating when I say that the success rate is somewhat below the camel's in attempting to go through the eye of a needle.[18] In more than 18 years, I do not recall a second genuine successive petition that I personally have authorized, and this is not because I have any pre-existing disposition one way or the other toward these petitions. It is because the statutory standards are so strict. Here is what AEDPA has to say about successive 2254 petitions[19] (and the standard is identical for successive 2255 attempts[20]):

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be

[18] See Matthew 19:24 ("it is easier for a camel to go through the eye of a needle than for a rich person to enter the Kingdom of God").
[19] 28 U.S.C. § 2244(b)
[20] 28 U.S.C. § 2255(h) (requiring certification as provided in section 2244 for second or successive motions under section 2255).

dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Summarizing, this means that there are no second chances on the same "claim." If the first habeas corpus petition raised a claim about ineffective assistance of counsel for Reasons A, B, and C, an attempted second petition on ineffectiveness of counsel must be denied, even if the applicant now wishes to complain about Acts D, E, and F. Subparts (A) and (B) of 2244(b)(2) may seem to open the door a crack, but in reality they do not. The Supreme Court does not normally make new rules of constitutional law retroactive to cases on collateral review, though it certainly might choose to do so for a new structural rule. Even if it did, the applicant would have only year from the date when the rule was made retroactive to seek permission to file. Vanishingly few people

have been able to satisfy the criteria for fact-based claims (which of course must be new claims that were not brought in an earlier habeas corpus petition).

B. Current Experience

I thought that it would be interesting to take a look at experience under the statute as close to the present time as possible. With deep thanks to my law clerks, Jeff Van Dam, Andrew Hammond, and Megan O'Neill, whom you can thank for this part of my talk, I can give you a good look at the habeas corpus cases that came before the federal courts of appeals in 2013. (I have included some graphs they created as an Appendix to this paper.) Counting both the precedential cases in the Federal Reporter (3d) and the non-precedential cases in the Federal Appendix, we identified 1,717 habeas cases for that year. Because many of them were resolved without much (or sometimes any) discussion, it was possible to take a careful look at only 581 of this set, approximately one-third. To the best of our ability, this data set includes cases in which the court of appeals denied a certificate of appealability – a document that is a necessary prerequisite to taking an appeal in a habeas corpus case..[21] Either the district court judge or a circuit judge may grant a CA, but "only if the applicant has made a substantial showing of the denial of a constitutional right."[22] If neither is persuaded that the applicant has met that standard, the case is over at the court of appeals before it begins.

[21] See 28 U.S.C. § 2253.
[22] *Id.*, § 2253(c)(2).

If the district judge grants the CA, the court of appeals typically moves ahead with the case without reconsideration of that decision. If the district court denies the CA, the court of appeals takes a fresh look at it. In the Seventh Circuit, we considered 239 requests for a CA in 2012 and granted 35 of them; in 2013, we considered 297 requests and granted 28. We do not keep track of how many certificates are issued by the district courts. Usually the court of appeals agrees with the district court's assessment of the case and denies the CA in a brief order, but in approximately 10 percent of the cases in our circuit, the responsible circuit judge sees something in the case and allows it to move forward. Bearing in mind that it is possible that we may have missed some denials (depending on how other courts of appeals keep their data), here is what the numbers show for the 581 cases analyzed.

About two-thirds of the cases came from state prisoners (and hence were 2254 matters), and one-third from federal prisoners. I was interested in how many habeas petitions were filed in cases that had been resolved by guilty pleas and how many in cases that were tried. The reason for my question is straightforward: more than 97% of federal criminal cases are resolved by guilty pleas, and I have no reason to think that the percentages in state courts are much different. Also, as you'll see in a moment, quite a few claims that can arise in litigated cases are by definition not available if the defendant pleaded guilty.

In our 581 cases, 29% were resolved by guilty pleas and 71% after trial. That already demonstrates that a highly disproportionate number of habeas corpus petitions come from the tiny group that go to trial. Within the guilty plea group, most of the habeas claims asserted ineffective assistance of counsel (70%). Other petitioners challenged the factual basis for the plea, the sentence received, and prosecutorial misconduct. Eight cases raised claims of actual innocence. Since a guilty plea waives any substantive defenses the defendant may have had other than involuntariness of the plea or ineffectiveness of counsel in the plea process,[23] this restricted group of theories is predictable. Unless there is a problem with the plea itself, or with something not addressed in any plea agreement that might accompany it, the defendant has little that can be raised in connection with the conviction.

The other 3% or so of cases in the country at large yielded 71% of the habeas corpus petitions. Once again, the most common claim raised was ineffective assistance of counsel, which came up in nearly 300 out of the 400 or so cases in our sample that went to trial. (Note that this is often a claim that is designed to overcome procedural default, so that some other claim such as a Confrontation Clause argument or a jury

[23] See, *e.g.*, United States v. Broce, 488 U.S. 563 (1989).

composition argument can be advanced.) Apart from ineffectiveness of counsel, petitioners raised a laundry list of complaints about their proceedings:

- Due process
- Prosecutorial misconduct
- Jury instructions
- *Brady* (that is, failure of the prosecutors to turn over exculpatory evidence)
- Sentencing
- Sufficiency of the evidence
- Confrontation Clause
- Fourth Amendment
- *Miranda*
- *Batson* (that is, racial or gender discrimination in jury selection)
- *Apprendi* (failure to get a jury finding on statutory sentencing point)
- Actual innocence (10 cases)
- Speedy trial
- Double jeopardy
- Ability to present defense
- Competency to stand trial
- Jury bias

- *Faretta* (right to self-representation)
- *Atkins* (capital cases; mental competency standard for death penalty)
- *Giglio* (right to impeachment evidence)

Some of these theories are sufficiently related to the integrity of the criminal trial that, I suspect, Judge Friendly would not require an additional showing of actual innocence. Many, however, are not. It is my understanding, finally, that none of the 581 cases analyzed qualified as a second or successive petition. With this experience in mind, let's return to the innocence question and to some broader thoughts about the way our habeas corpus law is working.

III. Habeas Corpus: Today and Tomorrow

There is one respect in which our system is entirely failing: our treatment of second or successive petitions. It is failing everyone: the court of appeals judges who regularly review applications for permission to file a new petition; the staff attorneys in the courts who painstakingly review each application and check dockets to see what the applicant's filing history is; and the prisoners themselves, who are told that a remedy exists when that remedy is almost entirely illusory. I am a great fan of truth-in-labeling, and I think that we have flunked that standard for second or successive petitions.

These cases are the most attractive candidates for a sharp focus on actual innocence of the underlying offense, or in the limited class of capital cases, a constitutional entitlement not to have the death penalty imposed. I stress again that I am not taking any position in this talk on whether part or all of the existing statutory language can be tweaked to reach these goals. I am instead trying to look at the system from 10,000 feet up and to leave for another day the question whether implementation should or must come from Congress, from the Supreme Court, or from some other source.

If permission to file second or successive habeas corpus petitions were limited to the group of cases presently described under section 2244(b)(2)(B)(ii) – that is, the cases in which the petitioner can proffer clear and convincing evidence (such as modern DNA evidence, or comparably powerful evidence) *either* that he is actually innocent of the underlying offense *or* that he is under a sentence of death that the Supreme Court of the United States has forbidden for someone of his characteristics – the number of applications would drop dramatically and the remaining ones would be entitled to serious review by the court of appeals. Just as importantly, the chimerical hope of another go-round on underlying constitutional claims would be put to rest. I recognize that there is a hypothetical risk that someone convicted under a legal regime that the Supreme Court later disapproves, and disapproves so thoroughly that it makes its rule

retroactive to cases on collateral review – will have no hope of relief under such a system aside from executive clemency. But that is a price that we pay in any event. At some point, it is impossible to undo the past, and somewhere near that point, the cost of undoing the past is too high.

I say this even though, unlike Judge Friendly, I do not hold out substantial hope for executive clemency in most cases. From the standpoint of the Due Process Clause, a prisoner has no "liberty" interest in obtaining clemency[24]; it is an entirely discretionary act on the part of the relevant executive. Some governors and some presidents may exercise their clemency power as the ultimate safeguard that it might be, while others might as a matter of policy choose never to grant clemency. Those decisions are not subject to any standards and thus are not judicially reviewable. What does persuade me is the fact that our system of criminal law and procedure, while not perfect, contains many safeguards against error. Before someone reaches the successive petition stage, he has had a trial, at least one appeal in the state system (two in most states, which have supreme courts that exercise discretionary jurisdiction), state post-conviction proceedings, and one opportunity for federal habeas corpus relief. That should be enough to ensure the proper functioning of the criminal justice system from a procedural point of view. Moreover, relief for the individual prisoner may not be the

[24] See Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981).

best way to handle those problems that remain. Instead, prison reform, or police reform, or anti-corruption measures, or the like, are probably a more direct way to address matters that do not affect the question whether an innocent person remains in prison.

That leaves the question of the person with a serious claim of actual innocence – perhaps one that was overlooked or brushed over by earlier courts, or perhaps one for which solid proof became available only late in the day. At the time Judge Friendly wrote, the law of actual innocence was in its infancy. By that I mean that it had not yet developed the two branches that we see today: the "gateway" version, and the "freestanding" version. The former retains a focus on the procedural quality of the trial, while the latter looks to the ultimate question. Thus, in *Schlup v. Delo*,[25] the Supreme Court spelled out how actual innocence operates in the "gateway" sense. Schlup was a Missouri prisoner who had been convicted of the murder of another inmate at his prison and had been sentenced to death. After the state courts affirmed both the conviction and sentence, he brought a petition for habeas corpus in the federal courts. In it, he asserted that he had received ineffective assistance of trial counsel, who allegedly had failed to interview and call witnesses who would establish Schlup's innocence. That petition was unsuccessful, and so Schlup (represented by new counsel) brought a second federal petition (in that pre-AEDPA era). He asserted that he was entitled to

[25] 513 U.S. 298 (1995).

have his Sixth Amendment claim heard on the merits, because he was asserting actual innocence. But in a sense, his innocence was almost beside the point. As the Supreme Court put it, "Schlup's claim of innocence ... is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel ... and the withholding of evidence by the prosecution ... denied him the full panoply of protections afforded to criminal defendants by the Constitution."[26] As the Court had put it in its earlier decision in *Herrera v. Collins*,[27] the claim of innocence was "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[28] In so doing, the Court distinguished between the greater respect that is due to a conviction (and sentence) that are the result of an error-free trial, and the lesser deference that is due to the result of a trial tainted by constitutional error. That gateway of which the Court spoke opens when the habeas corpus petitioner can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent."[29]

Herrera flirted with, but did not resolve, the ultimate question whether the Constitution includes a freestanding right for a person who is actually (meaning

[26] *Id.* at 314.
[27] 506 U.S. 390 (1993).
[28] 513 U.S. at 315, quoting 506 U.S. at 404.
[29] 513 U.S. at 327, quoting from Murray v. Carrier, 477 U.S. 478, 496 (1986).

factually) innocent of a crime not to be executed for that crime. That question could be phrased more generally, so that it includes not only capital punishment but also conventional incarceration, even though the Supreme Court has never done so. That is for the simple reason that it has never needed to rule definitively on the situation it described in *Herrera*. But here is what the *Herrera* Court had to say on the subject in the capital context:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.[30]

[30] 506 U.S. at 417.

That is what Chief Justice Rehnquist wrote, speaking for the Court. A number of other Justices offered more definite opinions on the issue. Justice O'Connor, writing a concurring opinion for herself and Justice Kennedy, began by saying "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."[31] Justice White, concurring in the judgment, stated that "[i]n voting to affirm, I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."[32] Justice Blackmun, with Justices Stevens and Souter, took the view that "[n]othing could be more contrary to contemporary standards of decency ... or more shocking to the conscience ... than to execute a person who is actually innocent."[33] On the other hand, Justice Scalia, joined by Justice Thomas, thought it "perfectly clear" that "[t]here is no basis in text, tradition, or even in contemporary practice … for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[34]

Seventeen years later, the Court came close to this issue again when it considered an original writ of habeas corpus that Troy Anthony Davis brought before it. Davis had

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[31] *Id.* at 419.
[32] *Id.* at 429.
[33] *Id.* at 430.
[34] *Id.* at 427-28.

been convicted in the Georgia state courts for the murder of a police officer, and he had been sentenced to death based on the eyewitness testimony of a number of witnesses. Years later, seven of those witnesses had recanted; indeed, some went further and implicated the State's principal witness as the perpetrator. In an unsigned order, the Court transferred the petition to the U.S. District Court for the Southern District of Georgia and ordered an evidentiary hearing on Davis's allegations. It instructed the district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[35] Justice Stevens wrote a brief concurring opinion (joined by Justices Ginsburg and Breyer) explaining why he thought that the hearing was needed; Justice Scalia, joined again by Justice Thomas, dissented. Justice Scalia wrote that the "Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[36] Given AEDPA, Justice Scalia was prepared to say that the existence of a "full and fair trial" meant that the Georgia courts could not have committed constitutional error in their rulings rejecting Davis's claims. (As an aside, this victory proved to be temporary for Davis. The federal district court held the required hearing, rejected Davis's arguments, and he was later executed.)

[35] 557 U.S. 952, 952 (2009).
[36] *Id.* at 955.

An important policy debate drives the Justices' respective positions. On the one hand, as many of them have said, it seems repugnant to execute (or for that matter to punish severely) a person that one is convinced is actually innocent of the charges, either because he (or she) was not the one who committed the crime, or because the thing that the person did is not something that the law makes illegal. This seems like a claim that can be redressed through judicial proceedings, whether we call them habeas corpus or something else, and it seems like something that ought to be a matter of right rather than executive discretion. Yet on the other hand, it is notoriously difficult to be sure that the "truth" has been exposed in any trial. Perhaps, as Justice Scalia believes, the best that human institutions can do, and the most that the Constitution offers, is a criminal procedure that is error-free. If powerful, or conclusive, evidence of innocence arises after all appeals and collateral petitions are over, then under this view one must trust either to the States to provide a final safety-valve based on actual innocence (as some do) or to their Governors or the President to exercise their power of clemency.

It is interesting that the question of evidence of actual innocence that comes to light, or that is created, many years after the criminal proceeding is over, has taken on new urgency in light of modern technology. Even at the time *Herrera* and *Schlup* were decided, no one could have imagined both the accuracy and the low cost of DNA testing. And DNA evidence may prove not to be the only source of indisputable

exoneration. In the world of 2014, it is not hard to imagine that someone might discover video footage from one of the countless cameras that dot our cities that would resolve a long-simmering question about culpability. The data and meta-data created every day by smart phones, tablets, and internet browsing would also have been unimaginable at the time most of this law was created.

Moreover, there is a broader point that should be considered – one that is raised by the outstanding book by William Stuntz, *The Collapse of American Criminal Justice* (tragically, his last book before he passed away). Professor Stuntz argues that we made a wrong turn quite some time ago when we decided to privilege procedural matters over substance. He wrote, for instance, that "[t]he first, and perhaps the worst, error Warren's Court made was … to tie the law of criminal procedure to the federal Bill of Rights instead of using that body of law to advance some coherent vision of fair and equal criminal justice."[37] He continued as follows:

> Two other mistakes were especially important. Warren and his colleagues continued and exacerbated a long-term trend: they proceduralized criminal litigation, siphoning the time of attorneys and judges away from the question of

[37] William J. Stuntz, The Collapse of American Criminal Justice at 227-28 (2011).

the defendant's guilt or innocence and toward the process by which the defendant was arrested, tried, and convicted.[38]

The phenomenon that Professor Stuntz described has given rise to countless rules that focus not on whether the right people are being held to account for the crimes they commit, but instead on whether the right hoops have been jumped through, in the right way, in order to convict and sentence them. I do not wish to be understood as saying that procedure is irrelevant. Far from it! One would never want all procedure without regard to substance, or all substance no matter how sloppy or unfair the procedures. But the place where the balance is drawn is well worth debate.

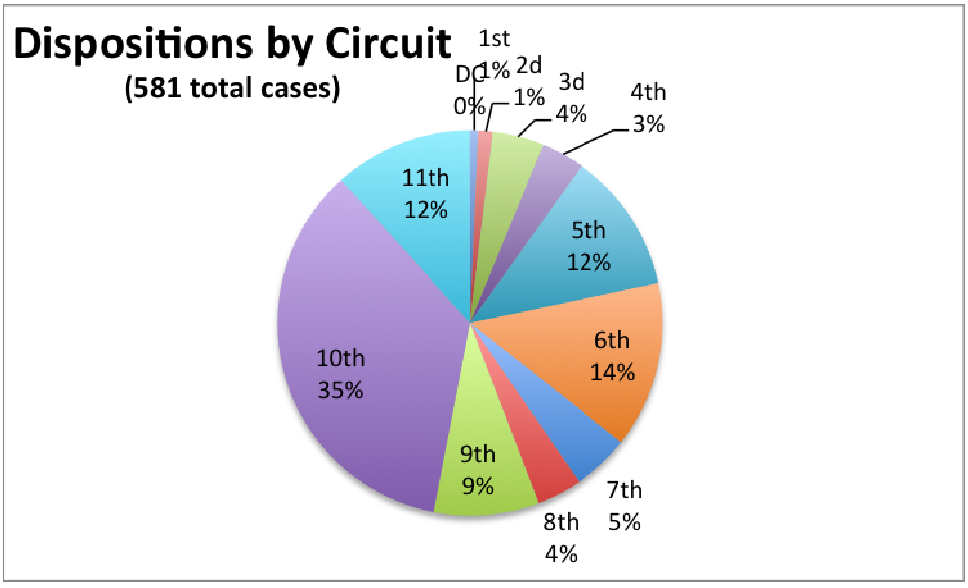
The law of habeas corpus, and in particular the place that actual innocence plays in that law, is just one example of that broader problem. My interest in raising it with you stems from my concern that the system as it is currently configured is devoting tremendous resources to these petitions, for very little payoff. Habeas corpus, in a word, promises too much, delivers too little, and reflects a questionable set of priorities. I am a believer in the proposition that it is always most efficient to address problems head-on, not through indirect means. Applying that approach, we should find a way to make actual innocence a primary concern throughout our criminal justice system – even in the last-chance proceedings we call habeas corpus. At the same time, we must continue our

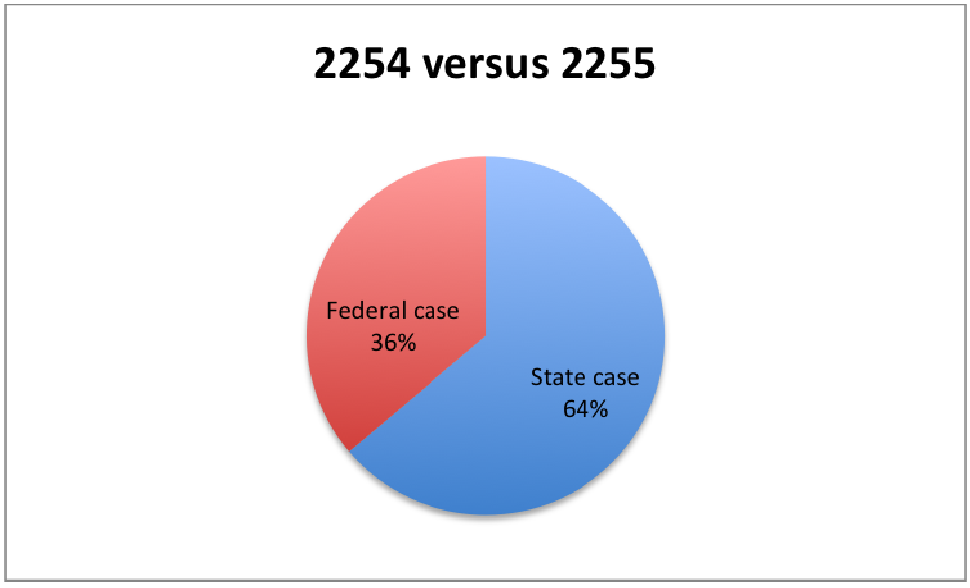
[38] *Id.* at 228.

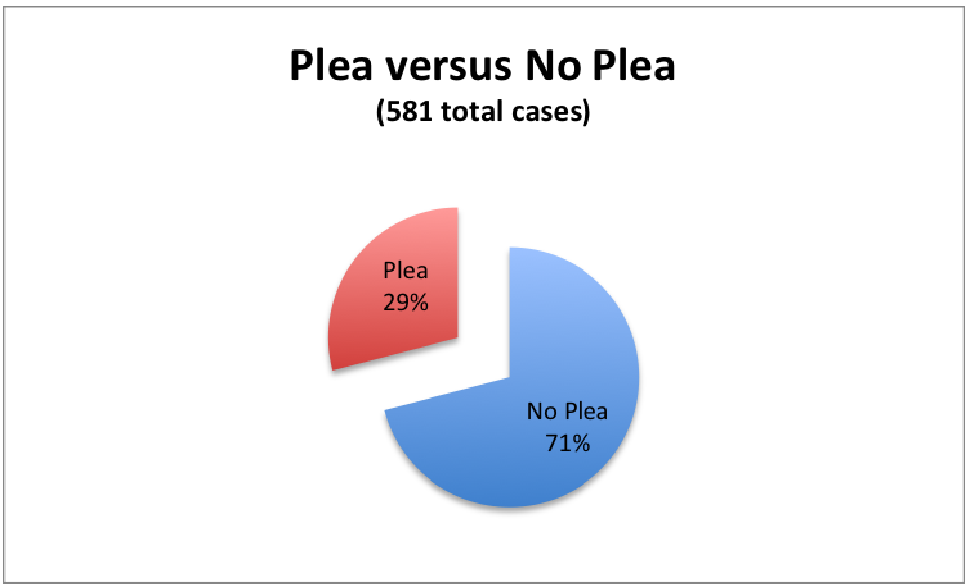
search for better and more direct ways to address police behavior, effective assistance of counsel, reliability of evidence, and fair procedure. Perhaps in the wake of Ferguson, Staten Island, and other such tragic events, we will begin to do so.

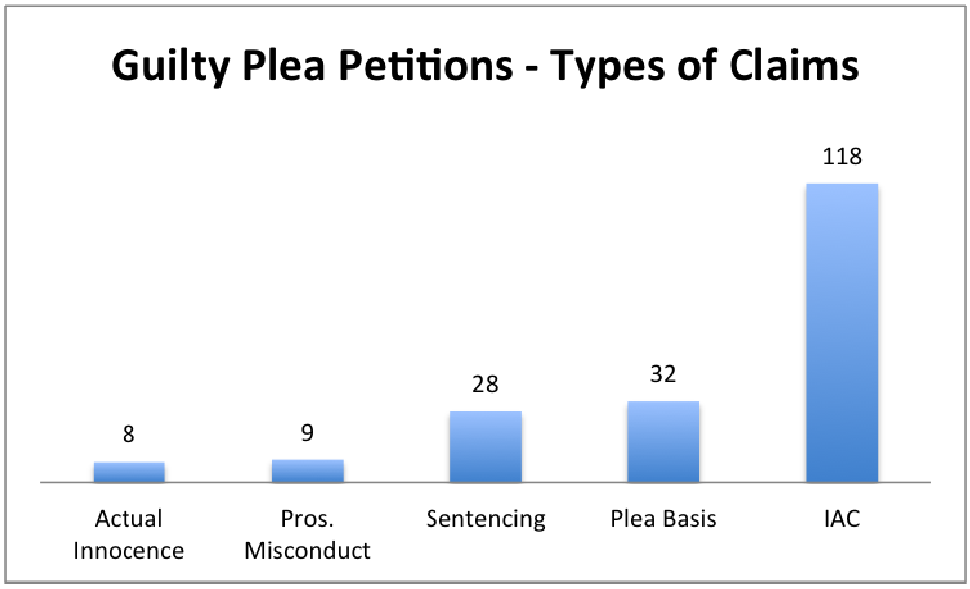
Thank you very much.

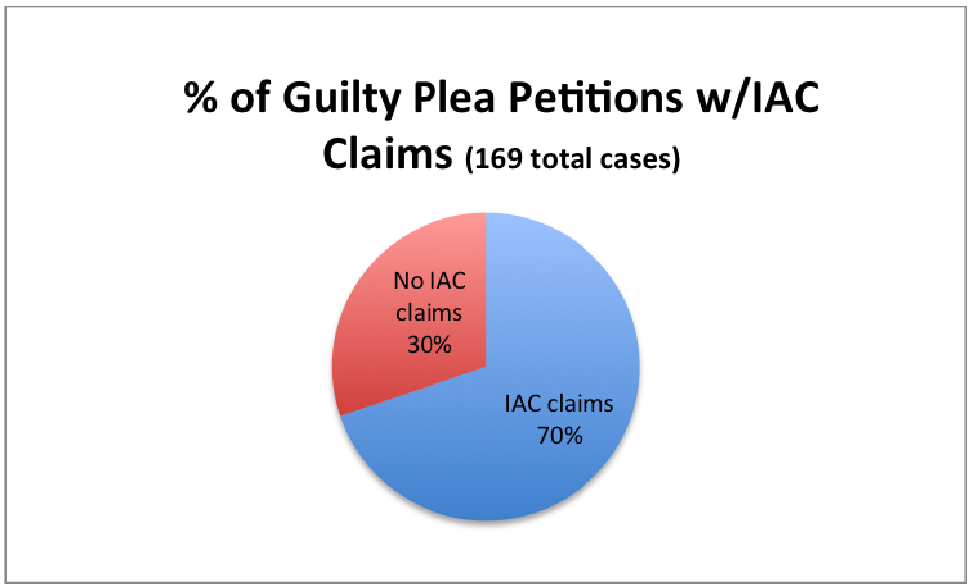
APPENDIX

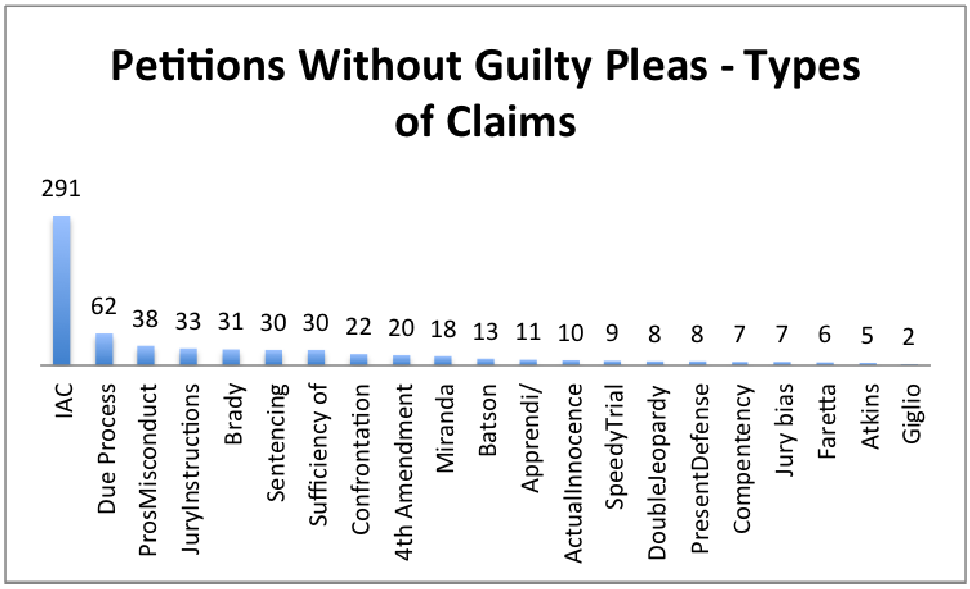

Dispositions by Circuit
(581 total cases)
1st
1%
DC
0%
2d
1%
3d
4%
4th
3%
5th
12%
6th
14%
7th
5%
8th
4%
9th
9%
10th
35%
11th
12%

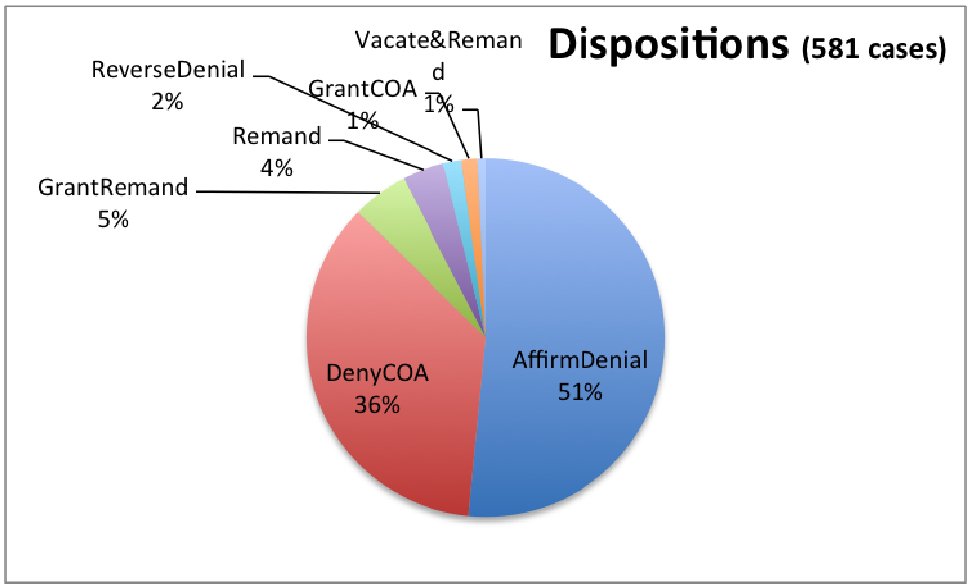

2254 versus 2255
Federal case
36%
State case
64%


Plea versus No Plea
(581 total cases)
Plea
29%
No Plea
71%


Guilty Plea Petitions - Types of Claims
8
9
28
32
118
Actual Innocence
Pros. Misconduct
Sentencing
Plea Basis
IAC


% of Guilty Plea Petitions w/IAC Claims (169 total cases)
No IAC claims 30%
IAC claims 70%


Petitions Without Guilty Pleas - Types of Claims
291
62
38
33
31
30
30
22
20
18
13
11
10
9
8
8
7
7
6
5
2
IAC
Due Process
ProsMisconduct
JuryInstructions
Brady
Sentencing
Sufficiency of
Confrontation
4th Amendment
Miranda
Batson
Apprendi/
ActualInnocence
SpeedyTrial
DoubleJeopardy
PresentDefense
Compentency
Jury bias
Faretta
Atkins
Giglio


Dispositions (581 cases)
Vacate&Remand 1%
ReverseDenial 2%
GrantCOA 1%
Remand 4%
GrantRemand 5%
DenyCOA 36%
AffirmDenial 51%