



“[a] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review.” *Valerio v. Crawford*, 306 F.3d 742, 773 (9th Cir. 2002) (en banc) (internal brackets omitted).

Here, the Court has denied relief on procedural grounds under “Rule 32.2(a).” That, however, is not sufficiently specific to preclude federal review because Rule 32.2(a) includes several subsections. Subsection (3) precludes relief for any claim “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.” Because subsection (3) indicates that the claim has never been properly presented to the state courts, it is sufficient to bar federal review. Subsection (2), however, precludes relief where the claim has already been “[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding.” Because subsection (2) indicates that the claim *has been* properly presented to the state courts (albeit in a different proceeding), it is not sufficient to bar federal review.

As it stands, this Court’s order does not clearly state whether it relies on Rule 32.2(a)(2) or Rule 32.2(a)(3). As a result, a federal court might later construe it to be “ambiguous” and hold that is not sufficient to preclude federal collateral review. *See Valerio*, 306 F.3d at 774–75 (“By failing to specify which claims were

barred for which reasons, the Nevada Supreme Court did not clearly and expressly rely on an independent and adequate state ground.”). Accordingly, the State respectfully requests this Court to clarify that its ruling is based on “Rule 32.2(a)(3)” and not merely on “Rule 32.2(a).”

RESPECTFULLY SUBMITTED this \_\_\_th day of [MONTH], [YEAR].

[Signatures]



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RESPECTFULLY SUBMITTED this \_\_\_th day of [MONTH], [YEAR].

[Signatures]

**Habeas Corpus for Everyday Prosecutors**

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**Introduction**

- Habeas corpus is the final step for a criminal conviction.
- Although in many ways it functions like an appeal, it has many aspects that are completely unique.
- Probably the most complicated and least understood area of criminal law.

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**Introduction**

- Goal is not to make you into a habeas attorney.



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**Introduction**

- **Goals:**
  - (1) basic overview of habeas corpus:
  - (2) give practical tips on how to keep cases from getting reversed in habeas corpus review.
- **Feel free to ask questions.**

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**Outline**

- **History of habeas corpus**
- **Overview of modern habeas practice**
- **Practical advice for trial prosecutors**

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**Outline**

- **History of habeas corpus**
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### Definition

- "Writ" = standardized judicial order
- "Habeas corpus" = "that you have the body"
- "Writ of habeas corpus" = order to bring the body of someone into court

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### Common Law

- Habeas corpus ad prosequendum
  - bring body of prisoner into court for prosecution
- Habeas corpus ad testificandum
  - bring body of prisoner into court to testify
- Habeas corpus ad subjiciendum
  - bring body of prisoner into court to test the validity of his or her confinement

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### Common Law

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### Common Law

- Goal: prevent arbitrary imprisonment by the executive.
- Sometimes called the "Great Writ"

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### Common Law



Blackstone: "the most celebrated writ in the English law"

William Blackstone, Commentaries \*129-37

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### Assize of Clarendon (1166)



Guarantees right to trial in royal courts.

Bars summary imprisonment by the local knights or barons.

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### Magna Carta (1215)

NO Freeman shall be taken or imprisoned ... but by lawful judgment of his Peers, or by the Law of the Land.



One of a handful of provisions from Magna Carta that are still on the books in England.

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### Habeas Corpus Act 31 Car. 2, c. 2 (1679)

- Formalizes process for habeas corpus similar to what we use today.
- Many commentators refer to it as a "second magna carta" for England.

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### Habeas Corpus Act 31 Car. 2, c. 2 (1679)

- Prisoner files suit against the person detaining them (i.e., their "custodian").
- Judge makes preliminary inquiry into reasons imprisonment.
- If no obvious basis for imprisonment, court must command the custodian make a "return" to the writ by
  - (1) bringing "the body of the prisoner" before the court; and
  - (2) explaining the legal basis for prisoner's detention.

3 William Blackstone, Commentaries \*129-37

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### Habeas Corpus Act 31 Car. 2, c. 2 (1679)

- If custodian fails to provide reason for imprisonment, the court may:
  - (1) Require the prisoner be indicted and tried for a crime within specified period of time;
  - (2) Order the prisoner be immediately released.
- In other words, if the prisoner is illegally detained, the court can either
  - (1) give the custodian time to make the detention legal, or
  - (2) order the prisoner be released.

3 William Blackstone, Commentaries \*129-37

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### Habeas Corpus Act 31 Car. 2, c. 2 (1679)

- Procedural requirements:
  - Must produce prisoner within 20 days.
  - Fines and punishment for noncompliance.
  - Forbids reimprisonment for same offense if release is granted.

3 William Blackstone, Commentaries \*129-37

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### History



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### United States Constitution

- Also protects right to habeas corpus.
- Not protected in the Bill of Rights.
- Framers thought habeas corpus was so important that *the original un-amended text of the Constitution presupposes its existence.*

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### United States Constitution

- The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
  - U.S. Const. art. I, § 9, cl. 2.

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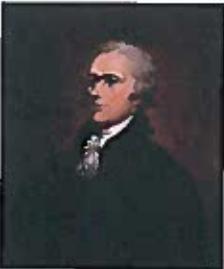
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### United States Constitution

Praised the writ of habeas corpus as one of the Constitution's key defenses against "arbitrary imprisonments," which are one of the "favorite and most formidable instruments of tyranny."



The Federalist No. 48 (Alexander Hamilton)

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### United States Constitution

"Why suspend the [writ of habeas corpus] in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them [back to custody]."



Letter to James Madison (July 31, 1788), available at <http://press-pubs.uchicago.edu/founders/documents/v1-ch11-446.html>

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### Arizona Constitution

- The privilege of the writ of habeas corpus shall not be suspended by the authorities of the state.
- Ariz. Const. art. II, § 14.



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### United States Constitution

- The Great Writ has been suspended several times in American history.

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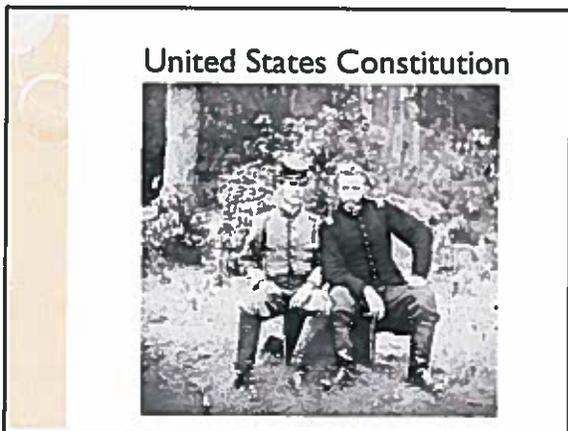
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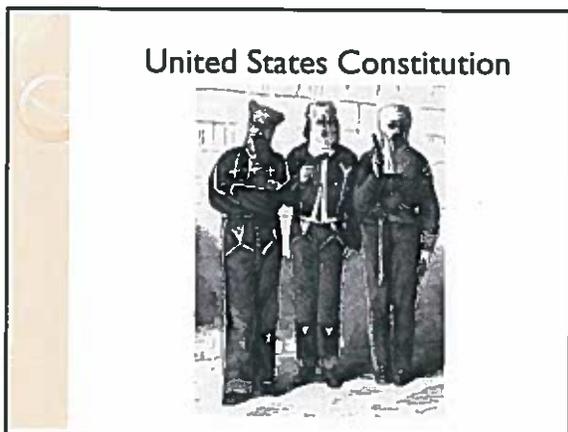
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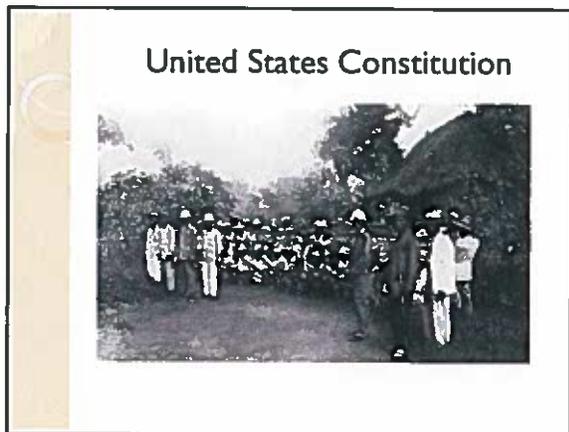
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### United States Constitution



By USN - Official U.S. Navy photo 80-G-K-13513 from the U.S. Navy Naval History and Heritage Command, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=993707>

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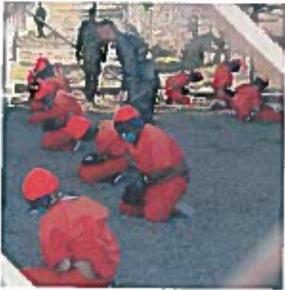
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### United States Constitution



By Shane T McCoy, U.S. Navy - (copied from [http://en.wikipedia.org/wiki/Image:Camp\\_x-ray\\_detainees.jpg](http://en.wikipedia.org/wiki/Image:Camp_x-ray_detainees.jpg) so that the image can be used on Wikimedia), Public Domain, <https://commons.wikimedia.org/w/index.php?curid=774039>

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### United States Constitution

"Why suspend the [writ of habeas corpus] in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them [back to custody]."



Letter to James Madison (July 31, 1788), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14e4.html>.

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### United States Constitution

"Why suspend the [writ of habeas corpus] in insurrections and rebellions? ***The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them [back to custody].***"



Letter to James Madison (July 31, 1798), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14e6.html>

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### Habeas Corpus Act 31 Car. 2, c. 2 (1679)

- If custodian fails to provide reason for imprisonment, the court may:
  - (1) Require the prisoner be indicted and tried within specified period; or
  - (2) Order the prisoner to be immediately released.

William Blackstone Commentaries \*129-37

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### United States Constitution

- QUESTION:
- If the constitutional writ of habeas corpus provides two options:
  - (1) Trial
  - (2) Release
- Why federal courts hearing habeas corpus in cases where the defendant has already been tried (and convicted)?
- Answer: habeas corpus review of criminal convictions is only required by statute and not by the constitutional "Great Writ."

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### Judiciary Act of 1789, §14

- “courts of the United States . . . shall have power to issue writs of . . . *habeas corpus* . . . *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.”

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### *Ex parte Dorr*, 44 U.S. 103, 105 (1843)

- Thomas Dorr convicted of treason against Rhode Island.
- U.S. Supreme Court rejected his habeas petition.
- No federal habeas corpus review of state-court convictions.

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### *Ex parte Dorr*, 44 U.S. 103, 105 (1843)

- Consistent with original purpose of ensuring either (1) lawful commitment; or (2) immediate release.
- No application where prisoner had *already* been lawfully convicted of a crime.
- Presume that state courts are equally capable of protecting their citizens' rights.
- So what happened? Why do we now have federal habeas corpus review for state court convictions?

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### Statutory habeas corpus



- Not all state courts were capable of protecting their citizens' rights.

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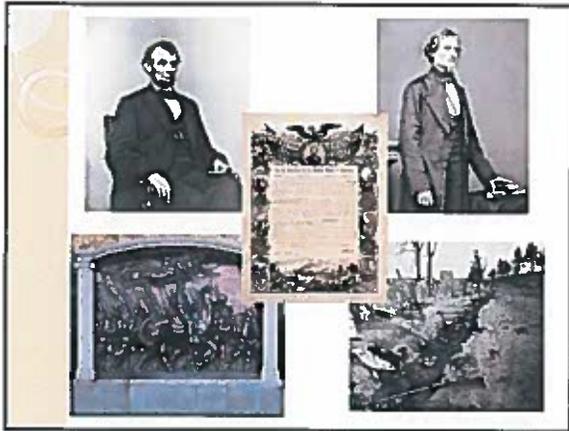
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### Habeas Corpus Act of 1867 14 Stat. 385

- federal courts "shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States"
- For years, its unclear how broadly the Supreme Court will interpret this statute.

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### Frank v. Mangum 237 U.S. 309 (1915)

- Leo Frank was a Jewish factory manager convicted of killing a 13-year-old girl in Atlanta and sentenced to death.
- Case was highly controversial with lurid allegations of sexual perversion and strong undercurrents of antisemitism.
- Habeas petition argues trial was "mob dominated".
  - Crowd laughing and cheering throughout trial
  - Frank not present for reading of verdict out of fears for his safety
  - "the hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of police of Atlanta and the colonel of the Fifth Georgia Regiment, stationed in that city, both of whom were known to the jury" (Holmes, J., dissenting)

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### Frank v. Mangum 237 U.S. 309 (1915)

- Supreme Court rejects Frank's mob-domination claim.
  - Frank presented claim to the Georgia courts, and they rejected it.
  - Supreme Court refuses to second-guess Georgia courts: the Georgia Supreme Court's decision "must be taken as setting forth the truth of the matter"
- Consistent with traditional approach to habeas corpus for state-court convictions.
- Signals there will be no substantial federal review of state-court convictions under the 1867 Act.

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### Frank v. Mangum 237 U.S. 309 (1915)

- Coda:
- April 19, 1915: Supreme Court issues decision
- June 21, 1915: governor commutes Frank's death sentence
- August 16, 1915: lynch mob breaks into prison
- August 17, 1915: Frank murdered by lynch mob.




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*Moore v. Dempsey*  
261 U.S. 86 (1923)

- Facts drawn from the habeas petition, which the Supreme Court assumes to be true for purposes of appeal.
- A white mob in Arkansas attacks a African-American church. During the attack, a white man is killed.
- "The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted."

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*Moore v. Dempsey*  
261 U.S. 86 (1923)

- Again, claim is mob dominated trial.
- The governor of Arkansas forms a "Committee of Seven" to investigate the "insurrection." It releases a public statement that the troubles were caused by a group "established for the purpose of banding negroes together for the killing of white people."
- A mob shows up to lynch the petitioners.
- U.S. troops and members of the Committee of Seven convince mob to leave by promising that the defendants will be executed if they're brought to trial.

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*Moore v. Dempsey*  
261 U.S. 86 (1923)

- The Committee arranges to have witnesses whipped and tortured.
- African-Americans are excluded from the grand and petit juries.
- Defense counsel calls no witnesses.
- The entire capital murder trial lasts 45 minutes
- The jury finds the defendants guilty after 5 minutes of deliberation.
- Prominent civic groups oppose commutation of the death sentences by arguing that "solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched," they would be found guilty and executed.

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### Moore v. Dempsey 261 U.S. 86 (1923)

- This time, the Court steps in.
- Justice Holmes, writing for the majority: "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void."
- Sends case back to district court to consider legality of the trial.
- Marks the beginning of federal scrutiny of state-court convictions.

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### Expansion of statutory habeas corpus

- *Brown v. Allen*, 344 U.S. 443 (1953).
  - Federal courts can reconsider legal merits of constitutional claims *de novo*, even if the state courts already rejected those claims.
- *Townsend v. Sain*, 372 U.S. 293 (1963).
  - Federal courts also have wide discretion to re-determine the facts of the case by holding evidentiary hearings.
- *Foy v. Noia*, 372 U.S. 391 (1963).
  - Prisoners can present claims in federal habeas proceedings even if they never properly presented them to the state courts.

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### Expansion of statutory habeas corpus

- High-water mark of federal habeas corpus.
- Federal courts can re-examine constitutional validity of state-court convictions *de novo*.
- In practical terms, this means that a single federal trial judge can overrule an entire state's supreme court.

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### Backlash

- The last forty years have been seen a general trend to narrow habeas corpus.
- Begins in *Stone v. Powell*, 428 U.S. 465, 493 n. 35 (1976) (citation and quotation marks omitted):
  - "Despite ... the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.... [T]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [constitutional claims] than his neighbor in the state courthouse."

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### Backlash

- Continues with a series of other Supreme Court decisions limiting the scope of federal habeas review.
- Culminates in 1996 with major federal legislation restricting federal habeas.
- The Antiterrorism and Effective Death Penalty Act (AEDPA).

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### So where do we stand today?

- Nobody is satisfied.
- Some think habeas review had been unfairly gutted.
- "I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights[.]"
  - *Coleman v. Thompson*, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting)

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### So where do we stand today?

- Others think habeas review still goes to far:
- "Even after AEDPA's pass through the Augean stables, no one in a position to observe the functioning of our byzantine federal-habeas system can believe it an efficient device for separating the truly deserving from the multitude of prisoners pressing false claims. Floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own."  
McQuiggen v Perkins, 133 S.Ct. 1924, 1942-43 (2013) (Scalia, J. dissenting) (quotation marks, brackets, and ellipsis omitted)

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### My own take

- Scalia is right that the overwhelming majority of federal habeas petitions are frivolous.
- On the other hand, its hard to look at where we came from and think that it wasn't necessary at one time.
- If you care about preventing wrongful convictions, is habeas review the most efficient way to do that?

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### Outline

- History of habeas corpus
- Overview of modern habeas practice
- Practical advice for trial prosecutors

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### Modern practice

- In modern practice, habeas corpus acts as both:
  - Second direct appeal; and
  - Second post-conviction/Rule 32 proceeding

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### Appellate review

#### Direct review



#### PCR/Rule 32



#### Habeas review




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### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

(Full Name of Petitioner) \_\_\_\_\_ )  
 Petitioner )  
 vs ) CASE NO. \_\_\_\_\_  
 (To be supplied by the Clerk) )  
 )  
 Officer of the Director of the Department of )  
 Corrections, (Inmate or authorized person having )  
 custody of Petitioner) )  
 Respondent )  
 and )  
 The Attorney General of the State of \_\_\_\_\_ )  
 Additional Respondent )

**PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (NON-DEATH PENALTY)**

- PETITION:**
- (a) Name and location of court that entered the judgment of conviction you are challenging \_\_\_\_\_
  - (b) Criminal docket or case number \_\_\_\_\_
  - Date of judgment of conviction \_\_\_\_\_
  - In this case, were you convicted on more than one count or crime? Yes  No

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### Modern practice

- Responses are filed by AG's office.

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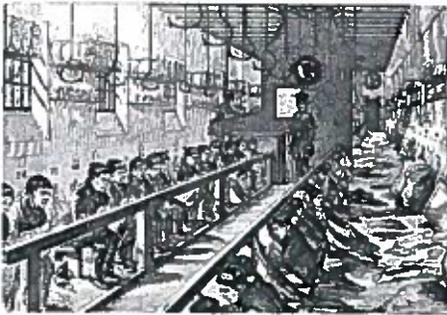
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### Modern practice



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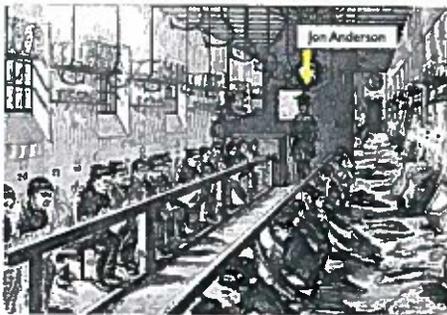
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### Modern practice



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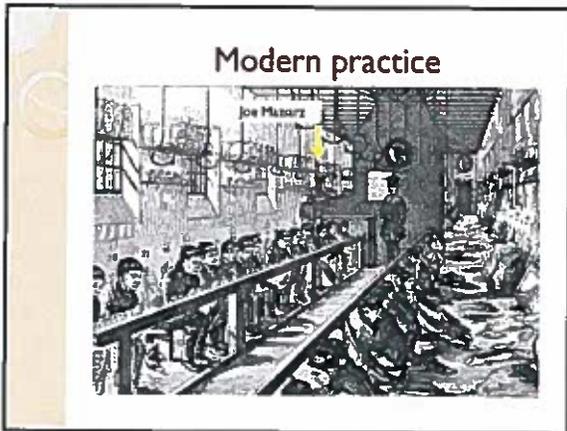
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### Modern practice

- State's response is called an "answer," but actually more like an appellate brief than a true civil answer.
- Can often be very lengthy. There is no page limit, no word limit, and no limit to the number of claims that can be raised.

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### Modern practice

- Almost all petitions involve serious felonies.
  - Legacy of "custody" requirement.
- Overwhelming majority of non-capital petitions *pro se*.
- Overwhelming majority of petitions are frivolous.
- "In recent years, [the federal courts] have heard close to 20,000 [habeas petitions] annually, of which fewer than one-half of one percent have succeeded."
  - *Whiteside v. United States*, 748 F.3d 541, 568-69 (4th Cir. 2014) (Wilkinson, J. dissenting)

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### Modern practice

If the overwhelming majority of habeas petitions fail, why should you care?



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### Modern practice

- Preface: This is not about Ninth-Circuit bashing.
- Nevertheless, we prosecute cases in the toughest federal circuit in the country for habeas.
- From 2000 to 2009, the Ninth Circuit had the highest rate of reversal by the Supreme Court of any of the federal circuits.
  - Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010*, 87 Notre Dame L. Rev. 2165, 2165-66 (2012).

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### Modern practice

- "There is one area in which the Ninth Circuit's record is especially troubling: writ of habeas corpus cases. It seems that at least once every term, the Supreme Court has to remind us about the proper standard of review in habeas proceedings."
  - O'Scannlain at 2168.
- In its 2010 term, the Supreme Court reversed Ninth Circuit six times in habeas cases.
- Five of those 6 were unanimous.
  - O'Scannlain at 2172.
- Supreme Court helps, but it can't catch everything.

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### Modern practice

- Ninth Circuit is also very skeptical of prosecutors
- *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., joined by five other judges, dissenting from denial of rehearing *en banc*).
  - "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."

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### Modern practice

- "I wish I could say that the prosecutor's unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors' offices across the country. But it wouldn't be true. *Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend."

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### Modern practice

- Finally, a number of Ninth Circuit judges are particularly skeptical of
  - (1) the death penalty; and
  - (2) of the Arizona courts in general.

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