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Federal Habeas Review of New York Convictions: Relieving The Tensions

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"Federal Habeas Review of New York Convictions:
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Good afternoon and welcome to our program, "Federal Habeas Review of New York Convictions: Relieving the Tensions." Before you are the members of the State/Federal Judicial Council of New York. They will constitute the panel for this program. I introduce them to you now. [from left to right] -- Justice Theodore R. Kupferman of the New York Supreme Court, Appellate Division, First Department; Justice Edwin Kassoff, Presiding Justice of Appellate Term, New York Supreme Court, Second and Eleventh Judicial Districts; and Judge Charles P. Sifton of the United States District Court, Eastern District of New York. Judge Fritz W. Alexander, II of the New York Court of Appeals who was scheduled to be on the program, has the flu and cannot attend. I am Judge Roger J. Miner of the United States Court of Appeals for the Second Circuit, Chairman of the State/Federal Judicial Council of New York, and Moderator of this forum. We are grateful to the New York State Bar Association and its Section on Commercial and Federal Litigation for co-sponsoring this symposium as part of the annual meeting of the New York State Bar Association.

First, a word about the State/Federal Judicial Council of New York. The Council exists to promote and harmonize the relationship between state and federal courts in New York and to

minimize any conflicts that may develop from the operation of the dual system of courts in this state. We seek to maintain a continuous dialogue on all joint problems in order to improve and expedite the administration of justice by the state and federal courts. Among other accomplishments, our Council has handled the scheduling conflicts of attorneys practicing in both systems, arranged for the sharing of court facilities, and participated in the establishment of the mechanism now in place for certifying to the New York Court of Appeals questions of state law presented to federal courts. We have sponsored joint programs for the exchange of views on such matters of mutual interest as the individual assignment system, jury selection, attorney sanctions and criminal sentencing.

Our program tonight deals with a subject that has been a constant source of friction over the years between state and federal courts -- the review of New York criminal convictions in habeas corpus proceedings brought in federal courts. Many members of the New York judiciary think that the dual court system goes awry when a single federal district judge orders the release or retrial of an incarcerated defendant whose case has been reviewed and considered by as many as 13 state judges. The statistics demonstrate, however, that the granting of such relief is a rare event. First of all, filings of federal habeas challenges to state court convictions do not constitute a significant part of the national federal caseload. Of the 233,529 district court filings for the 12 month period ended June 30, 1989, only 10,554 represented habeas challenges to state

court convictions. This is less than 5% of the national filings in federal district courts. For the same period, there were 16,974 civil cases filed in the New York federal district courts, and 677, or about 4% of these, were habeas challenges to New York convictions. During the last five years, district court filings of habeas challenges to New York convictions have been fairly level, ranging from a low of 663 to a high of 758. The last time-study of the federal court system revealed that the total number of judicial hours devoted to state habeas petitions in the district courts in the entire nation averaged 1.3% of all judicial time. While there were several hundred different categories of suits in the time-study, habeas cases obviously do not represent a major share of federal judicial time.

The reported decisions of the New York federal district courts show four petitions granted in 1990, six each in the years 1988 and 1989, seven in 1987 and three in 1986. Among the reported decisions issued by the Second Circuit Court of Appeals in 1990, there were only 11 state habeas cases. District court judgments were affirmed in eight of the cases, reversed with directions for entry of judgment for petitioner in one case and remanded for further proceedings in two cases. In 1989, seven judgments were affirmed in the Second Circuit and five were remanded for further proceedings. Habeas cases have even less of an impact on appellate caseloads than they do on district court caseloads. It is estimated that state court judgments of conviction are disturbed in only ½% to 1% of all habeas cases filed nationwide in any given year.

Despite the fact that there are comparatively few habeas cases in the federal system and even fewer grants of relief, the tension remains. Some recent decisions seem to have exacerbated the tension. No less a figure than our own Justice Kupferman, dissenting in a 1990 decision in his court, People v. Kin-Kan, wrote:

> It is unseemly for seven Judges of the New York State Court system, without a dissent, to be overruled by one Judge in the federal system simply because of a different subjective view of the applicable constitutional principle and the balancing of the defendant's right to a public trial versus the danger to a witness.

The majority in Kin-Kan decided that the defendant was entitled to the benefit of a district court determination, made in the case of a co-defendant, that the sixth amendment right to a public trial had been violated by the closure of the courtroom during accomplice testimony. The defendant and the co-defendant had been tried together, and the habeas grant to the co-defendant had been affirmed in the Second Circuit Court of Appeals. The majority wrote:

> It is no longer open to us to accept the People's invitation to find error in Judge Sand's conclusion that the state court proceeding at the same trial fell below federal constitutional standards. As properly asserted by defendant Kin, those arguments would lie only by way of reargument before the Second Circuit or by application for certiorari to the United States Supreme Court.

Perhaps our colleague will tell us a little more about that case when his time to speak comes. I was particularly offended by that part of his dissent in which he noted that a different panel of the Second Circuit may have come to a different conclusion.

As authority for that dubious proposition, he cited two copyright opinions, one of which was written by me.

Federal law requires substantial deference to state courts in criminal matters. State remedies must be exhausted before a federal habeas petition will be considered. State court factual findings are presumed to be correct. The Stone v. Powell Rule denies any challenge on fourth amendment grounds when the state has provided the opportunity for a full and fair litigation of the fourth amendment claim. As one commentator has written of federal habeas, "the courts are fond of extolling its virtues at length before denying relief." Nevertheless, the tension continues between state and federal courts in this area. We hope that our discussion this afternoon will help to relieve the tension between judiciaries. That is our purpose. We intend, as part of our discussion, to review some of the recent cases in which challenges to New York convictions were sustained and the writ allowed. Our program includes a large block of time for questions and comments from the judges and the panel and the lawyers in the audience. According to our format, each judge on the panel will make a 10 minute presentation. Following that, I will open the floor to questions and comments but will ask that they be directed through me.

I start the discussion by making some observations on some recent cases in which habeas challenges were sustained. Between 1988 and 1990, federal constitutional challenges to state court convictions in New York were sustained on a variety of grounds. In Harper v. Kelly, the trial court was found to have violated

the sixth amendment right to confrontation by curtailing cross-examination regarding the emotional state of the victim. The federal court held that the petitioner's ability to probe the reliability of the victim as eye witness had been denied. In Reddy v. Coombe, the statements of the defendants were found not to fall within the old interlocking confession exception to the Bruton rule. In Fullan v. Commissioner, the federal court dealt with the denial of a free trial transcript for appeal, holding that the free transcript must be provided despite the fact that the petitioner was represented by an attorney hired by family and friends.

In Innes v. Dalsheim, the federal court determined that the trial judge had not made it clear in the plea hearing that the plea could not be withdrawn. The conclusion was that there was no intelligent and knowing waiver of constitutional rights with full knowledge of the consequences. A violation of due process was found in Sanders v. Sullivan. The circuit court there held that such a violation occurs when a credible recantation of the testimony in question would probably change the outcome of the trial but the state nevertheless leaves the conviction in place. The circuit court remanded to determine the credibility of the victim's recantation.

The circuit court also remanded for an evidentiary hearing in the case of Escalera v. Coombe. In this case the petitioner's brother had not been allowed to testify because he was not on the list of alibi witnesses as required by the New York statute. The circuit court held that if the attorney had not acted willfully

in excluding the brother's name from the list, habeas should be granted. In Rosario v. Kulhman, the trial court's refusal to allow the transcript of impeaching testimony from a co-defendant's trial was held to be constitutional error where it was found that all possible efforts had been made to locate the impeaching witness.

More than any other type of case, cases involving delay in the state court system form the basis for successful habeas challenges in New York. In Elcock v. Henderson, the petitioner was convicted of murder and assault in 1978. He filed a notice of appeal shortly after his conviction, but his appeal was not decided in the Appellate Division until 1987. The Second Circuit returned the case to the district court for findings on the issue of a due process claim for unconscionable delay. Exhaustion of state remedies was not required in view of the nine year period of delay. In Brooks v. Jones, there was an eight year delay in prosecution of the appeal due to inexcusable neglect on the part of a series of assigned counsel. In Mathis v. Hood, a delay of six years in perfecting the appeal as the result of the neglect of counsel was characterized by the Second Circuit as "shocking" as well as not unusual in the First and Second Departments. On remand, the district court directed that the prisoner be released pending a new appeal.

I close my overview of cases in which habeas was granted with an opinion I wrote in 1988. The case is Jenkins v. Coombe. The attorney originally assigned to represent the petitioner in his state appeal was relieved because of a conflict of interest

arising from his representation of a co-defendant. The court appointed another attorney to represent petitioner on appeal and that attorney moved to be relieved within six months of his appointment. The motion was denied, and the attorney thereafter filed a clearly inadequate five page brief containing but one point. That point consisted of three paragraphs attacking the identification testimony. Petitioner then lodged a complaint against the attorney, who then unsuccessfully moved to be relieved. The application was granted, but the Appellate Division failed to provide substitute counsel.

Petitioner then filed a 51 page supplemental pro se brief advancing the same three arguments that had been successful for his co-defendant, together with three arguments of his own. The Appellate Division took the case under advisement and determined that the points which the co-defendant was successful on did not apply to petitioner. In the habeas case, the district court wrote that petitioner had the benefit of effective assistance of counsel, even though it was not his own counsel. On appeal, I wrote that the petitioner was not provided with effective appellate counsel and that he really had no counsel or, at best, nominal counsel to represent him on appeal.

It seems to me that much of our tension can be relieved by the assignment in state courts of competent counsel who can perfect appeals in a timely manner.

One final note. In Harris v. Reed, decided in 1989, the Supreme Court determined that a procedural default in a state court will not bar consideration of a federal substantive claim

on habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on the state procedural bar. To get past a state procedural bar in a habeas case, the petitioner must of course show cause for the procedural default as well as prejudice flowing from the alleged constitutional violation. The cause requirement may be dispensed with in the case of a strong showing of probable ~~cause~~ factual innocence. The Harris decision overrules Second Circuit precedent that silence in the state court in the face of both substantive and procedural claims would be taken to mean that the state court relied on the procedural bar. It is now especially important for the Appellate Division to indicate the basis for a decision in criminal appeals. Affirmance with no opinion just contributes to the tension. In any event, perhaps habeas corpus challenges to state court convictions should be restricted to claims that go to the reliability of the guilt-determining process and, just perhaps, only prisoners who urge that their guilt was not properly established should be entitled to the writ.

I call upon Justice Kupferman for his remarks.