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SUMNER v. MATA: TWILIGHT'S LAST GLEAMING FOR FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS? SPECULATIONS ON THE FUTURE OF THE GREAT WRIT

*By Jason G. Reynolds**

If the metaphor of the title suggests that only a faint glimmer of light remains before the dark, then it aptly fits *Sumner v. Mata*.[1] In less than twenty years, the Supreme Court has moved from the daylight of *Fay v. Noia*[2] through the sunset of *Stone v. Powell*[3] to the twilight of *Mata*. In the name of federalism and due deference to state judges, *Mata* threatens to destroy or vastly reduce what remains of the writ of habeas corpus as a remedy for constitutional defects in state criminal convictions. The Court's holding potentially converts all habeas issues into factual questions that federal judges may not lightly reverse.

In so doing, *Mata* is a far cry from *Fay v. Noia*, the highwater mark for habeas relief in federal courts. With few exceptions, there has since been a steady erosion[4] of what was perceived to be the grand sweep of *Fay*.[5] Like *Gideon*[6] and *Miranda*,[7] *Fay* incorporated the essence of the Warren Court's spirit of aggressive judicial stewardship. Of course, the broadening of the scope of the writ in *Fay* was not received everywhere with the same enthusiasm. Justice Harlan branded the decision "one of the most disquieting that the Court has rendered in a long time."[8]

The Court's decision in *Mata*, however, would do much to still the late Justice Harlan's disquiet. It is the latest in a line of Burger

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1. 101 S. Ct. 764 (1981).
2. 372 U.S. 391 (1963).
3. 428 U.S. 465 (1976).
4. *E.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976).
5. *See* Gibbons, *Waiver: The Quest for Functional Limitations on Habeas Corpus Jurisdiction*, 2 SETON HALL L. REV. 291, 294 (1971); Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966).
6. Gideon v. Wainwright, 372 U.S. 335 (1963).
7. Miranda v. Arizona, 384 U.S. 436 (1966).
8. Fay v. Noia, 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

Court decisions which serve notice that the *Fay* spirit is dead. Coming as it does on the heels of *Stone v. Powell*, the cumulative effect is every bit as disquieting in its own way as the critics thought *Fay* was. *Stone* ended habeas for petitioners' search or seizure claims in cases in which state judicial machinery affords a full and fair opportunity to litigate those claims.[9] *Mata* requires federal judges to give deference to the factual findings of state courts through section 2254 of the United States Code, the habeas corpus statute.[10] Its significance lies in the scope, meaning, and interpretation of "factual," together with its further extension of the present Court's restrictive approach to the writ.

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9. One analysis of Stone concluded: "*Stone* could pulverize federal relief for rights expressed in or derived from other constitutional amendments." Robbins & Sanders, *Judicial Integrity, The Appearance of Justice, and The Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone*, 15 AM. CRIM. L. REV. 63, 85 (1977). *See also* Comment, *Development of Federal Habeas Corpus Since Stone v. Powell*, 1979 WIS. L. REV. 1145; Comment, *The Scope of Federal Habeas Corpus Relief for State Prisoners*, 32 U. MIAMI L. REV. 417 (1978); Boyte, *Federal Habeas Corpus after Stone v. Powell: A Remedy Only for the Arguably Innocent?* 11 U. RICH. L. REV. 291 (1977); Comment, *The "Opportunity" Test of Stone v. Powell: Toward a Redefinition of Federal Habeas Corpus*, 23 VILL. L. REV. 1095 (1978); Comment, *Habeas Corpus After Stone v. Powell: The "Opportunity For Full and Fair Litigation" Standard*, 13 HARV. C.R.-C.L.L. REV. 521 (1978); Note, *Applying Stone v. Powell: Full and Fair Litigation of a Fourth Amendment Habeas Corpus Claim*, 35 WASH. & LEE L. REV. 319 (1978); Recent Cases, *Constitutional Law—Criminal Procedure—Circuits Split over the Application of Stone v. Powell's "Opportunity for Full and Fair Litigation"*, 30 VAND. L. REV. 881 (1977); Note, *Constitutional Law—Federal Habeas Corpus Relief Is Barred for State Prisoners' Fourth Amendment Claims*, 8 TEX. TECH. L. REV. 446 (1976).

10. 28 U.S.C. § 2254 (1976). Relevant portions of the statute provide:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> . . . .
>
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
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> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation

These judicial restrictions are of overriding importance because of the interplay between subsections (a) and (d) of section 2254. The former is the basic grant of habeas jurisdiction enacted in 1867 authorizing federal court review of state convictions. The ground for review under that subsection is that the petitioner is in state custody in violation of the Constitution or laws of the United States. This subsection seems to address itself to legal claims or questions of "law."

Almost a hundred years later Congress added subsection (d). It restricts the federal courts' authority to consider factual claims but does not purport to define what is "factual." *Stone*, it may be seen, is a Court-imposed limitation on the *legal* jurisdiction of the courts to consider claims of state prisoners pursuant to section 2254(a). *Mata*, on the other hand, seems to interpret "factual" under section 2254(d) so broadly that it also limits legal jurisdiction. Thus the decision serves to reduce materially the effective reach of both subsections (a) and (d).

The question in *Mata* was whether a photo display procedure identifying Mata violated due process. The California courts had held that it did not. The Supreme Court determined that this ruling was a "factual" finding entitled to deference under the terms of section 2254(d). The pernicious nature of the case derives from this holding. If a due process determination made from facts in the rec-

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of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

ord is a factual finding, then there is no longer any such thing as a finding of law.

As a result, *Mata* is potentially more dangerous than *Stone* in its implications for the future of habeas corpus. *Stone* merely carved out an exception from subsection 2254(a) saying, in essence, that fourth amendment claims for which state courts provide adequate opportunity to prosecute will no longer be heard. That ruling leaves intact other types of claims, even though the same approach ultimately could be used to eliminate other issues or cases. That method of pulverizing the writ of habeas corpus has been appropriately titled, "How to Kill Two Thirds (or More) with One *Stone*."[11]

Mata, though, is even more sweeping. The Court's overly broad reading of "factual" may include questions properly factual in the section 2254(d) sense as well as purely legal issues still subject to review after *Stone*. This threat is heightened by the present Court's hostile attitude toward the writ; its retreat from the attitude expressed in *Fay*; and its warm embrace of currently popular notions of federalism, deference to state criminal judgments, and finality in the criminal justice process. This philosophy is evident in *Mata v. Sumner*. The outer limits of the twilight zone thus created are sketched below.

Factually, nothing about the crime or the procedural path in *Mata* is extraordinary but the present Court seems much less disposed to view kindly this type of unattractive scenario than was the Warren Court. *Mata* was a case of one prison inmate murdering another and the sole legal point of contention was the propriety of certain eyewitness identifications of Mata as the perpetrator.

The California state courts and the United States district court all agreed that the photo display procedures used did not violate Mata's due process rights. This position was sustained through five separate proceedings.[12] On the sixth occasion, the Ninth Circuit Court of Appeals reached a contrary result on precisely the same record and reversed the district court's refusal to grant habeas relief.[13] The Ninth Circuit found that the identification "was so impermissibly suggestive as to give rise to a very substantial likelihood

11. Robbins & Sanders, *supra* note 9.

12. On his initial appeal, the California Court of Appeal sustained Mata's conviction. Mata then brought a state habeas corpus proceeding at the superior court level. That court ruled against him, the California Court of Appeal ruled against him for the second time, and the California Supreme Court also refused to sustain his claim. Then Mata took his case to federal district court with like results. Sumner v. Mata, 101 S. Ct. 764, 765 (1981).

13. Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979).

of irreparable misidentification."[14]

This five to one ratio seems to have been a factor that impressed the Supreme Court, as well as the fact that the misidentification issue was not even raised at the trial level.[15] The Supreme Court granted certiorari to review the case.

The only point of agreement between the decision of the Ninth Circuit and all prior courts was the applicability of the due process analysis of *Simmons v. United States*[16] to the photo display procedure. The circuit court of appeals had applied the same standard, but reached the contrary conclusion that the facts in the record showed the identification of Mata had violated due process.

Though it disclaimed taking one position or the other, the tenor of the Supreme Court's majority opinion only thinly conceals its apparent surprise and displeasure with the view taken by the Ninth Circuit. As Justice Rehnquist observed for the majority:

> [T]he Court of Appeals reached a conclusion which was in conflict with the conclusion reached by every other state and federal judge after reviewing the exact same record.[17]

Near the end of the opinion, the Court reemphasized the quoted statement through paraphrase and added: "Assuredly this is not the first nor the last time that such a result will occur."[18]

Just as assuredly, the majority opinion is devoted to prevention of such untoward results in the future. Aligning itself philosophically with the more restrictive views expressed in Justice Harlan's *Fay v. Noia* dissent[19] and Justice Powell's concurrence in *Schneckloth v. Bustamonte*,[20] the Court retreated to notions of federalism and congressional intent:

> This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts.[21]

The statutory section cited by the Court as controlling was enacted in 1966 and added to a habeas corpus law that had gone virtually unchanged since 1867. Arguing that the recent amendment was

14. *Id.* at 755.

15. The misidentification issue came up for the first time in Mata's initial appeal to the California Court of Appeal where it was considered but decided against him.

16. 390 U.S. 377 (1968).

17. Sumner v. Mata, 101 S. Ct. at 770.

18. *Id.* at 772.

19. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

20. 412 U.S. 218, 250 (1973) (Powell, J., concurring).

21. 101 S. Ct. at 769.

designed to restrict rather than enlarge the habeas powers of federal courts, Justice Powell said in *Schneckloth*:

> This most recent congressional expression on the scope of federal habeas corpus reflected the sentiment, shared alike by judges and legislators, that the writ has overrun its historical banks. . . .[22]

Agreeing in principle with this statement of legislative intent the *Mata* majority's construction of the statute insists upon greater deference to state court determinations in general, and factual determinations in particular. Ruling that the enactment of section 2254(d) was intended to minimize the inevitable friction which results when federal courts overturn state criminal convictions, the Court focused on three points in subsection (d). The Court's three-pronged analysis stresses that a state court's determination of (1) a *factual* issue is (2) *presumed* to be correct (3) in the absence of error demonstrated by the habeas petitioner through *convincing* evidence.[23]

Those factual determinations, the Court decided incidentally, may be made by state appellate courts as well as by trial level tribunals. How often appeals courts are likely to make determinations of fact remains an open question and probably depends largely upon what distinguishes "factual" from "legal." This distinction—or, more properly, the lack of one—formed the basis for Justice Brennan's vigorous dissent. Referring to the contrary decisions of the Ninth Circuit and the California Court of Appeal, he said:

> My examination of the opinions of the two courts does not reveal a single disagreement over a "basic, primary, or historical fact."[24]

He argues forcefully that the issues raised about the identification procedure "are examples of questions of law, or at the least mixed questions of fact and law."[25] In his view, the Ninth Circuit simply disagreed with the other courts' *legal* conclusion on the due

22. 412 U.S. 218, 273 (1973) (Powell, J., concurring).

23. Federal courts have more latitude with respect to state court factual determinations if the case can be fitted into one of the eight enumerated categories set forth in § 2254(d); the text of these appears at note 10 *supra*. Some doubt was cast upon the vitality of this part of § 2254(d) by LaVallee v. Delle Rose, 410 U.S. 690 (1973). There the Court ruled that, in the absence of specific state findings of fact, federal courts must presume that the facts were found contrary to the petititoner. Thus, in the absence of the facts, petitioner must overcome the presumption of correctness by convincing evidence just as if none of the eight enumerated conditions existed.

24. 101 S. Ct. at 773 (Brennan, J., dissenting).

25. *Id.* at 774.

process import to be given to the undisputed facts found in the identical record:

> Plainly, the disagreement between the courts is over the constitutional significance of the facts of the case, and not over the facts themselves.[26]

Justice Rehnquist's majority opinion does not dispute this contention. This is probably not an oversight and if Justice Brennan is correct, habeas corpus jurisdiction may have received another staggering blow. The basic proposition underlying the writ and the jurisdictional grant in section 2254(a) is the provision of a forum for testing the *legality* of state detention allegedly in violation of the Constitution or laws of the United States.

Thus the one most essential element, the *sine qua non* without which the federal courts cannot act, is the authority to decide questions of law. Without this there is no federal habeas corpus. Justice Brennan was on equally solid ground in further asserting that the majority position could not be sustained even if the identification question were deemed one of mixed fact and law. As recently as last term, the Court had affirmed both points in *Cuyler v. Sullivan*.[27] Accordingly, the dissent said, section 2254(d) has absolutely no application to *Mata*; its limitations on review of factual findings is no bar to consideration of the issue raised:

> A federal court need not—indeed, must not—defer to the state court's interpretation of federal law.[28]

Ironically, the latter point has been good law at least since *Townsend v. Sain*,[29] the 1963 case that furnished much of the material from which section 2254(d) was fashioned.[30] As Chief Justice Warren said for the majority, "The state conclusions of law may not be given binding weight on habeas."[31]

This dichotomy between the majority and dissent aptly exposes the last significant point in the Court's reasoning. To insure that the congressional mandate of due deference to the judgments of state courts is followed, any federal court granting the writ and thereby overturning the presumption of correctness must make "at least

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26. *Id.*
27. 446 U.S. 335, 341-42 (1980).
28. 101 S. Ct. at 775 (Brennan, J., dissenting).
29. 372 U.S. 293 (1963).
30. *See* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895 (1966).
31. 372 U.S. at 318.

some reasoned written references to § 2254(d) and the state court findings."[32] To this Justice Brennan would probably agree; he would ask, however, why the court should do this in a situation in which section 2254(d) is plainly inapplicable?

It is immediately apparent, then, that *Mata* may have significance far transcending its own facts if it is intended by the Court to encompass the whole of habeas corpus jurisdiction by telescoping it through section 2254(d). This conclusion would mean that all state court determinations, legal as well as factual, would be subject to the limitations of that subsection. It would require that federal courts reviewing state court judgments show by "reasoned written references" how the presumptively correct "facts" have been overcome, irrespective of whether they are, indeed, factual findings. All federal courts would be on notice that section 2254(d) applies to every application for the writ. That is due deference run amok.

Surely the Court cannot have meant thus to restrict habeas jurisdiction to the point of virtual abolition. Or can it? No such radical assumption would even be entertained were it not for the decision in *Stone v. Powell* and its inimical rationale.[33]

There is no discussion in *Stone* of section 2254(d); it may be fairly assumed, therefore, that section 2254(a) was the relevant subsection, and that section is devoid of any "full and fair opportunity" language. The Court simply exempted an area from habeas corpus jurisdiction that dealt with resolution of *legal* claims and said these will no longer be heard. That is the height of deference to state court decisions. It is also precisely the area where, as Justice Brennan said, federal courts must not defer to state court interpretation.

The rationale of *Stone* was that application of the exclusionary rule in habeas proceedings was too attenuated to have any deterrent effect and, in any event, the evidence excluded by virtue of an unconstitutional search or seizure is generally both reliable and probative.[34] This is not too different from a kind of harmless error[35] analysis, but the result is the same: questions concerning the consti-

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32. 101 S. Ct. at 770.

33. *See* the authorities cited note 9 *supra*.

34. *See* Comment, *Stone v. Powell: Limitations of Federal Habeas Corpus, The Role of the Exclusionary Rule and the Meaning of a Full and Fair Hearing*, 5 TEX. S.U.L. REV. 131 (1978); Note, *Stone v. Powell: Narrowing of Habeas Corpus-Not as We Would Like It*, 31 ARK. L. REV. 285 (1977); Note, *Stone v. Powell: The End of Collateral Review for Fourth Amendment Claims by State Prisoners?*, 13 CAL. W.L. REV. 558 (1977).

35. The whole harmless error concept has been criticized lately in Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980).

tutionality of evidence seized may not be entertained after full and fair litigation in the state courts.

But if evidentiary reliability is a key element of *Stone*, then the decision in *Mata* is all the more disquieting. Eyewitness identification is at the opposite end of the scale from illegally seized items in terms of inherent reliability. As the Court itself observed in *United States v. Wade*, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[36]

For that reason, the Court in *Wade* went on to hold that a post-indictment lineup is a critical stage of the prosecution entitling the defendant to the assistance of counsel. But, alas, the majority opinion in *Wade* was written by Justice Brennan. He became a dissenter in *United States v. Ash*, when the Court refused to extend *Wade* to postindictment photo displays:

> We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.[37]

Disagreeing, Justice Brennan argued that "the risks are obviously as great at a photographic display as at a lineup."[38]

Wade and *Ash* were right to counsel cases, it is true, but there is no reason to think that the Court's retreat on the misidentification issue will not extend into the due process area and beyond. Indeed, the issue was presented squarely in *Manson v. Brathwaite*[39] where a state police officer's photo identification of the defendant was alleged to have been overly suggestive. Rather than suppress such admittedly tainted evidence, the Court sanctioned an approach that

> permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. . . .[40]

Mata, of course, involved just such a photo display as passed muster in *Ash*, but which was perhaps less suggestive than that approved in *Manson*. In none of these cases has the Court said that photo displays are reliable. The Court's view seems better expressed in the negative: they are not *so* unreliable as to justify either the

36. 388 U.S. 218, 228 (1967).
37. 413 U.S. 300, 321 (1973).
38. *Id.* at 332 (Brennan, J., dissenting).
39. 432 U.S. 98 (1977).
40. *Id.* at 110.

assistance of counsel or other "extraordinary" safeguards. Any due process relief is, therefore, quite unlikely.

It is to be remembered, too, that even under *Wade* the remedy for a violation of the defendant's right to counsel at a lineup is not necessarily exclusion of the eyewitness' testimony. The prosecution is permitted to show, if it can, that the witness' in-court identification had an origin independent of the lineup procedure. Practice since has revealed that lower courts have rarely been unable to find such an independent origin.

From all of this one can readily see several possibilities emerge. First, a *Stone v. Powell* approach might dictate that a full and fair opportunity to litigate identity questions in state courts ought to be sufficient to preclude federal habeas relief especially since, even under *Wade*, the exclusionary rule is less applicable than it would be to fourth amendment claims. If use of the exclusionary rule has negligible deterrent effect in search and seizure cases on habeas, surely it must have no effect at all on identity issues.

A second way to approach the problem is exemplified by the *Mata* case itself: Treat identification questions as "factual" matters subject to the Court's interpretation of section 2254(d) and its required deference to state adjudications.

Both methods have huge disadvantages to the habeas petitioner. Employing the first approach, the Court could simply reduce the scope of review of legal claims under section 2254(a) by creating a *Stone*-like exception. Logically, this approach has no bounds except that the will of Congress would be frustrated if all jurisdiction were eliminated this way.

Using the second approach, the Court could merely convert various categories of issues into factual ones subject to the more restrictive application of section 2254(d) and its requirement of due deference. This too is consistent with congressional intent if one accepts the *Mata* majority's reading of it. Thus the Court can restrict the scope of habeas review of state court convictions and at one and the same time both follow and thwart legislative intent.

This kind of paradox, however, is unlikely to provoke much congressional or public outcry, given the current sentiment in the nation. Nor are the forthcoming Republican nominees to the Supreme Court likely to find in this situation a cause for alarm. No reason appears on the horizon why a gradually more conservative Court should display a less hostile attitude to habeas relief than has the present one in its *Stone* and *Mata* decisions.

There are, of course, some legitimate interests that arguably are served by curtailing the availability of the writ. Foremost is the necessity of finality and "a rational point of termination for criminal litigation."[41] As Justice Powell stated in *Schneckloth*:

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded.[42]

And if such is the case, Justice Powell continued:

> [I]t is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial. . . .[43]

Mata itself is a terrible example of the finality problem. First, the case presented an issue not even raised by the petitioner until his appeal of right to the California Court of Appeal. Second, it presented a difficult legal issue in the guise of a factual one. Worse, the Supreme Court was the seventh forum to hear the case, not counting the original trial. The litigation is not yet at an end; still to come is the Ninth Circuit's hearing on remand, plus whatever else may remain after that. Those urging for finality in criminal proceedings certainly have demonstrative evidence for their plea in *Mata*.

By the same token, it still is important—in fact, more important—to understand and articulate the goals that finality serves. Is finality desirable simply for the sake of administrative convenience? Or is the rationale behind the finality principle that one or two bites at the apple, albeit an occasionally rotten one, ought to be enough? On the contrary, should not successive appeals be entertained on the theory that this is an acceptable societal cost for the vindication of precious rights deemed fundamental to an advanced and enlightened civilization? Should we not permit the appeals, if for no other reason than to give the *appearance* that this country does not dispense Iranian justice?

One observer provided an apt analogy by comparing the function of habeas to the procedures used in advanced technology:

> We would not send two astronauts to the moon without providing them with at least three or four back-up systems. Should we

41. Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Powell, J., concurring).
42. *Id.* at 262.
43. *Id.* at 275.

> send literally thousands of men to prisons with even less reserves? . . . [W]ith knowledge of our fallibility and a realization of past errors, we can hardly insure our confidence by creating an irrevocable end to the guilt-determining process.[44]

Closely linked to the interest in finality is the Court's concern for federalism and the proper role of the federal judiciary in the field of state court convictions. The historical case for the federalist view is perhaps nowhere better expressed than in Justice Harlan's cogent dissent in *Fay v. Noia*.[45] That case preceded section 2254(d), however, and the dissent's main thrust was that the conviction was immune because it rested upon an adequate state ground.[46] By analogy, one could say that after *Mata*, strict construction requires that there be no habeas review of a conviction that rests upon adequate state fact-finding. This incorporates a limited but dangerous concept of res judicata into the system.[47]

That notion aside, the problem with arguing the interest in federalism is that the concept goes both ways: the principle does indeed contemplate that governmental partners will not stick their noses in where they have no responsibility or jurisdiction. But where there is legitimate constitutional interest or authority, a proper federal scheme *requires* that the interested partner exercise its authority. Failure to do that is not federalism or due deference; it is abdication, and irresponsible abdication at that. That is why there is such profound wisdom in Justice Brennan's remark that "A federal court need not—indeed, must not—defer to the state court's interpretation of federal law."[48] Yet the Court sanctions such deference in both *Stone* and *Mata*. Under these decisions, the state courts become the final arbiters of claims based upon the Constitution or laws of the United States.

If that approach be valid, then perhaps a reexamination is in

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44. Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 DE PAUL L. REV. 701, 710 (1972).

45. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting). *See generally* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 181-224 (1980); R. SOKOL, FEDERAL HABEAS CORPUS 1-27 (2d ed. 1969).

46. Justice Harlan's view was vindicated to some extent by the case of Wainwright v. Sykes, 433 U.S. 72 (1977). The Court held that the petitioner's failure to timely assert a *Miranda* claim in accordance with the Florida rules of criminal procedure constituted an adequate state ground for denying habeas relief. Other aspects of the *Fay v. Noia* historical analysis have been criticized in Oaks, *Legal History in the High Court-Habeas Corpus*, 64 MICH. L. REV. 451 (1966) and Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965).

47. *See* Robbins & Sanders, *supra* note 9, at 84.

48. 101 S. Ct. at 775.

order of the constitutional phrasing that says "[T]he judicial power of the United States, shall be vested in one supreme court. . . ."[49] Perhaps there was a mistake, too, when the Court staked out for itself in *Marbury v. Madison*[50] its authority as the ultimate determiner of constitutional issues. And, if all of that was in error, then Congress' grant of habeas jurisdiction in section 2254 may as well be recalled.

All of this suggests that *Mata* is not a decision that promotes federalism; it is in the mold of *Stone* in promoting anti-federalism. Doubtless it is true, as Justice Rehnquist asserts, that deference to state courts' factual findings will reduce the "inevitable friction." But that is not the same thing as aiding federalism.[51] Federalism as it has come to be known in this country cannot exist without some friction. Friction is minimized by a proper and responsible use of authority, not by abdication of it. Federated parties must interact according to the jurisdiction assigned each, rather than seek ways to avoid their roles.

It is one thing, therefore, to say that state judges are knowledgeable, God-fearing, and trustworthy interpreters of the law and that their reasoned decisions are worthy of respect. That is a working principle with which many would agree. Most would also not quibble with the idea of giving those decisions considerable deference. It is quite another thing to say, however, that all such decisions are to be treated as *factual* whether they actually are or not in order to give the kind of no-review deference that fact-findings enjoy in the appellate process.

As *Mata* well illustrates, that approach insulates state judge's findings of law and mixed questions of fact and law to an unjustified degree which, it might be added, is not enjoyed by federal judges in cases wholly within the federal system. If properly limited to actual questions of fact, *Mata* would have little significance. It would be a question of granting due deference where such deference is indeed due. But the problem arises because the case turned on "facts" that are not facts; *Mata* may thus be obligingly read by the lower federal courts as requiring the application of section 2254(d) in every instance. Failure to do so will invite reversal while actually applying section 2254 will lead to the bizarre result that every legal conclu-

49. U.S. CONST. art. III, § 1, cl. 1.

50. 5 U.S. 137 (1803).

51. *See* Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233 (1979).

sion of a state court will be treated like and deferred to as a fact. Petitioners may then have to do what is plainly impossible: demonstrate by convincing evidence that *legal* conclusions are wrong.

It is also possible, however, that no such radical departure was intended, even though the characterization of the issue presented in *Mata* as "factual" invites that speculation. As such, it is quite out of line with *Cuyler v. Sullivan*[52] and other existing precedent. What is more likely is that by choosing to call state court findings "factual" rather than "legal," the Court sought to encourage more deference to criminal convictions and at the same time impose the convincing evidence standard upon petitioners seeking relief. As has been noted, just how one would go about arguing a legal point by convincing evidence is not made clear, but perhaps that question will be settled another time.

There remains the possibility that notwithstanding the interpretive possibilities set forth above, the lower federal courts will continue to treat habeas essentially as they have in the past, giving lip service to *Mata*. This possibility was recognized by both the majority and dissenters in their acknowledgment that "boilerplate" paragraphs might be inserted into opinions referring to section 2254(d). In fact, Justice Rehnquist pointed with approval to *Taylor v. Lombard*,[53] a case the Court had declined to review during the last term. In its only reference to section 2254(d), the Court of Appeals for the Second Circuit said:

> The County Court's finding that there was no factual basis for the claim of perjury is not fairly supported by the record, and therefore is not entitled to deference. 28 U.S.C. § 2254(d)(8).[54]

Nevertheless, said the majority opinion, this statement by the Court of Appeals demonstrated its "full awareness" of the section's applicability. It may well be, of course, that this represents merely a *post hoc* justification since an example of thinner boilerplate than that used by the Second Circuit would be difficult to draft. Moreover, the Court spent some time in discouraging the practice, and the opinion even went so far as to analogize the habeas courts' "reasoned written references" to the special findings required by rule 52 of the Federal Rules of Civil Procedure.

In the final analysis, one conclusion seems inescapable: from the petitioners' perspective, the Court's demonstrated hostility to-

52. 446 U.S. 335 (1980).
53. 606 F.2d 371 (2d Cir. 1979).
54. *Id.* at 375.

ward the writ of habeas corpus portends nothing good for the future. Considering the political climate and the membership of the Court, notions of proper federalism, *Stone*-ism, and due deference to state court convictions seem very likely to snuff out the last ray of twilight remaining in the vitality of the Great Writ for testing the constitutional adequacy of state criminal judgments.