"SPECIAL CIRCUMSTANCES" AND COMITY: STATE OR FEDERAL FORUM FOR EVIDENTIARY HEARINGS IN POST CONVICTION PROCEDURES?

Edwin W. Gockley was convicted of second degree murder on September 27, 1961, and his conviction was affirmed on appeal by the Pennsylvania Supreme Court.[1] On August 7, 1964, Gockley filed a petition for federal habeas corpus alleging that his confession admitted into evidence at trial was involuntary. After an unfortunate five year delay, this petition was finally directed to a federal district court for a hearing on the merits. However, the decision in the United States Court of Appeals for the Third Circuit, remanding the case to the district court for the hearing, is a confusing explanation for the court's action in light of the law governing forum selection for post conviction evidentiary hearings.

The history of Gockley's petition presents a regrettable picture of delays and errors. Two months after the petition was first filed, the United States District Court for the Eastern District of Pennsylvania denied both the petition and Gockley's request for appointment of counsel, but granted a certificate of probable cause for appeal. The Third Circuit appointed counsel on February 19, 1965, but the appointed counsel did nothing for over a year and a half. His appointment was then vacated and new counsel was designated.[2]

With his new counsel, Gockley appealed the denial of his original petition. The Third Circuit remanded the case to the district court for an evidentiary hearing for the stated purpose of determining whether Gockley had waived his right to challenge the admission of the incriminating statements on the grounds of involuntariness.[3] Pursuant to this directive, the district court on remand found there had been no waiver. The court first held that *Jackson v. Denno*[4] (applied retroactively to Gockley's trial[5]) gave Gockley the right to have the voluntariness of his confession determined by a tribunal other than the one considering his guilt.[6] At the time of Gockley's trial Pennsylvania did not have this safeguard; under Pennsylvania law—as in the New York procedure struck down in *Jackson*—the voluntariness of the confession was submitted to the jury along with the question of guilt.[7]

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[1] Commonwealth v. Gockley, 411 Pa. 437, 192 A.2d 693 (1963).

[2] United States *ex rel.* Gockley v. Myers, 411 F.2d 216, 218 (3d Cir.), *cert. denied,* 396 U.S. 847 (1969).

[3] United States *ex rel.* Gockley v. Myers, 378 F.2d 398 (3d Cir. 1967).

[4] 378 U.S. 368 (1964).

[5] The *Jackson* holding is retroactive. *See, e.g.,* Senk v. Pennsylvania, 378 U.S. 562 (1964) (per curiam); Oister v. Pennsylvania, 378 U.S. 568 (1964) (per curiam).

[6] United States *ex rel.* Gockley v. Myers, 276 F. Supp. 748, 752 (E.D. Pa. 1967), *rev'd on other grounds,* 411 F.2d 216 (3d Cir.), *cert. denied,* 396 U.S. 847 (1969).

[7] This procedure has been modified to conform to the *Jackson* rule. PA. R. CRIM. P. 323(f).

Since Gockley was never given an opportunity for an independent determination of voluntariness, the court concluded that he could not have intelligently waived his right to object to the admissibility of his confession at trial.[8] Thus, a violation of the right could properly be alleged in a petition for habeas corpus. Also citing *Jackson,* however, the court decided that the hearing should be held in a state court.[9]

On another appeal, stemming from this last ruling, the court of appeals agreed that there had been no waiver but, reversing the district court, held that the determination of voluntariness should take place in a federal court.[10] Although recognizing that comity normally would require referral to the state, the court found that Gockley was excepted from this requirement and thus that a federal hearing was required.[11] This Comment analyzes the court's decision to except Gockley's case from the comity doctrine.

Federal courts have the power to issue a writ of habeas corpus in behalf of a person held in state custody in violation of the Constitution.[12] This power includes authority to hold an evidentiary hearing if the judge finds the state court record to be inadequate under certain specific statutory criteria.[13] Consistent with this requirement that a federal hearing supplement state proceedings, the statute further provides that any federal action shall be deferred until the petitioner has exhausted his state remedies.[14] But the legislation also codifies a Supreme Court case which stated that the doctrine of exhaustion is one of comity, not jurisdiction.[15] Thus federal courts may ignore the exhaustion requirement when there exist "circumstances rendering such process [at the state level] ineffective to protect the rights of the prisoner." [16]

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[8] 276 F. Supp. at 752.

[9] *Id.* at 753.

[10] United States *ex rel.* Gockley v. Myers, 411 F.2d 216 (3d Cir.), *cert. denied,* 396 U.S. 847 (1969).

[11] *Id.* at 219.

[12] 28 U.S.C. § 2241 (1964), *as amended,* 28 U.S.C. § 2241(d) (Supp. IV, 1969).

[13] 28 U.S.C. § 2254(d) (Supp. IV, 1969). This section provides that the evidence as adduced at the state level shall be deemed correct unless it appears that (1) the merits of the factual dispute were not resolved in the state court hearing; (2) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (3) the material facts were not adequately developed at the state court hearing; (4) the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding; (5) the applicant was an indigent and the state court failed to appoint counsel to represent him in the state court proceeding; (6) the applicant did not receive a full, fair, and adequate hearing in the state court; (7) the applicant was otherwise denied due process of law in the state court; or (8) the federal court, having considered that part of the record which is said to support the disputed factual issue, concludes that the factual determination contained therein is not fairly supported by the record. These provisions essentially codify the criteria established in Townsend v. Sain, 372 U.S. 293 (1963).

[14] 28 U.S.C. §§ 2254(b)-(c) (Supp. IV, 1969).

[15] *Ex parte* Hawk, 321 U.S. 114 (1944).

[16] 28 U.S.C. § 2254(b) (Supp. IV, 1969). The relevant language was first enacted in 1948. Act of June 25, 1948, ch. 646, § 2254, 62 Stat. 967. Judicial development both before and after the enactment of the statute recognized the special circum-

The court of appeals in *Gockley* did ignore this requirement, and held that the petitioner was entitled to a hearing in the federal district court on the voluntariness of his confession, notwithstanding the availability of a state remedy under the Pennsylvania Post Conviction Hearing Act.[17] Although the court's conclusion is correct, its reasoning is clouded with unconvincing arguments which detract from the strongest point of the decision.

A. United States *ex rel.* Singer v. Myers

First, the majority incorrectly relied on the recent Supreme Court decision in *United States* ex rel. *Singer v. Myers*,[18] which reversed in a brief per curiam opinion the Third Circuit's denial of a habeas corpus petition. A sketch of the history of the *Singer* case is necessary to see the Third Circuit's error.

In *Singer*, the district court first faced with the petition held a hearing and determined from the record that as a matter of federal law Singer's confession was involuntary.[19] Thus, no facts were at issue in the case. However, the Third Circuit, citing *Jackson v. Denno*[20] and *Case v. Nebraska*,[21] reversed the action of the district court granting the hearing, thus obliging the petitioner to take his case to the Pennsylvania state courts for a hearing on the voluntariness of his petition under the Pennsylvania Post Conviction Hearing Act, which became effective in March 1966—after his appeals in the state courts.[22] The Supreme Court in turn reversed this appellate action in a cryptic opinion providing no rationale other than citations to *Jackson* and *Roberts v. LaVallee*.[23] However, an investigation of these cases does afford an explanation for the Court's action.

Jackson v. Denno held that a criminal defendant is constitutionally entitled to have the voluntariness of his confession determined by a tribunal other than the jury which will determine his guilt or innocence. But *Jackson* also held that, since there were disputed issues of fact which would determine whether the confession was indeed voluntary and since the state had an interest in passing on these issues, the hearing to which Jackson was entitled should be held in state court.[24]

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stances exception to the exhaustion requirement. *See, e.g.*, Bowen v. Johnston, 306 U.S. 19, 27 (1939); Fulwood v. Stone, 394 F.2d 939, 942 (D.C. Cir. 1967); United States v. Follette, 275 F. Supp. 548, 553 (S.D.N.Y. 1967).

17 PA. STAT. ANN. tit. 19, §§ 1180-1 to -14 (Supp. 1969).

18 392 U.S. 647 (1968).

19 United States *ex rel.* Singer v. Myers, 260 F. Supp. 91 (E.D. Pa. 1966), *vacated*, 384 F.2d 279 (1967), *rev'd*, 392 U.S. 647 (1968).

20 378 U.S. 368 (1964).

21 381 U.S. 336 (1965).

22 United States *ex rel.* Singer v. Myers, 384 F.2d 279 (3d Cir. 1967), *rev'd*, 392 U.S. 647 (1968).

23 389 U.S. 40 (1967).

24 378 U.S. at 392-96.

Thus, by citing *Jackson* in its opinion in *Singer,* the Supreme Court was pointing out that in *Singer* no facts were in dispute and referral to the state courts was unnecessary.

This interpretation of the *Singer* Court's intention receives additional support from an examination of *Roberts v. LaVallee.* In *Roberts,* the question presented by the habeas corpus petition was whether an indigent defendant is entitled to a free transcript of a preliminary hearing. Roberts had raised the issue in an unsuccessful attempt to appeal his conviction to the New York Court of Appeals. In reversing the Second Circuit's decision to remit Roberts to the New York courts for his remedy (New York had since held that in such a case a defendant was entitled to a transcript[25]), the Supreme Court stated that since Roberts had once exhausted his state remedies on precisely the issue then being considered, and because the issue was predetermined by federal law,[26] repetitious state appeals were not necessary. The Court found no state interest in a further hearing on an issue already settled as a matter of law. Thus the *Singer* Court's citation to *Roberts,* together with the citation to *Jackson,* was intended to indicate that remission of a petitioner to a state court is unjustified when factual issues are not in dispute.

Given this interpretation of *Singer,* the *Gockley* majority's reliance on the case to justify a federal hearing is misplaced. The facts surrounding Gockley's confession were in dispute and not fully developed at the state level;[27] the record of the proceedings below was insufficient to support a legal conclusion concerning the voluntariness of Gockley's confession.

The situations in *Singer* and *Gockley* can also be distinguished on the basis of the procedures the petitioners went through before applying to the federal courts. Unlike Gockley, Singer attempted to have his confession considered under the old Pennsylvania habeas corpus proceedings and was turned down by the appellate courts.[28] Under the doctrine of *Brown v. Allen,* [29] a petitioner need only present his issue once before the highest state court in order to have exhausted his state remedies within the meaning of section 2254.[30] Thus, if before passage of the Pennsylvania Post Conviction Act a petitioner had been denied a state hearing, arguably his state remedies were exhausted, even though he might obtain a hearing after passage of the Act. In *Gockley,* however, this argument is unavailable, since the

[25] People v. Montgomery, 18 N.Y.2d 993, 224 N.E.2d 730, 278 N.Y.S.2d 226 (1966).

[26] 389 U.S. at 42; *see* Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[27] 411 F.2d at 218.

[28] Commonwealth *ex rel.* Singer v. Myers, 206 Pa. Super. 559, 213 A.2d 685 (1965) (allocatur refused by the Supreme Court of Pennsylvania).

[29] 344 U.S. 443 (1953).

[30] *Id.* at 447; *see* text accompanying note 16 *supra.*

state supreme court was never presented with the voluntariness issue. Thus *Singer* cannot be the basis for a federal evidentiary hearing for Gockley.

B. *Crossing the Threshold*

The *Gockley* court also reasoned that because the district court held a hearing and determined that Gockley had not waived his right to object to the use of his statements, "[t]he Federal courts . . . crossed the threshold to the issue of voluntariness," [31] and should therefore determine that issue as well. This argument fails on two grounds. First, the federal courts have been most ingenious in referring cases to the states for failure to exhaust state remedies, even after hearings have been held in the district court.[32] There is no threshold beyond which the federal courts have been compelled to determine an issue. Second, the issue of waiver is a question which may properly be given consideration by a federal court before a case is sent back to the state for an evidentiary hearing, since there is no compelling reason to have the issues decided together. The two issues can be severed with only minor procedural problems. Thus the court's "threshold" argument also fails to justify the federal hearing.

C. *Ineffective Remedy*

The court's primary ground for decision was a "special circumstances" rationale.[33] Essentially, the court felt that the petitioner had waited too long for his relief to justify another journey to the state courts.

The appropriateness of this approach depends upon the court's interpretation of the special circumstances rationale—an interpretation unfortunately not made clear. The articulated basis for the court's action is that:

> The requirement that a habeas corpus applicant exhaust his State court remedies, now embodied in 28 U.S.C. § 2254, is a principle of comity and does not rise to jurisdictional proportions. If the case is sufficiently exceptional the doctrine need not be rigidly followed to the point of inflicting manifest injustice.[34]

Perhaps these words mean that the court was acting in conformity with section 2254(b), finding no need for exhaustion because of "the existence of circumstances rendering [state] process ineffective

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[31] 411 F.2d at 219.

[32] *E.g.*, Henderson v. Dutton, 397 F.2d 375 (5th Cir. 1968); Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965). *Contra,* Roberts v. LaVallee, 389 U.S. 40 (1967); Pope v. Harper, 407 F.2d 1303 (9th Cir. 1969).

[33] 411 F.2d at 219.

[34] *Id.*

to protect the rights of the prisoner." However, this is unlikely for several reasons.

Initially, it should be noted that the court did not expressly follow the statute. It would be unusual for a court to rely upon statutory language without reference to that language. But even if the court intended to be interpreting the statute, the facts of *Gockley* do not fit within its language.

First, the *Gockley* court may have been looking to the five year delay prior to the instant proceeding to justify a finding of "ineffectiveness." However, since section 2254(b) requires the federal court to determine whether an available state proceeding will afford petitioner "effective" protection of his rights, past proceedings and delay should be relevant only when they shed light on the probable effectiveness of future state proceedings. It is no doubt true that prior delay in the state system may well indicate that more delay in the same system is likely; the state proceeding will presumably take longer than the federal proceeding, and thus the state proceeding will be relatively ineffective in protecting petitioner's rights. But *Gockley* was delayed five years while in the federal system; this delay is irrelevant in assessing the delay likely to be experienced on return to the state. In the absence of evidence to the contrary, the delay in *Gockley* should be taken as evidence that the federal court is slow in its relief and that the state procedure should, in this instance, be preferred.

Perhaps it could be argued that any future delay is relevant in determining whether section 2254(b) applies, insofar as a state court might take longer in affording relief to a petitioner than would a federal court. This interpretation considers only the possible delay after the case has been returned to the state. It is not concerned with delay experienced prior to the instant federal proceeding. In such a situation, one might say that the state remedy, because so slow to materialize, is "ineffective." But even assuming this to be a proper reading of the statutory language, it would not justify the result in *Gockley*. The *Gockley* court offered no evidence that relief for petitioner upon referral to the state would take longer than if the case were kept in a federal court. Furthermore, a concern for future delay, even if such delay were provable, would be an unwise basis for decision. It may be true that in almost all cases a petitioner already in federal court will obtain relief somewhat more quickly by remaining in federal court than by starting again in the state system. However, if this possibility justified dispensing with the exhaustion requirement, then the exception to section 2254(b) would become the rule, and the congressional attempt to prevent federal courts from entering a controversy until the state had an adequate opportunity to deal with it would be futile.

Finally, one might argue that in a case involving egregious past delay plus the prospect of future delay in moving to the state forum,

remitting a petitioner to the state court would render the whole proceeding an ineffective remedy.

However, since, as shown above, the separate elements should not properly be considered in determining effectiveness, this is essentially a "fairness" argument and is treated as such in the succeeding section.

D. *Special Circumstances*

A more likely interpretation of what the court was doing focuses on the intent of Congress in passing section 2254. The *Gockley* court stated that the exhaustion requirement now embodied in section 2254 is one of comity, not jurisdiction.[35] Implicit in this statement is the suggestion that the statute did not set forth all possible exceptions to the exhaustion rule, and thus federal courts are not required to act only within the strict statutory framework. It is clear that relief is in order if the facts fall within the statutory exception. But if the interpretation suggested here is correct, then even if the circumstances do not fit the statutory exceptions (as in *Gockley*), the court is free to consider whether relief should be granted. In other words, by embodying the "comity" concept, the statute leaves some discretion in federal judges to deal with situations not within the specific statutory exceptions.[36]

Given the background of section 2254, this reading is entirely plausible. The section was enacted to codify the exhaustion doctrine developed by the Supreme Court;[37] an important part of that doctrine was the principle that the exhaustion requirement imposed no jurisdictional barrier to a grant of habeas corpus relief. The requirement was merely a recognition that it was wise to defer to a state court remedy when such relief was available.[38] Thus, although the statutory exception was undoubtedly fashioned to cover the vast majority of cases, there is good reason to believe that it should not be read as exclusive: There is nothing to indicate that Congress intended to tighten the exhaustion doctrine from the status of comity to the strictness of jurisdiction.

Examination of the "exceptional circumstances" cases which have arisen subsequent to the enactment of section 2254 reinforces this

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[35] *Id.*

[36] A similar process of statutory interpretation was used by the Court of Claims in a tax case. *Compare* American Potash & Chemical Corp. v. United States, 399 F.2d 194 (Ct. Cl. 1968), *with* INT. REV. CODE OF 1954, § 334(b)(2).

[37] This doctrine has been set out in *Ex parte* Hawk, 321 U.S. 114, 116-17 (1944). The House report on section 2254 states: "This new section is declaratory of existing law as affirmed by the Supreme Court (See *Ex parte* Hawk, 1944, 64 S. Ct. 448, 321 U.S. 114, 88 L.Ed. 572)." H.R. REP. No. 308, 80th Cong., 1st Sess. A 180 (1947).

[38] The doctrine that federal courts had the power to act prior to state proceedings but should only do so in special circumstances was established in *Ex parte* Royall, 117 U.S. 241 (1886). *See also* Cook v. Hart, 146 U.S. 183 (1892); *In re* Wood, 140 U.S. 278 (1891).

interpretation. Virtually none of these cases speak in terms of the statutory language. References to section 2254 are made in passing, with no attempt strictly to apply the particular statutory language.

Typical of this approach is *Bacom v. Sullivan*.[39] Petitioner had not applied for certiorari to the Supreme Court of the United States after the Florida Supreme Court dismissed his appeal in a state habeas proceeding. The court found "unique and extraordinary circumstances" sufficient to merit federal review. In articulating the special circumstances exception, the court said:

> The rule just referred to, however, [exhaustion of state remedies] is not an inflexible one. In the Darr case, at 339 U.S. 210 [1950], it is further said: "Ex parte Hawk, 321 U.S. 114 [1944], prescribes only what should 'ordinarily' be the proper procedure; all the cited cases from Ex parte Royall, 117 U.S. 241 [1886], to Hawk recognize that much cannot be foreseen, and that 'special circumstances' justify departure from rules designed to regulate the usual case. The exceptions are few but they exist. Other situations may develop." Thus it appears that the general rule of the Darr case is not intended as an absolute.[40]

No reference was made to section 2254.[41]

Although most of the special circumstances cases have adhered to the statutory standard without articulating its applicability,[42] the *Gockley* court's excursion beyond the statute is not unprecedented. In *Bacom*, the court was in part motivated to grant relief because petitioner's post conviction proceedings had been going on for four years.[43] In *Dove v. Peyton*,[44] the court granted relief even though petitioner had not urged one of the grounds for relief upon the state courts. The court said:

> [W]e think all of the grounds now urged, with one exception, were put before the State court on the criminal appeal and overruled. The exception is the complaint about the adjournment of the criminal trial. For this single omission Dove

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[39] 194 F.2d 166 (5th Cir. 1952).

[40] *Id.* at 167.

[41] *See also* Fulwood v. Stone, 394 F.2d 939 (D.C. Cir. 1967); Ross v. Middlebrooks, 188 F.2d 308 (9th Cir. 1951); Johnson v. Walker, 199 F. Supp. 86 (E.D. La. 1961); Soulia v. O'Brien, 91 F. Supp. 965 (D. Mass. 1950). *But see* Thomas v. Teets, 205 F.2d 236 (9th Cir. 1953).

At the time *Bacom* was decided, the language of § 2254 concerning exceptions to the exhaustion requirement was identical to the present statutory language. *Compare* 28 U.S.C. § 2254 (Supp. V, 1952), *with* 28 U.S.C. §§ 2254(b)-(c) (Supp. IV, 1969); *see* note 16 *supra*.

[42] *See, e.g.*, Mobley v. Dutton, 380 F.2d 14 (5th Cir. 1967); United States *ex rel.* Grabousky v. Myers, 229 F. Supp. 702 (E.D. Pa. 1964).

[43] 194 F.2d at 168.

[44] 343 F.2d 210 (4th Cir. 1965).

> should not be required to retrace his steps through the State courts.[45]

Inconvenience to petitioner is indeed unfortunate, but it is not a statutory exception to the exhaustion doctrine.

The *Gockley* court did not go very far beyond the statute. *Gockley* does not stand for the broad proposition that whenever a petitioner can show delay in his proceedings, the exhaustion requirement need not be met. The court was precise in its description of the circumstances justifying relief:

> It would be grossly unjust to the petitioner at this stage of the case to render nugatory all of the proceedings in the Federal courts on the ground that he failed to exhaust his state remedies, which if it was a barrier should have been evident when his petition was filed almost five years ago.[46]

The court also referred to "the lack of a serious claim by the Commonwealth on the availability of state remedies" [47] as a factor combining with the lapse of time to justify relief. Thus the court pointed to a particular situation as appropriate for relief: Where petitioner's substantial delay in obtaining relief results from the failure of the state to raise the exhaustion issue in the first place and the failure of the courts adequately to deal with it, the state and the federal courts should be precluded from using the exhaustion doctrine to delay petitioner further. The *Gockley* case presents a very narrow venture beyond the confines of section 2254.

But given that the court's opinion rests upon a discretionary finding of unusual circumstances not strictly authorized by statute, the appropriateness of the court's result depends upon whether this discretion was wisely exercised. One major criticism of the wisdom of the decision which could be made is that it contravenes a strong policy in favor of utilizing available state post conviction remedies. In response to a call from the Supreme Court of the United States for increased state post conviction remedies,[48] many states have passed statutes providing hearings in which state prisoners can assert their constitutional claims.[49] As a result, the ever-increasing burden on the federal courts of many habeas corpus petitions [50] should be lightened.

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[45] *Id.* at 213.

[46] 411 F.2d at 219.

[47] *Id.*

[48] Case v. Nebraska, 381 U.S. 336, 337 (1965) (Clark, J., concurring); *id.* at 346-47 (Brennan, J., concurring); Young v. Ragan, 337 U.S. 235 (1949).

[49] *E.g.*, ILL. ANN. STAT. ch. 38, §§ 122-1 to -7 (Smith-Hurd 1964), *as amended*, ILL. ANN. STAT. ch. 38, §§ 122-1 & -4 (Smith-Hurd Supp. 1970); NEB. REV. STAT. §§ 29-3001 to -3004 (Supp. 1965); PA. STAT. ANN. tit. 19, §§ 1180-1 to -14 (Supp. 1969).

[50] H.R. REP. No. 1892, 89th Cong., 2d Sess. 18-35 (1966).

Accordingly, when interpreting section 2254(c), which provides:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the state to raise, by any available procedure, the question presented,

the courts have held that failure to act under available state post conviction statutes is a basis for denying a federal habeas corpus petition.[51] This construction of the statute gives the greatest effect to state statutes having a potentially beneficial effect on federal-state relations. Furthermore, to allow the states to correct any errors in their criminal processes before burdening the federal court is good judicial policy.[52]

However, the *Gockley* court's narrow holding does not significantly contravene that interest and is supported by strong policy. Certainly this sort of special circumstances exception to the exhaustion doctrine will encourage state courts to offer their criminal defendants a fair and prompt disposal of their claims in order to avoid having the matter taken out of state hands. The states will be very careful to assert all the grounds in defense to a habeas corpus petition at an early stage. The exception will in no way discourage use of or adoption of post conviction remedies by the states, since the states are assured that in the vast majority of cases, their procedure will be allowed full operation.[53] The extra burden imposed on federal courts is likely to be slight, since few cases will present the requisite facts. Most important, petitioner now avoids reentry onto the state procedure treadmill leading ultimately to a hearing on voluntariness. Instead, he remains in the federal system and receives a quick and expeditious hearing on voluntariness.[54] Individual justice has been done at no expense to principles of federalism.[55]

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[51] *E.g.*, Case v. Nebraska, 381 U.S. 336 (1965); United States *ex rel.* Rybarik v. Maroney, 406 F.2d 1055 (3d Cir. 1969); Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968); Peters v. Rutledge, 397 F.2d 731 (5th Cir. 1968); United States *ex rel.* Anderson v. Rundle, 393 F.2d 635 (3d Cir. 1968); Gray v. Wingo, 391 F.2d 268 (6th Cir. 1967). *But see* Morgan v. Tennessee, 298 F. Supp. 581 (E.D. Tenn. 1969).

[52] Peters v. Rutledge, 397 F.2d 731, 735-40 (5th Cir. 1968).

[53] The one drawback to this approach is the vast discretion it vests with the federal judge. Merely by labeling a case "special," the judge can take control of the evidentiary hearing. However, this is not an exorbitant price to pay for the flexible opportunity to do justice which the approach offers.

[54] The court's answer to the special circumstances presented in *Gockley* assumes that the federal hearing will take place more rapidly than a corresponding state hearing. This would certainly be a relevant consideration in a court's decision on where to hold a hearing. Evidence rebutting this assumption would give the state a powerful argument for asserting control over the case.

[55] Judge Biggs's dissent reasons that since the delay was caused by appointed counsel and not the state, the state ought not to be charged with the burdens of this delay. 411 F.2d at 224. However, where the blame for delay is to rest is irrelevant once it has been determined that the blame does not lie with the petitioner. A blameless petitioner should not be burdened by anyone else's fault.

CONCLUSION

In *Gockley,* the strong policy favoring resolution of issues via state post conviction procedures yields neither to a general rule concerning evidentiary hearings nor to a statutory mandate, but to the specific policy considerations of an individual case. The weakness of the decision lies in its failure properly to justify its result. By discussing *Singer* and the "threshhold" rationale, the court detracts from and clouds what this Comment asserts is the real issue—application of a special circumstances test. Moreover, its use of that test, although proper, is diluted by the failure to articulate its approach adequately. *Gockley* offers hope for those petitioners caught in a web of procedural delay. But its significance depends upon the extent to which future courts are able to pierce the veiled reasoning on which that hope rests.