Oklahoma Law Review

Volume 58 | Number 1

2005

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Recommended Citation

Joshua D. Smith, *Habeas Corpus: Expired Conviction, Expired Relief: Can the Writ of Habeas Corpus Be Used to Test the Constitutionality of a Deportation Based on an Expired Conviction?*, 58 OKLA. L. REV. 59 (2005),
https://digitalcommons.law.ou.edu/olr/vol58/iss1/5

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Habeas Corpus: Expired Conviction, Expired Relief: Can the Writ of Habeas Corpus Be Used to Test the Constitutionality of a Deportation Based on an Expired Conviction?*

I. Introduction

Aliens may become subject to removal from the United States for a variety of reasons, one of the most common of which is conviction of a crime.[1] Congress has designated a list of crimes known as "aggravated felonies" that are deportable offenses.[2] While these crimes are referred to as aggravated felonies, in many situations the designation is a misnomer as the list includes some offenses that seem quite minor and some that are not even felonies under state law.[3] For instance, the Immigration and Naturalization Service (INS) ordered Trevor Drakes, a native of Guyana, to be removed after being convicted of forgery for signing traffic tickets using a false name.[4] Errol Broomes, a native of Barbados, was subject to deportation based on a conviction for attempted sale of a controlled substance.[5] Asfaw Abtew, a native of Ethiopia, became deportable upon conviction of a sexual offense that warranted only a sentence of probation.[6]

Each of these men previously had attained lawful permanent resident status, which means that they were in the United States legally, and, absent their convictions, would have been allowed to remain indefinitely.[7] Also, each agreed to plead guilty to his respective charges to receive a reduced sentence, but only Drakes was warned that his conviction might result in removal from the United States.[8] Neither Abtew nor Broomes was aware that his guilty plea could lead to deportation.[9] While guilty pleas afforded reduced sentences to these individuals, in each case their reduced sentences created a procedural anomaly that eliminated any opportunity to have their convictions reviewed for

* The author would like to thank Professors Michael Scaperlanda and Joseph Thai for their insight and guidance on the development of this comment.

1. *See* 8 U.S.C. § 1227(a)(2) (2000).

2. *Id.* § 1101(a)(43).

3. *See* Douglas S. Weigle, *Criminal Aliens Under IIRAIRA, in* 1 IMMIGRATION & NATIONALITY LAW HANDBOOK 351, 355 (Randy P. Auerbach ed., 2001-02).

4. Drakes v. INS, 330 F.3d 600, 601 (3d Cir. 2003).

5. Brief of Appellants at 7, Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004) (No. 03-1063), *cert. denied*, 125 S. Ct. 809 (2004).

6. *Id.* at 5.

7. *See Drakes*, 330 F.3d at 601 n.1; Brief of Appellants at 5, 7, *Broomes* (No. 03-1063).

8. *Drakes*, 330 F.3d at 601; Brief of Appellants at 6, 7, *Broomes* (No. 03-1063).

9. Brief of Appellants at 6, 7, *Broomes* (No. 03-1063).

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constitutional deficiencies by a federal court on writ of habeas corpus.[10] Because an individual must both exhaust state remedies and be in custody to be eligible for habeas relief,[11] a shorter sentence may result in an abbreviated period during which a person may file for habeas review. For example, Abtew was unable to complete the lengthy and complicated state appeal and collateral review processes before he completed his term of probation.[12] In this situation, habeas review might not be available if the federal court determines that the alien is no longer in custody pursuant to the conviction for which he is being deported. Accordingly, although a reduced sentence typically benefits a criminal defendant, it effectively eliminates the availability of a procedure to review the constitutionality of the conviction. Under these circumstances, an alien-defendant, whose defense counsel has not discussed the deportation issues associated with a conviction and likely has encouraged the alien to plead guilty, forfeits his only opportunity to have a federal judge determine whether his conviction was in accord with the U.S. Constitution.

The writ of habeas corpus has been a bulwark in the common law of both England and the United States for centuries.[13] The Great Writ, as it is commonly known, has withstood centuries of jurisprudence and is generally recognized as the primary remedy to restore liberty to a person from whom it has been unlawfully deprived.[14] Congress codified the writ of habeas corpus in 28 U.S.C. § 2241[15] and, specifically regarding those individuals being held under the authority of state law, in 28 U.S.C. § 2254.[16] Both of these provisions allow for the issuance of the writ in favor of an individual whose custody violates the U.S. Constitution or federal law.[17] The proliferation of recidivist statutes, however, has resulted in prosecutors using previous, expired convictions to enhance subsequent sentences. Likewise, the expansion of

10. See *infra* Part IV.E for a discussion of this procedural situation.

11. 28 U.S.C. § 2254(a), (b)(1)(A) (2000).

12. Brief of Appellants at 8, *Broomes* (No. 03-1063).

13. The English were using the writ of habeas corpus within a century of the Norman Conquest in 1066. RONALD P. SOKOL, FEDERAL HABEAS CORPUS 3 (1969).

14. *See id.* at 13 ("*Bushell's Case* in 1670 declared that the writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty if he hath been against law deprived of it . . . .") (internal quotations omitted); *see also* Carafas v. LaVallee, 391 U.S. 234, 238 (1968); Fay v. Noia, 372 U.S. 391, 401-02 (1963).

15. 28 U.S.C. § 2241 (2000).

16. *Id.* § 2254.

17. "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . ." *Id.* § 2241(c)(3). A federal court may entertain an application for habeas relief by 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." *Id.* § 2254(a).

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conviction-related bases for deportation has enabled immigration officials to commence removal proceedings based on previous convictions, many of which may expire before the alien has an opportunity to mount a habeas challenge.

In response, the individuals subject to recidivist or deportation statutes have sought relief from these penalties via writs of habeas corpus to challenge the validity of the prior convictions, in the absence of which there would be a reduced penalty or no penalty at all. Once the judicial process has run its course and the individual is no longer subject to sanctions based on these convictions, however, the courts have struggled to determine whether the individual is "in custody," a prerequisite to habeas relief, and, if petitioners are in custody, whether they should be allowed to challenge an expired conviction on writ of habeas corpus.[18] Challenging expired convictions being used for sentence enhancement has been discussed at some length, and the U.S. Supreme Court examined these issues as recently as 2001.[19] The Supreme Court, however, has not yet decided this issue in the context of a deportation proceeding based on an expired conviction, which, if overturned on writ of habeas corpus, would vitiate the basis of removal.[20]

With the increase in foreign travel, as well as the escalation in detentions of aliens through the war on terror, properly applying the writ of habeas corpus in the deportation context is critical.[21] For many aliens, the writ of habeas corpus may provide the only opportunity to challenge the constitutionality of their detentions and deportation.[22] Accordingly, this comment will argue that: (1) federal courts have jurisdiction to review the validity of an expired conviction on writ of habeas corpus when that conviction is the sole basis of removal proceedings; (2) the lower federal courts have erred in applying the sentence-enhancement cases by analogy; and (3) the writ of habeas corpus is the proper mechanism for an alien to challenge deportation in such circumstances.

Part II of this comment briefly outlines the procedural and developmental issues of deportation that are necessary to conceptualize the importance of the availability of the writ of habeas corpus. First, this part discusses the basics of deportation procedure, with particular attention given to aggravated felonies, for which a lawful permanent resident may become subject to removal. Next, Part

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18. *See, e.g.*, Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001); Daniels v. United States, 532 U.S. 374 (2001); Custis v. United States, 511 U.S. 485 (1994); Maleng v. Cook, 490 U.S. 488 (1989).

19. *See generally Coss*, 532 U.S. 394; *Daniels*, 532 U.S. 374.

20. *See* Drakes v. INS, 330 F.3d 600, 603 (3d Cir. 2003) (applying *Daniels* and *Coss* in the absence of a decision on this particular issue).

21. SOKOL, *supra* note 13, at 61-62.

22. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("[Deportation] may result also in loss of . . . all that makes life worth living.").

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II examines the gravity of removal as imposed on lawful permanent residents and indicates that the seriousness of the sanction calls for proper forums to ensure the validity of the basis of the sanction itself.

Part III analyzes the development of the writ of habeas corpus in American jurisprudence. This part first examines the purpose and history of the writ, particularly focusing on the custody requirement, as well as the expansive view taken by the Supreme Court during the 1960s in determining when petitioners may employ the writ. Next, Part III presents the Rehnquist Court's treatment of the writ and how it has limited the availability of the writ's use to challenge expired criminal convictions. Part III also discusses how the lower federal courts are applying these Supreme Court cases, particularly focusing on the application of the rules to aliens who seek to challenge expired convictions that serve as the predicate for removal from the United States. Finally, Part III examines the cases involving Asfaw Abtew and Errol Broomes, which were decided by the Tenth Circuit in 2004.

Part IV argues that the writ of habeas corpus is the proper remedy for an alien seeking to challenge deportation based on an expired, unconstitutional conviction. This part first examines the jurisdiction of the federal courts to hear these claims and whether the petitioner in this type of case is "in custody." Second, Part IV argues that the application of the Supreme Court's reasoning in sentence-enhancement cases to deportation cases is inappropriate and that deportation cases present distinct issues that must be considered independently. Third, this part argues that ease of administration and finality of judgments, the primary interests that the Supreme Court has raised in refusing to allow this type of challenge in sentence-enhancement cases, should not operate to prevent an alien from challenging deportation based on expired convictions. The fourth subpart briefly discusses the federal interest in comity and how that interest is protected by the requirement that state remedies be fully exhausted before filing for writ of habeas corpus. Next, Part IV elaborates on the procedural difficulty that arises if aliens are not allowed to challenge their convictions using habeas corpus when their convictions expire before they are able to exhaust the available state law remedies. The final subpart provides a possible solution to this situation and discusses the applicability of the doctrine of equitable tolling to extend the period during which an alien may file for habeas relief.

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II. Fundamentals of Deportation

A. The Process of Removal

Lawful permanent residents are the most protected group of aliens under the Immigration and Nationality Act (INA).[23] Lawful permanent residents receive benefits from both state and federal government programs such as Social Security, are required to register with the Selective Service, and can become eligible for citizenship after five years of U.S. residency.[24] Additionally, a lawful permanent resident may be removed only for affirmative misconduct.[25]

A lawful permanent resident also becomes deportable, among other reasons, upon conviction for an aggravated felony.[26] Initially, as introduced by the Anti-Drug Abuse Act of 1988,[27] the term "aggravated felony" was limited to serious crimes including murder and drug trafficking.[28] The Anti-Drug Abuse Act also introduced special procedures for removal based on an aggravated felony, requiring the INS to complete removal proceedings before aliens finish their sentences for the aggravated felony conviction. If the INS is unable to complete the proceedings before the expiration of the aliens' sentences, then the Attorney General must take custody of the aliens until they are deported.[29]

Since the passage of the INA in 1952, Congress has continually broadened the crimes for which an alien may be deported.[30] An alien becomes deportable upon conviction of an "aggravated felony."[31] Only two years after passing the Anti-Drug Abuse Act, Congress first expanded the list of aggravated felonies in the Immigration Act of 1990.[32] The Immigration Act included offenses that

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23. Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135, 145 (2002).

24. *Id.* at 144-45.

25. *Id.* at 145.

26. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

27. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 5, 8, 10, 12, 15, 16, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 31, 38, 41, 42, 43, 48, and 49 U.S.C. (2000)).

28. Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 299 (2003).

29. *Id.*

30. *Id.* at 298.

31. 8 U.S.C. § 1101(a)(43).

32. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 and 42 U.S.C. (2000)).

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were significantly less serious than those on the previous list, such as lesser drug crimes and crimes of violence that warranted imprisonment for five years.[33] The Immigration Act also eliminated the possibility for certain aggravated felons to receive discretionary relief, which allowed the Attorney General to grant a waiver of deportation based on mitigating facts such as the length of the alien's residence in the United States and the effect of deportation on the alien's family.[34]

In 1996, Congress once again expanded the list of aggravated felonies through the Antiterrorism and Effective Death Penalty Act.[35] Currently, qualification as an "aggravated felony" is generally based on either the type of crime or the sentence required for the crime.[36] The list includes offenses one might not expect to be considered aggravated felonies, including some offenses that are misdemeanors under state law.[37] For example, a lawful permanent resident becomes subject to removal proceedings for misdemeanor battery, writing a bad check, or even shoplifting.[38]

After a lawful permanent resident is convicted for an aggravated felony, the removal process begins with the adjudication of deportability by an immigration judge, whose removal orders may be appealed to the Board of Immigration Appeals.[39] Although aliens have no constitutional right to an attorney during the removal proceedings,[40] aliens do maintain a statutory right to hire counsel at their own expense for the removal proceedings.[41] A removal order that is affirmed by the Board of Immigration Appeals becomes final.[42] While most orders of removal are subject to petition for review by a federal court of appeals, a lawful permanent resident who becomes removable as a result of conviction of an aggravated felony has no opportunity to petition for review.[43] Additionally, an alien's removal on this basis results in lifetime exclusion from the United States.[44] Despite the inability of an alien convicted of an aggravated

33. Cook, *supra* note 28, at 299-300.

34. *Id.* at 301.

35. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 19, 21, 22, 28, 40, 42, and 49 U.S.C. (2000)).

36. Weigle, *supra* note 3, at 355.

37. *Id.*

38. Cook, *supra* note 28, at 294.

39. Bibring, *supra* note 23, at 146.

40. Pietre v. Bintz, No. 9:01CV0260DNHGLS, 2003 WL 1562273, at *3 (N.D.N.Y. Mar. 25, 2003).

41. *Id.*

42. Bibring, *supra* note 23, at 146.

43. *Id.*

44. *Id.* at 147.

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felony to petition for review, the U.S. Supreme Court has held that stripping an alien of the opportunity for judicial review does not eliminate the jurisdiction of federal district courts to consider questions of law regarding removal orders on writ of habeas corpus.[45]

B. The Harshness of Deportation

Since deportation has been in use, it has commonly been understood as a serious measure. "As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted."[46] The gravity of removal from the United States is magnified when imposed upon a lawful permanent resident, who is likely to have significant connections with this country.[47] Moreover, when an alien's removal is based on a relatively minor crime, deportation is a disastrous, and often disproportional result.[48] Lawful permanent residents often have established careers and families to support in the United States, and deportation may be tantamount to banishment from the nation that the alien considers home.[49] Indeed, deportation is often a more severe punishment to the lawful permanent resident than the criminal sentence they received.[50]

Because of the harshness of deportation and the breadth of crimes for which it is available, it is important to ensure that the bases of these deportations are valid.[51] Because an alien convicted of an aggravated felony is not afforded the

45. INS v. St. Cyr, 533 U.S. 289, 312-14 (2001).

46. Fong Yue Ting v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting).

47. Bibring, *supra* note 23, at 135. See, for example, *Nguyen v. INS*, 533 U.S. 53 (2001), in which the petitioner, who was subject to deportation for an aggravated felony, had been born in Vietnam to an unmarried couple. Nguyen's father was an American citizen and his mother was a Vietnamese citizen. *Id.* at 57. Nguyen was twenty-eight at the time the immigration judge found him deportable, and he had been living with his father in the United States since before his sixth birthday. *Id.*

48. *See* Bibring, *supra* note 23, at 135.

49. Cook, *supra* note 28, at 301. Multiple commentators have recounted the unfortunate circumstances of the deportable individuals. *See*, *e.g.*, *id.* at 302 (recounting the story of a man's deportation to Columbia despite having lived in the United States since the age of two years, not being able to speak Spanish, and having registered with the Selective Service); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, 29-30 (2003) (relating an account of an alien becoming deportable for assisting a friend, who was in the United States unlawfully, in finding an apartment); *see also supra* note 47 and accompanying text.

50. Cook, *supra* note 28, at 293.

51. This comment is not intended to make a normative judgment on Congress's use of its power to define the realm of deportable offenses. In fact, there are many instances when removal is an appropriate result for an alien's misconduct. Rather, this discussion is necessary

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opportunity to petition for review of the order of removal,[52] the writ of habeas corpus stands as the only mechanism available to a lawful permanent resident to test the constitutionality of removal.

III. Evolution of the Writ of Habeas Corpus

A. History and the Purpose of the Writ of Habeas Corpus

The American legal system recognized the writ of habeas corpus as early as 1692 when South Carolina adopted the English Habeas Corpus Act of 1679.[53] The writ also received attention in the U.S. Constitution.[54] Subsequently, however, the writ of habeas corpus has been a creature of federal statute, and Congress has determined the means by which a writ of habeas corpus shall issue as well as its use.[55] The extension of the writ to those held in state custody was a product of the Reconstruction Era habeas corpus statute.[56]

In the United States, the nature and purpose of the writ of habeas corpus has remained "remarkably constant."[57] In fact, the descriptive diction changed very little from the days of Chief Justice Marshall[58] to those of Justice Holmes.[59] In recent history, the primary function of the writ of habeas corpus has been to serve as postconviction review.[60] Habeas corpus has become particularly salient in the realm of immigration as the traditional method of attacking orders for removal and exclusion.[61] In 1904, Justice Brewer clearly articulated the availability of habeas corpus to aliens challenging deportation by stating, "[T]he courts may and must, when properly called upon by petition in *habeas corpus*, examine and determine the right of any individual restrained of his personal liberty to be discharged from such restraint."[62]

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to recognize that deportation should not result without a complete examination of the underlying basis for such removal.

52. Bibring, *supra* note 23, at 146.

53. SOKOL, *supra* note 13, at 15.

54. "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.

55. *See* 28 U.S.C. §§ 2241-2255 (2000).

56. SOKOL, *supra* note 13, at 18.

57. Fay v. Noia, 372 U.S. 391, 402 (1963).

58. "The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.).

59. "*Habeas corpus* is the usual remedy for unlawful imprisonment." Chin Yow v. United States, 208 U.S. 8, 13 (1908) (Holmes, J.).

60. Peyton v. Rowe, 391 U.S. 54, 59 (1968) ("[I]ts major office in the federal courts since the Civil War has been to provide post-conviction relief.").

61. SOKOL, *supra* note 13, at 41.

62. United States *ex rel*. Turner v. Williams, 194 U.S. 279, 295 (1904) (Brewer, J.,

In the 1960s, the Supreme Court took an expansive view of habeas corpus, seeking to ensure that the writ remained the primary means of preventing any detention contrary to fundamental law, which the Court considered the purpose of the writ.[63] The Court's decisions extended habeas relief to: individuals released on parole;[64] individuals whose time had lapsed for application for state remedy despite the requirement that state remedies be exhausted before the availability of habeas corpus relief;[65] individuals challenging future sentences that were scheduled to run consecutively to those they were then serving;[66] and individuals whose sentences expired while their habeas petitions were pending.[67] In recognizing that "the commodity of liberty is a precious one," the Supreme Court of this era employed the writ of habeas corpus to scrutinize any restraint imposed on the liberty of a petitioner.[68]

In *Jones v. Cunningham*,[69] for example, the petitioner had been convicted in 1953 and, because this was his third conviction, was sentenced to ten years in the Virginia state prison system.[70] In 1961, he filed a writ of habeas corpus petition alleging that he had been denied his right to counsel in a trial that resulted in a 1946 conviction, which subsequently served as a basis for his ten-year sentence.[71] While his habeas proceeding was pending in the U.S. Court of Appeals for the Fourth Circuit, however, the Virginia Parole Board granted the petitioner parole.[72] The terms of the petitioner's parole made him subject to certain restrictions, including limitations on his living arrangements, travel, and ability to own a vehicle.[73] Because the petitioner was no longer subject to restraint by the superintendent of the Virginia State Penitentiary, who was the named respondent in his petition, and because the petitioner was not in the physical custody of the Virginia Parole Board, the Fourth Circuit dismissed the

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concurring).

63. *See* Carafas v. LaVallee, 391 U.S. 234 (1968); Peyton v. Rowe, 391 U.S. 54 (1968); Fay v. Noia, 372 U.S. 391 (1963); Jones v. Cunningham, 371 U.S. 236 (1963).

64. *Jones*, 371 U.S. at 243.

65. *Noia*, 372 U.S. at 398-99.

66. *Peyton*, 391 U.S. at 55.

67. *Carafas*, 391 U.S. at 238.

68. SOKOL, *supra* note 13, at 76-77.

69. 371 U.S. 236 (1963).

70. *Id.* at 237.

71. *Id.*

72. *Id.*

73. The petitioner was ordered to live with his aunt, informed that his parole was subject to revocation or modification at any time, and required to receive permission from his parole officer before leaving the area, changing residence, or owning or operating a motor vehicle. *Id.* Additionally, the petitioner was required to make monthly reports to his parole officer and permit visits to his home or place of employment by his parole officer at any time. *Id.*

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petitioner's case as moot regarding the superintendent and refused to allow the petitioner to add the parole board as a respondent.[74]

The Supreme Court, however, looked beyond the state's lack of physical control of the petitioner and recognized that the writ of habeas corpus encompassed the restrictions resulting from the petitioner's conviction and sentence.[75] In reversing the Fourth Circuit, the Court determined that the writ could do more than reach "behind prison walls and iron bars," stating that "[w]hile petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute . . . ."[76]

The same year it decided *Jones*, the Court also examined the exhaustion requirement of the habeas statute governing petitioners held in state custody.[77] In *Fay v. Noia*,[78] a New York state court had convicted the petitioner, Noia, of murder with two other defendants based solely on their signed confessions.[79] Noia forewent direct appeal, and, while appeals of the other two defendants were unsuccessful, subsequent proceedings resulted in the release of the other two defendants based on the court's determination that their confessions had been coerced and their convictions violated the Fourteenth Amendment.[80] After a lengthy examination of the history and use of the writ of habeas corpus, Justice Brennan determined that the requirement of exhaustion "is not one of defining power but one which relates to the appropriate exercise of power."[81] The Court reasoned that the proper application of the exhaustion requirement

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74. *Id.* at 237-38.

75. The Court stated:

> Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice . . . . Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution.

Id. at 242.

76. *Id.* at 243.

77. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ." 28 U.S.C. § 2254(b)(1)(A) (2000).

78. 372 U.S. 391 (1963).

79. *Id.* at 394-95.

80. *Id.* at 395.

81. *Id.* at 420 (quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939)).

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is to view it as a function of comity and a protection of federalism that is adequately addressed by giving federal judges discretion to deny relief to petitioners who have deliberately avoided consideration of their constitutional claims in state courts.[82] In Justice Brennan's view, one who has been convicted is naturally motivated to pursue any available state remedies. Justice Brennan further stated:

> Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution.[83]

The Court also declared that the availability of habeas corpus to petitioners in state custody did not hinder any legitimate state interest in enforcing criminal justice,[84] extending its holding to "all procedural hurdles to the achievement of swift and imperative justice on habeas corpus."[85]

Five years after *Jones* and *Noia*, the Court considered the application of the "in custody" requirement of the habeas statute to consecutive sentences. In *Peyton v. Rowe*,[86] decided in 1968, the habeas petitioners sought to challenge the validity of their convictions that resulted in sentences scheduled to run consecutively to sentences they were currently serving for other crimes.[87] After a rape conviction resulting in a sentence of thirty years, Robert Rowe pleaded guilty to an abduction charge for which he was sentenced to a twenty-year term scheduled to run consecutively to his prior sentence.[88] Clyde Thacker was serving a series of sentences totaling more than sixty years when he filed his habeas petition to challenge three consecutive five-year sentences, which he was not yet serving.[89] Thacker claimed these three sentences were invalid because he received inadequate counsel at the time he pled guilty.[90] The Court recognized that requiring the petitioners to wait to seek habeas relief until they were serving the sentences to be challenged, which in each case would be no

82. *Id.* at 433.
83. *Id.* at 433-34.
84. *Id.* at 440.
85. *Id.* at 435.
86. 391 U.S. 54 (1968).
87. *Id.* at 55.
88. *Id.* at 55-56.
89. *Id.* at 56-57.
90. *Id.*

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sooner than 1990, would subject the proceeding to "dimmed memories or the death of witnesses" that would "render it difficult or impossible to secure crucial testimony on disputed issues of fact."[91] This delay would be contrary to the character of the writ of habeas corpus, harming both the prisoner and the state by lessening the probability that justice would result from the proceeding.[92] Thus, the Court held that for purposes of habeas corpus relief, a petitioner is "in custody" for any sentence of a series of consecutive sentences.[93]

In *Carafas v. LaVallee*,[94] decided the same year as *Peyton*, the Court considered the case of James Carafas, whose conviction expired while his appeal for habeas relief was pending.[95] Claiming that the New York state court secured his conviction using illegally obtained evidence, Carafas petitioned for relief via writ of habeas corpus, which the district court dismissed.[96] On appeal, the Second Circuit affirmed the district court's dismissal, and Carafas filed a petition for writ of certiorari.[97] Two weeks before he filed for writ of certiorari, however, Carafas's conviction expired.[98] This scenario required the Court to address the issue of mootness in addition to jurisdiction under the habeas statute.[99] The Court determined that the "disabilities or burdens" that result from a conviction — such as restrictions on employment, voting, and the ability to serve as a juror — give the habeas petitioner a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."[100] The Court held that these "collateral consequences" prevent the case from being moot.[101]

The Court also determined that the expiration of Carafas's conviction did not deprive the federal courts of jurisdiction to consider his habeas petition because jurisdiction had already attached in the federal courts, and the jurisdiction to complete the proceedings of that petition survived the expiration of his conviction.[102] In recognizing that a contrary holding would punish the petitioner for the delays of appeal and habeas process, the Court stated:

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91. *Id.* at 62.
92. *Id.*
93. *Id.* at 63 (overruling McNally v. Hill, 293 U.S. 131 (1934)).
94. 391 U.S. 234 (1968).
95. *Id.* at 236.
96. *Id.*
97. *Id.*
98. *Id.* at 239.
99. *Id.* at 236-40.
100. *Id.* at 237 (overruling Parker v. Ellis, 362 U.S. 574 (1960)).
101. *Id.* at 237-38.
102. *Id.* at 238.

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> His path has been long — partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence.[103]

Although the expansive view of habeas availability prevalent in these cases has not been consistent in recent years, these holdings form the background against which courts now consider petitions for habeas relief.

B. Recent Supreme Court Treatment of the Writ of Habeas Corpus

The Rehnquist Court has not been nearly as kind to those seeking habeas relief as preceding courts.[104] For example, the 1989 case of *Maleng v. Cook*[105] was a pivotal case for habeas petitioners, particularly those seeking to attack the validity of expired convictions. *Maleng* presented an opportunity for the Court squarely to decide whether a habeas petitioner satisfies the custody requirement for a conviction that has fully expired but is being used to enhance the length of a current or future sentence.[106] In 1976, while on parole from a twenty-year sentence imposed in 1958, Cook, the habeas petitioner in *Maleng*, was convicted and sentenced in a Washington state court for assault and aiding a prisoner to escape.[107] That same year a federal court convicted him of bank robbery and conspiracy, and he was serving the thirty-year sentence imposed by the federal court when he filed for habeas relief in 1985.[108] The habeas petition sought to attack the 1958 conviction because the petitioner had not received a competency hearing despite reasonable doubt that he was competent to stand trial.[109]

In a per curiam opinion, the Court held that the petitioner was not "in custody" for the 1958 conviction, but was in custody under the 1978 state conviction even though he had not begun to serve the state sentence.[110] The

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103. *Id.* at 240.

104. *See*, *e.g.*, Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001); Daniels v. United States, 532 U.S. 374 (2001); Custis v. United States, 511 U.S. 485 (1994); Maleng v. Cook, 490 U.S. 488 (1989); *see also* Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 AM. J. CRIM. L. 99, 100 (1995) ("It is fair to say that the rights have fared poorly, and the remedy, even worse.").

105. 490 U.S. 488 (1989).

106. *Id.* at 490.

107. *Id.* at 489.

108. *Id.*

109. *Id.* at 490.

110. *Id.* The Court did not consider whether the 1958 conviction illegally enhanced the federal sentence because the petitioner did not raise it on writ of certiorari. *Id.*

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Court stated that it had "never extended [the custody requirement] to the situation where a habeas petitioner suffers no present restraint from a conviction" and reasoned that because such an extension would allow a petitioner whose sentence had expired to challenge that conviction indefinitely, the "in custody" requirement would effectively be read out of the statute.[111]

Although *Maleng* restricted a habeas petitioner from claiming to be in custody pursuant to a fully expired conviction, the Court nevertheless determined that the petitioner was in custody for the 1978 state conviction even though he had not begun to serve it; accordingly, he could challenge the sentences that resulted from it.[112] In so doing, the *Maleng* Court also left open the possibility that petitioners could attack an expired conviction on writ of habeas corpus by challenging the sentence that was enhanced by the expired conviction and pursuant to which they were presumably in custody.[113] In the final sentence of the opinion, the Court stated, "We express no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentences which it was used to enhance."[114]

While not a habeas case, *Custis v. United States*[115] provided the foundation for the Court's subsequent limitations on the use of habeas corpus relief. At a federal sentencing hearing, Custis sought to challenge the use of prior state court convictions to enhance his sentence under the Armed Career Criminal Act of 1984.[116] Custis contended that he received ineffective assistance of counsel and that his guilty pleas were not knowing and intelligent regarding those convictions.[117] The Court held that the petitioner could not collaterally challenge the state convictions at the sentencing hearing unless the challenge alleged that the state obtained the conviction in violation of the right to counsel[118] as guaranteed by *Gideon v. Wainwright*.[119] The Court concluded that the Armed Career Criminal Act looked to the fact of conviction as the basis for sentence enhancement, and the statute gave no indication that prior

111. *Id.* at 492.
112. *Id.* at 493.
113. *Id.* at 494.
114. *Id.*
115. 511 U.S. 485 (1994).
116. *Id.* at 488.
117. *Id.*
118. *Id.* at 487.
119. 372 U.S. 335 (1963). The *Custis* majority's allowance of the *Gideon* exception to the exclusion of other sufficient bases of constitutional challenge and the continuation of such in *Daniels* and *Coss* could provide adequate discussion for an entire article. Justice Souter, in particular, takes umbrage to the exclusivity of this exception in his dissent in *Custis*. *See Custis*, 511 U.S. at 498-512 (Souter, J., dissenting).

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convictions were subject to constitutional scrutiny when used for this purpose.[120]

Additionally, the Court based its distinction of Custis's claims from the denial of right to counsel on two interests — ease of administration and finality of judgments.[121] According to the Court, an ineffective assistance of counsel claim would hinder ease of administration because, contrary to a challenge based on the denial of counsel, the constitutional defect would not be apparent from the face of the judgment roll.[122] Therefore, determining the challenge would require examining transcripts that would be difficult to obtain, if they existed at all, and could come from any one of the fifty states.[123] Regarding finality, the majority stated that "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice."[124] The Court held that these interests prevented the petitioner from challenging the state convictions at the sentencing hearing, but, in deference to *Maleng*, the majority left open the possibility that the petitioner might challenge these convictions on writ of habeas corpus.[125]

In 2001, the Supreme Court closed the door left open by *Custis* in two important cases, *Daniels v. United States*[126] and *Lackawanna County District Attorney v. Coss*.[127] The petitioner in *Daniels* had received an enhanced sentence under the same statute as had been employed in *Custis* and sought relief under 28 U.S.C. § 2255, which provides postconviction remedy for federal prisoners.[128] The Court determined that the interests of ease of administration and finality of judgments outweighed the petitioner's interest in seeking § 2255 relief just as it had in *Custis*.[129] The Court reasoned that a district court's ability to undertake fact-intensive constitutional inquiries — what it referred to as "institutional competence" — does not make the location of old state court transcripts more tenable.[130] The Court also acknowledged that, while defendants have numerous opportunities to challenge their

120. *Custis*, 511 U.S. at 490-91.
121. *Id.* at 496-97.
122. *Id.* at 496.
123. *Id.*
124. *Id.* at 497 (alteration in original) (quoting United States v. Addonizio, 442 U.S. 178, 184 n.11 (1979)).
125. *Id.*
126. 532 U.S. 374 (2001).
127. 532 U.S. 394 (2001).
128. *Daniels*, 532 U.S. at 376.
129. *Id.* at 379.
130. *Id.*

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convictions on constitutional grounds, these avenues for relief are not available indefinitely, stating that

> [i]f a person chooses not to pursue those remedies, he does so with the knowledge that the conviction will stay on his record. This knowledge should serve as an incentive not to commit a subsequent crime and risk having the sentence for the crime enhanced under a recidivist sentencing statute.[131]

In any event, the Court concluded that once convictions have expired, the defendants themselves, either for failing to pursue the available remedies or for failing to prove a constitutional defect in their convictions, are responsible for the finality of their convictions and the resulting lack of relief.[132]

Coss involved a challenge under 28 U.S.C. § 2254, which provides postconviction remedy in federal courts to state prisoners.[133] After a conviction in Pennsylvania state court in 1990, the petitioner in *Coss* attempted to challenge, via writ of habeas corpus, state convictions from 1986 that enhanced his 1990 conviction.[134] The basis of his challenge was that he received ineffective assistance of counsel regarding the 1986 convictions.[135] The Court began its analysis by determining whether the petitioner was in custody pursuant to the 1986 convictions so as to confer jurisdiction on the federal court to hear the petitioner's challenges.[136] The Court noted that Coss was no longer serving the sentences pursuant to the 1986 convictions, so he could not direct his habeas petition at those convictions alone.[137] The Court followed *Maleng*, however, and construed the petition as directed at the 1990 sentence, which included the enhancement resulting from the 1986 convictions.[138] The Court then extended the holdings in *Custis* and *Daniels* to include the petitioner in *Coss*, finding that the concerns for ease of administration and finality are "equally present" in the state prisoner context.[139] The Court also made reference to a possible exception first mentioned in *Daniels*, under which petitioners, through no fault of their own, may be deprived of a real opportunity to have their constitutional claims heard.[140] For instance, if the state court has refused to rule on the constitutional claim, or if newly discovered evidence

131. *Id.* at 381.
132. *Id.* at 383.
133. Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 396-99 (2001).
134. *Id.*
135. *Id.*
136. *Id.* at 401.
137. *Id.*
138. *Id.* at 401-02.
139. *Id.* at 402.
140. *Id.* at 405.

indicates that the petitioners are actually innocent of the crime, review of that conviction on writ of habeas corpus might be appropriate. As in *Daniels*, however, the Court determined that this possible exception was not applicable.[141]

Despite the limitations placed on the writ of habeas corpus by these cases, the Rehnquist Court expanded the custody requirement in *Garlotte v. Fordice*.[142] While serving the latter of consecutive sentences, the *Garlotte* petitioner attempted to employ the writ of habeas corpus to challenge the conviction underlying the first of the consecutive sentences, which he had already completed, but which nonetheless postponed his eligibility for parole.[143] This case presented the converse situation to the issue presented in *Peyton v. Rowe*. Whereas the petitioner in *Peyton* challenged the latter of consecutive sentences while serving the first of those sentences,[144] the petitioner in *Garlotte* sought to challenge the earlier of consecutive sentences while serving the latter sentence.[145] Although Garlotte began his attempt for relief from the first conviction only seven months after his conviction, the rigors of the state collateral relief process outlasted his first sentence, which was for only three years.[146] The Court, following *Peyton*, refused to disaggregate the consecutive sentences, holding that the petitioner was still in custody pursuant to the first conviction.[147]

In addressing the concern that the holding might encourage a prisoner with a possible constitutional claim to delay in bringing a challenge, the Court posited three reasons that such a result was unlikely.[148] First, a prisoner's natural inclination for relief would prompt him to raise the challenge as quickly as possible.[149] Second, delay in bringing the petition would likely harm the petitioner because he has the burden of proof on habeas corpus.[150] Finally, a district court may prevent the petitioner from benefiting from willful tardiness by dismissing a petition if the state has been prejudiced by inexcusable delay in filing.[151] Although *Garlotte* expanded the custody requirement, it represents an

141. *Id.* at 406.
142. 515 U.S. 39 (1995).
143. *Id.* at 41.
144. Peyton v. Rowe, 391 U.S. 54, 55 (1968).
145. *Garlotte*, 515 U.S. at 41.
146. *Id.* at 42.
147. *Id.* at 46.
148. *Id.* at 46-47.
149. *Id.*
150. *Id.*
151. *Id.*

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exception to the Rehnquist Court's continual efforts to limit the application of the writ of habeas corpus.[152]

C. Application by Analogy: The Lower Federal Courts' Extension of Daniels and Coss to the Removal Context

While no Supreme Court jurisprudence exists regarding the use of the writ of habeas corpus to challenge an expired conviction that is the basis of deportation, the lower courts have routinely applied the sentence enhancement precedent to deportation cases. Before the Supreme Court's decisions in *Daniels* and *Coss*, whether the writ of habeas corpus was available to collaterally attack an expired conviction that was the basis of an enhanced sentence was in conflict.[153] While the Eighth Circuit had held that *Custis* proscribed habeas challenges of convictions for sentence enhancement,[154] several circuits had reached different results. For instance, in *Clark v. Pennsylvania*,[155] the Third Circuit had held that a prisoner in this context could attack the constitutionality of the expired sentence by a habeas challenge to the enhanced sentence that was then being served.[156] Subsequent to the Supreme Court's decision in *Custis*, the Third Circuit determined that its prior decision in *Clark* had not been overruled by *Custis*.[157] In *Young v. Vaughn*,[158] the Third Circuit extended *Clark* to apply to a petitioner whose expired conviction was the basis for revoking his probation from an earlier conviction. In so doing, the court determined that the petitioner in *Young* had a stronger case than the petitioner in *Clark* because "but for his [expired] conviction, he would not be in prison or otherwise 'in custody' at all," and his confinement was "even more closely related to his [expired] conviction than if it were merely the result of a sentence enhanced by that conviction."[159] Similarly, in 1994, in *Brock v. Weston*,[160] the Ninth Circuit held that a petitioner could use a habeas corpus challenge to his civil confinement as a sexual predator.[161] The *Brock* court reasoned that

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152. The Rehnquist Court's efforts to limit the writ of habeas corpus have led at least one commentator to suggest that "[t]he Great Writ has lost its adjective, its article, and its capitalization." Rosenberg, *supra* note 104, at 118.

153. Contreras v. Schiltgen, 151 F.3d 906, 907-08 (9th Cir. 1998) (stating that the circuits were split as to whether *Custis* applied in the context of habeas corpus).

154. *See* Arnold v. United States, 63 F.3d 708, 709 (8th Cir. 1995).

155. 892 F.2d 1142 (3d Cir. 1989).

156. *Id.* at 1145.

157. *See* Young v. Vaughn, 83 F.3d 72, 78 (3d Cir. 1996).

158. 83 F.3d 72 (3d Cir. 1996).

159. *Id.* at 78.

160. 31 F.3d 887 (9th Cir. 1994).

161. *Id.* at 890.

> Brock's confinement is more closely related to the prior conviction than is incarceration pursuant to a sentence enhanced by a prior conviction . . . . With an enhanced sentence, the prior conviction only lengthens the period of confinement; here, the prior conviction is a necessary predicate to the confinement. If anything, it is even more appropriate for a court to examine an expired conviction in the present circumstances than for it to do so in the context of an enhanced sentence.[162]

In *Coss v. Lackawana County*,[163] a case subsequently reversed by the Supreme Court, the Third Circuit held that habeas corpus provides a valid remedy for the petitioner whose sentence is being enhanced by an allegedly unconstitutional conviction despite the expiration of that conviction.[164] Indeed, it appears that a majority of the circuits allowed attacks on expired convictions in various contexts.[165]

The availability of the writ of habeas corpus to challenge expired convictions was also unclear in the deportation realm. In 1992, in *Kandiel v. United States*,[166] the Eighth Circuit misapplied *Maleng* by failing to construe a petition under 28 U.S.C. § 2255 as a petition under § 2241. In *Kandiel*, the court determined that the district court had no jurisdiction to hear the petitioner's challenge to an expired conviction because removal was "merely a collateral consequence of a conviction," and the petitioner was no longer in custody for the expired conviction.[167] Similarly, in 1998, the Ninth Circuit held in *Contreras v. Schiltgen*[168] that a petitioner could not collaterally attack an expired conviction in a habeas proceeding against the INS.[169] In contrast to these decisions, in *Taveras-Lopez v. Reno*,[170] the U.S. District Court for the Middle District of Pennsylvania concluded that collateral review of an otherwise expired conviction was available in a habeas corpus proceeding directed at the removal order that was based on the expired conviction.[171] After determining

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162. *Id.*

163. 204 F.3d 453 (3d Cir. 2000), *rev'd*, 532 U.S. 394 (2001).

164. *Id.* at 459-60.

165. Young v. Vaughn, 83 F.3d 72, 78-79 (3d Cir. 1996) ("With the possible exception of the Eighth Circuit's decision in *Partee*, we are aware of no case holding that a prisoner in custody under a sentence resulting from (or enhanced by) a conviction whose sentence has expired may not attack the prior conviction at all.").

166. 964 F.2d 794 (8th Cir. 1992).

167. *Id.* at 796.

168. 151 F.3d 906 (9th Cir. 1998).

169. *Id.* at 907.

170. 127 F. Supp. 2d 598 (M.D. Pa. 2000).

171. *Id.* at 604.

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that an alien subject to removal should be ensured an opportunity to test the constitutionality of a conviction that underlies deportation, the court determined that the Third Circuit's prior rulings in *Clark*, *Young*, and *Coss*, which had not yet been reversed by the Supreme Court, counseled in favor of allowing the petitioner to challenge the expired conviction on habeas corpus.[172] Nevertheless, because Taveras-Lopez had failed to satisfactorily exhaust his state court remedies, which is required to be eligible for habeas relief, the court denied him relief.[173]

Since 2001, when the Supreme Court decided *Daniels* and *Coss*, the lower federal courts have routinely denied aliens the opportunity to challenge expired convictions on writs of habeas corpus.[174] Some courts have continued to base their decisions on a lack of jurisdiction to hear challenges to expired convictions under § 2241.[175] Other courts, however, have concluded that the reasoning in *Daniels* and *Coss*, as well as the cases underlying them, applies in the deportation context by analogy.[176] For instance, the Third Circuit, after being reversed in *Coss*, determined in *Drakes v. INS*[177] that the interests of ease of administration and finality of judgments prohibit the use of habeas corpus to challenge an expired conviction that is the basis of deportation.[178] The court stated:

> Although *Daniels* and *Coss* dealt with . . . challenges to an enhanced prison sentence, the Supreme Court's reasoning is equally applicable to the present situation. There is no meaningful difference between a collateral attack on an expired state conviction underlying removal proceedings and a collateral attack on an expired state criminal conviction underlying an enhanced sentence.[179]

While the lower courts' disagreement as to the availability of the writ of habeas corpus to examine the validity of expired convictions serving as the basis for removal appears to have waned since the Supreme Court's decisions in *Daniels* and *Coss*, the mechanical nature in which the lower courts are applying these

172. *Id.* at 603-04.

173. *Id.* at 601.

174. *See*, *e.g.*, Drakes v. INS, 330 F.3d 600, 604 (3d Cir. 2003); Pacheco-Medina v. Oregon, No. 02-35474, 2003 WL 1919473, at *1 (9th Cir. Apr. 21, 2003); Pietre v. Bintz, No. 09:01CV0260DNHGLS, 2003 WL 1562273, at *4 (N.D.N.Y. Mar. 25, 2003); Neyor v. INS, 155 F. Supp. 2d 127, 138-39 (D.N.J. 2001).

175. *See*, *e.g.*, *Pacheco-Medina*, 2003 WL 1919473, at *1; *Pietre*, 2003 WL 1562273, at *4.

176. *See Drakes*, 330 F.3d at 604; *Neyor*, 155 F. Supp. 2d at 138-39.

177. 330 F.3d 600 (3d Cir. 2003).

178. *Id.* at 604.

179. *Id.*

cases triggers significant disquietude regarding the viability of decades of habeas corpus precedent.

D. The Tenth Circuit: Abtew and Broomes

In 2004, the Tenth Circuit joined the ranks of those courts applying *Daniels* and *Coss* to deportation cases. Asfaw Abtew, a lawful permanent resident alien from Ethiopia, had lived in Colorado, along with his wife and child, as a political refugee since 1992.[180] On July 17, 1996, Abtew pleaded guilty in state court to both third-degree sexual assault, for which he was sentenced to two years probation, and contributing to the delinquency of a minor, for which he received a four-year deferred judgment and sentence.[181] Abtew had ceaselessly denied committing the crimes for which he was convicted, and in April 1998, he requested that he be allowed to withdraw his guilty plea.[182] Abtew claimed that his attorney rendered ineffective assistance because he failed to advise Abtew of the immigration consequences of a guilty plea.[183] The trial court denied his request, entered the guilty plea to the charge of contributing to the delinquency of a minor, and sentenced Abtew to six months probation, which he later completed.[184] The Colorado Court of Appeals affirmed the trial court's denial of Abtew's motion to withdraw his plea, and the Colorado Supreme Court denied his petition for writ of certiorari.[185] While his appeal was pending, the INS arrested Abtew and began removal proceedings based on his sexual assault conviction.[186] The U.S. District Court for the District of Colorado dismissed Abtew's petition for writ of habeas corpus, holding that he could not challenge the validity of his expired conviction.[187]

The situation of Errol Broomes is similar to that of Abtew. Broomes, a lawful permanent resident from Barbados, had lived in the United States since 1980.[188] Broomes, like Abtew, had family in the United States.[189] On November 30, 2000, Broomes was convicted in New York state court as a result of a guilty plea for the attempted sale of a controlled substance.[190] Like

180. Brief of Appellants at 5, Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004) (No. 03-1063), *cert. denied*, 125 S. Ct. 809 (2004).
181. *Id.*
182. *Id.* at 6.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 6-7.
187. *Id.* at 3.
188. *Id.* at 7.
189. *Id.*
190. *Id.*

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Abtew, Broomes continually denied criminal activity.[191] Also like Abtew, Broomes's attorney failed to advise him of the likely deportation effects of his conviction.[192] Broomes's sentence expired on July 15, 2003.[193] While incarcerated in New York, an immigration judge issued an order of removal for Broomes that was affirmed by the Board of Immigration Appeals, and New York released him directly to the INS, where he remained in custody.[194] Broomes requested postconviction relief in New York but was denied.[195] His petition for writ of habeas corpus, filed in the Southern District of New York, was transferred to the Western District of Oklahoma.[196] The district court denied relief to Broomes.[197]

The Tenth Circuit consolidated the cases of Abtew and Broomes for appeal.[198] On appeal, the appellants presented issues regarding the district court's jurisdiction to consider the validity of expired state convictions under 28 U.S.C. § 2254 and § 2241, and whether failure to advise a client of the deportation consequences of a guilty plea constitutes ineffective assistance of counsel.[199] Because Abtew's conviction expired while he was attempting to exhaust his state remedies,[200] jurisdiction in his case was not apparent. The Tenth Circuit first recognized that Abtew did not satisfy the custody requirement of § 2254 because of the expiration of his state conviction before his habeas petition.[201] Abtew attempted to overcome this jurisdictional requirement by advocating for an exception to the "in custody" element for those who were "diligently pursuing state court relief when their convictions or sentences expired."[202] The Tenth Circuit rejected this argument, however, holding that the determination of who should receive habeas review is a policy decision for the legislature and that Abtew did not meet either of the Supreme Court's two narrow exceptions to the "in custody" requirement.[203] Finally, Abtew argued that he was entitled to challenge the validity of his state

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 8.
197. *Id.* at 4-5.
198. *Id.* at 5.
199. *Id.* at 1-2.
200. *Id.* at 8.
201. Broomes v. Ashcroft, 358 F.3d 1251, 1254 (10th Cir. 2004).
202. *Id.*
203. *Id.* The two exceptions exist when: (1) the Sixth Amendment is violated because of a failure to appoint counsel; or (2) through no fault of the petitioner, no channel of review exists. *Id.*; *see also* Daniels v. United States, 532 U.S. 374, 382-84 (2001).

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conviction pursuant to a § 2241 challenge to his detention by the INS.[204] The Tenth Circuit refused Abtew's attempt to collaterally challenge his state conviction, however, determining that the interests of finality and ease of administration applied to a § 2241 challenge just as in the sentence-enhancement context.[205]

Broomes filed his petition for writ of habeas corpus before the expiration of his sentence, but that sentence later expired.[206] This scenario presented a situation very similar to that in *Carafas*, where the Supreme Court held that the expiration of the petitioner's sentence during the appeal of his habeas dismissal did not strip the federal courts of jurisdiction.[207] Accordingly, the Tenth Circuit acknowledged that the federal courts had jurisdiction to consider Broomes's habeas claims because Broomes satisfied the custody requirement of § 2254.[208] Nevertheless, the Tenth Circuit denied relief to Broomes, holding that because deportation is a collateral consequence of a conviction, the failure of an attorney to advise a client of the possible immigration consequences of a guilty plea does not constitute ineffective assistance.[209] The U.S. Supreme Court subsequently denied Broomes's and Abtew's petitions for writ of certiorari.[210] Thus, except for the Tenth Circuit's summary rejection of their claims of ineffective assistance of counsel, Abtew and Broomes had no opportunity for a federal court to determine the merits of their constitutional claims.

IV. Analysis

The federal courts *can* hear challenges to expired convictions that are the bases for deportation, and they *should* exercise that ability in the appropriate circumstances. Both the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Supreme Court habeas corpus jurisprudence seek to promote the interests of comity and finality.[211] Recently, the Court has added ease of

204. *Broomes*, 358 F.3d at 1255.

205. *Id.*

206. Mr. Broomes applied for habeas relief on February 19, 2002 in the Southern District of New York, and his conviction expired on July 15, 2003. Brief of Appellants at 13, *Broomes* (No. 03-1063).

207. Carafas v. LaVallee, 391 U.S. 234, 238 (1968); *see also supra* notes 96-103 and accompanying text.

208. *Broomes*, 358 F.3d at 1256 n.2.

209. *Id.* at 1256. The court stated that a collateral consequence is one that "remains beyond the control and responsibility of the district court in which that conviction was entered," and state courts have no control over whether a criminal defendant will be deported. *Id.* (quoting United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)).

210. Broomes v. Ashcroft, 125 S. Ct. 809 (2004).

211. *See, e.g.*, Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402 (2001); Daniels v. United States, 532 U.S. 374, 378 (2001); Williams v. Taylor, 529 U.S. 420, 436

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administration to the interests federal courts should consider when discussing habeas availability.[212] Each of these interests is discussed below, but when compared to the effects of deportation on aliens and their families — particularly when the removal is the result of a minor crime — these interests do not outweigh the aliens' interest in having their convictions considered on habeas corpus. The federal courts have jurisdiction for this petition, and they should exercise that jurisdiction when equitable considerations make it appropriate.

A. Federal Courts Have Jurisdiction to Hear Habeas Challenges to Expired Convictions That Provide the Basis for Removal

The federal courts have jurisdiction to hear a habeas challenge to a state conviction that is the basis of removal under both § 2254 and § 2241. To apply for relief under § 2254, petitioners must assert that they are "in custody pursuant to the judgment of a State court . . . in violation of the Constitution or laws or treaties of the United States."[213] Aliens who are in INS custody pursuant to removal based on expired convictions often are no longer being detained under the authority of the state in which they were convicted.[214] The U.S. Supreme Court has determined, however, that a petitioner need not be in jail pursuant to a conviction to be "in custody" as the term is used in the habeas statutes.[215] "Rather, the term [custody] is synonymous with restraint of liberty."[216] In *Fay v. Noia*, the Court articulated the purpose of the writ of habeas corpus at the time it was written into the Constitution as a test of "any restraint contrary to fundamental law,"[217] concluding that no "procedural hurdles to the achievement of swift and imperative justice" should inhibit the realization of such purpose.[218] In this regard, the Court has held that habeas corpus relief is available to aliens whose only restraint is denial of entry into the country but who are free to travel anywhere else in the world.[219] Indeed, deportation that subjects the alien to INS detention during removal proceedings and exclusion subsequent to them similarly creates a "restraint contrary to

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(2000).

212. *See Coss*, 532 U.S. at 402; *Daniels*, 532 U.S. at 378.

213. 28 U.S.C. § 2254 (2000).

214. *See supra* Part III.C.

215. Carafas v. LaVallee, 391 U.S. 234, 238-39 (1968).

216. SOKOL, *supra* note 13, at 66.

217. Fay v. Noia, 372 U.S. 391, 426 (1963).

218. *Id.* at 435.

219. *See* Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 213 (1953); *see also* Jones v. Cunningham, 371 U.S. 236, 239-40 (1963) (using exclusion as an example that habeas corpus is applicable in situations in which something other than actual physical restraint is challenged).

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fundamental law" when it is based on a constitutionally invalid state court conviction.[220] According to the Court's jurisprudence, this restraint appears to place the alien "in custody" and invokes federal jurisdiction to test state convictions on writ of habeas corpus.[221]

In *Maleng*, the Court stated that it had "never extended [the "in custody" requirement] to the situation where a habeas petitioner suffers no present restraint from a conviction" and that "[w]hen the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore 'in custody.'"[222] The lower federal courts have consistently interpreted this language as foreclosing a § 2254 remedy once the state conviction has expired.[223] In the context of removal proceedings based on one expired conviction, however, this language should not foreclose the opportunity for § 2254 relief. The alien in this type of case *is* suffering present restraint — INS custody and possible deportation — from the lone, expired conviction.[224]

Additionally, the Supreme Court has acknowledged that, regardless of whether a petitioner is "in custody" for an expired state or federal conviction, if federal courts have habeas jurisdiction pursuant to 28 U.S.C. § 2241, the court may construe a petition filed under § 2254 as a petition under § 2241, thereby conferring jurisdiction.[225] Clearly, the alien is in INS custody pursuant to a removal proceeding in this context.[226] Therefore, because the alien in a deportation proceeding is "in custody under . . . the authority of the United States," which vests authority in the INS, federal courts have jurisdiction to test the validity of that restraint.[227]

In *Crank v. Duckworth*,[228] the Seventh Circuit soundly explained *Maleng's* ramifications on habeas jurisdiction.[229] The court stated that if "sentence A has expired but has been used to augment sentence B, the prisoner is 'in custody'

220. *Fay*, 372 U.S. at 426.

221. *See* 28 U.S.C. § 2254 (2000).

222. Maleng v. Cook, 490 U.S. 488, 492-93 (1989).

223. *See, e.g.*, Contreras v. Schiltgen, 151 F.3d 906, 907 (9th Cir. 1998); Neyor v. INS, 155 F. Supp. 2d 127, 132 (D.N.J. 2001); United States *ex rel*. Zegarski v. Moyer, No. 92 C 4156, 1992 WL 195338, at *3 (N.D. Ill. Aug. 5, 1992).

224. Young v. Vaughn, 83 F.3d 72, 78 (3d Cir. 1996) (stating that "but for his [expired] conviction, he would not be in prison or otherwise 'in custody' at all").

225. Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 401 (2001); Maleng v. Cook, 490 U.S. 488, 493 (1989).

226. *See* Neyor v. INS, 155 F. Supp. 2d 127, 134 (D.N.J. 2001).

227. 28 U.S.C. § 2241(c)(1) (2000).

228. 905 F.2d 1090 (7th Cir. 1990).

229. *See id.* at 1091.

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only on sentence B."[230] The court went on to say that whether a petitioner could contend that sentence B violated the Constitution because of its reliance on sentence A is a matter of comity, not "custody."[231] Accordingly, federal courts have jurisdiction under § 2241 to consider the validity of an INS detention. This jurisdiction includes the ability to consider the basis of removal — the expired conviction.[232]

Finally, once a petitioner exhausts state law remedies, habeas corpus relief is the only remaining means of preventing deportation based on an unconstitutional conviction.[233] The merits of a conviction are not subject to litigation in the deportation itself.[234] The fact of conviction, and not its validity, is the predicate for removal proceedings.[235] Therefore, if the federal courts lack jurisdiction on writ of habeas corpus to consider a petitioner's constitutional claims before removal, there will be no consideration of these issues. Because the disabilities and burdens that emanate from a resident alien's conviction are significant and survive the expiration of that conviction, the resulting burdens provide a substantial stake in the judgment despite the expiration of the conviction.[236]

B. The Rules of Daniels and Coss are Inapplicable in Removal Proceedings

Despite the lower courts' application of *Daniels* and *Coss* and their failure to recognize the differences between sentence-enhancement cases and deportation cases,[237] cases involving collateral attacks of expired convictions by writ of habeas corpus in the deportation context are distinct from those in the sentence-enhancement context. Lawful permanent residents subject to removal for an aggravated felony are under detention by immigration officials for one

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230. *Id.*

231. *Id.* The Seventh Circuit had previously held that a prisoner in this situation could employ the writ of habeas corpus in this manner. *See* Lowery v. Young, 887 F.2d 1309, 1312-13 (7th Cir. 1989).

232. *See* Maleng v. Cook, 490 U.S. 488, 493-94 (1989) (determining that the custody requirement is satisfied if habeas petition is read as asserting a challenge to the current detention).

233. United States *ex rel*. Zegarski v. Moyer, No. 92 C 4156, 1992 WL 195338, at *4 (N.D. Ill. Aug. 5, 1992).

234. *See* Trench v. INS, 783 F.2d 181, 184 (10th Cir. 1986); Zinnanti v. INS, 651 F.2d 420, 421 (5th Cir. 1981).

235. *See* Contreras v. Schiltgen, 151 F.3d 906, 908 (9th Cir. 1998); Neyor v. INS, 155 F. Supp. 2d 127, 139 (D.N.J. 2001).

236. Carafas v. LaVallee, 391 U.S. 234, 237 (1968).

237. Drakes v. INS, 330 F.3d 600, 604 (3d Cir. 2003) ("There is no meaningful difference between a collateral attack on an expired state conviction underlying removal proceedings and a collateral attack on an expired state criminal conviction underlying an enhanced sentence.").

conviction — the expired conviction they are attempting to challenge on habeas corpus — and if they successfully challenge that conviction, the basis of their removal will be eviscerated.[238] In contrast, if defendants successfully challenge an expired conviction being used to enhance their sentence, they will still be in custody pursuant to the nonenhanced sentence that they receive.[239] In the sentence-enhancement scenario, defendants have acted voluntarily by committing a subsequent crime for which they have been convicted, resulting in the current detention.[240] The alien, however, is now in INS custody as a direct result of his single, expired conviction to the exclusion of other bases of deportation.[241] "But for" his expired conviction, he would not now be in INS custody.[242] As was the case in *Brock*, the expired conviction is a "necessary predicate" to INS detention, and the examination of that conviction is more appropriate in the present context than in the sentence-enhancement context.[243]

As mentioned previously,[244] *Maleng's* contention that "[w]hen the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore 'in custody'" is inapplicable in this context because there is no "second conviction" for the alien to challenge.[245] The expired conviction is the sole basis upon which the alien is being detained. Likewise, the incentive provided in the sentence-enhancement scenario to refrain from future criminal activity, which was referred to in *Daniels*,[246] does not exist in this context because the alien's detention is subject only to the initial

238. *See* Young v. Vaughn, 83 F.3d 72, 78 (3d Cir. 1996) (noting that "but for his [expired] conviction, he would not be in prison or otherwise 'in custody' at all").

239. The petitioner in *Drakes* advanced this argument, alleging that there is a "disparity of culpability" between a petitioner subject to removal based upon one conviction and a petitioner subject to an enhanced sentence for a subsequent sentence. *Drakes*, 330 F.3d at 605. The rationale was that an alien in these circumstances might not be a criminal at all — if his lone conviction is found to be invalid — but a petitioner in a sentence-enhancement case will certainly be a criminal (assuming the current conviction is valid) regardless of whether his expired conviction is overturned. *Id.* Nevertheless, the Third Circuit dismissed this argument and denied relief because the petitioner failed to address the considerations of ease of administration and finality of judgments, upon which the Court based its decisions in *Daniels* and *Coss*. *Id.* at 605-06.

240. *See* Brief of Appellants at 25, Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004) (No. 03-1063), *cert. denied*, 125 S. Ct. 809 (2004).

241. *See* Pacheco-Medina v. Oregon, No. 02-35474, 2003 WL 1919473, at *1 (9th Cir. Apr. 21, 2003); Young v. Vaughn, 83 F.3d 72, 78 (3d Cir. 1996); Taveras-Lopez v. Reno, 127 F. Supp. 2d 598, 604 (M.D. Pa. 2000).

242. *Young*, 83 F.3d at 78.

243. Brock v. Weston, 31 F.3d 887, 890 (9th Cir. 1994).

244. *See supra* notes 222-27 and accompanying text.

245. Maleng v. Cook, 490 U.S. 488, 492-93 (1989).

246. Daniels v. United States, 532 U.S. 374, 381 n.1 (2001).

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conviction. This distinction demands that federal courts consider removal cases on their own merits and not mechanically apply *Daniels* and *Coss*, as some lower federal courts have erroneously done.[247] Furthermore, the distinction is very apparent when the interests of ease of administration and finality of judgments are considered in the deportation context.

C. The Interests of Ease of Administration and Finality of Judgments Should Not Prevent the Use of Writ of Habeas Corpus in the Alien Deportation Context When the Petitioner Has Diligently Pursued Relief

An understanding of what the interests of finality and ease of administration are and how they apply in various contexts is essential to conceptualize the Court's protection of these interests and their applicability, or inapplicability, in the deportation context. In *Custis*, the Supreme Court determined that a defendant could not collaterally attack an expired conviction that was being used to enhance a subsequent sentence in the sentencing hearing absent a claim that the expired conviction was obtained in violation of the petitioner's right to counsel.[248] The Court reasoned that the distinction between a petitioner's claim of ineffective assistance of counsel and a claim of denial of counsel is warranted because of two important interests: (1) ease of administration, and (2) promoting finality of judgments.[249]

Regarding ease of administration, the Court stated that a trial court's failure to appoint counsel would typically be apparent from either the judgment roll or an accompanying minute order.[250] In contrast, determining whether a petitioner suffered ineffective assistance of counsel would require a more strenuous investigation of trial records and transcripts.[251] The Court subsequently extended this reasoning to a petitioner seeking review of an expired conviction under § 2255[252] or § 2254,[253] determining that this same difficulty would exist if a district court considered an expired conviction on writ of habeas corpus because the capability of the district courts to evaluate "fact-intensive constitutional claims" did not dispel the difficulties of obtaining old court records.[254]

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247. *See supra* Part III.C.

248. Custis v. United States, 511 U.S. 485, 487 (1994).

249. *Id.* at 496-97.

250. *Id.* at 496.

251. *Id.* ("[D]etermination of claims of ineffective assistance of counsel . . . would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States.").

252. Daniels v. United States, 532 U.S. 374, 379 (2001).

253. Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403 (2001).

254. *Daniels*, 532 U.S. at 379.

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As for promoting the finality of judgments, the Court noted that a petitioner seeking to challenge an expired conviction at sentencing is attempting, in a proceeding with a purpose independent from overturning the prior judgment, to strip the judgment of its typical effect.[255] The Court explained that "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice."[256] Also, after a conviction has expired, a state's interest in preserving that conviction remains strong because of the various restraints on those convicted of crimes after their release.[257] Finally, jurisdictions other than the one in which the petitioner was convicted acquire an interest in the finality of that conviction because they must be able to rely on the "presumption of regularity" afforded final judgments in applying their recidivist statutes.[258] AEDPA also seeks to promote finality of judgments, and includes a statute of limitations as a method of such promotion.[259]

The *Daniels* and *Coss* Courts determined that in balancing the interests of individual liberty with the state interests of finality and ease of administration, the state interests outweighed the interests of the petitioners in those cases.[260] This balancing test is quite different in the context of deportation, however, which is another argument against applying those cases by analogy. In sentence-enhancement cases, the courts have often confronted situations where the petitioner is seeking to challenge a conviction that has been expired for many years, and this challenge is only a result of the current enhancement function the conviction is now serving.[261] The Court's discomfort with the lack of finality in this context is valid, though it is not altogether new.[262] Examining expired convictions could require the court to consider "decades-old" proceedings.[263] Aliens, by comparison, often become subject to immigration

255. *Custis*, 511 U.S. at 497.

256. *Id.* (alteration in original) (quoting United States v. Addonizio, 422 U.S. 178, 184 n.11 (1979)).

257. *Daniels*, 532 U.S. at 379-80.

258. *Coss*, 532 U.S. at 403 (quoting Parke v. Raley, 506 U.S. 20, 29 (1992)).

259. *See* 28 U.S.C. § 2244(d)(1) (2000); Duncan v. Walker, 533 U.S. 167, 178 (2001).

260. *Coss*, 532 U.S. at 402; *Daniels*, 532 U.S. at 378-80.

261. *See, e.g.*, *Coss*, 532 U.S. at 399 (filing habeas petition to challenge 1986 conviction); *Daniels*, 532 U.S. at 377 (attempting to challenge 1978 and 1981 convictions); Maleng v. Cook, 490 U.S. 488, 488 (1989) (seeking to challenge a conviction from 1958).

262. *See* SOKOL, *supra* note 13, at 25 ("A criminal conviction today, whether obtained in a state or federal court, probably has less finality, in a traditional sense, than at any time in the entire history of Anglo-American law.").

263. The *Daniels* Court indicated that the "institutional competence" of the district courts to consider fact-intensive claims on habeas corpus did not prevent the difficulties regarding records and transcripts that arise from the passage of time. *Daniels*, 532 U.S. at 379.

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proceedings shortly after a conviction, and the length of time postponing their habeas petitions is measured by the time necessary to exhaust state remedies.[264] In these cases, the petitioners may have been diligent in their efforts to challenge their convictions by every means available, but because state procedures for direct appeal and collateral relief can be quite long, their convictions may expire before a petition for writ of habeas corpus is available.[265] In *Carafas*, the Court recognized that a federal court must not foreclose a habeas petitioner from relief based on the lethargic appellate process.[266]

Additionally, regarding the state interest of finality, the Supreme Court has acknowledged that finality alone is insufficient reason to compromise the protection of the liberties at stake in a petition for habeas relief.[267] In *Fay v. Noia*, the Court stated that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[268] The states' interest in the finality of judgments is certainly no more significant today than when those words were written.

Also, in his dissent in *Daniels*, Justice Souter pointed out that the Court's valuation of the interest of finality as a bar to examining an expired conviction is somewhat one-sided because the INS is free to "reach back" to that conviction as the basis of removal.[269] In this situation, as long as the petitioner has diligently sought redress in the proper venues, the interest of finality is not threatened in the manner that it is by a defendant subject to sentence enhancement, whose conviction, if available to challenge by writ of habeas

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264. *See*, *e.g.*, Drakes v. INS, 330 F.3d 600, 601 (3d Cir. 2003) (basing removal proceedings on 1998 conviction); Kandiel v. United States, 964 F.2d 794, 795 (8th Cir. 1992) (basing deportation on 1987 convictions); Neyor v. INS, 155 F. Supp. 2d 127, 130 (D.N.J. 2001) (basing removal on 1995 conviction); Taveras-Lopez v. Reno, 127 F. Supp. 2d 598, 600 (M.D. Pa. 2000) (seeking to challenge 1998 conviction). For a discussion of the exhaustion requirement, see SOKOL, *supra* note 13, § 22.

265. *See* Carafas v. LaVallee, 391 U.S. 234, 240 (1968).

266. Acknowledging the arduous path of the petitioner's challenge, the Court stated:

> His path has been long — partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of an assertedly unlawful conviction simply because the path has been so long that he has served his sentence. The federal habeas corpus statute does not require this result . . . .

Id.

267. Reed v. Ross, 468 U.S. 1, 15 (1984).

268. Fay v. Noia, 372 U.S. 391, 424 (1963).

269. Daniels v. United States, 532 U.S. 374, 390 (2001) (Souter, J., dissenting).

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corpus, would be open to collateral attack "indefinitely and without limitation" and would not become final until the defendant's death.[270]

Furthermore, the petitioner generally bears the burden of proof in a habeas corpus proceeding.[271] Because the petitioners will bear the difficulty of obtaining court records and procuring evidence required for them to successfully attack the validity of their convictions, "delay [in seeking habeas relief] is apt to disadvantage the petitioner more than the State."[272] Because the petitioners will at least share in the difficulty of administering the habeas proceeding, the judicial interest in ease of administration should not weigh so heavily against their efforts.[273]

D. Comity Is Protected by the Exhaustion Requirement

Comity is used to indicate the deference of one jurisdiction to another, and the Supreme Court has defined it as "respect for state [court] functions, a recognition of the fact that the entire country is made up of . . . separate state governments, and a continuance of the belief that the National Government will fare best if the States . . . are left free to perform their separate functions in their separate ways."[274] In the context of habeas corpus, the operative issue of comity is deference by the federal courts to the courts of the various states. State courts and federal courts are equally competent to consider constitutional claims.[275] Each time a federal court overrules a decision of a state court, the federalist balance is endangered; thus, comity is an indispensable protection for ensuring federal courts do not lightly make such decisions.[276]

Comity interests are protected by the requirement that state remedies be exhausted before a federal court considers a claim on writ of habeas corpus.[277] The exhaustion requirement is intended to ensure that state courts have a "full and fair opportunity" to adjudicate constitutional claims before the same claims

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270. *Id.* at 381 (Souter, J., dissenting).

271. *See*, *e.g.*, Garlotte v. Fordice, 515 U.S. 39, 46 (1995); Loper v. Beto, 405 U.S. 473, 499 (1972); Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982); White v. Pescor, 155 F.2d 902, 904 (8th Cir. 1946).

272. *Garlotte*, 515 U.S. at 46.

273. "It would not be sentencing courts that would have to do this rummaging, however, but defendants . . . for no one disagrees that the burden of showing the invalidity of prior convictions would rest on the defendants." Custis v. United States, 511 U.S. 485, 511 (1994) (Souter, J., dissenting).

274. Younger v. Harris, 401 U.S. 37, 44 (1971).

275. *See* Norlynn Blocker, Comment, *An Exercise in Comity: Exhaustion of State Remedies in Federal Habeas Corpus Proceedings*, 35 BAYLOR L. REV. 497, 506-07 (1983).

276. *See id.* at 506.

277. *See* 28 U.S.C. § 2254(b)(1)(A) (2000).

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are raised in federal courts on habeas corpus.[278] When properly enforced, the exhaustion requirement provides an incentive for a petitioner to first seek full relief from the state courts, thereby giving the state the first opportunity to review claims to be presented in the habeas application.[279] As such, the exhaustion requirement affords adequate deference to the states.

The exhaustion requirement, however, is only a mechanism for delaying federal adjudication until the state court has fully considered the claim presented.[280] While determining whether the remedy is available to a petitioner may be difficult,[281] once a court has determined that the exhaustion requirement has been satisfied, the federal interest in comity is served, and the federal courts are free to consider the merits of the petitioner's claim. Therefore, comity should be raised as a means of dismissing a habeas petition only when effective means of relief remain available to the petitioner in the state courts. Also, because the Supreme Court and AEDPA both adamantly seek to further the interest of comity, petitioners who attempt to comply with the exhaustion requirement should not be denied the opportunity to seek habeas review when their convictions expire before they are able to adequately exhaust all state processes. Dismissing claims in this situation would provide an incentive for aliens to seek habeas relief before exhausting state remedies to ensure that the custody requirement is satisfied and that federal courts have jurisdiction to hear their claims.[282]

E. The Effects of Denying an Alien the Opportunity to Challenge a Conviction When It Expires Before Exhaustion of State Remedies

The federal courts' refusal to allow aliens to challenge the basis of their removal by writ of habeas corpus after the conviction has expired places these aliens in an awkward position regarding the proper procedures to obtain relief.[283] The period of time available for a habeas challenge would typically begin when the petitioner exhausted available state remedies[284] and end when the sentence the petitioner wished to challenge expired. These two dates create a de facto limitations period in which a petition for writ of habeas corpus may

278. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

279. Rose v. Lundy, 455 U.S. 509, 518-19 (1982).

280. Blocker, *supra* note 275, at 508.

281. *See* Duncan v. Walker, 533 U.S. 167, 184 n.2 (2001) (Stevens, J., concurring).

282. *See infra* Part IV.E.

283. *See* Brief of Appellants at 15, Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004) (No. 03-1063), *cert. denied*, 125 S. Ct. 809 (2004).

284. "An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A) (2000).

be validly filed. If the sentence expires before the alien is able to completely exhaust the remedies available in state court, however, such period is nonexistent.[285] The petitioner may request that the state waive the exhaustion requirement, but unless the state does so expressly, the alien's failure to exhaust state remedies prevents a habeas challenge before the expiration of his sentence.[286]

In this instance, the alien has two equally clumsy procedural options. First, the alien may seek both state and federal relief contemporaneously and request an abeyance in federal court until the state proceedings have concluded.[287] Courts discourage interpretations, however, that encourage petitioners to file for habeas relief before the state completes the process of collateral review because this "would lead to great uncertainty in the federal courts, requiring them to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred . . .)."[288] Also, in *Duncan v. Walker*,[289] the Supreme Court acknowledged that the statute of limitations for habeas petitions,[290] its complimentary tolling provision,[291] and the requirement that state remedies be exhausted before seeking habeas relief,[292] together "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible."[293] An interpretation that would force a petitioner to apply for habeas relief before completing the exhaustion process in the state courts would clearly be counter to the explicit policy of the statutory requirements for the writ of habeas corpus.

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285. In his dissent in *Duncan v. Walker*, Justice Breyer discusses the difficulties posed by the interaction between filing limitation periods (specifically the federal habeas corpus statute of limitations in 28 U.S.C. § 2244(d)) and the requirement that petitioners exhaust state remedies before filing for federal habeas relief. *Duncan*, 533 U.S. at 185-86 (Breyer, J., dissenting). The tension that this interaction creates is palpable in this context where the cumulative effects of the exhaustion requirement and the expiration of a brief sentence may preclude an alien from relief.

286. *See* 28 U.S.C. § 2254(b)(3).

287. Brief of Appellants at 15, *Broomes* (No. 03-1063).

288. Burger v. Scott, 317 F.3d 1133, 1144 (10th Cir. 2003) (quoting Carey v. Saffold, 536 U.S. 214, 220 (2002)).

289. 533 U.S. 167 (2001).

290. *See* 28 U.S.C. § 2244(d)(1) (establishing a one-year statute of limitations for an application of writ of habeas corpus by a petitioner in custody pursuant to a judgment of a state court).

291. *See id.* § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

292. *See id.* § 2254(b)(1)(A).

293. *Duncan*, 533 U.S. at 181.

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The other option, which seems counterintuitive, would be for an alien to seek to lengthen his own sentence, either by attempting to withdraw his guilty plea or by requesting that the state court add time to his sentence or probation, so that he would have more time to seek federal habeas relief before his conviction expired.[294] Several lower court cases, in which the convictions that the petitioners sought to challenge were the result of guilty pleas,[295] illustrate the harshness of applying the rules of *Daniels* and *Coss* to this context. While not cognizant of the immigration effects of conviction, defense counsel is likely to advise the alien that a guilty plea is beneficial because of the shorter sentence that typically accompanies the plea.[296] Because of this shortened sentence, an alien's conviction might expire before the alien is able to satisfy the requirement that state remedies be exhausted.[297] In *Taveras-Lopez v. Reno*, the court counseled in favor of preventing such a result:

> Courts should be reluctant to permit the bare fact of conviction to result in removal where there may not have been an opportunity to mount an attack on a constitutionally-suspect conviction . . . . A person convicted of a state crime and sentenced to life in prison is assured of an opportunity to test the constitutionality of the conviction in a federal court. A lawful permanent resident alien . . . convicted of a crime carrying a relatively short sentence followed by a lifetime banishment from the United States, should not lightly be denied the same opportunity.[298]

Unbelievably, petitioners in this situation who have diligently pursued every remedy available to them might be placed in the precarious position of requesting a lengthier sentence rather than release so that they might be eligible for habeas relief.[299]

F. Equitable Tolling: A Possible Solution

One available solution for an alien whose conviction expires before he is able to exhaust state remedies is for federal courts to acknowledge their power to

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294. Brief of Appellants at 16, Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004) (No. 03-1063), *cert. denied*, 125 S. Ct. 809 (2004).

295. *See* Drakes v. INS, 330 F.3d 600, 601 (3d Cir. 2003); Taveras-Lopez v. Reno, 127 F. Supp. 2d 598, 600 (M.D. Pa. 2000).

296. *Taveras-Lopez*, 127 F. Supp. 2d at 603-04.

297. "An application for writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ." 28 U.S.C. § 2254(b)(1)(A).

298. *Taveras-Lopez*, 127 F. Supp. 2d at 603-04.

299. *See* Brief of Appellants at 16, *Broomes* (No. 03-1063).

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hear these claims by equitably tolling the filing period in a manner similar to equitably tolling a statute of limitations. Statutes of limitations and other procedural devices designed to limit the temporal availability of access to the courts are a valuable part of the judicial system.[300] Not only do these limitations ensure the freshness of evidence to be considered by the fact-finder,[301] but they also help protect the interest in finality of judgments that the Supreme Court has emphasized. Limitations periods can also be quite harsh, however, because they eliminate a person's rights irrespective of the merits of that person's claim.[302] Equitable tolling emerged as a means of moderating this result.[303] Equitable tolling allows courts to extend the period in which a person may seek redress in the courts beyond the statutory period if that person has been denied the opportunity to timely seek such redress by some inequitable event.[304] By extending statutory deadlines in the appropriate circumstances, equitable tolling allows courts to protect fundamental fairness.[305]

The U.S. Supreme Court has stated that "[s]tatutory filing deadlines are generally subject to . . . equitable tolling."[306] Indeed, a "rebuttable presumption" exists that federal statutes are subject to equitable tolling.[307] Courts typically insist that the petitioner demonstrate two requirements before invoking the doctrine of equitable tolling: (1) an inequitable event that prevented the individual from complying with the limitation; and (2) a time limitation that can be tolled.[308] Courts also typically consider whether the party seeking equitable tolling adequately pursued his claims and did not "sleep on his rights."[309]

The writ of habeas corpus has developed contemporaneously as a product of both statute and judicial doctrine.[310] While the Supreme Court has not reached the question of whether the federal courts retain the power to equitably toll the

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300. Damon W. Taaffe, Comment, *Tolling the Deadline for Appealing in Absentia Deportation Orders Due to Ineffective Assistance of Counsel*, 68 U. CHI. L. REV. 1065, 1067 (2001).

301. *Id.*

302. Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of* Brockamp *and* Beggerly, 29 SETON HALL L. REV. 885, 886 (1999).

303. *Id.*

304. David D. Doran, Comment, *Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis*, 64 WASH. L. REV. 681, 681 (1989).

305. Taaffe, *supra* note 300, at 1065.

306. United States v. Locke, 471 U.S. 84, 94 n.10 (1985).

307. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990).

308. Doran, *supra* note 304, at 682.

309. Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 429 (1965); *see also* Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000).

310. Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., concurring).

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filing periods for a habeas petition after the legislative revisions of the habeas statute, Justice Stevens indicated in *Duncan v. Walker* that AEDPA has not preempted courts' power to toll the filing period available to habeas petitioners.[311] Justice Stevens pointed out that the federal courts may fill in perceived omissions by Congress regarding AEDPA's statute of limitations where equitable considerations make it appropriate.[312] Accordingly, the federal appellate courts have acknowledged that the one-year statute of limitations governing habeas petitions under AEDPA may be equitably tolled under extraordinary or exceptional circumstances.[313] Specifically, the Tenth Circuit stated that equitable tolling is only available to an inmate who "diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control."[314]

The presence of extraordinary circumstances, over which the petitioner has no control but which nevertheless prevent him from complying with the limitation, usually satisfies the first requirement.[315] Equitable tolling has become particularly relevant in the deportation context because statutory deadlines may determine whether an alien remains in the United States or is deported.[316] This doctrine appears to be appropriate for the cases of Mr. Broomes and particularly Mr. Abtew, whose conviction expired before he was able to exhaust his state remedies.[317] The fact that a petitioner in this situation is subject to deportation because of the brevity of his conviction should fulfill the first requirement both as an "extraordinary circumstance"[318] and an "inequitable event."[319] Regarding the requirement of a relevant time limitation that may be tolled, a de facto limitations period is formed by the time at which the petitioner may exhaust state remedies and by the expiration of the

311. *Id.*

312. *Id.* at 184 (Stevens, J., concurring).

313. *See*, *e.g.*, Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999); Austin v. Mitchell, 200 F.3d 391, 393 (6th Cir. 1999); Ford v. Bowersox, 178 F.3d 522, 523 (8th Cir. 1999); Ross v. Artuz, 150 F.3d 97, 100-03 (2d Cir. 1998); Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir. 1998); Brown v. Angelone, 150 F.3d 370, 374-76 (4th Cir. 1998); United States v. Flores, 135 F.3d 1000, 1006 (5th Cir. 1998); Hoggro v. Boone, 150 F.3d 1223, 1225-26 (10th Cir. 1998); Wilcox v. Fla. Dept. of Corr., 158 F.3d 1209, 1211 (11th Cir. 1998); Calderon v. Dist. Court, 128 F.3d 1283, 1286-87 (9th Cir. 1997), *overruled on other grounds*, 163 F.3d 530 (9th Cir. 1998); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

314. *Marsh*, 223 F.3d at 1220.

315. *See* Taaffe, *supra* note 300, at 1069.

316. *Id.*

317. Brief of Appellants at 8, Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004) (No. 03-1063), *cert. denied*, 125 S. Ct. 809 (2004).

318. Valverde v. Stinson, 224 F.3d 129, 133 (2d Cir. 2000).

319. Doran, *supra* note 304, at 682.

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petitioner's conviction.[320] While this period is not necessarily statutorily defined, it is nonetheless prohibitory if interpreted as the lower federal courts have in applying *Daniels* and *Coss*.[321]

Finally, equitable tolling should be available to habeas petitioners in the positions of Mr. Broomes and Mr. Abtew who diligently pursued their options in an effort to exhaust their state remedies, but were unable to do so before the expiration of their convictions. While equitable tolling should certainly not be available to provide infinite availability of habeas relief, that will not be the case where a petitioner has diligently pursued his rights. The Tenth Circuit has stated that tolling would be available to a petitioner who missed the filing period because he filed a defective pleading.[322] Certainly a petitioner who has missed the available period through absolutely no fault of his own should also be afforded the same equity. A petitioner in such a situation did not "sleep on his rights,"[323] and he "failed to file [his] action in the federal courts, not because he was disinterested,"[324] but rather, because the action was not available to him until after his conviction expired. When such a situation exists, the requirements of equitable tolling are present, and this equitable remedy is absolutely appropriate as a means of allowing aliens in this situation to contest the validity of expired convictions that serve as the basis of removal. By employing such a mechanism, the courts would adequately ensure aliens the opportunity to receive "fundamental fairness."[325]

V. Conclusion

Because the list of crimes for which an alien may be removed has grown to include crimes that carry relatively short sentences, many aliens are placed in the awkward position of having their sentences expire before they can comply with the exhaustion requirements of the federal habeas corpus statute. Consequently, these aliens may face deportation without having the opportunity to challenge the constitutional validity of these convictions in federal court. The importance of determining the breadth of habeas availability in this area is evident, considering the extreme consequences that often result from deportation. Again, for many criminal aliens, removal is a very appropriate sanction. For others, however, the opportunity to test the validity of their convictions in a federal court will not arise absent the opportunity to test those

320. *See supra* Part IV.E.
321. *See supra* Part III.C.
322. Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000).
323. Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 429 (1965).
324. *Id.*
325. Taaffe, *supra* note 300, at 1065.

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convictions on writ of habeas corpus. Although the lower federal courts have addressed this situation, they are using cases that are not actually analogous to the issues facing a petitioner subject to deportation.

Federal courts have jurisdiction to consider the validity of expired convictions in this context, and aliens should be allowed to challenge those convictions when there is a question about the constitutionality of such convictions, particularly when the convictions serve as the sole reason for deportation. The Supreme Court has not yet addressed this issue. Until it does, lower federal courts will continue to deny the only statutory forum for litigating the validity of an expired, unconstitutional conviction that is the basis of deportation proceedings to the persons the statute was designed to protect.

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