

10-1-1984

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Recommended Citation

Lang, Glenn F. (1984) "Independent Federal Injury in Habeas Corpus Cases: When Is a State Court Factual Determination Not Fairly Supported by the Record under 28 U.S.C. 2254 (d)(8)," *North Carolina Central Law Review*: Vol. 15 : No. 1 , Article 6.
Available at: <https://archives.law.nccu.edu/ncclr/vol15/iss1/6>

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Independent Federal Inquiry in Habeas Corpus Cases: When is a State Court Factual Determination Not Fairly Supported by the Record Under 28 U.S.C. § 2254(d)(8)?

I. INTRODUCTION

The writ of habeas corpus, the “Great Writ,” has its roots deep in English common law. “It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I.”¹ The Great Writ is recognized in the United States Constitution,² and it was incorporated into the first grant of federal court jurisdiction.³ Federal habeas corpus extended only to federal prisoners until 1867, when it was extended to state prisoners.⁴ This extension of federal habeas corpus to state prisoners is contained in section 2254 of the United States Code.⁵

Section 2254 incorporates certain aspects of case law as developed by the United States Supreme Court. In dictum in *Frank v. Magnum*,⁶ the United States Supreme Court gave a clear indication that independent federal inquiry into the facts of a habeas corpus case is sometimes warranted.⁷ In *Brown v. Allen*,⁸ the Court attempted to set minimal standards for determining when a federal evidentiary hearing was necessary, but these were not adequate.⁹ Finally, in *Townsend v. Sain*,¹⁰ the Court set out five specific situations in which a federal court must grant a de novo evidentiary hearing to a state prisoner seeking federal habeas corpus.¹¹ The Court also articulated a sixth open-ended category. These and other situations were embodied in section 2254(d) of the United States Code.¹²

1. *Fay v. Noia*, 372 U.S. 391, 400 (1963) (quoting Secretary of State for Home Affairs v. O'Brien, 1923 A.C. 603, 609).

2. U.S. CONST. art. I, § 9, cl. 2.

3. Act of September 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

4. Act of February 5, 1867, ch. 28, 14 Stat. 385; see Note, *Developments in the Law - Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1-114 (1970).

5. 28 U.S.C. § 2254 (1982).

6. 237 U.S. 309 (1915).

7. *Id.* at 335-36.

8. 344 U.S. 443 (1953).

9. Note, *supra* note 4, at 1117.

10. 372 U.S. 293 (1963).

11. *Id.* at 313.

12. 28 U.S.C. § 2254 (1982). The statute provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The subject of this comment is section 2254(d)(8) which provides that a federal court need not presume correct a state court factual determination if such factual determination is not fairly supported by the record. Under subsection (8), the state prisoner first must produce that part of the state court record "pertinent to a determination of the sufficiency of the evidence to support such factual determination."¹³ Then, after considering "such part of the record as a whole,"¹⁴ the federal court need not presume correct the state court factual determination if it "concludes that such factual determination is not fairly supported by the record."¹⁵ In particular, this comment examines the difficulties created by the United States Supreme Court's failure to articulate a standard for judging when a state court factual determination is not fairly supported by the record. One federal circuit judge has suggested that the "any evidence" standard be applied to section 2254(d)(8). Another such judge and several commentators have suggested that the "clearly erroneous" standard used in federal appellate review of factual determinations by federal courts be applied to determine when a state court factual determi-

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

- (1) that the merits of the factual dispute were not resolved in the State court hearing;
- (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;
- (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
- (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding;
- (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record; And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

See *infra* notes 26-32 and accompanying text for the discussion of the extent to which the *Townsend* circumstances are incorporated into section 2254(d).

13. *Id.* § 2254(d)(8).

14. *Id.*

15. *Id.*

nation is not fairly supported by the record. This comment suggests that adoption of either of these standards would be inappropriate; rather, a standard tailored to the unique nature of habeas corpus is required.

Part II of this comment will examine, in more detail, the history of section 2254(d). Parts III and IV will explain the distinction among questions of fact, mixed questions of fact and law, and questions of law in the context of recent Supreme Court cases applying section 2254(d)(8). Part V will examine the possible use of either the "any evidence" standard or the "clearly erroneous" standard to determine when a state court finding of fact is not fairly supported by the record. Part VI will draw some conclusions regarding the use of these standards. Throughout this comment, it is important to be mindful that section 2254(d) refers to federal habeas corpus review of state court factual determinations, i.e., "between systems" review, as opposed to federal appellate review of federal court factual determinations, i.e., "within system" review.

II. HISTORY OF SECTION 2254(d)

In his concurring opinion to *Brown v. Allen*,¹⁶ a 1953 habeas corpus case, Justice Jackson noted that in 1952, 541 petitions for habeas corpus had been filed in federal district courts.¹⁷ He complained of "progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own."¹⁸ In 1959, and again in 1963, the Committee on Habeas Corpus of the Judicial Conference of the United States drafted bills restricting state prisoners' applications for the writ.¹⁹ These drafts were embodied in bills before Congress, but only House approval could be obtained.²⁰ In 1966, the 89th Congress enacted the current section 2254(d),²¹ the language of which was adopted almost verbatim from a bill drafted by the Committee on Habeas Corpus and accepted by the Judicial Conference in 1965.²² Review by a three-judge panel of writs issued was not part of the legislation that Congress enacted due to the withdrawal by the Judicial Conference of its prior favorable recommendation of the provision because of

16. 344 U.S. 443 (1953).

17. *Id.* at 536 n.8 (Jackson, J., concurring).

18. *Id.* at 536.

19. S. REP. NO. 1797, 89th Cong., 2d Sess. 7, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 3663. Report of the Committee on Habeas Corpus to the Judicial Conference of the United States.

20. *Id.*

21. Act of November 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1105.

22. S. REP. NO. 1797, *supra* note 19, at 4 (Letter from Judge Phillips, United States Court of Appeals, Tenth Circuit, as Chairman of the Committee on Habeas Corpus of the Judicial Conference of the United States, to Senator Tydings, Chairman of the Subcommittee on Improvements in Judicial Machinery).

the administrative burdens it would create.²³

Justice Powell, in *Cuyler v. Sullivan*,²⁴ stated that the *Townsend v. Sain* opinion was the precursor to section 2254(d).²⁵ *Townsend* set out six circumstances which required a federal habeas corpus court to grant an evidentiary hearing to a state prisoner seeking the writ.²⁶ The language of the statute lists eight possible deficiencies in state court fact findings, and all of the *Townsend* circumstances are subsumed thereunder.²⁷ However, as Professor Bator points out, the statutory criteria and the *Townsend* circumstances do not address exactly the same issue.²⁸ The latter define when a federal evidentiary hearing is mandatory, while the former are relevant to whether state court findings of fact are presumed to be correct.

Further, if none of the eight [statutory] deficiencies is shown, the effect of this is, not to negate the power of the judge to call for a hearing, but . . . to shift to the petitioner the burden to show [by convincing evidence] at a hearing that the state findings [of fact] were erroneous.²⁹

Thus, even though some of the criteria in section 2254(d) are identical to the *Townsend* circumstances, the thrust of the statute and the thrust of the case are not identical. "[T]he language of the amendment apparently assumes that the decision to hold an evidentiary hearing has already been made . . . , [but] [i]ndirectly the statutory language and the *Townsend* rules do reinforce each other."³⁰ If there is no longer a statutory presumption of correctness for a state court finding of fact, *Townsend* would seem to require the federal judge to hold a hearing to make conclusions of fact.³¹ On the other hand, if one of the *Townsend* circumstances

23. *Id.* at 304. These burdens included increased travel time for lower federal judges and increased workload for the Court, since panel review was by writ of certiorari to the Court.

24. 446 U.S. 335 (1980).

25. *Id.* at 341.

26. *Townsend v. Sain*, 372 U.S. 293, 313 (1963). These six circumstances are:

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id.

27. The amendment adds three criteria including: the state court lacked subject matter jurisdiction, the state court unconstitutionally failed to appoint counsel for an indigent defendant, and the state court otherwise denied the applicant due process of law. The *Townsend* circumstance of a "substantial allegation of newly discovered evidence" does not appear in the statute but would seem to be subsumed under the statutory criterion of "material facts were not adequately developed in the state court," also a *Townsend* circumstance. For a similar discussion, see Note, *supra* note 4, at 1141.

28. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1505 & n.8 (2d ed. 1973).

29. *Id.*

30. Note, *supra* note 4, at 1141-42.

31. *Id.* at 1142.

shows a state conclusion to be unreliable, such a conclusion should be given no weight in the federal hearing.³²

It is clear that the language of section 2254(d) was simply adopted by Congress from the bill drafted by the Judicial Conference's habeas corpus committee. Because of this, it can be said that to the extent the Judicial Conference represents the views of the federal judiciary, any congressional purpose for the enactment of section 2254(d) gleaned from the legislative history is really the purpose of the federal judiciary. This assertion is supported by the fact that references in the body of the senate report regarding the rationale for enacting section 2254(d) parallel those found in a letter, incorporated into the senate report, written by the chairman of the Judicial Conference Committee on Habeas Corpus to the chairman of the Senate Subcommittee on Improvements in Judicial Machinery.³³

The bill enacting section 2254(d) and other amendments to section 2254 also contained amendments to section 2244 of the same title.³⁴ Judge Phillips, as chairman of the Habeas Corpus Committee, stated that the bill had a dual purpose, "to prevent the abuse of the writ of habeas corpus by persons in custody under judgments of [s]tate courts in habeas proceedings in [f]ederal courts, and to expedite the disposition of non-meritorious and repetitious applications for the writ in [f]ederal courts by [s]tate court prisoners."³⁵ These purposes were to be attained,

by provisions for a qualified application of the doctrine of res judicata in [f]ederal court habeas corpus proceedings brought by [s]tate prisoners, by provisions according a presumption of correctness to factual determinations made at a hearing on the merits by [s]tate courts and by provisions with respect to the burden of proof in [f]ederal court proceedings for habeas corpus by [s]tate prisoners.³⁶

The amendments to section 2244 are the provisions for a qualified application of the doctrine of res judicata, while section 2254(d) represents the other two provisions.³⁷

Most significantly, Judge Phillips indicated the need for the legislation was demonstrated by practical considerations.³⁸ He noted that applications for the writ by state prisoners in federal court increased from 134 in 1941, to 814 in 1957, to 3,248 in 1964, to 3,773 for the first nine months of fiscal 1966, while more than ninety-five percent of such applications were held to be without merit.³⁹ These practical considerations underlie

32. *Id.*

33. S. REP. NO. 1797, *supra* note 19, at 4.

34. Act of November 2, 1966, Pub. L. No. 89-711, § 1, 80 Stat. 1104.

35. S. REP. NO. 1797, *supra* note 19, at 4.

36. *Id.*

37. *Id.* at 5.

38. *Id.* at 5-6.

39. *Id.*

the amendments to both section 2244 and section 2254, since there is no indication that they apply to just one or the other.⁴⁰

The same purposes set out by Judge Phillips are reflected in the body of the senate report itself.⁴¹ Some argument can be made that the senate report was basing only the amendments to section 2244 on the practical considerations of the heavy burden placed on federal courts by increased habeas applications.⁴² This construction is not likely, however, given Judge Phillips' indication that practical considerations underlay the amendments to both sections 2244 and 2254. Since the enactment of the amendments to these two sections, applications for the writ by state prisoners have remained relatively constant, at least since 1970, averaging about 7,800 per year.⁴³

The senate report also notes that the legislation, will be a strong inducement to the [s]tates that have not already done so to provide adequate postconviction remedies and procedures and to make and keep available records and evidentiary matter in criminal and post-conviction proceedings, and to the [s]tate courts in criminal proceedings to safeguard the constitutional rights of defendants.⁴⁴

There was no discussion of the bill on the floor of either house prior to its enactment.⁴⁵

The legislative history shows that section 2254(d) was a means to the dual ends of preventing the abuse of the writ of habeas corpus by state prisoners and of facilitating the disposition of nonmeritorious and repetitious applications for the writ. Underlying these purposes was the practical consideration that the increasing number of habeas applications was felt to be overburdening the federal courts. This legislation was also intended to improve state criminal justice systems by inducing the states to develop adequate post-conviction remedies, to make permanent evidentiary records in criminal and post-conviction proceedings, and to make state courts more responsive to the constitutional rights of defendants. These improvements in state courts would, presumably, result in reduc-

40. *Id.*

41. *Id.* at 1-4.

42. *Id.* at 2-3.

43.

Year	1966 ^a	1967 ^a	1968 ^a	1969 ^a	1970 ^a	1971 ^a	1972 ^a
	5,339	6,201	6,488	7,359	9,063	8,372	7,949
	1973 ^a	1974 ^a	1975 ^a	1976 ^a	1977 ^b	1978 ^b	1979 ^a
	7,784	7,626	7,843	7,833	6,866	7,033	7,123
	1980 ^c	1981 ^d	1982 ^c				
	7,029	8,004	8,379				

44. S. REP. NO. 1797, *supra* note 19, at 3 (quoting Report of the Committee on Habeas Corpus of the Judicial Conference of the United States, which report was incorporated into the senate report).

45. 112 CONG. REC. 21,754 (House), 27,974 (Senate) (1966).

ing the number of writs filed in federal courts. Because section 2254(d) was essentially judicially drafted with the above purposes in mind, it can be said that it represents a shift in judicial policy. That is, section 2254(d) is a shift from the liberating view of *Townsend* in which the purpose of the circumstances was to make mandatory an evidentiary hearing in federal courts, to a desire to stem an apparent flood of habeas corpus applications. It must be said that section 2254(d) was not immediately effective in reducing the number of applications for the writ, since applications approximately tripled in the four years after its enactment.⁴⁶ However, the legislation may have had the intended effect of improving state court practices and procedures.

In the case of *Summer v. Mata*,⁴⁷ (*Mata I*), the Court referred several times to congressional intent in the enactment of section 2254(d) as support for giving a high degree of deference to state court findings of fact.⁴⁸ However, in *Mata I* the legislative history is never cited, nor does the Court acknowledge the fact that section 2254(d) is the enactment of a bill drafted by the Judicial Conference, generally incorporating the Court's own decision in *Townsend*. While practical considerations of the rapidly rising number of habeas corpus applications underlay the enactment of section 2254(d), such considerations are absent in the Court's restrictive view of that section in *Mata I*. Rather, the Court asserts that federal habeas corpus has been a source of friction between state and federal courts, and "Congress obviously meant to alleviate some of that friction when it enacted subsection (d)"⁴⁹ However, there is no authority offered in support of this assertion. It seems the Court is only offering its view of state court-federal court relations and its desire to use section 2254(d) as a means to reduce a perception of friction between the two court systems. Finally, the Court stated that the amendments were intended by Congress to limit the federal courts' exercise of habeas jurisdiction.⁵⁰ The *Mata I* decision would clearly serve this end regardless of whether Congress actually had such an intention.

III. QUESTIONS OF FACT, MIXED QUESTIONS, QUESTIONS OF LAW

Section 2254(d) requires a federal habeas court to accord a presumption of correctness to a state court determination of a factual issue after a hearing on the merits, regardless of whether such factual issue was determined by a state trial court or a state appellate court.⁵¹ The statute also

46. See statistics cited *supra* note 43.

47. 449 U.S. 539 (1981).

48. *Id.* at 547 & n.2, 550 & n.3, 552. For a more detailed discussion of the case, see *infra* notes 57-72 and accompanying text.

49. *Id.* at 550.

50. *Id.* at 548.

51. *Id.* at 546-47.

provides that the presumption can be rebutted if the federal court concludes such factual determination is not fairly supported by the record.⁵²

Because state determinations of factual issues are presumed correct, it is important to define what a factual issue is and distinguish it from other issues. Issues of fact "are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . .'"⁵³ Mixed questions of fact and law require that a legal standard be applied to the historical fact determinations; thus mixed questions are distinct from issues of fact.⁵⁴ Questions of law can be defined as the abstract determination of the proper legal standard to be applied. "The Court has . . . noted the vexing nature of the distinction between questions of fact and questions of law."⁵⁵

Regardless of the difficulty of the distinction between questions of fact, mixed questions, and questions of law, the categorization of an issue as one of the three is critical, because "[i]t is the [federal] district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas."⁵⁶

In *Mata I*, a case involving one inmate murdering another, the defendant contended for the first time in his direct appeal to the California Court of Appeal that the pretrial photographic identification employed by the state police was impermissibly suggestive. The defendant contended that this was in violation of the due process of law guarantee of the fourteenth amendment of the United States Constitution.⁵⁷ The defendant did not take direct appeal to the California Supreme Court, but instead sought relief in state habeas corpus proceedings.⁵⁸ He exhausted his remedies in those proceedings without relief, whereupon he sought a writ of habeas corpus in the district court, but the petition was denied.⁵⁹ The United States Court of Appeals for the Ninth Circuit reversed.⁶⁰ The Court vacated the Ninth Circuit judgment and remanded.⁶¹

In its initial opinion, the Ninth Circuit never mentioned section 2254.⁶² Despite this, it was clear to the Court that the Ninth Circuit had not implicitly relied on paragraphs one through seven of section 2254(d),

52. 28 U.S.C. § 2254(d)(8) (1982).

53. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (quoting *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)).

54. *Id.*

55. *Pullman-Standard, Inc. v. Swint*, 456 U.S. 273, 288 (1982).

56. *Townsend*, 372 U.S. at 318.

57. *Mata I*, 449 U.S. at 541-42.

58. *Id.* at 542.

59. *Id.*

60. *Id.* at 543.

61. *Id.* at 552.

62. *Mata v. Sumner*, 611 F.2d 754 (9th Cir. 1979), vacated, 449 U.S. 539 (1981).

and the failure to consider section 2254 made it impossible to tell whether the circuit court relied on paragraph eight.⁶³ Even if the Supreme Court could have implied that the Ninth Circuit relied on section 2254(d)(8), i.e., the state appellate court's findings of fact were not fairly supported by the record, this would not have been sufficient, nor would a boilerplate reference to section 2254(d)(8) have been sufficient.⁶⁴ The Court concluded that Congress "contemplated at least some reasoned written references to § 2254(d) and the state-court findings."⁶⁵ In this regard, the Court made reference to Rule 52 of the Federal Rules of Civil Procedure wherein a district court is required, following a bench trial, to specifically find the facts and separately make a statement of conclusions of law thereon.⁶⁶ Rule 52 governs the effect of findings of fact made by a lower federal court judge, sitting without a jury, on federal appellate court review.⁶⁷ The Court held that a habeas court must include in its opinion granting the writ its reasoning leading to the conclusion that one of the eight paragraphs of section 2254(d) rebutted the presumption of correctness accorded to state court fact findings.⁶⁸

Justice Brennan's dissent, joined by two Justices, points out that the Ninth Circuit's failure to mention section 2254(d) resulted from the petitioner's failure to raise the argument.⁶⁹ More importantly, the dissent contended that the Ninth Circuit and the California Court of Appeal did not disagree over the historical facts.⁷⁰ Rather, the issue of the suggestiveness of the photo identification procedure was a mixed question of fact and law falling outside the limitations of section 2254(d).⁷¹ Other Supreme Court cases had held similarly on the related issue of a show-up identification procedure and on other issues.⁷²

Professor Reynolds argued that *Mata I* could result in two possible

63. 449 U.S. at 549.

64. *Id.*

65. *Id.*

66. *Id.*

67. FED. R. CIV. P. 52(a).

68. 449 U.S. at 549.

69. *Id.* at 553-54 (Brennan, J., dissenting).

70. *Id.* at 556.

71. *Id.* at 557.

72. *Id.* at 557-58. In *Neil v. Biggers*, 409 U.S. 188 (1972), defendant was convicted of rape on evidence which included testimony concerning the victim's identification of defendant at a stationhouse show-up. Defendant contended that the show-up was so suggestive that it violated his due process rights. The Court held that his due process rights had not been violated. *Id.* at 199-201. The Court could reach the merits because the dispute was not over elemental facts, rather it was over "the constitutional significance attached to them." *Id.* at 193 n.3. In *Brewer v. Williams*, 430 U.S. 387 (1977), the police questioned defendant during a 160 mile automobile ride, despite having agreed not to do so. Defendant made incriminating statements and led police to the victim's body. The question of waiver was found to be a mixed question; thus, 2254(d) was not applicable. *Id.* at 397 & n.4. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (whether lawyers' representation of defendant and co-defendant at separate trials was conflict of interest held to be a mixed question not covered by 2254(d)).

outcomes.⁷³ The first was that the constitutionality of photo identification procedures would be precluded from habeas review.⁷⁴ Alternatively, identification questions would be treated as factual matters; thus, state court findings on such questions would be presumed correct under section 2254(d).⁷⁵ Professor Reynolds feared that the second approach could lead to the categorization of other issues as factual, and thereby subject to the statute's presumption of correctness.⁷⁶ This would serve the Court's restrictive view of habeas corpus,⁷⁷ but it raises the danger that issues of law could be swallowed up by issues of fact in the field of habeas corpus. Professor Reynolds' fears have been allayed, but not completely dispelled.

On remand from *Mata I*, the Ninth Circuit took Justice Brennan's position that whether the pretrial photographic identification was impermissibly suggestive was a mixed determination of fact and law not subject to section 2254(d).⁷⁸ The result was a reversal of the district court.⁷⁹

In its second *Sumner v. Mata* opinion, (*Mata II*), the Court again vacated the Ninth Circuit judgment and remanded.⁸⁰ In its per curiam opinion, the Court attempted to dispel any notion that the suggestiveness of a photo identification procedure was an issue of fact⁸¹ by stating, "[w]e agree with the Court of Appeals that the *ultimate question* as to the constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact that is not governed by § 2254(d)."⁸² Nevertheless, the Court found section 2254(d) was applicable to the case. The Court stated:

[T]he questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption as our earlier opinion made clear. Thus, whether the witnesses in this case had an opportunity to observe the crime or were too distracted; whether the witnesses gave a detailed, accurate description; and whether the witnesses were under pressure from prison officials or others are all questions of fact as to which the

73. Reynolds, *Sumner v. Mata: Twilight's Last Gleaming for Federal Habeas Corpus Review of State Court Convictions? Speculations on the Future of the Great Writ*, 4 U. ARK. LITTLE ROCK L.J. 289, 298 (1981).

74. *Id.* This was the approach taken in *Stone v. Powell*, 428 U.S. 465 (1976), where "questions concerning the constitutionality of evidence seized may not be entertained [on habeas] after full and fair litigation in the state courts." *Id.* at 296-97.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Mata v. Sumner*, 649 F.2d 713 (9th Cir. 1981), *vacated*, 455 U.S. 591 (1982).

79. *Id.*

80. *Sumner v. Mata*, 455 U.S. 591 (1982).

81. Judge Sneed, in his dissent to the Ninth Circuit majority opinion on remand from *Mata I*, indicated he thought the Court in *Mata I* found the issue of whether the photo identification was impermissibly suggestive to be an issue of fact entitled to a presumption of correctness under 2254(d). 649 F.2d at 717 (Sneed, J., dissenting).

82. 455 U.S. at 597 (emphasis added).

statutory presumption applies.⁸³

The Court notes that the distinction between law and fact is not always easily made,⁸⁴ and this seems particularly true in this case. At least the question of whether the witnesses were under pressure from prison officials or others seems to require a finding that takes it out of the realm of being a "basic, primary or historical fact [] . . . 'in the sense of a recital of external events and the credibility of their narrators'"⁸⁵ Even though any suggestiveness in a photo identification procedures continues to be a mixed question, the potential remains for treating such questions as factual issues, because what are termed the underlying questions of fact may encompass more than a recital of external events. Thus, while the *Mata II* decision allays Professor Reynolds' fear that the suggestiveness of photo identification procedures will ultimately be treated as an issue of fact, such potential still remains.

On remand from *Mata II*, the Ninth Circuit meticulously reviewed the trial transcript and the findings of the California Court of Appeal, and specifically held that the findings were "not fairly supported by the record [section 2254(d)(8)] and, therefore, need not be accorded the presumption of correctness mandated by section 2254."⁸⁶ As *Mata II* required, the Ninth Circuit made a finding of fact regarding each of the factors indicating a witness' ability to make an accurate identification.⁸⁷ Against these factors the court weighed the indicia of the corrupting effect of the photographic identification procedure.⁸⁸ On balance, after giving due deference to the state court findings that were fairly supported by the record, it was held that the procedures employed were so impermissibly suggestive as to make likely an irreparable misidentification.⁸⁹ And again, the Ninth Circuit reversed the district court.

Judge Sneed dissented from the Ninth Circuit majority opinion.⁹⁰ In his dissent, he noted the case of *Lonberger v. Jago* as a similar case which was on certiorari to the Supreme Court at that time.⁹¹ That case is the subject of discussion in the next section.

83. *Id.* (emphasis in original).

84. *Id.* at 598.

85. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (quoting *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)).

86. *Mata v. Sumner*, 696 F.2d 1244, 1251 (9th Cir. 1983), *vacated and remanded to dismiss as moot*, 104 S. Ct. 386 (1984).

87. 696 F.2d at 1251-53. These factors include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

88. *Id.* at 1253-55.

89. *Id.* at 1255.

90. *Id.* at 1256 (Sneed, J., dissenting). For the discussion of Judge Sneed's proposed standard for not fairly supported by the record, section 2254(d)(8), see *infra* text accompanying notes 136-60.

91. *Id.* at 1258 n.2.

While the most recent Ninth Circuit decision apparently ends the tug-of-war between that court and the Supreme Court, the potential remains for mixed questions to be transformed into issues of fact. In its opinion following *Mata I*, the Ninth Circuit had determined that a mixed question was involved. In *Mata II*, the Supreme Court channeled the Ninth Circuit's subsequent opinion into reliance on section 2254(d)(8) by its determination of what issues were questions of fact, even though at least one of those issues arguably involved more than a recital of external events on their narrator's credibility.

Moreover, the struggle between the Ninth Circuit and the Supreme Court added very little to the search for a standard to guide lower federal courts in deciding when a state court factual determination is not fairly supported by the record under section 2254(d)(8). Neither court articulated a standard for when state court findings are not fairly supported by the record, and this failure is disturbing because the case eventually turned on such a conclusion.

IV. THE *LONBERGER* CASE

The *Lonberger* case shuttled back and forth between the Sixth Circuit and the Supreme Court much like the *Mata* case did between the Ninth Circuit and the Court. Involved are two opinions by the Sixth Circuit and an ultimate decision by the Court.

The *Lonberger* case represents the application of the *Mata I* requirements on habeas corpus in the context of the determination of the voluntariness of a guilty plea. As in the latest Ninth Circuit opinion, the Sixth Circuit relied on section 2254(d)(8) in deciding that the voluntariness of the defendant's guilty plea was not fairly supported by the record.⁹² The Court, however, rejected the Sixth Circuit's argument, holding that the latter had erroneously applied that section.⁹³ Again, neither the Supreme Court nor the court of appeals articulated a clear standard for when a state court factual determination is not fairly supported by the record, although the Court made a passing reference to such a standard.⁹⁴ This case can best be discussed by first setting forth the facts as gleaned from the two Sixth Circuit opinions and that of the Supreme Court.

Under Ohio law, the defendant, Robert Lonberger, was convicted of aggravated murder by a jury with a "specification" which resulted in the death penalty under the Ohio sentencing enhancement statute.⁹⁵ The

92. *Lonberger v. Jago*, 651 F.2d 447, 449 (6th Cir. 1981), *rev'd sub nom.*, *Marshall v. Lonberger*, 459 U.S. 422 (1983).

93. *Marshall v. Lonberger*, 459 U.S. 422 (1983) (*Lonberger II*).

94. *Id.* at 432.

95. *Lonberger v. Jago*, 635 F.2d 1189, 1189 (6th Cir. 1980), *vacated*, 451 U.S. 902 (1981).

victim had bled to death from a neck wound.⁹⁶

The indictment contained two counts of "aggravated murder." Both counts included a "specification," wherein the prosecution charged that the defendant previously had been convicted of purposefully killing or attempting to kill another.⁹⁷ Under Ohio law, a sentence of death is possible only upon the defendant separately being found guilty of aggravated murder and a specification.⁹⁸

At trial, the state introduced three items of documentary evidence in an attempt to prove Lonberger's prior conviction in Cook County, Illinois, of the attempted murder of Dorothy Maxwell.⁹⁹ These items included: (1) a copy of the Illinois grand jury indictment, (2) a certified copy of an Illinois record known as a "conviction statement", and (3) a transcript of the Illinois court hearing at which the defendant pled guilty.¹⁰⁰ The controversy between the Sixth Circuit and the Court concerning the voluntariness of the defendant's guilty plea to attempted murder centered around the absence of the words "attempted murder" and "murder" in the conviction statement and in the transcript, respectively.¹⁰¹ The conviction statement recited only that the defendant had pled guilty to "AGGRAVATED BATTERY, ETC."¹⁰² The transcript showed that the Illinois judge questioned the defendant as to whether he understood he was pleading guilty to aggravated battery and whether "you did on the same date attempt on Dorothy Maxwell, with a knife" ¹⁰³

Prior to the trial, the Ohio court held a hearing *in limine* to determine the voluntariness of the defendant's guilty plea to attempted murder in Illinois.¹⁰⁴ The state offered the documentary evidence, and the defendant took the stand.¹⁰⁵ The defendant testified that he had not been apprised of the Illinois charges, that his attorney told him he was pleading guilty only to aggravated battery, and that he never personally received or read the indictment.¹⁰⁶

The Ohio trial court made three sets of findings concerning the defendant's Illinois guilty plea. On the basis of the evidence, the court found that the defendant was an intelligent individual, that he was well versed in the criminal processes, and that he was well represented by competent

96. *Id.* at 1191.

97. *Lonberger II*, 459 U.S. at 425.

98. *Lonberger v. Jago*, 635 F.2d at 1190 n.3.

99. *Lonberger II*, 459 U.S. at 426-27.

100. *Id.* at 427.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 428.

105. *Id.*

106. *Lonberger v. Jago*, 635 F.2d at 1195.

counsel in Illinois.¹⁰⁷ The trial court also found that every effort was made to protect the defendant's constitutional rights.¹⁰⁸ On the basis of these two sets of findings, the Ohio trial court found that the defendant had voluntarily and intelligently pled guilty in Illinois.¹⁰⁹

The jury found the defendant guilty on the second count of aggravated murder and on the corresponding specification.¹¹⁰ The Ohio Court of Appeals reversed the defendant's conviction of aggravated murder because the state failed to prove beyond a reasonable doubt the elements of rape or the identity of the defendant as the rapist.¹¹¹ The Ohio appellate court did uphold the jury finding that the defendant was guilty of the lesser included offense of murder and that the specification concerning the Illinois conviction of attempted murder was adequately proved.¹¹²

With respect to the admissibility and evidence of the prior Illinois conviction, the Ohio Court of Appeals found that the trial court had not erred in its ruling that the guilty plea was voluntarily and knowingly made and that it should be submitted to the jury as evidence.¹¹³ The appellate court also found that the defendant had stipulated, through his counsel, that the facts were sufficient to sustain the charges in the indictment.¹¹⁴ Upon exhausting his state court remedies, the defendant sought a writ of habeas corpus from the district court, but the petition was denied.¹¹⁵ The defendant appealed to the Sixth Circuit Court of Appeals.

In its first opinion, the Sixth Circuit, without referring to section 2254(d), reversed the district court's dismissal of the defendant's motion for a writ of habeas corpus on the ground that the state of Ohio had failed to meet its burden of showing that the defendant understood the nature of the prior Illinois charge to which he pled guilty.¹¹⁶ The Supreme Court granted certiorari and summarily vacated the judgment and remanded the case for consideration in light of *Mata I*.¹¹⁷

On remand, the Sixth Circuit attempted to follow the *Mata I* requirements necessary to rebut the presumption of correctness accorded to state court fact findings under section 2254(d). In explaining its reasons for departing from the state court findings of fact, as *Mata I* required, the court made a one sentence notation that the Ohio trial court had made

107. *Lonberger II*, 459 U.S. at 428.

108. *Id.* at 429.

109. *Id.*

110. *Id.*

111. *Lonberger v. Jago*, 635 F.2d at 1191.

112. *Lonberger II*, 459 U.S. at 429. The judgment imposing the death penalty was reversed, and the court "directed imposition of a sentence based solely on the conviction of murder." *Id.*

113. *Id.* at 430.

114. *Id.*

115. *Lonberger v. Jago*, 635 F.2d at 1191.

116. *Id.* at 1195.

117. *Marshall v. Lonberger*, 451 U.S. 902 (1981).

no explicit findings regarding Lonberger's testimony as a witness.¹¹⁸ This statement became significant in the subsequent Supreme Court opinion. The Sixth Circuit expressly held that the Ohio courts' factual determination that Lonberger had intelligently pled guilty to attempted murder in Illinois was not fairly supported by the record under section 2254(d)(8).¹¹⁹

The Sixth Circuit's chief rationale for invoking 2254(d)(8) was its finding that the transcript of Lonberger's plea of guilty, in Illinois, to attempted murder was inadequate to show his awareness of pleading to that charge.¹²⁰ According to Sixth Circuit law, when a transcript is inadequate the state must make a clear and convincing showing that the plea was knowingly and understandingly made, and the state failed to make such a showing.¹²¹ In particular, Lonberger testified that he had not heard of the "attempt" charge either at his arraignment or from his attorneys, and the state produced no evidence to the contrary.¹²²

In *Lonberger II*, the Supreme Court took an approach similar to its opinion in *Mata II*. The Court made the same ultimate conclusion/underlying facts distinction it had made in *Mata II*. It agreed with the Sixth Circuit that the standard of whether a guilty plea is voluntary for federal constitutional purposes is a question of federal law, and not a question of fact subject to section 2254(d).¹²³ As in *Mata II*, the Court set out what it considered to be the underlying questions of fact governed by section 2254(d), including: "what the Illinois records show with respect to respondent's [Lonberger's] 1972 guilty plea, what other inferences regarding those historical facts the . . . Sixth Circuit could properly draw, and related questions . . ."¹²⁴

In holding that the Sixth Circuit had erroneously applied the "fairly supported by the record" exception contained in section 2254(d)(8), the Court focused on the defendant's testimony at the Ohio pre-trial hearing regarding his guilty plea in Illinois.¹²⁵ The Court rephrased the language of section 2254(d)(8) and found that for that section to apply, the Sixth Circuit "must conclude that the state court findings lacked even 'fair support' in the record."¹²⁶ Based upon this "standard," the Court held that "[t]he Court of Appeals' treatment of the issue of respondent's credibility failed to satisfy this standard."¹²⁷ First, even though the Ohio trial court

118. *Lonberger v. Jago*, 651 F.2d at 448.

119. *Id.* at 449.

120. *Id.*

121. *Id.*

122. *Id.* at 450.

123. *Lonberger II*, 459 U.S. at 431.

124. *Id.* at 431-32.

125. *Id.* at 432.

126. *Id.*

127. *Id.*

failed to make express findings regarding the defendant's credibility as a witness, in terms of his knowledge of the charges to which he pled guilty in Illinois, the trial court's admission of the prior conviction into evidence, for purposes of proving the specification, was equivalent to that court's refusal to credit the defendant's testimony.¹²⁸ Second, for purposes of deciding whether state court factual findings are fairly supported by the record, a federal habeas court may not redetermine the credibility of witnesses.¹²⁹ Finally, the Court found that the presumption that Lonberger had been informed of the Illinois attempted murder charges had not been rebutted.¹³⁰

If the Court's statement that "lack of fair support" is to be taken as the standard for the language "not fairly supported by the record" in section 2254(d)(8), it is of little help to lower federal courts in defining what the latter phrase means. Thus, the federal courts remain without any comprehensive guide for determining when a state court factual finding is not fairly supported by the record.

V. A STANDARD FOR "NOT FAIRLY SUPPORTED BY THE RECORD"

Section 2254(d)(8) provides that a state court factual determination, after a hearing on the merits, is to be presumed correct by a federal habeas court unless the latter court, after considering such part of the record as a whole, concludes that the "factual determination is not fairly supported by the record."¹³¹ It has been noted that the purpose of the fair support criterion is to provide "a minimal check on the earlier [state] court's reasoning and impartiality, a necessary check if the prior factual conclusions - not merely the data generated and recorded - are to be adopted by the habeas court."¹³²

Some federal judges have suggested certain standards be used in deter-

128. *Id.*

129. *Id.* at 434. The Court quoted from *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952), to the effect that the trial court findings regarding the credibility of witnesses must be given deference because only such courts have the opportunity to observe the demeanor of the witnesses. *Id.* at 339. The case involved review within the federal court system of a district court's denial of an injunction sought by the organized medical profession against "contract practice." *Id.* On the other hand, it has been noted that where documentary evidence is involved, no such deference is required on review within the federal court system. See *Pullman-Standard, Inc. v. Swint*, 456 U.S. 273, 301-02 (1983) (Marshall, J., dissenting) (case involving discriminatory intent in a labor union seniority system).

If these "within system" rules are applied to "between systems" review, it is evident that the degree of deference accorded to state court findings will, in part, be dependent upon whether a case is categorized as turning upon documentary or oral evidence. In the case under discussion, the Sixth Circuit focused on the documentary evidence, but the Supreme Court focused on the defendant's testimony, thus a higher degree of deference was required.

130. *Lonberger II*, 459 U.S. at 435-36.

131. 28 U.S.C. § 2254(d)(8) (1982).

132. Note, *supra* note 4, at 1132.

mining when a state court factual finding is not fairly supported by the record. Judge Sneed, in his dissent to the most recent Ninth Circuit majority opinion in the *Mata* case, stated that an “any evidence” standard be used to evaluate the section 2254(d)(8) exception.¹³³ In *Alderman v. Austin*,¹³⁴ a Fifth Circuit case, Judge Fay, in his dissent, suggested that the “clearly erroneous” standard of Rule 52 of the Federal Rules of Civil Procedure, be used to determine when state court findings of fact are not fairly supported by the record.¹³⁵ The appropriateness of these standards will be reviewed.

A. The “Any Evidence” Standard

Judge Sneed notes that because section 2254(d) was enacted in response to *Townsend v. Sain*, one must turn to that case to discern the meaning of the statute.¹³⁶ Judge Sneed adds that *Townsend* refers to *Blackburn v. Alabama* and *Fiske v. Kansas* for the definition of “fairly support.” “According to these cases, a finding is not fairly supported by the record if it is ‘shown by the record to be without evidence to support it.’”¹³⁷ Judge Sneed concludes that proper application of section 2254(d)(8) requires one to ask “whether there is *any evidence* in the record to support the state court’s finding of fact.”¹³⁸ If any such evidence can be found in the record, then the state court findings must be presumed correct, unless the state prisoner can show convincing evidence that the factual finding was erroneous.¹³⁹ However, the argument has been made that the *Blackburn* and *Fiske* cases are inappropriate to support the use of the “any evidence” standard to evaluate when a state court finding of fact is not fairly supported by the record.

The Court, in *Townsend*, cited *Blackburn* and *Fiske* as examples of when “state factual determinations not fairly supported by the record cannot be conclusive of federal rights.”¹⁴⁰ In *Fiske v. Kansas*,¹⁴¹ the Court said it would “review the finding of facts by a [s]tate court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it”¹⁴² In *Fiske*, the Court held that the defendant was denied due process in the application of a criminal syndicalism statute to him, because there was no evidence at all

133. *Mata v. Sumner*, 696 F.2d at 1257 (Sneed, J., dissenting).

134. 695 F.2d 124 (5th Cir. 1983) (en banc).

135. *Id.* at 132-33 (Fay, J., dissenting). Judge Roney joined in Judge Fay’s dissent.

136. 696 F.2d at 1257 (Sneed, J., dissenting).

137. *Id.* (quoting *Fiske v. Kansas*, 274 U.S. 380, 385 (1927)). Judge Sneed notes that *Blackburn v. Alabama*, 361 U.S. 199, 208-09 (1960), makes a similar finding.

138. *Id.* (emphasis in original).

139. *Id.*

140. *Townsend v. Sain*, 372 U.S. 293, 316-17 (1963).

141. 274 U.S. 380 (1927).

142. *Id.* at 385.

that the organization, for which defendant solicited membership, advocated unlawful acts or methods in accomplishing its ends.¹⁴³ Wright and Sofaer argue that "[t]hese cases [*Blackburn* and *Fiske*] do not establish a scope of review for judging findings based on conflicting evidence; rather they deal with the *legal question* whether there is such an absence of evidence that due process is violated."¹⁴⁴ Thus, these cases represent questions of law, and, as such, they are not relevant to the issue of whether a state court fact finding is not fairly supported by the record. Questions of law are not subject to section 2254(d).¹⁴⁵

In *Townsend*, the Court stated that a federal habeas court has the same exacting duty to scrutinize the state court record as the Supreme Court has on direct review.¹⁴⁶ To indicate the extent of this exacting duty, the Court cited *Blackburn v. Alabama* and *Moore v. Michigan*, both of which came to the Court on direct review.¹⁴⁷ However, these cases are largely irrelevant to the issue of whether a state court's finding of fact is not fairly supported by the record, because they involve mixed questions of fact and law.¹⁴⁸ Mixed questions are not subject to section 2254(d).¹⁴⁹

It can be seen that the *Fiske*, *Blackburn*, and *Moore* cases are inapposite as examples of when a state court factual determination is not fairly supported by the record under section 2254(d)(8). These cases represent the examination of questions of law or mixed questions by the Supreme Court on direct review. Had these cases arisen on habeas, they would have been reviewed by the federal district court, but not because of the operation of the section 2254(d)(8). Rather, they would have been reviewed because they involved questions of law or mixed questions, which issues are reviewable independent of that section of the statute. If these cases truly fall under section 2254(d)(8), then the Supreme Court on di-

143. *Id.* at 387.

144. Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 946 (1966). (emphasis added). This article was published in May, 1966, just prior to the enactment of section 2254(d). Therefore, all references are to *Townsend* with respect to the discussion of when state court findings of fact are not fairly supported by the record. *Id.* at 946-53. However, it should be noted that Judge J. Shelly Wright, co-author of the article, was a member of the Judicial Conference Habeas Corpus Committee which drafted the section 2254(d) amendment which was enacted by Congress. S. REP. NO. 1797, *supra* note 19, at 3. As a member of the drafting committee, he was certainly intimately familiar with section 2254(d)(8) and the intended meaning of when a state court factual determination is not fairly supported by the record.

145. See *supra* text accompanying notes 53-56.

146. *Townsend*, 372 U.S. at 316.

147. *Id.*

148. Note, *supra* note 4, at 1133 n.82. See *Blackburn v. Alabama*, 361 U.S. 199, 208-09 (1960) (voluntariness of murder confession of defendant who was confined to mental hospital shortly after arrest and confession, four years later found competent to stand trial, tried and convicted; deposition of doctor on lunacy commission regarding defendant's sanity at time of confession was "in such hopeless internal conflict that it raises no genuine issue of fact"); see also *Moore v. Michigan*, 355 U.S. 155 (1957) (fear of mob violence planted in defendant's mind raised the inference that his waiver of counsel prior to his guilty plea was not intelligently and understandingly made).

149. See *supra* text accompanying notes 53-56.

rect review and the federal habeas court on collateral review, under that section, would be functioning identically in examining mixed questions and questions of law.

If the role of the habeas court were limited to the functions of the Court on direct review, there would never be any need for a fact-finding hearing on this ground [section 2254(d)(8)]. So if the habeas fact-finding hearing is to perform any function in the review of the sufficiency of evidence, the habeas court must have a greater obligation than the Supreme Court on direct review.¹⁵⁰

That the role of the habeas court is not identical to that of the Supreme Court is evidenced by the requirement that the former review the record as a whole.¹⁵¹ The habeas court is required to review both the undisputed and disputed portions of the record, whereas only the disputed portion of the record is examined on direct review.¹⁵² Because the habeas court is not in the same role as the Court on direct review, "[t]he 'fairly supported' formulation, therefore, must mean more than merely a review to determine whether *any* evidence supports a finding."¹⁵³

The case of *Norris v. Alabama*¹⁵⁴ has been cited as one instance in which the Supreme Court, on direct review, engaged in the weighing of conflicting evidence.¹⁵⁵ The Court rarely plays such a role with respect to state findings of historical fact.¹⁵⁶ In *Norris*, the Court rejected the testimony of state officials that even though no black had served on a jury within the memory of life-long residents of the county, blacks were not systematically excluded from jury duty.¹⁵⁷ The state officials' testimony was rejected on the basis of other uncontroverted testimony that there were a number of blacks qualified for jury service.¹⁵⁸ Because the Supreme Court, on direct review, rarely weighs conflicting evidence as it did in *Norris*, it is essential that the federal habeas court do so where the state court findings of fact are not fairly supported by the record.¹⁵⁹ Otherwise, constitutional violations may not be rectified for lack of review.

Judge Sneed's suggestion that the "any evidence" standard be used to determine when a state court factual finding is not fairly supported by the record is inapposite.¹⁶⁰ The standard is more properly applied when

150. Wright & Sofaer, *supra* note 144, at 947.

151. *Id.*

152. *Id.*

153. *Id.* (emphasis in original).

154. 294 U.S. 587 (1935).

155. Note, *supra* note 4, at 1133 n.82. See also Wright & Sofaer, *supra* note 144, at 947 n.176.

156. Note, *supra* note 4, at 1133 n.82.

157. 294 U.S. at 596-99.

158. *Id.* at 597.

159. Note, *supra* note 4, at 1133 n.82.

160. The Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), held that the "no evidence" standard of *Thompson v. Louisville* could not be used on federal habeas corpus in evaluating whether a

questions of law or mixed questions are at issue. Moreover, use of the "any evidence" standard with respect to section 2254(d)(8) would restrict the federal habeas court's ability to protect the federal constitutional rights of state prisoners.

B. The "Clearly Erroneous" Standard

Judge Fay, in his dissent in *Alderman v. Austin*,¹⁶¹ suggested that the "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure be used to evaluate whether state court factual determinations are not fairly supported by the record under section 2254(d)(8).¹⁶² Rule 52 is applicable in federal appellate review.¹⁶³ The Supreme Court has expressed its willingness to accept a standard of review for section 2254(d)(8) that is familiar in federal appellate review. "We greatly doubt that Congress, when it used the language, 'fairly supported by the record' considered 'as a whole' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself."¹⁶⁴ The "clearly erroneous" standard

necessary element of a crime has been proved. The Court said: "[I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

This case does not alter the argument made in this section of the comment; rather, it supports the contention that Judge Sneed's suggested use of the "any evidence" standard is inapposite.

Following a bench trial, a Virginia court convicted defendant of first degree murder. *Id.* at 309. Defendant had sought relief on the ground that there was insufficient evidence of premeditation, a necessary element of first degree murder. *Id.* at 311 & n.2, 312.

In re Winship established the constitutional requirement that a criminal conviction will not stand unless every fact necessary to constitute the crime is proved beyond a reasonable doubt. *Id.* at 315. The question in *Jackson* was whether this rule should be applied in federal habeas corpus. *Id.* at 312-13. The Court distinguished the *Thompson* "no evidence" criterion from the "guilt beyond a reasonable doubt standard," in that the former involved no question of the sufficiency of the evidence, while the latter did. *Id.* at 314.

In *Jackson*, the Court indicated that the *In re Winship* standard involved a mixed question of fact and law. The Court cited *Blackburn v. Alabama* as an instance of when the application of a constitutional standard requires a federal court to assess the facts. *Id.* at 318. *Townsend* is then cited for the proposition that the same duty obtains no habeas corpus. *Id.* As has already been noted, *Blackburn* and its application in habeas corpus signify a mixed question of fact and law not subject to section 2254(d). See *supra* notes 140-49 and accompanying text.

The Court's only reference to section 2254 was to subsection (a) to the effect that a state prisoner's application for a writ of habeas corpus must be entertained when he is in custody in violation of the Constitution of the United States. *Jackson*, 443 U.S. at 320-21. Section 2254(d)(8) was never mentioned.

The above indicates that the *Jackson* standard is not to be used in the section 2254(d)(8) determination of when a state court finding of fact is not fairly supported by the evidence. The "guilt beyond a reasonable doubt" standard involves the application of a federal standard to the facts as found—a mixed question of fact and law not subject to section 2254(d).

161. 695 F.2d 124 (5th Cir. 1983) (en banc).

162. 695 F.2d at 133 (Fay, J., dissenting).

163. FED. R. CIV. P. 52(a).

164. *Lonberger II*, 459 U.S. at 434-35.

would serve this purpose.

In *Alderman*, a federal habeas corpus case, the en banc majority adopted the panel's holding that defendant's sixth amendment right to an impartial jury had been violated by the exclusion of three veniremen, who, while stating that they could vote for the death penalty, expressed doubts about their ability to write out and sign such a verdict if selected as jury foreperson.¹⁶⁵ After noting the majority's failure to mention section 2254(d), contrary to the *Mata I* requirement, Judge Fay surmised that the state court findings of fact had been rejected by the majority under section 2254(d)(8).¹⁶⁶ Then, the view is adopted that the "fairly supported by the record" standard of section 2254(d)(8) is the same as the "clearly erroneous" standard.¹⁶⁷

The classic definition of "clearly erroneous" comes from the Supreme Court. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."¹⁶⁸ Rule 52 governs the effect of lower federal court findings of fact on appellate review. "In all actions tried upon the facts without a jury or with an advisory jury . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."¹⁶⁹ Judge Fay and others seek to apply this "within system" federal appellate review standard to the "between systems" review by federal habeas courts of state court findings of fact.

Several commentators have suggested that the "clearly erroneous" standard be applied to section 2254(d)(8). Use of the "clearly erroneous" standard was proposed even before the enactment of section 2254(d)(8) in connection with the *Townsend* criterion which eventually was embodied in that section.¹⁷⁰ The test was thought to prevent total abandonment of federal review of state findings, while ensuring that federal judges do not merely substitute their own judgments for those of state courts.¹⁷¹

Wright and Sofaer also advocate that the "clearly erroneous" standard be used in determining when state court findings of fact are not fairly supported by the record.¹⁷² The standard was favored because of its gen-

165. *Alderman*, 695 F.2d at 126; see *Alderman v. Austin*, 663 F.2d 558, 562-64 (5th Cir. 1982).

166. *Alderman*, 695 F.2d at 132.

167. *Id.* at 132-34.

168. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

169. FED. R. CIV. P. 52(a).

170. Note, *Federal Habeas Corpus Treatment of State Factfinding: A Suggested Approach*, 76 HARV. L. REV. 1253, 1262 (1963).

171. *Id.*

172. Wright & Sofaer, *supra* note 144, at 948. The substantial evidence test used in reviewing administrative decisions and a scope of review broader than the "clearly erroneous" standard were

eral applicability and its flexibility to handle credibility issues. "The standard applies whether or not there were conflicts in testimony and simply becomes narrower when credibility is involved."¹⁷³ In stating that "[a]pplication of the clearly erroneous standard entails evidence evaluation,"¹⁷⁴ the authors argue that generalizations about types of evidence can only offer guidance in this task.¹⁷⁵ Generally, reviewing courts are to defer to findings based upon credibility, but demeanor evidence can be as deceiving as it is helpful.¹⁷⁶

The plain fact is that reviewing courts do test the credibility of witnesses, by reference to such factors as corroboration, interest in the outcome, reputation, degree of recall, internal consistency of the testimony, the likelihood of the story in light of common experience and knowledge, and whether the witness behaved in a manner strongly at variance with the way in which we would expect a similarly situated person to behave.¹⁷⁷

Similarly, Wright and Sofaer argue that the generalization that documentary evidence is inherently more valuable than testimony is not especially helpful, because a useful comparison is difficult to make when the value of the former and of the latter varies from case to case.¹⁷⁸ The authors' point is that any application of the "clearly erroneous" standard to the evaluation of state court findings of fact should not be completely ruled by generalizations about the type of evidence under scrutiny. Relying on the Wright and Sofaer analysis, the author of *Developments in the Law—Federal Habeas Corpus*¹⁷⁹ takes the position that "'fair support' should be construed as broadly as the 'clearly erroneous' standard."¹⁸⁰

In his dissent, Judge Fay cites several cases as holding that the statutory standard of fairly supported by the record is equivalent to the "clearly erroneous" standard.¹⁸¹ In *Leavitt v. Howard*,¹⁸² the First Circuit said, "[w]e read the 'fair support' standard [of section 2254(d)(8)] as authorizing the district court in habeas cases to review the state court findings by the same 'clearly erroneous' standard employed in federal appellate review of trial findings"¹⁸³ For this view, the *Develop-*

also discussed. *Id.* The former was rejected as too narrow. *Id.* at 949. The latter was rejected because of the danger it would lead to complete relitigation of numerous state court judgments. *Id.* at 950.

173. *Id.* at 950.

174. *Id.* at 951.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 951-52.

179. Note, *supra* note 4.

180. *Id.* at 1133 & n.83.

181. *Alderman*, 695 F.2d at 132 (Fay, J., dissenting).

182. 462 F.2d 992 (1st Cir.), *cert. denied*, 409 U.S. 884 (1972).

183. *Id.* at 996 (habeas case involving consent to search of automobile; state court not mistaken in believing testimony of police witnesses over uncorroborated testimony of defendant and his wife).

ments note was cited.¹⁸⁴ Citing *Leavitt and Developments*, the Fourth Circuit came to the same conclusion in *Wright v. North Carolina*,¹⁸⁵ a habeas case involving the voluntariness of a confession. Judge Fay also cites *Moore v. Ballone*,¹⁸⁶ a Fourth Circuit case, but that opinion never mentions section 2254(d)(8). Rather, the Fourth Circuit seems to be applying the "clearly erroneous" standard to the last paragraph of section 2254(d) under which a state prisoner, who cannot rebut the presumption of correctness under paragraphs one through eight, may still do so by establishing by "convincing evidence that the factual determination . . . was erroneous."¹⁸⁷ *Leavitt* and *Wright* do hold that the "fair support" standard of section 2254(d)(8) is the same as the "clearly erroneous" standard used in federal appellate review, primarily on the strength of the *Developments* note and the authority cited therein.

Assuming the "clearly erroneous" standard is adopted as the standard of review for when a state finding of fact is not fairly supported by the record, the question becomes how much of this established "within systems" doctrine is applicable to the "between systems" review of federal habeas corpus. It has been suggested that the Supreme Court's interpretation of rule 52(a) regarding the "clearly erroneous" standard, expressed in *Pullman-Standard, Inc. v. Swint*, be applied to federal habeas corpus.¹⁸⁸

*Pullman-Standard, Inc. v. Swint*¹⁸⁹ involved the question of intent to discriminate in a union seniority system under Title VII of the Civil Rights Act of 1964. The case turned on whether the Fifth Circuit had misapplied the "clearly erroneous" standard of rule 52 to the district court's finding that any disparities resulting from the seniority system were not the result of intentional racial discrimination.¹⁹⁰ The Fifth Circuit had attempted to distinguish the ultimate issue of discrimination from findings of subsidiary fact made by the district court. The court of appeals would be bound only by the district court's findings of subsidiary fact which were not clearly erroneous. The Fifth Circuit said:

Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case As such, a finding of discrimination or non-discrimination is a finding of ultimate fact. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are

184. *Id.*

185. 483 F.2d 405, 408 (4th Cir. 1973).

186. 658 F.2d 218 (4th Cir. 1981) (habeas case involving voluntariness of confession).

187. *Id.* at 223, 226 (quoting 28 U.S.C. § 2254(d) (1976)).

188. *Alderman*, 695 F.2d at 133 (Fay, J., dissenting).

189. 456 U.S. 273 (1982).

190. *Id.* at 275-76.

themselves not clearly erroneous.¹⁹¹

This distinction would free the court of appeals to decide the issue of intent to discriminate.

The Supreme Court found that the court of appeals' independent determination of intent to discriminate, which the latter had termed an issue of "ultimate fact," was error under rule 52.¹⁹² With respect to rule 52 and the "clearly erroneous" standard, the Court said:

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.¹⁹³

Under this view of rule 52 and the "clearly erroneous" standard, no distinction is recognized between "ultimate" facts and "subsidiary" facts. The Court specifically went on to hold that the issue of "whether the differential impact of the seniority system reflected an intent to discriminate on account of race . . . is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard [and] not a question of law and not a mixed question of law and fact."¹⁹⁴

In *Pullman*, the Supreme Court recognized that the Fifth Circuit considered the term "ultimate facts" to be synonymous with mixed questions of law and fact.¹⁹⁵ Further, the Court recognized that it had indicated "ultimate" facts and mixed questions were equivalents.¹⁹⁶ Mixed questions of fact and law are independently reviewable. But, intent to discriminate, which had been thought by the Fifth Circuit to be a mixed question, was found to be a pure question of fact. As such, it was subject to the "clearly erroneous" standard of rule 52.

The Court's analysis in recent habeas corpus cases, involving "between systems" review, is strikingly similar to the Court's analysis in *Pullman*, a "within system" case. In *Mata II*, the Court recognized that the ultimate question of the constitutionality of pretrial identification procedures was a mixed question independently reviewable apart from section 2254(d). Similarly, in *Lonberger II*, the Court recognized that the issue of the voluntariness of a guilty plea was a mixed question not subject to section 2254(d). In both *Mata II* and *Lonberger II*, the Supreme Court

191. *Swint v. Pullman-Standard*, 624 F.2d 525, 533 n.6 (5th Cir. 1980) (quoting *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975)).

192. *Pullman*, 456 U.S. at 285-88.

193. *Id.* at 287.

194. *Id.* at 287-88.

195. *Id.* at 286 n.16.

196. *Id.*

found underlying questions of fact. In these cases, and in *Pullman*, the Court explicitly determined what were mixed questions and what were pure questions of fact.

In *Mata II* and *Lonberger II*, it was the underlying questions of fact which were subject to the "not fairly supported by the record" standard of section 2254(d)(8). If the "clearly erroneous" standard was adopted to determine when state court factual findings are not fairly supported by the record, it should be applied only to these so-called underlying questions of fact.

Even if the "clearly erroneous" standard was applied only to the underlying questions of fact, there would still be a certain inconsistency in applying the "clearly erroneous" standard of federal appellate review in the context of habeas corpus review. The Supreme Court, in *Townsend v. Sain*, said:

The whole history of the writ - its unique development - refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations.¹⁹⁷

The Court recognized that the function of habeas corpus was not the same as federal appellate review. Habeas corpus was to provide an independent review of state criminal judgments "free from the momentum of the guilt-determining process."¹⁹⁸

While advocating the adoptions of the "clearly erroneous" standard of federal appellate review to evaluate whether there is fair support in the state court record under section 2254(d)(8), Wright and Sofaer said:

If the role of the habeas court were limited to the functions of the Court on direct review, there would never be any need for a fact-finding hearing on this ground [section 2254(d)(8)]. So if the habeas fact-finding hearing is to perform any function in the review of the sufficiency of evidence, the habeas court must have a greater obligation than the Supreme Court on direct review.¹⁹⁹

Thus, even those who advocate the use of the "clearly erroneous" standard under section 2254(d)(8) recognize that the role of federal courts is not the same in habeas corpus review as it is in appellate review.

If, as the Court and commentators suggest, the function of federal habeas corpus review is different from the function of federal appellate review, the question must be asked: why use a standard of federal appellate review in the context of habeas corpus review when these types of

197. 372 U.S. at 311-12.

198. Note, *supra* note 4, at 1132.

199. Wright & Sofaer, *supra* note 144, at 947. See *supra* text accompanying notes 150-53 for the discussion of this statement in the context of the "any evidence" standard.

review serve divergent functions? To do so would impose a restrictive federal appellate review standard on the special function of habeas corpus review to independently examine state court criminal judgments outside of the trial process so that federal constitutional rights may be protected.

VI. CONCLUSION

The failure of the United States Supreme Court to clearly articulate a standard for when a state court factual determination is not fairly supported by the record pursuant to section 2254(d)(8) has made exceedingly difficult the lower federal courts' task of applying this section of the statute. The problem has been exacerbated by the difficulty, admitted by the Court itself, of distinguishing among questions of fact, mixed questions of law and fact, and questions of law.

In *Mata II* and *Lonberger II*, issues which had been perceived as mixed questions, which are reviewable independent of section 2254(d)(8), were transformed into two-level issues. The more general level was termed the ultimate mixed question; the other was termed the underlying question of fact. Such an analysis will require the federal courts in habeas review to make more determinations about what issues are mixed questions and what issues are pure questions of fact. In *Pullman*, the Court recognized the vexing problem of distinguishing factual from legal issues. Nevertheless, such distinctions are critical, because state court conclusions on mixed questions and questions of law may not be given binding weight on habeas. Ultimately, the Supreme Court will of necessity be required to make difficult and explicit decisions about what are, and what are not, questions of fact for purposes of habeas corpus review under section 2254(d)(8).

The Court, in *Mata II* and *Lonberger II*, gave the lower federal courts no clear standard for evaluating when state court findings of fact, especially those regarding credibility, are not fairly supported by the record, but it did seem willing to accept a standard familiar in federal appellate review. While some standard is needed, neither the federal appellate standard of "any evidence" nor of "clearly erroneous" is appropriate.

Neither of the standards suggested recognizes that federal habeas review and federal appellate review serve different functions. Habeas corpus review entails a special civil proceeding which is designed to assure that state prisoners have not been denied federal constitutional rights. Use of the "any evidence" standard does not recognize the special nature of habeas review under section 2254(d)(8). It is a federal appellate review standard used to evaluate mixed questions and questions of law.

The "clearly erroneous" standard of federal appellate review also is not well suited to the task of evaluating fair support for the record under

section 2254(d)(8). A broad view of the “clearly erroneous” standard which did not strictly adhere to generalizations about types of evidence, especially those requiring deference when witness credibility is at issue, might be acceptable. Such a view would recognize the special function of habeas. The danger is that this broad view of “clearly erroneous” would not be taken, given the restrictive nature of the standard in federal appellate review as exemplified by the *Pullman* case. If this restrictive view of “clearly erroneous” was carried over to habeas corpus review, the special function of such review would not be served.

The unique nature of habeas corpus requires an equally unique standard to determine when state court findings of fact are not fairly supported by the record pursuant to section 2254(d)(8). To adequately recognize the special nature of habeas corpus, the standard should be broad and flexible. It can be argued, however, that a more expansive standard ignores practical workload considerations. This argument would be that a broad and flexible standard would result in an increase in the number of habeas applications when the federal courts have been receiving even greater numbers of these applications. While a more expansive standard may increase the number of petitions, it can be said, in the relative sense, that the federal courts have not been overwhelmed with habeas applications. State prisoner petitions to federal district courts have remained constant for more than a decade. What is at issue, then, is the absolute number of habeas petitions that are acceptable and how many of those petitions result in a state court decision being overturned because the findings of fact are not fairly supported by the record. The Court’s present emphasis upon the interests of federalism indicates an inclination toward holding constant or reducing the number of applications and toward upholding state court decisions. A unique standard that is broad and flexible would run counter to these inclinations; but, such a standard would recognize the uniqueness of the Great Writ.

GLENN F. LANG