



Winter 1-1-1982

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Recommended Citation

Administering The Death Penalty, 39 Wash. & Lee L. Rev. 101 (1982).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol39/iss1/7>

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NOTES

ADMINISTERING THE DEATH PENALTY

In *Coleman v. Balkcom*,¹ Justice Rehnquist recently protested against the "constitutional stalemate" that currently prevents the states from administering their death penalty statutes.² Justice Rehnquist observed that since the Supreme Court upheld the constitutionality of the death penalty in 1976,³ state juries have sentenced hundreds of people to death.⁴ Justice Rehnquist noted, however, that only once since 1976 has a state actually executed a person who had vigorously attacked his sentence on appeal.⁵ Justice Rehnquist offered two reasons to explain

¹ 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting).

² 451 U.S. at 957 (Rehnquist, J., dissenting). In *Coleman*, Justice Rehnquist dissented from the Court's decision to deny certiorari to a capital defendant who had avoided imposition of the death penalty since 1973 by continuously appealing his conviction and sentence. *Id.* The Supreme Court previously had denied certiorari to Coleman on direct appeal from the Georgia Supreme Court. *See Coleman v. Georgia*, 431 U.S. 909 (1977); text accompanying notes 50-60 *infra* (discussion of direct appeal process). In *Coleman*, the Court denied certiorari a second time after Coleman had pursued post-conviction relief in the Georgia court. 451 U.S. at 957; *see* text accompanying notes 61-63 *infra* (discussion of post-conviction appeal process). Justice Rehnquist stated that by denying certiorari the Supreme Court permitted Coleman to pursue further appeals in federal habeas corpus proceedings. 451 U.S. at 957; *see* text accompanying notes 64-73 *infra* (discussion of federal habeas corpus review).

³ 451 U.S. at 957 (Rehnquist, J., dissenting) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)); *see* text accompanying notes 33-37 *infra* (discussion of Supreme Court's 1976 death penalty cases).

⁴ 451 U.S. at 958 (Rehnquist, J., dissenting). Since 1976, the states have added an average of 120 people each year to the nation's death row population. *See Gillers, Deciding Who Dies*, 129 U. PA. L. REV. 1, 5 n.13 (1980) [hereinafter cited as Gillers]. The death row population has grown from a low of 65 people in late 1976 to 453 people in October 1978, 691 people in October 1980, and 850 people in September 1981. *See Gillers, supra*, at 2 n.2; *A New Executioner: The Needle*, TIME, Sept. 14, 1981, at 80; *Death Row, U.S.A.* (June 30, 1980) (unpublished document prepared by N.A.A.C.P. Legal Defense and Educ. Fund, Inc., 10 Columbus Cir., New York, N.Y., 10019) [hereinafter cited as *Death Row*].

⁵ 451 U.S. at 958 (Rehnquist, J., dissenting). The State of Florida executed John Spenkelink in 1979 after Spenkelink had challenged his sentence on appeal for over six years. *Id.* at 951 n.5 (Stevens, J., concurring); *see* note 74 *infra* (discussion of Spenkelink case). The Supreme Court has permitted the execution of two other prisoners since 1976 after both prisoners expressed the desire to die rather than spend their lives in jail. *See Lenhard v. Wolff*, 443 U.S. 1306, 1307, *vacating stay of execution*, 444 U.S. 807, 808 (1979) (Brennan and Marshall, JJ., dissenting) (the case of Jesse Bishop); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (the case of Gary Gilmore); *see generally*, Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981) [hereinafter cited as *Right to Die*] (discussion of Bishop and Gilmore cases). The Supreme Court has refused to stay the execution of one other capital defendant who had indicated a desire to die. *See Evans v. Bennett*, 440 U.S. 987, *vacating stay of execution*, 440 U.S. 1301, 1306-07 (1979). At the last

the lack of executions since 1976.⁶ First, he suggested that the Court in its post-1976 death penalty decisions has surrounded the capital defendant with procedural safeguards not available to other criminal defendants.⁷ Second, Justice Rehnquist suggested that the present system of appellate review precludes the states from imposing the death penalty within a reasonable time after trial.⁸ Concluding that the lengthy delay between conviction and punishment frustrates the valid deterrent and retributive purposes of the death penalty,⁹ Justice Rehnquist proposed

moment, however, the prisoner authorized his attorneys to apply for a writ of habeas corpus in federal court and the Fifth Circuit Court of Appeals subsequently granted the writ. See *Evans v. Britton*, 628 F.2d 400, 401 (5th Cir. 1980). The Supreme Court recently granted certiorari to consider the Fifth Circuit's disposition of the case. See *Britton v. Evans*, 49 U.S.L.W. 3954 (U.S. May 23, 1981).

⁶ See 451 U.S. at 957-60 (Rehnquist, J., dissenting).

⁷ 451 U.S. at 958-60 (Rehnquist, J., dissenting); see text accompanying notes 40-48 *infra* (discussion of Supreme Court's post-1976 death penalty decisions). Justice Rehnquist in *Coleman* suggested that the Supreme Court unwisely has been "tinkering" with the Constitution in the post-1976 death penalty cases and may have sent a message to lower courts to prevent imposition of the death penalty at all costs 451 U.S. at 959 (Rehnquist, J., dissenting). Justice Rehnquist has refused to participate in this "tinkering," having dissented in all but one case since 1976 where the Court overturned a state prisoner's death sentence on constitutional grounds. See *Estelle v. Smith*, 451 U.S. 454, 475 (1981) (Rehnquist, J., concurring in part, dissenting in part).

⁸ 451 U.S. at 957 (Rehnquist, J., dissenting); see text accompanying notes 49-74 *infra* (discussion of present system of appellate review in death penalty cases).

⁹ 451 U.S. at 957-61 (Rehnquist, J., dissenting). Justice Rehnquist in *Coleman* cited the plurality opinion in *Gregg v. Georgia*, 428 U.S. 153, 185-87 (1976), for the proposition that the two social purposes for the death penalty are deterrence and retribution. 451 U.S. at 957-61 (Rehnquist, J., dissenting). Numerous commentators have debated whether the death penalty does fulfill deterrent and retributive purposes. See, e.g., W. BERNS, FOR CAPITAL PUNISHMENT 83-152 (1979); C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 23-28 (1974); F. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 82-101 (1978); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Passell & Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 447 (1977); Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 J. CRIM. L. 291 (1978). Justice Brennan in *Furman v. Georgia*, 408 U.S. 238, 302-05 (1972), also observed that the time between conviction and execution was so great that the deterrent and retributive effects of the death penalty were minimized. *Id.* Unlike Justice Rehnquist, however, Justice Brennan concluded that since lengthy appellate review frustrated the deterrent and retributive purposes of the death penalty, the Court should declare the death penalty unconstitutional. *Id.*

The anti-capital punishment attorneys associated with the NAACP Legal Defense and Education Fund, Inc. for years have made it part of their tactics to extend the appellate process in capital cases as long as possible. See M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 66 (1974) [hereinafter cited as MELTSNER]; Bodine, *DAs Fight Delays on Death Row*, Nat'l L.J. Dec. 22, 1980, at 1, col. 4 [hereinafter cited as Bodine]; Note, *Furman to Gregg: The Judicial and Legislative History*, 22 HOW. L.J. 53, 70-71 (1979) [hereinafter cited as *Furman to Gregg*]. The rationale for using delaying tactics is that the longer the delay between conviction and execution, the more cogent the argument becomes that the death penalty serves no useful purpose. See MELTSNER, *supra*, at 66; *Furman to Gregg*, *supra*, at 70. Stretching out the appellate process also increases the prospect that federal judges, reviewing the case in federal habeas corpus proceedings many

as a reform that the Court automatically grant certiorari to capital defendants petitioning the Court from the states' highest appellate courts.¹⁰ Under the proposal, if the Supreme Court affirmed the death penalty sentence after reviewing the defendant's constitutional claims, the defendant could not present again these same claims in a federal court.¹¹ The state, therefore, could then promptly carry out the execution.¹²

While Justice Rehnquist's arguments are persuasive, his proposal is not a practical solution to the present system of federal appellate review in death penalty cases.¹³ The Supreme Court does not have the capacity to grant certiorari and decide every death penalty case coming to it from the lower courts.¹⁴ Justice Rehnquist's proposal does provide, however,

years after the defendant was sentenced to die, will experience revulsion at the prospect of imposing the sentence at such a late date. Telephone interview with Judge Clement F. Haynsworth, Jr., Chief Judge of the Fourth Circuit Court of Appeals (Sept. 17, 1981) (transcript on file in law review office). In addition, extending the appellate process insures that the number of people on death row continues to grow. *See* note 4 *supra*. The tactical importance of increasing the death row population is that the courts will be less likely to permit the first executions on the belief that their decisions would create the momentum for the immediate executions of hundreds of death row prisoners. *See Furman to Gregg, supra*, at 71. Some of the anti-capital punishment attorneys, however, have predicted recently that since many capital defendants are about to exhaust their appeal options, the states will execute hundreds in 1982, barring a major Supreme Court decision preventing the executions. *See Marcus, Death Wait Shortens*, Nat'l L.J., July 14, 1980, at 1, col. 1 [hereinafter cited as Marcus].

¹⁰451 U.S. at 963-64 (Rehnquist, J., dissenting). Justice Rehnquist in *Coleman* is somewhat unclear whether he is proposing that the Supreme Court automatically grant certiorari to all capital defendants on appeal from the states' highest courts or only to those capital defendants who present claims that on their face have little merit. In attacking the practicality of Justice Rehnquist's proposal, Justice Stevens reads the proposal to apply to all capital defendants. *See id.* at 949 (Stevens, J., concurring). The general tone of Justice Rehnquist's opinion, if not the precise language of his proposal, supports Justice Stevens' interpretation. *See id.* at 956-64 (Rehnquist, J., dissenting).

¹¹ 451 U.S. at 963-64 (Rehnquist, J., dissenting). Justice Rehnquist in *Coleman* noted that if the Supreme Court heard all of the prisoner's claims and denied relief, § 2244(c) of Title 28 United States Code would preclude further federal review of those claims. 451 U.S. at 963 (Rehnquist, J., dissenting); 28 U.S.C. § 2244(c) (1976), *see* text accompanying notes 64-73 *infra* (discussion of 28 U.S.C. § 2244 and other provisions of federal habeas corpus).

¹² 451 U.S. at 964 (Rehnquist, J., dissenting). Justice Rehnquist in *Coleman* did acknowledge that the capital defendant could still pursue any form of state relief available to him, such as executive clemency. *Id.*; *see* text accompanying notes 51-58, 61-62 *infra* (discussion of state appeal options).

¹³ *See* 451 U.S. at 949-53 (Stevens, J., concurring).

¹⁴ *See* 451 U.S. at 949-50 (Stevens, J., concurring). In *Coleman* Justice Stevens observed that death row prisoners had filed over 90 certiorari petitions in the previous 10 month period. *Id.* He predicted that the Court would have to devote over half of its docket to hear a substantial number of these cases. *Id.* Justice Stevens concluded that such an allocation of the Court's resources would be improper. *Id.* at 950. A review of past Supreme Court practice supports Justice Stevens' position. Since 1925, the Court consistently has issued opinions in about 150 cases a year, even though the number of petitions

the basis for an alternative reform. In recent years, several commentators have called for the creation of a new national court of appeals.¹⁵ A national appeals court could provide the prompt and thorough federal review of a capital defendant's constitutional claims that Justice Rehnquist advocates.¹⁶ The proposed court could, therefore, resolve the current stalemate in death penalty administration.¹⁷

In *Coleman*, both Justice Rehnquist¹⁸ and Justice Stevens¹⁹ observed that the Supreme Court's numerous decisions in death penalty cases since 1972 were partly responsible for the lack of executions during this time period. Prior to 1972, several hundred years of legal tradition,²⁰ the Constitution,²¹ numerous Supreme Court decisions,²² and the frequency

for review has increased from 1000 in 1925 to more than 4000 in 1973. See Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 339 (1975) [hereinafter cited as Griswold]. In 1976, the Court issued opinions in 142 cases, 23 of which involved constitutional challenges by state prisoners. See C. WHITEBREAD, *CRIMINAL PROCEDURE* 574 n.2 (1980) [hereinafter cited as WHITEBREAD]. Only five of these 23 cases involved the death penalty. See text accompanying notes 33-37 *infra* (discussion of the 1976 death penalty cases). The Supreme Court has not granted certiorari and issued an opinion in more than three death penalty cases in any year since 1976. See note 40 *infra*. In 1980, for example, of the more than 90 certiorari petitions before the Court from capital defendants, the Court issued opinions in only three cases. See *Adams v. Texas*, 448 U.S. 38 (1980); *Beck v. Alabama*, 447 U.S. 625 (1980); *Godfrey v. Georgia*, 446 U.S. 420 (1980); Note, *Eighth Amendment—The Death Penalty*, 71 J. CRIM. L. 538 (1980).

¹⁵ See text accompanying notes 81-126 *infra*.

¹⁶ 451 U.S. 956-64 (Rehnquist, J., dissenting).

¹⁷ See text accompanying notes 6-8 *supra*.

¹⁸ See text accompanying notes 6 & 7 *supra*.

¹⁹ 451 U.S. at 950-53 (Stevens, J., concurring). Justice Stevens in *Coleman* suggested that the Supreme Court confronted a number of important constitutional issues during the 1970s in death penalty jurisprudence that took considerable time to resolve. *Id.* Justice Stevens predicted that since the Court had now settled many of the outstanding issues, the states should be able to carry out the death penalty sentence without as much delay in the future. *Id.* But see text accompanying note 29 *infra* (Supreme Court has not provided states clear guidelines on what Constitution requires in death penalty cases).

²⁰ See *Furman v. Georgia*, 408 U.S. 238, 334-41 (1972) (Marshall, J., concurring). In 1776, every American colony punished certain crimes by death. *Id.* at 335-37. Not until 1852 did Rhode Island become the first state to abolish the death penalty. See Murchison, *Toward A Perspective on the Death Penalty Cases*, 27 EMORY L.J. 469, 473 (1978) [hereinafter cited as Murchison].

²¹ See U.S. CONST. amends. V and XIV, § 1. Both the fifth and fourteenth amendments appear to recognize capital punishment as one punishment available to the states and federal government. The fifth amendment reads in part:

No person shall be held to answer for a *capital* or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of *Life* or *Limb* . . . nor be deprived of *life*, liberty, or property, without due process of law. . . . (emphasis added)

The fourteenth amendment reads in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of *life*, liberty, or property, without due process of law. . . . (emphasis added)

²² See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). In *Gregg* and *Furman*, the Supreme Court reviewed the pre-1972 Supreme Court cases rele-

with which the states and the federal government executed people²³ provided implicit support for the proposition that the death penalty was a constitutional punishment. In 1972, however, the Supreme Court in *Fur-*

vant to the issue of capital punishment. The relevant pre-1972 cases can be divided into four categories. The first category consists of death penalty cases where the defendant attacked the method of execution as an unconstitutionally cruel and unusual punishment. *See, e.g., Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (mechanical failure does not preclude rescheduling of execution); *In re Kemmler*, 136 U.S. 436, 448-49 (1890) (death by electrocution does not violate fourteenth amendment); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879) (death by firing squad does not violate eighth amendment). The second category includes those cases where the Supreme Court created special procedural protections for the capital defendant. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968) (state cannot exclude potential jurors with scruples against death penalty who are willing to consider all possible penalties); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (capital defendant has a constitutional right to counsel). The third category includes those non-death penalty cases involving the eighth amendment where the Supreme Court gave the "cruel and unusual" clause a dynamic and evolving rather than fixed and unchanging meaning and applied the amendment to the states. *See Robinson v. California*, 370 U.S. 660, 666 (1962) (the eighth amendment's prohibition against cruel and unusual punishment applies to states); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (eighth amendment draws its meaning from evolving standards of decency that mark progress of maturing society); *Weems v. United States*, 217 U.S. 349, 378 (1910) (eighth amendment requires punishment to be proportionate to crime and appropriate punishment is determined by public opinion enlightened by humane justice). The fourth category includes those cases that set the stage for the constitutional attack on the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972). *See McGautha v. California*, 402 U.S. 183 (1971); *Rudolph v. Alabama*, 375 U.S. 889 (1963). In *McGautha*, the Court held that the fourteenth amendment does not require the states to provide the sentencing judge or jury specific standards to guide sentencing discretion in capital cases. 402 U.S. at 207. One year later in *Furman*, the Court would hold that the eighth amendment does require the states to provide the sentencing authority specific guidelines. 408 U.S. at 239-40; *see text* accompanying notes 24-29 *infra* (discussion of *Furman* decision). In *Rudolph*, Justice Goldberg dissented from the denial of certiorari in a case where the defendant faced death for the crime of rape. 375 U.S. at 889 (Goldberg, J., dissenting). Justice Goldberg argued that the Court should consider the issue of whether death was an appropriate punishment for rape. *Id.* at 890. Justice Goldberg questioned whether under current standards of decency the penalty of death may be disproportionate to the crime of rape and may constitute cruel and unusual punishment. *Id.* at 891. The effect of Justice Goldberg's dissent was to stimulate for the first time petitions to the Supreme Court directly attacking the constitutionality of the death penalty. *See Goldberg, Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 365 (1973); *Furman to Gregg*, *supra* note 9, at 67 n.41. The Supreme Court did not resolve the issues raised by Justice Goldberg until 1977, when the Court held that the death penalty was a cruel and unusual punishment for the crime of rape. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977).

²³ *See Murchison, supra* note 20, at 552 n.478. In the four decades between 1930 and 1969, the states and the federal government executed 3859 persons. *Id.* The frequency of execution within each decade dropped appreciably over the forty year period:

<u>Decade</u>	<u>Number of Executions</u>
1930-1939	1667
1940-1949	1284
1950-1959	717
1960-1969	191

Id. The downward trend continued in the 1970-1979 decade with the states executing only three people. *See* note 5 *supra*.

*man v. Georgia*²⁴ explicitly considered whether the death penalty violated the eighth amendment's proscription against cruel and unusual punishment.²⁵ The *Furman* Court did not reach a majority on the issue of whether the death penalty was an unconstitutional punishment per se. Five justices, however, agreed that the eighth amendment prohibited death penalty statutes that granted the sentencing authority unfettered discretion in deciding whether to impose life imprisonment or death upon conviction of a capital crime.²⁶ The *Furman* decision invalidated all existing death penalty statutes in the nation²⁷ and reversed the death penalty sentences of over 600 death row inmates.²⁸ Given the absence of a common rationale in the *Furman* decision, however, the longer term effect of *Furman* was to begin what one commentator has called a "decade of disarray" in death penalty jurisprudence.²⁹

²⁴ 408 U.S. 238 (1972).

²⁵ 408 U.S. at 239. In *Furman*, a Georgia jury sentenced the defendant to death after finding him guilty of murder. *Id.* at 240 (Douglas, J., concurring).

²⁶ 408 U.S. at 239. *Furman* included not only a per curiam opinion invalidating Georgia's death penalty statute, in which five justices joined, but also included individual opinions by all nine justices. *Id.* at 240. Four of the justices dissented in *Furman*, all agreeing that the death penalty was constitutional and that the Court should defer to the judgment of state legislatures regarding the sentencing procedures that judges and juries should follow in capital cases. *See id.* at 375-405 (Burger, C.J., dissenting); *id.* at 405-14 (Blackmun, J., dissenting); *id.* at 414-65 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting).

Two of the concurring justices concluded that the death penalty was a per se violation of the cruel and unusual clause of the eighth amendment. *See id.* at 257-306 (Brennan, J., concurring); *id.* at 314-74 (Marshall, J., concurring). The remaining three concurring justices refused to hold that the death penalty was always cruel and unusual punishment, but did hold that the broad sentencing discretion permitted the jury in *Furman* did violate the eighth amendment. Justice Douglas concluded that discretionary death penalty statutes were unconstitutional because they allowed the sentencing authority to impose the death penalty in an arbitrary and discriminatory manner. *Id.* at 240-57 (Douglas, J., concurring). Justice Stewart refused to decide whether the death penalty was per se unconstitutional, although he conceded that the argument was persuasive. *Id.* at 306-10 (Stewart, J., concurring). Instead, Justice Stewart concluded that discretionary sentencing statutes permitted random and capricious imposition of the death penalty. *Id.* Justice White noted that under existing death penalty laws there was no meaningful way to distinguish those few cases in which trial courts imposed the death penalty from the many cases where trial courts did not. *Id.* at 313 (White, J., concurring). Justice White concluded that since under existing circumstances the death penalty was so infrequently and arbitrarily imposed, the punishment no longer fulfilled a valid state purpose. *Id.* at 312-13.

²⁷ *See* 408 U.S. at 411 (Blackmun, J., dissenting); *id.* at 417 (Powell, J., dissenting); Gillers, *supra* note 4, at 8 n.28; *Furman to Gregg*, *supra* note 9, at 84 n.94.

²⁸ *See* Gillers, *supra* note 4, at 8 n.28; *Furman to Gregg*, *supra* note 9, at 84 n.94. The states did not resentence to death any of the more than 600 prisoners convicted under pre-*Furman* death penalty statutes. *See* *Dobbert v. Florida*, 432 U.S. 282, 309 (1977) (Stevens, J., dissenting).

²⁹ Radin, *Cruel and Unusual Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1183-84 (1980) [hereinafter cited as Radin]. Support for Radin's proposition that the Supreme Court's *Furman* decision ushered in a "decade of disarray" in death penalty jurisprudence is abundant. *See, e.g.,* *Lockett v. Ohio*, 438 U.S.

Subsequent to the *Furman* decision, many states passed new death penalty statutes designed to eliminate arbitrary sentencing.³⁰ Some states interpreted *Furman* to require the adoption of mandatory death penalty statutes for particular crimes.³¹ Other states interpreted *Furman* to require the adoption of statutes that guided, but did not eliminate, the sentencer's discretion.³² In 1976, the Supreme Court considered the appeals of five capital defendants who challenged both the constitutionality of capital punishment and the constitutionality of their state's post-*Furman* death penalty statute.³³ In the principal case of *Gregg v. Georgia*,³⁴ a majority of the justices agreed that the death penalty is a constitutional punishment and that Georgia's guided discretion death penalty statute did not violate the eighth amendment's prohibition against arbitrary and capricious sentencing.³⁵ The same majority

586, 599, 602 (1978) (per Burger, C.J.) (*Furman* and subsequent death penalty cases have sent states signals not easy to decipher); *People v. Frierson*, 25 Cal. 3d 142, 191, 599 P.2d 587, 616, 158 Cal. Rptr. 281, 285 (1979) (Mosk, J., concurring) (Supreme Court has not given states consistent and workable guidance on what Constitution requires in death penalty cases); Combs, *The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 S. U. L. REV. 1, 13-30 (1980); Gillers, *supra* note 4, at 8; Comment, *New Direction for Capital Sentencing or an About-Face for the Supreme Court?*—*Lockett v. Ohio*, 16 AM. CRIM. L. REV. 317, 336 (1979).

³⁰ See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976). By 1976, 35 states and the federal government had enacted new death penalty statutes for certain crimes. *Id.* at 179 & n.23. See *Furman to Gregg*, *supra* note 9, at 84-96 (discussion of action taken by states subsequent to *Furman*).

³¹ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). After *Furman*, North Carolina enacted a new mandatory death penalty law whereby, once a jury found a capital defendant guilty of first degree murder or rape, the court was required to impose the death penalty automatically. *Woodson v. North Carolina*, 428 U.S. 280, 286-87 (1976). In addition to North Carolina, at least 19 other states interpreted *Furman* to require mandatory sentencing. See *Furman to Gregg*, *supra* note 9, at 89-90.

³² See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 163-67 (1976); *Proffitt v. Florida*, 428 U.S. 242, 248-50 (1976); *Jurek v. Texas*, 428 U.S. 262, 269-74 (1976). After *Furman*, Georgia enacted a new guided discretion death penalty law whereby, after the trier of fact returned a guilty verdict to one of six capital crimes, the court would schedule a separate sentencing hearing. *Gregg v. Georgia*, 428 U.S. 153, 163 (1976). At the hearing, the trier of fact must find beyond a reasonable doubt one of ten statutory aggravating circumstances present before it can sentence the defendant to death. *Id.* at 164-65. Even if the sentencing authority finds beyond a reasonable doubt the presence of one or more statutory aggravating circumstances, the sentencing authority is still free, after considering any mitigating circumstances the defendant may introduce at the hearing, to exercise its discretion and sentence the defendant to life imprisonment. *Id.* at 166. In addition to Georgia, at least nine other states interpreted *Furman* to require guided discretion sentencing. See *Furman to Gregg*, *supra* note 9, at 86-88.

³³ See *Gregg v. Georgia*, 428 U.S. 153, 162 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 282 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 327 (1976).

³⁴ 428 U.S. 153 (1976).

³⁵ See 428 U.S. at 158-207 (Stewart, J. with Powell and Stevens, JJ., plurality); *id.* at 207-26 (White, J., concurring, with Burger, C.J. and Rehnquist, J., joining); *id.* at 227

of justices upheld the guided discretion death penalty statutes that Texas and Florida had adopted subsequent to *Furman*.³⁶ A different majority of justices, however, held that the mandatory death penalty statutes enacted by North Carolina and Louisiana violated the eighth amendment.³⁷

(Blackmun, J., concurring). As in *Furman*, see note 26 *supra*, the *Gregg* Court split into three factions. Justices Brennan and Marshall dissented on the grounds that the death penalty was always cruel and unusual punishment and violated the eighth amendment. See 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting). The plurality of Justices Stewart, Powell, and Stevens first considered whether the death penalty was unconstitutional per se. See *id.* at 168 (Stewart, J. with Powell and Stevens, JJ., plurality). The plurality reviewed the precedents in eighth amendment cases and extracted two standards to guide the Court in evaluating the constitutionality of the death penalty. *Id.* at 169-73. First, the plurality noted that the eighth amendment drew its meaning from the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Second, the plurality noted that central to the eighth amendment was the core concept of "the dignity of man" which prohibited excessive punishment. 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). The plurality concluded that, since 35 states had enacted new death penalty statutes in the wake of *Furman*, the death penalty did not violate contemporary standards of decency. 428 U.S. at 180-81. The plurality also noted that since the death penalty served the useful social purposes of deterrence and retribution, the punishment was not excessive when imposed on people who had committed extremely serious crimes such as murder. *Id.* at 187; see note 9 *infra* (discussion of social purposes of death penalty). The plurality then turned to the issue of whether Georgia's death penalty statute was constitutional. See 428 U.S. at 188. Noting that death was different from other kinds of punishment, the plurality stated that a constitutional sentencing procedure must minimize the risk that a sentencing authority will impose death in an arbitrary and capricious manner. *Id.* Although the plurality refused to specify what is required constitutionally in a death penalty statute, the plurality did conclude that Georgia's statute was constitutionally sufficient. *Id.* at 195. The plurality noted with approval that Georgia's statute required a separate proceeding for sentencing, provided objective standards for the sentencing authority to follow in exercising its discretion, allowed the defendant to introduce and the sentencing authority to consider all mitigating evidence, and provided for automatic appellate review by the Georgia Supreme Court. *Id.* at 196-207.

In *Gregg*, a third faction comprised of Justices White, Rehnquist, Blackmun, and Chief Justice Burger concurred in the decision to uphold the constitutionality of Georgia's death penalty statute. See *id.* at 207 (White, J., concurring, with Burger, C.J., and Rehnquist, J., joining); *id.* at 227 (Blackmun, J., concurring). In his concurring opinion, Justice White reviewed the Georgia death penalty statute and concluded that the statute adequately guided jury discretion and would prevent the death penalty from being imposed in an arbitrary and discriminatory fashion. *Id.* at 222-23 (White, J., concurring, with Burger, C.J. and Rehnquist, J., joining). Justice Blackmun concurred on the basis of his dissenting opinion in *Furman*. *Id.* at 227 (Blackmun, J., concurring); see note 26 *supra* (basis of Justice Blackmun's dissent in *Furman*).

³⁶ See *Proffitt v. Florida*, 428 U.S. 242, 244, 260-61 (1976); *Jurek v. Texas*, 428 U.S. 262, 264, 277-79 (1976); Murchison, *supra* note 20, at 499-502 (discussion of *Proffitt* and *Jurek* decisions).

³⁷ See *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Justices Brennan and Marshall concurred in the decision to strike down the North Carolina and Louisiana statutes based on their opinions in *Gregg*. See *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 336 (1976) (Brennan, J., concurring); *id.* at 336-37 (Marshall, J., concurring); *Woodson v. North Carolina*, 428 U.S. 280, 305-06 (1976) (Brennan, J., concurring); *id.* at 306 (Marshall, J., concurring); note 35 *supra* (discussion of

Since 1976, thirty-five other states have enacted death penalty statutes similar to the Georgia, Florida, or Texas statute.³⁸ Under these statutes, state courts have sentenced hundreds of people to death.³⁹ The Supreme Court, however, in thirteen of fourteen post-1976 death penalty decisions has imposed further constitutional requirements on the states in death penalty cases.⁴⁰ Although the Court has not yet provided the

Justices Brennan's and Marshall's *Gregg* opinions). The *Gregg* plurality of Justices Stewart, Powell, and Stevens also drafted a joint opinion striking down the North Carolina and Louisiana statutes. See *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 327 (1976) (Stewart, J. with Powell and Stevens, JJ., plurality); *Woodson v. North Carolina*, 428 U.S. 280, 283 (1976) (Stewart, J. with Powell and Stevens, JJ., plurality).

In *Woodson*, the plurality of Justices Stewart, Powell, and Stevens gave three reasons for invalidating North Carolina's mandatory death penalty statute. The plurality noted that, under contemporary standards of decency, the old common law practice of imposing death upon every person convicted of a capital crime was constitutionally intolerable. 428 U.S. at 301. Second, the plurality recognized that mandatory statutes encouraged juries to find the defendant not guilty when the death penalty is the only punishment for the crime. *Id.* at 303. Third, the plurality held that since death is qualitatively different from other punishments, the eighth amendment requires that the sentencing authority hear any mitigating evidence the defendant can present on his character, record, or the particular circumstances surrounding the crime. *Id.* at 303-05. The plurality also gave these reasons for invalidating Louisiana's mandatory death penalty statute. See *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 331-36 (1976). The dissenters in *Woodson* and *Roberts (Stanislaus)* rejected the plurality's argument that mandatory death penalty statutes for certain serious crimes violated the Constitution. See *Woodson v. North Carolina*, 428 U.S. 280, 306-07 (1976) (White, J., dissenting); *id.* at 308 (Rehnquist, J., dissenting); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 337-39 (1976) (White, J., dissenting).

The effect of the *Woodson* and *Roberts (Stanislaus)* decisions was to invalidate the death penalty statutes in 21 states and to reduce to life imprisonment the sentences of 395 of the 460 people then on death row. See *Death Row*, *supra* note 4; Gillers, *supra* note 4, at 3 n.6.

³⁸ See Hertz and Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 327 n.52 (1981) [hereinafter cited as Hertz]; *Death Row*, *supra* note 4; Gillers, *supra* note 4, at 101-19 (detailed analysis of current death penalty statutes of 35 states).

³⁹ See text accompanying note 4 *supra*.

⁴⁰ See *Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (state violates double jeopardy clause if it seeks death penalty upon retrial after jury in first trial selected life sentence option at sentence hearing); *Estelle v. Smith*, 451 U.S. 454, 473-74 (1981) (state violates fifth and sixth amendments if prosecutor introduces results of pretrial psychiatric examination at sentence hearing and neither Miranda warnings were given defendant nor notice given defense counsel prior to examination); *Adams v. Texas*, 448 U.S. 38, 50-51 (1980) (state violates sixth amendment if it excludes from jury prospective jurors who admit that their deliberations on issue of guilt or innocence will be affected by their knowledge that upon conviction court must sentence defendant to death or life imprisonment); *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (state violates eighth amendment when it prohibits jury from considering a guilty verdict for lesser noncapital offense when evidence so warrants); *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (state violates eighth amendment when its death penalty statute does not rationally distinguish between murder cases where death penalty is imposed and murder cases where death penalty is not imposed); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (state violates fourteenth amendment if it applies hearsay evidence rule to sentencing hearing and precludes defendant from introducing mitigating evidence); *Presnell v. Georgia*, 439 U.S. 14, 15-17 (1978) (state violates fourteenth amend-

states clear constitutional guidelines to follow in enacting and implementing death penalty statutes,⁴¹ the Court has emphasized two principles in overturning death penalty sentences.⁴² First, the Court has adopted a proportionality rule that requires the states to reserve the death penalty for the most serious of crimes.⁴³ Second, the Court has stated that death is constitutionally different from other types of punishment.⁴⁴ Consequently, the states may impose the punishment only after

ment if trial court imposes death penalty based on imprecise jury finding at sentence hearing); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (state violates eighth amendment if it prevents defendant from introducing mitigating evidence during sentencing hearing); *Bell v. Ohio*, 438 U.S. 637, 642 (1978) (same holding as *Lockett*); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (state violates eighth amendment if it imposes death penalty on person guilty of rape); *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637-38 (1977) (state violates eighth amendment if it requires death penalty in all cases where person has killed policeman); *Gardner v. Florida*, 430 U.S. 349, 358-62 (1977) (state violates fourteenth amendment if it imposes death penalty on defendant who was not allowed to deny or explain presentence report); *Davis v. Georgia*, 429 U.S. 122, 123 (1977) (state violates sixth amendment if it improperly excludes prospective jurors in a death penalty case). *But see Dobbert v. Florida*, 432 U.S. 282, 284 (1977) (state does not violate ex post facto clause if it convicts and sentences defendant under death penalty statute that state amended after crime occurred but before trial began).

⁴¹ See text accompanying note 29 *supra*.

⁴² See Hancock, *The Perils of Calibrating the Death Penalty through Special Definitions of Murder*, 53 TUL. L. REV. 828, 836 (1979); Murchison, *supra* note 20, at 546.

⁴³ See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Stewart, J. with Powell and Stevens, JJ., plurality). In *Gregg*, the plurality of Justices Stewart, Powell, and Stevens held that the death penalty is a constitutionally proportionate punishment for the crime of intentional murder. *Id.* at 187. The plurality refused to consider whether the death penalty is a constitutionally permissible punishment for crimes that do not result in the intentional murder of another human being. *Id.* at 187 n.35. The Supreme Court subsequent to *Gregg*, however, has held that the death penalty is a disproportionate punishment for the crime of rape under the eighth amendment. See *Coker v. Georgia*, 433 U.S. 584, 592-600 (1977). In *Lockett v. Ohio*, 438 U.S. 586 (1978), Justice White proposed that the death penalty is a disproportionate punishment for unintentional murder. *Id.* at 624 (White, J., concurring in part, dissenting in part). The plurality opinion in *Lockett*, however, overturned the death penalty sentence on other grounds and refused to address the proportionality issue. See 438 U.S. at 609 n.16 (per Burger, C.J. with Stewart, Powell, and Stevens, JJ., joining). The Supreme Court recently granted certiorari to a capital defendant who is attacking his sentence on the ground that it is a disproportionate punishment under the eighth amendment for the crime of felony murder. See *Enmund v. Florida*, 50 U.S.L.W. 3300 (U.S. Oct. 20, 1981). The defendant in *Enmund* was the aider and abettor in a robbery that culminated in the murders of the robbery victims. *Id.* at 3330. The defendant did not actually kill anyone nor was he present at the scene of the murders. *Id.*

⁴⁴ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), where Justices Stewart, Powell, and Stevens wrote in a joint opinion:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

See *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (significant constitutional difference exists between death and lesser punishments); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (same);

providing the capital defendant what amounts to "super due process" protection during the trial proceedings.⁴⁶ The Supreme Court's post-1976 decisions not only have vacated the sentences of over 100 death row prisoners,⁴⁶ but also have increased the number of constitutional objections a capital defendant may raise on appeal.⁴⁷ As a result, the states have been unable to administer their death penalty statutes in a timely fashion.⁴⁸

Gardner v. Florida, 430 U.S. 349, 357 (1977) (five members of Court now agree that death is constitutionally different penalty than any other penalty).

⁴⁵ See Radin, *supra* note 29, at 1143. The origins of "super due process" are found in the 1976 death penalty cases where the plurality of Justices Stewart, Powell, and Stevens upheld or struck down death penalty statutes according to whether the sentencing procedures minimized the prospect of arbitrary and capricious imposition of the death penalty. See text accompanying notes 34-37 *supra*. Of the thirteen post-1976 death penalty cases in which the Court has vacated or reversed the death sentence, twelve of those cases involved state procedures the Court found unconstitutional. See note 40 *supra* (cast list). The only case in which procedural considerations played no role was the proportionality case, Coker v. Georgia, 433 U.S. 584 (1977), where the Supreme Court held that the death penalty was an unconstitutional punishment for the crime of rape. *Id.* at 592-600. In *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978), Chief Justice Burger became the fourth Justice to adopt the eighth amendment "super due process" rationale. *Id.* at 589. Chief Justice Burger stated in his opinion that, under the eighth amendment, the state must allow the capital defendant to introduce at the sentencing hearing any mitigating evidence regarding his character, record, or the surrounding circumstances of the offense which might serve as the basis for a sentence less than death. *Id.* at 604-05. Chief Justice Burger justified this rule, which would not apply in non-capital cases, as follows:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. *The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.*

Id. at 605 (emphasis added). Justice Rehnquist, who dissented in *Lockett*, did observe that a majority of the Court had not yet endorsed the notion that the eighth amendment required more stringent procedural protections in capital cases. *Id.* at 632 (Rehnquist, J., dissenting). Justice Blackman invalidated Justice Rehnquist's observation two years later when he became the fifth member of the Court to join an opinion reversing a death penalty sentence on the ground that the state followed procedures that violated the defendant's eighth amendment rights. See *Godfrey v. Georgia*, 446 U.S. 420, 427-33 (1980). Recently, Justice Rehnquist noted that the effect of the Court's decisions since 1976 has been to surround the capital defendant with procedural safeguards unheard of in cases involving lesser sentences. See *Coleman v. Balkcom*, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

⁴⁶ See *Death Row*, *supra* note 4. The Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), alone vacated the sentences of 101 death row inmates. See *Death Row*, *supra* note 4. In most cases, when the Supreme Court has vacated a death penalty sentence because the sentencing procedures were unconstitutional, the state courts have resentenced the defendant to life imprisonment. See *Hertz*, *supra* note 38, 329-32. Some courts, however, have resentenced the defendant to death under corrected procedures. *Id.*

⁴⁷ See Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69, 73-76 (1978) [hereinafter cited as Nakell]; Marcus, *supra* note 9, at 9; note 40 *supra* (post-1976 Supreme Court decisions).

⁴⁸ See text accompanying notes 1-8 *supra*.

In addition to the delaying effect of recent Supreme Court decisions, the pattern of appellate review in death penalty cases contributes to further delay. The prospect of immediate execution motivates the capital defendant, more so than other criminal defendants, to pursue fully all avenues of appellate review open to him.⁴⁹ The capital defendant normally pursues a direct appeal, a state post-conviction appeal, and a federal habeas corpus review.⁵⁰ The capital defendant also may seek executive clemency review from the state in which he was convicted.⁵¹ In addition, when timing problems occur in the appeal process and execution is impending, the capital defendant will seek a stay of execution from a state or federal court.⁵²

⁴⁹ See Nakell, *supra* note 47, at 75. The fearful prospect of execution is not the only reason a capital defendant vigorously appeals his conviction and sentence. Most capital defendants believe that they will inevitably avoid execution if they pursue their appeal vigorously. See Lewis, *Killing the Killers: A Post-Furman Profile of Florida's Condemned*, 25 CRIME & DELINQUENCY 200, 217-18 (1979). One commentator found that 56 of the 68 death row inmates he surveyed believed the courts or the state clemency authority would reduce their death sentence to a lesser punishment or overturn their conviction. *Id.* In a few cases since 1976, the capital defendant has expressed a desire to die rather than live an uncertain existence on death row. In these cases, the defendant's counsel, a close relative, or other interested party has sought appellate review on the defendant's behalf and in opposition to his wishes. See *Lenhard v. Wolff*, 443 U.S. 1306, 1307, *vacating stay of execution*, 444 U.S. 807, 808 (1979) (counsel filed habeas corpus petition and obtained temporary stay of execution over prisoner's objections); *Evans v. Bennett*, 440 U.S. 987, *vacating stay of execution*, 440 U.S. 1301, 1306-07 (1979) (prisoner's mother filed "next friend" petition for habeas corpus and obtained stay of execution); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (prisoner's mother and Latter-Day Saints Freedom Foundation sought stay of execution); *Potts v. Zant*, 638 F.2d 727, 730-37 (5th Cir. 1981) (counsel filed habeas corpus petition, obtained stay of execution, and may have instigated clemency hearing despite prisoner's objections); *Right to Die*, *supra* note 5, at 583-89 (discussion of third party efforts to prevent capital defendants' imminent execution).

⁵⁰ See text accompanying notes 53-74 *infra*. See generally *Coleman v. Balkcom*, 451 U.S. 949, 956-57 (1981) (Rehnquist, J., dissenting); P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *JUSTICE ON APPEAL* 59 (1976) [hereinafter cited as CARRINGTON]; Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 602 (1974) [hereinafter cited as *Handling Criminal Cases*]; Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U.L. REV. 485 (1974) [hereinafter cited as Robinson]; Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 961 (1976) [hereinafter cited as Stolz].

⁵¹ See *Gregg v. Georgia*, 428 U.S. 153, 199 & n.50 (1976). In *Gregg*, the Supreme Court held that the granting of executive clemency to a death row inmate was an act of individualized mercy and did not violate the Constitution. *Id.* All fifty states in their constitutions give the executive branch the power to grant clemency to capital defendants. See S. STAFFORD, *CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE* XVI, 1 (1977). See generally Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI-KENT L. REV. 13 (1965) (history of doctrine of executive clemency).

⁵² See *Shaw v. Martin*, 613 F.2d 487, 493 (4th Cir. 1980). In *Shaw*, a federal circuit judge granted a stay of execution to a prisoner facing execution the following day. *Id.* at 493. The judge noted that under South Carolina law the state supreme court must schedule

The capital defendant begins the direct appeal process immediately after the trial court returns a guilty verdict and a sentence of death. The defendant may file a motion for a new trial based on alleged defects in the original trial proceedings, but failure to file such a post-trial motion does not affect the capital defendant's right to appeal.⁵³ The trial court usually denies this new trial motion.⁵⁴ In sixteen states, the death penalty statute mandates that once the trial court resolves any post-trial motions before it, the state supreme court is to review the case automatically.⁵⁵ In other states, the appeal is discretionary and the capital defendant must take the initiative to file the appeal.⁵⁶ Once the case is before the state supreme court, the court reviews the capital defendant's claim that the state has violated his state or federal rights.⁵⁷ The court usually finds no violations and affirms both the conviction and death sentence.⁵⁸ At this point, the capital defendant can seek federal review of his federal claims in the United States Supreme Court by filing a petition for the writ of certiorari.⁵⁹ In most capital cases, the Supreme Court denies the petition.⁶⁰

the execution of a capital defendant to take place four weeks after a denial of certiorari by the United States Supreme Court. *Id.* at 489. The judge granted the stay in part because he considered the four week statutory time frame too restrictive of the prisoner's right to pursue his other appeal options. *Id.* at 492 n.2. The authority to grant stays of execution is given to federal judges in § 2251 of Title 28 of the United States Code. 28 U.S.C. § 2251 (1976).

⁵³ See *National Advisory Commission on Criminal Justice Standards and Goals*, COURTS 117 (1973) [hereinafter cited as COURTS]; Corbett, *Post-trial Motions and Appeals*, 14 WAKE FOREST L. REV. 997, 1000-01 (1978) (North Carolina's post-trial motion procedures); *A Jailhouse Lawyer's Manual*, 9 COLUM. HUMAN RIGHTS L. REV. 3, 235 (1977) (New York's post-trial motion procedures).

⁵⁴ See COURTS, *supra* note 53, at 117; Nejelski and Emory, *Unified Appeal in State Criminal Cases*, 7 RUT.-CAM. L.J. 484, 495-96 (1976).

⁵⁵ See *Right to Die*, *supra* note 5, at 578 & n.22. The 16 states requiring automatic appellate review of death penalty cases are Alabama, Arizona, California, Delaware, Florida, Georgia, Idaho, Louisiana, Maryland, Nevada, New Hampshire, Oklahoma, Pennsylvania, South Carolina, Virginia, and Wyoming. *Id.*

⁵⁶ See *Right to Die*, *supra* note 5, at 579. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Supreme Court upheld a death penalty statute that provided for expedited appellate review rather than automatic appellate review. *Id.* at 269-70.

⁵⁷ See Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 106-59 (1979).

⁵⁸ *Id.* Dix found in a study of state appellate review of death penalty cases in Georgia, Florida, and Texas that the Georgia Supreme Court affirmed the sentence of death in 75% of the cases it reviewed between 1974 and 1979, the Florida Supreme Court affirmed the sentence in 50% of the cases, and the Texas Supreme Court affirmed the sentence in 67% of the cases. *Id.* at 111, 125, 145.

⁵⁹ Section 1257(3) of Title 28 of the United States Code gives the Supreme Court discretionary jurisdiction by way of the writ of certiorari to hear federal or constitutional law challenges to final judgements of the highest court in a given state. 28 U.S.C. § 1257(3) (1976).

⁶⁰ See note 14 *supra* (discussion of Supreme Court's treatment of certiorari petitions from capital defendants).

Once the capital defendant has exhausted his direct appeal, he typically will begin the post-conviction appeal sequence. The capital defendant can return to the state court in which he was convicted and sentenced and in post-conviction proceedings present any state or federal claims he did not raise on direct appeal.⁶¹ If the state court denies him relief, the capital defendant can appeal the decision to the state supreme court.⁶² If the state supreme court also denies relief, the capital defendant may appeal the federal claims raised in the post-conviction proceedings to the United States Supreme Court by filing his second petition for the writ of certiorari.⁶³

Assuming a second denial of certiorari by the Supreme Court, the capital defendant begins the third, and final, appeal sequence by filing for the writ of habeas corpus⁶⁴ in a federal district

⁶¹ See generally *State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 147 (1970) [hereinafter cited as *State Post-Conviction Remedies*]. In 36 states, the prisoner can appeal under a post-conviction procedure act that is very similar to the federal habeas corpus provisions of § 2255 of Title 28 of the United States Code. 28 U.S.C. § 2255 (1976). See R. POPPER, *POST-CONVICTION REMEDIES* 44, 50 (1978). In the remaining states, the prisoner will seek the common law writ of habeas corpus or coram nobis. *Id.* See also Note, *Relieving the Habeas Corpus Burden: A Jurisdictional Remedy*, 63 IOWA L. REV. 392, 420 (1977) [hereinafter cited as *Relieving Habeas Corpus*]. Work done by the National Conference of Commissioners on Uniform State Laws in the 1950s and 1960s provided the model for the states' post-conviction laws. See UNIFORM POST-CONVICTION PROCEDURE ACT, *Commissioners' Prefatory Note* (1966 rev. ed.).

⁶² See *State Post-Conviction Remedies*, *supra* note 61, at 183-233 (discussion of the appeal process in post-conviction proceedings).

⁶³ See CARRINGTON, *supra* note 50, at 58-59.

⁶⁴ See *Handling Criminal Cases*, *supra* note 50, at 598-99. The writ of habeas corpus originated in England as a common law remedy for illegal imprisonment. *Id.* The framers of the Constitution included the writ of habeas corpus in the Constitution and specified that Congress could not suspend the writ except when public safety required. U.S. CONST. art. 1, § 9, cl. 2. In the Judiciary Act of 1789, Congress gave federal courts the power to grant the writ when the federal government restrains a person's liberty in violation of the Constitution, federal treaty, or law. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82. The grant of habeas corpus jurisdiction to federal courts to hear cases involving federal prisoners is presently located in § 2241 of Title 28 of the United States Code. 28 U.S.C. § 2241 (1976). In 1867, Congress extended the writ of habeas corpus to state prisoners imprisoned by the state in violation of the Constitution, federal treaty, or law. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The grant of habeas corpus jurisdiction to federal courts to hear cases involving state prisoners is presently located in § 2254 of Title 28 of the United States Code. 28 U.S.C. § 2254 (1976). Since Congress originally did no more than make the writ available, the Supreme Court has had the task of defining over the last 200 years the meaning and scope of the writ. See WHITEBREAD, *supra* note 14, at 576.

Originally, the Supreme Court limited the writ of habeas corpus to prisoners who claimed the trial court lacked jurisdiction to hear the case. See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-04 (1830); *In re Moran*, 203 U.S. 96, 105 (1906); *Frank v. Mangum*, 237 U.S. 309, 326 (1915). See also Note, *Guilt, Innocence, and Federalism in Habeas Corpus*, 65 CORNELL L. REV. 1123, 1124 (1980). In *Waley v. Johnston*, 316 U.S. 101 (1942), however, the Court held that habeas corpus was available, even when the trial court had exercised valid jurisdiction, if the state did not provide the defendant adequate means to raise his constitu-

court.⁶⁵ The district court will review the capital defendant's claims if the court determines that the capital defendant is in state custody pursuant to a judgment by a state court,⁶⁶ has exhausted his state remedies,⁶⁷ is not presenting claims that he waived at an earlier stage

tional claims. *Id.* at 105. The Supreme Court expanded the writ further in *Brown v. Allen*, 344 U.S. 443 (1953). In *Brown*, the Court held that a prisoner may raise a constitutional claim in federal habeas corpus proceedings after he had presented the claim in the state trial and appellate courts, provided that the defendant had earlier exhausted all his state remedies. *Id.* at 486-88. In *Fay v. Noia*, 372 U.S. 391 (1963), the Warren Court expanded the writ beyond *Brown* by holding that the defendant need only exhaust the state remedies still available to him before seeking habeas corpus review. *Id.* at 435. The Court added in *Fay*, however, that a federal judge may deny habeas corpus relief if the defendant deliberately by-passed a state remedy that is now no longer available to him. *Id.* at 438-39.

Commentators have offered two reasons to explain why the Warren Court expanded the scope of federal habeas corpus. See *Handling Criminal Cases*, *supra* note 50, at 601; WHITEHEAD, *supra* note 14, at 574. Some commentators suggest that the Warren Court, prevented by its heavy caseload from giving attention to all the legitimate constitutional questions state prisoners presented in certiorari petitions, expanded the writ of habeas corpus to insure adequate federal review. See *Handling Criminal Cases*, *supra* note 50, at 601; Stolz, *supra* note 50, at 960-61. One commentator has noted that the Warren Court, having greatly expanded the federal constitutional rights of the criminal defendant in the 1960s and not trusting the state courts to enforce these rights, expanded habeas corpus review to protect the state prisoner's constitutional claims. See WHITEHEAD, *supra* note 14, at 574. As a result of the Warren Court's decisions in the area of habeas corpus and criminal procedure, the state criminal defendant could cast almost all his substantive or procedural objections in federal constitutional terms and obtain federal review of his case. See CARRINGTON, *supra* note 50, at 59; COURTS, *supra* note 53, at 130. Beginning in 1975, the Burger Court began to narrow the scope of the writ of habeas corpus and the extent to which a state prisoner has access to the federal courts for review of his federal constitutional rights. See Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233 (1979); WHITEHEAD, *supra* note 14, at 574. The current federal habeas corpus statutes pertaining to state prisoners are located in §§ 2241-2254 of Title 28 of the United States Code. 28 U.S.C. §§ 2241-2254 (1976).

⁶⁵ 28 U.S.C. §§ 2241-2242 (1976). A prior denial by the Supreme Court of the capital defendant's petition for the writ of certiorari does not preclude a federal court from hearing the same claims in federal habeas corpus proceedings. See *Neil v. Biggers*, 409 U.S. 188, 189-91 (1972). Moreover, a decision by an equally divided Supreme Court does not preclude the defendant from raising the same claims in an application for federal habeas corpus. *Id.* at 192. A Supreme Court decision on the merits or a dismissal for want of a federal question, however, prohibits all federal courts from subsequently considering the defendant's claims in habeas corpus proceedings unless the defendant produces new evidence which he could not have by due diligence presented earlier to the Supreme Court. See *Faulk v. Mabry*, 600 F.2d 172, 174 (8th Cir. 1979) (federal courts need not entertain petitions for habeas corpus after Supreme Court dismisses appeal for want of substantial federal question); 28 U.S.C. § 2244(c) (1976).

⁶⁶ 28 U.S.C. § 2254(a) (1976).

⁶⁷ Section 2254(b) of Title 28 of the United States Code requires the state criminal defendant to exhaust his state remedies before seeking federal habeas corpus, unless he can show such remedies are no longer available or would be inadequate. 28 U.S.C. § 2254(b) (1976). See *Fay v. Noia*, 372 U.S. 391, 438-39 (1963) (exhaustion requirement applied only to state remedies available at time state prisoner seeks habeas corpus relief); *Relieving Habeas Corpus*, *supra* note 61, at 397-99.

of judicial proceedings,⁶⁸ and is not presenting claims the Supreme Court has excluded from habeas corpus review.⁶⁹ Under certain circumstances, the district court will go outside of the written record of the case and hold an evidentiary hearing to gather additional facts.⁷⁰ If after review of the case, the district court denies habeas corpus relief, the capital defendant may appeal only if he obtains a certificate of probable cause either from the district court judge who denied his petition for habeas corpus or from a federal circuit court judge for the circuit in which the trial occurred.⁷¹ Finally, if the district and circuit judges refuse to issue the certificate of probable cause, or if the federal circuit court denies habeas corpus after reviewing the case, the capital defendant can make his final application for the writ of certiorari to the United States Supreme Court.⁷² Assuming the Supreme Court again denies certiorari, and the capital defendant fails to persuade a lower federal court to consider a subsequent application for habeas corpus,⁷³ the capital defendant will have exhausted his appeal

⁶⁸ See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 86-91 (1977); *Francis v. Henderson*, 425 U.S. 536, 539-42 (1976); *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976). These cases have substantially narrowed the deliberate by-pass rule announced in *Fay v. Noia*, 372 U.S. 391, 438-39 (1963). Under *Fay*, a state defendant could raise in federal habeas corpus proceedings a constitutional claim he had not raised in state courts as long as he had not intentionally bypassed the state courts. *Id.* In *Wainwright*, the Court explicitly narrowed the *Fay* rule. 433 U.S. at 87. The *Wainwright* Court held that if the defendant fails to comply with the state's contemporaneous objection rule, he has waived the right to raise that claim in federal habeas corpus proceedings unless he can show cause for failure to object and actual prejudice. *Id.* at 89-90. In *Wainwright*, the Court refused to give cause and prejudice precise definitions. *Id.* at 90-91; see *Relieving Habeas Corpus*, *supra* note 61, at 406-09 (discussion of the *Wainwright*, *Francis*, and *Estelle* decisions); *WHITEBREAD*, *supra* note 14, at 582-85 (same).

⁶⁹ See *Stone v. Powell*, 428 U.S. 465, 481 (1976). In *Stone*, the Supreme Court held that federal courts should not review alleged violations of fourth amendment rights in habeas corpus proceedings if the state court had provided an opportunity for a full and fair hearing on the issues. *Id.* But see *Jackson v. Virginia*, 443 U.S. 307, 321 (1979) (federal courts should review insufficiency of evidence claims in habeas corpus proceedings despite opportunity for full and fair hearing in state courts); *Rose v. Mitchell*, 443 U.S. 545, 560-64 (1979) (federal courts should review in habeas corpus proceedings defendant's claim of racial discrimination in grand jury selection process because state judiciary unlikely to give opportunity for full and fair hearing).

⁷⁰ See 28 U.S.C. § 2254(d) (1976). Section 2254(d) of Title 28 of the United States Code requires a federal court in habeas corpus proceedings to presume that the state court's factual determinations are correct, unless certain statutory circumstances exist. *Id.* If a federal court makes independent findings of fact contrary to the state court's determinations, the federal court must in writing indicate which of the statutory circumstances of § 2254(d) warranted an independent federal evidentiary review. See *Sumner v. Mata*, 449 U.S. 539, 551-52 (1981).

⁷¹ See 28 U.S.C. § 2253 (1976).

⁷² See *Robinson*, *supra* note 50, at 488.

⁷³ Section 2244(b) of Title 28 of the United States Code limits the prisoner's ability to file successive petitions for habeas corpus in federal courts. 28 U.S.C. § 2244(b) (1976). If a defendant bases his second petition on new facts or issues, the court will require a showing that the defendant did not deliberately withhold these matters in the earlier petition. *Id.* Although not explicitly stated in § 2244(b), the federal judge does have the discretion to

options in the federal system. The state then may administer the death penalty.⁷⁴

The present system of judicial review of death penalty cases has two major defects. First, the system is repetitive and prone to delay.⁷⁵ The delay not only prevents the states from administering their death penalty statutes in a timely fashion, but it also unjustifiably subjects capital defendants possessing valid constitutional claims to an uncertain and lengthy death row existence.⁷⁶ Second, the present system of judicial

hear a second petition solely because the ends of justice require it. *See Sanders v. United States*, 373 U.S. 1, 15-18 (1963).

⁷⁴ *See, e.g.*, FLA. STAT. ANN. § 922.06 (West 1972). The appeal of John Spenkelink graphically illustrates the current appeal process in death penalty cases. Spenkelink is the only person who vigorously pursued all his appeal options to be executed in the United States since the Supreme Court upheld the constitutionality of the death penalty in 1976. *See Coleman v. Balkcom*, 451 U.S. 949, 951 n.5 (1981). A Florida trial court found Spenkelink guilty of first degree murder and sentenced him to death in 1973. *See Spenkelink v. State*, 313 So.2d 666, 668 (Fla. 1975). The Florida Supreme Court affirmed both the sentence and punishment in early 1975. *Id.* at 671. After a 17 month delay in which the United States Supreme Court considered, and then upheld, the constitutionality of Florida's death penalty statute in *Proffitt v. Florida*, 428 U.S. 242, 260 (1976), the Court denied Spenkelink's certiorari petition. *See Spenkelink v. Florida*, 428 U.S. 911 (1976). Over the next 16 months, Spenkelink unsuccessfully applied for executive clemency, initiated post-conviction proceedings in the court that convicted him, appealed the trial court decision to the Florida Supreme Court, and unsuccessfully sought the writ of certiorari in the United States Supreme Court. *See Spenkelink v. State*, 350 So.2d 85 (Fla.), *cert. denied*, 434 U.S. 960 (1977).

In September, 1977, Spenkelink initiated federal habeas corpus proceedings in a Florida district court. *See Spenkelink v. Wainwright*, 578 F.2d 582, 589 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). The district court stayed Spenkelink's execution and granted an evidentiary hearing before subsequently denying to issue the writ. 578 F.2d at 589. Spenkelink unsuccessfully appealed the district court decision to the Fifth Circuit. *Id.* The Supreme Court in March 1979 denied Spenkelink's third petition for certiorari. 440 U.S. at 976.

Over the next two months, Spenkelink again unsuccessfully sought executive clemency from Florida's governor, the writ of habeas corpus from a Florida district court and the Fifth Circuit, and a stay of execution from Justice Rehnquist. *See Spenkelink v. Wainwright*, 442 U.S. 1301 (1979) (Rehnquist, Circuit Justice). On May 25, 1979, after six years and fourteen state and federal reviews of his case, the state of Florida executed John Spenkelink. *See Coleman v. Balkcom*, 451 U.S. at 951 n.5.

⁷⁵ *See Coleman v. Balkcom*, 451 U.S. 949, 956-58 (1981) (Rehnquist, J., dissenting); Nakell, *supra* note 47, at 473-76; Bodine, *supra* note 9, at 22. The criticisms of duplication and excessive delay are not unique to death penalty cases, but apply to appellate review of state criminal cases in general. *See Cameron, National Court of State Appeals: A View from the States*, 65 A.B.A.J. 709, 710-11 (1979) [hereinafter cited as Cameron]; Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841, 842 (1973) [hereinafter cited as Haynsworth]; *Handling Criminal Cases*, *supra* note 50, at 602; Stolz, *supra* note 50, at 964; J. Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem* 17-21 (1981) (unpublished dissertation, University of Virginia School of Law) [hereinafter cited as *National Court*].

⁷⁶ *See Estelle v. Jurek*, 450 U.S. 1014 (1981) (Rehnquist, J., dissenting) (discussion of death penalty case in which defendant spent eight years on death row before winning new trial in federal habeas corpus proceedings); Johnson, *Warehousing for Death*, 26 CRIME AND

review discourages the development of clear constitutional guidelines for the states to follow in administering their death penalty laws.⁷⁷ The Supreme Court, because of its caseload, is simply unable to hear the number of capital cases necessary to provide the states clear constitutional standards to follow.⁷⁸ Moreover, the numerous federal district and circuit courts must resolve the constitutional issues presented in death penalty cases, since the Supreme Court already will have denied certiorari in these cases on two occasions.⁷⁹ These multiple forums cannot provide the same consistent application of the Constitution that a single federal court would provide.⁸⁰

Concern over the defects in the present system of judicial review of state criminal cases has led to numerous proposals for reform in the last few years.⁸¹ Among the most appealing of these proposals is one first put forward in 1973 by Judge Clement F. Haynsworth, Jr., Chief Judge of the Fourth Circuit Court of Appeals.⁸² Judge Haynsworth proposed that Congress create a new national court of criminal appeals with jurisdiction to review by writ of certiorari the federal questions arising in all state and federal criminal cases.⁸³ Under Judge Haynsworth's proposal, state criminal defendants could petition the national court of criminal appeals for a writ of certiorari on direct appeal from their state's highest appeals court.⁸⁴ In addition, state criminal defendants who subsequently raised new federal questions in state post-conviction proceedings could submit one post-conviction petition for certiorari to the national appeals court.⁸⁵ On either direct or post-conviction appeal, the national court would deny certiorari only in cases where the criminal defendant failed

DELINQUENCY 545 (1980) (discussion of problems condemned prisoners face living on death row); Note, *Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 826-31 (1972) (same).

⁷⁷ See text accompanying note 29 *supra*.

⁷⁸ See note 14 *supra* (discussion of Supreme Court's caseload and Court's inability to hear more capital cases). At least one commentator argues that the Supreme Court, because of its workload, no longer provides adequate guidelines in all areas of the law, both criminal and civil. See Griswold, *supra* note 14, at 335-50.

⁷⁹ See text accompanying notes 64-74 *supra*.

⁸⁰ See Cameron, *supra* note 75, at 710-11; *National Court*, *supra* note 75, at 21-23; CARRINGTON, *supra* note 50, at 209. Justice Cameron of the Arizona Supreme Court points out that not only do the various federal circuit courts apply the United States Constitution differently when reviewing state criminal cases on habeas corpus review, but various panels of the same federal circuit court, and the numerous federal district judges, also apply the Constitution inconsistently. See Cameron, *supra* note 75, at 711. The multiplicity of federal forums creates confusion rather than clarity and leaves state courts uncertain as to what the Constitution requires in criminal cases. *Id.*

⁸¹ See notes 50 & 75 *supra*.

⁸² See Haynsworth, *supra* note 75, at 842.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 844.

to present a substantial federal question.⁸⁶ Once the court had heard a prisoner's claim, or had denied certiorari for failure to present a substantial federal question, no federal court other than the Supreme Court could reconsider the claim.⁸⁷

Under the Haynsworth proposal, the state criminal defendant could obtain review of his case by the Supreme Court in one of three ways. First, if the national court of criminal appeals decided the defendant's claims on the merits, the defendant then could petition the Supreme Court for certiorari.⁸⁸ Second, if the national court denied certiorari to a defendant for failing to present a substantial federal question and at least one judge objected to the denial of certiorari, the defendant also could petition the Supreme Court for certiorari.⁸⁹ Third, after a denial of certiorari by a unanimous national court, the Supreme Court, on its own motion, could issue the writ of certiorari to the national court or the state court of origin if the Supreme Court felt the defendant's constitutional claims warranted further consideration.⁹⁰

Judge Haynsworth would permit the lower federal courts to continue hearing petitions for the writ of habeas corpus, but only when the defendant could demonstrate two facts.⁹¹ The defendant must show that a state procedural rule now prevents him from raising his constitutional challenge in the state courts.⁹² In addition, the defendant must show that he did not deliberately by-pass an opportunity to present his constitutional claims in an earlier court proceeding.⁹³

The Haynsworth proposal would alleviate one problem confronting

⁸⁶ See *Handling Criminal Cases*, *supra* note 50, at 604 n.28.

⁸⁷ *Id.* at 606.

⁸⁸ See Haynsworth, *supra* note 75, at 843.

⁸⁹ *Id.* In his proposal for a national criminal appeals court, Judge Haynsworth suggested that if the national court unanimously voted to deny certiorari to a criminal defendant, the Supreme Court should not subsequently have to entertain the defendant's petition. *Id.* Judge Haynsworth justified this policy on the grounds that in most cases the defendant's petition will not contain meritorious claims worthy of Supreme Court review. *Id.*

⁹⁰ *Id.* Judge Haynsworth would allow the Supreme Court on its own motion to grant certiorari to a criminal defendant in two circumstances. First, the national court might occasionally unanimously dismiss a petition for certiorari that contained meritorious federal claims. *Id.* Judge Haynsworth proposed that the Supreme Court add a small staff for the purpose of monitoring the national court's unanimous denials of certiorari to insure that criminal defendants who have substantial federal claims to present do get federal review of their claims. *Id.* Second, Judge Haynsworth noted that occasionally the national court might dismiss a defendant's claims based on settled federal law that the Supreme Court would now like to reconsider. *Id.* The Supreme Court could, under the Haynsworth's proposal, take up the case on its own motion and resolve the issues involved. *Id.*

⁹¹ *Id.* at 843-44.

⁹² *Id.*

⁹³ *Id.* Judge Haynsworth adopted the deliberate by-pass rule announced in *Fay v. Noia*, 372 U.S. 391, 438 (1963), for determining when a state defendant can raise a claim in federal habeas corpus proceedings. See Haynsworth, *supra* note 75, at 843.

the states in death penalty cases by providing a prompt and thorough review of the capital defendant's constitutional claims.⁹⁴ The national court would hear all the constitutional claims the capital defendant raised on direct appeal soon after the state's highest appeals court considered the case. A decision by the national court adverse to the capital defendant would preclude the defendant from thereafter raising the same claims in any federal forum other than the Supreme Court.⁹⁵ In those cases where a capital defendant had additional constitutional claims to raise in state post-conviction proceedings, the national court would provide the same prompt review.⁹⁶ Furthermore, the national court would greatly reduce, if not practically eliminate, the need for habeas corpus proceedings by providing the capital defendant a single federal forum in which to raise his constitutional claims early in the appeal process.⁹⁷ Consequently, the capital defendant with valid constitutional claims would spend less time living an uncertain existence on death row.⁹⁸ Conversely, if the capital defendant had no valid constitutional claims, the national court's prompt disposition of the case would permit the state to impose the death penalty in an expeditious manner.⁹⁹

The national court proposed by Judge Haynsworth would also contribute to the development of clear constitutional standards for the states to follow in administering their death penalty laws. As a single court of review with the capacity to hear all death penalty cases coming from the states, the national court would provide a more uniform application of the Constitution than is now possible in the current multi-court review process.¹⁰⁰ The states would receive prompt and regular feedback on those features of their death penalty laws that do not provide capital defendants the "super due process" protections the Constitution requires.¹⁰¹ The states presumably would translate the feedback from the national court into constitutionally appropriate procedures for capital trials and the possibility of constitutional error occurring at trial would diminish. Consequently, the states would be less likely to sentence people to death in an unconstitutional manner. Moreover, the

⁹⁴ See Haynsworth, *supra* note 75, at 844. Judge Haynsworth identified prompt resolution of a state criminal defendant's constitutional claims as the major reason for creating the national court. *Id.*

⁹⁵ See text accompanying notes 84-87 *supra*.

⁹⁶ See text accompanying notes 85-87 *supra*.

⁹⁷ See *Handling Criminal Cases*, *supra* note 50, at 606; text accompanying notes 91-93 *supra*.

⁹⁸ See text accompanying note 76 *supra*.

⁹⁹ See note 9 *supra* (discussion of reasons for prompt disposition of death penalty cases).

¹⁰⁰ See Cameron, *supra* note 75, at 712. Justice Cameron of the Arizona Supreme Court has observed that once a national court began applying the United States Constitution in a uniform manner to state criminal cases, state courts could apply the Constitution in subsequent cases in a similarly consistent manner. *Id.* at 711.

¹⁰¹ See text accompanying note 45 *supra*.

national court would encourage the uniform development of constitutional law as capital defendants raise new or previously unresolved issues on appeal.¹⁰²

The Haynsworth proposal for a new national court of criminal appeals, however, is open to at least three criticisms. First, there would be the danger that a specialized criminal appeals court would create a body of criminal law understandable only to a specialized criminal bar and contrary to the basic values of society.¹⁰³ Second, there would be the danger that the President, his political party, and special interest groups would politicize the appointment process to insure the selection of judges with a common hard-line or soft-line philosophy regarding crime and punishment issues.¹⁰⁴ Third, there would be the problem that the President would be unable to attract qualified judges to sit on a court that many people would perceive to lack the prestige of a federal appeals court of general jurisdiction.¹⁰⁵

Recently, Justice James Duke Cameron of the Arizona Supreme Court has offered a modified version of the Haynsworth proposal which

¹⁰² See *People v. Frierson*, 25 Cal. 3d 142, 188-96, 599 P.2d 587, 615-20, 158 Cal. Rptr. 281, 308-13 (1979) (Mosk, J., concurring) (discussion of numerous unresolved constitutional issues in death penalty cases). Judge Haynsworth has predicted that his proposed national court could produce clear constitutional principles for the states to follow in death penalty cases within a reasonably short period of time. Telephone interview with Judge Clement F. Haynsworth, Jr., Chief Judge of the Fourth Circuit Court of Appeals (Sept. 17, 1981) (transcript on file in law review office).

¹⁰³ See CARRINGTON, *supra* note 50, at 168. Judge Haynsworth acknowledged in his original proposal for a national criminal appeals court that many people opposed a specialized criminal court. See Haynsworth, *supra* note 75, at 845. Judge Haynsworth, however, argued that the provisions he proposed for Supreme Court review would prevent the national court from going off on "erratic tangents of its own." *Id.* See also text accompanying notes 88-90 *supra* (discussion of Haynesworth's provisions for Supreme Court review).

¹⁰⁴ See CARRINGTON, *supra* note 50, at 168; Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301, 1306 (1974); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 639 (1974). Judge Haynsworth in his original proposal for a national criminal appeals court suggested that the President should nominate the judges to sit on the new court and the Senate confirm the nominations. See Haynsworth, *supra* note 75, at 845. Judge Haynsworth argued that this selection process would preclude the appointment of judges with narrow ideological viewpoints to the court. *Id.* In a subsequent article on the national court proposal, Judge Haynsworth acknowledged that many people were concerned that the Haynsworth proposal would result in an overly politicized selection process and an ideologically biased court. See *Handling Criminal Cases*, *supra* note 50, at 614-15. Judge Haynsworth, however, re-emphasized his earlier position that Senate confirmation would provide adequate safeguards. *Id.* In spite of Judge Haynsworth's assurances, the politicization and polarization problems continue to have a "chilling effect" on the Haynsworth proposal. See Cameron, *supra* note 75, at 712.

¹⁰⁵ See CARRINGTON, *supra* note 50, at 168. Judge Haynsworth stressed in his original proposal that although the court would have jurisdiction to hear only criminal cases, the opportunity to participate in the fashioning of uniform constitutional standards in the criminal area would attract qualified judges. See Haynsworth, *supra* note 75, at 842. As an added incentive, however, Judge Haynsworth proposed that the members of the national court hold the title of justice and receive a salary greater than that paid federal circuit judges. *Id.*

avoids the criticisms mentioned above.¹⁰⁶ Justice Cameron proposes the creation of a national court of state appeals rather than a national court of criminal appeals.¹⁰⁷ The proposed court would have exclusive original jurisdiction to review by writ of certiorari all federal questions arising in state criminal and civil litigation.¹⁰⁸ The national court would not review, as Judge Haynsworth originally proposed, federal criminal cases.¹⁰⁹ Since Justice Cameron's court would hear both criminal and civil cases, there would be minimal danger that the court would become a specialized criminal court.¹¹⁰ Additionally, the proposed court would eliminate the danger of politicization because its general jurisdiction would concentrate on no single issue.¹¹¹ Lastly, since the national court would have general jurisdiction to review all state court determinations of federal law, there would be no problem attracting qualified judges.¹¹² Judge Haynsworth recently endorsed the jurisdictional modification proposed by Justice Cameron and observed that the national court of state appeals would provide a prompt and uniform application of federal constitutional principles to state death penalty cases.¹¹³

There are, however, two unsatisfactory features of the Cameron proposal that should not be incorporated into a modified Haynsworth proposal. These features would prevent some capital defendants from getting as thorough a federal review of their constitutional claims as the present system provides. First, the Cameron proposal would give the national court complete discretionary jurisdiction.¹¹⁴ Since Justice Cameron predicts that the caseload of the national court would be quite heavy,¹¹⁵ there is the possibility that the national court would soon begin

¹⁰⁶ See Cameron, *supra* note 75, at 711; *National Court*, *supra* note 75, at 26-27; text accompanying notes 103-05 *supra*.

¹⁰⁷ See Cameron, *supra* note 75, at 711.

¹⁰⁸ *Id.*

¹⁰⁹ See text accompanying note 83 *supra*.

¹¹⁰ See text accompanying note 103 *supra*.

¹¹¹ See text accompanying note 104 *supra*. In his proposal for a national court, Justice Cameron calls for the President to nominate and the Senate to confirm the members of the national court. See Cameron, *supra* note 75, at 712. Justice Cameron also proposes that the President, in selecting his nominees, employ the same merit review process that is now used to select federal circuit judges to avoid the prospect that the selection process becomes overly politicized. *Id.*

¹¹² See text accompanying note 105 *supra*; Cameron, *supra* note 75, at 712. Justice Cameron asserted that a court with general jurisdiction to hear state cases like he proposed would be more able to attract qualified judges than would the specialized criminal court proposed by Judge Haynsworth. *Id.*

¹¹³ Letter from Judge Clement F. Haynsworth, Jr., Chief Judge of the Fourth Circuit Court of Appeals (Sept. 22, 1981) (copy on file in law review office).

¹¹⁴ See Cameron, *supra* note 75, at 711. The Cameron national court proposal places no restrictions on the national court's capacity to deny certiorari to a state defendant. *Id.*

¹¹⁵ See *National Court*, *supra* note 75, at 41. Based on statistics compiled by the Administrative Office of the United States Courts, Justice Cameron predicted that the annual caseload of the new court would consist of approximately 500 civil cases and 3000 criminal cases. *Id.* The national court's caseload would be slightly less than the Supreme Court's annual caseload. See note 14 *supra*.

denying certiorari in death penalty cases as frequently as the Supreme Court currently does.¹¹⁶ Under the Cameron proposal, the lower federal courts would lose their jurisdiction to hear habeas corpus petitions¹¹⁷ and could no longer provide the federal review they now do subsequent to a denial of certiorari by the Supreme Court.¹¹⁸ Furthermore, under the Cameron proposal a denial of certiorari by a unanimous national court would preclude the capital defendant from thereafter petitioning the Supreme Court for certiorari.¹¹⁹ The effect of these provisions would be to limit some capital defendants to considerably less federal review of their claims than they would receive under the present system. In contrast, the Haynsworth proposal would not so limit the capital defendant's access to federal appellate review. The Haynsworth proposal would restrict the national court's capacity to deny certiorari by requiring the court to determine first that the defendant's certiorari petition contains no substantial federal claims.¹²⁰ Requiring the national court to consider the substance of the capital defendant's claims should not overly burden the national court's caseload and would insure that the capital defendant received more than a cursory federal review of his constitutional claims. Furthermore, the Haynsworth proposal would allow the Supreme Court to grant certiorari on its own motion after a unanimous denial of certiorari by the national court.¹²¹ This provision provides an additional safeguard that the capital defendant's constitutional claims would be reviewed adequately.

The second unsatisfactory feature of the Cameron proposal concerns the limits placed on Supreme Court review of national court decisions. Under the Cameron proposal, a unanimous decision on the merits by the national court that is adverse to the defendant cannot be reviewed by the Supreme Court.¹²² This limitation on Supreme Court review is quite different from the present system of federal appellate review whereby a capital defendant can petition the Supreme Court for certiorari after a federal circuit court has denied habeas corpus relief by either a unanimous or majority opinion.¹²³ In contrast to the Cameron proposal, the Haynsworth proposal allows the capital defendant to petition the Supreme Court after the national court issues either a unanimous or majority opinion adverse to the defendant.¹²⁴ The Haynsworth proposal

¹¹⁶ See text accompanying note 14 *supra*.

¹¹⁷ See *National Court*, *supra* note 75, at 46.

¹¹⁸ See text accompanying notes 64-72 *supra*.

¹¹⁹ See Cameron, *supra* note 75, at 712.

¹²⁰ See text accompanying note 86 *supra*.

¹²¹ See text accompanying note 90 *supra*.

¹²² See Cameron, *supra* note 75, at 712.

¹²³ See 28 U.S.C. § 1254(1) (1976). Section 1254(1) of Title 28 of the United States Code provides the Supreme Court discretionary jurisdiction to review decisions by the federal courts of appeals. *Id.* Section 1254(1) does not distinguish between unanimous and majority court of appeals decisions. *Id.*

¹²⁴ See Haynsworth, *supra* note 75, at 843. In discussion of the Haynsworth proposal, Justice Cameron incorrectly states that Judge Haynsworth would preclude a capital defen-

would insure that the national court could not insulate its unanimous decisions in death penalty cases from subsequent Supreme Court review. The task of reviewing approximately ninety certiorari petitions filed annually by capital defendants on appeal from the national court would not add to the Supreme Court's current workload¹²⁵ and would insure that the Supreme Court remains supreme.¹²⁶

A national court for state appeals based on the Haynsworth proposal¹²⁷ with the Cameron jurisdictional modification¹²⁸ would do much to eliminate the constitutional stalemate that now exists in death penalty cases.¹²⁹ Capital defendants would receive a prompt and thorough review of their constitutional claims.¹³⁰ Moreover, the states would receive adequate constitutional guidelines as the national court applied the Constitution uniformly to all death penalty cases.¹³¹ As a result, the states could maximize the deterrent and retributive purposes of the death penalty by promptly imposing the punishment on capital defendants who have been constitutionally convicted and sentenced to die for their crimes.¹³²

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dant from petitioning the Supreme Court after a unanimous adverse decision on the merits by the national court. *See* Cameron, *supra* note 75, at 712. Judge Haynsworth, however, was referring to a unanimous denial of certiorari by the national court and not a unanimous decision on the merits. *See* Haynsworth, *supra* note 75, at 843.

¹²⁵ *See* note 14 *supra*.

¹²⁶ *See* Haynsworth, *supra* note 75, at 843. In his proposal for a national court, Judge Haynsworth stressed that the "overlordship" of the Supreme Court would be preserved under his proposal. *Id.*

¹²⁷ *See* text accompanying notes 82-93 *supra*.

¹²⁸ *See* text accompanying notes 106-113 *supra*.

¹²⁹ *See* text accompanying notes 1-9 *supra*.

¹³⁰ *See* text accompanying notes 94-99 *supra*. The time required for a state capital defendant to have all his constitutional claims reviewed by the national court could be shortened considerably if the states implemented a unified appeals procedure similar to the one recently adopted in Georgia. *See* Georgia Unified Appeal Procedure, GA. CODE ANN. § 27-2538 (1977 and Supp. 1981). The Georgia procedure is specifically designed for trial courts to use in death penalty cases. *Id.* The purpose of the procedure is to encourage the capital defendant to raise all of his constitutional challenges at the trial level so that these challenges will be reviewed by state and federal appellate courts on direct appeal. *Id.* The Georgia procedure requires the trial court to confer regularly with the prosecutor, defense counsel, and defendant at every stage of the criminal proceedings and during these conferences make use of an elaborate constitutional law checklist. *Id.* This checklist identifies most constitutional errors that can occur prior to, during, and after trial in death penalty cases. *Id.* The procedure is designed not only to prevent constitutional errors from occurring, but also to insure that the defendant either raises all his constitutional claims in the first instance or knowingly, voluntarily, and intelligently waives the claims. *Id.* The Georgia procedure, by encouraging the capital defendant to raise his claims at the trial level, should greatly reduce if not eliminate the need for a subsequent post-conviction appeal. A federal judge has recently praised the Georgia unified appeals procedure. *See* Westbrook v. Zant, 515 F. Supp. 1347, 1348 (M.D. Ga. 1981) (Georgia's onetime, quicker appeal procedure is good news for future).

¹³¹ *See* text accompanying notes 100-02 *supra*.

¹³² *See* text accompanying note 9 *supra*.