1-1989

Habeas Corpus Committee - Correspondence

Lewis F. Powell, Jr.

File
Include on agend for Jan 30

MEMORANDUM

TO: Habeas Committee File January 3, 1989

FROM: Hew

RE: Stef Cassella

Stef Cassella, counsel to the Senate Judiciary Committee called to inquire about the Ad Hoc Committee on Federal Habeas Review of Capital Sentences. In response to his questions I provided the names of the Committee members and a general description of the Committee's task. Cassella seemed most interested in knowing when a report was likely to be completed, and I told him that a date had not been set.

In response to my questions on the provisions in the Anti-Drug Abuse Act concerning the Committee, Cassella said that the basic effect of the provision would be to require Joe Biden to introduce some habeas reform legislation, which he has been reluctant to do. Whatever bill is introduced by Biden or by Strom Thurmond will be discharged from Committee and be voted on by the Senate. The House is not bound to do anything. Cassella said that any proposal would have been "buried" by former House Judiciary Committee Chairman Rodino, but that the new chairman, Jack Brooks of Texas, favors the death penalty and may be open to proposals for habeas reform.

File

MEMORANDUM

TO: Justice Powell January 3, 1989

FROM: Hew

RE: Habeas Committee -- John Daly

John Daly from the Washington office of the State of Florida called with general inquiries on the Committee, which I answered. He was particularly interested in whether the Committee would be receiving public testimony, the projected date of the Committee's report, and the effect of the provisions of the Anti-Drug Abuse Act.

I informed Daly that Prof. Pearson had communicated with the AG's offices in the CA5 and CA11 states. Daly stated that Florida has a Democratic AG and a Republican governor (Martinez), and implied that communication was not the best between the two offices. Gov. Martinez is very interested in habeas reform, and asks that the Committee advise him separately if there will be an opportunity to present testimony.

Address:

John Daly
Florida Washington Office,
Hall of States, Suite 287
444 N. Capital St.
Washington, DC 20001
624-5885

lfp/ss 01/05/89 COMM SALLY-POW

Ad Hoc Committee on Federal Habeas

MEMO TO FILE:

Judge Robert Huntley of the Idaho Supreme Court called me today. He previously had expressed an interest in the work of our Committee, and we have a letter from him in the file.

In our discussion today he stated that his primary interest was administrative. He has been studying (collecting information) the causes of delay in state courts primarily at the trial level. He characterizes the problem as "gross inefficiency". He cited the case of a state court judge in a capital case who failed for 17 months to enter a routine order.

I advised him that our mandate was limited to repetitive habeas review, particularly in the federal courts. But I responded affirmatively when he asked whether our committee would like to have the benefit of his research. I suggested that he a copy to Al Pearson.

L.F.P., Jr.

ss

January 5, 1989

Ad Hoc Committee on Federal Habeas

Dear Judge Huntley:

A brief note to thank you for your telephone call. Although our specific mission is to consider causes of delay attributable to repetitive habeas corpus review, your investigation and study of administrative delay - often due to negligence or incompetency - certainly would be of interest. The Committee would be happy to receive a copy of your investigation.

It would be helpful if you also sent a copy directly to our Reporter, Professor Albert M. Pearson, School of Law, University of Georgia, Athens, Georgia 30602. Professor Pearson is working with the offices of the state attorneys general in the Fifth and Eleventh Federal Circuits. Our Committee meets again on January 30.

I mentioned that the American Bar Association also has a study underway. The Chairman is Judge Alvin B. Rubin, 2440 One American Place, Baton Rouge, Louisiana 70825, an able member of the Fifth Circuit Federal Court of Appeals.

Sincerely,

Hon. Robert G. Huntley, Jr.
Supreme Court of Idaho
Supreme Court Building
451 West State Street
Boise, Idaho 83720

lfp/ss

cc: Professor Albert M. Pearson

January 9, 1989

Dear Al:

Justice Powell is interested in knowing whether there is any available information on the racial composition of juries in death penalty cases, and suggested that I write you for help. Perhaps the NAACP Legal Defense and Education Fund, Inc. has some figures. I have asked the library research staff here to see what they can find, and will let you know what they say.

The Justice also mentioned that it would be helpful to have a memo summarizing your progress in gathering data about a week before the January 30 meeting. I look forward to seeing you then.

Sincerely,

R. Hewitt Pate

Professor Albert M. Pearson
School of Law
University of Georgia
Athens, Georgia 30602

January 12, 1989

Ad Hoc Committee on Federal Habeas

Dear Chief:

The Committee meets again at 9:30 a.m. on Monday, January 30.

Jo and I have been invited to a dinner here at the Court to be given by the Smithsonian on the evening of Sunday, January 29. The other four judges on our Committee (Chief Judges Clark and Roney, and DC Judges Hodges and Sanders) will be in the city that evening. If you think it appropriate, it would be nice if they (with spouses, if any) were invited.

Of course, I have not mentioned this to them, and will understand if this is inappropriate or difficult.

Sincerely,

The Chief Justice

lfp/ss

OFFICE OF THE
ATTORNEY GENERAL
DON SIEGELMAN
ATTORNEY GENERAL
MONTGOMERY, ALABAMA 36130
(205) 261-7400

STATE OF ALABAMA

JAN 17 1989

January 12, 1989

Professor Albert M. Pearson
School of Law
University of Georgia
Athens, GA 30602

Dear Professor Pearson:

Enclosed, as we discussed yesterday, are various materials relating to the work of the Ad Hoc Committe on Federal Habeas. These materials include lists of all United States Supreme Court and federal appellate court decisions in post-Furman capital cases, with the only exception being those which have not yet made the Federal Second Reporter advance sheets.

The decisions list is provided to you in two formats. First, there is a computer printout of the decisions listed alphabetically by case name with the citation at which each decision appears, but with no subsequent case history citation. Also enclosed are lists in typewritten page format of the decisions by federal circuit with subsequent case history supplied.

These lists, which contain 596 decisions, are drawn from a computer program which I use to keep up with all the post-Furman federal appellate court holdings in capital cases. Note that the lists are of decisions rather than cases. For example, where a post-Furman capital case resulted in a panel decision, an en banc decision, and a Supreme Court decision there will be a total of three decisions, each with its separate citation, for that case. What the lists represent are every published federal appellate court decision in a capital case that I have been able to locate, read, and plug its issues into my computer system. I believe the lists to be at least 99% complete.

In using the case lists, you should ignore the one to four digit number to the left of each listed decision. That number is simply a computer number which I use to program the cases and issues which they address into my computer.

Also enclosed, as you requested, is a complete procedural history in chronological order for each of the three Alabama cases which have gone through to execution in the post-Furman era. If the execution which we have scheduled for later this month occurs, I will send you a chronological history for that case, also.

By copy of this letter, I am informing the committee members of the materials being transmitted to you, but due to the bulk of those materials, I have not enclosed copies for each of the committee members. However, I will glady do so should any of the members desire them.

Please let me know what else I can do to assist you and the committee in your important work.

Sincerely,

Ed Carnes

ED CARNES
Assistant Attorney General

EC/jaf

Enclosures

cc: Chief Justice William H. Rehnquist
Justice Lewis F. Powell, Jr.
Hon. Paul H. Roney
Hon. Charles Clark
Hon. Barefoot Sanders
Hon. William Terrell Hodges
William L. Burchill, Jr. Esquire
Noel J. Augustyn, Esquire

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January 18, 1989

Ad Hoc Committee on Federal Habeas

Dear General Carnes:

A brief note to thank you for the copy of your letter to Professor Pearson.

The materials you have sent him will certainly be of assistance, particularly the complete procedural history of the three Alabama cases in which the defendant has been executed.

I am speaking for the Committee when I send warm thanks.

Sincerely,

Hon. Ed Carnes
Assistant Attorney General
State of Alabama
Montgomery, Alabama 36130

lfp/ss

cc: Professor Albert M. Pearson

WILLIAM W SCHWARZER
UNITED STATES DISTRICT JUDGE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

January 18, 1989

JAN 23 1989

Honorable Lewis F. Powell
Retired Associate Justice
Supreme Court of the United States
1 First Street, NE
Washington, D. C. 20543

Dear Justice Powell:

Enclosed is a copy of the paper I mentioned in my recent letter to you being presented to California Trial Judges as a part of the effort to promote better understanding of Federal Habeas Corpus and, it is hoped, to reduce resort to it.

With best regards,

Sincerely yours,

William W Schwarzer

Enclosure

A BRIEF OVERVIEW OF FEDERAL HABEAS CORPUS LAW

The purpose of this memorandum is to address a problem that state and federal courts share: federal post-conviction review of state court judgments. The writ of habeas corpus permits a prisoner to challenge his conviction on federal constitutional grounds. Although the writ provides important protection for the constitutional rights of defendants, its widespread use has also been a source of tension between the state and federal judicial systems and of public dissatisfaction with the administration of criminal justice. Whether the conditions for granting federal post-conviction relief should be tightened has been a subject of great controversy. But, however the debate is resolved, the most immediate concern is, and will continue to be, how to reduce the causes for post-conviction relief.

This memorandum examines the principal grounds on the basis of which federal courts, principally the Ninth Circuit Court of Appeals, which has jurisdiction of California, have granted relief to defendants convicted in state courts. It is intended simply to report what the federal courts have done and how they might be expected to deal with particular problems or situations. It is not intended to suggest to state court judges how they should conduct trials in their courts. The assumption underlying this memorandum is that, although state court judges are thoroughly familiar with California law, they may not have the opportunity to follow federal habeas law. The objective is, through greater familiarity with relevant federal law, to advance

the common interest of state and federal judges in reducing the incidence of meritorious habeas petitions.

Because of time and space constraints, this memorandum is not exhaustive. It covers the taking of guilty pleas, evidentiary rulings, some aspects of the right to counsel, jury instructions, exposure of jurors to extrinsic evidence, and prosecutorial misconduct. Some issues, such as jury selection, ineffective assistance of counsel, competency to stand trial, vindictive sentencing, double jeopardy, and mistrial motions, are not covered. The main objective in selecting case citations was to find clear statements of rules and representative fact patterns, not to cite every case on point.

I. GUILTY PLEAS

A guilty plea forecloses all grounds for habeas corpus relief except that the plea itself is not voluntary and intelligent.[1] If the defendant is fully aware of the direct penal consequences of his plea, including the significance of any commitments made to him by the court, the prosecutor, or his own attorney, then the plea is valid unless it is induced by threats, misrepresentations, mistake, or unenforceable or unethical promises.[2] If the defendant pleads guilty on the advice of counsel, the plea is voluntary unless counsel was ineffective.[3] If the defendant waived his right to counsel, that waiver itself

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[1] Tollet v. Henderson, 411 U.S. 258, 267 (1973).

[2] Brady v. United States, 397 U.S. 742, 755 (1970).

[3] Hill v. Lockhart, 474 U.S. 52, 56 (1985).

must have been voluntary and intelligent.

A habeas court determines whether a plea was voluntary and intelligent based on a review of the entire record, especially the record of the plea proceeding. Therefore, the making of an accurate and complete record of the proceeding is vital.[4] The representations made by the defendant, his attorney, and the prosecutor at such a proceeding, as well as any findings made by the judge accepting the plea are presumed to be true and will generally be accepted by the habeas court at face value.[5]

Pre-plea questioning by the court on the record should cover the following matters: that the defendant is mentally competent and not under the effects of drugs or alcohol;[6] that the defendant understands the relevant law in relation to the facts;[7] that the defendant understands the charge against him and the elements that the state must prove;[8] and that a sufficient factual basis exists for the plea.[9] The court should also ask the defendant, his attorney, and the prosecutor what promises have been made to the defendant as part of the plea agreement.

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[4] See Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

[5] Blackledge v. Allison, 431 U.S. 63, 73-74 (1977).

[6] See Brady v. United States, 397 U.S. 742, 756 (1970).

[7] See McCarthy v. United States, 394 U.S. 459, 466 (1969).

[8] See Henderson v. Morgan, 426 U.S. 637, 647 (1976) (guilty plea invalid because defendant unaware that intent to kill is necessary element of second degree murder).

[9] The defendant need not admit that he committed the crime charged if there is otherwise a sufficient factual basis to support the plea. North Carolina v. Alford, 400 U.S. 25, 32 (1970).

And the court should make sure that the defendant understands that, although the prosecution is bound by the agreement, the court is not bound and is free to exercise its judgment in imposing sentence.

The court must inform the defendant of the direct penal consequences of pleading guilty.[10] Direct consequences include

* the giving up of the constitutional rights against compulsory self incrimination, to trial by jury, and to call and confront witnesses;[11]
* the maximum and, where applicable, the minimum punishment provided by law;[12]
* a mandatory parole term[13] or ineligibility for parole;[14]
* restitution; and
* anything within the discretion of the sentencing judge.[15]

Under current law, the court need not inform the defendant of the indirect consequences of pleading guilty, although in cases where they are significant it is well to include them. Indirect consequences include

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[10] Brady v. United States, 397 U.S. 742, 755 (1970).

[11] See Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[12] United States ex rel. Pebworth v. Conte, 489 F. 2d 266, 267 (9th Cir. 1974).

[13] Carter v. McCarthy, 806 F.2d 1373, 1375 (9th Cir. 1986) (considering Cal. Penal Code § 3000), cert. denied, 108 S. Ct. 198 (1987).

[14] Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964), overruled on other grounds, Heiden v. United States, 353 F.2d 53 (9th Cir. 1965).

[15] Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988).

* the possibility that sentences may run consecutively;[16]

* the possibility of early release;[17]

* the possibility that parole may be revoked;[18]

* the possibility that the defendant may be deported;[19]

* civil tax liability;[20]

* the possibility of an undesirable military discharge;[21]

* the possibility of civil commitment;[22]

* the possibility that a juvenile may later be sentenced as an adult if youth authorities determine that he is not amenable to youth authority treatment;[23] and

* anything that depends on the subsequent behavior of the defendant or is in the control of an agency independent of the sentencing judge.[24]

Finally, if the defendant is represented by counsel, the court should ask whether he is pleading guilty on the advice of counsel, and, if so, whether he has fully consulted with counsel and is satisfied with the advice. The questioning should be

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[16] United States v. Rubalcaba, 811 F.2d 491, 494 (9th Cir.), cert. denied, 108 S. Ct. 107 (1987).

[17] Carter v. McCarthy, 806 F.2d 1373, 1375 (9th Cir. 1986), cert. denied, 108 S. Ct. 198 (1987).

[18] Sanchez v. United States, 572 F. 2d 210, 211 (9th Cir. 1977).

[19] Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir.), cert. denied, 429 U.S. 895 (1976).

[20] United States v. King, 618 F.2d 550, 553 (9th Cir. 1980).

[21] Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963).

[22] George v. Black, 732 F.2d 108, 111 (8th Cir. 1984).

[23] Torrey v. Estelle, 842 U.S. 234, 236 (9th Cir. 1988).

[24] Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988).

sufficient to preclude a subsequent sixth amendment attack on the ground that counsel was ineffective.[25]

A failure to satisfy these constitutional requirements may be excused if it can be shown that the defendant received the missing advice and information from other sources, such as his attorney,[26] or if the failure is harmless beyond a reasonable doubt.[27]

II. EVIDENTIARY RULINGS

Erroneous evidentiary rulings do not afford a basis for federal habeas corpus relief unless they violate the defendant's federal constitutional rights.[28] The principal relevant constitutional provisions are the fourteenth amendment due process clause and the sixth amendment confrontation clause. A federal court will not hear a claim that evidence was obtained as a result of a search or seizure violating the fourth amendment if the defendant had a full and fair opportunity to litigate the merits of that claim in state court.[29]

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[25] To establish ineffective assistance of counsel, the defendant must satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984). Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on a trial. Id.

[26] E.g., Quiroz v. Wawrzaszek, 749 F.2d 1375, 1378 (9th cir. 1984), cert. denied, 471 U.S. 1055 (1985).

[27] See Carter v. McCarthy, 806 F.2d 1373, 1377 (9th Cir. 1986), cert. denied, 108 S. Ct. 198 (1987).

[28] See Engle v. Isaac, 456 U.S. 107, 119 (1982).

[29] Stone v. Powell, 428 U.S. 465, 482 (1976).

A. *Due process analysis*

Erroneous admission or exclusion of evidence violates the defendant's due process rights only if it renders the trial "fundamentally unfair."[30] Only in rare cases will a petitioner be able to meet this standard; the survey conducted for this memorandum did not turn up any case in which relief was granted on due process grounds for erroneous admission of evidence.

Where the claim is based on exclusion of evidence, the petitioner must satisfy a rigorous balancing test that accords substantial weight to the state's interests in preserving orderly trials, in judicial efficiency, and in excluding unreliable or prejudicial evidence.[31] Unless the state's interest is weak, constitutional error will be found only if the excluded evidence is shown to be critical, reliable, and highly probative evidence.[32]

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[30] Colley v. Sumner, 784 F.2d 984, 990 (9th Cir.), cert. denied, 479 U.S. 839 (1986).

[31] Perry v. Rushen, 713 F.2d 1447, 1452-53 (9th Cir. 1983); cert. denied, 469 U.S. 838 (1984). See Green v. Georgia, 442 U.S. 95 (1979) (exclusion at capital sentencing proceeding of hearsay admission by accomplice that he had killed the victim after telling the defendant to run an errand violates due process, particularly because state used same testimony to secure death sentence against accomplice); Chambers v. Mississippi, 410 U.S. 284 (1973) (mechanistic application of procedural rule to bar defense cross-examination of witness who had confessed to crime with which defendant was charged, and exclusion as hearsay of testimony of three other witnesses to whom the first witness had confessed). See also Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (defendant at capital sentencing proceeding must be allowed to introduce any relevant mitigating evidence).

[32] Perry v. Rushen, 713 F.2d 1447, 1452 (9th Cir. 1983); cert. denied, 469 U.S. 838 (1984).

B. Confrontation Clause

The sixth amendment guarantees a defendant the right to confront and cross-examine the witnesses against him. This is a fundamental right of great importance. Confrontation clause issues typically arise in three situations: when hearsay statements by a non-testifying declarant are admitted against the defendant, when a non-testifying co-defendant's confession is admitted, and when the trial court restricts the defendant's cross-examination of a witness on an issue.

1. Hearsay

If a hearsay declarant is not present for cross-examination, the confrontation clause ordinarily requires the state to show that he is unavailable and that the statement bears adequate "indicia of reliability."[33] Reliability may be inferred if the statement falls within "a firmly rooted" hearsay exception.[34] These principles have been applied mainly to prevent introduction of prior testimony of an unavailable witness.[35] The statements of a co-conspirator in furtherance of the conspiracy, whether technically hearsay or not, are binding on each member of the conspiracy and therefore are admissible against them, regardless of the unavailability of the declarant.[36]

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[33] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[34] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[35] See United States v. Inadi, 475 U.S. 387, 391-93 (1986). The Inadi Court appears to limit the unavailability requirement of Roberts to prior testimony. Id.

[36] See United States v. Inadi, 475 U.S. 387, 391-93 (1986).

2. Confession of non-testifying co-defendant

It is error to allow the jury to hear the confession of a co-defendant that implicates the defendant unless the defendant has an opportunity to cross-examine the co-defendant.[37] This error, frequently referred to as Bruton error, is not cured by an instruction that the jury should not consider the confession against the implicated defendant,[38] or by the admission of the implicated defendant's own confession.[39] Error may be prevented, however, by redacting the confession to remove any reference to the existence of the non-confessing defendant.[40]

Again, relief will be denied if the state demonstrates that the error is harmless beyond a reasonable doubt.[41] If the implicated defendant has also confessed, his confession may be used in determining whether the error was harmless.[42]

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[37] Bruton v. United States, 391 U.S. 123, 136 (1968) (out-of-court confession of non-testifying co-defendant); Toolate v. Borg, 828 F.2d 571, 575 (9th Cir. 1987) (in-court confession but confessing co-defendant refused to allow cross-examination).

[38] Bruton v. United States, 391 U.S. 123, 135-36 (1968).

[39] Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 1719 (1987).

[40] Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 1709 (1987). The Supreme Court noted that merely removing the name of the non-confessing co-defendant may not be sufficient. Id., at 1709 n.5.

[41] Harrington v. California, 395 U.S. 250 (1969) (error harmless where substantial evidence against non-confessing defendant plus opportunity to cross-examine one of three confessing co-defendants); Toolate v. Borg, 828 F.2d 571, 575 (9th Cir. 1987) (error harmless where confession cumulative).

[42] Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 1719 (1987).

3. Trial court limitation of cross-examination

The confrontation clause is violated when the trial court restricts the defendant's cross-examination of a witness to show a "prototypical form of bias."[43] The harmless error test applies to such violations.[44] Relevant factors for determining whether the error was harmless include the significance of the witness's testimony, the presence or absence of corroborating or contradictory evidence, the extent of cross-examination permitted, and the strength of the prosecution's case.[45]

III. RIGHT TO COUNSEL

The sixth amendment guarantees a criminal defendant's right to the effective assistance of counsel.[46] Most claims of ineffective assistance are based on facts that the trial court could not observe or inquire into.[47] There is little that the trial court can do to prevent such claims. In extreme cases, the trial court may observe evidence of ineffectiveness, as where counsel is asleep during the trial or fails to appear; in such

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[43] Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (prohibition of cross-examination about agreement with prosecution to drop a criminal charge in return for cooperation). But see Evans v. Lewis, 855 F.2d 631, 634 (9th Cir. 1988) (no confrontation clause violation when cross-examination about immunity agreement would have been cumulative).

[44] Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

[45] Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

[46] See, e.g., Strickland v. Washington, 466 U.S. 668, 684-86 (1984).

[47] See Strickland v. Washington, 466 U.S. 668, 689-91 (1984) (for example, inquiry into counsel's conversations with the defendant may be critical to an evaluation of effectiveness).

cases, the court should take prompt action. The more common situations requiring trial court action are conflicts of interest and defendants seeking to proceed pro se.

A. Counsel with conflicts of interest

The right to effective assistance of counsel includes a right to counsel free from conflicts of interest.[48] Existence of a conflict of interest that adversely affected the attorney's representation of the defendant can amount to constitutional error.[49]

If the trial court has reason to suspect that a defendant's counsel has a conflict of interest, the court should hold a hearing.[50] Conflicts may arise when the same attorney represents more than one defendant in the case before the court or in a related matter,[51] when the attorney's own interests conflict with the defendant's interests,[52] or when the attorney is hired by

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[48] E.g., Holloway v. Arkansas, 435 U.S. 475, 481 (1978).

[49] Strickland v. Washington, 466 U.S. 668, 692 (1984); Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980).

[50] See Wood v. Georgia, 450 U.S. 261, 272 (1981).

[51] E.g., Cuyler v. Sullivan, 446 U.S. 335 (1980) (successive representation; three defendants represented at separate trials by two attorneys and decisions at one trial may have been affected by considerations of impact on subsequent trials of other co-defendants); Holloway v. Arkansas, 435 U.S. 475 (1978) (simultaneous representation; possibility that confidential information learned from co-defendants affected single counsel's ability to effectively represent three co-defendants).

[52] E.g., Mannhalt v. Reed, 847 F.2d 576 (9th Cir.) (in prosecution for receiving stolen goods, defendant's attorney alleged to have purchased stolen goods from defendant), cert. denied, 109 S. Ct. 260 (1988).

another defendant[53] or a third party who has an interest in the case.[54]

If the court finds that a conflict exists, it must appoint new counsel to represent the defendant unless the defendant effectively waives the conflict. Like all waivers of constitutional rights, a waiver of conflict must be voluntary and intelligent and on the record.[55] If the court finds that the conflict or potential conflict is sufficiently serious, it may decline to accept a waiver,[56] although doing so may create another problem by violating the defendant's qualified right to choose his attorney. When the trial court declines to accept a waiver, it should make findings on the record explaining why the state interest in ensuring that the judgment will withstand appeal should prevail over the defendant's qualified right.[57]

B. Conflicts between defendant and counsel

Compelling a defendant to stand trial represented by an attorney with whom he has an irreconcilable conflict may violate

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[53] Cuyler v. Sullivan, 446 U.S. 335 (1980).

[54] E.g., Wood v. Georgia, 450 U.S. 261 (1981) (owner of adult theatre and bookstore hired attorney to defend three employees charged with distributing obscene materials; attorney pressed broad constitutional attack and did not argue for leniency for the individual defendants).

[55] Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir.), cert. denied, 109 S. Ct. 260 (1988).

[56] Wheat v. United States, 108 S. Ct. 1692, 1699-1700 (1988) (trial court was within its discretion in refusing a waiver of conflict of interest where one co-defendant sought to retain the same counsel as another co-defendant who was a probable prosecution witness at the first co-defendant's trial).

[57] See Wheat v. United States, 108 S. Ct. 1692, 1701 (1988) (Marshall, J., dissenting).

the defendant's sixth amendment right to counsel.[58] When a defendant requests substitute counsel, the trial court should consider the following three factors in determining whether the conflict requires granting the request: (1) whether the defendant's request is timely; (2) whether it is supported by reasons; and (3) whether the conflict between the defendant and his attorney has resulted in such a lack of communication as to prevent an adequate defense.[59]

The timeliness of a motion for substitution of counsel depends on when the motion is made, any reasons for delay, and the need for a continuance of the trial if the motion were granted. If the defendant's motion for substitution of counsel is made immediately before or during trial and the defendant has not articulated reasons for the delay, denial of the motion is justified if substitution would require a continuance.[60] In contrast, a motion made at a pretrial appearance is timely, and late consideration of the motion for reasons not attributable to

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[58] Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982), cert. denied, 461 U.S. 916 (1983).

[59] Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982), cert. denied, 461 U.S. 916 (1983).

[60] United States v. Gonzalez, 800 F.2d 895, 898-99 (9th Cir. 1986) (motion made on second day of trial); United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986) (motion made on first day of trial); United States v. Rogers, 769 F.2d 1418, 1423 (9th Cir. 1985) (motion made on morning of trial untimely where defendant could have informed court of dissatisfaction with counsel during the five weeks between arraignment and trial); Hudson v. Rushen, 686 F.2d 826, 831 (9th Cir. 1982) (granting motion made at close of prosecution's case would have required continuance or mistrial), cert. denied, 461 U.S. 916 (1983); United States v. Mills, 597 F.2d 693, 700 (9th Cir. 1979) (motion made one week before trial was untimely).

the defendant will not render the motion untimely.[61]

In considering the defendant's reasons for his dissatisfaction with counsel, the court should hold a hearing at which the defendant has the opportunity to state specific reasons for his dissatisfaction with counsel.[62] The "court must take the time to conduct such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern."[63] The court, however, need not ask specific questions regarding the defendant's reasons for his dissatisfaction if the court has sufficient information to make a decision.[64] Likewise, the court need not interrogate the defendant or his counsel about their confidential communications.[65]

The reasons typically stated by defendants for their dissatisfaction with counsel are insufficient in themselves to

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[61] Chavez v. Pulley, 623 F. Supp. 672, 687 (E.D. Cal. 1985).

[62] United States v. Gonzalez, 800 F.2d 895, 898 (9th Cir. 1986). This hearing is substantially equivalent to the California requirement, set forth in People v. Marsden, 2 Cal. 3d 118, 123-24, 84 Cal. Rptr. 156, 465 P.2d 44 (1970), that the court permit the defendant to specify his reasons for requesting new counsel. Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982), cert. denied, 461 U.S. 916 (1983).

[63] Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982), cert. denied, 461 U.S. 916 (1983). If the court's interrogation reveals that the defendant's counsel has taken a position adverse to the defendant, by appearing uncooperative or hostile toward the defendant, then the court must appoint new counsel for the defendant for the purpose of the hearing; otherwise, the defendant would improperly be deprived of counsel at the hearing. United States v. Wadsworth, 830 F.2d 1500, 1510 (9th Cir. 1987).

[64] E.g., United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986) (counsel vigorous and well prepared).

[65] United States v. Rogers, 769 F.2d 1418, 1424 (9th Cir. 1985).

require substitution of counsel. Disagreement with counsel's recommendation to plead guilty does not require replacement of counsel if the recommendation was within the reasonable range of competence.[66] Likewise, unless there is a total breakdown in communication, a defendant's disagreement with counsel's trial strategy does not require substitution of counsel.[67] The defendant's assertion that counsel is not adequately prepared does not require substitution unless the conflict has resulted in a total breakdown in communication or the court finds that counsel has not prepared an adequate defense.[68] Finally, antagonism between the defendant and his counsel does not require substitution of counsel unless the hostility has prevented counsel from preparing a defense.[69]

In determining whether there is a total lack of communication, the court should focus on the effect of a breakdown in communication on counsel's ability to prepare a defense. If the conflict between defendant and his counsel does not result in such a loss of communication that counsel is unable to adequately prepare a defense, then the court need not grant

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[66] United States v. Rogers, 769 F.2d 1418, 1424 (9th Cir. 1985).

[67] United States v. Wadsworth, 830 F.2d 1500, 1509-10 (9th Cir. 1987).

[68] United States v. Wadsworth, 830 F.2d 1500, 1510 (9th Cir. 1987); United States v. Mills, 597 F.2d 693, 700 (9th Cir. 1979).

[69] United States v. Wadsworth, 830 F.2d 1500, 1510 (9th Cir. 1987); Chavez v. Pulley, 623 F. Supp. 672, 688 (E.D. Cal. 1985).

the motion to substitute counsel.[70] Even a complete lack of communication may not require substitution if counsel is able to prepare and competently represent the defendant at trial.[71] In contrast, if the lack of communication is so complete that the attorney cannot prepare a defense, substitute counsel must be appointed even if the failure to cooperate stems from the defendant's refusal to cooperate.[72]

C. Waiver of the right to counsel

A criminal defendant has a qualified right to waive counsel and proceed pro se.[73] If the defendant's waiver of the right to counsel is voluntary and intelligent,[74] if he is competent to represent himself,[75] and if his motion to represent himself is timely,[76] then the trial court must grant his request.

When the defendant indicates his desire to represent himself the trial court should make a record establishing that the defendant is aware of the dangers and disadvantages of self-representation to establish that waiver of the right to counsel

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[70] United States v. Gonzalez, 800 F.2d 895, 898-99 (9th Cir. 1986).

[71] Barnes v. Housewright, 603 F. Supp. 330, 332 (D. Nev. 1985), aff'd mem., 785 F.2d 314 (9th Cir. 1986).

[72] Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

[73] Faretta v. California, 422 U.S. 806, 819 (1975).

[74] See Faretta v. California, 422 U.S. 806, 835 (1975).

[75] See Faretta v. California, 422 U.S. 806, 835 (1975).

[76] See Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982) (motion timely if made before jury empaneled unless trial court makes factual finding that purpose of motion is to gain delay).

is voluntary and intelligent.[77]

The court should also question the defendant to determine whether he is competent to represent himself. Competency does not depend on technical legal knowledge as such, but on the defendant's ability to present his case to the trier of fact.[78]

If the defendant wishes to proceed pro se, the court may appoint, over the defendant's objection, standby counsel to aid the defendant when he requests help and to be available to represent the defendant if the defendant turns out to be incompetent to represent himself.[79] However, the defendant is entitled to control of the case and it may be constitutional error if the actions of the standby counsel destroy the jury's perception that the defendant is in control of his defense.[80]

IV. JURY CHARGE

Federal habeas corpus relief may be given where error in the jury charge is so prejudicial as to have infected the entire trial, rendering it "fundamentally unfair," thereby violating due

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[77] Faretta v. California, 422 U.S. 806, 835 (1975). Explanation of these dangers and disadvantages on the record is not constitutionally required in the Ninth Circuit. United States v. Kimmel, 672 F.2d 720, 722 (9th Cir. 1982); but see McDowell v. United States, 108 S. Ct. 478 (1987) (White, J., dissenting from denial of certiorari) (arguing that the Supreme Court should resolve conflict between circuits whether trial court must explain risks).

[78] Faretta v. California, 422 U.S. 806, 835-36 (1975).

[79] Faretta v. California, 422 U.S. 806, 835 n.46 (1975).

[80] McKaskle v. Wiggins, 465 U.S. 168, 178 (1984).

process.[81] A challenge claiming error under state law only does not state a claim cognizable in federal habeas corpus proceedings.[82] Nor does one on the ground that the instructions are "undesirable, erroneous, or even 'universally condemned.'"[83] The federal court will evaluate the effect of the allegedly erroneous instruction or of the allegedly erroneous failure to give an instruction in the context of the record as a whole, including the entire charge to the jury, and compare the instructions given with those that should have been given.[84]

The trial court must instruct the jury on all of the elements of each offense charged. Failure to do so violates due process because a defendant may be convicted only upon proof beyond a reasonable doubt of every element of the crime with which he is charged.[85] For that reason, due process also bars evidentiary presumptions in a jury charge that would allow the jury to infer one element from proof of another element, such as an instruction that allows the jury to infer malice from the use of a deadly weapon.[86]

Due process requires the court to instruct the jury on the defendant's theory of the case when that theory is supported by

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[81] Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

[82] Willard v. California, 812 F.2d 461, 463 (9th Cir. 1987).

[83] Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

[84] Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

[85] In re Winship, 397 U.S. 358, 364 (1970).

[86] Francis v. Franklin, 471 U.S. 307, 313 (1985).

the law and the evidence.[87] However, refusal to give such an instruction does not alone render the trial fundamentally unfair,[88] and omission of an instruction is less likely to be prejudicial than a misstatement of the law.[89]

Even if there is constitutional error in the jury charge, it will not be ground for relief if it was harmless beyond a reasonable doubt.[90] An error is harmless if "the facts found by the jury were such that [if the error had not occurred] its verdict would have been the same."[91] Examples of error that were found to be harmless include

* failure to instruct the jury on a necessary element of the crime charged if that element is not disputed[92] or if the arguments of counsel adequately define that element and make clear to the jury that it must be proved; [93] and

* an instruction that may be understood by the jury to allow it to infer a necessary element when that instruction is followed by a clear statement that the state is required to prove all elements beyond a reasonable doubt[94] or when the evidence of that element

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[87] United States v. Tsinnijinne, 601 F.2d 1035, 1040 (9th Cir. 1979), cert. denied, 445 U.S. 966 (1980).

[88] Duckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988).

[89] Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

[90] Rose v. Clark, 478 U.S. 570, 583 (1986).

[91] Pope v. Illinois, 481 U.S. 497, 107 S. Ct. 1918, 1922 n.6 (1987).

[92] E.g., Darnell v. Swinney, 823 F.2d 299, 301 (9th Cir. 1987) ("deficiencies in the instructions went to matters that were not in dispute"), cert. denied, 108 S. Ct. 1012 (1988).

[93] Henderson v. Kibbe, 431 U.S. 145, 153-54 (1977).

[94] Knaubert v. Goldsmith, 791 F.2d 722, 725-26 (9th Cir.) (inference of sanity), cert. denied, 479 U.S. 867 (1986).

is overwhelming.[95]

The only recent reported examples of reversible error arising in the Ninth Circuit are

* the trial court's failure, in a capital case, to instruct sua sponte on second degree murder when the evidence would support such a lesser included charge;[96] and

* instruction on a charge if the indictment or information does not provide the defendant with notice adequate to prepare a defense against that charge.[97]

Thus, jury instructions that are reasonably clear, that state each element of the charged offenses, and that clearly place on the prosecution the burden of proving each element beyond a reasonable doubt will pass constitutional muster. To this end the trial court should be careful to identify the disputed material issues and to instruct on those issues.

V. EXPOSURE OF JURORS TO EXTRINSIC EVIDENCE

Exposure of the jury to extrinsic evidence violates the defendant's sixth amendment confrontation right unless the state proves that it was harmless beyond a reasonable doubt.[98] If the extrinsic evidence relates directly to a material aspect of the

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[95] E.g., McKenzie v. Risley, 842 F.2d 1525, 1530-31 (9th Cir.) (en banc) (inference of intent), cert. denied, 109 S. Ct. 250 (1988).

[96] Vickers v. Ricketts, 798 F.2d 369, 372-73 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987).

[97] Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986) (reversible error to instruct on murder by torture when only notice in information was citation to statute that includes murder by torture as one type of aggravated murder but does not indicate that murder by torture need not be premeditated).

[98] Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988).

case and a rational connection can be drawn between the extrinsic evidence and a prejudicial jury finding, then a writ will be granted, even if the connection is improbable.[99]

The trial court can take steps prior to exposure and after it learns of the exposure to reduce the risk of error. The court should admonish the jury regularly that it should not consider any evidence except that which is admitted by the court.[100] The court can also ensure that extrinsic evidence, such as court files,[101] reference books,[102] or magazines,[103] is excluded from the jury room.

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[99] E.g., Dickson v. Sullivan, 849 F.2d 403, 405-08 (9th Cir. 1988).

[100] See United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982) (daily instruction to consider only evidence produced at trial cited by reviewing court in denying habeas relief).

[101] See United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979) (new trial required because jurors may have seen inadmissible evidence of prior convictions, rejected jury instructions, and other documents in court file left in jury room for four hours).

[102] See Marino v. Vasquez, 812 F.2d 499 (9th Cir. 1987) (new trial required partly because jury considered dictionary definition of malice); Gibson v. Clanon, 633 F.2d 851 (9th Cir. 1980), cert. denied, 450 U.S. 1035 (1981) (new trial required where jurors consulted medical encyclopedia to determine rarity of defendant's blood type which matched blood found on weapon, after judge had earlier ruled such evidence inadmissible).

[103] See United States v. Littlefield, 752 F.2d 1429 (9th Cir. 1985) (new trial required in prosecution for tax fraud where jurors read and discussed magazine article discussing similar fraudulent tax shelters, describing them as growing national concern, and decrying light sentences imposed for convictions); but see United States v. Brodie, 858 F.2d 492 (9th Cir. 1988) (no new trial in prosecution for failure to file tax returns where booklets advocating tax resistance received by two jurors who were removed, other jurors did not read booklets, and no direct and rational connection between general booklets and specific case).

If the court learns that the jury has been exposed to extrinsic evidence, it should conduct an evidentiary hearing (ordinarily through individual voir dire of each affected juror) to determine what extrinsic evidence the jury was exposed to, which jurors were exposed, how the jury was exposed to the evidence, whether and to what extent the jury discussed the evidence, whether the evidence was introduced before a verdict was reached, and anything else that may bear on whether the exposure affected the verdict.[104] The court should determine whether the extrinsic evidence relates directly to a material aspect of the case and, if so, whether a rational connection can be drawn between the extrinsic evidence and a prejudicial jury finding. If the jury has not yet reached a verdict, the trial court should consider whether the problem can be solved by removal of tainted jurors and a curative instruction to consider only the evidence that the court admitted.[105] A ruling by the trial court following procedures such as have been described is likely to avoid constitutional error.

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[104] See Dickson v. Sullivan, 849 F.2d 403, 406 (9th Cir. 1988); see also United States v. Bagnariol, 665 F.2d 877, 885 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982) (evidentiary hearing is factor to consider in deciding whether new trial required).

[105] See Bayramoglu v. Estelle, 806 F.2d 880 (9th Cir. 1986) (no new trial required where jury divided between first and second degree murder, one juror researched penalties and told rest of jury, but jury only discussed it for one to two minutes, the tainted juror was removed, a curative instruction was given, and new jury returned verdict of second degree murder); but see Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988) (instruction to ignore evidence of prior convictions ineffective, especially if defendant does not have an opportunity to rebut).

VI. PROSECUTORIAL MISCONDUCT

A. Effect of Misconduct

Prosecutorial misconduct violates the defendant's due process rights if, in the context of the entire proceedings, it renders the trial "fundamentally unfair."[106] Misconduct may also violate the defendant's fifth amendment right against self-incrimination or his sixth amendment right to counsel. If one of the defendant's constitutional rights is violated the state has the burden of demonstrating that the misconduct was harmless beyond a reasonable doubt.[107]

The most important factor in determining the prejudicial effect of prosecutorial misconduct is whether the trial court issued a curative instruction. The jury normally is presumed to disregard inadmissible evidence when instructed to do so unless there is an "overwhelming probability" that it would be unable to do so and there is a strong likelihood that the effect of the misconduct would be "devastating" to the defendant.[108]

Other factors affecting the prejudicial effect of prosecutorial misconduct include whether it was invited by

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[106] See Darden v. Wainwright, 477 U.S. 168, 181 (1986); Donnelley v. DeChristoforo, 416 U.S. 637, 645 (1974).

[107] See United States v. Hasting, 461 U.S. 499, 509-510 (1983) (overwhelming evidence of guilt makes misconduct harmless beyond a reasonable doubt).

[108] Greer v. Miller, 107 S. Ct. 3102, 3109 n.8 (1987) (no due process violation from improper questioning on why the defendant remained silent after arrest when trial court sustained objection to question and instructed jury to ignore it).

inappropriate comments by the defense,[109] whether a comment manipulates or misstates the evidence,[110] the weight of the evidence against the defendant,[111] whether the misconduct is an isolated incident or part of an ongoing pattern of misconduct,[112] and whether the misconduct relates to a critical part of the case.[113]

B. Forms of Misconduct

Prosecutorial misconduct can take many forms, but may be divided into two main classes: misconduct in the courtroom, which the trial court can recognize and correct, and misconduct outside the courtroom, of which the trial court cannot know unless it is brought to the court's attention.

1. Misconduct in the courtroom

Prosecutorial misconduct in the courtroom typically takes the form of inappropriate comments, frequently in the summation.

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[109] United States v. Young, 470 U.S. 1, 13 (1985) (defense misconduct does not excuse prosecutorial misconduct but is relevant for determining prejudicial effect of prosecutorial misconduct); see also United States v. Robinson, 108 S. Ct. 864, 869 (1988) (prosecutor's remark in summation that defendant could have testified does not violate fifth amendment after defense summation argued that government had not given defendant an opportunity to explain his side of the story).

[110] See Darden v. Wainwright, 477 U.S. 168, 182 (1986).

[111] Compare United States v. Young, 470 U.S. 1, 19 (1985) ("overwhelming" evidence of guilt) with United States v. Schuler, 813 F.2d 978, 982 (9th Cir. 1987) (in light of prior hung jury, new trial required because of prosecutor's reference to defendant's courtroom demeanor, without curative instruction).

[112] See Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987).

[113] See Giglio v. United States, 405 U.S. 150, 154 (1970) (failure to disclose information showing potential bias of witness especially significant because government's case rested on credibility of that witness).

The prosecutor may not make comments that express personal opinions on the credibility of witnesses,[114] the weight of the evidence,[115] or the guilt of the defendant,[116] or that implicate a specific constitutional right of the defendant such as the right against compulsory self incrimination[117] or the right to counsel.[118]

Misconduct that implicates the defendant's right against compulsory self incrimination takes two basic forms: questioning the defendant about his prior silence, and commenting, in the summation, on the defendant's failure to testify. If the defendant chooses to testify, the prosecutor may not cross-examine him on why he did not tell his story to the police after he received Miranda warnings.[119] However, the prosecutor may cross-examine the defendant on why he did not tell his story to the police prior to his arrest[120] or after his arrest but before

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[114] United States v. McKoy, 771 F.2d 1207, 1210-11 (9th Cir. 1985).

[115] See United States v. McKoy, 771 F.2d 1207, 1210-11 (9th Cir. 1985).

[116] See United States v. Young, 470 U.S. 1, 19 (1985).

[117] Griffin v. California, 380 U.S. 609, 615 (1965).

[118] See Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983) (suggestion that jury may infer guilt from fact that defendant hired an attorney), cert. denied, 469 U.S. 920 (1984).

[119] See Greer v. Miller, 107 S. Ct. 3102, 3107-08 (1987) (such questioning violates state's promise, implied in Miranda warnings, that silence would not be used against defendant; no due process violation, however, when objection to question sustained and jury instructed not to draw any inference of guilt from the defendant's post-warning silence).

[120] Jenkins v. Anderson, 447 U.S. 231 (1980).

he was warned.[121]

The prosecutor may not directly call attention to the defendant's failure to testify or make a comment that the jury naturally would take as a comment on the defendant's failure to testify.[122] However, when the defendant advances his own theory of the case, the prosecutor may comment on the failure of the defense to produce evidence or witnesses supporting that theory.[123]

2. Misconduct outside the courtroom

Misconduct outside the courtroom can take several forms. The most significant is failure of the prosecution to furnish information to the defendant. If the defense makes a specific formal request for such information, then the prosecutor must turn over any evidence that is material to the guilt or innocence of the defendant or to punishment.[124] If the defense does not make such a request, then the prosecutor must turn over any evidence that might create a reasonable doubt that otherwise would not exist.[125]

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[121] Fletcher v. Weir, 455 U.S. 603 (1982).

[122] See Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987) (misconduct to comment four times that only one person other than the prosecution's witness could know anything about conversations between that witness and the defendant).

[123] United States v. Bagley, 772 F.2d 482, 494 (9th Cir. 1985) (not misconduct to respond to defense summation by asking "where would that evidence [supporting the defense theory of the case] be, wouldn't it be presented to you?"), cert. denied, 475 U.S. 1023 (1986).

[124] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[125] United States v. Agurs, 427 U.S. 97, 103 (1976) (if the case is close then minor evidence may meet this requirement).

C. Dealing with Misconduct

Because the trial court is in the best position to weigh the prejudicial effect of the misconduct and to decide whether a curative instruction would be effective,[126] it is important for it to do so, whether or not the defendant objects.[127] If the court decides that a curative instruction would be effective, it should give one, such as an instruction that the arguments of counsel are not evidence, or that the jury should not draw an inference of guilt from the defendant's failure to testify, or even that a particular action of the prosecutor was inappropriate and that the jury should disregard it. If the court determines that a curative instruction would not be sufficient to render the trial fair, it should declare a mistrial.

January 1989

William W Schwarzer

Jon Bernhardt

Marie Louise Caro

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[126] See Caldwell v. Mississippi, 472 U.S. 320, 339 (1985).

[127] But see Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988) (court suggests that, if prejudicial effect of misconduct could have been cured by instruction, and if defendant did not request such an instruction, then the defendant cannot claim misconduct as a ground for federal habeas corpus relief).

SUPREME COURT OF IDAHO

JAN 23 1989

Ad Hoc File

ROBERT C. HUNTLEY, JR.
JUSTICE

451 W. STATE STREET
BOISE, IDAHO 83720
(208) 334-3464

January 18, 1989

Professor Albert M. Pearson
School of Law
University of Georgia
Athens, Georgia 30602

Dear Professor Pearson:

Under letter dated January 5, 1989, Justice Powell suggested I communicate directly to you relative to my interest in expediting the processing of capital sentencing cases. My focus is on an area that few others care to discuss and, that is, the fact that my experience and data convinces me that a substantial portion of the delay is simply due to lack of basic calendar management by judges themselves. Not only do individual judges fail to monitor and move their cases along, but more importantly, with respect to the federal district courts and the federal circuit courts, they have failed to institutionalize those procedures which would result in proper case flow.

THE IDAHO EXPERIENCE

Enclosed hereto as Appendix A to this letter is a copy of my letter of August 24, 1988, to the Honorable Alfred T. Goodwin, Chief Circuit Judge of the Ninth Circuit. It details a number of the management problems I have identified and has as an attachment thereto our Attorney General's summary of the process of three Idaho cases.

THE MONTANA EXPERIENCE

I now have received a document explaining the time line of five Montana cases from a Justice of the Montana Supreme Court, compiled by Montana's Attorney General and the lack of simple basic calendar management is even more shocking than obtains in the Idaho cases. Let me comment on just a few examples.

Coleman v. McCormick:

(1) Twenty months for the district court to get to oral argument on cross motions for summary judgment. (I have tried many summary judgment cases in complex civil litigation and find that time lapse ridiculous except in the most complex of cases.)

(2) Eight months to get the opinion out.

(3) After oral argument in the Ninth Circuit, one full year before the court orders supplemental briefing.

(4) Nineteen months from oral argument to decision.

(5) Five months to order rehearing.

McKenzie v. Risley:

(1) The document shows most of the state court proceedings were done in one year and usually the decisions were rendered within three months.

(2) Took fourteen months to get to hearing on first petition in district court.

(3) Took nineteen months to decide following the hearing.

(4) Took thirteen months to decide two remaining claims.

(5) When it reached the Ninth Circuit, it took the Circuit five months to decide to grant an en banc hearing and the en banc process took about one year on the first appeal.

(6) In a second petition for habeas at the district court level, a summary judgment was granted and a notice of appeal to the Circuit was filed. Nothing happened for fifteen months relative to getting a certificate of probable cause issued, until the attorney general wrote a letter inquiring as to which crack the case had fallen into. Who was monitoring this case at that time?

Smith v. Risley:

(1) Federal District Court took twenty-one months to process a summary judgment.

State v. Fitzpatrick:

(1) Note the bracketed material on the enclosure. It took:

(a) Sixteen months to get a summary judgment to oral argument and then two years to decide it, and a total of three years and six months to process a summary judgment motion.

(2) When the case was appealed to the Ninth Circuit, it took one year and nine months to bring it to oral argument.

CONCLUSION

Someone needs to focus on calendar management techniques. Procedures and rules need to be institutionalized which will make the cases automatically flow. It is facile to blame the problem on habeas corpus legislation, which of course may be some substantial part of the problem, but I think the real problem is lack of judicial focus on calendar management.

Respectfully submitted,

Robert C. Huntley, Jr.

Enc.
cc: Justice Lewis F. Powell, Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.
RETIRED

January 5, 1989

Ad Hoc Committee on Federal Habeas

Dear Judge Huntley:

A brief note to thank you for your telephone call. Although our specific mission is to consider causes of delay attributable to repetitive habeas corpus review, your investigation and study of administrative delay - often due to negligence or incompetency - certainly would be of interest. The Committee would be happy to receive a copy of your investigation.

It would be helpful if you also sent a copy directly to our Reporter, Professor Albert M. Pearson, School of Law, University of Georgia, Athens, Georgia 30602. Professor Pearson is working with the offices of the state attorneys general in the Fifth and Eleventh Federal Circuits. Our Committee meets again on January 30.

I mentioned that the American Bar Association also has a study underway. The Chairman is Judge Alvin B. Rubin, 2440 One American Place, Baton Rouge, Louisiana 70825, an able member of the Fifth Circuit Federal Court of Appeals.

Sincerely,

Lewis Powell

Hon. Robert G. Huntley, Jr.
Supreme Court of Idaho
Supreme Court Building
451 West State Street
Boise, Idaho 83720

lfp/ss

cc: Professor Albert M. Pearson

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M E M O R A N D U M

TO: Harriet W. Ellis

FROM: Eugene C. Thomas

DATE: January 5, 1988

Justice Robert Huntley of the Idaho Supreme Court has become interested in delays in judicial process in major felony cases in general and capital punishment cases in particular.

Many of the delays that have come to his attention involve nothing more - he tells me - than administrative laxity or indolence. He cites examples of extended delay because of responsible administrators simply ignoring a pending proceeding and he is interested in focusing on those situations. That is different from the matter of due process review or post conviction review of federal issues in federal courts following state court convictions. The point he makes is an interesting one.

Yesterday he spoke to Justice Lewis Powell about his interest in the point and Justice Powell recommended he get in touch with the ABA in order to volunteer for service on a germane committee of the Association. Justice Powell particularly mentioned that the ABA has a committee in the field under the chairmanship of Al Rubin of New Orleans and recommends to Justice Huntley that he volunteer to serve on that committee.

Could you check, Harriet, and find out what committees we have working in this field and, in particular, if there is one chaired by Rubin? If you find such committees then it would be a matter of noting who the appointing authority is; for example, the Chairman of a Section, the Chairman of a Division or, in the case of an Association-wide entity, the President-Elect. With that information, I can advise Justice Huntley appropriately and communicate with whoever has the appointing authority for vacancies that may come up within the year.

Thanks for your help.

ECT/pm

cc: The Honourable Robert C. Huntley

SUPREME COURT OF IDAHO

ROBERT C. HUNTLEY, JR.
JUSTICE

451 W. STATE STREET
BOISE, IDAHO 83720
(208) 334-3464

August 24, 1988

Honorable Alfred T. Goodwin
Chief Circuit Judge
350 U.S. Court of Appeals Bldg.
125 South Grand Avenue
P.O. Box 91510
Pasadena, CA 91109-1510

Dear Chief Judge Goodwin:

This letter is to invite the attention of yourself, the other judges of the Ninth Circuit and the Supreme Court Justices in the Ninth Circuit area to my extreme concern about the unconscionable delay we seem to be having in getting capital cases through both the state and federal court systems. In this regard I am critical of both the state and federal judiciaries. I think that if retention of our jobs were dependent upon executives from other walks of life favorably evaluating the way we manage our respective court systems, most of us would be looking for work elsewhere or selling pencils on the street corner.

At my request, the Idaho Attorney General's office has provided me with the history of the processing of three Idaho appeals once they left the Supreme Court of Idaho and reached the federal system. Enclosed is a copy of this narrative of the processing of these cases.

As a supreme court justice, I have some appreciation of the problems and delays which are inherent in any judicial process. However, I feel that the extended delays of these capital cases are inexcusable and demonstrate a lack of focus, commitment and hands-on management of the process by the judges. There are things that can be done to expedite these cases. For example, the Idaho Legislature and the Idaho Supreme Court have taken a major step forward by requiring that all issues that a criminal defendant might have be filed at one time within a forty-two day period following sentencing. Disposition by the trial court is mandated ninety days after the filing of a petition or motion. This results in a single appeal from the judgments and all post-judgment motions in contrast to the old practice of a series of appeals on each

ruling.

As you can see from the three case studies of the progress of Creech, Paradis and Gibson, in the federal system, there are some serious problems, most of which could be resolved. The Creech case has been in the federal system two years and three months and has not yet been resolved. You will note that there has been frequent and substantial slippage in that case in the preparation and filing of transcripts and in the simple act of getting the record designated (in the Creech case there was only a fifteen minute hearing to designate). There was later unconscionable delay in getting the briefs filed.

Note further, that although the federal district court found absolutely no error or specific grounds for appeal to the Ninth Circuit, a certificate of probable cause was granted. In short, although the district court found no merit in the petitioner's assignments it certified probable cause without specifying any issue whatsoever wherein there was probable cause. Accordingly, counsel and the State of Idaho had to go to the expense of briefing and oral argument on all issues, regardless of their speciousness.

The Paradis case took two years and four months from time of filing of the habeas to hearing in the Ninth Circuit. The district court again found all of the contentions of the defense to be without merit and, yet, granted a certificate of probable cause for the appeal. Again, the certificate of probable cause specified no issues and, therefore, did not limit the appeal process in any way.

Another continuing problem is evidenced in Paradis where the Ninth Circuit clerk's office, apparently without intervention or supervision from any judge, granted ex parte motions and stays. It appears that in the Idaho capital cases motions are granted without service of the motions ever having first been accomplished on the Idaho Attorney General.

In the Gibson case the habeas corpus petition was filed in June 1986 and has not come to trial in the federal court some two years and two months later, nor has any summary disposition of any kind occurred.

The bottom line is that inordinate delays, whether they be in the state system or the federal system, result in a public "black eye" for all judges. Our criminal justice system enjoys very little public respect, largely because of the lack of timeliness of the justice we dispense. We have become a laughing-stock for those familiar with business management techniques.

I have stated my case in rather plain language, without the use of tactful and high-sounding euphemism, and have done so because I think it is time that we collectively take action to

rectify this situation. Two conclude my comments in "truck-driver language," the proof of the pudding is before us without any necessity of detailed statistical analysis. I understand that of the several hundreds of capital cases in the Ninth Circuit area, not one single case has reached completion in recent years unless the defendant has withdrawn his appeal or stipulated to a resolution.

PROPOSAL

We have enough collective expertise so that no more "studying of the problem" should be necessary. I would offer the following suggestion for direct action by the federal and state judiciaries:

That Chief Judge Goodwin convene a two day meeting on the problem attended by the following:

(a) two or three Ninth Circuit Judges
(b) one justice from each supreme court
(c) a representative of the Attorney General's office of at least two states
(d) experienced capital punishment case defenders from no more than three states
(e) two or three federal district judges
(f) a representative of the administrative office or clerk's office of the Ninth Circuit and one or two counterparts from state court systems

The group should be charged with taking testimony over a period of no longer than two days. At the end of those hearings the group would issue specific proposals for submission to our respective court systems. There may be some things the gathering would decide require more study, but I think that there are many time-saving suggestions which could be immediately identified and implemented based upon the expertise of the group.

Very truly yours,

Robert C. Huntley, Jr.

Original to All Ninth Circuit Judges
cc: All Supreme Court Justices in Ninth Circuit Area
Idaho Federal District Judges

Our federal experience in capital litigation is limited to three cases, Creech v. Arave, USCA 86-3983, Paradis v. Arave, USCA 87-4100, and Gibson v. Arave, 86-1213 (D.Ct.). All three have been attended by substantial delays.

Creech v. Arave

The Idaho Supreme Court made final disposition of this case on December 31, 1985, when it denied Creech's petition for rehearing of the court's order denying post-conviction relief.

Creech then filed a petition for a writ of habeas corpus in the federal district court. That court found that the record justified summary denial of relief in all but one particular. With respect to Creech's claim that mismanagement of prescription medication affected the voluntariness of his guilty plea, the court scheduled an evidentiary hearing. The state arrived at the appointed time with its witnesses, but Creech came unprepared to present evidence. Defense counsel stated to the court that he had not understood the purpose of the hearing and claimed that he had no funds to produce evidence. The district court then denied all relief.

In July of 1986 Creech filed a notice of appeal. Despite the district court's earlier finding that only one issue had any possible merit, and his subsequent denial of relief on all issues, the court nonetheless granted a certificate of probable cause, but without specifying any appealable issue. The district court refused to stay execution.

On July 24, 1986, the United States Court of Appeals stayed the execution. Creech's motion for a stay and supporting documents were not served on the state.

The state, in anticipation of the appeal, had filed motions to vacate the certificate of probable cause. These motions were summarily denied.

On November 6, 1986, the clerk of the court notified defense counsel that his designation of the reporter's transcript was long (several months) overdue. Since the transcript applied only to the brief hearing before the district court, it presented no complication whatever. On November 10, 1986, the state moved to dismiss the appeal for lack of prosecution.

On December 1, 1986, the Court of Appeals ordered defense counsel to show cause within fourteen days why he should not be disciplined for failing to file his designation and why the appeal should not be dismissed for failure to prosecute. Approximately one month later, on December 31, 1986, defense counsel filed a response that accounted for only a portion of the time consumed. (His designation of record was filed December 22, 1986.)

On March 2, 1986, two months later, the court reprimanded defense counsel, but denied the state's motion to dismiss the appeal. Appellant's brief became due April 20, 1987.

On the day his brief was due, defense counsel filed an emergency motion for the appointment of co-counsel and an emergency motion for an extension of time.

On May 11, 1987, the court vacated its briefing schedule pending disposition of the motion for the appointment of co-counsel. Over a month later the court granted the unopposed motion for appointment of co-counsel and appointed Cliff Gardner of San Francisco. Gardner effectively took over the case. The court set July 27, 1987, as the date for filing appellant's opening brief. On the day this brief was due, July 27, the state received Gardner's motion for an order extending the due date of his brief, citing among other things a need to take his annual vacation. On August 13, 1987, the court extended Gardner's due date until October 15, 1987.

On October 19, 1987, more than fifteen months after the appeal was filed, the state received Creech's opening brief and a motion to file an overlength brief. The motion to file an overlength brief was denied on October 26, 1987. On November 6, 1987, the state received Creech's motion for panel reconsideration of the order denying permission to file an overlength brief. On November 13, 1987, we received an order granting permission.

The state's brief was filed December 15, 1987, after receiving a one-day extension of time.

The case was argued in Seattle on April 6, 1988.

Paradis v. Arave

The Idaho Supreme Court's final disposition of this case occurred on April 30, 1986, when the court denied rehearing of its decision denying post-conviction relief. That disposition, in turn, had been delayed when Paradis attempted to take a direct appeal to the U. S. Supreme Court from the Idaho Supreme Court's decision of February, 1984, upholding his conviction.

The habeas case was filed in federal district court on June 9, 1986. The U. S. District Court allowed extensive discovery and then conducted an evidentiary hearing that took as much time as it took to receive evidence at the original trial. The district court found that Paradis' federal claims were wholly without merit, and denied his habeas petition on July 30, 1987. The district court nonetheless granted a certificate of probable cause without identifying any arguably meritorious appeal issues.

Notice of appeal was filed August 11, 1987.

A further problem in this case is that a stay of execution was granted without notice to the state. The clerk's office at the Ninth Circuit refused to acknowledge any problem with granting an ex parte stay and was uncooperative in the matter of calling to the court's attention the state's objection to this procedure.

A motions judge has also granted the defense application to supplement the record with portions of the transcript of the Evans trial, which was held in northern Idaho in the summer of 1987.

Appellant's brief was filed March 31, 1988. The state's brief was filed April 29, 1988. Heard August 4, 1988.

Gibson v. Arave

The petition for a writ of habeas corpus in this case was filed on June 19, 1986, almost contemporaneously with the Paradis petition. Nonetheless, the case is still in the U. S. District Court on unresolved motions relating to an evidentiary hearing.

Extensive discovery has been allowed, and numerous depositions have been conducted.

Date of Crime: July 1974

COLEMAN V. McCORMICK

The Montana Supreme Court's final disposition of the appeal of this case was on December 19, 1979, and the United States Supreme Court declined to review certain alleged errors on May 27, 1980. State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979), cert. denied, 446 U.S. 970 (1970).

In the meantime, Coleman sought review in the Sentence Review Division of the Montana Supreme Court and was refused. The Montana Supreme Court denied supervisory control in an order dated March 21, 1980, prompting the filing of a second petition for writ of certiorari before the United States Supreme Court. Certiorari was denied on the second petition on October 6, 1980. Coleman v. Sentence Review Division of the Supreme Court of Montana, cert. denied, 449 U.S. 893 (1980).

On December 12, 1980, Coleman filed a petition for post-conviction relief in the state district court, raising 52 separate claims for relief. Following oral argument and submission of proposed findings and conclusions, the court granted the State's motion to dismiss on February 18, 1981.

Coleman appealed the dismissal of his petition for post-conviction relief to the Montana Supreme Court, which affirmed the district court on August 28, 1981. The Supreme Court denied rehearing on September 28, 1981, and Coleman's third petition for a writ of certiorari was denied by the United States Supreme Court. Coleman v. State, 38 St. Rptr. 1352, 633 P.2d 624 (1981), cert. denied, 455 U.S. 983 (1982).

On November 19, 1981, Coleman filed his petition for a writ of habeas corpus in the United States District Court. On May 11, 1982, proceedings were stayed to allow Coleman to exhaust an issue in the state courts. Coleman filed a petition for writ of habeas corpus in the Montana Supreme Court on June 10, 1982. The Court denied the petition on May 4, 1983. Coleman v. Risley, 40 St. Rptr. 418, 663 P.2d 1154 (1983). Coleman's federal habeas corpus action then proceeded, and oral argument on cross motions for summary judgment was heard on January 9, 1985. The district court, in an order and memorandum opinion issued on August 8, 1985, granted respondents' motion for summary judgment and denied Coleman's petition.

20 mo. 8 mo.

Coleman appealed, and the Ninth Circuit Court of Appeals heard oral argument on the issues on May 7, 1986. On May 6, 1987, the Court ordered supplemental briefing discussing the applicability, if any, of the recent decisions of the United States Supreme Court in McCleskey v. Kemp, No. 84-6811, 55 U.S.L.W. 4537 (April 22, 1987); Tison v. Arizona, No. 84-6075, 55 U.S.L.W. 4496 (April 21, 1987); and Hitchcock v. Dugger, No. 85-6756, 55 U.S.L.W. 4567 (April 22, 1987).

1 year

9 months from oral argument to decision

The panel decision of January 19, 1988, of the Ninth Circuit Court of Appeals affirmed the district court's denial of Coleman's application for a writ of habeas corpus under 28 U.S.C. § 2254. By order of the Court dated May 12, 1988, rehearing en banc was granted. Subsequently, the Court set oral argument and requested briefs on the above-stated issues. Oral argument was heard by the Ninth Circuit Court of Appeals on July 20, 1988.

5 months to order rehearing

Date of Crime: January 1974

McKenzie v. Risley (McCormick)

I. STATE COURT PROCEEDINGS

A. First Direct Appeal

McKenzie was sentenced on March 3, 1975. The record on appeal was filed June 30, 1975, pursuant to an order of the Montana Supreme Court extending the time to do so. The Court granted McKenzie at least four extensions of the time for filing his brief on appeal. The brief was finally filed on February 17, 1976. The State was granted two extensions totalling 55 days and filed its brief on May 17, 1976. McKenzie's Reply Brief was filed June 14, 1976. The case was argued September 3, 1976, and the Court issued its order affirming the conviction and sentence on November 12, 1976. State v. McKenzie, 171 Mont. 278, 557 P.2d 1023 (1976). The Court granted McKenzie an extension until December 2, 1976, of the time in which to file a petition for rehearing. A petition was filed on that date. The Court ordered it stricken on December 14, 1976, apparently sua sponte, and directed the appellant to file a corrected petition within 15 days. A second petition was filed December 28, 1976, and the Court entered its order denying rehearing on January 10, 1977.

1 year all briefs

1 month to decid-

action 13 days

McKenzie filed a petition for writ of certiorari with the United States Supreme Court on May 10, 1977. On June 27, 1977, the Court entered its order granting certiorari and remanding the case to the Montana Supreme Court for further consideration in light of Patterson v. New York, 432 U.S. 197 (1977). McKenzie v. Montana, 433 U.S. 905 (1977).

B. Second Direct Appeal

On August 8, 1977, the Montana Supreme Court set a 70 day briefing schedule for the reconsideration of the case on remand from the United States Supreme Court and set oral argument for November 2, 1977. On motion of the appellant over the State's objection, the hearing was vacated and rescheduled for December 14, 1977, and appellant was granted a 30 day extension of the time for filing his brief. Appellant's brief was filed October 3, 1977. The State's brief was filed November 7, 1977, following a three-day extension of time granted by the Court. The case was argued to the five-justice court on December 14, 1977, and

reargued before the newly constituted seven-justice court, on the court's sua sponte order, on March 13, 1978. The Court affirmed the conviction and sentence on June 7, 1978. McKenzie v. Montana, 177 Mont.280, 581 P.2d 1205 (1978). Appellant petitioned for rehearing on June 19, 1978, and the Court entered its order denying rehearing on July 25, 1978.

3 months to decide

McKenzie filed a petition for certiorari in the United States Supreme Court on October 23, 1978. In November, 1978, McKenzie filed a petition for review before the Sentence Review Division. He concurrently asked the United States Supreme Court to stay proceedings on his cert petition. The Sentence Review Division conducted its hearing on December 11, 1978. On December 27, 1979, the Sentence Review Division entered its order denying the petition. McKenzie attempted to appeal the decision, but the Montana Supreme Court dismissed the appeal on February 20, 1979. McKenzie then filed a second petition for certiorari directed at the judgment of the Sentence Review Division. On June 25, 1979, the Supreme Court entered an order granting the petition for certiorari filed the previous October and remanding the case for further consideration in light of Sandstrom v. Montana, 442 U.S. 510 (1979). McKenzie v. Montana, 443 U.S.903 (1979). The Court entered an order the same day denying the petition directed to the decision of the Sentence Review Division. McKenzie v. Montana, 443 U.S. 912 (1979).

C. Third Direct Appeal

On August 15, 1979, the Montana Supreme Court entered an order establishing a 75 day briefing schedule on the case and setting oral argument for October 29, 1979. The Court adhered to the schedule established in the order. On February 26, 1980, the Court entered its opinion affirming the conviction and sentence. McKenzie v. Montana, 186 Mont. 481, 608 P.2d 428 (1980). The Court denied rehearing on March 31, 1980. On July 26, 1980, pursuant to an extension of time granted by the United States Supreme Court, a petition for certiorari was filed. The State received a 15 day extension and filed its brief in response on September 11, 1980. On December 8, 1980, the Court entered its order denying the petition. McKenzie v. Montana, 449 U.S. 1050 (1980).

D. Post-Conviction Relief

On January 5, 1981, McKenzie filed a petition for post-conviction relief in the District Court for the Eighth Judicial District pursuant to Title 46, Chapters 21 and 22, Mont. Code Ann. The State filed its answer and motion to dismiss the petition on January 21, 1981. The motion was heard on January 27, 1981, and on March 1, 1981, the court entered its order denying the petition.

McKenzie promptly filed a notice of appeal, in part because the court had earlier set March 20, 1981 as the date for his execution. The State moved for an expedited appeal, and in response the Montana Supreme Court set a briefing schedule which required the appellant's brief to be filed twenty days after the filing of the record on appeal and gave the State twenty days to respond. On May 28, 1981, the Court set oral argument for June 8, 1981. On October 29, 1981, the Court entered its opinion affirming the denial of post-conviction relief. McKenzie v. Osborne, 195 Mont. 26, 640 P.2d 368 (1981). The Court denied rehearing on November 25, 1981.

II. FEDERAL HABEAS CORPUS

A. First Petition

On December 23, 1981, McKenzie filed a petition for federal habeas corpus under 28 USC section 2254. On February 19, 1982, the court entered an order setting a scheduling conference for February 26, 1982. The court vacated the conference on its own motion on February 25, 1982. On April 30, 1982, the State filed its answer sua sponte. The parties then corresponded with the court at length seeking direction as to a schedule for further proceedings. On September 13, 1982, the court entered an order setting a briefing schedule on cross-motions for summary judgment to be filed regarding the 21 issues raised in the petition. The briefing was completed on January 3, 1983. On October 28, 1982, the court had entered its order setting oral argument on the motions for February 17, 1983. Following the hearing the court directed the parties to file proposed findings and conclusions, which were filed March 23, 1983.

14 month to get to hearing

On July 20, 1984, the court entered an order granting summary judgment for the State on seventeen of the claims, reserving ruling on one, and setting an evidentiary hearing on two of the claims for October 4, 1984. The parties promptly moved for leave to conduct discovery. On September 10, 1984, the court entered an order resetting the hearing to November 7, 1984, and allowing the parties to conduct discovery. A three-day evidentiary hearing was held as scheduled. The court directed the parties to file proposed findings and briefs, which were completed on January 7, 1985.

19 month to decide

13 month to decide 2 claim

On August 16, 1985, the court entered its findings, conclusions, memorandum, and order dismissing the remaining claims. McKenzie applied for and was granted a certificate of probable cause, and promptly filed a notice of appeal.

B. First Appeal

McKenzie filed his Appellant's Brief on December 23, 1985. The State's brief in response was filed January 23, 1986. The case was argued before a three-judge panel on May 9, 1986, in Seattle, Washington. On October 8, 1986, the panel decision affirming the dismissal of the petition was filed. McKenzie v. Risley, 801 F.2d 1519 (9th Cir. 1986). After a fourteen day extension of time was granted, McKenzie filed a petition for rehearing and suggestion for rehearing en banc on November 5, 1986. A response to a petition for rehearing may not be filed unless the court so directs. Rule 40, Fed. R. App. P. On March 2, 1987, more than five months after the filing of the petition, the court ordered the State to file a response on or before March 23. The State's response was timely filed, and on April 29, 1987, the court entered an order granting rehearing en banc.

5 months to grant en banc

1 year to process en banc

On May 20, 1987, the court ordered the filing of supplemental briefs and set the hearing for August 12, 1987. The hearing was held as scheduled, and on March 10, 1988, the opinion of the en banc court affirming the judgment was filed. McKenzie v. Risley, 842 F.2d 1525 (9th Cir.1988)(en banc). McKenzie petitioned for rehearing on March 28, 1988, and on May 10, 1988, the court entered its order denying rehearing.

Pursuant to an extension of time granted without objection, McKenzie filed a petition for certiorari in the United States Supreme Court on August 8, 1988. The State's brief in opposition was filed September 14, 1988. The matter is now pending before the United States Supreme Court.

C. Second Petition

One of the issues raised in McKenzie's first habeas corpus petition was the argument that infliction of the death penalty by hanging violated the Eighth Amendment. Petition, para. 34. In 1983, while the petition was pending, the Montana Legislature amended the applicable statute, section 46-19-103, MCA, to authorize execution by lethal injection if the defendant so elects. The State stipulated that McKenzie be allowed to file a second federal habeas petition challenging the statute as amended if he promptly sought to exhaust his state remedies on the issue and promptly filed his federal petition if the State courts denied relief. Mckenzie filed a petition for habeas corpus in the Montana Supreme Court on February 22, 1985, raising the death penalty issue and an unrelated issue alleging that the prosecutor engaged in improper ex parte discussions with the sentencing judge regarding sentencing. The latter issue was based on evidence brought to light during the evidentiary hearing on the first petition. On the same day, the Montana Supreme Court entered an order directing the State to file a response within thirty days. The State's response was filed March 25, 1985, and

on April 16, 1985, the Montana Supreme Court entered an order denying the petition.

On or about June 27, 1985, McKenzie filed a second petition for habeas corpus under section 2254, raising the issues rejected by the Montana Supreme Court in its April 16 order. On August 12, 1985, the court entered its order requiring the State to file a response on or before September 16, 1985. The State's answer was filed September 12, 1985, accompanied by a motion for summary judgment with supporting brief and affidavit. The court ordered McKenzie to file a brief in response by October 18, 1985, and set a hearing for November 22, 1985. McKenzie filed a brief in opposition and motion for an evidentiary hearing. The hearing was held as scheduled.

On March 3, 1987, the court entered an order granting the State's motion for summary judgment. McKenzie filed a motion for a certificate of probable cause and a notice of appeal on March 27, 1987. The State filed its brief in opposition on April 2, 1987. Fifteen months later, on May 17, 1988, after receiving a letter from the Attorney General commenting on the delay in ruling on the pending motion, Judge Battin issued an order denying the certificate of probable cause. McKenzie filed a motion with the Ninth Circuit Court of Appeals on July 18, 1988 seeking a certificate of probable cause. On July 28, 1988, without waiting for a response from the State, the court granted the motion. The court's order set a briefing schedule which will be completed November 18, 1988.

Date of Crime: August 1982

Ronald Allen Smith v. Risley (McCormick)

The Montana Supreme Court made its final disposition of this case on August 14, 1986, when it denied Smith's petition for post-conviction relief. In its order the Court dismissed the eight claims raised, explaining that the claims had either been fully and finally litigated, or because they were procedurally barred by section 46-21-105, MCA. It found the claim of ineffective assistance of counsel to be without merit.

Smith then filed a petition for writ of habeas corpus and motion for stay of execution of sentence of death on October 10, 1986 in federal court. The Missoula Division of the United States District Court, Judge Charles Lovell presiding, granted the motion for stay pending final disposition of the petition.

Following the filing of an amended petition on February 27, 1987, both parties agreed that the matter was ripe for summary judgment. The State filed a motion for summary judgment and a motion to strike due to procedural bars on August 3, 1987, and Smith filed a motion for summary judgment on September 2, 1987. Briefing of the motions was completed January 29, 1988, and a hearing was held before Judge Lovell on February 26, 1988.

19 months to process summary judgment

The District Court issued its opinion on July 19, 1988, explaining that because Smith's claims had not been fairly presented to the Montana Supreme Court and that further State remedies were procedurally barred under Montana's statutes, its duty was to examine the "cause and prejudice" requirements set out in Wainwright v. Sykes, 433 U.S. 72 (1977). (Where issues of federal law are not resolved on the merits in state proceedings due to petitioner's failure to raise them as required by state procedure, the claims are barred in a federal habeas proceeding unless the petitioner can show "cause" for failure to raise them and "prejudice" resulting from the errors. Wainwright, supra.) Smith claimed that cause was established by reason of ineffective assistance of counsel as well as "external factors." The Court cited Murray v. Carrier, 477 U.S. 478 (1986) to support its holding that the inadvertent failure of counsel to raise a particular claim on appeal does not constitute cause for a procedural default, granted the

State's motion to strike the new claims, and addressed only the claims decided on their merits by the Montana Supreme Court, affirming its decisions. The United States District Court denied Smith's motion for summary judgment, granted the State's motion for summary judgment, and denied Smith's petition for writ of habeas corpus.

Smith mailed a notice of appeal on August 16, 1988, and a motion for certificate of probable cause on August 18, 1988. District Court Judge Lovell ruled that probable cause existed for the issuance of a certificate authorizing Smith to appeal his decision on August 22, 1988. A motion for appointment of co-counsel on appeal was mailed by Smith's attorney on August 30, 1988, and the State filed notice of change of counsel on September 8, 1988. No further activity has occurred as of September 12, 1988.

Date of Crime: April 1975

State v. Fitzpatrick:

The Montana Supreme Court made final disposition of this case on July 25, 1984, when it rejected Fitzpatrick's claim that the law under which his execution date was set constituted an unlawful bill of attainder.

Prior to final disposition by the Montana courts, on December 8, 1983, Fitzpatrick filed a petition for a writ of habeas corpus in the United States District Court for the District of Montana. On that date, District Judge James Battin issued an order staying Fitzpatrick's execution.

On February 2, 1984, the district court ordered that the respondent answer the habeas corpus petition before April 1, 1984. The respondent moved for and was granted a ten-day extension of time, until April 11, 1984, to file its answer. The answer was filed April 11, 1984.

On October 11, 1984, the respondent filed a motion for summary judgment and brief in support of the motion. On January 7, 1985, Fitzpatrick filed a motion for an evidentiary hearing and a cross-motion for summary judgment, along with a supporting memorandum. At that time, Fitzpatrick also filed a motion to amend his petition. The motion to amend was granted by the district court on January 31, 1985.

The respondent filed an answer to the amended petition and a reply brief in support of its motion for summary judgment on February 8, 1985.

Oral argument on the cross-motions for summary judgment was heard on April 26, 1985. In all, 19 issues were argued before the Court.

On June 14, 1985, Fitzpatrick moved to supplement the record. The respondent filed a response opposing the motion on July 1, 1985. No resolution of the motion is found in the record.

The cross-motions for summary judgment were submitted for decision for two years, from April 26, 1985, until April 28, 1987, when the district court entered an order granting the respondent's motion for summary judgment and denying Fitzpatrick's motion for summary judgment.

On May 7, 1987, Fitzpatrick moved to alter or amend the judgment. The respondent filed a response on May 14, 1987. On June 15, 1987, the District Court denied the motion to amend its judgment, but did amend its memorandum opinion to clarify a conclusion of law.

Fitzpatrick filed a notice of appeal and motion for certificate of probable cause on July 3, 1987. The

2 years, 3 months to process S.J.

16 months to get to oral argument on S.J.

2 years to decide S.J.

certificate of record was filed in the Court of Appeals on October 6, 1987.

On September 10, 1987, Fitzpatrick's attorney filed a motion for appointment of co-counsel. The motion was granted on November 10, 1987. Fitzpatrick's opening brief was due December 28, 1987.

On December 7, 1987, Fitzpatrick filed a motion for extension of time to file his brief and a motion for leave to file an enlarged brief. The Ninth Circuit granted an extension of time until February 8, 1988, to file the brief, but denied the motion to file an oversized brief.

On February 8, 1988, Fitzpatrick moved for an extension of time until February 17, 1988, to file his brief and renewed his motion to file an enlarged brief (over 50 pages). Before the Ninth Circuit issued a ruling on his motions, Fitzpatrick, on February 18, 1988, filed a 71-page brief discussing ten issues. The Court, on March 2, 1988, issued an order allowing Fitzpatrick to file the oversized brief out of time. In the order, the Court stated that the respondent's brief was due April 1, 1988.

The respondent requested and received one extension of time for filing its brief. The respondent's brief was filed April 20, 1988. Fitzpatrick's reply brief was due May 6, 1988. He obtained one telephonic extension of time from the Clerk of Court and filed his reply brief on May 19, 1988.

The appeal was orally argued before a three-judge panel in Seattle, Washington, on July 12, 1988. The appeal is currently submitted and a decision is pending.

1 year, 9 days to bring appeal to oral argument

STATE OF MISSISSIPPI

JAN 23 1989

OFFICE OF THE ATTORNEY GENERAL
TELEFAX NUMBER (601) 359-3796
CARROLL GARTIN JUSTICE BUILDING
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE (601) 359-3680

MIKE MOORE
ATTORNEY GENERAL

January 19, 1989

Justice Lewis F. Powell, Jr., Retired
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: Ad Hoc Committee On Federal Habeas

Dear Justice Powell:

Attorney General Moore referred your request for statistics concerning the delay found so often in death penalty appeals to me as I am the assistant charged with handling those cases in this office. I spoke with Professor Pearson earlier and have today forwarded to him the requested statistics on Mississippi death penalty cases. This office stands ready to assist you and your committee in any way necessary to complete your task.

With best wishes, I am

Sincerely,

Marvin L. White, Jr.

Marvin L. White, Jr.
Assistant Attorney General

MLW/ds

cc: Judge Charles Clark
Professor Albert Pearson

lfp/ss 01/23/89 ADC SALLY-POW

Ad Hoc Committee on Habeas Corpus

MEMO TO HEW:

I think it will be appropriate, and not too burdensome to mail to members of the Committee and to our Secretary copies of Judge Huntley's letter of January 18 with the attached material.

L.F.P., Jr.

ss

January 24, 1989

Dear Justice Huntley:

A brief note to thank you for the copy of your letter of January 18 to Professor Pearson. I note that, in your view, the primary blame for the serious delays in the capital cases is a failure to focus on inadequate "calendar management."

I am sending copies to members of the Committee.

Sincerely,

Hon. Robert C. Huntley, Jr.
Justice
Supreme Court of Idaho
451 W. State Street
Boise, Idaho 83720

lfp/ss

cc: Hon. Paul H. Roney
Hon. Charles Clark
Hon. Barefoot Sanders
Hon. William Terrell Hodges
William L. Burchill, Jr., Esquire

January 26, 1989

Ad Hoc Committee Meeting - Monday, January 30, 9:30 a.m.

Memo to Marshal's Office:

We would like to have the usual coffee and tea for our committee meeting. As I understand, we order this from the cafeteria and Harry Fenwick will arrange for it to be served.

I understand that the Lawyer's Lounge, across from the Marshal's Office will be available.

L.F.P., Jr.

ss

cc: The Chief Justice
Noel J. Augustyn, Esquire
Mr. Harry Fenwick

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(All Correspondence)
P.O. BOX 7587
CHARLOTTESVILLE, VIRGINIA
22906-7587

January 27, 1989

The Honorable Lewis F. Powell, Jr.
Retired Justice of the United States Supreme Court
One First Street, N.E.
Washington, DC 20543

Re: Special Committee on Habeas Corpus Review of Capital Sentences

Dear Justice Powell:

Enclosed with our compliments is a set of our recent two-volume publication, **Federal Habeas Corpus Practice and Procedure**, by James S. Liebman, Associate Professor of Law, Columbia University School of Law.

Prior to his joining the faculty at Columbia, Liebman, a former law clerk to Justice John Paul Stephens, served as Assistant Counsel to the NAACP Legal Defense Fund for six years, where he gained unsurpassed expertise in trying and writing about federal habeas corpus cases. During his tenure with the Legal Defense Fund, Liebman prepared the **Federal Habeas Corpus Manual for Capital Cases**. That manual ultimately became the nucleus for his new work, which is an encyclopedic guide to the litigation and adjudication of federal habeas corpus cases.

We are extremely pleased to provide you with a set of the publication in the hope that it will contribute meaningfully to the work of the Special Committee on Habeas Corpus Review of Capital Sentences.

Very respectfully,

Lee Freudberg
Deputy Director
Professional Publications

enclosure

cc: James S. Liebman

LF:yf

MEMORANDUM

TO: Justice Powell January 29, 1989

FROM: Hew

RE: Habeas Proposals

1. Chief Justice's Proposal

This proposal would amend 28 U.S.C. §2244 to apply a one year statute of limitations in capital cases only. The statute would run from the time of "exhaustion" or the "last dispositive order on the merits before the federal petition." This essentially means that the statute would not come into play until after state habeas review. The statute would apply only where the state has provided a lawyer throughout the state post-conviction proceedings and for one year thereafter. The function of this proposal (in terms of delay) would be to force the inmate to move into federal court soon after state collateral review ended.

2. Judge Hodges' Proposal

The Hodges proposal (as originally submitted Aug. 29) also provides for a one year statute of limitations for federal habeas claims. The statute would run, however, from the date at which state conviction becomes final. An inmate would be required to file a federal petition within one year despite the fact that state collateral review had not occurred, but the federal dct would stay its proceedings until

either (a) state remedies have been exhausted or (b) the state waives the exhaustion requirement. Once exhaustion or waiver occurred, the dct could proceed with the federal petition. Judge Hodges' proposal allows for exceptions in cases of new Supreme Court decisions or newly discovered facts.

At the last meeting, my recollection was that Judge Hodges described his proposal somewhat differently. Rather than requiring the inmate to file in federal court prior to exhaustion of state remedies to toll the statute, the statute would simply be tolled during the period of time that state habeas proceedings occurring. Once state habeas proceedings ended, the statute would then pick up where it left off and begin to run again. I think this version of the Hodges plan is simpler. The Judge Hodges' proposal has the benefit of encouraging inmates to proceed expeditiously to collateral review in <u>both</u> federal and state systems as soon as the conviction is final rather than waiting around for a warrant to be signed. This is appropriate in the unique captial context: the non-capital inmate has every incentive to seek habeas as soon as possible, but the captial inmate wants only delay. I note that there is no reason that the Hodges proposal could not be combined with provision of counsel.

R.H.P.

Supreme Court of the United States
Washington, D. C. 20543

FEB 2[illegible] 1989

CHAMBERS OF
THE CHIEF JUSTICE

Ad Hoc File

February 16, 1989

The Honorable Donald P. Lay
Chief Judge
P.O. Box 75908
St. Paul, Minnesota 55175

Dear Don,

Thanks very much for sending me a copy of your submission to the Powell Committee on Habeas Corpus. I do not think I agree with your comments about Wainwright v. Sykes, but on the basis of fragmentary information I think there is probably a good deal of merit to your comment about Rose v. Lundy and its effect in capital cases. I am sure the work of the Powell committee will be improved by submissions from knowledgeable judges in the field like you.

Sincerely,

cc: Justice Powell

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

February 16, 1989

FEB 24 1989

Honorable Lewis F. Powell, Jr.
Associate Justice, Retired
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Dear Justice Powell:

I know that you are interested in following the agenda of the newly commissioned Judicial Conference Federal Courts Study Committee, which held its first meeting on February 3.

I thought that you might like to see the enclosed memorandum prepared by Judge Weis of the Third Circuit, chairman of the Federal Courts Study Committee, designating three subcommittees and proposing relevant issues to be examined by each of them. We are making this communication available to all chairmen of Judicial Conference committees.

I was very sorry to learn of your recent hospitalization and hope that you will be completely recovered by the time this letter reaches you. With kindest personal regards,

Sincerely,

William R. Burchill, Jr.
General Counsel

Enclosure

Federal Courts Study Committee

22716 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, PA 19106-1722

Telephone: 215-597-3320
Facsimile: 215-597-3350

Judge Joseph F. Weis, Jr.
Chairman

William K. Slate, II
Director

February 6, 1989

TO: Federal Courts Study Commission Members

FROM: Judge Weis

Dear Committee Members:

As promised, here is a list of subcommittees and the topics which I hope each will undertake.

I. ROLE OF THE FEDERAL COURTS AND RELATIONSHIP TO STATE COURTS

Honorable Richard A. Posner, Chairman
Chief Justice Callow
Congressman Kastenmeier
Professor Rex Lee

1. Overall concept of the federal courts, their role and citizen access.

2. Relationship with administrative agencies and Article 1 courts.

3. Diversity Jurisdiction. Should it be eliminated or limited? If trials continue in district courts, should appellate proceedings be transferred to state appellate courts?

4. Workmens' Compensation. Should Federal Employers' Liability and Jones Act cases be transferred to the Harbor and Longshoremen Act procedures?

5. Pendent Jurisdiction. Should it be limited or expanded.

6. Bankruptcy. Should much of the proceedings be assigned to an administrative body with reference to bankruptcy judges only of legal issues?

7. Should federal question issues from state courts be sent in the first instance to the federal court of appeals, rather than the United States Supreme court.

8. Should a permanent Commission be established.

II. STRUCTURE OF THE FEDERAL COURTS

Honorable Levin H. Campbell, Chairman
Mr. J. Vincent Aprile, II
Mr. Morris Harrell
Senator Howell Heflin
Honorable Judith N. Keep

1. Can the United States Courts of Appeals function as one National Court of Appeals operating through circuit divisions with provisions for a central en banc division.

2. Should district court be given greater flexibility in devising methods for resolving complex cases or disputes outside the mainstream of traditional adversary proceedings.

3. What should be the role of magistrates in the district courts. Should they continue to be appointed by the district courts.

4. Structure of the role of the Judicial Conference of the United States and the Circuit Councils. Is a separation between administrative and judicial function desirable. Should the district courts operate under more decentralized administrative methods.

5. Role of the Administrative Office and the Federal Judicial Center. The budget process.

6. How can delays in filling vacancies on the bench be reduced?

7. Should district and circuit boundaries be revised? Should geographical boundaries be de-emphasized in adjudication? Should the number of places of hearing court be reviewed and possibly reduced?

III. WORK LOAD OF THE FEDERAL COURTS

Honorable Jose A. Cabranes, Chairman
Edward S.G. Dennis, Jr.
Senator Charles E. Grassley
Ms. Diana Gribbon Motz

1. Should there be statutory provisions for the transfer of cases, both civil and criminal, between state and federal courts, both at trial and appellate levels?

2. Complex multi-district and multi-state litigation. What statutory provisions would be necessary to arrange more efficient disposition of this type of litigation?

3. Trial of federal crimes in state courts. Would this lessen the load on the federal courts and reassign the loads between state and federal courts?

4. Shifting of some federal question cases to state courts.

5. Alternative Dispute Resolution -- mediation, arbitration, summary trials, "rent-a-judge" systems.

6. Appeals from federal administrative agencies to district courts in the first instance with appeal to courts of appeals by leave only.

7. Should state administrative exhaustion be a prerequisite to some actions in federal courts?

8. Utilization of senior judges.

9. Incentives and disincentives in litigation, including fee shifting. Simplification of fee assessments where presently permitted by statutes.

10. Media access and enhancement of public understanding of the courts.

11. Judicial conduct and disability proceedings.

12. Statutory suggestions for eliminations of unnecessary litigation, e.g., establishment of federal statute of limitations, designation of private cause of action where intended, regulation of discovery, etc.

13. Legal and technical support staff. Can limitations be removed on trial and appellate court use of expert and technical assistance from outside sources as an aid to adjudication.

The division of topics is necessarily arbitrary and in some areas the work of the subcommittees may overlap, so that some coordination will be necessary. However, I hope that all of

us will be kept informed of the work of the subcommittees as it proceeds. I would anticipate too that as we go along, additional topics for review will be presented to us and as they come up I will assign them to the various subcommittees.

Might I suggest that each subcommittee retain a reporter -- probably a law school professor who is interested in the work -- to assist in research and writing. Our budget at the present time will permit paying $5,000 for reporter plus travelling expenses for the period up until September 1, 1989, and the same amount for the remainder of our term. As you can see, the acquisition of wealth cannot be the dominant motive for accepting that employment. However, I believe that many law school faculty members would enthusiastically welcome the opportunity to work with the Committee and would be able to enlist the aid of student researchers.

As we discussed at the meeting on Friday, advisory panels may be of substantial assistance to the subcommittees. Within the next few days, I will follow up with you on the use of advisory panels. In addition, a number of individuals and organizations have and will be volunteering to work with us and we will want to utilize those resources as well.

As you know, we also have available to us the facilities of the Judicial Center and the Administrative Office to the extent that they can accommodate our needs. To facilitate the process, might I suggest that you contact Bill Slate with your specific needs for assistance from those offices so that we may coordinate our request to them.

We are hopeful that the Department of Justice will undertake one or more research projects at its expense which will be made available to the Committees. We will keep you advised on the progress of that effort.

In addition, various groups within the American Bar Association, the Judicial Conferences, and many others, have been working on projects which are exploring matters within our area of interests. We will try to match up those groups with the three subcommittees as well.

As we discussed at our initial meeting, I hope that we can have our four regional "outreach" meetings scheduled some time in March, preferably before March 20, 1989. To repeat those assignments --

Boston -- Judge Campbell presiding, Judge Cabranes, Judge Weis.

Atlanta -- Judge Weis presiding, Mr. Harrell, Ms. Motz.

Chicago -- Judge Posner presiding, Mr. Aprile, Mr. Dennis.

Los Angeles -- Chief Justice Callow presiding, Judge Keep, Professor Lee.

Again, in deference to the confining schedules of our congressional members you have not been assigned to a regional meeting. However, if you can attend or at your discretion, designate a staff member to attend, it would benefit the process immeasurably.

Bill Slate will be assisting with the details of the meetings, including date selection, meeting sites, and notification of interested parties.

Indeed, in all that we do we should keep Bill Slate advised so that he can keep the full committee informed of the many different efforts which will be underway simultaneously.

Lastly, we need to identify the date of our next full committee meeting. As Congressman Moorhead noted the proposed March 30 date falls in the middle of a congressional working recess period. May I suggest either the morning of Monday, April 3 or Monday, April 10 beginning at 8:30 a.m. at the Supreme Court in Washington. Elizabeth Bege will contact your office in the next several days to ascertain your preference.

We have a busy and exciting year ahead of us. I look forward to working with all of you.

Sincerely,

Joseph F. Weis, Jr.

cc: William K. Slate, II

NACDL
National Association of Criminal Defense Lawyers
1110 Vermont Avenue, NW
Suite 1150
Washington, DC 20005
202-872-8688
Fax: 202-331-8269

February 17, 1989

Ad Hoc Committee
FEB 21 1989

The Honorable Lewis F. Powell
Chairman, Special Committee on Habeas Corpus
Review of Capital Sentences
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Dear Justice Powell:

I am writing to express this Association's great interest in the work of the Special Committee on Habeas Corpus Review of Capital Sentences.

Among the membership of NACDL are some of the foremost experts in the nation on all stages of capital litigation--including public and private defense counsel as well as law professors. We share a deep commitment to ensuring that competent counsel is available to capital defendants throughout the process, and a concern that the criminal justice system as a whole suffers when a trial counsel's inexperience or incompetence leads to a subsequent review process which many find "chaotic" and unacceptable.

I have recently appointed a special NACDL committee to review problems relating to habeas review in capital cases, to provide information and assistance to, and to serve as liaison with, both your Committee and the congressional committees which will receive and review your Committee's final report and recommendations.

I respectfully urge you to convene public hearings, to receive and consider the widest possible range of views and information regarding the present system of capital habeas review and any potential modifications thereof, and I request that a representative of NACDL's habeas committee be permitted to testify.

I am aware that the Chief Justice, in response to a similar request from the American Bar Association in August, suggested that no hearings would be held or public comment solicited. We respectfully urge reconsideration of this position, in light of the Congress's subsequent decision to elevate the Committee's work to quasi-legislative status. (I refer to section 7323 of the Anti-Drug Abuse Act of 1988,

which requests legislative recommendations from the Committee, and requires expeditious and "faithful" consideration thereof by the Congress).

The 101st Congress will confront few issues more important than this. We hope we will have an opportunity to assist your Committee in laying before the Congress the fullest possible exposition of the issues and the legislative options.

The Committee's kind consideration of our request is greatly appreciated.

Sincerely,

E. Margolin

Ephraim Margolin
President

Ad Hoc file
on Habeas Corpus

MEMORANDUM

TO: Justice Powell February 22, 1989

FROM: Hew

RE: Habeas Day

The Court handed down three habeas corpus cases today (copies attached):

1. Teague v. Lane: This case is potentially the most important of the three, but has turned out to be something of a mess. A plurality (SOC, WHR, AS, AMK) would apply Justice Harlan's test for retroactivity of newly decided cases on habeas (your position in e.g., Hankerson v. North Carolina). BRW, HAB, and JPS concurred in part and/or concurred in the judgment. JPS stated that he agreed in general that Justice Harlan's rule should apply, but that the rule should not apply to prevent habeas claims of "fundamental unfairness." WJB and TM dissented. The adoption of the Harlan rule would of course be of great benefit in enforcing finality. In capital cases, the rule would prevent the frequent practice of inmates filing last minute stay applications claiming that their case should be held for numerous cases in which cert. has been granted. I expect that there will be an attempt to undermine Teague, however, by arguing that every claim in a capital case involves "fundamental fairness" or the like, and must thus come under an exception to the Harlan rule.

The decision of CA7

my test

Yes

Yes

Batson was not limited to the ~~venire~~ venire

2. Harris v. Reed: In this case, HAB wrote for 8 Justices to apply the Michigan v. Long "plain statement rule" to habeas cases. That is, federal habeas courts will not honor a state's procedural bar rule unless the state court made a "plain statement" that the petr's claim was barred. Ambiguities will be resolved in favor of federal habeas review on the merits. Only Justice Kennedy dissented. Miguel wanted me to make clear that he worked on the AMK dissent, and that Ned Foley worked on the HAB majority.

3. Castille v. Peoples: This is an exhaustion case. The unanimous Court held that a petr's claim is not exhausted where he has presented it only to a state forum in which review is discretionary, and which will not entertain the claim unless there are "special and important reasons therefor." The Court also reaffirmed (9-0!) the Engle rule that where a non-exhausted claim would clearly be barred under the state's procedural rules, the dct need not dismiss for lack of exhaustion, but may find the claim procedurally barred outright. (One of the chief points of AMK's Harris dissent is that the reaffirmance of Engle and the majority's rule in Harris are inconsistent.)

R.H.P.

February 24, 1989

Ad Hoc Committee on Federal Habeas

Dear Mr. Margolin:

Thank you for your letter of February 17. I can, of course, understand the interest of your organization in the work of this Committee. At this time, as you noted, there are no plans for a public hearing. We are merely a temporary committee of the Judicial Conference, and report to it. In this respect, I do not think the Anti-Drug Abuse Act (§7323) makes a difference, as the Judicial Conference itself is authorized by law to report to Congress.

I can assure you that we are sensitive to your concerns, and agree wholeheartedly that a major problem has been the unavailability at an early date of competent counsel to represent capital case defendants on collateral review. We are seeking the assistance in this respect of the Attorneys General of the six states in CA5 and CA11.

I am sure that you know the American Bar Association is engaged in a broader study of federal habeas corpus, and I believe a member of your organization may be on its Committee. To the extent it may prove useful, Judge Rubin (co-chair of the ABA Committee) and we have agreed to cooperate.

Sincerely,

Ephraim Margolin, Esquire
President
National Association of Criminal
Defense Lawyers
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D. C. 20005

lfp/ss

United States District Court

NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CHAMBERS OF
JUDGE BAREFOOT SANDERS

To Hew. Than to file. Remind me to request Mem before our next meeting.

MAR 04 1989

February 28, 1989

The Honorable Lewis F. Powell
Associate Justice, Ret.
United States Supreme Court
Washington, D.C. 20543

Re: Ad Hoc Committee on Federal Habeas

Dear Justice Powell:

As you know, in addition to serving on your Ad Hoc Habeas Committee, I am a member of the American Bar Association Habeas Task Force. As a member of that group I receive from time to time information relating to issues which we on your Committee are considering.

The enclosed letter from Mr. Stephen B. Bright, Director of the Southern Prisoners' Defense Committee, is an example of the material which I am receiving. Do you think it would be appropriate to send this, and similar material (providing that it does not become too voluminous) to Al Pearson and the other members of your Ad Hoc Committee? I will be glad to do that if you think that it would be helpful.

Yes

I have similar letters from Circuit Judge Alvin Rubin, State District Judge Stephens of North Carolina who tries felony cases, and two or three others.

Judge Rubin, who is Co-Chair of the ABA Committee, has no problem -- in fact, favors -- sharing this information.

I send my best wishes and warmest regards.

See pg 12

Sincerely,

BAREFOOT SANDERS

Encl.