3-30-1988

Habeas Corpus Committee - Memoranda

Lewis F. Powell Jr.

MEMORANDUM TO THE CHIEF JUSTICE
FROM: Al Pearson, Judicial Fellow
RE: Habeas Corpus Statute of Limitation Provision
DATE: March 30, 1988

Sent with CJ's letter of Aug 22nd

But see Pearson's revised Draft 4/13/88 W/ copy

The brevity of the attached habeas corpus statute of limitation proposal, while it may surprise you, could actually prove to be a strength. The concept is straight forward as is the legislative language required to put it into effect. Here is a list of the most important questions that the proposal takes into account:

1. Should the SL be general or apply only in capital cases? Should it apply to both state and federal prisoners?

2. How long should a prisoner have before the SL would operate as a bar to habeas corpus relief?

3. What event or events should trigger the SL? Under what circumstances would the operation of the SL be tolled?

4. At what point should counsel be provided in order for the SL to become operational in a particular case? This raises the possibility or perhaps necessity of a double trigger? From the perspective of the federal system, this proposal won't work unless there is representation at the state habeas phase where Brady and ineffective assistance contentions can be added to issues which have been presented on direct appeal.

5. What system of legal representation do we want to propose? Would a state qualify for the SL if it put into operation a comprehensive system of legal representation in habeas cases? How would the system be certified as adequate for purposes of triggering the SL? Would such a broad gauged approach to legal representation make the benefits of finality in criminal cases too expensive to be an effective inducement? The alternative would be to make the SL apply on a case-by-case basis---allowing the government to make the cost-benefit assessment selectively and to commit incrementally.

The attached proposal is for a one year SL that is applicable only to state prisoners under a capital sentence. The

rationale for gauging the proposal so narrowly is that the finality problem arises almost entirely from this class of prisoners and in this class of cases. The inducement of quicker finality is offered to the states in return for their development of a system of representation for capital defendants in state and federal post-conviction proceedings. The purpose is to provide the optimal combination of judicial efficiency and fundamental fairness.

Is this a reasonable quid pro quo?

It is clear that inmates are being added to death row more rapidly than executions are being carried out. The reason is the length of time necessary to complete state and federal post-conviction proceedings---a problem that is intensified by a capital felon's understandable desire for delay and the procedural doctrines like the exhaustion requirement that make such a strategy generally quite effective. As complex and time consuming as death penalty litigation has proven to be thus far, more difficult times lie ahead.

A 1987 study reveals the outlines of what it describes as a coming "crisis". As of June 15, 1987, there were 1940 inmates on death row nationally. Of those 1940 capital cases, 1021 were pending on state direct appeal. Approximately 660 were either pending in state post-conviction proceedings or had been ruled upon. The study forecast that 304 death penalty cases would be in a position to move into the federal habeas corpus phase of litigation in FY 1987. It forecast 340 more such cases for FY

default. It would permit a habeas petitioner to try to return to state court as required by Rose v. Lundy, but the clock would continue to run as to that issue. You could call this the "one clock principle" for all issues and contrast it with the way exhaustion works which is issue-by-issue. The only circumstances where multiple clocks would be possible are identified in subparagraphs (1),(2) and (3). They are essentially situations where exhaustion was not possible due to factors beyond the control of the petitioner and his attorney.

Subsection (f)---This subsection contemplates qualifying on a state-by-state basis. You could do it on county-by-county or case-by-case basis. But the inevitable comparisons between the haves and have nots might be undesirable. We want to move on this problem on a broad basis and doing it at the state level is really the best approach in my view. My instinct is that we need a clear step which establishes that a program qualifies and that a SL is in effect. What about cost allocation? I put the costs entirely on the state, but the state can make some telling points in response. For example, the federal government has created the need for counsel because it has made habeas corpus relief so freely available. Why should the states pay 100% of the counsel fees for a problem that they didn't create in its entirety? The federal government can say that the states want the death penalty and federal habeas is necessary to make sure it is applied in a fair manner. In that sense, the states have contributed to the problem. A cost sharing approach seems the most plausible compromise given these lines of argument.

Al Pearson's draft of a s/Lum bill with revisions of March 30

See his amended draft of 4/11/88

PROPOSED STATUTE OF LIMITATION PROVISION

Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) In all capital cases involving a person in custody pursuant to a judgment of a state court, a one year period of limitation shall apply to the filing of an application for a writ of habeas corpus under this chapter. This period of limitation shall apply only if the state, under the standards and procedures set forth in subsection (f), has a program that provides competent and adequately compensated counsel for state prisoners under death sentence during all state and federal post-conviction proceedings.

"(e) The one year period of limitation shall run from the time at which state remedies are exhausted or could have been exhausted. It shall run separately with respect to any issue or issues for which the exhaustion requirement has not been satisfied because:

"(1) the state created an impediment to post-conviction review in violation of the Constitution or laws of the United States;

"(2) the federal right asserted has been newly recognized and could not have been asserted in any prior post-conviction proceeding; or

"(3) the factual basis of the claim or claims could not have been discovered through the exercise of reasonable diligence.

"(f) A state may qualify for the one year period of limitation if it establishes a comprehensive program providing for representation of capital defendants in state and federal post-conviction proceedings. To qualify, the capital representation program must receive the approval of a majority of the active judges of the United States Circuit Court of Appeals in which the State is situated. The Court of Appeals shall approve a program of capital representation if it provides adequate compensation and otherwise assures the availability of competent counsel for all capital defendants desirous of representation."

MEMORANDUM TO THE CHIEF JUSTICE
FROM: Al Pearson, Judicial Fellow
RE: Refinement of Habeas Corpus
Statute of Limitation Proposal
DATE: April 13, 1988

Attached is a redraft of the statute of limitation proposal. It incorporates your suggestions and attempts to refine some features.

1. Section (d) establishes two triggers for the SL. Subsection (d)(1) makes the SL applicable if a capital habeas applicant in fact was represented during state post-conviction proceedings and for an aggregate period of a year thereafter. The premise is a case-by-case determination of the applicability of the SL provision. Upon the conclusion of state post-conviction proceedings, a lack of representation would toll the SL but once counsel comes back into the case, the clock resumes running. A tacking principle governs. Thus, five months of representation by Jones and eight months by Smith would make an aggregate period of representation of more than a year. If no federal habeas petition had been filed during that time, the SL would operate as a bar as specified in Section (e).

Subsection (d)(2) enables a state to trigger the SL across-the-board in its own death penalty cases. The quid pro quo is the establishment in accordance with section (f) of a program of legal representation in state and federal post-conviction proceedings. As written, the across-the-board option probably does not contain sufficient incentives to make the idea attractive to the states. They can argue with some force that all the costs of representation should not be borne by them. Some combination of state and federal financing is likely to be the key.

Section (e) attempts to define the point in time from which the SL would run. Two alternatives are suggested. The first uses the date at which "state remedies are exhausted." I borrowed the "exhaustion" standard from the SL provision of HR 1333. In my view it is highly ambiguous. The concept of exhaustion is never used to describe a single moment in the process of state review---whether on direct appeal or during habeas corpus proceedings. In fact, it refers to a series of instances throughout state review where the state judiciary has given all the consideration that it intends to afford to a particular issue. Linked as it is to discrete issues and the factual allegations in support of them, exhaustion can and regularly does take place at many different times during state review. With respect to some issues, it does not occur at all. For

these reasons, "exhaustion" seems to be a particularly inapt starting point for a SL.

We could try to assign a meaning to the term "exhaustion" for the purposes of this section that differs from the usage under 28 USC $ 2254(b). But the potential for confusion hardly seems worth it. What we seek is a clearly defined terminal point in state judicial consideration of criminal cases---a point that objectively reflects the end of the state prisoner's efforts. Depending on the nature of the issues involved, it could occur after direct appeal or after state post-conviction proceedings. But once state review is concluded and the state prisoner shifts his attention to the federal courts, the premise of this proposal is that he is entitled to a year to filed his application for federal habeas relief.

The alternative language I propose would have the SL run from the "last dispositive order on the merits" issued by a state court. Unlike the exhaustion concept, this language describes a single, identifiable point in time from which to measure the operation of the SL bar. As I conceive of this approach, it would not apply to rulings denying motions for rehearing or motions for extraordinary reconsideration of prior dispositive rulings. In my view, this language (or something based on the same rationale but more aptly phrased) is the way to go.

A further advantage of the alternative language is that while it makes the operation of the SL independent of the exhaustion requirement, the SL rule still serves as a powerful disincentive against the filing of mixed petitions. It deals with one of the most serious but unintended consequences of Rose v. Lundy in the death penalty context. If a state prisoner seeks federal relief and raises an unexhausted claim, the SL clock would continue to run from the date of the "last dispositive order on the merits" in state court. Nothing in this proposal would deny the state prisoner the right to rush back to state to cure his exhaustion problem. He would required to do so, however, within the time frame of the one year SL---a difficult, if not impossible, task in most instances.

Is this unfair to a state prisoner under death sentence? Not in my view since he bears none of these consequences if he is unrepresented. On the other hand, if the state prisoner is represented in state post-conviction proceedings and afterwards as this proposal contemplates, the factual record built up in the state courts ought to be entirely adequate to sustain all legal theories appropriate in federal habeas proceedings. Under these assumptions, the presentation of unexhausted claims to a federal court is difficult to

excuse. This proposal exacts a price for such "afterthought" contentions, but it is one that seems fair in view of the representation in death penalty cases that this proposal seeks to encourage. Moreover, it would seem to be reasonable from the perspective of judicial administration.

Section (e) recognizes that there are certain issues that a state prisoner might not fairly be expected to raise within the context of the one year SL and it creates exceptions for each of them. The SL runs separately if any one of the exceptions is applicable; it runs from the time at which the disability is removed. The rationale behind these exceptions is self-evident.

In practice, however, the newly discovered evidence exception will probably be the source of most last ditch litigation efforts in capital cases. I see no way to avoid this. Bare allegations of this type are easy to make. Meritorious allegations are, of course, quite unusual. In principle, however, if there is previously unknown and unavailable evidence suggestive of a state capital prisoner's innocence, the federal courts should always remain open to consider it. This particular exception suggests the limit of the present proposal; it seeks to promote fairer and more efficient consideration of capital cases but it does not attempt to deal with the chaos frequently associated with last minute attempts to stay executions.

Section (f) needs little elaboration beyond what I have said in previous memoranda. If a state wishes to qualify for the SL across-the-board, the program ought to compensate counsel and have controls that assure competency. Once a program is approved by the Court of Appeals, there will not be any further need for case-by-case review of the competency of individual attorneys before the SL could be invoked in a given case.

4-13-88

PROPOSED HABEAS CORPUS STATUTE OF LIMITATION PROVISION

Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) In all capital cases involving a person in custody pursuant to a judgment of a state court, a one year period of limitation shall apply to the filing of an application for a writ of habeas corpus under this chapter. This period of limitation shall apply if either of the following conditions is satisfied:

"(1) the state prisoner was represented by counsel during all state post-conviction proceedings and for an aggregate period of at least a year following the completion of such proceedings;

"(2) the state, under the standards and procedures set forth in subsection (f), has a program that provides counsel for state prisoners under death sentence during all state and federal post-conviction proceedings and the state prisoner was in fact represented by counsel pursuant to such a program.

"(e) The one year period of limitation shall run from [the time at which state remedies are exhausted] [the date of the last dispositive order on the merits issued by a state court prior to the application for a writ of habeas corpus under this chapter]. It shall operate as a bar to all issues actually litigated on state direct appeal or during state post-conviction proceedings

and to those issues that might have been raised at either stage of review. The one year period shall run separately with respect to any issue or issues for which the exhaustion requirement could not have been satisfied because:

> "(1) the state created an impediment to post-conviction review in violation of the Constitution or laws of the United States;
>
> "(2) the federal right asserted has been newly recognized and could not have been asserted in any prior post-conviction proceeding; or
>
> "(3) the factual basis of the claim or claims could not have been discovered through the exercise of reasonable diligence.

"(f) A state may qualify for the one year period of limitation if it establishes a comprehensive program providing for representation of capital defendants in state and federal post-conviction proceedings. To qualify, the capital representation program must receive the approval of a majority of the active judges of the United States Circuit Court of Appeals in which the state is situated. The Court of Appeals shall approve a program of capital representation if it provides adequate compensation and otherwise assures the availability of competent counsel for all capital defendants desirous of representation."

Hodges Proposal

Proposed Amendment to
28, USC 2254
(adding Subsections (g), (h) and (i))

(g) Except as provided in subsection (i) below, the district court shall have no jurisdiction to entertain a petition under this section unless the petition is filed within one year from the date of the judgment of conviction in state court or, in the event of a timely direct appeal from such judgment, the date on which direct appellate review of the judgment is exhausted or becomes final. The terms "direct appeal" and "direct appellate review" shall include all proceedings on direct appeal as of right and any certiorari proceedings under state or federal law permitting or providing for direct review of the judgment of conviction or the judgment of a lower appellate court reviewing the judgment of conviction on appeal, but such terms shall not include collateral post conviction remedies or proceedings under state law in the nature of habeas corpus, coram nobis or the like.

(h) In the event a post conviction proceeding for collateral review under state law has not been instituted or is still pending in state court at the time a petition in the district court must be filed in order to be timely under subsection (g) of this section, the district court may entertain the federal petition but shall stay any proceedings thereon until such time as (1) all state remedies by way of collateral review are exhausted with respect to the claims presented or (2) the respondent in behalf of the state expressly waives exhaustion of such remedies with respect to such claims.

(i) Notwithstanding the provisions of subsection (g) of this section, if a claim as hereafter defined first arises after the time for the filing of a federal petition under subsection (g) has expired or after an earlier federal petition has been heard and denied or while a federal petition is still pending, the district court shall have jurisdiction to entertain a petition, successive petition or an amended petition, as the case may be, asserting that claim; providing that the provisions of subsection (b) of this section regarding abstention pending exhaustion of state remedies shall apply, and, providing further, that the petition or amended petition is filed within sixty days after the claim first arises or within such lesser time as the district court may direct when a federal proceeding is already pending in the district court at the time such claim first arises. A "claim" within the meaning of this subsection shall mean only: (1) a claim based upon a new constitutional principle established by an intervening decision of the Supreme Court of the United States, which is retroactively applicable, and which was not reasonably foreseeable at the time any earlier federal petition was filed or could have been filed; or (2) the discovery of a previously unknown state of facts, sufficient to support a claim of constitutional deprivation. Such a claim "arises" within the meaning of this subsection on the date of the publication of the applicable Supreme Court decision, or on the date such state of facts was either discovered or could have been discovered through the exercise of reasonable diligence.

Mary copy

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
September 12, 1988

MEMORANDUM

TO: Chief Judge Charles Clark

FROM: Mark Maney (quite helpful as a summary of H/C law)

SUBJECT Federal Habeas Corpus Review of State Criminal Convictions

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Every Federal habeas corpus attack on a state criminal conviction inherently delays the finality of those convictions. In addition, the habeas process can be purposely utilized to cause such delay. In most habeas cases, however, there is little likelihood of intentional delay. An incarcerated habeas petitioner usually wants to be set free promptly. Delay causes its own punishment. Failure to raise all possible issues or to bring the petition at the earliest possible time, in these cases, is presumably due to ignorance of rights or unavoidable circumstances, not lack of diligence.

Capital prisoners awaiting execution do not share these incentives for prompt review. Although they desire to be free of the sentence, the fear of execution overrides all else. Capital prisoners have a strong incentive to pursue all possibilities of delay.

This memorandum discusses the causes of delay in federal

habeas corpus review, particularly in capital cases, and possible methods of speeding the process. It begins in Part I by discussing the major limits on federal habeas corpus -- abuse of the writ by delay and successive petitions, exhaustion, and the limits imposed by enforcing state procedural default rules. In Part II, the extent to which federal habeas corpus can be further limited without transgressing the Constitution is analyzed. Part III lists potential statutory solutions to the perceived causes of delay -- delay in filing, successive petitions, exhaustion, and delay in resetting an execution date after a stay of execution has been imposed.

I. Present Limits on Federal Habeas Corpus Review of State Criminal Convictions

A. Dismissal for Abuse of the Writ -- Delay in Filing the Petition

Rule 9(a) of the Habeas Corpus Rules provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

This rule, adopted in 1977, introduced the equitable doctrine of laches into federal habeas review for the first time. C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4268.2, at 497-98 (1988) (Federal Practice & Procedure). Mere delay is not a bar; the state must establish that the delay has prejudiced its ability to respond to the constitutional claim asserted in the petition. Prejudice to the state's ability to retry the petitioner successfully is not relevant. Vasquez v. Hillery, 474 U.S. 254 (1986). Delay should be "disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief." Advisory Committee Note to Rule 9(a).

B. Abuse of the Writ -- Successive Federal Petitions. Rule 9(b)

If a defendant has previously petitioned for federal habeas

corpus relief, a federal court is not required to entertain a subsequent application for the writ

> . . . if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b) of the Habeas Corpus Rules. See also 28 U.S.C. § 2244(b); Sanders v. United States, 373 U.S. 1 (1983).

At least when the petitioner is represented by counsel, this rule has been interpreted to preclude a subsequent petition as to any constitutional claim that "could have been raised earlier." Straight v. Wainwright, 106 S.Ct. 2004, 2005 (1986) (Powell, J., joined by Burger, C.J., Rehnquist, and O'Connor, JJ., concurring in the denial of stay). See also Woodard v. Hutchins, 464 U.S. 377, 378-80 (1984) (Powell, J., joined by Burger, C.J., Blackmun, Rehnquist, and O'Connor, JJ., concurring); Jones v. Estelle, 722 F.2d 159, 165-67 (5th Cir. 1983) (en banc). Greater tolerance for omitted claims must be shown pro se petitioners. Jones, 722 F.2d at 163 n.3, 165, 167. The standard for pro se petitioners has not been established. Id.

C. Exhaustion of State Remedies.

By statute, federal habeas corpus relief is not available to a state prisoner unless the prisoner has exhausted any remedies available in the state courts as to each constitutional claim presented. 22 U.S.C. § 2254(b),(c). If a claim is based on new evidence, fact, or theory, there is no exhaustion, and a petitioner must first resort to the state courts. Federal

Practice & Procedure §§ 4264.4. This limit on federal habeas review is also a cause of delay.

Exhaustion requirement is a cause of delay.

The exhaustion requirement is premised upon notions of comity; it is not jurisdictional. Granberry v. Greer, 107 S.Ct. 1671, 1673-75 (1987). When the state decides not to raise exhaustion as a defense, the "court should determine whether the interests of comity and federalism would be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim." Id. at 1675. Waiver is, therefore, not automatic, but likely if the state does not wish to raise exhaustion. See also Federal Practice & Procedure § 4269.7; Resendez v. McKaskle, 722 F.2d 227, 229-30 (5th Cir. 1984).

It is not jurisdiction

Incident to the exhaustion doctrine is that in most cases a state court will have already heard and decided the prisoner's constitutional claims. Federal statute requires that the factual findings of the state court be given preclusive effect unless the petitioner establishes --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his

constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

28 U.S.C. § 2254(d). See also Townsend v. Swain, 372 U.S. 293, 314-16 (1963).

This rule is complicated when mixed questions of law and fact are presented to the court. The Supreme Court has noted: "In the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." Miller v. Fenton, 474 U.S. 104, 113 (1985). Preclusive effect should be given to the underlying factual findings, but the federal court remains free to decide the ultimate legal question. See Sumner v. Mata, 455 U.S. 591, 597 (1982).

D. State Procedural Defaults (Wainwright v. Sykes ("must show "good cause" for the default and prejudice")

State procedural rules, particularly contemporaneous objection rules, also limit federal habeas corpus relief. Failure to comply with state procedural rules that punish

noncompliance with forfeiture also bars federal habeas relief, unless the defendant can show cause for the failure and actual prejudice resulting from the waiver of the constitutional claim. Wainwright v. Sykes, 433 U.S. 72, 86-88 (1977). See also Smith v. Murray, 106 S.Ct. 2661, 2668 (1986) (holding that Wainwright applies in death penalty cases). Although the Wainwright rule does not require that prisoners bring their federal petitions within a particular time limit, it reinforces state procedural rules and thus permits the states "to channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." Reed v. Ross, 468 U.S. 1, 10 (1984). As such, to the extent a state requires that federal constitutional issues be raised on direct appeal, Wainwright greatly simplifies federal review. As to those matters properly raised in the state court, the federal court benefits from the prompt review and determination by the state court, and as to matters not properly raised, federal review consists only of determining whether cause and prejudice has been established.

The "cause and prejudice" exception to the Wainwright rule is narrow. The petitioner must show "cause" and "prejudice" in the conjunctive. "[C]ause for a procedural default (. . . ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." Murray v. Carrier, 106 S.Ct. 2639, 2648 (1986). The Supreme Court has found cause when the defendant's "constitutional claim is so novel that its legal

basis is not reasonably available to counsel . . . ." Reed, 468 U.S. at 16. Novelty, however, is narrow. "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for procedural default." Engle v. Isaac, 456 U.S. 107, 134 (1982). The fact that current state law clearly rejects a "novel" constitutional claim is not cause for failing to object if the basis for the claim exists in federal law. Id. at 130. "Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." Id.

It follows from the above discussion that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Murray, 106 S.Ct. at 2648. It also follows that "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default." Id. at 2648. See also Smith v. Murray, 106 S.Ct. 2661, 2666-68 (1986). In addition, the claim of ineffective assistance of counsel must first be presented to the state courts, as required by the exhaustion doctrine, or it cannot be used to establish cause. Murray, 106 S.Ct. at 2646.

To establish prejudice, the defendant must demonstrate "in the total context of the event at trial," that the constitutional errors "worked to his actual and substantial disadvantage, injecting his entire trial with error of constitutional

dimensions." United States v. Frady, 456 U.S. 152, 169-170 (1982). (Although Frady involved review of a federal conviction, it explicitly held that the cause and prejudice standard is the same for state and federal prisoners. Id. at 165.)

The potential severity of this rule is ameliorated by the Supreme Court's admonition that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray, 106 S.Ct. at 2650. See also Engle, 456 U.S. at 135.

II. The Extent to which Federal Habeas Relief can be Further Narrowed.

The present limits on federal habeas review of state criminal convictions are of relatively recent vintage. In 1977, both Rule 9(a) and Wainwright v. Sykes began a substantial shift from earlier precedent. Prior to that time, forfeiture of a federal constitutional claim occurred only if the failure to comply with a state procedural rule was deliberate. Fay v. Noia, 372 U.S. 391 (1963). Laches was also unknown. Federal Practice & Procedure § 4268.2, at 497-98. It was not until 1981 that section 2254(a), which requires that a state court's factual findings be given preclusive effect, gained attention. See id. at § 4265.1, at 408. Dismissals for abuse of the writ under Rule 9(b) because of successive petitions have also become more frequent. See Straight, 106 S.Ct. at 2005.

It is unlikely that the effect of these recent limitations has been completely felt or analyzed, but predictions can be

made. The expansion of the Wainwright doctrine will likely encourage states to expand procedural rules requiring that federal constitutional claims be raised at trial or on direct appeal. For example, in Green v. Estelle, 706 F.2d 148 (5th Cir.), rehearing denied, 712 F.2d 995 (1983), the Texas Attorney General argued that Texas did not impose a procedural bar for failure to object to a psychiatrist's testimony because of a misinterpretation of the Constitution and not a procedural decision; the Fifth Circuit did not apply Wainwright. Texas may have altered its procedural position because of this decision. See Green, 712 F.2d at 997 (on denial of rehearing). The frequency with which petitions are dismissed as successive should force prisoners to raise all claims in their first petition. These rules should mean that a district court is presented with one petition that raises constitutional claims previously raised on direct appeal.

None of the present limits are without exception, however. The Each has an equitable exception that allows the petitioner to explain the apparent error. See discussion in Part I. Therefore, despite the limits, last-minute petitions cannot be summarily rejected.

equitable exceptions to Wainwright v. Sykes are

These equitable exceptions are probably of constitutional dimension. Summary dismissal may constitute a suspension of the writ in violation of Art. I, Sec. 9, cl. 2. The Sixth Circuit, relying on its interpretation of Supreme Court precedent, stated, "a rule which would permit a court to dismiss an action for habeas relief without any consideration of the equities presented

If we proposed a S/h rule, equitable exceptions would be required

renders the habeas corpus process inadequate to test the legality of a prisoner's conviction and, thereby, constitutes a prohibited suspension of the writ." Davis v. Adult Parole Authority, 610 F.2d 410, 414, 414 n.10 (6th Cir. 1979). See also case cited id. at 414 n.10; Atmore v. State, 1988 WL 69319 (Ala. Ct. Crim. App. May 24, 1988). Under this analysis, a statute of limitation for habeas petitions would require an equitable exception for constitutional claims that "could not have been raised earlier" because the claim is based on new fact or law.

yes

Arguably, a strict statute of limitation could be imposed on petitions for state criminal convictions. See Swain v. Pressley, 430 U.S. 372, 384-86 (1977) (Burger, C.J., joined by Blackmun and Rehnquist, JJ., concurring in part and concurring in the judgment). The writ originally issued to test only detention by the United States, and not by the states. It was not until 1867 that the writ was extended to allow review of detentions by the states. Act of Feb. 5, 1867. Initially, after being extended to state detention, the writ was limited to review of jurisdictional defects. The writ began its expansion in 1927 with Moore v. Dempsey, 261 U.S 86 (1923). See generally Federal Practice & Procedure § 4261. The origins of habeas review of state detention, at least, are not constitutionally based. Equity, however, would still argue for some exception to any limit upon habeas corpus review, so that a prisoner could raise newly discovered evidence or a change in the law that entitled the prisoner to release.

yes - See my speech

yes - possibly But the 1867 Act will not be repealed

> Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to the writ.

Discuss with Hew. This may make any statutory limitations subject to equitable expansion

Price v. Johnston, 334 U.S. 266, 284. (1947).

Substitution of a remedy for the writ of habeas corpus, which is both adequate and effective to test the legality of a person's detention, is not a suspension of the writ. Swain, 430 U.S. at 382. In Swain, a statute that prohibited federal district courts from entertaining habeas corpus petitions filed by prisoners incarcerated pursuant to a sentence imposed by a court of the District of Columbia was found constitutional. The Court relied on a provision in the statute that permitted review by the federal district courts if it appeared that the remedy afforded was "inadequate or ineffective" to test the legality of the petitioner's detention. Id. at 381. This opinion implies that such a safeguard would be required in any substitued remedy.

III. Possible Changes in the Procedure for Federal Review of State Criminal Convictions.

Of the four suggested causes for delay--(1) delay in filing, (2) successive petitions, (3) exhaustion, and (4) delay in resetting execution dates--only two appear to warrant change in federal habeas procedure. Successive petitions are already addressed by Rule 9(b), and the effect of exhaustion is mitigated by the state's ability to waive this requirement. Therefore, only delay in filing and setting execution dates are addressed below.

But Rule 9(b) is ineffectual ?

A. Changes to Limit Delay in Filing

Delay in filing habeas petitions threatens the finality of the criminal process. There is no penalty imposed for pure delay in filing a habeas petition, absent prejudice to the state. Although Wainwright and Rule 9(b) encourage prisoners to raise their constitutional claims in a single state proceeding followed by a single federal habeas review, a death-row inmate still has great incentive to file a habeas petition just prior to an execution date.

Yes

It is a virtual certainty that a state capital prisoner will file at least one federal habeas petition. Getting the prisoner into federal court at the earliest possible time, therefore, is the most effective way of speeding finality of criminal convictions. Three methods of achieving that end follow.

Yes

1. Statute of Limitations

Two variations of a statute of limitations have been outlined by Al Pearson and Judge Hodges. This approach appears to present several problems. Its constitutionality, discussed above, is not clear. The time the limitation period should start is difficult to ascertain. If time is to run from the end of direct review of the conviction, exhaustion is threatened. If it is to run from completion of collateral review, that date is virtually impossible to determine.

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2. Modified Statute of Limitations

Wainwright and its progeny make a modified statute of limitations possible. Wainwright encourages states to require that most, if not all, federal constitutional claims be raised by direct review. A statute of limitations applicable only to

federal constitutional claims raised in state court reduces the problems of a broader limitation. Such a limitation would leave few, if any, constitutional claims for later review, but would not infringe upon the exhaustion doctrine. The time period could be relatively short, running from the end of direct review, and the record from the state appeal could be used by the district judge.

The infringement on habeas review would be minimal because the limitation applies only to claims known and previously raised. An equitable exception to the limitation period would further decrease the potential unfairness of the rule. The "cause and prejudice" standard could be borrowed from Wainwright, so that a single standard would apply to any claim required by the state to be raised on direct appeal that is not raised within the limitation period.

This modified limitation scheme suggests a third approach.

3. Direct Review

A process of direct review of federal constitutional claims raised in state court is another possible method of hearing a defendant's constitutional claims. This approach has the same effect as a limitation period for habeas review because it can create a definite time-table for federal review. However, it would suffer fewer constitutional problems. It does not limit the power of federal habeas corpus to override determinations of a person's federal constitutional claim.

Direct review, however, may bother federalism. The Supreme Court cannot conduct such reviews except in extraordinary

cases. The provision for direct review of the decision of the highest state court by an inferior federal court is unprecedented. This concern is addressed by the following two approaches.

a. State Option

The state could be permitted to certify federal constitutional questions to a federal court of appeals. The state could be allowed to exercise this option by rule in all capital cases or by certification in individual cases from its highest court.

b. New Intermediate Court with Review by the Supreme Court.

Under this approach a new court would be created to review direct criminal appeals in state capital cases. Opinions of this court would be subject to review by the Supreme Court. The precedential value of adopted opinions would need to be addressed.

B. The Last-Minute Petition -- The Delay in Resetting the Execution Date After the Execution has been Stayed.

The equitable exception that exists with any limit on habeas corpus relief means that a state prisoner will always be entitled to bring a petition, at least to secure a determination that an earlier petition could not have been filed. There must be a method for a prisoner to raise newly discovered facts or a change in the law that entitles the prisoner to release. This equity means there can be "no absolute bar" to last-minute petitions designed solely for delay. If a capital defendant files such a petition, he often will receive a stay of execution. Under most

state rules a stay requires that a new execution date be set through a reworking of the entire date-setting process (often 30 - 90 days minimum). The capital defendant thus may have an incentive to file even a frivolous petition.

This incentive can be removed or reduced if a stay delays the execution date only to the extent necessary to review the habeas petition. This could be done by a simple provision that automatically resets the execution date following federal habeas action. A change in state procedure, however, would be required to implement this change.