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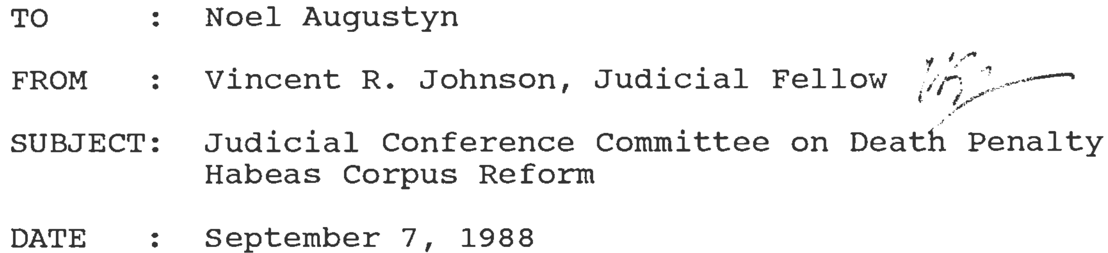
M E M O R A N D U M



TO : Noel Augustyn

FROM : Vincent R. Johnson, Judicial Fellow

SUBJECT: Judicial Conference Committee on Death Penalty Habeas Corpus Reform

DATE : September 7, 1988

<u>A.B.A. Task Force on Death Penalty Habeas Corpus</u>

Professor Ira Robbins of American University, a former Judicial Fellow, indicated to me on Friday, September 2nd, that he has been named reporter for an A.B.A. Task Force on Death Penalty Habeas Corpus Reform. This task force has received a grant from the State Justice Institute. Beginning October 1, the task force will conduct a 14-month study aimed at eliminating tension and avoiding redundancy in state and federal post-conviction remedies. The study will focus on death penalty cases, and if it is successful there is contingent funding for further study of non-death penalty habeas corpus proceedings. The $137,000 budget for the task force includes money for hearings across the country to obtain a broad base of input into the review process. During this initial 14-month stage the task force will investigate only habeas corpus procedures. It will not take any position on the death penalty.

Ira indicated that he had intended to write to the Chief Justice to suggest coordination of the task force with the judicial conference committee. He said that it might be possible, for example, to include one member of the Powell Committee on the task force, which will have approximately a

dozen members with representatives from academia, state and federal courts, and prosecution and defense groups. Alternatively, he said, some other form of coordination might be possible. Ira said that he will hold off contacting the Chief Justice, in order to allow me to relay this information. Ira will be out of the country from the 16th to 26th of September. A copy of the task force's grant proposal is attached.

RATIONALIZING FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CRIMINAL CONVICTIONS -- DEATH PENALTY AND "ORDINARY" CASES

Submitted to:

STATE JUSTICE INSTITUTE
120 S. Fairfax Street
Alexandria, VA 22314

Submitted by:

The American Bar Association
Fund for Justice and Education
on behalf of the
ABA CRIMINAL JUSTICE SECTION
750 N. Lake Shore Drive
Chicago, IL 60611

July 11, 1988

Contact:
Laurie Robinson, Director
Section of Criminal Justice
American Bar Association
1800 M Street, NW
Washington, DC 20036
202/331-2260

FORM A

State Justice Institute

APPLICATION

1. APPLICANT

a. Applicant Name American Bar Association Fund for Justice and Education
b. Organization Unit Criminal Justice Section
c. Street/P.O. Box 1800 M Street, N.W.
d. City Washington
e. State D.C. f. Zip Code 20036
g. Name and Telephone Number of Contact Person Laurie Robinson (202)331-2260

2. TYPE OF APPLICANT *(Circle appropriate letter)*

a. State or local court
b. National organization operating in conjunction with State court
c. National state court education/training organization
d. College or University
(e) Other non-profit organization or agency [circled]
f. Individual
g. Corporation or partnership
h. Other unit of government
i. Other ______ (specify)

3. EMPLOYER IDENTIFICATION NUMBER 36-611-0299

4. ENTITY RESPONSIBLE FOR FUNDS *(if different from applicant)*

a. Name of Responsible Entity American Bar Association/FJE
b. Street/P.O. Box 750 North Lake Shore Drive
c. City Chicago
d. State Illinois e. Zip Code 60611
f. Name and Telephone Number of Contact Person Sandra R. Hughes (312)988-5400

5. TYPE OF PROJECT *(Circle most appropriate letter)*

a. Education/Training
(b) Research/Evaluation [circled]
c. Demonstration
d. Technical Assistance
e. Other ______ (specify)

6. TYPE OF APPLICATION *(Circle appropriate letter)*

(a) New [circled]
b. Continuation
c. Supplemental

7. TITLE OF PROPOSED PROJECT Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions -- Death Penalty and "Ordinary" Cases.

8. PROPOSED START DATE October 1, 1988

9. PROJECT DURATION *(Months)* 14 mos.

10. a. AMOUNT REQUESTED FROM SJI $ 136,275

b. **AMOUNT OF MATCH**

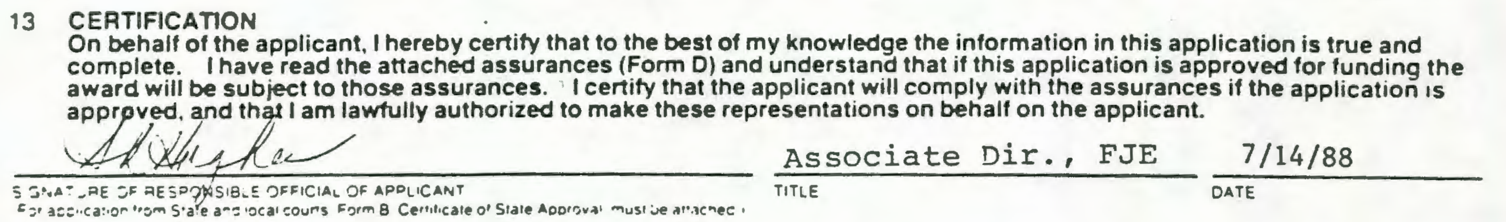
Cash match $ 304
Non-cash match $ 3,000
TOTAL MATCH $ 3,304

c. **TOTAL PROJECT COST** $ 139,579

11. IF THIS APPLICATION HAS BEEN SUBMITTED TO OTHER FUNDING SOURCES, PLEASE PROVIDE THE FOLLOWING INFORMATION:

Source N/A
Date Submitted ______
Amount Sought ______
Disposition (if any) or Current Status ______

12. CONGRESSIONAL DISTRICT OF: 1st Illinois (Applicant) National (Project (If Different than Applicant))



13 CERTIFICATION
On behalf of the applicant, I hereby certify that to the best of my knowledge the information in this application is true and complete. I have read the attached assurances (Form D) and understand that if this application is approved for funding the award will be subject to those assurances. I certify that the applicant will comply with the assurances if the application is approved, and that I am lawfully authorized to make these representations on behalf on the applicant.

[signature] Associate Dir., FJE 7/14/88

SIGNATURE OF RESPONSIBLE OFFICIAL OF APPLICANT — TITLE — DATE

(For application from State and local courts, Form B, Certificate of State Approval, must be attached.)

FOR INSTITUTE USE ONLY

14 a APPLICATION NUMBER ______
b Concept Paper Number ______

15 DATE RECEIVED

16. DATE OF ACTION

17 ACTION TAKEN
a Awarded
b Rejected
c Returned for Modification
d Deferred
e Withdrawn
f Other ______

18 TYPE OF AWARD
a. Grant
b Cooperative Agreement
c. Contract

19 a AMOUNT OF AWARD
$ ______
b Amount of Match Required
$ ______

FORM C
(Instructions on reverse side)

State Justice Institute

PROJECT BUDGET
(TABULAR FORMAT)

Applicant: American Bar Association Fund for Justice and Education
Project Title Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions -- Death Penalty and "Ordinary" Cases.
For Project Activity from October 1, 1988 **to** November 31, 1989
Total Amount Requested for Project from SJI **$** 136,275

ITEM	SJI FUNDS	STATE FUNDS	FEDERAL FUNDS	APPLICANT FUNDS	OTHER FUNDS	IN-KIND SUPPORT	TOTAL
Personnel	18,533					3,000	21,533
Fringe Benefits	4,263						4,263
Consultant/Contractual	21,250						21,250
Travel	41,900						41,900
Equipment	-0-						-0-
Supplies	2,375						2,375
Telephone	2,600						2,600
Postage	4,400						4,400
Printing/Photocopying	13,600						13,600
Audit	-0-						-0-
Other (Specify) Rent & Data Processing	2,623			248			2,871
Direct Costs	111,544			248		3,000	114,792
Indirect Costs 22.4% *	24,731			56			24,787
Total	136,275			304		3,000	139,579

Remarks: * Indirect exclusive of wordprocessing cost - $1,138.

PROJECT ABSTRACT

The American Bar Association proposes to undertake a fourteen month study of the unique problems associated with federal court review of state court criminal convictions involving the death penalty.

The use of the federal courts' "Great Writ" of habeas corpus to review state court criminal convictions has been a matter of disagreement within the legal community since the Warren court expanded its availability beginning with Fay v. Noia almost 25 years ago. The controversy concerning its use echoes the debates of two hundred years ago -- the sovereignty of the states in preserving domestic order versus the federal government's preeminence in vouchsafing national interests -- in this instance constitutional criminal procedures. The topic is one of the Special Interest Program Areas of the State Justice Institute.

The tensions surrounding federal habeas corpus review are most exaggerated when the case under review involves the death penalty. The stakes are very high; public interest and publicity peak; the factual, legal, and procedural issues are most complex; and (ironically, in view of the protracted history of most such cases) the time frames within which decisions must be made are extremely short. The burdens on the federal courts are heavy. The need for cooperation between the state and federal court systems is high; actual cooperation is grudging at best.

The Chief Justice recently called for "some sort of regularization of the procedures that now attend last minute appeals and requests for stay of execution" by state death row inmates. The ABA proposes to convene a joint state-federal task force composed of knowledgeable judges, lawyers and court administrators, assisted by an expert reporter, to address the problems identified by the Chief Justice and to propose practical solutions. The task force's inquiry will assume the continued existence of federal court jurisdiction to review such cases. It will focus on ways to make the review process itself more rational -- to the ultimate benefit of death row inmates with legitimate constitutional claims as well as both the federal and state court systems.

The task force's process will involve maximum input from public officials, lawyers and others throughout the country with a useful perspective on the problems presented by these cases. Its final report will include recommendations to both state and federal courts, legislatures and executive branch officials concerning the whole of the death penalty review process.

PROGRAM NARRATIVE

The American Bar Association proposes to undertake a fourteen month analysis of the special problems attendant upon Federal habeas corpus review of state court criminal convictions involving the death penalty. It responds to Chief Justice Rehnquist's call for "some sort of regularization of the procedures which now attend last minute appeals and requests for stay of execution" by state death row inmates. Citing "the sort of chaotic conditions that often develop within a day or two before an execution is scheduled," he urged the Conference of Chief Justices in January of this year to explore "the possibility of imposing some reasonable regulations" on the situation. "We judges," he said, "have no right to insist that matters such as these proceed at a leisurely pace, or even at an ordinary pace, but I think we do have a claim to have explored the possibility of imposing some reasonable regulations in a situation which is disjointed and chaotic." A joint state-federal task force will address the very real problems identified by the Chief Justice with two initial assumptions:

- that federal habeas corpus jurisdiction to review these cases will continue to exist, and
- that an effective solution to the problems of "last minute" federal court appeals and requests for stay of execution will not be found by focusing only on the last stage of the process. Rather, attention needs to be given to the entire process from start to finish.

PROJECT OBJECTIVES

The joint state-federal task force, and reporter, will:

- survey the existing data and literature on the problems associated with state and federal review of state death penalty convictions,
- prepare an issues paper to serve as a vehicle for input from the courts, the legal profession, and the public,

- hold a series of public hearings on the topic, and
- make a final report and recommendations addressed to state and federal judicial, legislative and executive branch leaders.

The objective to be attained by these activities is a series of recommendations that (i) will be implemented, and (ii), when implemented, will produce state and federal review processes for these cases that are:

a. coordinated,

b. efficient in terms of the use of the time and resources of counsel and of the courts,

c. as certain as possible that no person will be executed on the basis of a conviction flawed by fundamental factual, legal or constitutional procedural error, and

d. devoid of the chaotic character of current "last minute," piecemeal state and federal reviews.

The scope of the project has been narrowed considerably from that proposed in an earlier concept paper. Questions raised by SJI staff have demonstrated that a separate study of federal habeas corpus review of state non-capital criminal cases cannot be differentiated satisfactorily from the study now proposed. Any further consideration of a follow-on study will have to await conclusion of this endeavor.

PROGRAM AREAS TO BE COVERED

This project falls within two State Justice Institute Authorized Program Areas -- (10) "Studies of court rules and procedures . . . to identify problems with the operation of such rules [and] procedures . . . and the development of alternative approaches to better reconcile the requirements of due process with the need for swift and certain justice . . ." and (14) "[P]rojects dealing with the relationship between Federal and State court systems in areas

where there is concurrent State-Federal jurisdiction and where Federal courts, directly or indirectly, review State court proceedings" -- and one Special Interest Program Area -- (1) "The Relationship Between State and Federal Courts . . . includ[ing] research to develop creative ideas and procedures that could improve the administration of justice in the State courts and at the same time reduce the work burdens of the Federal courts. Such research projects might address . . . Reducing the burdens attendant to Federal habeas corpus cases involving State convictions . . ."

NEED FOR THE PROJECT

Both federal and state court officials have complained for years about federal habeas corpus procedures. Chief Justice Burger often drew attention to the burden posed for federal courts by state prisoner habeas corpus petitions. In statistical year 1987, for instance, 9,542 state prisoner petitions were filed in U. S. District Court, and 2,694 appeals of District Court decisions on those petitions were filed in the federal Courts of Appeals. These cases represented 3% of all District Court filings and 8% of the cases filed in the U. S. Courts of Appeals. Research has shown that relief is accorded to state prisoners in only 3.2% of the petitions filed. (See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments (US Dept. of Justice 1979).) Federal trial and appellate courts have both developed special procedures for handling these cases which consume less resources than the average case; nonetheless, the handling of these matters requires the expenditure of federal court resources and produces only rare benefits for state prisoners. The number of these cases continues to rise, but at a lower rate than the growth of state prison populations.

Some in the state courts see federal habeas corpus review of state court criminal convictions as both an affront to their sovereignty and an impediment to the certainty and finality of their judgments. The Conference of Chief Justices has passed numerous resolutions in the past ten years calling upon the Congress to enact legislation designed to restrict the application of the "Great Writ" to these cases, *inter alia*, by strengthening the presumption of correctness accorded state proceedings, factual findings and legal interpretations; creating a statute of limitations following the imposition of a final state judgment of conviction within which a federal habeas corpus petition can be filed; and prohibiting the adjudication of these matters by a federal magistrate.

Although the United States Supreme Court, through a decade or more of interpretations and rulings, has restricted significantly the circumstances under which a state prisoner can obtain federal habeas corpus relief (by, for instance, requiring exhaustion of state court remedies and according a presumption of correctness to state court post-conviction fact findings made in the course of "full and fair hearings"), the calls of both federal and state judicial officials for a legislative solution have gone unheeded.

Criticism of the "Great Writ" is not universal, however.

> The need for federal habeas has not subsided. State judges, who must stand periodic election or answer to the public under some version of the Missouri Plan, cannot be as zealous in the protection of constitutional rights as life-tenured federal judges, who view federal claims in isolation from the inevitable attention in state court upon the guilt or innocence of the defendant. State judges act at their peril when they subordinate societal interests in convicting the guilty to the defendant's interest in procedural safeguards. (Larry W. Yackle, The Reagan Administration's Habeas Corpus Proposals, 68 Iowa L. Rev. 609, 616 (1983).)

The problems of federal court habeas corpus review of state court convictions are magnified in the case of convictions in which a sentence of death has been imposed. The importance of the cases themselves is far greater, as is the attendant publicity and public interest. The usual procedures are more extensive, involving far greater federal court time and effort. Unlike the "ordinary" state prisoner habeas corpus case, the federal courts, including the United States Supreme Court, have granted relief to a significant proportion of prisoners on state death rows. According to one source, federal judges have found constitutional flaws in as many as 73% of state death penalty cases reviewed (Brief Amicus Curiae, for the NAACP Legal Defense and Education Fund, Inc., at App.E, at 1b-1b, Barefoot v. Estelle, 463 U.S.880 (1983)). Although that percentage is certain to fall now that the systematic challenges to capital punishment, and the initial review of most states' statutory procedures, have run their course, the likelihood of federal court relief for a state prisoner facing execution will remain not insubstantial.

Federal habeas corpus review in the death penalty context appears to most observers to be both chaotic and protracted. The least complicated case, in which relief is denied at every stage, will be presented to the U. S. Supreme Court a minimum of three times, and to the U. S. District Court and Court of Appeals at least twice each. The first petition for certiorari to the Supreme Court will follow affirmance of the conviction by the State's court of last resort. Following state post-conviction proceedings (including appeals within the state judicial system), a first Federal habeas corpus petition will be filed in U. S. District Court, where a

full-scale hearing will be held in most instances. An appeal will follow, which will also be given full -- not expedited -- attention. A second petition for certiorari will be filed in the Supreme Court. Following Supreme Court review, if any, the case will become the subject of state executive branch clemency proceedings. If clemency is denied, as an execution date approaches, emergency habeas corpus petitions will be filed in both state and federal trial courts, with expedited proceedings in both, followed by expedited appeals to the State and Federal intermediate and final appellate courts.

Death penalty litigation is extraordinarily complex, for the courts and for the attorneys involved. The cases involve every traditional criminal case evidentiary and procedural issue. They also involve a host of issues unique to capital cases, including special voir dire of jurors, presentation of evidence going to guilt or innocence and punishment, special penalty procedures including special factual findings by the jury, proportionality review (under some state appellate procedures), and unusual questions of competence of counsel. Post-conviction cases involve not only the issues going to the merits, but also those going to the imposition of a stay of execution. A separate body of precedent has developed, based on the Supreme Court's decision in Barefoot v. Estelle in 1983, on the criteria to be used in deciding whether to grant a stay of execution in order to allow the court additional time for consideration of the merits of a petition. Problems of exhaustion of state remedies, procedural default of possible claims, and abuse of the habeas corpus writ itself, take on significance equal to that of the merits of the issues sought to be raised.

Under current practice, many of these complicated issues are presented to the courts under bizarre time constraints. Both state and federal courts have become accustomed to a frantic pace of last minute writs, accompanied by frenzied paperwork from the attorneys, procedural ambiguities arising from simultaneous proceedings in multiple courts, and rapidly convened hearings and conferences, many by conference telephone call. Neither the prison authorities nor the prisoner know when an execution will be aborted by a telephone call literally at the last minute.

Despite the frantic pace of some of these proceedings, death penalty litigation in most cases is inordinately protracted. It is rare that a death sentence is executed within five or six years of its imposition.

The death penalty necessarily poses a dilemma for the legal system. Principles of deterrence and retribution that underlie the imposition of capital punishment require its relatively swift and certain imposition. Yet its inexorable finality requires that no stone be left unturned in the process of assuring that the person to be executed is in fact guilty and was convicted fairly and in accordance with constitutional procedural standards.

Our current processes clearly fail the objective of swiftness. But sadly, and ironically, because of the many procedural labyrinths and the plethora of attorneys involved at various stages of the cases, it is rare that every claim raised by a petitioner is decided on its merits prior to his or her execution, despite the extraordinary length of time consumed by the process.

Surely there must be better procedures by which to handle these cases. It is to find such procedures that the American Bar

Association proposes this project.

TASKS AND METHODS

The proposed study would be conducted by an expert state-federal task force, supported by a knowledgeable reporter and professional staff.

Composition of State-Federal Task Force: The task force would be co-chaired by state and federal appellate judges from circuits and states that deal with these problems regularly. Possible candidates for such leadership roles would be Chief Justice James G. Exum, Jr., of the North Carolina Supreme Court and Circuit Judge Alvin B. Rubin of the Fifth Circuit Court of Appeals. The task force would consist of at least eight additional members, including state and federal trial judges and court administrators, two state prosecutors or attorneys general, and two defense attorneys with extensive experience in death penalty litigation. Consideration would be given to inclusion on the task force of members of the U.S. Judicial Conference's Federal-State Jurisdiction Committee which contains both state and federal judges.

Reporter and staff: The reporter will be a law professor with an established reputation as a scholar of federal habeas corpus law, Professor Ira Robbins of American University.

The staff project coordinator will be Elizabeth Harth, Section Administrator for the Association's Section of Criminal Justice.

Duration: The project would last fourteen months.

Issues Paper: The project would commence with a staff analysis of the issues associated with federal court habeas corpus review of state death penalty cases. That analysis would address, but not be limited to, the following subjects:

• <u>Problems Associated with the Provision and Competence of Counsel.</u> Much of the chaos associated with current death penalty litigation appears to be linked directly to the inadequacy of current processes for appointment of counsel in state and federal post conviction death penalty proceedings. In few states is counsel appointed as a matter of right for the purpose of pursuing state post-conviction remedies. Instead, volunteer lawyers take on the cases. Due to the enormous burden of these cases, lawyers are willing to handle them on a pro bono basis only through state or federal court, not both, and for only one review cycle. Even where the attorneys are appointed, the fees provided in many states are inadequate by virtue of a low hourly rate or an unrealistic maximum limit or "cap." Consequently, the attorneys seek to withdraw at the earliest time.

When the case enters the federal system, the problems of counsel continue. Rule 8(c) of the Federal Rules Governing Section 2254 Cases in the United States District Courts authorizes the appointment of counsel at any stage, but does not require appointment until the need for an evidentiary hearing has been established. Consequently, volunteer counsel is often required to draft and file a federal habeas corpus petition, and to represent the petitioner in his efforts to obtain a stay of execution and a hearing on the petition.

Some federal judges then refuse to appoint the attorney who first appeared as a volunteer, even though compensation is available under the Criminal Justice Act. The result is further incentive for withdrawal of counsel and his or her replacement with another volunteer, or appointed, attorney.

Whenever new counsel appears in one of these cases, he or she inevitably identifies issues overlooked, or considered unimportant, by previous counsel. The plethora of issues, raised at various times throughout the course of the litigation, protracts and complicates death penalty litigation.

When state trial, appellate, or post-conviction counsel have not identified or pursued valid issues--by virtue of unfamiliarity with death penalty law, general lack of legal or trial experience, or incompetence--the problems are magnified. Death penalty cases constitute a specialized and complex area of the law. For the courts to be able to address them in a thoughtful systematic manner, they must be presented by attorneys for both the defendant/inmate and the state with a maximum degree of familiarity with the legal specialty and the specific case. Careful planning, adequate compensation, backup support centers, and state-federal cooperation are needed to achieve that objective.

• <u>Problems Associated with Exhaustion.</u> Another major impediment to efficient handling of these cases arises from the application of the exhaustion of State remedies requirement of <u>Rose</u> v. <u>Lundy</u>. It arises in this fashion: federal habeas

counsel, often different from state post-conviction counsel, identifies an issue not raised on direct appeal or during the state post-conviction proceedings. He may not raise that issue in Federal court; the presence of an "unexhausted" claim will cause the entire habeas petition to be dismissed. But his client's stay of execution is dependent upon the pendency of the federal habeas petition. The attorney has no choice but to go forward with the exhausted matters in the current petition, knowingly postponing consideration of the unexhausted matters until a subsequent proceeding.

• Problems Associated with State Procedural Default Rules. Most states have contemporaneous objection rules, barring the consideration on appeal of matters to which no objection was made at trial, unless the error was fundamental. Similar procedural bars exist for issues not raised on appeal, or in a post-conviction petition, if they were known, or should have been known, at the time of the filing of the appeal or petition. State appellate and trial courts often invoke such bars in death penalty litigation, rather than address all claims on the merits. Counsel feels obligated to seek a resolution of such matters on their merits, fearing that their client will be put to death despite the existence of a defect in his conviction. Consequently, the issue of the procedural bar will be litigated extensively in the federal courts, both in its own right, and in terms of the ineffective assistance of counsel by the attorney who failed to raise the issue in a timely fashion.

• Problems Associated with Cumbersome Federal Procedures. Numerous procedural hurdles face a federal habeas corpus litigant, which complicate, perhaps unnecessarily, the handling of a death penalty case. Among them are the requirement that the District Judge, or the Court of Appeals, issue a "certificate of probable cause" for an appeal, the requirements associated with proceeding in forma pauperis, the procedures for appointment of counsel, and the requirements for a transcript at government expense. In each of these instances, federal rules and statutes require that a judge make a preliminary judgment of the merits of the case in the course of a procedural ruling.

• Problems Associated with the Zeal of Counsel. Death penalty litigation has been characterized by the zeal with which counsel for death row inmates pursue their clients' interests, including last minute, desperation attempts to obtain stays and raise new claims to avoid or postpone execution. This project would not, and could not, attempt in any fashion to check an attorney's ethical or personal moral obligation to pursue his or her client's best interests to the last ounce of the attorney's strength and competence. The project could not have as its goal the elimination of all last minute appeals in such cases. However, obtaining an opportunity for orderly, thorough presentation of all issues in the case -- in an atmosphere conducive to thoughtful judicial consideration of them -- is the true goal of defense attorneys in these death penalty cases. The inmate's interests are not served by chaotic, disjointed consideration of his claims.

* Problems Associated with Delay Itself. The drawn out consideration of death row litigation itself breeds confusion, complication and further delay. The vacation of any other death penalty verdict -- even on grounds that in another context would be considered routine -- creates the need for the investigation of the possibility of another non-frivolous claim in the hundreds of other pending death row cases. Providing a thorough, but not protracted, review process might reduce this compounding process.

Empirical Data. The reporter and staff will assemble and include in the issues paper existing empirical data on state and federal court review of state death penalty cases. Data collected by the Administrative Office of United States Courts will not be useful. Current federal court statistical reporting procedures identify a case only as arising under 28 U.S.C. 2254 -- the state prisoner habeas corpus jurisdiction. They do not differentiate death penalty from other state criminal convictions. Nor do they report case outcomes. No report is made of the District Court disposition. The appellate courts report whether cases are affirmed, reversed, affirmed in part and reversed in part, etc.; but, even with consistent District Court outcome data, such conclusory designations of appellate action would be incapable of indicating reliably whether the state prisoner had ultimately prevailed or failed. The federal courts have no current plans to revise the statistical reporting system in those regards, or to supplement the data with a case-by-case analysis of death penalty habeas corpus outcomes.

The empirical evidence will thus have to be derived from studies done by others, or inspired by the task force's inquiry and public hearings. The project budget will not support the gathering of original data. Nonetheless, the issues paper itself could invite interested parties, including law reviews and graduate programs in

social science, to undertake such studies.

Public Hearings. After review by the task force, the issues paper analyzing these and other matters would be disseminated widely within the legal community, to practitioners and judges in every state and federal circuit where capital punishment is authorized, and to national organizations with an interest in the topic. The task force would then hold three open hearings on the paper -- on the East and West Coasts and in the Midwest -- to elicit opinions on the correctness of the views expressed, to obtain other perceptions of problems associated with Federal habeas corpus review of state death penalty convictions, and to solicit proposed solutions to the problems identified.

Invitations to testify would be sent to the state and federal judiciaries in every jurisdiction where capital punishment is authorized, to the attorney general and a representative local prosecutor of each such State, to the National Association of Attorneys General, to the National District Attorneys Association, to the U. S. Department of Justice, to state and local public defenders in each such state, to Federal Public Defenders, to the National Legal Aid and Defenders Association, to the National Association of Criminal Defense Lawyers, to representatives of every death penalty litigation "back up" center, and to state and local bar associations.

Preparation of Report and Recommendations. Following the hearings, the task force, with the assistance of its reporter, would prepare a report with recommendations embodying its findings. The task force will not take a position on the advisability of the death penalty, or the advisability of federal habeas corpus review of

state criminal convictions. It might include in its report legislative recommendations for the Congress and the state legislatures and proposed rule changes for consideration by federal and state judiciaries; however, it would include, as well, recommendations for administrative actions that could be taken under current law. The task force's report will be presented to the ABA House of Delegates for approval as policy of the Association. It will also be printed for widespread distribution prior thereto. Members of the task force will present the task force's report to the Conference of Chief Justices, to the Judicial Conference of the United States, to federal and state legislative bodies, to legal organizations, and to other interested organizations.

Evaluation. The project's work will be evaluated in terms of the reception accorded its recommendations. It they are adopted widely, the project will be considered a success. If they are ignored or rejected, the project will fail.

Cooperation. The Director of the Federal Judicial Center has expressed his personal belief in the importance of the proposed project and indicated his willingness to provide the Association with access to any relevant expertise the Center's staff may have. Neither Director Godbold nor the Association have yet been able to identify a more formal role that the Center could play in the project, the Center having conducted no previous studies of habeas corpus or federal review of state death penalty cases. Professor Robbins is, in fact, one of the Center's experts on this issue, having been used extensively by the Center as a lecturer on federal habeas corpus procedures to federal trial and appellate judges, magistrates and staff attorneys.

PROJECT MANAGEMENT

The project will undertake these tasks:

Task 1 (Month 1) - Appoint Task Force membership:

During the first month of the project, the Section of Criminal Justice will select and appoint the task force members. Members will be sent the project description and tentative timetable, and urged to share their thoughts on project focuses with the reporter.

Task 2 (Month 1) - Execute Contract with Reporter:

The Project Coordinator during the first month will also draft and execute a contract with the reporter for the project, delineating his duties.

Task 3 (Month 1) - Advise Outside Groups:

The Project Coordinator will advise outside groups and other potentially interested ABA entities about the project's launching and its objectives. Suggestions for the task force's focus will be solicited. Organizations will be informed about the project's timetable and its plans for public hearings.

Task 4 (Months 1 through 4) - Survey Literature and Prepare Draft Issues Paper:

As soon as the project commences, the Reporter, with the help of student research assistants and the Project Coordinator, will assemble and synthesize available literature into a draft issues paper. He will talk by phone with each Task Force member and with a limited number of other experts to identify issues. He will assemble and analyze existing empirical data on both state and federal reviews of death penalty convictions and solicit supplementary studies from other potential sources.

Task 5 (Month 4) - Hold Initial Task Force Meeting:

The task force will convene in the fourth month to clarify project objectives, review the draft issues paper (disseminated in advance), and discuss plans for the public hearings.

Task 6 (Months 5 through 8) - Arrange Logistics for Public Hearings and Notify Potential Attendees:

Following the first task force meeting, the Project Coordinator will begin scheduling the three hearings -- choosing sites, negotiating arrangements, and notifying potential attendees as described previously.

Task 7 (Month 5) - Prepare and Disseminate Final Issues Paper:

The Reporter and research assistants will revise the draft issues paper in accordance with the task force's instruction. The Project Coordinator will disseminate it to all potential public hearing attendees and other interested parties.

Task 8 (Month 7) - Hold First Public Hearing:

The task force will hold its first hearing six weeks after the issues paper is disseminated. Following a two-day hearing, the task force will discuss the input obtained.

Task 9 (Month 8) - Hold Second Public Hearing.

Task 10 (Month 9) - Hold Third Public Hearing and Give Tentative Direction to Reporter:

The task force will attempt to develop a rough first approximation of a consensus for its recommendations following the third hearing.

Task 11 (Months 10 and 11) - Prepare First Draft Report and Recommendations:

The Reporter will prepare a first draft of a report and recommendations for review by the task force.

Task 12 (Month 11) - Fifth Task Force Meeting:

The task force will convene to conduct a major review of the first draft report, giving the Reporter detailed guidance for revisions and supplementations of the document.

Task 13 (Months 11 through 13) - Prepare Second Draft Report and Recommendations:

The Reporter will prepare a polished report for the project.

Task 14 (Month 13) - Final Task Meeting:

The task force will convene to make final editorial changes to the Report and Recommendations.

Task 15 (Month 14) - Prepare and Disseminate Final Report and Recommendations:

The final product will be prepared by the Reporter and Project Coordinator, and disseminated by the latter to all hearing attendees and other interested parties.

Task 16 (Months 3, 6, 9, 12 and 14) - Prepare Quarterly Progress and Financial Reports:

The Project Coordinator will prepare and submit these required reports to SJI within 30 days of the close of each calendar quarter.

Task 17 (Post-project) - Obtain ABA House of Delegates Approval of Report and Recommendations:

The task force members, with the help of Criminal Justice Section staff and volunteers, will present the report to the Association's policy-making body -- the House of Delegates -- at the next appropriate occasion following project completion and report dissemination.

Task 18 (Post-project) - Report Promotion:

Members of the task force will undertake to present the Report and Recommendations to federal and state judicial, legislative,

and executive branch policymakers, and to other interested organizations, as funds for travel are available from the Association or from the interested organizations.

Project monitoring and quality control will be provided by Laurie Robinson, Director of the ABA's Criminal Justice Section, by the Task Force co-chairs, and by the Task Force members. The Section has a reputation for high quality workmanship on projects of this sort.

PRODUCT

The project will have but a single product -- its Report and Recommendations -- designed to be a highly practical series of suggestions for changes in state and federal court procedures to improve and rationalize the process of review of state death penalty convictions. The Report will contain an executive summary suitable for publication in Judicature, the ABA Journal, Criminal Justice, the State Court Journal, or similar publications.

APPLICANT STATUS

The American Bar Association Fund for Justice and Education (FJE) is the 501(c)(3) entity within the Association through which the ABA is qualified to accept tax-exempt grants or gifts to assist the organized bar in carrying out public service activities and projects; separate accounting records are maintained for each FJE project. The ABA sponsors over 150 such projects each year. Through the Office of the Comptroller, the American Bar Association administers over 200 grant-funded projects. Throughout the life of the program, the Grant Administration Unit, of the Office of the Comptroller, works with project coordinators to insure compliance

with grantor conditions for program reporting and expenditure of funds. Separate accounting records are maintained for each project. The American Bar Association Fund for Justice and Education is audited annually, a copy of which is enclosed.

As a membership organization with over 340,000 members, representing every state and type of jurisdiction in the country, the ABA is in an excellent position to undertake the project -- which will have national implications for judges, attorneys and others in the criminal justice system.

STAFF CAPABILITY

Professor Ira P. Robbins will serve as Reporter. He has written and taught extensively on the subject of federal habeas corpus review of state criminal convictions. Professor Robbins is a Phi Beta Kappa graduate of the University of Pennsylvania and the Harvard Law School. He has taught law at the University of Kansas and American University, clerked for the United States Court of Appeals for the Second Circuit, served as a U. S. Supreme Court Judicial Fellow, and even served briefly as Acting Director of the Federal Judicial Center's Division of Continuing Education and Training.

Professor Robbins has served as reporter for a previous ABA project to study privatization of corrections made possible by a grant from the John D. and Catherine T. MacArthur Foundation. That project has been performed at the highest degree of professional workmanship, thoroughness, and written excellence. A copy of his resume is attached in Appendix A.

Section Administrator Elizabeth Harth will devote 20% of her time as Project Coordinator, handling all planning, administrative,

financial and personnel aspects of the undertaking. She will have chief responsibility for initial notification of interested parties, for structuring meetings, and for product dissemination. Ms. Harth has served in a similar capacity for other successful Criminal Justice Section grant projects, including the MacArthur Foundation-funded project on private prisons (working with Professor Robbins) and a National Institute of Justice-funded project on expediting criminal appeals. Her 13 years' experience with the American Bar Association, with increasing administrative and fiscal responsibilities, will provide the project with effective coordination, assuring an efficiently run project and a timely product.

Laurie Robinson, Director of the ABA's Professional Services Division (D.C.) and Criminal Justice Section Staff Director, will contribute a portion of her time to the project to provide management support and linkage to other ABA entitites and outside organizations. Her long experience with the Association and in the criminal justice field will help insure the project effectively draws upon the ABA's extensive volunteer resources. She has directed numerous grant projects and ABA standards-drafting efforts. (A copy of both Ms. Harth's and Ms. Robinson's resumes are included in Appendix A.)

The project will hire an administrative secretary (40% time) to handle word processing, mailing, meeting arrangements, and other secretarial duties. Criteria ordinarily used for ABA secretarial hiring will be employed in selecting this individual.

ORGANIZATIONAL CAPACITY

The American Bar Association, the nation's largest professional association, has a membership of more than 340,000 members -- representing over half of the country's attorney practitioners. Sponsorship by the ABA will insure the project a national scope, as well as ready access to and credibility with individuals whose participation will be essential to its success. The Criminal Justice Section is well suited to serve as project sponsor. Its "umbrella" membership of some 8,700 includes state and federal judges, prosecutors, private defense attorneys, public defenders, law students, and law professors, as well as law enforcement and corrections professionals.

The American Bar Association is an appropriate entity to sponsor such a study. It has taken no position on the wisdom of capital punishment as a criminal sanction (although it has opposed its imposition on minors). It has focused considerable attention upon the adequacy of legal representation for persons charged with capital offenses and for prisoners facing execution, conducting for the past two years a Death Penalty Representation Project (financed with its own funds) to draw attention to the plight of unrepresented inmates, to recruit volunteer attorneys to represent them, and to address the need for systematic approaches to representation for future death row cases. The project has provided assistance on the subject to the Defender Services Branch of the Administrative Office of United States Courts. It has worked with the Conference of Chief Justices, as well, to direct attention to the problems of adequate legal representation. It has helped to launch "back up centers" in a number of states to assist appointed attorneys to cope with the

unique legal issues presented by death penalty litigation. The American Bar Association includes within its ranks both state and federal judges, but is not controlled by, or especially beholden to, either. The prestige of the Association will assure that the most competent group of experts will be assembled to address the problem, that their deliberations will be supported by knowledgeable staff, and that the product of their work will enjoy considerable professional respect within both the federal and state judicial branches.

Funding by the State Justice Institute, under the auspices of the special authority conferred upon it by the Congress to study cross-jurisdictional problems of this sort, would serve to confer special legitimacy upon such an endeavor.

BUDGET

Financial assistance has not been sought from other sources. Because it is uniquely suitable for SJI funding, the Association has no current plans to seek funding elsewhere. A detailed budget narrative follows.

0057Q

My copy

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

See pp 12-16 for suggestions

M E M O R A N D U M

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. Yes

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.

where state has been prejudiced in ability to respond

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).

State must show delay prejudiced to respond

Rule 9(b)

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

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). yes

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

'Failure to object' limits H/C.

See Wainwright v. Sykes (must show "good cause" & prejudice)

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 (failure to object) . . . 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.

failure of counsel to recognize a claim is not "good cause"

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~~ is without exception, however. ~~Each has an~~ The equitable exception~~s~~ to Wainwright v. Sykes are ~~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.~~

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/L lim. 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 S 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!

p. 11.

> 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 limitation 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 substituted 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.

no

?

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.

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.

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.

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* by Fed Cts of Const. Claims

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

But it would be contrary to Federalism

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.

TO: Justice Powell September 15, 1988

FROM: Hew

RE: Ad Hoc Committee on Federal Habeas

DISCUSSION OF PROPOSALS

A. Chief Justice's Proposal

The Chief Justice's proposal, prepared by Al Pearson, would amend 28 U.S.C. §2244, which is the statutory provision that states the substance of Rule 9. The proposal would apply a one year statute of limitations to the filing of habeas petitions in capital cases only. The statute of limitations would apply only where either (1) the prisoner was represented by counsel during state post-conviction proceedings and for an aggregate of one year following the completion of the proceedings, or (2) where the state set up a program, approved by the judges of the CA for that state, to provide counsel to death-row prisoners. I note that a similar proposal to apply a limitations period triggered by provision of counsel has been introduced in Congress, H.R. 5217. H.R. 5217 is not limited to capital cases.

Professor Pearson expresses some question about the appropriate date from which the statute should run because of the difficulty of defining "exhaustion." He suggests that the limitations period run from the "last dispositive order on the merits issued by a state court prior to the

federal petition." The statute would provide an "escape clause," in that the limitations period would not run as to claims that could not have been raised during the limitations period because of (1) an unconstitutional impediment created by the state, (2) novelty of the claim, (3) new facts that could not have been previously discovered.

Professor Pearson's memo provides a good discussion of the features of this plan. I took special note of several of his comments. First, he is unsure whether the increased finality and state interest in carrying out executions will be sufficient to persuade the states to set up programs to provide counsel. He believes that partial federal financing will be necessary as an incentive. Second, Professor Pearson acknowledges that the proposal cannot specifically solve the problem of last-minute petitions prior to execution. He apparently feels that any system that provides a safety valve for new legal claims or newly discovered facts will inevitably allow last minute stay attempts.

I believe that the Chief's approach is very promising, especially from a pragmatic viewpoint. The fate of the numerous habeas reform bills in Congress (I do not have the figures, but I guess that there have been as many as 50 since 1980) suggests that legislative proposals along the same lines that have been tried previously will fail. This proposal adds a new twist that may bring success. There is currently a strong movement afoot to assure representation for death row prisoners. Mr. Civiletti's ABA program, which

you mentioned in Toronto, is one example. The statute of limitations proposal allows a useful tradeoff -- states provide counsel and in return can be assured of some measure of finality. Although I wonder about the fact that the proposal applies only to death row prisoners, the fact that the recent moves for provision of counsel have focused on capital cases suggests the limitation may be workable. Also, the financial burden on the states of a system limited to capital cases would be far lighter.

This plan would also appear to serve the function of causing prisoners to bring all of their claims in one petition. Once state collateral review is complete, the limitations period would begin to run as to all claims, not just those that were exhausted. Because it will be virtually impossible for a prisoner to return to state court to exhaust claims not initially brought in the state collateral proceeding within the one-year limitations period, those claims would be lost. Prisoners will thus have an incentive to bring all their claims in the first state habeas petition. Those claims will then be exhausted, and ready for presentation in a single federal petition. The successive petition problem might be ameliorated in this way without change to 9(b), since claims not brought in a previous petition would be barred once the limitations period had run. Of course, exceptions for new law or facts would likely remain, and would continue to be the basis of last minute stay attempts.

B. Chief Judge Clark's Proposals

Chief Judge Clark's memo provides a good summary of the law with respect to habeas corpus. As for proposals, the memo notes four causes for delay: (1) delay in filing, (2) successive petitions, (3) the exhaustion requirement, and (4) delay in resetting execution dates. The memo states that successive petitions are addressed by Rule 9(b) (I do not agree that 9(b) in its present state is doing a sufficient job) and that the effect of exhaustion is mitigated by the state's ability to waive the exhaustion requirement. The memo's proposals therefore address delay in filing and setting execution dates.

First, the memo discusses the possibility of statutes of limitations. The memo expresses the view that the limitations periods suggested by the Chief and Judge Hodges may not be constitutional. I do not agree with this. First, habeas review of state convictions is a statutory right. Second, I cannot see why a mere statute of limitations would run afoul of the Suspension Clause even if it were applicable. I agree with the memo's criticism of Judge Hodge's proposal: a one year statute of limitations to run from the completion of direct review would not leave time for exhaustion. I note that the study included as item 6 in the materials suggests that exhaustion requires an average of 2.8 years. I further question the utility of Judge Hodge's proposal to allow a federal petition to be filed within the one

year limitations period and then stayed pending the completion of exhaustion.

Page 13 of Judge Clark's memo proposes a "modified statute of limitations." The limitations period would apply only to claims previously raised in state court. I must admit that I do not understand this proposal. The memo states that the modified statute of limitations would not infringe on the exhaustion doctrine, but proposes a "[short limitations period] that would run from the end of direct review." The memo also suggests an equitable exception to the rule that would borrow the "cause and prejudice" standard of Wainwright v. Sykes. Yet the cause and prejudice standard applies by definition to claims that were not raised in state court, while the proposed limitation would apply only to claims that were. Maybe I am overlooking something here.

The memo next suggests a scheme of direct review of state convictions by federal courts. A direct review scheme would have a built in time limitation. I note that the memo does not discuss the question whether counsel would be required for the added stage of "direct" review. The memo suggests that the proposal could create problems for federalism, and that direct review of state courts by lower federal courts is "unprecedented." As to that point, it is interesting to note that Federalist No. 82 proposed direct review of this type. What is more, although it would be novel to have "direct" review, we presently have plenary

review of state supreme courts by single federal district judges. The memo suggests that states might participate in the review scheme at their option through a system of certification. This could eliminate some potential for federal/state tension. The memo suggests as an option the creation of a new federal intermediate court. I see from your notation that your interest in this possibility is limited. These proposals for direct review are strikingly similar to those in Professor Meador's article, which I believe you have read. The article is item no. 4 in the book.

My own view is that direct review would be a symbolic affront to the states, but could provide a workable limitation. The present system essentially allows direct review, but with no time limit for its exercise. If a direct review were adopted, I believe that only claims of factual innocence based on new evidence should be entertained following the appeal. I imagine that newly decided cases would apply retroactively while a case remained on "direct" appeal at this new federal stage. As a general matter, I think that such a radical proposal may not be the best use of the Committee's time. Progress is likely to come through concentration of efforts on on a single proposal, and I believe the Chief's has a greater likelihood of success.

The memo finally suggests changes in state law so that a stay would not require resetting of execution dates. This would perhaps be a step beyond the provisions for setting a period for execution rather than a single time of execution

that you discussed in the ABA speech. I believe this proposal would be a positive development, but I wonder what role the committee can take in advocating changes to state law.

C. Rule Changes or Legislative Proposal

I have given further thought to the question whether changes to the Rules Governing §2254 Cases might provide a better approach than legislation. My present view is that rulemaking is not likely to be a superior approach. Under 28 U.S.C. §2072, rules that are approved by the Supreme Court become effective ninety days after they are reported to Congress unless Congress takes adverse action. §2072 states, however, that changes in the Rules "shall not abridge, enlarge, or modify any substantive right." A tightening of the standards concerning successive petitions under Rule 9(b)would arguably be a "substantive" change.

From a practical standpoint, I also wonder what would be gained by the rulemaking approach. Changes to the habeas rules would have to be approved by a majority of the Court. With the exception of Woodard v. Hutchins, 464 U.S. 377 (1984), I am not aware of cases in which a majority of the Court has endorsed a strict interpretation of "abuse of the writ" under Rule 9(b). Further, in view of the consistent failure of habeas legislation in Congress, I do not think it likely that Congress would allow changes in habeas procedure to become effective without heavy scrutiny. In view of the likely opposition to any significant changes, I remain con-

vinced that the Chief's proposal has the greatest potential of those we have seen at this early stage.

R.H.P.