12-1988

Habeas Corpus Committee - Memoranda

Lewis F. Powell Jr.

File

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

December 16, 1988

MEMORANDUM TO THE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS REVIEW OF CAPITAL SENTENCES

I am pleased to transmit the minutes of our last meeting on November 30. Justice Powell has reviewed these minutes in draft and asked me to distribute them at this time.

I look forward to seeing you at our next meeting here in Washington on January 30. With best wishes for the Holidays.

William R. Burchill, Jr.

Attachment

cc: Chief Justice of the United States
Mr. Noel J. Augustyn
Professor Albert M. Pearson

JUDICIAL CONFERENCE AD HOC COMMITTEE ON HABEAS CORPUS REVIEW OF CAPITAL SENTENCES

Minutes of the Meeting of November 30, 1988

The Ad Hoc Committee on Federal Habeas Corpus Review of Capital Sentences held its second meeting at the Supreme Court Building, Washington, on November 30, 1988. Justice Lewis F. Powell, Jr., presided, and all members of the committee were present. Also in attendance were Professor Albert Pearson of the University of Georgia Law School, Hewitt Pate, Law Clerk to Justice Powell, and William R. Burchill, Jr., General Counsel, Administrative Office of the United States Courts.

Justice Powell opened the meeting by asking the committee's approval of the minutes of its first meeting, held on September 16, 1988. Those minutes were approved unanimously. Justice Powell then noted that the committee had received a legal memorandum from Professor Pearson prepared incident to its discussions at the last meeting. He called upon Professor Pearson to summarize the essence of the memorandum.

Professor Pearson began by stating the need to refute any view that death penalty habeas corpus petitions do not constitute a major burden on the Federal courts. While habeas corpus cases account statistically for only about four percent of civil filings in 4% of the United States district courts, it is evident that habeas corpus review of capital cases is unique in its consumption of judicial time and resources. He noted that, in evaluating the sources of this burden, concerns as to adequacy of legal representation are widely perceived as a leading cause, although these concerns span the whole habeas corpus jurisdiction and are not confined by any means to death penalty cases. Professor Pearson suggested that increased empirical information would be desirable in order to document

the extent and nature of the courts' problems in adjudicating capital habeas claims. Such data would be helpful not only in documenting the degree of the problem and building support for remedial steps but also in refuting the thesis of critics of reform, as expressed in the recent National Law Journal article regarding the Ad Hoc Committee's formation, that judges tend to be *inimical* to this category of their docket.

Professor Pearson then identified the following potential changes as possible options to reduce the excess time and duplicative nature of Federal habeas review in capital cases:

- elimination of multiple opportunities for certiorari review at disparate stages of the process;
- design of a sequential system requiring complete disposition by a United States court of appeals of all lower court review prior to the opportunity to petition for certiorari;
- provision for an automatic stay of execution on first petition for Federal habeas review to eliminate the need for individual review of stay applications.

At this point Justice Powell raised the question whether these conclusions extend beyond the Chief Justice's charge to the Ad Hoc Committee and might present too large an undertaking for change. Justice Powell noted that some commentators have suggested the desirability of eliminating dual Federal-state collateral review, as has occurred in the District of Columbia through the D.C. Court Reorganization Act of 1970, but questioned whether such an objective is beyond the Ad Hoc Committee's mandate. Professor Pearson in response stated that the Chief Justice's primary expressed interests

are the creation of a statute of limitations upon state habeas review in Federal court and the provision of counsel for state habeas petitioners under sentence of death, thus enhancing the ability of the Federal courts to require timely and orderly processing of their petitions. Professor Pearson urged, however, that the Ad Hoc Committee consider other ideas, including that of Professor Daniel Meador to confine Federal habeas review to the court of appeals level. His proposal is also premised upon the provision of adequate counsel in the direct and collateral proceedings at the state level, resulting in a relatively complete factual record for Federal collateral review and diminishing the need for Federal evidentiary fact-finding.

Justice Powell then inquired of Judge Sanders as to the plans and schedule of the American Bar Association task force on this issue. Judge Sanders responded that this task force has now been formed under the co-chairmanship of Judge Alvin Rubin of the Fifth Circuit and Chief Justice Malcolm Lucas of the California Supreme Court. It is a ten-member group with three appointments remaining to be made, and it will have available the reportorial services of Professor Ira Robbins of American University Law School. Judge Sanders added that the ABA task force has been given an 18-month time frame in which to make its report and has been asked to confine its efforts to the death penalty habeas situation, although its original mandate had been broader. Of further relevance to the timing of the Ad Hoc Committee's study, Justice Powell cited the provisions of the recently enacted Anti-Drug Abuse Amendments of 1988, section 7323 of which urges the Ad Hoc Committee to expedite filing its report and attempts to facilitate expeditious congressional consideration thereof.

Judge Sanders then expressed the need for more empirical documentation of the extent of the death penalty habeas corpus problem. He noted the wide variation between the various state death penalty procedures as to when and how execution dates are fixed,

setting the stage for Federal habeas review. At this point a general discussion took place as to the practicality of any attempt to standardize the disparate state death penalty procedures in the interest of avoiding last-minute review initiatives. The discussion focued on (1) the early provision of counsel to assure full and fair consideration of constitutional objections as promptly as possible, together with the possibility of a statute of limitations to address late attacks based on ineffective assistance of counsel. The discussion acknowledged that a statute of limitations cannot effectively bar late attacks based upon newly emergent principles of law or newly discovered evidence. Judge Clark stated that the key is to build a cooperative relationship between the Federal Judiciary and state governments, addressing orderly procedures in the relatively small universe of death penalty cases, and that this might even alleviate the need for a statute of limitations. Judge Sanders agreed that more evidence will be necessary to support the imposition of a Federal statute of limitations.

Judge Hodges then addressed and supported the idea of providing for one automatic stay of state execution proceedings to enable a petitioner's resort to Federal collateral review. He stated that such an automatic stay would reduce the public perception of Federal judges deliberately exercising their discretion on issuance of stay so as to frustrate state law and procedure. A discussion then took place as to the difficulty of attracting and retaining quality lawyers to serve as counsel to defendants confronting the death penalty. The consensus of the discussion was that the chronic delays and absence of any certainty in time commitment when undertaking this category of cases have deterred lawyers from volunteering a commitment which can extend over many years and readily subject them to claims of ineffective assistance of counsel.

Justice Powell then returned the discussion to the question of needed data. Judge Sanders suggested that it is necessary to determine the principal sources of delay

in these proceedings and particularly whether delay typically occurs in the Federal system or between the conclusion of state collateral proceedings and the institution of Federal proceedings. He also raised the question of the role of exhaustion requirements in propagating delay, the number of capital defendants who have counsel at the state level, and the time it takes these cases to move through the state judiciary. The question was then raised as to how to acquire this sort of data, and Professor Pearson suggested that the attorneys general of the states leading in death penalty imposition could be asked to provide it.

Judge Roney expressed the desirability to eliminate duplicative appeals and to reduce death penalty cases to three distinct phases—direct review, state collateral review, and Federal habeas review. Judge Hodges expressed support for allowing state and Federal collateral review to proceed simultaneously.

Justice Powell then asked Professor Pearson to review the categories of empirical data that would be needed and useful to fulfill the purposes delineated in the committee discussion. Professor Pearson answered that what is needed in summary is the procedural history of these cases, and he recited the following proposed specific data requests:

- time consumed in state court;
- time consumed in Federal court;
- time consumed resulting from failure to comply with exhaustion requirements;
- the practice of each state as to willingness to waive exhaustion compliance;
- the practice of the state in providing counsel for collateral review in capital cases;

what about the Court's decision?

- an analysis of the reversal patterns of death sentences, i.e., how does each state define a reversal and at what stage do reversals occur?

Justice Powell then proposed that the Ad Hoc Committee should communicate with the state attorneys general in each of the states within the Fifth and Eleventh Circuits to seek the categories of data outlined by Professor Pearson. The committee agreed that this will be done. In summarizing the need for such data, Judge Clark noted that it should inform the committee on the extent of needed Federal-state interaction or whether the need for reform measures is primarily confined to the Federal phase of this process.

The question was then raised whether Professor Pearson will need professional assistance in collecting this data. He stated that the extent of needed assistance will depend upon whether the data is presented by the state attorneys general in standardized statistical form. He expressed the likely need for at least some statistical help, but it was agreed that this must await his initial contact with the attorneys' general offices after Justice Powell has made initial contact with them by letter formally requesting cooperation. It was agreed that, for the present, this exercise will be confined to the six states of the Fifth and Eleventh Circuits because they have an estimated one-half of all death penalty cases and 90 percent of the executions. Professor Pearson noted that California is the only other state with relatively comparable numbers in these categories.

Judge Roney then raised the question of devising a procedure for certification by the states to the appropriate United States court of appeals of the Federal constitutional issues implicit in a particular death sentence prior to the governor's signing of the death warrant. Judge Roney urged that legislation to this effect be seriously considered.

Judge Clark distributed a check-list type memorandum employed in the Southern District of Alabama for death penalty habeas cases. He described it as a modified Rule 16 procedure with a pretrial order intended to expedite identification of issues and thus foreclose repetitive Federal petitions.

Justice Powell noted that so far only Chief Judge Holloway of the Tenth Circuit has responded to his request to all Judicial Conference members to comment upon the Ad Hoc Committee's mission. Judge Holloway's letter focused upon the need to promote consistent and effective legal representation for capital defendants. Justice Powell stated that he will acknowledge Judge Holloway's letter. Justice Powell then reviewed the remainder of the meeting agenda, noting that the determination to acquire additional data would moot most of the remaining topics for present discussion. In particular, the Anti-Drug Abuse Act provision affecting the Ad Hoc Committee had already been discussed, a decision about public hearings was deferred in view of the expressed concern about how to delineate the number of participants and assure the hearings' orderly conduct, and it was agreed that the preparation of tentative recommendations remains premature. Justice Powell urged the members to read the article by the late Judge McGowan which had been distributed. Judge Clark raised the issue of possibly establishing by procedural rule time limits upon various phases of capital habeas proceedings and the establishment of priorities for the disposition of such cases. Judge Clark clarified that he was not promoting this proposal, but Justice Powell directed that it be placed on the agenda for further discussion at the next Ad Hoc Committee meeting. Judge Sanders noted in this regard that nearly all preexisting statutory priorities on judicial disposition of cases were repealed by Congress in 1984 (Public Law No. 98-620, § 401(a), 98 Stat. 3356), although habeas corpus cases remain a statutorily defined priority under 28 U.S.C. § 1657.

In view of the committee's threshold decision to seek additional empirical information, it was agreed that there is no possibility of submitting any final recommendations to the Judicial Conference at its March 1989 meeting. Thus the committee decided to schedule its next meeting for Monday, January 30, at the Supreme Court Building in Washington. Finally, Justice Powell referred to a suggestion that the Ad Hoc Committee participate in the upcoming Brookings Institution seminar on relationships between Congress and the Judiciary, which is scheduled for April 6, 1989. Justice Powell questioned the relevance of this meeting to the Ad Hoc Committee's agenda, but it was decided to defer any decision on participation at the Brookings session until the committee's January 30 meeting to determine whether its proposals are then sufficiently developed to justify such participation. The committee then adjourned.

Respectfully submitted,

William R. Burchill, Jr.
General Counsel

Summary of Issues for Task Force Consideration

Preliminary Issues

1) What is the purpose of state and federal post-conviction review of state criminal convictions? Is the purpose different for capital than for non-capital cases?

Issues Associated with the Competence, Provision, and Zeal of Counsel

2) Should the states be required to provide counsel for indigent persons after the first appeal as of right? If so, should the counsel requirement include state post-conviction review? Review on certiorari in the United States Supreme Court? Should the federal government be required to provide counsel for indigent persons on federal habeas corpus review?

3) What compensation and other resources should be provided?

4) Should different counsel be appointed at some stage of the review process, such as on direct appeal in the state?

5) Should jurisdictions create a formal system for providing counsel for indigent persons in capital cases? If so, how should the system be structured to attract and retain qualified attorneys and to insure independence of counsel and competent representation?

6) Should standards for representation of defendants/appellants/petitioners in capital cases be established? If so, what standards? Should state and local bar associations take steps to implement these standards?

Issues Associated with State Procedural Default Rules

7) Should state procedural default rules apply in capital cases? If so, what should be the test for their application? How should the test apply to unintentional counsel errors? Under the Wainwright v. Sykes and Murray v. Carrier standard, how should the terms "fundamental fairness," "manifest injustice," and "miscarriage of justice" be defined for capital cases?

8) Should federal judges be able to rule directly on the merits of habeas corpus petitions in capital cases?

Issues Associated with Exhaustion of State Judicial Remedies

9) Should the exhaustion doctrine be eliminated or modified in death penalty habeas corpus cases? If the latter, are the rules for waiver of exhaustion already sufficient to accomplish the purposes of a modification? Alternatively, is an amendment to 28 U.S.C. §§ 2254(b) and (c) warranted?

10) Should the state routinely waive exhaustion in capital cases?

11) Where unexhausted claims are presented to a federal district court that has stayed or is disposed to stay the execution, should that court hold the case in abeyance until all cognizable claims have been exhausted in the state system?

Issues Associated with Successive Petitions, Abuse of the Writ, and Delay

12) What standards should apply for federal courts to entertain second or successive petitions in capital cases? Should the standards for "same claim" successive petitions be different from those for "new claim" successive petitions? How should the term "ends of justice" be defined?

13) Should there be a statute of limitations for state and/or federal post-conviction petitions in death penalty cases? If so, what should the limitations period be? When would it start to run? What exceptions, if any, would exist?

Issues Associated with Certificates of Probable Cause, Stays of Execution, and Last-Minute "Chaos"

14) What measures, if any, should be adopted to require or encourage the filing of post-conviction proceedings before a date of execution is set? After a date of execution is set and collateral review is sought, when should a stay of execution be granted? For what duration?

15) Should there continue to be a certificate-of-probable cause requirement for the review of capital cases? If so, should it be restricted only to second or subsequent appeals from the denial of habeas corpus relief? If a district court denies a certificate of probable cause, what weight should the appellate court attach to that denial?

16) If the certificate requirement continues to be applied in capital cases, when a district judge, circuit judge, or circuit justice grants a certificate of probable

cause should a stay of execution automatically be granted as well? If a federal district court grants relief on a habeas corpus claim, should it address the merits of all of the other questions as well?

17) Are expedited procedures appropriate for the post-conviction review of federal constitutional claims in death penalty cases? If so, when? What should they be? Should they be restricted only to second or subsequent appeals from the denial of habeas corpus relief?

18) More generally, should the Task Force develop a "model timetable" for all of the stages of death penalty review? If so, what times are appropriate for each stage? What exceptions, if any, should be recognized?

19) Whether or not there are expedited procedures, what internal procedures (such as assigning all motions and substantive matters in a case to the same panel) might make the review process both more fair and more efficient?

20) Should priority be given to deciding death penalty cases in federal district courts and courts of appeals?

TO: JUDICIAL CONFERENCE AD HOC COMMITTE
ON FEDERAL HABEAS CORPUS REVIEW
OF CAPITAL SENTENCES

FROM: ALBERT M. PEARSON, REPORTER

RE: DEATH PENALTY PROCEDURAL HISTORIES

DATE: JANUARY 27, 1989

Attached is a chart setting forth the amount of time taken in the litigation of death penalty cases in the state and federal systems. The states submitting usable information were Alabama, Florida and Mississippi. Texas has provided extremely detailed case histories, but since this material arrived only today it could not be incorporated into this report. The information from Georgia and Louisiana was not sufficiently detailed to be utilized.

What the attached chart shows is how much time is consumed in litigating death penalty cases in the state systems, in the lower federal courts and in the United States Supreme Court. Within each system, at this juncture at least, I couldn't break the chronologies down further and still provide the same information from each jurisdiction. For example, the chart doesn't separate state trial and direct appeal time from state post conviction review time. Similarly, lower federal court review doesn't differentiate district court from circuit court consideration. Nor does it separate out applications for stays of execution from proceedings where a case is considered on its merits. I can get this information if you think it would be helpful to follow up.

A few comments on what the entries on the chart include. The inmates are listed by state and within each state's listings, the inmates are listed by order of execution date. The frame of reference for my percentages is from the crime date to the execution date. My preference would have been to use the indictment date as the beginning point, but that information was not available in every case summary that I received. What this approach does is expand the amount of time allocated to the state courts beyond what it should be. If we get the indictment dates in all of the cases that we study, the state court time will drop in every instance and in some there may be a pretty significant drop. Of course, this will mean a corresponding increase in the percentage of time in the lower federal courts and in the Supreme Court.

A summary of the other information categories on the chart follows:

CRIME TO EXECUTION---gives the number of days from the crime date to the execution date and provides the dates for each.

STATE COURT---gives the total time from the date of the crime through the completion of direct appeal; also includes state post conviction review time and any other proceedings that occur in state court including retrials, resentencings and applications for stays of execution.

FEDERAL COURT---gives the total time of involvement in both the district courts and the circuit courts for any purpose.

SUPREME COURT---same as the above; time is allocated to the Supreme Court from the time a lower court judgment becomes final until certiorari is denied or the Court takes some other dispositive action in a case.

DOWN TIME---refers to time when a death penalty case is not pending in any court. Typically, this time shows up after a cert petition has been denied. A litigant will not go to the next stage of review---usually state or federal habeas corpus---until forced. Down time also occurs when state post conviction relief is denied. Florida cases have had quite a bit of what I call down time.

Aggregate figures for the 24 cases studied reflect that there are 9.36 years from crime to execution. The averages for the other chart categories are: state court 4.06 years; lower federal court 2.51 years; Supreme Court 1.45 years; and down time 1.34 years.

I don't think these statistics, as general as they are, point to any dramatic conclusions. If a death penalty case is properly before a court, there is not a great deal that can be done to compel a judge or a panel of judges to rule more quickly than they might be inclined to do. A statute of limitations might be helpful in eliminating some of the down time in death penalty cases. As you know, the Attorneys General in the southern states are moving cases forward by using the threat of requesting a death warrant. This has the same operative effect as a statute of limitation. But it is an informal system and there may be disadvantages to continuing to proceed in that manner.

Assuming a statute of limitation imposes some discipline on the death penalty litigation process by forcing all cases ahead at a certain pace, the problem remains that the system of post conviction review has so many discrete steps. Are they all necessary to attain fairness to death row inmates? Unless there is some interest in cutting out some redundancies in the system, I don't see how the average time for death penalty cases can be reduced substantially.

Several of the capital litigation specialists that I spoke with over the past few weeks have offered their views on the causes of delay in death penalty cases. One is that courts

occasionally don't act on the cases once the record is complete and the briefs have been submitted. This complaint seems to have been aimed at trial judges more than appellate judges.
A second is that as the Supreme Court has dealt with many difficult death penalty issues lower courts have tended to hold cases in abeyance awaiting a definitive ruling on a point. When such a ruling comes down, if it is potentially beneficial to death row litigants, more delay results as the lower courts have to decide whether the new doctrine applies to pending cases. The point is that much of what we have seen to date is the result of rapidly and sometimes erratically developing legal doctrine in a ideologically charged area of the law.

One individual was rather vehement in his intent to oppose any proposal that would make counsel available as a matter of right to death row inmates. It made no apparent difference that this right would be tied to a statute of limitation mechanism.

ATTACHED TO JAN 21 1991

DEATH PENALTY CASE HISTORIES
TIME SHOWN IN DAYS

INMATE & STATE	CRIME TO EXECUTION	STATE COURT	FEDERAL COURT	SUPREME COURT	DOWN TIME
1. Evans (ALA)	2298 1/5/77*4/22/83	717 (31%)	808 (35%)	676 (30%)	97 (4%)
2. Jones (ALA)	1678 8/17/81*3/21/86	1008 (60%)	280 (17%)	332 (20%)	58 (3%)
3. Ritter (ALA)	3881 1/5/77*8/28/87	1681 (43%)	1315 (34%)	806 (21%)	79 (2%)
4. Sullivan (FL)	3889 4/9/73*11/30/83	641 (16%)	1425 (37%)	734 (19%)	1089 (28%)
5. Antone (FL)	3026 10/23/75*1/26/84	1678 (55%)	607 (20%)	271 (9%)	470 (16%)
6. Goode (FL)	2957 3/5/76*4/5/84	1629 (55%)	485 (16%)	348 (12%)	495 (17%)
7. Adams (FL)	3831 11/12/73*5/10/84	1396 (36%)	1323 (35%)	601 (16%)	511 (13%)
8. Shriner (FL)	2799 10/22/76*6/20/84	1406 (50%)	570 (20%)	247 (19%)	576 (21%)
9. Washington (FL)	2954 9/20/76*7/13/84	757 (27%)	597 (21%)	805 (28%)	695 (24%)
10. Dobbert (FL)	4633 12/31/71*9/7/84	2495 (54%)	662 (14%)	878 (19%)	598 (13%)
11. Henry (FL)	3834 3/23/74*9/20/84	775 (20%)	1096 (29%)	781 (20%)	1182 (31%)
12. Palmes (FL)	2902 11/4/76*11/8/84	1659 (57%)	654 (23%)	301 (10%)	288 (10%)
13. Raulerson (FL)	3577 4/27/75*1/20/85	2083 (58%)	733 (21%)	538 (15%)	212 (6%)
14. Witt (FL)	4149 10/28/73*3/6/85	1542 (37%)	1124 (27%)	715 (17%)	767 (18%)
15. Francois (FL)	2975 7/27/77*5/29/85	1663 (57%)	699 (24%)	155 (5%)	348 (12%)
16. Thomas (FL)	3757 1/1/76*4/15/86	1379 (37%)	1052 (28%)	368 (10%)	958 (25%)

INMATE & STATE	CRIME TO EXECUTION	STATE COURT	FEDERAL COURT	SUPREME COURT	DOWN TIME
17. Funchess (FL)	4147 12/16/74*4/22/86	2389 (58%)	1199 (29%)	235 (6%)	324 (8%)
18. Straight (FL)	3524 10/4/76*5/20/86	1717 (49%)	1234 (35%)	310 (9%)	263 (7%)
19. White (FL)	3690 7/27/77*8/28/87	1619 (44%)	543 (15%)	683 (19%)	845 (23%)
20. Darden (FL)	5302 9/8/73*3/15/88	1018 (19%)	2217 (42%)	1308 (25%)	759 (14%)
21. Daugherty (FL)	4635 3/1/76*11/7/88	3062 (66%)	192 (4%)	628 (14%)	753 (16%)
22. Gray (MS)	2625 6/25/76*8/26/83	1236 (47%)	778 (30%)	553 (21%)	58 (2%)
23. Johnson (MS)	2910 6/2/79*5/20/87	1202 (41%)	1385 (48%)	88 (3%)	235 (8%)
24. Evans (MS)	2284 4/4/81*7/8/87	828 (36%)	100 (44%)	410 (18%)	45 (2%)

For your information:

1 year = 365 days

2 years = 730 days

3 years = 1095 days

4 years = 1460 days

5 years = 1825 days

6 years = 2190 days

7 years = 2555 days

8 years = 2920 days

9 years = 3285 days

10 years = 3650 days