4-1989

Habeas Corpus Committee - Memoranda

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April 6, 1989

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

SUBJECT: Introduction of Legislation

I am forwarding for your review the attached bill, S. 271, introduced in the 101st Congress by Senator Bob Graham of Florida, to reform procedures for collateral review of criminal judgments. This bill, known as the Habeas Corpus Reform Act of 1989, would make various changes relevant to the mission of the committee, several of which have been discussed at our meetings. I am also transmitting a copy of Senator Graham's remarks in the Congressional Record at the time he introduced this bill.

I note that what appears to be an identical bill has also been introduced in the House of Representatives by Congressman Charles Bennett of Florida. The House bill is designated as H.R. 1090.

William R. Burchill, Jr.

Attachments

cc: Professor Albert M. Pearson

II

101ST CONGRESS
1ST SESSION

S. 271

To reform procedures for collateral review of criminal judgments, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. GRAHAM (for himself, Mr. NUNN, Mr. BRYAN, and Mr. MACK) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reform procedures for collateral review of criminal judgments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Habeas Corpus Reform Act of 1989".

SEC. 2. FINALITY OF DETERMINATION.

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

"(d) When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and—

"(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the

Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

"(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SEC. 3. APPEAL AND REVIEW.

Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"(a)(1) In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"(2) There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"(b) An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding if the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 4. PROCEDURES UNDER RULE 22 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"RULE 22.

"HABEAS CORPUS AND SECTION 2255 PROCEEDINGS

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of

title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

SEC. 5. STATE CUSTODY; REMEDIES IN FEDERAL COURTS.

Section 2254 of title 28, United States Code, is amended—

(1) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the States.";

(2) by amending subsection (d) to read as follows:

"(d) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence.".

SEC. 6. FEDERAL CUSTODY; REMEDIES ON A MOTION ATTACHING SENTENCE.

Section 2255 of title 28, United States Code, is amended by—

(1) striking the second paragraph which begins "A motion for such relief" and the penultimate paragraph which begins "An appeal may be taken"; and

(2) adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and—

"(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in

violation of the Constitution or laws of the United States;

"(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

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HABEAS CORPUS REFORM ACT OF 1989

Mr. GRAHAM. Mr. President, the Constitution of the United States affords every individual specific protections in judicial proceedings. Those constitutional protections are being jeopardized under the pretense of a legitimate search for justice.

Our courts are increasingly burdened by frivolous and dilatory petitions which impede the timely disposition of legitimate claims—including legitimate habeas corpus requests.

On January 25, joined by my colleagues Senator NUNN, MACK, and BRYAN, I introduced the Habeas Corpus Reform Act of 1989. The Habeas Corpus Reform Act is designed to protect prisoners' right while it protects the integrity of our judicial system.

The bill proposed includes a number of reforms of the current Federal habeas corpus process.

For State prisoners: it imposes a 1-year limit on habeas corpus applications, normally running from exhaustion of all possible State habeas corpus petitions and appeals.

For Federal prisoners: it imposes a 2-year limit on Federal habeas corpus applications, normally running from the time of final judgment on the original Federal determination of guilt.

This legislation also clarifies present law—establishing the requirement that a State prisoner must ordinarily raise all claims in accordance with State rules of procedure or be barred from asserting such claims in a Federal habeas corpus proceeding, and clearly states that a Federal habeas court petition may be denied on the merits without requiring prior exhaustion of State remedies.

Finally, this legislation seeks to relieve the administrative burden on district courts and simplify the appellate process by providing that an appeal from the district court in a habeas corpus proceeding may not be taken unless a certificate of probable cause is issued by a circuit judge.

There are at least four reasons that establish an urgent need for the reforms that this legislation would provide.

First, the number of petitions filed is increasing at an alarming rate.

Beginning in the late 1970's, the filing of Federal habeas corpus petitions by State prisoners increased significantly; 1987 filings of 9,524 surpassed the all-time peak figure and represented an increase of 35 percent over the 1978 filings.

Given recent trends, 1988 will probably reflect the highest number of State petitions ever filed for Federal habeas corpus relief.

Second, a significant number of these petitions simply duplicate earlier litigation.

According to a Department of Justice study of six district courts and one circuit court, more than 30 percent of the State prisoner habeas corpus petitions were filed by persons who had filed one or more previous Federal habeas corpus petitions. More than 44 percent had previously filed at least one petition in State court.

Third, Federal district courts and courts of appeals are unable to keep up with these increases. In 1986, in both Federal district courts and U.S. courts of appeals, the number of habeas corpus cases filed exceeded the number of habeas corpus cases resolved.

Although State habeas corpus petitions in 1985 constituted less than 8 percent of all Federal appeals filed, they constituted almost 19 percent of the backlog in Federal courts.

Fourth, many petitions are filed years after the crime, when evidence is stale or nonexistent. The Department of Justice study found that almost one-third of the habeas corpus petitions were filed more than 10 years after conviction.

In response to this crisis, Chief Justice William Rehnquist has appointed a commission to survey habeas corpus reform proposals. This commission, headed by retired Supreme Court Justice Lewis Powell, has begun to gather information on the extent of the problem and is expected to report to Congress later this year.

Last year the Anti-Drug Abuse Act of 1988 included a provision to ensure that habeas corpus reform proposals receive timely action in the 101st Congress.

In section 7323 of the Act it was provided:

> Beginning on the date the Chief Justice of the United States forwards to the Committees on the Judiciary of the Senate and the House of Representatives the report and recommendation of the Special Committee on Habeas Corpus Review of Capital Sentences, appointed by the Chief Justice of the United States and chaired by Justice Lewis Powell, the chairman of the Committee on the Judiciary of the Senate shall have 15 days of session thereafter to introduce a bill to modify Federal habeas corpus procedure after having fatihfully considered the report and recommendations of the Special Committee. If no such bill is introduced by the chairman within the 15-day period, such bill may be introduced by the ranking minority member of the committee within an additional 10 days of session.

We hope the Habeas Corpus Reform Act of 1989 will offer focus to the public debate and complement the efforts of the Powell Commission.

Habeas corpus is a cherished constitutional right of all Americans. Our proposal will enhance the potential of habeas corpus to achieve justice expeditiously through a reduction of unseemly litigation and delay.

It will bring us closer to timely justice for society and the accused.

Our responsibility is to ensure that the system works in the way it was originally intended, with equal and timely dispensation of justice in all habeas corpus cases.

Mr. President, I ask unanimous consent that the text of S. 271 be printed in the RECORD, to be followed by a statement in support of S. 271.

[From the Florida Times-Union, Jan. 28, 1989]

LEGISLATION COULD CUT THE FLOW OF INTERMINABLE LEGAL APPEALS

The execution of Ted Bundy has brought an outpouring of philosophical opinions concerning the mentality and motivations of this mass sex killer whose only public show of remorse, if any, surfaced shortly before he was put to death last Tuesday.

The final chapter in the ugly saga of Bundy also has rekindled interest in a more practical side of the Bundy case: how he was able through legal maneuvers to evade his ultimate date with the electric chair for almost 10 years.

One day after Bundy's execution, two U.S. senators, Bob Graham, D-Fla., and Sam Nunn, D-Ga., filed legislation in Congress to limit the power of federal judges to review appeals in state capital-punishment cases. Its purpose is to limit the time for filing and disposing of death-row appeals.

The idea is by no means new. For example, former U.S. Sen. Lawton Chiles, D-Fla., won Senate approval in 1985 of similar legislation, which became bogged down in the House of Representatives. Chiles' bill placed a three-year limit on post-conviction legal questions a defendant could raise based on existing issues, as opposed to new evidence.

Under the proposed new legislation, a convicted killer would have one year after exhausting state remedies to file a federal attack on a conviction, and two years to challenge a federal order denying such an appeal.

"No one," Graham said, "is well-served by excess court delays." He noted the sharp rise in death-row appeals, to nearly 10,000 a year. Graham has firsthand knowledge of the subject. During eight years as Florida governor, he signed 155 death warrants, all but 16 of them—including three for Bundy—blocked by appeals. Graham's successor, Gov. Bob Martinez, has signed 64 death warrants, four resulting in executions, including Bundy's.

But the proposal to cut federal appeal time has its dissenters, as it has had in the past. Larry Spalding, who heads the state's publicly funded bureau to provide legal help to indigent Death-Row inmates, says federal judges are in a better position to rule objectively in death-case appeals because they are not subject to election, as are state judges.

It is a matter of record that death-row appeals ultimately wind up in the federal courts and are decided there. No one can argue with a defendant's right to appeal. But allowing the system to be manipulated by frivolous appeals only frustrates the ends of justice. That is not the purpose or intent of the law. It calls for change.

L.F.P.

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

Received April 10, 1989
(I returned from W & L on the 15th)

FROM: ALBERT M. PEARSON, REPORTER

RE: LEGISLATIVE REFORM PROPOSALS

I. INTRODUCTION

This report attempts to formulate federal habeas corpus reform proposals that might be politically acceptable and at the same time have a reasonable prospect of addressing the problems of judicial administration created by death penalty litigation in this country. My working premise is that we should leave the scope of federal habeas corpus review intact and concentrate on eliminating its most cumbersome procedural features. In my view, this objective can be achieved without compromising fundamental fairness to inmates under death sentence. The legal and political framework for this approach is straightforward. I propose recognition of a right to counsel in post-conviction proceedings as an inducement to overcome political objections to federal habeas corpus reform in death penalty cases.

We can't impose this on States, but we can create an incentive

II. RIGHT TO COUNSEL

Public frustration about the many delays of death penalty litigation often focuses on the defense lawyers. Fairly or not, they are seen as fervently opposed to the death penalty and willing to use their legal skills to thwart the legal system on behalf of profoundly undeserving clients. Serious questions are

now being raised about their tactics.[1] In light of all this, one might expect the argument that lawyers are part of the problem not the solution. But that in fact is not the case. The "availability of counsel" at the post conviction phase in death penalty litigation -- both state and federal -- is perhaps the most pressing issue on the agenda in the death penalty area.[2] Concern about this issue transcends differences of opinion about the legitimacy of the death penalty as an appropriate form of punishment.[3]

Increased understanding of the dynamics of death penalty litigation has led to an important conclusion about the role of counsel. Adequate legal representation in death penalty cases involves more than an abundance -- some would say overabundance

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[1]See Statement of Associate Deputy Attorney General Paul Cassell concerning Habeas Corpus and Capital Punishment Litigation before Subcommittee on Government Information, Justice and Agriculture of the House Comm. on Government Operations (Feb. 26, 1988); Statement of Honorable Kendall Sharp concerning Capital Habeas Corpus Procedures: A Pragmatic Assessment before Subcommittee on Government Information, Justice and Agriculture of the House Comm. on Government Operations (Feb. 26, 1988). For recent judicial discussion of the abuse of the writ by delaying federal habeas filings until almost the eve of execution, see Ball v. Lynaugh, 858 F.2d 978, 983 (5th Cir. 1988).

[2]This issue is pending before the Supreme Court now in Murray v. Giarrantano, ___ U.S. ___, 109 S. Ct. 303 (1988) (certiorari granted October 31, 1988). For an extensive discussion of the issue, see Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 Am. U. L. Rev. 513 (1988).

[3]Godbold and Mikva, Dialogue: You Don't Have to Be a Bleeding Heart, 14 Human Rights 22 (Winter 1987); Van de Kamp, The Right to Counsel: Constitutional Imperatives in Criminal Cases, 19 Loyola of Los Angeles Law Review 329 (1985) (article by Attorney General of California).

-- of concern about fairness to persons facing execution. Attorneys are, after all, officers of the courts as well as advocates. Their actions in handling any case, death penalty or otherwise, should not only promote fairness to the client but also be compatible with the efficient administration of justice. Without counsel responsive to both obligations, the disposition of death penalty cases in this country will slow to the point that the death penalty itself is effectively nullified.[4] The death row population in America now exceeds 2,000 and more and more death penalty cases are working their way into the post-conviction phase of review.[5]

In addition to heightened professional awareness of this issue, there has been some noteworthy political and judicial response. First, a significant number of states, some with large death row populations, provide for the appointment of counsel in

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[4]According to a bulletin published in July 1988 by the Bureau of Justice Statistics, 3,404 persons received the death penalty between 1973 and 1987. Of that number, 93 had been executed and 1,984 remained under death sentence as of December 31, 1987. Nearly 300 new death sentences are imposed nationally each year. Capital Punishment 1987 at 10.

[5]For a discussion of the impact of death penalty litigation on the judiciary, Report of the Spangenburg Group, Case Load and Cost Projections for Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989 at 20 (Sept. 1987).

post-conviction proceedings on some basis.[6] This legislation reflects the serious public policy considerations weighing in favor of extending the right to counsel beyond the limits set in Gideon, Argersinger and Evits v. Lucey. In addition to trends at the state level, Congress in 1988 amended the Criminal Justice Act to authorize the appointment and compensation of counsel in death penalty cases when they get to the federal system.[7] This

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[6]A table drawn from a yet to be published manuscript by Wilson and Spangenburg, State Post-Conviction Representation of Defendants Sentenced to Death at 8, sets forth the law nationally concerning the appointment of counsel at the state habeas phase in capital cases:

Mandatory	Total Judicial Discretion	P.D. Discretion	Appt. if Merit To Pet.	Appt. if Hearing Required	No Right
Ariz.	Mont.	Colo.	Ala.	La.*	Ga.
Cal.	Tex.	Ohio	Ark.	Miss.	N.H.
Conn.			Del.	N.M.	
Fl.			Ill.	S.C.	
Id.			Ky.	Va.**	
Ind.			La.*		
Md.			Neb.		
Mo.			N.M.		
Nev.					
N.J.					
N.C.					
Okla.					
Ore.					
Penn.					
S.D.					
Tenn.					
Utah					
Wash.					
Wy.					

*Statutory grounds are stated alternatively.
**Pursuant to case law.

[7]This was part of the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181, Tit. VII, Section 7001(b) to be codified at 21 U.S.C. §848(q)(4)-(10).

enactment goes hand in hand with Congressional funding for resource centers in 13 states which provide assistance to attorneys who are handling death penalty cases.[8]

Finally, the issue of a constitutionally mandated right to counsel in state post-conviction proceedings is now before the Supreme Court in Murray v. Giarrantano,[9] a section 1983 class action filed by death row inmates in Virginia. In my experience, the facts in Giarrantano concerning the availability of counsel in death penalty cases do not differ materially from the circumstances existing in other states. It is never easy to find capable and willing lawyers to handle death penalty cases in any jurisdiction. Moreover, even when counsel can be found, the timing of appointment frequently is a problem because scarce legal resources tend to be devoted to the death penalty cases where the situation is most urgent -- those in which an execution date is imminent. In that setting, the considerations surrounding appointment of counsel understandably focus on the interests of the client and concerns about judicial efficiency are secondary if not irrelevant. The litigation strategy in Giarrantano is to expand the availability of counsel in death penalty cases by placing an affirmative duty on the state to find and appoint attorneys for habeas corpus proceedings or else

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[8]Funding for the last five of the death penalty resource centers came in 1988. This was also part of the Anti-Drug Abuse Act of 1988.

[9]Cert. granted, ___ U.S. ___, 109 S. Ct. 303 (October 31, 1988).

forfeit the right to impose the death penalty.[10]

As Judges Godbold and Mikva have suggested, you don't have to be a bleeding heart to see the need for counsel in death penalty habeas litigation.[11] But the fact remains that many perceive the right to counsel argument as a bleeding heart position and fear that defeat on that issue might have serious, though uncertain, repercussions on the status of the death penalty in America over the long run.[12] In their view, the death penalty is a good-versus-evil controversy and anything that benefits death row inmates legally must be resisted.

This reasoning will seem most persuasive to those who consider the right to counsel issue in death penalty litigation without reference to possible compensating adjustments elsewhere in the system of state and federal post-conviction review. The freedom to think about and address this problem comprehensively is a luxury which this Committee enjoys that is not available to the Supreme Court as it now considers how to rule in Giarrantano.

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[10]This strategy is based on the argument that the rationale of Bounds v. Smith, 430 U.S. 817 (1977) ought to be applied in death penalty cases to require the appointment of counsel in state post-conviction proceedings.

[11]Dialogue: You Don't Have to Be a Bleeding Heart, 14 Human Rights 22 (Winter, 1987).

[12]This position is outlined in the amici curiae brief by the Attorneys General of 19 states who joined in support of Virginia's petition for certiorari in Giarrantano. Those states included Georgia, Mississippi, North Carolina, Missouri, South Dakota, Wyoming, Delaware, California, Pennsylvania, New Mexico, Indiana, Kentucky, New Hampshire, Nevada, Utah, South Carolina, Oregon, Maryland and Idaho. Florida supported Virginia's petition through a separate amicus brief.

While the Supreme Court may have the constitutional authority to impose an obligation on the states -- and perhaps even the federal government -- to provide counsel in death penalty cases at the post-conviction phase, judicial decision is surely not the only way to accomplish that goal, nor is it likely to be the most effective.

Accordingly, a recommendation by this Committee concerning the appointment of counsel should have utility regardless of the outcome in Giarrantano. My recommendation for the appointment of counsel in death penalty cases runs along the following lines:

(1) Counsel should be provided to death row inmates on request without the necessity of first filing a habeas corpus petition, showing need for an evidentiary hearing or establishing probability of success on the merits.[13] This right would apply in both state and federal habeas corpus proceedings. The recent amendments to the Criminal Justice Act largely accomplish this at the federal level. The most serious gap in the system, however, has been at the state level and that of course is what prompted the Giarrantano litigation.

In my view, the death penalty states get several benefits from this proposal, especially when they are considered in light of the other recommendations, particularly the statute of

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[13]As shown in the chart set out in note 6, there is considerable variation concerning the appointment of counsel at the post-conviction phase in the 37 death penalty states. To be discussed later in this report are the procedural changes that ought to be insisted upon as a quid pro quo for the right to counsel provision.

limitations.[14] At least four seem apparent. First, the states can respond at least in part to the contention that the system for the enforcement of the death penalty is procedurally unfair. Second, they can push more aggressively for the full development of all relevant legal issues at the earliest possible point in death penalty litigation. Third, they can strengthen the presumption of correctness afforded to state fact findings to the fullest extent possible under section 2254(d). And, fourth, they can argue with greater force that the application of state procedural default rules in death penalty cases is fair. In short, by having a skilled advocate on the other side at each stage of post-conviction review in death penalty cases, the state should gain material reassurance that one journey through the legal system will settle definitively whether or not an execution can be carried out.

(2) Even if the states can be convinced that expansion of the right to counsel in death penalty cases is sound on public policy grounds, funding of this recommendation is going to be a delicate matter. Funding for indigent defense in criminal trials varies widely throughout the United States, but funding questions, until now, have been resolved at the state level exclusively. Death penalty cases are by far the most expensive of all criminal cases to try quite apart from expanding the right to counsel to include state and federal post-conviction review.

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[14]The statute of limitations, as will be discussed, would press counsel to advance the case through state post-conviction review.

The traditional division of responsibility between the federal government and the states might break down in this context.

Here the impact of the Giarrantano decision could be significant. Should the court recognize in death penalty cases a constitutionally based right to counsel in state habeas proceedings, this would at least partially preempt the Committee's work. But there should still be ample room to discuss whether compliance with Giarrantano is better handled judicially or legislatively. For example, a strong case can be made for uniform federal standards in all death penalty states to assure competency of appointed counsel, adequacy of compensation and continuity of representation between state and federal habeas corpus review. If federal financial assistance were made available to ease the burden of a constitutionally mandated counsel requirement, it would promote those goals and it also might prove helpful in moderating public reaction to an unpopular ruling.[15]

If the Court's ruling in Giarrantano is against recognizing a right to counsel in state post-conviction proceedings, the

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[15]Here it is worthwhile to note that the state interest in funding defense counsel for indigents at trial is quite different than in the post-conviction context. The state has a paramount interest in convicting criminals, but it cannot achieve that goal without paying up front for legal representation for the poor. At the post-conviction phase, the state is being asked to subsidize an attorney to deny the state the fruit of its prosecutorial labor. The state has more choice about what to do at this juncture. For example, a state could decide that paying for attorneys in death penalty cases in post-conviction proceedings is too costly. Rather than pay the freight, a state could elect to eliminate its system of post-conviction review and shift all the costs on the federal government.

Committee's task would be to persuade the states to do what is constitutionally unnecessary. In this vein, recall that the federal government has already committed itself to appoint and compensate counsel in death penalty cases when they reach federal court. Here the funding mechanism would serve as one of two primary inducements for the states -- the other being the availability of a statute of limitation in the event the state makes counsel available in the state post-conviction proceedings. Both will probably have to be used. If counsel at the post-conviction phase is genuinely helpful to the expeditious but fair consideration of death penalty cases, no one can say with certainty how helpful it would be or whether the gains in efficiency and finality are worth the direct costs of compensating counsel in all death penalty cases throughout state and federal habeas review.[16] Federal financial assistance to the states, however, would lower the costs of finding out and thus might tip the balance politically in favor of the counsel proposal under a voluntary scheme.

Once the broad outlines of the counsel proposal are settled, if the Committee is inclined to favor this approach, it may be necessary to address some details of implementation. For example, what would be the mechanism for finding and appointing counsel at the state habeas phase of death penalty litigation?

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[16]Here the role of the statute of limitation would be crucial. Under a voluntary system, a state would not get the benefit of the federal statute of limitation unless it provided counsel in death penalty cases.

Should the specifics be left up to the states or is there a need to establish a joint federal-state entity? Do we need to address the role of the habeas trial judge in this scheme? One of the important issues surrounding the appointment of counsel will be monitoring death penalty cases to determine the need for appointment and then assuring continuity of representation between both the state and federal habeas phases of litigation. To me these considerations militate in favor of centralizing the appointment or recruitment process at the state level which is how it is handled de facto in most states now anyway.[17]

III. STATUTE OF LIMITATIONS

Statutes of limitations have appeared in a number of habeas corpus reform proposals submitted to Congress in this decade. Each has been a part of a legislative package designed to limit rather dramatically the scope of federal habeas corpus review in section 2254 cases.[18] To my knowledge, no proposal -- with or without a statute of limitation provision -- has been advanced to

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[17]A latent issue here is the role of the death penalty defense bar. One experienced death penalty specialist exprssed strong concern about giving authority to appoint counsel in death cases to state trial judges. He believed that they would not be inclined to appoint the specialists, but would opt instead for local attorneys who might not litigate death penalty cases as aggressively as they should at the state habeas phase. On the other hand, the responsibility for finding and appointing attorneys in death penalty cases probably ought not be turned over exclusively to people who are ideologically opposed to the death penalty. This is a general challenge for the bar as a whole and the involvement of attorneys who are not death penalty specialists might be helpful.

[18]See in this connection the memorandum which I prepared for the November 30, 1988 meeting of the Committee.

address only problems of judicial administration in death penalty cases. In my view, the one situation where a statute of limitation makes sense is in death penalty cases.

As you know, the incentives to litigate are different for death row inmates. Since guilt is typically not in serious dispute, they realistically must be resigned to the fact of indefinite confinement; their objective is to forestall the death penalty. Until some step is taken to schedule an execution, the death row inmate will be content with the status quo. He has little or no reason to start the clock with litigation until he must. His interest is conserving, if not gaining, time. The prisoner under sentence of confinement, however, is in an altogether different position. Unlike his death row counterpart, he has every reason to initiate habeas corpus review and to do so promptly because that is the only way he can quickly regain his liberty. Time works against him. Whether death row or not, all prisoners share a common outlook on one matter however; they have no reason to cease filing habeas corpus petitions until they get the relief they desire.

In death penalty cases, the state's concern is both starting and stopping the post-conviction review process. None of the Supreme Court fashioned doctrines of procedural default or bar address the start up question. Their aim is the <u>termination</u> of litigation. A statute of limitation in death penalty cases, however, would perform double duty. It would spur the death row inmate to initiate post-conviction review and in conjunction with

doctrines of bar and procedural default bring that review to a conclusion. Currently, death penalty states use the scheduling of an execution date or its threat as the driving mechanism to make death row inmates pursue post-conviction remedies.[19] Not only would a statute of limitation serve the same purpose, but it would do so without the waste of time and judicial resources associated with efforts to seek a stay of execution.

How would a statute of limitation work? It should have the following features:

(1) It should be linked to the appointment of competent counsel to represent death row inmates in both state and federal post-conviction proceedings.[20]

(2) It should span the time period from the end of state direct appeal in death penalty cases to the filing of a section 2254 petition in federal district court. In death penalty litigation, there are two steps that are not subject to a timely filing requirement: the transition from direct appellant review of a criminal conviction to state habeas corpus review and the jump from state to federal habeas corpus proceedings. From the

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[19]Despite its occasional disadvantages, my impression is that many capital litigators -- both state and defense -- are comfortable with this informal working relationship. Interestingly, Florida and Alabama both have two year statutes of limitation applicable to post-conviction remedies. See Rule 20.2(c), Ala. Temp. R. Crim. Proc. and Fla. R. Crim. Proc. 3.850.

[20]This is the key quid pro quo in my proposal. If death row inmates receive the benefit of state paid representation, they will have to litigate at the post-conviction phase within a set time frame and they get only one opportunity for post-conviction review.

standpoint of finality of state criminal convictions and judicial administration generally, these unregulated time gaps are hard to justify.

(3) It should be triggered by reference to one of two events, whichever occurs later: whenever, for state law purposes, the judgment of criminal conviction becomes final on direct appeal; or the date on which competent post-conviction counsel is appointed. This recommendation runs against the formula in every habeas corpus reform proposal that I have seen, which make the date of exhaustion of state remedies the triggering date for the statute of limitations.[21] In my view, the date of exhaustion as it is currently understood can refer to more than one point in time. With respect to some issues, exhaustion occurs at the end of state direct appellate review and then again as to others at the conclusion of state post conviction review. I see no need to get caught up in slippery questions of state and federal law in determining when a statute of limitation begins to run. My formulation avoids that problem by linking the running of the statute of limitation to the concrete event of appointment of counsel.

(4) Finally, whatever the length of the statute of limitation, it must have certain tolling rules. Most of the habeas corpus reform proposals submitted to Congress in the 1980s

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[21]The latest example is S. 271 which was introduced by Senator Graham of Florida. Section 2 of the bill proposes a one year statute of limitation linked to "the time at which state remedies are exhausted."

have included three: for newly discovered evidence; for newly recognized constitutional rights; and for rights a prisoner was unable to assert due to the unconstitutional action of the state which typically means Brady violations.[22] To that list I would add a rule tolling the statute of limitation for any time prior to the filing of a federal habeas corpus petition that a case is pending before a court of competent jurisdiction. This tolling rule, for example, would stop the running of the statute of limitation once a certiorari petition is filed with the U.S. Supreme Court after the state direct appeal has become final. It would also toll the statute when a state habeas corpus petition is filed and it would remain tolled while the case is being litigated at the state level. As long as a death row inmate has counsel and is actively litigating his case in a court of competent jurisdiction, he should suffer no prejudice to his right to file a section 2254 petition.

As for the length of the statute of limitation, most federal legislative proposals have specified one year. A statute of limitation must be long enough, given the tolling rules, to allow a death row inmate a fair opportunity to prepare the necessary documents to move to a new stage of litigation.[23] I

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[22]S. 217 is illustrative of this pattern.

[23]If new counsel is appointed at the state post-conviction phase, he would need time to master the record, conduct any necessary investigation and prepare the pleadings. This could be a fairly lengthy process. However, when a case shifts from state to federal habeas review, less time would be necessary for that transition.

am inclined to think that a one year statute of limitation might be too tight. Two years, on the other hand, probably would leave too much down time.

IV. LIMIT SUPREME COURT JURISDICTION

State prisoners have a benefit that no other class of litigants in the United States has. Given the resources and access to counsel, they can petition for certiorari before the United States Supreme Court a minimum of three times. In death penalty litigation, it is not uncommon for an inmate to exercise this option every chance he gets. While the likelihood of Supreme Court review is generally quite low even in death penalty cases, there is still a concrete advantage to filing a petition for certiorari; the death row inmates gains time. The existence of multiple opportunities for Supreme Court review of state criminal convictions is more an accident of history than anything else. Does it make sense to maintain the system in its present form in death penalty cases? There are some strong reasons for change.

First, if federal habeas corpus review is a surrogate for Supreme Court review of state court judgments in criminal cases, why allow a state prisoner both lower federal court review under section 2254 and multiple opportunities to petition the Supreme Court for certiorari? I would propose deferral of Supreme Court review in death penalty cases until after all lower court review

-- state and federal -- has been completed.[24]

Under current practice, Supreme Court review in death penalty cases is like focusing on a moving target. After direct appeal, the record in a state criminal case can change at least twice more: once in state post-conviction proceedings and then again during federal habeas review. A certiorari petition filed after state direct appeal or state post-conviction review is a roll of the dice which at a minimum gives the death row litigant extra time. Ordinarily, when a case reaches the Supreme Court, the denial of certiorari at least brings that case to an end even though the action otherwise has no precedential significance. This is not true of death penalty cases. If Supreme Court review in death penalty cases were to be deferred as suggested earlier, certiorari review would be more compatible with the Supreme Court's function as the court of last resort on constitutional issues.

In this vein, deferred Supreme Court review would promote finality in death penalty cases in a way that is not currently possible. Once the Supreme Court has acted in a death penalty case without granting relief to a state prisoner, it would mean

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[24]The states might want to retain the right to petition for certiorari whenever a state supreme court rules in favor of the criminal defendant. In such a situation, a state would have no other forum to seek review of a state court ruling that misapplies Supreme Court authority. Retention by the states of the right to seek certiorari would not make Supreme Court review rules asymmetrical. The habeas petitioner who loses now has the luxury of both Supreme Court and lower federal court review. My proposal would put the states and death row inmates in roughly equivalent positions as far as the right to seek review of an adverse ruling is concerned.

the end of federal intervention.[25] Society would have afforded the litigant competent counsel and a full and fair opportunity to litigate all constitutional issues associated with his trial, including such standard post-convictions issues as newly discovered evidence, prosecutorial misconduct, ineffective assistance of counsel and new law. If this scheme does not satisfy the federal interest in the fairness of state death penalty trials, I don't know whether the case for federal habeas corpus reform in death penalty cases can be made.

V. AUTOMATIC STAY OF EXECUTION

If the statute of limitation concept is acceptable to the Committee in some form, a mandatory stay of execution ought to be considered as well. As previously noted, a statute of limitation would be a substitute in death penalty cases for the setting of an execution date or its threat. A tacit understanding now appears to exist that no death row inmate will be executed without at least one opportunity for state and federal post-conviction review. The practice associated with stays of execution in both state and federal court has produced many complaints. But all who are involved in death penalty litigation agree that stay of execution practice consumes an enormous amount of time and energy and is largely unnecessary -- certainly during the first time through post-conviction review. Why not eliminate this feature of death penalty practice and conserve scarce legal

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[25]The death row inmate thereafter would have to go to state court for any further relief.

resources for an examination of the merits in each case? The enactment of an automatic stay of execution would serve this purpose.

If the Committee is inclined to favor this idea, at least three additional considerations would need to be addressed. What would trigger the automatic stay of execution? What should be the duration of the stay? Finally, should there be any basis for staying executions after the automatic stay of execution has expired? It seems to me that the trigger for the automatic stay of execution and the statute of limitation should be the same event. This approach would create an incentive for the state (or a duly designated agency) to appoint counsel quickly.[26] As for the duration of the stay, it should remain in effect during state post conviction review, during federal habeas corpus review at the district and circuit court levels and finally during Supreme Court consideration of a certiorari petition. In short, the automatic stay would be effective in death penalty cases as long as necessary to make one trip through the state and federal judicial systems. Once the Supreme Court denies certiorari in a death penalty case, the stay would expire automatically. Federal review would be over and the inmate would be remitted to the state courts for relief, if any.

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[26]Under a voluntary system, the state's appointment of counsel would place the case on the fast track so to speak. The execution would be stayed on the condition that the case be litigated actively through state and then federal post-conviction review.

Should there be any residual authority for federal courts to stay executions after review of this character has occurred in a death penalty case? One can argue against such residual authority, but it would conflict with the premise underlying exceptions to the statute of limitation. For example, if, after this review process, a death row inmate could still make a colorable showing of innocence -- due to newly discovered evidence -- what would be the point of a right to further federal habeas corpus review if the state could execute him anyway? If the Committee favors the statute of limitations concept and recognizes exceptions as a part of the scheme, then it makes sense to recognize discretionary authority to grant stays of execution to the extent necessary to vindicate those exceptions. The stay of execution issue reveals how important the statute of limitation provision is to the scheme now under discussion. As indicated earlier, its exceptions must be drafted narrowly enough so that a valid second petition is rare, but not so narrowly that a demonstrably unjust death penalty conviction would go without a federal remedy.

VI. EXHAUSTION REQUIREMENT

In my view, the total exhaustion requirement of Rose v. Lundy[27] can be and frequently is a source of delay in death penalty litigation. Serious consideration should be given to modifying the doctrine. The problems with the exhaustion

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[27]455 U.S. 509 (1982).

doctrine in death penalty cases stem in no small part from the typical discontinuities in the availability of legal representation. In the great majority of death penalty cases, the attorney who handled the case at trial drops out after the direct appeal. A search then begins for counsel to prepare a certiorari petition to the Supreme Court or to initiate state post-conviction review (or do both). Frequently, the skill of the new counsel exceeds that of the attorney who handled the case up to that point. This has consequences for the course of death penalty litigation in each case.

If and when a death penalty case moves into the post-conviction phase, new counsel invariably means a series of new issues. In addition, there is also the possibility that new counsel might want to offer more and better quality evidence in support of claims actually litigated and rejected at trial. If this process of refinement occurs at the state post-conviction phase where it should, the interests underlying the exhaustion doctrine are generally going to be satisfied. When the case reaches federal district court, the record will be complete. Everyone will know which issues are ripe for adjudication and which are subject to procedural default. The problem comes when this process of record refinement and record expansion does not occur at the state post-conviction phase. Since there are unexhausted issues in the case, the federal district court will dismiss and direct that the petitioner return to state court to present those issues for initial adjudication. The alternative

to this time consuming step is for the state to waive the exhaustion requirement which is being done now with more frequency in death penalty litigation.[28]

It is clear, however, that compliance with the exhaustion requirement is not entirely detrimental to the interests of the death row inmate. Like the filing of a certiorari petition, the procedure guarantees additional time. It also guarantees at least the possibility of expanding the record factually and legally. The word "possibility" is used advisedly here since a litigant's return to state court under the compulsion of the exhaustion doctrine is usually an exercise in futility. Typically, such claims run head long into state procedural bar rules. If this is the upshot of the total exhaustion doctrine, it is an inefficient way to cull issues from a case.

Why continue the exhaustion doctrine in its present form in death penalty litigation? Under the present proposal, which contemplates appointed counsel beginning at the state post-conviction phase, there is a reasonable argument for change. Why not limit federal habeas corpus review in section 2254 cases to those claims actually presented to the state courts for adjudication? Under this approach the exhaustion doctrine would continue to serve the interest in comity but, more important, it

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[28]After some years of doctrinal disarray, the Supreme Court made it clear that a state court could waive the exhaustion requirement even if done inadvertently. Granberry v. Green, ___ U.S. ___, 107 S. Ct. 1671 (1987).

would also be a rule of procedural default.[29]

How would this version of the exhaustion doctrine work? I believe that a death penalty litigant could raise the following issues in federal court: (1) all constitutional issues raised either at trial or on direct appeal; (2) any constitutional issue properly raised in state post-conviction proceedings; and (3) any constitutional issue newly raised in state post-conviction proceedings that was not raised at trial or on direct appeal but which habeas counsel believes should have been.[30] If an issue falls outside these categories, it would not be reviewable in federal habeas corpus proceedings. A major example of an unreviewable issue would be ineffective assistance of state habeas counsel.[31]

A final matter is what to do with those issues that come within one of the exceptions to the proposed statute of limitations: (1) new law; (2) newly discovered evidence; and (3) official misconduct which prevents the litigation of a claim.

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[29]In short, once a prisoner makes an election to file a habeas petition in federal court, he would be limited to the claims asserted in the petition but only if presented first to the state courts. As to "unexhausted" claims, the prisoner would be free to return to state court to try to litigate them, but he could not renew those claims again in federal court.

[30]With respect to this category of issues, habeas counsel in death penalty cases would have to try to overcome state procedural bar rules in state court first before trying to satisfy the Sykes "cause" and "prejudice" standards in federal court.

[31]This argument would appear to be foreclosed definitively by Pennsylvania v. Finley, 481 U.S. 551 (1987). See also Whitely v. Muncy, 823 F.2d 55 (4th Cir. 1987) and Mitchell v. Wyrick, 727 F.2d 773 (8th Cir. 1984).

These issues could arise at any stage of post-conviction review. Since there may have been no opportunity to exhaust with respect to such issues, where would a death row litigant be expected to raise them initially? One solution would be to send the litigant back to state court for post-conviction review without delaying consideration of the other issues in the case. This would be a slight modification of the practice under Rose v. Lundy. This approach would satisfy comity concerns but at some cost in terms of achieving finality. An alternative approach would be to permit litigation of the late emerging issue in federal district court without first routing it back through the state judicial system for initial consideration. Comity interests would be subordinated under this approach to the presumptively paramount state interest in promoting finality in death cases. Less time would be needed for the late emerging issue to catch up with the rest of the case.

VII. CERTIFICATE OF PROBABLE CAUSE

This is a relatively minor issue in comparison to the others under discussion. I would eliminate the certificate of probable cause (CPC) requirement to appeal an adverse federal district court ruling in death penalty cases -- at least during first time federal habeas corpus review. Interestingly, the CPC requirement became law in 1908 to eliminate delay in capital cases. Unless there is some reason for it that I have missed or do not understand, the CPC requirement does not work as originally intended. I doubt that many CPCs have been denied in post-

Furman death penalty cases. Quite apart from its functional obsolescence in death penalty cases, the CPC requirement contradicts the working premise of this proposal which is that every death row litigant should get full federal habeas review of all properly presented constitutional issues at least once. The CPC requirement implies that some appeals to the circuit courts in first review death penalty cases might be frivolous and suggests the need to exercise vigilance in weeding them out. The time spent trying to do this doesn't seem worth it.

VIII. CONCLUSION

This scheme most likely would have to be voluntary as far as state participation is concerned. Whether the balance of advantage is enough to attract the interest of any states probably necessitates discussion of this proposal at some point with state officials. However, if a state wants the benefit of "faster track" death penalty procedures, this proposal would provide them. The other death penalty states, in effect, would make an election to live with post conviction review procedures in death penalty cases as they now stand. The voluntary system of state participation, however, has a major drawback to consider. Would a two track system of post conviction review in death penalty cases create problems that thwart the realization of benefits from having a "fast track" system of review in at least some death penalty states?

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

FROM: ALBERT M. PEARSON, REPORTER

RE: NAACP LEGAL DEFENSE FUND DATA ON DEATH PENALTY REVERSAL RATES

DATE: APRIL 13, 1989

"Removal" = removed from Death Row.

The NAACP Legal Defense Fund provided me this week the following information on post-Furman death penalty reversal rates at the U.S. District Court and U.S. Court of Appeals levels. This breakdown is more specific than the statistics published in Death Row, U.S.A. Note that any time the writ of habeas corpus is "granted" it is counted as a "reversal."

1. As of 3-1-89 for the U.S. District Courts, the reversal rate is:

REVERSED (writ granted):	105 (25.74%)
AFFIRMED (writ denied):	303 (74.26%)
Total:	408 decisions

2. As of 3-1-89 for the U.S. Courts of Appeals, the rate is:

REVERSED (reversal of writ denial or affirmance of writ grant):	99 (38.37%)
AFFIRMED (reversal of writ grant or affirmance of writ denial):	159 (61.63%)
Total:	258 decisions

3. When en banc decisions are included in the U.S. Courts of Appeals totals, the rate is:

REVERSED (reversal of writ denial or affirmance of writ grant):	113 (40.65%)
AFFIRMED (reversal of writ grant or affirmance of writ denial):	172 (60.35%)
Total:	285 decisions

In addition, LDF provided reversal rate data for cases decided in the state supreme courts. Overall totals as of 3-1-89 are:

REVERSED:	1052 (40.79%)
AFFIRMED:	1527 (59.21%)

State reversal rates are set out in APPENDIX A on a state-by-state basis.

The data does not reflect when these reversals occurred which would enable us to compare the current reversal rate to the reversal rate in any earlier year. As Supreme Court doctrine in the death penalty area settles and matures, there should be some evidence of a decline in the reversal rate. In this regard the Bureau of Justice Statistics has compiled data on removals from death row since 1973. It is set out below on a year-by-year basis and is categorized according to reason for removal. Note that these figures are based on the year of sentencing not the year of actual removal.

TABLE I

Reasons for Removal from Death Row and Number of Prisoners on Death Row at Year-end 1987, by year of Sentencing

The figures in Table I show that 1164 of the 3404 (34.2%) persons sentenced to death from 1973 to 1987 have been removed from death row because of judicial action. When you consider 1980 separately (a year when only 2 death penalty statutes were invalidated), the removal rate is 35.9%. In 1981 (when no death penalty statutes were invalidated), the removal rate is still 30.0%. In 1982, the removal rate (21.7%) shows its first precipitous drop, but at this point the age of the case would be a possible reason for the drop. Remember that these figures are compiled as of December 31, 1987.

As shown in Table II, BJS provided me with its latest* information on removals from death row for the 1972-1987 period. Unfortunately, it is arranged on the basis of the year of removal from death row rather than the year of sentence as in Table I. So direct comparisons between the two compilations are not possible.

TABLE II

Summary table of reasons for removal from death row, 1972-87

Year	Sentence declared unconstitutional by Supreme Court	Death sentence commuted	Conviction affirmed, sentenced overturned on appeal	Conviction and sentence overturned on appeal	Other reason	Reason for removal unknown
1972	0	0	0	0	0	0
1973	0	0	232	2	3	0
1974	0	9	38	3	2	0
1975	0	17	29	18	0	0
1976	255	18	26	5	2	4
1977	75	16	44	16	0	0
1978	112	1	8	10	0	0
1979	3	4	28	14	0	0
1980	1	2	35	35	0	0
1981	8	15	37	14	0	0
1982	0	9	27	25	0	0
1983	0	11	60	26	0	0
1984	1	1	36	15	0	0
1985	0	4	62	32	0	0
1986	0	8	42	13	0	0
1987	0	5	46	28	0	0
Total	455	120	750	256	7	4

Note: The table does not include prisoners that were removed from death row because of execution or those prisoners who died from natural causes. Some prisoners reentered the prison system after being removed for the following: Capital sentence declared unconstitutional - 0; Sentence commuted - 1; Conviction affirmed and sentence overturned - 16; Conviction and sentence overturned on appealed - 6; Other reason - 0; Reason for removal unknown - 0.

*Not yet published; compiled as December 31, 1988.

However in Table II, a general trend for removals from death row as a result of judicial action is evident. The trend offers some insight into the reversal rate issue. For example, during the 1976-1978 period there were 551 removals: 442 were directly attributable to Supreme Court decisions holding state death statutes unconstitutional; 109 convictions or convictions and sentences were overturned on appeal. Since that time the removal rate has dropped and stabilized to a considerable extent. From 1979 to 1987, there were 13 removals because of Supreme Court determinations that state death penalty statutes were invalid and in 575 cases either the conviction or conviction and sentence were reversed (an average of 63.8 per year).

The bottom line is that the reversal rate in death penalty cases is significant whether you use Legal Defense Fund or BJS figures. As a political matter, the reversal rate issue could have a major influence on the reception that Judicial Conference proposals will have in Congress.

One final examination of reversal rate data comes from a reexamination of the appendix compiled by the NAACP Legal Defense Fund in its amicus brief in Barefoot v. Estelle, 463 U.S. 880 (1983). In this appendix was an analysis of capital case decisions at the circuit court level from 1976 to February of 1983. All circuits were included in the survey even if they had just one decision in a capital case. The overall reversal rate claimed in the analysis (based on 41 cases) was 73.2% when you included state appeals from an adverse district court ruling and 67.6% when you excluded them. Because Justice Marshall quoted

these statistics in his dissenting opinion in Barefoot, Id. at 915, they have received a wide circulation and support the argument that death penalty trials are error ridden affairs.

My content analysis established that the reversal rate is actually the rate at which the habeas writ was granted. When you eliminate the cases which were remanded for procedural reasons, the result is a reversal rate of 51.2%. Admittedly this is a high figure but one must take into account the volatility of developing death penalty jurisprudence during this time.

To allow some comparison with the NAACP Legal Defense Fund data, I did a similar analysis of the death penalty cases decided by the Fifth and Eleventh Circuits in calendar year 1988. The Fifth Circuit had only one reversal out of 21 cases for a reversal rate of 4.7%. The Eleventh Circuit had 12 reversals out of 26 cases for a reversal rate of 46.1%. In two other cases the writ or a stay was granted, but no decision on the merits of the sentence or underlying conviction was reached.

APPENDIX A

STATE SUPREME COURT REVERSAL RATES IN DEATH PENALTY CASES

PRD5.PRG Reversal Rates by State on Direct Appeal: Capital Cases
Run Date: 03-01-89

State: Alabama
Affirmances: 89
Reversals: 79
State Total: 168
Percentage Affirmed: 52.98 %
Percentage Reversed: 47.02 %

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State: Arizona
Affirmances: 66
Reversals: 59
State Total: 125
Percentage Affirmed: 52.80 %
Percentage Reversed: 47.20 %

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State: Arkansas
Affirmances: 34
Reversals: 21
State Total: 55
Percentage Affirmed: 61.82 %
Percentage Reversed: 38.18 %

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State: California
Affirmances: 53
Reversals: 81
State Total: 134
Percentage Affirmed: 39.55 %
Percentage Reversed: 60.45 %

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State: Colorado
Affirmances: 0
Reversals: 3
State Total: 3
Percentage Affirmed: 0.00 %
Percentage Reversed: 100.00 %

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State: Delaware
Affirmances: 5
Reversals: 3
State Total: 8
Percentage Affirmed: 62.50 %
Percentage Reversed: 37.50 %

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State: Florida
Affirmances: 238
Reversals: 205
State Total: 443
Percentage Affirmed: 53.72 %
Percentage Reversed: 46.28 %

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State: Georgia
Affirmances: 179
Reversals: 66
State Total: 245
Percentage Affirmed: 73.06 %
Percentage Reversed: 26.94 %

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State: Idaho
Affirmances: 10
Reversals: 7
State Total: 17
Percentage Affirmed: 58.82 %
Percentage Reversed: 41.18 %

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State: Illinois
Affirmances: 63
Reversals: 42
State Total: 105
Percentage Affirmed: 60.00 %
Percentage Reversed: 40.00 %

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State: Indiana
Affirmances: 26
Reversals: 12
State Total: 38
Percentage Affirmed: 68.42 %
Percentage Reversed: 31.58 %

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State: Kentucky
Affirmances: 15
Reversals: 15
State Total: 30
Percentage Affirmed: 50.00 %
Percentage Reversed: 50.00 %

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State: Louisiana
Affirmances: 55
Reversals: 32
State Total: 87
Percentage Affirmed: 63.22 %
Percentage Reversed: 36.78 %

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State: Maryland
Affirmances: 14
Reversals: 18
State Total: 32
Percentage Affirmed: 43.75 %
Percentage Reversed: 56.25 %

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State: Mississippi
Affirmances: 46
Reversals: 50
State Total: 96
Percentage Affirmed: 47.92 %
Percentage Reversed: 52.08 %

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State: Missouri
Affirmances: 55
Reversals: 6
State Total: 61
Percentage Affirmed: 90.16 %
Percentage Reversed: 9.84 %

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State: Montana
Affirmances: 7
Reversals: 5
State Total: 12
Percentage Affirmed: 58.33 %
Percentage Reversed: 41.67 %

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State: Nebraska
Affirmances: 14
Reversals: 5
State Total: 19
Percentage Affirmed: 73.68 %
Percentage Reversed: 26.32 %

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State: Nevada
Affirmances: 29
Reversals: 15
State Total: 44
Percentage Affirmed: 65.91 %
Percentage Reversed: 34.09 %

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State: New Jersey
Affirmances: 0
Reversals: 10
State Total: 10
Percentage Affirmed: 0.00 %
Percentage Reversed: 100.00 %

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State: New Mexico
Affirmances: 4
Reversals: 1
State Total: 5
Percentage Affirmed: 80.00 %
Percentage Reversed: 20.00 %

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State: New York
Affirmances: 0
Reversals: 1
State Total: 1
Percentage Affirmed: 0.00 %
Percentage Reversed: 100.00 % (LEMUEL SMITH v. NY)

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State: N. Carolina
Affirmances: 33
Reversals: 45
State Total: 78
Percentage Affirmed: 42.31 %
Percentage Reversed: 57.69 %

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State: Ohio
Affirmances: 41
Reversals: 14
State Total: 55
Percentage Affirmed: 74.55 %
Percentage Reversed: 25.45 %

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State: Oklahoma
Affirmances: 46
Reversals: 38
State Total: 84
Percentage Affirmed: 54.76 %
Percentage Reversed: 45.24 %

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State: Oregon
Affirmances: 1
Reversals: 2
State Total: 3
Percentage Affirmed: 33.33 %
Percentage Reversed: 66.67 %

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State: Pennsylvania
Affirmances: 40
Reversals: 24
State Total: 64
Percentage Affirmed: 62.50 %
Percentage Reversed: 37.50 %

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State: S. Carolina
Affirmances: 38
Reversals: 44
State Total: 82
Percentage Affirmed: 46.34 %
Percentage Reversed: 53.66 %

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State: Tenn.
Affirmances: 47
Reversals: 21
State Total: 68
Percentage Affirmed: 69.12 %
Percentage Reversed: 30.88 %

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State: Texas
Affirmances: 214
Reversals: 105
State Total: 319
Percentage Affirmed: 67.08 %
Percentage Reversed: 32.92 %

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State: Utah
Affirmances: 9
Reversals: 3
State Total: 12
Percentage Affirmed: 75.00 %
Percentage Reversed: 25.00 %

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State: Virginia
Affirmances: 48
Reversals: 5
State Total: 53
Percentage Affirmed: 90.57 %
Percentage Reversed: 9.43 %

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State: Washington
Affirmances: 4
Reversals: 8
State Total: 12
Percentage Affirmed: 33.33 %
Percentage Reversed: 66.67 %

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State: Wyoming
Affirmances: 3
Reversals: 6
State Total: 9
Percentage Affirmed: 33.33 %
Percentage Reversed: 66.67 %

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State: US Military
Affirmances: 0
Reversals: 1
State Total: 1
Percentage Affirmed: 0.00 %
Percentage Reversed: 100.00 %

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APPENDIX B

CONTENT ANALYSIS OF REVERSAL RATE DATA DRAWN FROM NAACP LEGAL DEFENSE FUND BRIEF IN BAREFOOT V. ESTELLE

Case	Relief Granted	Conviction Reversed	Sentence Reversed	Other Relief
Spinkellink v. Wainwright (578 F.2d 582)	no			
Chenault v. Synchombe (581 F.2d 444)	yes			remand to dist. ct. to dismiss so pet. can pursue st. remedies
Jurek v. Estelle (623 F.2d 762)	yes	involuntary confession		
Burns v. Estelle (626 F.2d 396)	yes	Witherspoon error		
Smith v. Estelle (602 F.2d 694)	yes		compelled psych. exam w/o Miranda	
Evans v. Britton (639 F.2d 221)	yes	unconst. death pen. precludes mit. circ.		
Stephens v. Zant (648 F.2d 446)	yes		1 of 3 agg. circ. declared unconst.	
Potts v. Zant (638 F.2d 727)	yes			remand for evidentiary hearing
Williams v. Blackburn (679 F.2d 381)	no			
Baldwin v. Blackburn (653 F.2d 942)	no			
Granviel v. Estelle (655 F.2d 673)	yes	Witherspoon error		
Batte v. Estelle (655 F.2d 692)	yes		compelled psych. exam w/o Miranda	
Washington v. Watkins (662 F.2d 1116)	yes		Lockett	

Case	Relief Granted	Conviction Reversed	Sentence Reversed	Other Relief
Smith v. Balkcom (671 F.2d 858)	no			
Henry v. Wainwright (686 F.2d 311)	yes		non-statutory agg. cir. at sentencing	
Spivey v. Zant (683 F.2d 881)	no			
Alderman v. Austin (695 F.2d 124)	no			
Mason v. Baldcom (669 F.2d 222)	yes	Jury instruction -- Burden Shifting		
Moore v. Estelle (670 F.2d 56)	yes	Witherspoon error		
Washington v. Strickland (693 F.2d 1243)	yes			remand for evid. hearin
Gholson v. Estelle (675 F.2d 734)	yes		psych. exam w/o Miranda warning	
Ross v. Estelle (675 F.2d 734)	yes		psych. exam w/o Miranda warning	
Gray v. Lucas (685 F.2d 139)	no			
Jordan v. Thigpen (688 F.2d 395)	yes		Jury instruction error -- agg. circumstance	
Bell v. Watkins (692 F.2d 999)	yes		Jury instruction error -- agg./mit. circumstance	
Clark v. La. St. Pen (694 F.2d 75)	yes	Jury instruction error -- specific intent		
Bass v. Estelle (696 F.2d 1154)	no			
Holtan v. Parratt (683 F.2d 1163)	yes	ineff. counsel		

Case	Relief Granted	Conviction Reversed	Sentence Reversed	Other Relief
Knapp v. Cordwell (667 F.2d 1253)	no			
Harris v. Pulley (692 F.2d 1189)	yes			remand for evid. hearing -- race/gender discrimination
Hays v. Murphy (663 F.2d 1004)	yes			remand for evid. hearing -- competency of prisoner
Ford v. Strickland (696 F.2d 804)	no			
Young v. Zant (677 F.2d 792)	yes	ineff. counsel		
Machetti v. Linaham (769 F.2d 236)	yes	unconst. state jury selection procedure		
Goodwin v. Balkcom (684 F.2d 794)	yes	ineff. counsel		
Proffitt v. Wainwright (685 F.2d 1227)	yes		consideration of non-statutory agg. circumstance	
Hance v. Zant (696 F.2d 940)	yes	Witherspoon/inflammatory remarks		
Sullivan v. Wainwright (no. 81-5843)	no			
Stanley v. Zant (no. 81-7615)	no			
Thomas v. Zant (no. 81-7675)	yes			remand for evid. hearing --ineffective counsel
Darden v. Wainwright	no			

APPENDIX C

FIFTH CIRCUIT 1988 DEATH PENALTY DECISIONS

Content Analysis to Show Ground for Reversal

Case	Relief Granted	Conviction Reversed	Sentence Reversed	Other Relief
Bell v. Lynaugh (858 F.2d 978)	no			
Bridge v. Lynaugh (860 F.2d 162)	no			
Bridge v. Lynaugh (838 F.2d 770)	no			
Bryne v. Butler (845 F.2d 501)	no			
Bryne v. Butler (847 F.2d 1135)	no			
Condova v. Lynaugh (838 F.2d 764)	yes	Jury instruction -- lesser included offense		
Earvin v. Lynaugh (860 F.2d 623)	no			
Edwards v. Scroggy (849 F.2d 204)	no			
Franklin v. Lynaugh (860 F.2d 165)	no			
Garrett v. Lynaugh (842 F.2d 118)	no			
Gilliard v. Scroggy (847 F.2d 1141)	no			
Graham v. Lynaugh (854 F.2d 715)	no			
Hawkins v. Lynaugh (844 F.2d 1132)	no			
King v. Lynaugh (850 F.2d 1055)	no			

Case	Relief Granted	Conviction Reversed	Sentence Reversed	Other Relief
Londry v. Lynaugh (844 F.2d 1122)	no			
Lowerfeld v. Butler (843 F.2d 183)	no			
Mana v. Lynaugh (840 F.2d 1194)	no			
Sawyer v. Butler (848 F.2d 582)	no			
Salvage v. Lynaugh (842 F.2d 89)	no			
Streetman v. Lynaugh (835 F.2d 1521)	no			
Williams v. Lynaugh (837 F.2d 1294)	no			

APPENDIX D

ELEVENTH CIRCUIT 1988 DECISIONS

Content Analysis to Show Ground for Reversal

Case	Relief Granted	Conviction Reversed	Sentence Reversed	Other Relief
Berryhill v. Zant (858 F.2d 633)	yes	under-representation of women on jury list		
Buford v. Dugger (841 F.2d 1057)	yes		Jury instruction -- unconst. presumption	
Bundy v. Dugger (850 F.2d 1402)	no			
Corn v. Kemp 837 F.2d 1474)	yes	Jury instruction -- Burden of Proof in insanity case		
Cervi v. Kemp (855 F.2d 702)	yes	involuntary confession		
Daugherty v. Dugger (839 F.2d 1426)	no			
Dunkins v. Thigpen (854 F.2d 394)	no			
Fleming v. Kemp (837 F.2d 940)	no			
Godfrey v. Kemp (836 F.2d 1557)	yes	Jury instruction -- Burden of Proof in insanity case		
Harick v. Dugger (844 F.2d 1464)	no			
Jackson v. Dugger (837 F.2d 1469)	yes		Jury instruction -- unconst. to advise jury death penalty presumed proper	
Julius v. Johnson (854 F.2d 400)	no			
Mann v. Dugger (844 F.2d 1446)	yes		Jury instruction -- role of jury in deciding sentence	
Middleton v. Dugger (849 F.2d 491)	yes		ineff. counsel	

Case	Relief Granted	Conviction Reversed	Sentence Reversed	Other Relief
Presnell v. Kemp (835 F.2d 1567)	yes			remand to dist. ct. to consider unspecified claims
Ruffin v. Dugger (848 F.2d 1512)	yes		Lockett issue	
Singleton v. Thigpen (856 F.2d 126)	no			
Smith v. Dugger (840 F.2d 878)	no			
Smith v. Kemp (855 F.2d 712)	yes	unconst. confession		
Stano v. Dugger (846 F.2d 1286)	yes			stay, CPC granted, unconst. waiver of rt. to counsel
Stephens v. Kemp (846 F.2d 642)	yes		ineffec. counsel	
Stewart v. Dugger (847 F.2d 1486)	no			
Stone v. Dugger (837 F.2d 1477)	yes		Jury instruction -- mit. circ.	
Waters v. Kemp (845 F.2d 260)	no			
Williams v. Kemp (846 F.2d 1276)	no			
Willis v. Kemp (838 F.2d 1510)	no			

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

FROM: ALBERT M. PEARSON, REPORTER

RE: CASE CHRONOLOGIES

DATE: APRIL 17, 1989

Attached is a copy of a revised and supplemented list of death penalty cases that have ended in execution. There are now 44 case histories on the list.

The information is arranged to show the overall time from sentence to execution and then to indicate how much time in litigation is spent in the state and lower federal courts and the U.S. Supreme Court. Also shown is the amount of down time in each case which means the time when a death penalty case is not actually pending before any court. This data is a reflection of what happens in a death penalty case after the trial phase is done and the conviction review process begins.

The average times are as follows:

1. state court (including state habeas review)	2.85 years (40%)
2. federal court (excluding U.S. Supreme Court review)	2.00 years (28%)
3. Supreme Court	1.20 years (17%)
4. Down Time	1.03 years (15%)
Overall sentence to execution	7.09 years

According to Bureau of Justice Statistics data compiled as of December 31, 1987, the average time from sentence to execution was 77 months or 6.41 years:

Average elapsed time from sentence to execution for:

All races	**White**	**Black**
77 months	70 months	86 months
58	59	58
79	76	84
71	65	80
86	77	102
86	78	96

DEATH PENALTY CASE HISTORIES

TIME SHOWN IN DAYS, YEARS AND BY PERCENTAGE OF TOTAL TIME FROM SENTENCE TO EXECUTION

Inmate	Sentence to Execution	State Court	Federal Court	Supreme Court	Down Time
Evans (ALA)	2155	574	808	676	97
Crime: 1/5/77	5.90	1.57	2.21	1.85	.27
Execution: 4/22/83	--	27%	37%	31%	5%
6.29 years					
Jones (ALA)	1215	545	280	332	58
Crime: 8/7/81	3.32	1.49	.77	.91	.16
Execution: 3/21/86	--	45%	23%	27%	5%
4.62 years					
Ritter (ALA)	3768	1568	1315	806	79
Crime: 1/5/77	10.32	4.29	3.60	2.21	.21
Execution: 8/28/87	--	42%	35%	21%	2%
10.63 years					
Sullivan (FL)	3634	386	425	734	1089
Crime: 4/9/73	9.96	1.06	3.90	2.01	2.98
Execution: 11/30/83	--	11%	39%	20%	30%
10.65 years					
Antone (FL)	2716	1368	60	271	470
Crime: 10/23/75	7.44	3.75	1.66	.74	1.29
Execution: 1/26/84	--	50%	22%	10%	18%
8.29 years					
Goode (FL)	2575	1247	485	348	495
Crime: 3/5/76	7.05	3.42	1.33	.95	1.36
Execution: 4/5/84	--	48%	19%	14%	19%
8.10 years					
Adams (FL)	3509	1074	1323	601	511
Crime: 11/12/73	9.61	2.94	3.62	1.64	1.40
Execution: 5/10/84	--	30%	38%	17%	15%
10.5 years					
Shriner (FL)	2608	1215	570	247	576
Crime: 10/22/76	7.15	3.33	1.56	6.77	1.58
Execution: 6/20/84	--	47%	22%	9%	22%
7.7 years					
Washington (FL)	2417	320	597	805	695
Crime: 9/20/76	6.62	.88	1.64	2.20	1.90
Execution: 7/13/84	--	13%	25%	33%	29%
8.1 years					

Inmate	Sentence to Execution	State Court	Federal Court	Supreme Court	Down Time
Dobbert (FL)	3786	1648	662	878	598
Crime: 12/31/71	10.37	4.51	1.81	2.40	1.64
Execution: 9/7/84	--	44%	17%	23%	16%
12.7 years					
Henry (FL)	3740	681	1096	781	1182
Crime: 3/23/74	10.24	1.87	3.0	2.14	3.24
Execution: 9/20/84	--	18%	29%	21%	32%
10.5 years					
Palmes (FL)	2653	1410	654	301	288
Crime: 11/4/76	7.27	3.86	1.79	.82	.79
Execution: 11/8/84	--	54%	25%	11%	10%
7.95 years					
Raulerson (FL)	3400	1917	733	538	212
Crime: 4/27/75	9.31	5.25	2.0	1.47	.58
Execution: 1/20/85	--	56%	21%	16%	7%
9.80 years					
Witt (FL)	4032	1426	1124	715	767
Crime: 10/28/73	11.04	3.91	3.08	1.96	2.10
Execution: 3/6/85	--	35%	28%	18%	19%
11.37 years					
Francois (FL)	2411	1209	699	155	348
Crime: 7/27/77	6.60	3.31	1.91	.42	.95
Execution: 5/29/85	--	50%	29%	6%	15%
8.15 years					
Thomas (FL)	3286	908	1052	368	958
Crime: 1/1/76	9.0	2.48	2.88	1.0	2.62
Execution: 4/15/86	--	28%	32%	11%	29%
10.3 years					
Funchess (FL)	2330	572	1199	235	324
Crime: 12/16/74	6.38	1.57	3.28	.64	.89
Execution: 4/22/86	--	25%	51%	10%	14%
11.36 years					
Straight (FL)	3197	1390	1234	310	263
Crime: 10/4/76	8.75	3.8	3.38	.85	.72
Execution: 5/20/86	--	43%	39%	10%	8%
9.65 years					
White (FL)	3395	1324	543	683	845
Crime: 7/27/77	9.30	3.63	1.49	1.87	2.31
Execution: 8/28/87	--	39%	16%	20%	25%
10.1 years					

Inmate	Sentence to Execution	State Court	Federal Court	Supreme Court	Down Time
Darden (FL)	5147	863	2217	1308	759
Crime: 9/8/73	14.1	2.36	6.07	3.58	2.08
Execution: 11/7/88	--	17%	43%	25%	15%
14.5 years					
Daugherty (FL)	2736	1163	192	628	753
Crime: 3/1/76	7.49	3.18	.53	1.72	2.06
Execution: 11/7/88	--	42%	7%	23%	28%
12.7 years					
Gray (MS)	2465	1076	778	553	58
Crime: 6/25/76	6.75	2.95	2.13	1.51	.15
Execution: 8/26/83	--	44%	32%	22%	2%
7.19 years					
Johnson (MS)	2468	760	1385	88	235
Crime: 6/2/79	6.76	2.08	3.79	.24	.64
Execution: 5/20/87	--	31%	56%	4%	9%
7.97 years					
Evans	1188	633	100	410	45
Crime: 4/4/81	3.25	1.73	.27	1.12	.12
Execution: 7/8/87	--	53%	8%	35%	4%
6.25 years					
Brooks (TX)	1830	1350	371	85	24
Crime: 12/14/76	5.01	3.70	1.02	.23	.07
Execution: 12/7/82	--	74%	20%	5%	1%
5.99 years					
Autry (TX)	1259	498	398	297	70
Crime: 4/20/80	3.45	1.36	1.09	.81	.19
Execution: 3/14/84	--	40%	32%	23%	5%
3.90 years					
O'Bryan (TX)	3223	1841	947	357	78
Crime: 10/31/74	8.83	5.04	2.59	.98	.21
Execution: 3/31/84	--	57%	29%	11%	3%
9.42 years					
Barefoot (TX)	2165	557	800	263	556
Crime: 8/7/78	5.96	1.53	2.19	.72	1.52
Execution: 10/30/84	--	26%	37%	12%	25%
6.15 years					
Skilleron (TX)	2483	1011	645	562	265
Crime: 10/23/74	6.80	2.77	1.77	1.54	.73
Execution: 1/16/85	--	41%	26%	23%	10%
10.24 years					

Inmate	Sentence to Execution	State Court	Federal Court	Supreme Court	Down Time
De La Rosa (TX)	1399	658	220	284	237
Crime: 8/22/79	3.83	1.80	.60	.78	.65
Execution: 5/15/85	--	47%	16%	20%	17%
5.73 years					
Bass (TX)	2114	881	510	324	399
Crime: 8/16/79	5.79	2.41	1.40	.89	1.09
Execution: 3/12/86	--	42%	24%	15%	19%
6.58 years					
Esquivel (TX)	2854	613	1294	372	574
Crime: 6/8/78	7.81	1.68	3.54	1.02	1.57
Execution: 6/9/86	--	21%	45%	13%	21%
8.01 years					
Brock (TX)	4153	728	2441	631	353
Crime: 5/21/74	11.37	1.99	6.69	1.73	.97
Execution: 6/18/86	--	18%	59%	15%	8%
12.08 years					
Smith (TX)	1796	1274	184	2	337
Crime: 2/3/78	4.92	3.49	.50	.005	.92
Execution: 8/22/86	--	71%	10%	0%	19%
8.56 years					
Wicker (TX)	2031	1143	384	356	148
Crime: 4/4/80	5.56	3.13	1.05	.97	.41
Execution: 8/26/86	--	56%	19%	18%	7%
6.40 years					
Andrade (TX)	770	399	121	129	121
Crime: 3/20/84	2.11	1.09	.33	.35	.33
Execution: 12/18/86	--	51%	16%	17%	16%
2.75 years					
Hernandez (TX)	2322	849	148	411	914
Crime: 6/19/80	6.36	2.32	.41	1.13	2.50
Execution: 1/30/87	--	36%	6%	18%	40%
6.62 years					
Williams (TX)	3168	2099	511	443	115
Crime: 6/12/78	8.68	5.75	1.40	1.21	.31
Execution: 5/28/87	--	66%	16%	14%	4%
8.97 years					
Johnson (TX)	1491	672	405	342	74
Crime: 4/8/82	4.08	1.84	1.11	.94	.20
Execution: 6/24/87	--	45%	27%	23%	5%
5.22 years					

Inmate	Sentence to Execution	State Court	Federal Court	Supreme Court	Down Time
Thompson (TX)	1952	1333	164	292	163
Crime: 5/21/77	5.34	3.65	.45	.80	.45
Execution: 7/8/87	--	68%	8%	15%	9%
9.70 years					
Starvaggi (TX)	3513	1191	1867	364	91
Crime: 1/28/77	9.62	3.26	5.11	1.00	.25
Execution: 9/10/87	--	34%	53%	10%	3%
10.62 years					
Streetman (TX)	1612	827	623	1	161
Crime: 12/17/82	4.41	2.26	1.71	.002	.44
Execution: 1/7/88	--	51%	39%	0%	10%
5.06 years					
Franklin (TX)	2411	1226	481	629	75
Crime: 7/25/75	6.60	3.36	1.32	1.72	.20
Execution: 11/3/88	--	51%	20%	26%	4%
13.29					
Landry (TX)	2038	1412	94	370	162
Crime: 8/6/82	5.58	3.87	.16	1.01	.44
Execution: 12/13/88	--	69%	5%	18%	8%
6.36 years					