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Habeas Corpus Committee - Memoranda

Lewis F. Powell Jr.

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

June 1, 1989

Hon. Lewis F. Powell, Jr.
Associate Justice, ret.
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice Powell:

This letter responds to your recent invitation to the American Civil Liberties Union to submit written comments to your ad hoc committee of the Judicial Conference. Although we are pleased to have the opportunity to comment, we must express our grave concern at the process for recommending changes in so serious a matter as the availability of federal habeas corpus for the adjudication of constitutional claims raised by citizens sentenced to death in state court. We believe that such a serious matter warrants a far more comprehensive approach including extensive public hearings and an opportunity to comment on specific proposals. Because we do not know what specific proposals the Committee is considering we are unable to focus our comments on the specific issues raised by any specific proposal. Moveover, we have been unable to give this matter the exhaustive study it deserves because we only recently received notice of the Committee's willingness to review comments with a June 1 deadline. Given these constraints, this letter attempts only to sketch our initial thoughts; we would appreciate an opportunity to elaborate our views later and to comment on specific proposals in due course.

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I. Initial Observations

At the outset, we confess some concern that your letter states the committee's purpose as, in part, to "formulate proposals to reduce the delay in the implementation of capital sentences...." That statement seems to assume, first, that executions are in fact delayed and, second, that the Judicial Conference has an interest in eliminating any such delay. In our view, neither assumption is warranted. The federal habeas courts require time in which to address petitioners' claims. The time required for the courts to carefully consider legitimate constitutional claims relating to the appropriateness of an irrevocable should not be labeled as "delay." Moreover, while the Judicial Conference has an entirely appropriate concern that litigation in the federal courts be prompt and efficient, it is not clear to us that the Conference has any direct interest in expediting state criminal sentences. Surely, the paramount interest of the federal courts in these cases is safeguarding the rights of Americans. No other interest should take precedence. The assumptions underlying a project of this kind necessarily color both the analysis and the conclusions. If those assumptions are wrong or poorly stated, they should be reexamined or clarified.

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An inquiry into the federal courts' adjudication of claims raised by death row prisoners is undertaken against a background -- in which two different but related debates are raging. First, there is the continuing controversy over the desirability of federal post conviction habeas corpus. That debate has a long history, but it took on new significance in the early 1980s when the first of a series of bills, supported by the Justice Department, was introduced in the Congress. Similar bills have been put forward in every Congress since, including the present session. Of course, none of those bills has been enacted into law. Second, there is the even more divisive controversy over the death penalty. These two debates are commingled when attention turns to the availability of federal habeas corpus in capital cases. The results can be deeply troubling.

In all candor, we doubt the wisdom of charging a committee to examine habeas corpus in death penalty cases alone. Such a charge invites a study of the jurisdiction of the federal courts on the one hand, or a study of the advisability and administration of capital punishment on the other, to be skewed - when views fashioned in one debate spill over into the other. For example, and here we are abundantly candid only to be clearly understood in these serious circumstances, we are concerned that whether an observer regards the postponement of executions

pending federal habeas as "delay" may depend on that observer's views regarding the death penalty.

Any proposals your committee generates may bear significant consequences for matters beyond the scope of your project. Narrowly focused prescriptions, offered with only death penalty cases in mind, can undercut the overarching framework for federal collateral litigation generally. Similarly, proposals to change habeas corpus law in general can have serious implications for the administration of capital punishment in the jurisdictions that impose the death penalty. Indeed, any proposal to limit federal collateral review in death penalty cases invites the creation of a discriminatory system, where death penalty petitioners would have fewer opportunities to have their claims heard in a federal forum than the ordinary state prisoner. Given the irrevocable nature of the penalty and the well documented rate of constitutional error in such cases, this would be an unacceptable result.

We are further concerned that the narrow focus on habeas as it relates to capital cases will lead this committee to view new restrictions on collateral review as a possible means of conserving judicial resources. Capital cases by no means comprise the largest portion of state or federal court dockets. Efforts to improve judicial economy on the backs of capital

defendants will foster injustice and will not significantly advance the goal of judicial efficiency.

Finally, any proposal to limit access to federal review in death penalty cases must be viewed against a backdrop of pervasive racial discrimination. Nowhere is the presence of discrimination more starkly presented than in the imposition of the death penalty. As Justice Brennan points out in his dissenting opinion in McCleskey v. Kemp, 481 US 279 (1987) there are a "myriad of opportunities for racial considerations to influence criminal proceedings." See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986)(in the exercise of preemptory challenges); Vasquez v. Hillery, 474 U.S. 254 (1986)(in the selection of the petit jury); Amadeo v. Zant 56 108 S.Ct 1771 (1988)(intentional under-representation of jurors based on race and sex); Whitus v. Georgia 385 U.S. 545 (1967); Wayte v. United States, 470 U.S. 598 (1967)(in the exercise of prosecutorial discretion); Donnelly v. De Christoforo, 416 U.S. 637 (1974)(in conduct of arguments); Turner v. Murray, 476 U.S. 28 (1986) (in the conscious or unconscious bias of jurors). Moreover, over a decade of research reveals a remarkably consistent pattern of sentencing which appears to be explained only by race. See e.g., S. Gross & R. Mauro, Death and Discrimination (1989); Bienen, Weiner, Allison & Mills, "The Reimposition of Capital Punishment in New Jersey: The

Role of Prosecutorial Discretion, 41 Rutgers L. Rev. 36 (1988); Baldus, Pulaski & Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts," 15 Stetson L. Rev. 133 (1986); Radelet & Pierce, "Race and Prosecutorial Discretion in Homicide Cases," 19 Law and Soc. Rev. 587 (1985). The Court in McCleskey rejected the petioner's request for relief based on evidence of a statistical disparity in capital sentencing and placed an exceedingly high burden on capital defendants seeking to obtain relief from race discrimination. It did not, however, abdicate its obligation to ensure that invidious discrimination does not influence decisions of life and death. This Committee must understand that any further limitations on access to federal collateral review that it may propose will undoubtedly serve to further insulate racially biased state proceedings from review. Moreover, without the vigorous federal oversight that habeas provides, we see little likelihood that states which suffer from institutionalized racial bias throughout the criminal justice system will feel compelled to squarely address the problem.

II. The Time Required for Adjudication in Habeas

The time necessary for adjudication in habeas corpus is, of course, an issue in discussions regarding habeas generally. Some

critics charge that the mere availability of habeas corpus extends litigation unnecessarily and threatens the finality of state court judgments. That argument is circular; it begins with the proposition that post conviction habeas lacks justification and on that basis laments the time devoted to collateral adjudication. If, by contrast, one accepts the value of federal adjudication of federal claims, the expenditure of time and resources is entirely appropriate. We take the latter view. Pressures to expedite habeas adjudication for no better reason than to advance the day when criminal sentences are deemed to be beyond legal challenge should be resisted. In this, we include procedures, approved in Barefoot v. Estelle 463 US 800 (1983), to expedite death penalty litigation in particular.

Of course, we recognize that some litigants need incentives to keep cases moving. In habeas corpus, however, such incentives are abundant. Prisoners with claims that might set them free have ample reason to press those claims aggressively. Moreover, petitioners who sit on their rights may suffer dismissal under Rule 9(a).

If there is any explanation for singling death penalty cases out for special attention, it must be that these ordinary

incentives for prompt litigation are thought to be ineffective when petitioners face death rather than future custody. That is not so. Rule 9(a) applies to all habeas cases, capital or not, and petitioners who have constitutional claims that might lift the threat of death from them can be expected to pursue those claims zealously. The notion that capital petitioners are content to languish on death row, to engage in dilatory tactics, and generally to abuse avenues for frivolous litigation in order to postpone the inevitable is not supported by any reliable data of which we are aware. In fact, the State can and does move cases along at will by setting execution dates. No other litigants can precipitate action by their opponents. If, indeed, death-sentenced prisoners occasionally can be found with no litigation pending, it is undoubtedly because they lack the resources needed to press their claims in court. This lack of resources largely stems from these condemned prisoners' inability to obtain counsel or legal materials. At the state post-conviction level, only 19 states mandate the appointment of counsel in capital cases; 15 states allow the discretionary appointment; and in two states, Georgia and New Hampshire, there is no right to counsel. Further, states such as Florida prohibit death row inmates from physical access to the prison law library. Instead, the state requires condemned inmates to request at most

three specific legal materials, from their cells, once a week. Mello, "Facing Death Alone: the Post-Conviction Attorney Crisis on Death Row," 37 Am. U.L. Rev. 513, 543 (1988).

Nor is it the case that death row prisoners are moved to act only by the spur of imminent execution. The explanation for feverish litigation on the eve of executions is that it is then, and often only then, that the prisoners concerned obtain counsel to speak for them. Legal talent for prisoners sentenced to death is spread thin in the United States. Specialists typically channel their efforts through a sort of triage, which gives highest priority to clients in immediate danger.

In this connection, the committee would do well to recommend that stays of execution be automatic during postconviction litigation, in either state or federal court, just as they are pending direct review. We recognize that collateral litigation does appear to proceed on a hurry-up-and-wait schedule. Cases move along deliberately, and then suddenly the lawyers and judges are caught up in the exigencies of emergency practice--with the attendant logistical difficulties, general inconvenience, and emotional drain. The contrast is not, however, between deliberate foot-dragging on the one hand and equally deliberate eleventh hour litigation on the other. It is between the normal pace of complex litigation and emergency practice imposed upon

the parties by the (sometimes unanticipated) establishment of execution dates. Capital cases would proceed on a balanced basis if attorneys were not required periodically to abandon the development of their arguments in order to prevent the execution of their clients before viable claims are adjudicated.

Finally, let this be clear. Death penalty cases may be expected to proceed more slowly than noncapital cases. The stakes being what they are, surely the courts are warranted in taking whatever time is required for careful, deliberative adjudication. Moreover, the complexities of eighth amendment doctrine generate litigation that takes time to complete. Often, lawyers must investigate factual matters never before explored; always, they must research, develop, and advance sophisticated legal contentions. If this society wants the constitutional rights of capital petitioners to be respected, and it clearly does, then it follows that the federal courts charged with enforcing those rights must be allowed an appropriate opportunity to do their job. Surely, if the federal system is able to tolerate the pace of other complex federal litigation, it should tolerate the pace of death penalty litigation where life rather than money is at stake.

III. The Conceptual Framework of Habeas Corpus

The federal courts' jurisdiction to entertain petitions for the writ of habeas corpus constitutes the principal federal means by which the Bill of Rights is enforced, via the fourteenth amendment, against state power. The Supreme Court is physically incapable of sitting as a court of error to determine federal claims on direct review from the state courts; collateral litigation in the lower federal courts provides the essential alternative. The availability of such a mechanism for searching, sensitive, and independent adjudication of constitutional claims on the merits is vital to the preservation of the system of individual rights enjoyed by all.

Congress has never given the lower federal courts authority to take appeals from the state courts, and the federal courts thus do not regard their role as reviewing state judgments for error. By contrast, § 2241 of the Judicial Code, providing for the federal habeas corpus jurisdiction, establishes an independent head of federal judicial power, comparable to the general federal question statute, § 1331.

Of course, petitioners for the federal writ of habeas corpus often have previously engaged in litigation in state court. This is because Bill of Rights claims typically arise as procedural defenses on the part of defendants in state criminal

prosecutions. While criminal defendants could be permitted to turn such defenses into affirmative claims for immediate relief in federal court, the current scheme contemplates that defendants will remain in state court, raise their federal claims in the manner provided by state law, and then, if they wish, press the same claims in federal habeas corpus--which necessarily is exempted from the full faith and credit statute and ordinary preclusion rules. This system has the advantage of avoiding federal interference with state court proceedings in criminal cases. It also involves the state courts in the making and enforcement of federal constitutional law.

Some observers have begun to argue that federal habeas corpus should be considered a further stage of the criminal proceedings initiated in state court and that the federal courts should function as appellate tribunals--in the teeth of Congress' unquestioned decision <u>not</u> to establish an appellate jurisdiction directly. In its strong form, this perspective challenges the very existence of the federal habeas jurisdiction. In its mild form, the appellate review model suggests that habeas "review" should be sharply circumscribed in the manner of direct appeals within a single jurisdiction.

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We submit that the appellate framework for federal habeas corpus is inappropriate. We take the two forms of the argument in turn.

A. Proposals to Limit the Issues That Can Be Addressed in Habeas

Once federal habeas corpus is conceived as appellate in nature, in the minds of some it becomes largely unnecessary. Given that all the states provide for direct review in the state appellate courts, an additional appeal to the federal courts seems to the federal writ's harsh critics to be redundant, wasteful, and disrespectful. By this account, the federal habeas courts should eschew serious treatment of the merits of claims already addressed in state court and, at most, should merely ensure that state court judgments on federal questions are "reasonable." This is the understanding of habeas offered in a series of bills introduced in the Congress in recent years. The ACLU has opposed those bills--in company with the American Bar Association and other groups concerned that habeas corpus be retained and the Congress has consistently failed to enact them. Issue preclusion has no place in federal habeas corpus. It is that simple.

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As we have demonstrated in our testimony in the Congress, illustrative copies of which are attached, any proposal that the federal courts should be asked to determine not whether the state courts got a federal question wrong, but whether they got it unreasonably wrong, is plainly misguided and unworkable. More fundamentally, the notion that federal habeas corpus should be relegated to checking state court judgments for extraordinary error misconceives the nature of the habeas jurisdiction and disregards the fundamental decision, made years ago by the Congress and long respected by the Supreme Court, that habeas is an occasion for plenary adjudication of constitutional claims. There can be no question that here as in other cases, the federal courts must remain the final arbiter of federal rights.

Certainly, your committee would make a serious mistake if it were to endorse a cut-back in the scope of federal habeas review in death penalty cases. First, where human life is at stake the federal courts' ability to reach and determine the merits of federal claims should be at the maximum. Second, the vagaries of substantive eighth amendment doctrine make it essential that the federal courts be free to make independent and authoritative judgments of their own. In this vein, the committee should take careful note that the rate of successful federal habeas petitions is extraordinarily high in death penalty cases: 60-70% as of

1982; 70% as of 1983; 60% as of 1986; 73.2% between 1973-1983. See Mello, supra, at 521. See also, Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., app. E, at 6e, Barefoot v. Estelle, 463 U.S. 880 (1983). To deny the federal courts the ability to reach federal claims in capital cases would be to risk, even to acknowledge, that petitioners with meritorious claims will go to their death.

B. Proposals to Establish Rigid Procedural Barriers to Habeas

Other proposals, some of which have also appeared recently in failed bills in the Congress, would have the federal habeas courts operate in the manner of appellate courts within a single jurisdiction. Four contentions dominate this account: (1)habeas proceedings should begin shortly after the last state court judgment in a case; (2)direct review of state court judgments in the Supreme Court should be eliminated; (3)the federal habeas courts should defer to factual findings in state court; and (4)the federal courts should enforce state rules on when and how issues must be raised on pain of forfeiture.

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1. A Statute of Limitations for Habeas Corpus

Any proposal to link the initiation of federal habeas corpus with previous state court proceedings by demanding that federal petitions be filed within a fixed time after judgment in state court seriously mistakes the nature of the habeas jurisdiction. Once again, the federal habeas courts do no review state court decisions directly, second-guessing state judges and purporting to overturn judgments thought to be erroneous. By contrast, habeas corpus petitions initiate new and independent lawsuits in which the federal courts have the power and obligation to appraise federal claims afresh. To neglect this well-settled conceptual understanding of habeas is to tamper with the distribution of judicial business recognized and respected for generations. Moreover, as we explained earlier, capital habeas applicants do not sit on their rights after the completion of state court proceedings.

If litigants need any additional incentives to press their claims in season, those incentives are provided by Rule 9(a), which establishes a workable and working scheme for appraising allegedly tardy claims, measuring any genuine state interests jeopardized by delay, and dismissing claims when late filing is unjustified and prejudicial. Nothing more is needed. A firm statutory period promises only an arbitrary barrier to the

federal forum, which would primarily affect pro se petitioners who are either unaware of the time limit or unable to to meet it -- or both. Such petitioners would be denied a federal forum even if no state interests have been jeopardized.

Proposals to establish a statute of limitations for federal habeas corpus have been offered over the years. Those who find the federal forum undesirable naturally enough seek to cut off claims on procedural grounds, whatever the merit of those claims. And a stringent statute of limitations would constitute just such a procedural vehicle for defeating the habeas jurisdiction. Impoverished prisoners, often attempting to negotiate complex proceedings pro se would routinely miss any such deadline, beause of ignorance or inability to move with the speed required.

Particularly in death penalty cases, a statute of limitations that forecloses treatment of claims notwithstanding their merit would work an egregious hardship. These are the cases in wich procedural barriers, intended merely to encourage effciency in litigation, should be relaxed in favor of adjudication on the merits -- lest a mechanistic insistence on procedural form send petitioners with solid claims to their death.

It may be tempting to respond to complaints about habeas corpus with a statute of limitations that allows petitioners what

seems to be a reasonable time in which to act, yet creates an incentive to proceed promptly. Such a statute would not constitute the benign policy it seems on first glance to be. Prisoners need time to identify and articulate their claims, marshall their arguments, and present their cases to the federal courts. Given their imprisonment, their poverty, and their general lack of resources, they need much more time than ordinary litigants. Accordingly, rigid statute that displaces Rule 9(a) would operate to deny federal adjudication to prisoners who need it most.

2. Supreme Court Review of State Judgments

The misguided idea that federal habeas corpus may be understood as a species of appellate review begets a similarly ill-advised suggestion: that direct review of state court judgments in the United States Supreme Court might be scrapped--if not immediately after direct review in the state appellate courts, then in the wake of state postconviction proceedings. It is common currency, of course, that the Supreme Court's certiorari jurisdiction is properly limited to cases presenting issues of special national moment. We would not expect, then, that the Court would accept review at the behest of many would-be federal habeas applicants, capital or otherwise. Certainly no

litigant should be obligated to ask the Court for discretionary review on the chance that the Justices might find her or his case certworthy. Yet the elimination of such an opportunity to seek direct review prior to federal habeas corpus would deny petitioners, and the Court itself, an important vehicle for constitutional litigation.

This is particularly true in death penalty cases. Many of the Court's eighth amendment decisions in recent years have come on direct review of state court judgments. Direct review could become even more important under recent cases. See Teague v. Lane 108 S.Ct 1106 (1988). While in many instances the Court finds federal habeas adjudication to perform a valuable screening function, working issues into shape for Supreme Court consideration, the fact remains that the Court often chooses to take issues sooner. When it does, everyone's interest in prompt adjudication is served.

Certainly there is no warrant for foreclosing direct review merely on the ground that time is required for petitions to be considered. Certiorari applications must be filed promptly, and the Court deals with them on a tight schedule. There is no solid evidence whatever of any "delay" associated with certiorari practice.

It is also true that in light of Stone v. Powell, direct review in the Supreme Court constitutes the principal opportunity for federal treatment of fourth amendment exclusionary rule claims. To cut off Supreme Court review in favor of immediate resort to federal habeas corpus would be to frustrate entirely the adjudication of exclusionary rule claims in a federal forum.

3. Federal Court Treatment of State Fact-Finding

To be sure, appellate courts typically defer to state court findings of primary fact and reject such findings only if they are found to be clearly erroneous. At least since Brown v. Allen, however, independent fact-finding in habeas corpus as been accepted as equally routine. Subject to §2254(d), which accords state findings a presumption of accuracy in certain specified circumstances, the federal courts have the authority, and in the situations identified in Townsend v. Sain the obligation, to hold evidentiary hearings and make their own findings touching federal rights.

This fundamental element of habeas law is as sound as it is well-settled. Constitutional claims of the kind that are raised in habeas corpus are fact-sensitive. Particularly in death penalty cases where an inadequate record at the state level is often the result of uninformed or incompetent representation at

the trial, the federal courts must have the authority to find the facts. Indeed, if the federal habeas courts are to fulfill their function as authoritative tribunals, they must attend to the critical fact-finding stage of adjudication just as to the posterior, judgment phase.

Arguments that state court findings should routinely be accepted in federal court again mistake the nature of federal habeas corpus. Indeed, by neglecting the vital role of fact-finding in constitutional adjudication, such arguments threaten to frustrate the fair treatment of claims when they are properly before the federal courts for decision.

4. The Effect of Procedural Default in State Court

After the Supreme Court reintroduced the adequate and independent state ground rule in habeas corpus, it might have been expected that some habeas critics would carry the point on to an extreme conclusion: claim preclusion. The Court itself has done no such thing; nor has the Congress. To be sure, the federal habeas courts may decline to consider claims that might have been, but were not, raised seasonably in state court--if the state courts, for that reason, refused to hear the claims later. But the current "cause-and-prejudice", "miscarriage-of-justice" formulation remains reasonably flexible.

The committee would make yet another mistake if it were to encourage the notion that death penalty habeas corpus can or should be expedited by the invocation of the forfeiture rules now in place or the more rigid rules that some observers would prefer. First, the routine preclusion of federal claims would run counter to the underlying proposition in habeas corpus that the federal courts are open to consider such claims independently. It would hardly make sense formally to put habeas forward as an opportunity for federal enforcement of federal rights, but at the same time to frustrate any treatment of the merits by the imposition of harsh forfeiture sanctions.

Second, it is demonstrably plain that habeas petitioners in capital cases have ample incentives to comply with state procedures for raising federal claims in state court and scarcely need the threat of preclusion in federal habeas as an additional reason to meet state procedural requirements. Sandbagging is a myth. Litigants and attorneys in state court do not commit procedural default strategically, in order to "save" federal claims for the federal forum. The genuine explanation for defaults by unrepresented litigants is ignorance; the explanation for defaults by counsel is ignorance again--as well as neglect and, all too often, rank incompetence. Condemned inmates lack the ability to serve as their own lawyers: their education levels

and intelligence are very low and many prisoners are mentally retarded and/or suffer from mental illness. See Mello, supra, at 548-52. Moreover, many attorneys who have handled these cases are ill-equipped to try a case in this complex area of law. Some counsel have failed to provide effective assistance by conceding the defendant's guilt, failing to investigate or present any evidence in mitigation, or committing a per se violation of due process by putting a mentally incompetent defendant on the stand. Id. at 521. It is frankly unfair to cut off federal adjudication of the merits of claims because a petitioner's attorney in state court, in most instances a lawyer assigned to the case by the trial court, made a significant procedural error. Forfeiture rules do not effectively encourage compliance with state law, but only provide an easy, we think cynical, excuse for foreclosing what may be meritorious claims.

Third, many claims raised in federal court by capital petitioners flow from the intricacies of eighth amendment doctrine. Issues of that kind are rarely foremost in the minds of defendants and counsel in state court, where the immediate objective is to avoid conviction or a death sentence in the first instance. If the chief question before the committee is the way in which the federal courts should deal with eighth amendment claims, then it makes very little sense to refer to procedural

default doctrine for an answer. In this vein, it is vital to recognize that the current system depends upon a small group of death penalty specialists to advance and develop sophisticated eighth amendment contentions. These attorneys typically become involved in cases only at the federal habeas stage. Then to block their arguments because of what other, ill-informed lawyers did or failed to do in state court would threaten the judicial system's ability seriously to enforce eighth amendment standards. Forfeiture rules, the committee must understand, foreclose adjudication in any forum, state or federal.

Fourth, it is unseemly at best to waste the considerable talents of federal judges on litigation over the applicability of procedural default/forfeiture rules. It is one thing to engage the lower federal courts in the enforcement of Bill of Rights claims on the merits. One could scarcely think of a better use of federal judicial resources. It is quite another to immerse busy district judges in time-consuming litigation over whether they should reach the merits. Anyone who has read the reports of habeas cases in recent years knows full well that the federal habeas courts spend an enormous amount of time deciding whether to decide--before getting down to deciding. We submit that it

would be far better to use the federal courts for the essential work they were given jurisdiction to do--the enforcement of federal rights on the merits.

Fifth, in this same direction, veteran observers of federal habeas corpus consistently point out that the most effective means of achieving efficiency in federal collateral proceedings would be to discard vexing, time-consuming litigation over threshold procedural matters and allow the federal courts to go immediately to the merits of petitioners' claims. Here, as in so many other instances in life, the best long-run course is the course that respects the legitimate interests of all concerned. If the committee really wants to strike a blow for common sense regarding federal habeas corpus, it should recommend that the system stop wasting precious resources on excuses for avoiding the merits and spend those same resources on straightforward adjudication of substantive claims.

IV. The Role of Counsel

Experienced, competent counsel plays a critical role in the fair administration of justice. Most of us would not dream of going before a traffic tribunal without our legal training or unrepresented and yet we expect capital defendants to go before tribunals to beg for their lives without lawyers who are expert

in their craft. Everyone who has studied these problems acknowledges that death-sentenced petitioners need vigorous professional representation. Moreover, many or most apparent inefficiencies in habeas corpus practice can be traced to the absence or inadequacy of counsel, either before or after petitioners apply for federal relief. *See*, Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 9-60, Murray v Giarrantano, 847 F.2d. 1118 (4th Cir. 1988), Petition for cert filed, 57 U.S.L.W. 3549 (Feb. 21,1989) (no. 88-411); *see* also Mello, supra, at 519-30. If the committee does nothing else, it should offer bold and thoroughgoing proposals for seeing to this vital requirement. Specifically, the committee should endorse efforts to provide counsel to indigent capital defendants be provided with counsel, beginning with the initiation of the criminal prosecution in the first instance and continuing until no viable avenues remain open in any forum.

Of course, defendants in capital cases are constitutionally entitled to counsel through the trial stages and on first appeal as of right. Thereafter, under current case law, constitutional entitlements are less clear. The question whether indigent capital petitioners are constitutionally entitled to government-provided counsel in state postconviction proceedings is now

before the Court in Murray v. Giarrantano. We think the Court should recognize such a right. The prospect of petitioners attempting to identify, develop, and argue federal claims pro se is unacceptable. Petitioners need counsel to press their claims; state authorities and courts also benefit from the participation of professionals.

Congress has recently established a statutory right to counsel for death-sentenced petitioners in state court as well as in federal habeas corpus proceedings under the Anti-Drug Abuse Act of 1988. This is an important first step. Vigorous support of such a scheme is necessary to assure that resources are made available to provide experienced counsel is in these cases. To begin, it makes only good sense that counsel should be provided to prepare certiorari petitions to the United States Supreme Court. The Court is now besieged with pro se petitions that only exacerbate overwhelming logistical pressures on the Justices. Certainly in death penalty cases, if not in all, the Court needs and should have the benefit of papers prepared and filed by professionals.

Counsel is again essential in any later appellate review in the Supreme Court. When, indeed, capital cases make their ultimate approach to the Court, professional advocates are

critical if claims are to be given their due in circumstances in which failure means execution for the litigant.

Simply put, experienced, competent counsel should be provided routinely. In addition to this basic proposition, the committee should accept several others.

First, it is essential that counsel be provided at the preparation stage and throughout subsequent proceedings, and not merely if and when a pro se petitioner first states a nonfrivolous claim. Far too often under current arrangements, petitioners are caught in a litigational catch 22. They must identify and advance factual allegations and apparently meritorious legal contentions before they can hope for professional representation, which, of course, is almost always essential to the development of allegations and claims in the first instance. This is unacceptable in any class of cases and wholly intolerable in capital litigation.

Second, it is equally critical that the lawyers provided to capital litigants are of the highest professional caliber. It is not enough merely to announce formally that death-sentenced petitioners should be given counsel of some sort. As recent studies have shown, the formal promise of Gideon v. Wainwright has been breached time and again. That cannot be permitted to occur in this instance. Great care must be exercised to see that

the lawyers recruited to represent capital petitioners are experienced, skilled, and zealous advocates--willing and able to pursue their clients' cause competently and effectively. They should meet rigorous standards well above those fixed for assigned counsel in noncapital cases. They should be fairly compensated commensurate with the services they render, and they should be allowed ample funds to cover the costs of investigation and evidence preparation. These standards are in fact established by the Anti-Drug Abuse Act of 1988.

Third, in order to ensure the quality of legal counsel in death penalty cases in state court, the lawyers concerned should not be selected in the ordinary fashion by the trial court. Rather, independent machinery should be established at the state level.

Fourth, government-funded attorneys chosen for capital cases should have the benefit of resource centers, also government-funded, which provide expert guidance and assistance. Death penalty litigation is enormously complex, and it is vital that even seasoned professionals be supported by specialists.

Fifth, while continuity in legal representation has value on the whole, individual lawyers should not be asked to serve the same client over what may be years of litigation. Death penalty litigation is notoriously difficult and draining; the potential

for exhaustion is great. The involvement of different lawyers along the way is often essential to the maintenance of committed advocacy. Moreover, new counsel is better positioned to evaluate what has gone before, to appraise possible avenues that may have been overlooked and, of course, to examine the effectiveness of the representation that the client received previously. Put simply, the efficiencies associated with continuous legal representation should not be preferred over the fresh insights of new counsel.

Sixth, in federal habeas corpus proceedings, lawyers who have performed competently in state post-conviction proceedings should be appointed as counsel. The federal capital resources centers should be relied upon to assist the court in matching these skilled lawyers with the appropriate clients. Accordingly, federal judges can and must have plenary authority to see that death-sentenced petitioners are well represented.

Finally, we all must realize that the availability of counsel, even excellent counsel, will not address all the problems and issues in this vexing field. Certainly, it would be wrong to think that collateral litigation in habeas should be met with a simplistic, two-prong attack--the provision of counsel at all stages coupled with a rigid system of forfeitures that holds petitioners to the mistakes lawyers make. The availability of

first-rate lawyers to capital litigants is a step, but only a step, in the direction of ensuring that the courts, state and federal, are positioned to address federal constitutional claims on the merits, deliberately and efficiently. The establishment of such a regime should be the committee's objective.

We hope these remarks are useful to you and the committee. Of course, we are available to respond to any questions you may have. As noted at the outset we would appreciate an opportunity to elaborate on the thoughts presented here. We also believe that it is essential to provide an opportunity to the ACLU and others to provide the Committee with detailed comments on any proposals that the Committee is seriously considering. We, therefore, ask that you release a draft of your report and allow time for careful comment before the Committee makes any final decisions or recommendations.

With regards,

Diann Rust-Tierney
Legislative Counsel

Leslie Harris
Legislative Counsel

Larry Yackle
Professor of Law
Boston University
School of Law

SUBMISSION OF THE

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.

TO THE

AD HOC COMMITTEE OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES ON FEDERAL HABEAS CORPUS REVIEW
IN CAPITAL CASES

JUNE 6, 1989

JULIUS L. CHAMBERS
Director Counsel
RICHARD H. BURR, III
GEORGE H. KENDALL
MARJORIE M. SMITH
Associate Counsel

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Hon. Lewis F. Powell, Jr.
Retired Justice
Supreme Court of the United States
Washington, D.C. 20543

RE: Ad Hoc Committee on Federal Habeas Corpus Review in Capital Cases

Dear Justice Powell:

Thank you for inviting the Legal Defense Fund to submit our views on the subject of capital collateral review.

As you and the committee members are well aware, for the past 25 years the Legal Defense Fund has provided legal representation to scores of indigent death-sentenced inmates throughout the United States. We have appeared as counsel of record and amicus curiae in cases before the United States Supreme Court and in state and federal post-conviction proceedings. We have lent assistance to attorneys, many of them having no prior experience in criminal, habeas or capital cases, who have volunteered to represent an indigent, capitally-sentenced defendant on a pro bono basis. Our experience during the past three decades has given us insight into the workings of the state criminal justice systems, as well as the federal habeas corpus process.

We understand the goal of your committee to be to formulate proposals that will lead to more orderly review of capital cases. Change within the capital trial, direct appeal, and collateral review process is indeed desperately needed. Our experience

teaches that these changes must take place primarily in the state system; lengthy federal review, where it occurs, and the problems associated with that review, are largely born, bred, and cultivated, in the state system.

A responsible examination of the role of federal review of state capital cases begins with the realization that the state court process critically shapes capital cases before these cases ever arrive at the federal courthouse door. We have found three factors most substantially influence the length and scope of federal review of capital cases: (1) the absence of competent, adequately compensated defense services throughout the state process; (2) the lack of meaningful post-conviction review in the state system; and (3) the reluctance of state judges to grant relief and thereby appear to the electorate as "soft on crime." Over and over again, one or more of these factors operates to preclude all but the most superficial review of meritorious federal constitutional claims in the state courts.[1]

Simply stated, our experience has taught us that unwarranted

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[1] We have already provided the Committee with data explaining the incidence of harmful federal constitutional error in capital cases during the post-Furman era. See, April 3, 1989 letter from Associate Counsel George H. Kendall to Professor Al Pearson. Our data show that the federal courts of appeal have granted relief in roughly 40% of the cases considered on habeas review. This number, in and of itself, shows that any cutback in the scope or vigor of federal review will only ensure the execution of inmates who were sentenced to death in violation of the Constitution.

delay[2] emerges from the unwillingness of many states to perform as responsible partners in federalism. It is the state's obligation to provide adequate defense services in all capital cases.[3] Many do not. It is also the state's duty to wash their "own linen, rather than pretending that it's not dirty and then react[ ] with a fit of pique when the federal courts hold to the contrary." Evans v. State, 441 So.2d 520, 532 (Miss. 1983)(Robertson, J., dissenting).[4] State courts continue to ignore straightforward violations of the constitution and fail to provide any viable post-conviction process. We briefly flesh out these views below.

1. The inadequate funding for indigent defense.

Capital cases are complex. They are necessarily time intensive and consume more resources than any other criminal matter. Even experienced defense attorneys usually find defending a capitally-charged client an overwhelmingly draining and difficult experience. Mastery of Eighth Amendment

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[2] We take it as a given that capital cases are complex matters, that they almost always present serious constitutional issues, that counsel, both for the petitioner and state, require a substantial amount of time to adequately prepare their views, and courts often require considerable time for thought and study prior to rendering judgment. No one can or should expect these cases to pass through our already crowded court systems at breakneck speed. Complex cases, as with any complex matter in life, take more time.

[3] Gideon v. Wainwright, 372 U.S. 335 (1963).

[4] Justice Robertson's dissent in Evans articulates best the responsibilities of the state courts, in our system of federalism, when they are called upon to review constitutional error in capital cases. We commend its full reading to committee members.

jurisprudence and state capital procedure, a complete investigation of a client's life, and planning for the bifurcated proceeding, impose considerable burdens in addition to the pressures attendant to any high profile homicide case. No one disagrees that the practice has become a specialty, and one that few lawyers develop willingly.[5]

Despite the obvious need for only experienced, adequately financed counsel to represent capitally-charged defendants, many states make no provision for such representation. The great majority of persons charged with capital crimes are indigent and therefore depend exclusively upon court-appointed counsel. In a substantial number of states with death statutes, there is no state funding for indigent defense.[6] The responsibility for indigent defense is left to each county. Alabama typically limits appointed counsel's fee for handling a capital trial to $1000.[7] Arkansas has a similar provision.[8] And many trial courts in Georgia, Mississippi and other states provide similar

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[5] In most states, the prosecution has long recognized capital cases require specialists. In District Attorney's offices throughout the country, only prosecutors with substantial felony trial and capital trial experience handle capital cases. Every state Attorney General's office that we know of long ago created a special division to handle capital appeals. These assistant attorneys general do little else but represent the state in capital cases on direct appeal, and through state and federal post-conviction proceedings.

[6] Georgia, Alabama, Mississippi, and Arkansas, for example, provide little or no money on a state-wide basis for indigent defense, even in capital cases.

[7] See Code of Alabama §15-12-21(d).

[8] See Arkansas Code Ann. §16-92-108.

levels of compensation.[9] As a result, little incentive, financial or otherwise, exists for attorneys to develop expertise in defending criminal cases generally, and capital cases in particular.

It is not surprising then that many capitally-charged defendants are represented by inexperienced counsel,[10] or counsel without resources to adequately investigate and prepare the case. It is little wonder that these attorneys fail to perform investigations that could turn up witnesses for the penalty phase or adequately investigate the state's case at each phase of trial.[11] It is also not surprising that such underfunded counsel are unaware of fundamental constitutional requirements peculiar to capital cases. Justice Robertson, having reviewed numerous capital cases as a member of the Mississippi Supreme Court, has found these problems arise there regularly.

> We have reviewed the record in numerous death penalty cases in recent years. Generally, we

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[9] Recently, a United States district court in Georgia reversed the convictions and death sentence imposed by the state court on Nathan Brown. Brown and his two co-defendants were indigent. The state trial court appointed the same lawyer to represent all three defendants and told the lawyer he would be paid $500 per case. In Mr. Brown's case, this attorney filed no pretrial motions. The district court granted habeas relief finding trial counsel's conflict of interest violated the Sixth Amendment, whereas the state courts had repeatedly denied relief. Brown v. Zant, No. CV-188-027 (S.D.Ga. 1989).

[10] See e.g., Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985)(lead trial counsel admitted to bar six months before appointment).

[11] See e.g., Agan v. Dugger, 828 F.2d 1496 (11th Cir. 1987); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986).

> find that a vigorous all-out defense is made, although there are exceptions. Generally speaking, the Mississippi Bar has reason to be proud of the vigor and competence with which its members have defended capital cases. On points that arise regularly in criminal cases of all descriptions - change of venue, insanity defense, pretrial motions to suppress statements and evidence, trial tactics generally, jury instructions, and the like - our bar has performed well. What happens frequently, however, and what has happened in this case, is that - as a conventional criminal case - the case was well tried. In spite of this, numerous important and highly technical death penalty issues were not raised. Most of the sixteen issues presented on this petition are issues which have resulted in death sentences being vacated in other cases. These are points of law with which the average Mississippi criminal defense lawyer has no familiarity.

Evans v. State, 441 So.2d at 528 (Robertson, J., dissenting)(emphasis added).

This absence of competent, adequately compensated defense services also inhibits competent advocacy on direct appeal. In some states, the money received for trial is assumed to cover the attorney's time for preparing and arguing the appeal. Repeatedly, we have seen direct appeal briefs that comprise but 10 or 20 pages, cite little law, and argue but a few issues.[12]

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[12] See e.g., Morgan v. Zant, 743 F.2d 775, 780 (11th Cir. 1984)("It is uncontradicted in the record that Morgan's trial counsel did not file a notice of appeal and filed a brief only after the Georgia Supreme Court threatened to impose sanctions. This brief, which included only five pages of argument, failed to raise as an issue the trial court's charge to the sentencing jury. Counsel failed to attend oral argument before the Georgia Supreme Court and failed to heed a request by the court that he file a supplemental brief on the adequacy of the trial court's penalty charge. We find this conduct on the part of Mr. Morgan's attorney woefully inadequate and likely ineffective.")

The consequences of inadequate funding for defense service at trial and direct appeal are substantial. Important evidence necessary to sustain a defense in the culpability phase, or to portray a mitigating circumstance at sentencing, is never uncovered and utilized. Counsel fail to perceive and assert even obvious constitutional error. For the defendant and the system, the proceedings lack completeness and reliability. They fall short of being the "main event," the time when all important legal issues are properly raised and reliably resolved. Their incompleteness necessitates comprehensive post-conviction review.

After direct appeal, despite the importance of preparing a thoughtful petition for writ of certiorari,[13] many court-appointed attorneys consider their obligation to the client at an end.[14] It is at this point that many indigent death-sentenced inmates must rely upon pro bono counsel to step forward and assume responsibility for the case.[15] Few states provide any

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[13] Teague v. Lane, 109 S.Ct. ___, 103 L.Ed.2d 334 (1989); Barefoot v. Estelle, 463 U.S. 880 (1983).

[14] This is because the appointment by the trial court or state supreme court rarely envisions the filing of a petition for writ of certiorari.

[15] In the past, civil rights organizations in states with sizable death row populations have provided the link between the legal community and death row. It is not unusual for such volunteers to contact 30-40 law firms prior to finding a firm willing to take on the representation of a capital petitioner. As every member of this committee knows well, that commitment can consume hundreds of hours of professional time and thousands of dollars of out-of-pocket expenses.

The recent creation of Resource Centers in 13 states has not solved this problem. For instance, in Georgia, Mississippi, Louisiana, and Alabama, Resource Center staff provide direct representation to only a small number of the inmates in their

compensation to counsel after the direct appeal, even in capital cases. Representation on certiorari before the United States Supreme Court, the filing and prosecution of state and federal constitutional claims in the state post-conviction court, any appeal from the denial of post-conviction relief, and seeking certiorari from that order, must be provided, if at all, by volunteer counsel.

Because the quality of representation at trial and on direct appeal is all too often far from adequate, habeas counsel must start from scratch. Habeas counsel simply cannot rely upon the work of his predecessor. Counsel must thoroughly investigate the case to see if evidence supporting a defense at trial, or a case for life, was available and not pursued. The record must be read with great care to see if meritorious constitutional error, both state and federal, was identified and raised properly. Counsel must raise every possible issue at this stage to (1) bring to the attention of the habeas court any constitutional violation, and (2) exhaust the issue for later federal habeas review.

These lawyers, serving entirely in a pro bono capacity, often fail to assert claims solely because they lack the

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state. Direct representation, for most inmates, will continue to be provided by the private bar. None of these states provide any money for attorney fees or expenses. Volunteer counsel is expected still to absorb all such costs and expenses incurred in state collateral proceedings. And our survey of a number of states, including Texas, Alabama and Mississippi, has informed us that volunteer attorneys are becoming harder, not easier, to find. All the southern states continue to have indigent, death-sentenced inmates with no counsel. Our efforts to locate new volunteer counsel have also grown more difficult.

resources to adequately investigate the case or because they simply cannot devote the hundreds of hours of unpaid time necessary to thoroughly review the entire record. And where the state has set an execution date, matters are worse. Papers are drawn and court proceedings held often prior to counsel having read all or even most of the record. State post-conviction review becomes even less available when working under a warrant, and the time crunch only exacerbates the effect of the lack of resources. Under these circumstances, the state collateral process operates to discourage and devalue, rather than entertain and resolve, serious constitutional challenges to the fundamental fairness of the conviction and capital sentence.[16]

2. Strict default rules and the absence of meaningful review in state post-conviction proceedings.

While the absence of adequate defense resources at trial and direct appeal acts to severely constrain the assertion of constitutional claims, and the near complete absence of such resources in state post-conviction proceedings makes their assertion there even more difficult, the increasingly strict enforcement of procedural default rules in the state court system all but precludes entertainment of meritorious constitutional claims. Today, such enforcement far exceeds the legitimate

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[16] Again in sharp contrast to the volunteer counsel representing the indigent, death-sentenced petitioner, the state is usually represented by members of the Attorney General's office. These offices, in addition to providing counsel, also have resources to retain expert assistance and to cover all other expenses incurred in post-conviction proceedings.

interest of the state in preventing a capital defendant, or his attorney, from withholding a viable claim from the state forum; today, even meritorious claims going to the heart of the fairness of the case will not be entertained in more and more state systems, even where their untimely assertion is based wholly upon inadvertence or negligent error of counsel.

In many states, the post-conviction process precludes relitigation of issues decided on direct appeal.[17] New claims asserted in such proceedings are also barred; the failure to bring them at trial and direct appeal constitutes a default that will be excused only by showing that previous counsel provided ineffective assistance of counsel or that the state prevented the assertion of the claim. This unwillingness to entertain new claims in post-conviction proceedings, a dramatic change from a decade ago, renders the state post-conviction remedy in many states wholly impotent to address even shocking violations of the Constitution.[18]

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[17] Even when a petitioner can show that an intervening decision casts serious doubt upon the correctness of the direct appeal decision, many state habeas courts will refuse to reentertain the claim.

[18] A good case in point is Georgia. Until 1983, claims not raised at trial or direct appeal could be entertained on their merits in post-conviction proceedings. See, O.C.G.A. 9-14-42; 9-14-48. In a large number of capital cases, new counsel identified and raised issues unforeseen by prior counsel. This scheme ensured that the state court system had the opportunity to take corrective action where harmful constitutional error was identified. For all cases tried after January 1, 1983, a strict rule of default is applied. No longer does the state judge review the fairness of the proceeding. Instead, the court typically refuses to entertain any issue decided on direct appeal, and will not reach the merits of any claim presented for

Looking at the Mississippi collateral review process, Justice Robertson aptly describes its inability to remedy error:

> After today, we have no plain, adequate and speedy post-conviction remedy for adjudication of constitutional issues. Today's decision makes clear that, if such issues are presented at trial and on direct appeal, they are barred on error coram nobis as res judicata. If such issues are not presented at trial and on direct appeal, they are deemed waived. All constitutional claims are thus precluded from post-conviction review. Today's decision unmistakably holds that the writ of error coram nobis is no longer a viable form of post-conviction action for the litigation of a prisoner's constitutional claims no matter how meritorious those claims may be. The writ has become an ambassador without portfolio.

Evans v. State, 441 So.2d at 524 (Robertson, J., dissenting)(emphasis in original).

Our experience has taught us further that State prosecutors urge state courts to rigidly enforce default rules, not to promote some higher interest of justice, but to preclude later federal review, even when it is clear the constitutional claim was not timely asserted because the defense lawyer simply goofed. Again, Justice Robertson:

> It is important to understand the reasons why the State urges that the issues tendered be disposed of on procedural grounds only. The State's articulated motivation is to short-circuit anticipated federal review . . .

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the first time unless the petitioner can show cause and prejudice. In many instances, the only claim reviewed on its merits is one of ineffective assistance of trial and direct appeal counsel. In short, the corrective remedy available prior to 1983 has been replaced with a scheme that induces the court to ignore and leave for the federal courts to correct even the most egregious constitutional violations.

> The state is saying we should hold Evans' claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case.

441 So.2d at 531. Particularly where claims are not brought timely because of lawyer error, the state's subordinating federal constitutional rights to rules of procedure constitutes a triumph of form over justice. Without a state forum to entertain serious constitutional claims, the capital petitioner has no choice not to seek federal review.

Coupled with the lack of adequate defense resources, strict enforcement of default rules precludes corrective action except in the most extraordinary case. And the preclusion of merits review in the state system in most instances insulates even serious constitutional violations from review in federal court.[19]

3. The politically sensitive state judiciary.

Capital case often subject judges to intense political scrutiny, more so than any other type of legal proceeding.[20] In

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[19] See Dugger v. Adams, 103 L.Ed.2d 435 (1989); Smith v. Murray, 477 U.S. 527 (1986).

[20] In 1985, a panel of the United States Court of Appeals for the Eleventh Circuit overturned the convictions and death sentences of three inmates who had been convicted of killing 6 members of a farming family in a rural Georgia county. See, Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). According to the court officials, this decision generated more hostile mail and phone calls than any desegregation order rendered in the 1950-60's. In its aftermath, over 200,000 persons signed petitions seeking the impeachment of each judge. These petitions were presented to the House Judiciary Committee.

states where members of the state judiciary stand for reelection, or for reconfirmation by the voters, a judge's voting record in capital cases can decide the election.[21] From 1983 - 1987, the Georgia state judge who hears many of the state post-conviction petitions filed by capital defendants issued 26 decisions. He has yet to grant any relief in any capital case. Because state judges rarely enjoy the insulation from the passions of the day life tenure reposes with Article III judges, political pressure can and does influence a judge's willingness to grant habeas relief in these highly visible, controversial cases.[22]

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[21] In 1986, three judges on the California Supreme Court, all with voting records in capital appeals which were characterized as favoring capital defendants over the rights of law abiding citizens, were targeted and portrayed as being soft on crime by special interest groups who supported, inter alia, the death penalty. Each judge was soundly defeated in the November confirmation election.

[22] The reluctance of the state judiciary to remedy serious federal constitutional error can be seen by comparing the treatment given cases in the state post-conviction process with their later review in the federal system. For example, between 1983 and 1988, 49 opinions in capital habeas cases issued from the state post-conviction process in Georgia. The state courts granted habeas relief in only two cases. See Curry v. Zant, 371 S.E.2d 647 (Ga. 1988)(ineffective assistance of trial counsel, guilt and penalty relief ordered); Zant v. Hamilton, 307 S.E.2d 667 (Ga. 1983)(court modifies granting of full relief on ineffective assistance of counsel grounds to provide only penalty relief). In 14 cases where the state courts had denied relief, the federal courts found harmful constitutional error and ordered habeas relief. Each case presented straightforward violations of the Constitution. See Brown v. Zant, No. 88-CV-228 (N.D.Ga. 1988)(full relief ordered after court finds Brady violation and unreliable determination of petitioner's competency to be tried); N. Brown v. Zant, No. CV-188-027 (S.D.Ga. 1989)(three independent constitutional errors found in capital sentencing proceeding to warrant penalty relief; conflict of interest of trial counsel warrants guilt relief); Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988)(full relief ordered after court found straightforward violation of Edwards v. Arizona); Dick v. Kemp, 833 F.2d 1448

In addition, a considerable number of state court judges plainly do not keep up with federal law and have no regular access to federal reporters. We have appeared in a number of

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(11th Cir. 1987)(full relief ordered because burden-shifting charge not harmless); Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988)(full relief ordered by district court affirmed; court found burden-shifting charge not harmless and double jeopardy clause violated by second death sentence); Hardy v. Kemp, No. C86-115 (N.D.Ga. 1987)(penalty relief ordered because prosecutor's closing argument violated fundamental fairness); Jones v. Zant, No. 88-CV 328 (N.D.Ga. 1989)(penalty relief granted because jury utilized Bible during sentencing deliberations and because of overbroad construction of aggravating circumstances); Mathis v. Zant, No. 87-2355 (N.D.Ga. 1989)(failure of trial counsel to present any mitigating evidence at penalty phase constitutes ineffective assistance of counsel; penalty relief ordered); C. Moore v. Zant, 809 F.2d 702 (11th Cir. 1987)(en banc)(penalty relief ordered because of unconstitutional penalty instruction; case remanded for further factfinding on Giglio issue); W. A. Smith v. Zant, 855 F.2d 712 (11th Cir. 1988)(full relief granted; evidentiary hearing in district court showed that petitioner's mental retardation foreclosed knowing and intelligent waiver of his rights to silence and counsel) rehearing en banc granted; W. K. Stephens v. Kemp, 846 F.2d 647 (1988)(failure of trial counsel to present psychiatric evidence showing petitioner suffers from substantial mental disease ineffective assistance of counsel; penalty relief ordered); Strickland v. Kemp, 738 F.2d 1542 (11th Cir. 1984)(full relief ordered as record shows petitioner was incompetent to stand trial); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986)(failure of trial counsel to present any evidence in mitigation despite evidence showing petitioner was good worker yet suffered from schizophrenia ineffective assistance of counsel; penalty relief ordered); Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985)(full relief granted as record shows petitioner was incompetent to stand trial). In 4 cases, federal review has been delayed due to exhaustion issues. See Collier v. Kemp, No. 86-282 (N.D.Ga)(remanded for exhaustion of state remedies); Gilreath v. Zant, No. 87-50 (N.D.Ga.)(remanded for exhaustion of remedies); Putman v. Kemp, No. 84-79-VAL (M.D.Ga.)(petition dismissed without prejudice for exhaustion); Stevens v. Zant, 580 F.Supp. 322 (S.D.Ga. 1984)(dismissal for exhaustion); No. CV-286-84 (S.D.Ga.1988)(dismissal for second time for exhaustion). Eleven of these cases are pending in the federal system; three cases did not receive any relief in the original federal habeas proceeding; three cases received relief and/or are pending within the federal system in successor proceedings, and 12 cases have been denied relief in successor federal habeas proceedings.

courts over the years where the state judge informed counsel he would prefer counsel rely upon cases decided by his state supreme court because he had no other reporter available, and if we did rely upon federal case law, we should submit xerox copies of the opinions. Such courts are ill equipped to deal with the complex federal constitutional claims often presented in these cases. The review given such claims in state court is plainly inferior to later review in the federal forum. As long as state courts insulate themselves from the development of federal constitutional law, those courts have no legitimate claim to the last word on questions of federal constitutional law.[23]

Finally, we have dealt with state court judges who are openly hostile to vigorous representation in capital cases. During the past 4 years, several judges from all parts of Georgia have refused to appoint, in cases returning for retrial from the federal courts, the counsel who represented the death-sentenced inmate for years in post-conviction proceedings and who won relief. These counsel are uniquely and fully qualified to represent the indigent client on retrial. In several instances, inexperienced counsel, or counsel the client justifiably was wary

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[23] The Supreme Court has also observed this phenomenon. In Sandstrom v. Montana, 442 U.S. 510, 513 (1979), trial counsel attempted to tender to the state trial court federal decisions in support of his argument that the burden-shifting charge about to be directed to the jury violated due process. That judge rebuffed that effort: "'You can give those to the Supreme Court. The objection is overruled.'"

to trust, was appointed over objection.[24]

Our experiences lead to the conclusion that the states, in these key areas, have failed to act as a responsible partner in our system of federalism.

Because of the serious problems concerning indigent defense and the shrinking opportunity to secure correction of constitutional error in the state courts, any plan to make more orderly the collateral review process must realistically address the following:

> 1. The states must be willing to provide competent, independent, and adequately compensated counsel, and other defense services at trial, on direct appeal, for certiorari, and for state post-conviction proceedings. Where it does, it will be the exceptional case, rather than the rule as today, that issues of fact and law are not timely raised and litigated before the state courts.
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> 2. The states should apply their procedural default rules, where they exist, to bar review only where defense counsel or the client was clearly aware of the relevant facts and/or law which supported the claim not timely brought. Inadvertent mistakes should not foreclose review. Some states rarely apply their default rules to bar constitutional claims raised by capitally sentenced inmates, either on direct appeal or in post-conviction review. Constitutional error accordingly is treated on its merits, and reviewing courts can focus on whether the

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[24] We are participating in a law suit challenging the refusal of one trial judge to appoint qualified counsel at retrial. Gamble v. McMillan, No. CV-688-0066 (S.D. Ga. 1989). There, in lieu of simply appointing counsel who had successfully vindicated a Batson claim on appeal, the trial court first solicited bids from area attorneys, and then, without explanation, contacted a defense lawyer from outside the circuit and appointed that lawyer.

trial was fair; not whether the state's rules were honored to perfection.

3. The states should provide a meaningful post-conviction process that allows for litigation of claims inadvertently omitted on direct appeal, and for claims, such as ineffective assistance, which could not be asserted sooner. The petitioner should be encouraged to raise all constitutional claims in this proceeding.

4. The states should refrain from setting an execution date until after state and federal post-conviction review has run its course. Counsel for the petitioner and state can agree, as is the practice in some states, that cases will not languish after one court has completed its review. In some states, cases move at a regular clip because counsel agree, for instance, that the state post-conviction petition will be filed within 120 days after denial of certiorari. A similar agreement assures the federal habeas petition is filed without undue delay. The threat of setting a date will ensure that the petition for the next court is filed.

5. After federal habeas review is completed, counsel for the state and petitioner should discuss whether changes in law or the discovery of new facts provide a basis for relief. If the petitioner plans to file successor proceedings in the state system, the courts should promptly consider the claims. Default rules should allow for merits review of claims where the petitioner can show significant development in the law or facts has taken place since the filing of the original habeas proceeding. These successor proceedings should receive prompt yet careful review by the state courts.

Federal Habeas Reform

If state capital cases arrived at the federal courthouse after the federal Constitutional issues had received comprehensive treatment on their merits in the state courts, few

would present the recurring problems we have witnessed in the past. With thorough and careful review by competent counsel, in most cases, all federal constitutional claims would arrive having been properly raised and exhausted.[25] Because of their timely assertion, either at trial or before the state post-conviction court, procedural default questions would arise infrequently. Because the state courts would have provided, in reality, a full and fair hearing on all claims, the need for a federal evidentiary hearing would be infrequent. The federal court, not delayed by the morass of issues dealing with (1) whether the claims were adequately presented before the state court; (2) whether they were timely presented; (3) whether the state default rule represents an adequate and independent ground; (4) whether the states apply the rule consistently; (5) whether the states allow an exception for capital cases; (6) whether the petitioner nevertheless substantially complied with the state rule; (7) whether the petitioner can show cause and prejudice for the default; or (8) whether the petitioner can show a miscarriage of justice, could instead focus primarily upon whether the trial was held in accordance with the Constitution. The length of review would be shorter, and the questions the court must resolve dramatically fewer.

While much of the needed change must take place in the state systems and is beyond the control of this Committee, steps can be

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[25] As a result we suspect some of the cases that today wind up in federal court would receive relief in the state system. Accordingly, fewer cases would require federal review.

taken to ensure the process becomes more orderly without sacrificing the Committee's stated goal "to ensure fairness and the preservation of constitutional rights."

Knowing that under current conditions many cases coming out of the state system have lacked adequate defense resources at every stage, we recommend that a district court presented with a habeas petition by an indigent defendant should take a number of steps to ensure that federal review is conducted more thoughtfully.

> 1. Pursuant to the Anti-Drug Abuse Act of 1988, the district court should appoint and fully compensate two counsel of record. Where counsel has previously represented the petitioner in state court, and the petitioner [raises no objection to these attorneys,] the district court should appoint those counsel.
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> 2. Where the petitioner requires new counsel, the court should contact the Resource Center for that state, or one within the Circuit, for names of counsel who are eligible and presently able to accept responsibility for a death case. The court should rely heavily upon the Resource Center's recommendation. The staff, having monitored the case through the state system, will be aware of any special problems or needs raised by the case. The staff is in the best position to match the appropriate lawyer(s) with the proper case.
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> 3. The district court should also appoint <u>expert resource</u> counsel. In many cases, this assistance can be provided by the Resource Center within the state, or a Center within the circuit, or in cases of conflict, with experienced private counsel who have been certified by the Resource Center as competent and available. As with counsel of record, where the client and counsel have worked with an expert counsel in state court, unless there is objection from counsel of record or from the client, that expert should be

appointed for the federal proceeding. The court should also provide funds for expert assistance upon any reasonable request.

4. With the appointment of counsel and expert counsel, the court should then direct the state to file its answer. Depending upon the contents of the answer, the petitioner will have a reasonable time to file a traverse. Where the state files a motion for dismissal claiming the petition contains unexhausted claim(s), the petitioner will, within a reasonable amount of time, oppose the dismissal, or move for voluntary dismissal of the petition and return to the state court for exhaustion.

5. Where the petition contains unexhausted claims, and the petitioner elects to return to state court, the federal court should dismiss the petition without prejudice.

6. When the case returns to the district court, counsel should be reappointed and should file any motion for discovery, for an evidentiary hearing, and for funds for expert services within a reasonable time. Where the court concludes that discovery, or an evidentiary hearing is necessary, they shall be ordered. The court should asks for briefs on all issues not affected by the evidentiary hearing, prior to the hearing, so that it can commence work on those issues. The court should receive post-hearing briefs within a reasonable time after the hearing and proceed to decide the case.

7. Where relief is denied, the court should presumptively grant probable cause to appeal. The case should be heard as are other appeals, with counsel receiving the normal amount of time to research, write and file briefs. Oral argument should always be held. Counsel should be fully compensated for all work performed in the court of appeals.

8. Where relief is denied in the court of appeals, the mandate should be stayed to permit the preparation of a petition for writ of certiorari.

9. After the original habeas proceedings

> come to a close, counsel is obligated to determine whether retroactive changes in the law, or newly discovered changes in the facts, warrant further litigation. Where such issues are pleaded, every reviewing court should give the petition prompt and thoughtful review.

CONCLUSION

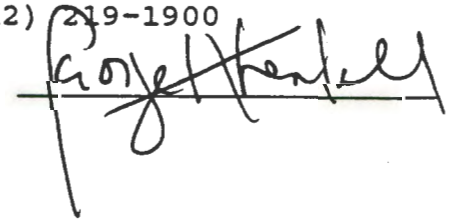
Because capital cases are complex and involve gravely important issues, no reasonable voice can demand they proceed through our court system at breakneck speed, and any serious effort to impose order and reduce unwarranted delay needs to focus upon where the problems arise. Based on our extensive experience litigating habeas cases, we have concluded that neither the federal habeas process, nor federal judges, are the problem. Rather, it is the states' failure to provide competent, independent and adequately compensated counsel, and their reluctance to clean their own dirty linen, that makes these cases more complex and vastly more difficult for the federal courts to resolve promptly and responsibly.

We urge this committee to provide the voice of reason in the continuing heated debate over the future scope of the writ of habeas corpus. That 40% of the state capital cases have given rise to harmful federal constitutional error, and have required the availability of a federal remedy for their correction, is

evidence enough that if any changes are warranted, the writ ought to be made more available, not less so.

Very truly yours,

Julius L. Chambers
Richard H. Burr, III
George H. Kendall
Marjorie M. Smith
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

By: 

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

350 McALLISTER STREET, ROOM 6000
SAN FRANCISCO 94102
(415) 557-2544

June 15, 1989

(916) 324-5430

William R. Burchill
General Counsel
Administrative Office of the United States Courts
Washington, DC 20544

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

Dear Mr. Burchill and Mr. Pearson:

Proposals to the Ad Hoc Committee on Federal Habeas Corpus Review in Capital Cases

Thank you for the opportunity to submit proposals concerning federal habeas corpus review of death penalty cases. I apologize that this submission will not meet the deadline of June 1, 1989. However, this office did not receive notice of the Committee's request for submissions until June 9, 1989.

As noted by many observers, including the distinguished Chairman of this Committee, the present system of federal habeas corpus review of capital cases does not work. Chaos and unnecessary delay permeate the process, undermining public confidence in the entire criminal justice system. (See, e.g., *Stephens* v. *Kemp* (1983) 464 U.S. 1027, 1032 (Powell, J., dissenting from a grant of stay of execution.) Proposals that seek to maintain the status quo simply will not do. Rather, we must seek a return to the essential purpose of habeas corpus--to provide a prompt, extraordinary remedy for an unjust detention. We must also seek a return to the proper role of the writ in our federal system. The proposals that follow seek to accomplish these goals. I hope that the Committee will find them helpful in performing its task.

I. The Scope of Federal Habeas Corpus--A Proposal for Change

In major part the problems of federal habeas corpus review in capital cases are symptoms of a larger affliction. The

vast expansion of the scope of the writ to permit federal courts (with limited exceptions) to readjudicate federal constitutional issues already determined by the state courts (see *Brown* v. *Allen* (1953) 344 U.S. 443; *Fay* v. *Noia* (1963) 372 U.S. 391), has denigrated the concept of finality. Concomitantly it has subordinated various other significant societal values, including the deterrence of crime, judicial efficiency, "the minimization of friction between our federal and state systems of justice, and . . . the maintenance of the constitutional balance upon which the doctrine of federalism is founded." (*Schneckloth* v. *Bustamonte* (1973) 421 U.S. 218, 257-258 (Powell, J., concurring).)

These concerns have motivated important proposals to limit the scope of federal habeas corpus jurisdiction. (See, e.g., Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. R. 142 (1970) (proposing that, subject to certain exceptions, the scope of federal habeas jurisdiction be limited to those cases in which petitioner supplements his constitutional claims with a colorable showing of factual innocence); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. R. 441 (1963) (arguing that federal habeas jurisdiction should generally be limited to cases in which state courts fail to provide a fair process for litigating the federal constitutional claim).) The general thrust of such proposals has been to "accomodat[e] the historic respect for the finality of the judgment of a committing court with the recent Court expansions of the role of the writ," by seeking to reaffirm "the central reason for habeas corpus: the affording of means, through an extraordinary writ, of redressing an *unjust* incarceration. (*Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 257 (Powell, J., concurring); emph. in orig.)

Sensitive to the costs incurred by the criminal justice system and society in general by widespread use of the writ, recent decisions of the High Court have sought, through various procedural rules, to restore the balance between state and federal courts, and to restrict federal habeas corpus interference in state criminal proceedings. (See *Teague* v. *Lane* (1989) 489 U.S. __ [103 L.Ed.2d 334, 357] (plurality) (limiting creation of new rules in non-capital habeas corpus to those that place certain kinds of private conduct beyond the criminal law making power, or that seriously diminish the accuracy of conviction); *Kuhlman* v. *Wilson* (1986) 477 U.S. 436 (plurality) (proposing requirement of a colorable showing of factual innocence for successive petitions); *Wainwright* v. *Sykes* (1976) 433 U.S. 72 (precluding federal court from considering procedurally

defaulted claims absent a showing by petitioner of cause and prejudice); *Stone* v. *Powell* (1976) 428 U.S. 465 (excluding from federal habeas review all Fourth Amendment claims as to which the state has provided a full and fair opportunity for litigation); *Rose* v. *Lundy* (1982) 455 U.S. 509 (requiring district court to dismiss petitions containing both exhausted and unexhausted claims); *id.* at pp. 520-521 (plurality) (suggesting that abandonment of unexhausted claims in a mixed petition to avoid dismissal would preclude later consideration of the claims under the doctrine of abuse of the writ).)

The High Court has also affirmed that death penalty cases are not immune from the concerns that have motivated this trend toward restricting the reach of federal habeas. "Collateral challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that 'there will at some point be the certainty that comes with an end to litigation.'" (*Teague* v. *Lane*, *supra*, 103 L.Ed.2d at p. 358, fn. 3, quoting *Sanders* v. *United States* (1963) 373 U.S. 1, 25 (Harlan, J., dissenting); see *Smith* v. *Murray* (1986) 477 U.S. 527 (rejecting argument that the cause and prejudice standard for procedural defaults applies differently in death penalty cases); see also *Dugger* v. *Adams* (1989) 489 U.S. ___ [103 L.Ed.2d 435] (applying cause and prejudice standard to death penalty case).) Indeed, for most purposes the Court has equated capital and non-capital habeas corpus. (See *Smith* v. *Murray*, *supra*, at pp. 537-538; cf. *Murray* v. *Carrier* (1986) 477 U.S. 478, 495-486.) Thus, "death penalty cases are no exception" to the general rule that following direct appeal the judgment is presumptively valid, and that "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." (*Barefoot* v. *Estelle* (1983) 463 U.S. 880, 887.)

In non-capital cases, the results of these attempts to restore balance to the scope of federal habeas have proved mixed at best. In capital cases, they have proved flatly ineffectual. (See U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 1987, at p. 9 (1987), showing that from 1977 to 1987, the average time from date of sentencing to execution in capital cases was 77 months).) The very existence of this Committee, and of the American Bar Association Task Force studying the same subject area, is testament to that fact.

The time has come to rethink the piecemeal approach the Court has taken to habeas corpus reform in favor of a more

thorough, rational approach. With that premise in mind, and recognizing that the vexations of capital-case habeas proceedings are simply part of the larger problem of the scope of federal habeas corpus in general, this Committee should give serious thought to proposing limits on the reach of federal habeas corpus jurisdiction. As noted in *Teague* v. *Lane*, *supra*, at p. 357, the Court's recent cases "have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review." This trend provides the touchstone for the proposal this Committee should adopt. Where the state has provided a full and fair opportunity to litigate a constitutional claim relating to the determination of guilt, the federal court should be precluded from granting habeas corpus relief unless the petitioner makes a colorable showing of factual innocence. (See *Kuhlman* v. *Wilson*, *supra*, 477 U.S. at p. 454, & fn. 17; *Schneckloth* v. *Bustamonte*, *supra*, at pp. 265-266 (Powell, J., concurring); Friendly, *supra*, at p. 160.)

A similar standard should apply to claims of error relating to the sentencing determination of a death penalty case. Thus, where the state has provided a full and fair opportunity to litigate the constitutional claim, the federal court should be precluded from granting relief unless the petitioner makes a colorable showing that the alleged error undermined the accuracy of the sentencing determination, that is, undermined the accuracy of the determination that the balance of aggravating and mitigating factors warranted death.

These limitations on the scope of federal habeas corpus "would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system." (*Schneckloth* v. *Bustamonte*, *supra*, at p. 266 (Powell, J., concurring).) They would also cure the chaos and delay that currently afflict federal habeas corpus review of death penalty cases, while remaining true to the essential purpose of habeas corpus--to provide a prompt, extraordinary remedy for an unjust detention. (*Id.* at pp. 257-258.) Without such reform, there is little hope that the pervasive problems of federal habeas review of capital cases can be resolved.

While I hope that this proposal will be adopted, nonetheless I recognize that there are other areas of concern that need to be addressed if it is not. A discussion of them follows hereinafter.

II. Exhaustion of State Remedies and Avoidance of Piecemeal Litigation

The doctrine of exhaustion of state remedies should be retained in capital cases. It is based on comity, and on "a pragmatic recognition that 'federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.'" (*Castille* v. *Peoples* (1989) 489 U.S. __ [109 S.Ct. 1056, 1059], quoting *Rose* v. *Lundy*, *supra*, 455 U.S. at 519.) Given the ever-recurring review of state death judgments by federal habeas courts, these interests are magnified in capital cases. So too is the concomitant "'strong presumption in favor of requiring the prisoner to pursue his available state remedies.'" (*Castille* v. *Peoples*, *supra*, quoting *Granberry* v. *Greer* (1987) 481 U.S. 129, 131.) The total exhaustion rule of *Rose* v. *Lundy*, *supra*, at p. 522, which serves these and other goals, should also be maintained, as should the rule of *Granberry* v. *Greer*, *supra*, at pp. 134-135, which permits the courts of appeals to exercise discretion in determining whether to require exhaustion or to address the merits where the state has not raised the exhaustion issue.

It has been observed that the total exhaustion rule may, in some instances, encourage piecemeal litigation. (See Lucas, Speech Before the Conference of Chief Justices (Jan. 24, 1989), reported in Los Angeles Daily Journal, Feb. 6, 1989.) Prisoners whose execution dates are rapidly approaching may file a petition that omits available, unexhausted claims, for fear that a mixed petition will be dismissed under *Rose* v. *Lundy*, *supra*. But if federal district courts order first-time habeas petitioners to follow the procedure outlined in *Neuschafer* v. *Whitley* (9th Cir. 1989) 860 F.2d 1470, 1482 (Alarcon, J., conc.)), this problem can be cured in virtually all cases The *Neuschafer* procedure is designed to eliminate the need and justification for the filing second or successive petitions, except in extraordinary circumstances. As described by Judge Alarcon:

> "[T]he district court can avoid the filing of a subsequent petition by issuing an order requiring the prisoner's counsel, within a reasonable time, to review the trial record and to inform the court whether there are any other exhausted or *unexhausted* claims. . . . [¶] Once counsel has disclosed to the court all *exhausted* claims, the court may require the petitioner either to amend the pending petition to include such claims or to abandon them on the record. Similarly, once counsel

> has disclosed all *unexhausted* claims, the court may require the petitioner to exhaust them in the state system or to abandon them on the record. The court need not hold a hearing on the pending petition until all disclosed claims have been either exhausted or abandoned on the record. [¶] If this procedure is followed, the filing of a second petition alleging a new federal constitutional claim will be inexcusable, and an abuse of the writ, unless petitioner is able to allege a change in the law, a newly discovered fact, or ineffective assistance of counsel in connection with the first petition." (*Ibid.*; emph. in orig.)

Recently, in *Rogers* v. *Whitley* (D.Nev. 1988) 701 F.Supp. 757, the district court followed this procedure. (See also *Ybarra* v. *Sumner* (D.Nev. 1988) 678 F.Supp. 1480, 1484.) It should be mandatory for all district courts to do so in capital cases.

III. Procedural Default

As held by the High Court in *Smith* v. *Murray*, *supra*, 477 U.S. 527 and *Dugger* v. *Adams*, *supra*, 103 L.Ed.2d 435, the cause and prejudice standard of procedural default established by *Wainwright* v. *Sykes* (1976) 433 U.S. 72 and its progeny applies to capital cases. Of course, this standard is subject to the "safety valve" (*Harris* v. *Reed* (1989) 489 U.S. __ [103 L.Ed.2d 308, 323 (O'Connor, J., concurring)) of remedying a fundamental miscarriage of justice. (See *Murray* v. *Carrier*, *supra*, 477 U.S. at pp. 496-497 (miscarriage of justice exists "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent").)

A specific definition of a miscarriage of justice for alleged errors at the penalty phase of a capital case should be adopted. The following is a fair synthesis of the Court's relevant precedents: to show a fundamental miscarriage of justice for an alleged error at the penalty phase, the petitioner must show a substantial probability that the alleged error actually resulted in an inaccurate sentencing determination, that is, in an inaccurate determination that the balance of aggravating and mitigating factors warranted death. This standard is consistent with *Dugger* v. *Adams*, *Smith* v. *Murray*, *Murray* v. *Carrier*, and Justice O'Connor's concurring opinion in *Harris* v. *Reed*, all of which recognize that a claim of a miscarriage of justice must be "substantial;" that it must relate to an error that

"actually" undermined the accuracy of guilt or sentencing determination; and that it must be limited to the "extraordinary case."

IV. The Competence, Provision, and Zeal of Counsel

The standard of the competence of trial counsel in capital cases should be that established in *Strickland* v. *Washington* (1984) 466 U.S. 668, which itself was a capital case. No special standard is warranted. The Sixth Amendment does not have a different meaning in capital cases than it does in non-capital cases.

For post-conviction review, the states should be encouraged to provide counsel, but should not be required to do so. In the appointment of counsel at the state level, preference should be given to those attorneys willing to follow the case into state and federal collateral proceedings. Such continuity of counsel can help alleviate the delay often occasioned when there are different attorneys handling the case at different procedural stages. However, the decision of what system of appointment, if any, to adopt, and what compensation to provide, ought to be left to the states, which are in the best position to appraise local conditions.

There is no right to counsel in federal habeas proceedings. However, if the federal court appoints counsel, it should be done early, with preference given to the attorney who handled the state proceedings. If petitioner has counsel for the initial federal habeas petition, the court should be very skeptical of second or successive petitions and last-minute stay requests.

V. Successive Petitions, Abuse of the Writ and Delay

A colorable showing of factual innocence should be required for federal courts to entertain both second *and* successive petitions in capital cases. (*Kuhlman* v. *Wilson*, *supra*, 477 U.S. at p. 454 (discussing this standard as to successive petitions only).) For claims relating to the *penalty* phase, this would require the petitioner to make a colorable showing that the sentencing determination is inaccurate, that is, that the determination that the balance of aggravating and mitigating factors warrants death is inaccurate.

As for the problem of delayed petitions, current law requires that the state prove prejudice resulting from the delay before the petitioner is required to justify the delay. (Rule 9(a), Rules following 28 U.S.C. § 2254.) As applied to capital cases, this rule fails to take into

account that when a petitioner is under a death sentence, he has a strong incentive to delay. Every procedural stage he exhausts brings just that much closer the day of judgment if he should not prevail. Thus, capital cases present "the only part of the criminal appeals process in which the state, rather than the defendant, is the moving force." (Note, The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases, 95 Yale L. J. 371, 377 (1985).) Hence, in capital cases, the initial burden should be on the *petitioner* to justify his delay. If he cannot do so, the petition should be dismissed. If he can, then the burden should shift to the state to prove prejudice. The nature of the prejudice to the state should be balanced against the nature of the petitioner's justification in order to determine whether the federal court should hear the claim. Additionally, the prejudice component of this analysis should be augmented to permit the state to show that because of the delay, it will be unable to retry the petitioner. (*Vasquez* v. *Hillary* (1986) 474 U.S. 254, 283 (Powell, J., dissenting).)

When the petitioner delays his petition until the eve of execution, he should be required to bear an especially heavy burden of justification. A petition filed within ten days of an execution should be presumed to be an abuse of the writ. That presumption should be considered rebutted only by a showing of extraordinary circumstances. If the delay is unjustified, sanctions should be imposed on counsel. (See *Bell* v. *Lynaugh* (5th Cir. 1988) 858 F.2d 978, 983.)

A statute of limitations for federal habeas petitions is advisable, perhaps one year after decision by the last state court to review the matter.

VI. Certificates of Probable Cause, Stays of Execution, Last-Minute Chaos

Both federal district courts and courts of appeal should adopt time limits within which capital cases must be decided. They should also adopt time tables for handling certificates of probable cause to appeal and stay requests. Examples of abusive, last-minute stay applications abound. For instance, in *Franklin* v. *Lynaugh* (5th Cir. 1988) 860 F.2d 165, the execution date of November 3 was set in September. However, counsel did not file for habeas corpus relief in the state court until only ten days before the execution date. He then did not file for habeas corpus relief in federal court until only sixty hours remained before execution. Noting that no justification for these delays had been offered, the court concluded that "they represent a fixed resolve to call haste and confusion into

service in Franklin's cause along with analysis and argument." (*Id.* at p. 166.) As Justice Powell stated in *Woodward* v. *Hutchins* (1984) 464 U.S. 377, 380, concurring in an order vacating a stay of execution: "A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate--even in capital cases--this type of abuse of the writ of habeas corpus." Only by setting strictly enforced time limits within which stay requests and petitions can be filed can this type of abuse be stopped.

The courts of appeals should give priority to deciding capital cases. The guidelines set forth in *Barefoot* v. *Estelle*, *supra*, 463 U.S. at 892-896 for expedited consideration of the merits of an appeal with the stay application should be implemented by all courts of appeal. The courts should continue to require a certificate of probable cause to appeal, and should not grant a stay unless such a certificate is issued. For second or successive petitions, a stay should be granted only if there are substantial grounds on which relief may be granted.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

Richard B. Iglehart

RICHARD B. IGLEHART
Chief Assistant Attorney General

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

June 16, 1989

JUN 16 1989

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

SUBJECT: Receipt of Written Comments

As agreed at our April 21 meeting, Justice Powell on April 26 wrote to a wide range of relevant organizations extending an invitation to submit written comments to the Ad Hoc Committee. These submissions were to be addressed simultaneously to Professor Pearson and me and were to be mailed not later than June 1.

I am now transmitting for your review the seven sets of comments received by this office to date. As explained below, in some instances I have omitted attachments and exhibits in the interest of conserving the amount of material to be photocopied and keeping this package of more manageable size. If you wish to have any of these referenced attachments, of course, please telephone my office and they will be dispatched to you immediately. Comments have been received from:

1. The National Governors' Association.

2. The Florida Public Defender Association.

3. The NAACP Legal Defense and Education Fund, Inc.

4. The National Association of Criminal Defense Lawyers. These comments refer to a recent en banc decision by the Court of Appeals for the Ninth Circuit in Coleman v. McCormick (No. 85-4242, decided May 5, 1989). This opinion is 62 pages long, and therefore I have omitted it in the interest of economy.

5. The American Civil Liberties Union. Omitted from this transmittal is the accompanying statement of Professor Yackle before the Senate Judiciary Committee in 1985 opposing the bill, S. 238, 99th Congress.

6. The American Bar Association. Their submission also includes a lengthy amicus curiae brief before the Supreme Court this term in Murray v. Giarratano (No. 88-411), and a 205-page issues and background paper by Professor Ira Robbins, reporter for the ABA Task Force. As indicated, these documents are not being sent herewith but are available from this office. Included is Professor Robbins' Summary of Issues for Task Force Consideration.

7. The National Legal Aid and Defender Association. Also included herewith is a copy of this organization's Standards for the Appointment and Performance of Counsel in Death Penalty Cases.

Additional comments may yet be received. For example, we have been notified that the headquarters office of the National Association of Attorneys General was delayed in transmitting Justice Powell's invitation letter to the individual state offices of the attorney general. We are told that at least several of the state attorneys general wish to submit comments, and Justice Powell has agreed to keep the record open for whatever examination of such comments the committee finds it practical to afford in the time available.

William R. Burchill, Jr.

Attachments

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CHARLES CLARK
CHIEF JUDGE
245 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

(601) 353-0911

June 16, 1989

The Honorable Lewis P. Powell, Jr.
Associate Justice, Retired

The Honorable Paul H. Roney
Chief Judge, United States
Court of Appeals

The Honnorable William Terrell Hodges
Chief Judge, United States
District Court

The Honorable Barefoot Sanders
United States District Court

Mr. William R. Burchill, Jr.
General Counsel

Mr. Albert M. Pearson

Gentlemen:

I would offer as a substitute proposal the four statutes attached. My main purpose in offering this substitute is to confine the expedition of litigation about death penalty rights to federal procedures (with the sole exception of encouraging the appointment of counsel in state habeas). The first proposal commands federal courts to act expeditiously. Only criminal cases, because of Speedy Trial Act problems, would come before death penalty matters. Coupled with Teague, this statute should curtail or eliminate any lengthy delays in federal review. It could be handled by a conference resolution requiring such priority rules. I prefer the mandate of a statute. The second imposes a brief statute of limitations but one which does not hazard a petitioner's rights to a full, fair review. If a state provides counsel for its collateral review and during the succeeding 60 days, federal review must be commenced within that time. This means it would not be necessary to use a writ of execution to provoke federal action. The third permits the highest criminal court of a state to certify federal questions to a court of appeals. The fourth allows a custodian or prisoner to seek a declaratory judgment from a district court. A major

purpose of all declaratory relief is to allow one who needs a decision to get it when the party entitled to seek relief fails to take the necessary steps. This just makes the right explicit in the death penalty context.

I recognize that we have not spoken much of the last two statutes. I propose them only to round out the concept that we should offer any alternatives the federal system can provide to adjudicate federal rights without delay. Neither is essential to our task. If the committee thinks them too far off the beaten track, they can be dropped and the first statute can be amended to delete the reference to them.

I did not include anything on exhaustion since the state can control delays caused by mixed petitions by waiver and the petitioner can control it by exhausting. The certificate of probable cause procedure is not directly implicated, so I omitted it. Present statutory and decisional law regarding successive petitions is deemed sufficient. Better utilization rather than more statutory wording in this is my preference.

Sincerely,

Proposed Statutory Amendments to
Title 28 U.S.C.

§ 1657(b) - A court, justice or judge entertaining an application for a writ of habeas corpus or a stay of execution brought by a prisoner in state custody subject to a capital sentence, or an action under 28 U.S.C. § 1293 or § 2256, shall give such action priority over all other civil actions pending or filed, except prior actions of the same kind. Any appeal from a final order in any proceeding under this subsection shall be determined, as soon as practicable, but not later than thirty days from the filing of the record on appeal. The preparation and filing of such record shall be given priority over all other records by the clerk and any court reporter involved. [Present subsection (b) becomes (c)].

§ 2244(d) - No justice or circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a capital sentence by a state court with respect to any claim that was adjudicated in the state trial court or on direct appeal or collateral review of such proceedings unless the application was filed within 60 days of the completion of all available collateral review procedures in the courts of the state if the

petitioner was represented by counsel during any such collateral review procedures and during the succeeding 60-day period.

§ 1293 - The court of appeals shall have jurisdiction to answer dispositive questions of law, arising under the Constitution or laws of the United States in a capital case conviction or sentence, which are certified to such court of appeals by the highest criminal court of any state within that circuit.

§ 2256 - The district courts shall have original jurisdiction of actions under Chapter 151 by or against the state custodian of a prisoner subject to a capital sentence who is represented by counsel.

JUN 30 1989

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

June 28, 1989

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

I have just received, and am transmitting for your review, the attached letter of comment from the Attorney General of the State of Montana. If any further comments are received, I shall send them to you promptly.

I was sorry to have missed being with you last Friday, but I look forward to seeing you again on July 27.

William R. Burchill, Jr.

Attachment

ATTORNEY GENERAL
STATE OF MONTANA

Marc Racicot
Attorney General

Justice Building
Helena, Montana 59620

June 21, 1989

William R. Burchill Jr.
General Counsel
Administrative Office of the
United States Courts
Washington DC 20544

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

Re: Ad Hoc Committee on Federal Habeas Corpus Review in Capital Cases

Gentlemen:

The notice from the Ad Hoc Committee on Federal Habeas Corpus Review in Capital Cases inviting comments on capital collateral review from the National Association of Attorneys General by June 1, 1989, was not brought to my attention until June 10, 1989. It is my hope these comments will nevertheless be taken into account.

The delay in cases involving appeals from habeas corpus petitioners in death penalty cases is a serious concern to the citizens of Montana. The Ninth Circuit, in a proposed committee note to Rules 35-1 to 35-3 of its Circuit Rules, essentially perpetuates the practice of delay in these cases by observing that requests for initial en banc hearings are "virtually never granted." Two Montana cases illustrate the intolerable delay caused by a two-tier review process:

> Coleman v. McCormick, CA85-4242, docketed in October 1985, argued to a panel in May 1986, reargued en banc in July 1988, decision issued May 5, 1989.

McKenzie v. Risley, CA85-4156, docketed in September 1985, argued to panel in May 1986, reargued en banc in August 1987, decision issued March 10, 1988. (Second habeas corpus action now pending in the Ninth Circuit, despite district court denial of certificate of probable cause to appeal.)

The State's interest in expediting death penalty cases should be recognized and accommodated, as suggested by the United States Supreme Court in Barefoot v. Estelle, 463 U.S. 880 (1983). In furtherance of this interest, the Courts of Appeal should screen these cases either at the initial filing or at the time of consideration of the certificate of probable cause, to determine whether an initial en banc hearing is warranted.

With regard to Rule 22 of the Federal Rules of Appellate Procedure, the standards for granting a certificate of probable cause to appeal should reflect that the petitioner must make a "substantial showing of the denial of a federal right." Barefoot v. Estelle, 463 U.S. at 893; Van Pilon v. Reed, 799 F.2d 1332 (9th Cir. 1986). A certificate of probable cause to appeal should not issue if the claim "is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record." Id. at 894. Where the district judge has denied the certificate of probable cause and has given viable reasons, his determination should be given deference by virtue of his familiarity with the case. It has been Montana's experience that certificates are automatically granted by the Ninth Circuit, even before the opposing party has had sufficient time to file a response to the request.

Thank you for your consideration of these comments.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

cc: Doug Ross, National Association of Attorneys General