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Helpful.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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

(601) 353-0911

July 14, 1989

JUSTICE LEWIS F. POWELL
CHIEF JUDGE PAUL H. RONEY
CHIEF JUDGE WM. TERRELL HODGES
JUDGE BAREFOOT SANDERS
PROFESSOR ALBERT M. PEARSON

Dear Judges and Professor:

I enclose a proposed modification of Professor Pearson's draft statute which incorporates most of the comments of Judges Hodges and Sanders. I also suggest a proposed report by our committee which includes an analysis of the statistical data we have on hand. Since these show the main delay occurs in federal habeas, I recommend that we not keep the elaborate requirements for appointment of counsel or for federal approval as Judge Sanders suggests. This step may be added later if experience shows it is needed. I have also suggest a preamble to the legislation. It will, of course, be discarded in any bill, but should serve as a worthwhile introduction to members of Congress who might look at it.

My hope is that this proposal will benefit our effort to achieve a committee consensus. I am wide open to suggestions, corrections, deletions, or additions.

Sincerely,

Enclosure

cc: William R. Burchill, Jr.

Charlie's draft received with his letter of 7/12

Committee Report

When Chief Justice William H. Rehnquist formed this committee, his charge to us was to inquire into "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases in which the prisoner had or had been offered counsel. He specifically directed our attention to the following issues: (1) better coordination of state and federal collateral procedures, (2) exhaustion, (3) expediting federal habeas corpus review, (4) a statute of limitations for collateral proceedings, and (5) lack of finality in the collateral process. We have examined statistical information, studied case histories, considered many articles published in leading journals, solicited and considered the views of a broad spectrum of organizations and attorneys interested in the area, and conferred extensively. Our report to the Conference follows.

In 1972, Furman v. Georgia allowed states to impose the death penalty based on guided jury discretion. Since ~~then~~ 1972, there

In Gregg v. Georgia (1976), the Court approved the new Georgia statute that provides standards to guide the judge and jury in capital cases.

Other states imposing the death penalty have adopted similar statutes.

challenges in the state forum. This results in delayed or ineffective federal collateral procedures. Other factors also contribute to the present process of difficult and unsatisfactory collateral adjudication. Prominent among them is the fact that the Supreme Court has handed down 71 decisions affecting various phases of death penalty litigation since *Furman*. Until the recent decision in *Teague* limited the effect of new precedent on long pending litigation, many of these decisions created new rules that spawned relitigation of settled collateral issues and the pending of such cases delayed the process of adjudication.

Capital litigation must be improved if the death penalty remains a constitutional form of punishment for extreme criminal action. To accomplish the task our Committee was given, we propose legislation that will benefit federal collateral proceedings. The Committee's detailed analysis of cases from Alabama, Florida, Georgia, Mississippi, and Texas shows that 80% of the time spent in collateral litigation in death penalty cases occurs outside of state collateral proceedings. A table showing

the average time periods and ratios in death penalty cases in these states is attached to this report. Underlying data is available from the reporter.

No single reason for this disproportionately high federal percentage can be identified. The recommended legislation is designed to achieve a single state proceeding ~~which~~ that exhausts all issues and, if necessary, is followed by a single federal habeas corpus action. To accomplish this goal, we are convinced that the petitioner must be represented in state post-conviction review by competent counsel who stays with the collateral proceedings through any federal court habeas corpus litigation. This goal can best be achieved with the initiative and cooperation of the 37 states that authorize imposition of the death penalty. We would hope that those governments would also take steps to make their trial and direct review process in death penalty cases as error-free as possible. ~~We believe they must~~ The states should ~~offer~~ provide competent counsel promptly to indigent petitioners for state collateral review. If these ~~things are done~~ steps are taken, federal collateral

review proceedings also would be expedited, ~~should be minimized and could possibly be eliminated~~. The single, well-counseled series of collateral proceedings we envision would best ensure that every proper issue is raised and decided in ~~the most~~ an orderly way.

The legislation we propose to effectuate the one prompt, counseled state/federal post-conviction process provides that ~~once~~ when counsel is appointed by a state for collateral review, a statute of limitations would begin to run as to all claims cognizable in federal habeas. At this time, an automatic stay of execution, if needed, could be obtained. This stay would remain in place until all collateral proceedings were completed. The prisoner would have six months following the end of state collateral review within which to file in federal court. This limitation would assure~~s~~ that the presentation of issues will not be delayed. Time would ~~stop running when the prisoner filed for state collateral review, and would remain~~ be tolled during such state proceedings. When state proceedings conclude~~d~~, the running of time would recommence ~~where it stopped~~ and any federal petition would have to be filed within the time period provided or be time-barred

unless petitioner could show a basis for relief that had not been presented, that a substantial question of guilt existed, that new and pertenant facts had been found, or that new fundamental rights had been developed. Since 28 U.S.C. §§ 1657 and 2243 already require all federal habeas corpus proceedings to be expedited and decided "forthwith" and "summarily," no additional legislation requiring priorities for the handling of federal habeas corpus proceedings is needed. ~~if such courts will comply with existing law.~~ We do suggest that district and courts of appeal expedite consideration of capital cases.

SUMMARY OF DEALTH PENALTY LITIGATION STATISTICS BASED ON 50 CASES FROM FLORIDA, TEXAS, ALABAMA, MISSISSIPPI, AND GEORGIA

Average Times:	Months
Crime to:	
Conviction	13
End of state direct appeals	40
Direct certiorari review by U.S. S. Ct.	47
Execution	106
Valid sentence to:	
End of state direct appeals	27
Certiorai denied on direct review	34
Execution	93
Total Time:	
State collateral	9
Federal collateral	38
All collateral	47

Percentage ratios:	
Sentence to cert. on direct/sentence to execution	36%
Down time*/sentence to execution	14%
State collateral/sentence to execution	10%
Federal collateral/sentence to execution	40%
Total collateral/sentence to execution	50%
State collateral/total collateral	20%
Federal collateral/total collateral	80%

*Time when no proceedings are pending in any court.

[DRAFT] (Charles Clark)

Received by me July 17.

PREAMBLE

Representation by competent counsel in all post-conviction proceedings for prisoners in state custody subject to a capital sentence would best ensure justice and minimize delay. Such representation is now available in all federal habeas corpus proceedings. This bill is intended to encourage states to make such representation available to indigent prisoners in state post-conviction proceedings by eliminating unmeritorious, successive petitions and requiring prompt filing of habeas corpus claims in federal courts. Its goal is to achieve a more orderly post-conviction review process in both state and federal court that will both assure constitutional rights of capital sentenced prisoners and protect the interest of society in the meaningful enforcement of this constitutional punishment.

Subchapter B. Habeas Corpus in Capital Sentencing: Special Procedures
[new]

Section 2256 Habeas Corpus in capital sentences of prisoners in state custody; appointment of counsel

(a) This subchapter shall apply to cases arising under section 2254 of Title 28 involving prisoners in state custody who are subject to a capital sentence. It shall apply only if indigent prisoners have been offered the assistance of competent counsel at all stages of post-conviction proceedings authorized by the state.

(b) For the provisions of this subchapter to apply to it, a state must establish and fund a resource center or equivalent to recruit, select, and compensate counsel in state post-conviction proceedings in cases involving state priosners under capital sentences.

Section 2257 Mandatory stay of execution; duration; limits on stays of execution; successive petitions

If, during the pendency of any state or federal post-convicton proceeding claiming the violation of a right arising under the Constitution or laws of the United States, a state issues a writ for the execution of a prisoner under a capital sentence who is represented by counsel, the writ shall be stayed by any district court in which habeas proceedings are pending or could be instituted. The stay shall expire automatically if counsel for the state prisoner fails to file a petition for a writ of habeas corpus in the district court within 180 days of the final judgment of the highest court of the state on direct appeal and through the time for filing a petition for certiorari in the Supreme Court of the United States after direct appeal, and, if such a petition be filed, through the date of final disposition of the petition. If a petition for habeas corpus is so filed, then the stay shall expire automatically upon final determination of such habeas corpus proceedings.

The 180-day period provided shall be tolled during any

period counsel has pending before a state court of competent jurisdiction a petition for post-conviction relief.

No federal court thereafter shall have the authority to enter a stay of execution in the case unless:

(1) the basis for the stay is a claim not previously presented in any state or federal court;

(2) the facts underlying the claim are sufficient, if proven, to undermine substantially the court's confidence in the jury's determination of guilt on the underlying offense or offenses for which the death penalty was imposed; and

(3) the failure to raise the claim is (A) the result of state action in violation of the Constitution or laws of the United States; (B) based on a federal right newly recognized by the Supreme Court that is retroactively applicable, or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state or federal post-conviction review.

Section 2258 Filing of habeas corpuus petitions' time requirements; tolling rules

Counsel appointed under section 2256 to represent a state prisoner under capital sentence must file any petition for habeas corpus in the appropriate federal district court within 180 days from the effective date of appointment. The filing rule established by this section shall be tolled:

(a) During the time period running from the date of the affirmance of the capital sentence on direct appeal by the highest court of the state through the time for filing of a petition for certiorari in the Supreme Court; and, if counsel for the state priosoner files such a petition for certiorari, through the date of final disposition of the petition.

(b) During any period in which a state prisoner under capital sentence has a properly filed request for post-conviction review pending before a state court of competent jurisdiciton; if all state filing rules are made in a timely manner, this period shall run continuously from the date that the state prisoner files a request for post-conviction review of his capital

sentence in the court of conviction or other proper trial court until final disposition of the post-conviction review proceedings by the highest court of the state. The filing rule is not tolled during the pendency of certiorari proceedings in the Supreme Court of the United States related to such state collateral proceedings.

(b) During an additional period not to exceed 60 days, if counsel for the state prisoner: (A) moves for an extension of time in the federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition and (B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 60-day period established by this subsection. The moton for extension of time may not be filed prior to the completion of all state post-conviction review of the validity of a capital sentence.

Section 2259 Evidentiary hearings; scope of federal review; exhaustion by a state prisoner under capital sentence.

In any habeas corpus proceeding under this subchapter a district court shall consider and rule upon any request for an evidentiary hearing and conduct any evidentiary hearing necessary to complete the record for the purpose of habaas review. [Upon the development of a complete evidentiary record, the district court shall rule on the merits of all claims properly before it] [Upon the development of a complete evidentiary record, the district court shall certify the record to the court of appeals as ripe for the adjudication of all claims properly before it].

[(c) Upon the receipt of a record from a district court in a case involving a state prisoner under capital sentence, the court of appeals shall proceed to consider and resolve all propoerly preserved and presented calims as if the case were on direct appeal from a ruling of the district court adverse to the petitioner on all claims, including any request for an evidentiary hearing where that request was denied by the district

court.]

Unexhausted claims shall not be considered by the district court and shall be dismissed by a district court under § 2254(b) or (c), unless the prisoner can show that the failure to raise or develop the claims in the state courts is (A) the result of state action in violation of the Constitution or laws of the United States; (B) based on a federal right newly recognized by the Supreme Court that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state post-convction review.

Section 2260 Certificate of probable cause inapplicable

The requirement of a certificate of probable cause in order to appeal from a district court to a court of appeals does not apply to any habeas corpus proceeding subject to the provisions of this subchapter.

OFFICE OF THE
ATTORNEY GENERAL
DON SIEGELMAN
ATTORNEY GENERAL
MONTGOMERY, ALABAMA 36130
(205) 261-7400

STATE OF ALABAMA

SEP 1 1988

September 13, 1988

Justice Lewis F. Powell, Jr.
United States Supreme Court
Washington, D.C. 20543

Dear Justice Powell:

I understand that you are involved in a study of the problem of delay and successive petitions in federal habeas proceedings, including those involving capital cases. Having handled post-conviction capital punishment litigation in Alabama for nine years, I am also concerned about those problems, and I have enclosed some materials relating to the subject.

The enclosed execution chart lists the date of commission of the capital offense and the date of execution in each of the 101 post-*Furman* executions. Of particular relevance are the 90 executions which were non-consensual.

Pages 5 and 6 of the enclosed capital data sheet list the average period of delay by state and by federal circuit. The capital data sheet also includes death row population data by state and by federal circuit. The death row population data is taken from the Legal Defense Fund's "Death Row, U.S.A." report. I have compiled the execution data independently.

Also enclosed is an example of the orders which our Southern District issues in all first-time habeas proceedings involving death row inmates. Paragraphs 2 - 4 of the enclosed order is a more detailed version of the order originated by Judge Hand, which you commended in your speech to the Eleventh Circuit Judicial Conference in 1983. *See*, 69 A.B.A.J. 1000 (Aug. 1983). I believe that such orders are helpful in reducing the number of claims raised in successive petitions, although they are obviously not a complete solution to the problem.

I have the capital data sheet on a computer and I update it and the execution chart immediately after each execution.

If you wish, I will be glad to send you updated copies as they are produced. I would also be honored to assist in any other way you desire.

Please forgive the impertinence of this unsolicited letter, but I do feel that the problem you are studying is a serious one. As Chief Judge Clark wrote for the Fifth Circuit in a successive petition case last year:

> The courts themselves have been slow to react to their new responsibility in today's death penalty cases. During the period when the Supreme Court of the United States interdicted capital punishment and sorted out the constitutional propriety of statutes and trial procedures, the population of death row in many states multiplied. That dam has broken, and the rush of cases is upon the courts. Justice requires that in each instance capital punishment be imposed with maximum assurance of scrupulous legality. But, justice equally demands an assurance that such punishment be imposed when the minds of men still retain memory of the crime committed. Otherwise, capital punishment becomes a sort of second, albeit legal, crime.
>
> ... I write to plead for change to come and come quickly before respect for the law erodes beyond repair.

Brogdon v. Butler, 824 F.2d 338, 344 (5th Cir.), cert. denied, 108 S.Ct. 13 (1987).

Respectfully yours,

ED CARNES
Assistant Attorney General

EC/jaf

Enclosures

0555t

POST-*FURMAN* EXECUTION LIST

Compiled by: Assistant Alabama Attorney General
Ed Carnes

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Gilmore, Gary W	Utah	Consent	Jan. 17, 1977	Robbery-murder (July 20-21, 1975)	Firing Squad
Spenkelink, John W	Florida	Involuntary	May 25, 1979	Murder (Feb. 4, 1973)	Electric Chair
Bishop, Jesse W	Nevada	Consent	Oct. 22, 1979	Robbery-murder (Dec. 20, 1977)	Gas Chamber
Judy, Steven W	Indiana	Consent	Mar. 9, 1981	Rape-murder and Multiple murders (Apr. 28, 1979)	Electric Chair
Coppola, Frank W	Virginia	Consent	Aug. 10, 1982	Robbery-murder (Apr. 22, 1978)	Electric Chair
Brooks, Charles B	Texas	Involuntary	Dec. 7, 1982	Kidnap-murder (Dec. 14, 1976)	Lethal Injection

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Evans, John W	Alabama	Involuntary	Apr. 22, 1983	Robbery-murder (Jan. 5, 1977)	Electric Chair
Gray, Jimmy W	Mississippi	Involuntary	Sept. 2, 1983	Rape-murder (June 25, 1976)	Gas Chamber
Sullivan, Robert W	Florida	Involuntary	Nov. 30, 1983	Robbery-murder (Apr. 9, 1973)	Electric Chair
Williams, Robert B	Louisiana	Involuntary	Dec. 14, 1983	Robbery-murder (Jan. 5, 1979)	Electric Chair
Smith, John W	Georgia	Involuntary	Dec. 15, 1983	Multiple murders for pecuniary gain (Aug. 31, 1974)	Electric Chair
Antone, Anthony W	Florida	Involuntary	Jan. 26, 1984	Murder for hire (Oct. 23, 1975)	Electric Chair
Taylor, Johnny B	Louisiana	Involuntary	Feb. 29, 1984	Robbery-murder (Feb. 8, 1980)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Autry, James W	Texas	Involuntary	Mar. 14, 1984	Robbery-murder (Apr. 20, 1980)	Lethal Injection
Hutchins, James W	North Carolina	Involuntary	Mar. 16, 1984	Murder of officers (May 31, 1979)	Lethal Injection
O'Bryan, Ronald W	Texas	Involuntary	Mar. 31, 1984	Murder for remuneration (Oct. 31, 1974)	Lethal Injection
Sonnier, Elmo W	Louisiana	Involuntary	Apr. 5, 1984	Rape-murder (Nov. 5, 1977)	Electric Chair
Goode, Arthur W	Florida	Involuntary	Apr. 5, 1984	Sodomy-murder (Mar. 5, 1976)	Electric Chair
Adams, James B	Florida	Involuntary	May 10, 1984	Robbery-murder (Nov. 12, 1973)	Electric Chair
Shriner, Carl W	Florida	Involuntary	June 20, 1984	Robbery-murder (Oct. 22, 1976)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Stanley, Ivon B	Georgia	Involuntary	July 11, 1984	Robbery-murder (Apr. 12, 1976)	Electric Chair
Washington David B	Florida	Involuntary	July 13, 1984	Kidnapping-murder Multiple murders (Sept. 20, 23, & 27, 1976)	Electric Chair
Dobbert, Ernest W	Florida	Involuntary	Sept. 7, 1984	Child abuse-murder (Dec. 31, 1971)	Electric Chair
Baldwin, Timothy W	Louisiana	Involuntary	Sept. 10, 1984	Robbery-murder (Apr. 4, 1978)	Electric Chair
Henry, James B	Florida	Involuntary	Sept. 20, 1984	Robbery-murder (Mar. 23, 1974)	Electric Chair
Briley, Linwood B	Virginia	Involuntary	Oct. 12, 1984	Robbery-murder (Sept. 14, 1979)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Knighton, Earnest B	Louisiana	Involuntary	Oct. 30, 1984	Robbery-murder (Mar. 17, 1981)	Electric Chair
Barefoot, Thomas W	Texas	Involuntary	Oct. 30, 1984	Murder of officer (Aug. 7, 1978)	Lethal Injection
Barfield, Velma W	North Carolina	Involuntary	Nov. 2, 1984	Murder by poison (Feb. 3, 1978)	Lethal Injection
Palmes, Timothy W	Florida	Involuntary	Nov. 8, 1984	Robbery-murder (Oct. 4, 1976)	Electric Chair
Stephens, Alpha B	Georgia	Involuntary	Dec. 11, 1984	Burglary-murder Robbery-murder (Aug. 19, 1974)	Electric Chair
Willie, Robert W	Louisiana	Involuntary	Dec. 28, 1984	Rape-murder (May 28, 1980)	Electric Chair
Martin, David W	Louisiana	Involuntary	Jan. 4, 1985	Multiple murders [4 victims] (Aug. 13 or 14, 1977)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Green, Roosevelt B	Georgia	Involuntary	Jan. 9, 1985	Rape-murder Kidnap-murder (Dec. 12, 1976)	Electric Chair
Shaw, Joseph W	South Carolina	Involuntary	Jan. 11, 1985	Rape-murder Multiple murders [2 victims] (Oct. 29, 1977)	Electric Chair
Skillern, Doyle W	Texas	Involuntary	Jan. 16, 1985	Murder of officer (Oct. 23, 1974)	Lethal Injection
Raulerson, James W	Florida	Involuntary	Jan. 30, 1985	Murder of officer (Apr. 27, 1975)	Electric Chair
Solomon, Roosevelt B	Georgia	Involuntary	Feb. 20, 1985	Robbery-murder (June 17, 1979)	Electric Chair
Witt, Johnny W	Florida	Involuntary	Mar. 6, 1985	Kidnapping-murder (Oct. 28, 1973)	Electric Chair
Morin, Stephen W	Texas	Consent	Mar. 13, 1985	Kidnapping-murder (Dec. 11, 1981)	Lethal Injection

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Young, John B	Georgia	Involuntary	Mar. 20, 1985	Burglary-murder & Multiple-murders (Dec. 7, 1974)	Electric Chair
Briley, James B	Virginia	Involuntary	Apr. 18, 1985	Rape-murder Multiple murders [2 victims] (Oct. 19, 1979)	Electric Chair
De La Rosa, Jesse H	Texas	Involuntary	May 15, 1985	Robbery-murder (Aug. 22, 1979)	Lethal Injection
Francois, Marvin B	Florida	Involuntary	May 29, 1985	Robbery-murder Multiple murders (July 27, 1977)	Electric Chair
Milton, Charles B	Texas	Involuntary	June 25, 1985	Robbery-murder (June 24, 1977)	Lethal Injection
Mason, Morris B	Virginia	Involuntary	June 25, 1985	Rape-murder (May 13, 1978)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Porter, Henry H	Texas	Involuntary	July 9, 1985	Murder of officer (Nov. 29, 1975)	Lethal Injection
Rumbaugh, Charles W	Texas	Consent	Sept. 11, 1985	Robbery-murder (Apr. 4, 1975)	Lethal Injection
Vandiver, William W	Indiana	Consent	Oct. 16, 1985	Murder for hire (Mar. 20, 1983)	Electric Chair
Cole, Carroll W	Nevada	Consent	Dec. 6, 1985	Murder by previ-ously convicted murderer (May 14, 1977)	Lethal Injection
Roach, James W	South Carolina	Involuntary	Jan. 10, 1986	Rape-murder Multiple murders (Oct. 29, 1977)	Electric Chair
Bass, Charles W	Texas	Involuntary	Mar. 12, 1986	Murder of officer (Aug. 16, 1979)	Lethal Injection
Jones, Arthur B	Alabama	Involuntary	Mar. 21, 1986	Robbery-murder (Aug. 17, 1981)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Thomas, Daniel B	Florida	Involuntary	Apr. 15, 1986	Rape-murder (Jan. 1, 1976)	Electric Chair
Barney, Jeffrey W	Texas	Consent	Apr. 16, 1986	Rape-murder (Nov. 24, 1981)	Lethal Injection
Funchess, David B	Florida	Involuntary	Apr. 22, 1986	Robbery-murder Multiple murders (Dec. 16, 1974)	Electric Chair
Pinkerton, J. Kelly W	Texas	Involuntary	May 15, 1986	Robbery-murder Burglary-murder (Oct. 26, 1979)	Lethal Injection
Straight, Ronald W	Florida	Involuntary	May 20, 1986	Robbery-murder (Oct. 4, 1976)	Electric Chair
Esquivel, Rudy H	Texas	Involuntary	June 9, 1986	Murder of officer (June 8, 1978)	Lethal Injection
Brock, Kenneth W	Texas	Involuntary	June 19, 1986	Robbery-murder (May 21, 1974)	Lethal Injection

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Bowden, Jerome B	Georgia	Involuntary	June 24, 1986	Robbery-murder (Dec. 8, 1976)	Electric Chair
Smith, Michael B	Virginia	Involuntary	July 31, 1986	Rape-murder (May 23, 1977)	Electric Chair
Woolls, Randy W	Texas	Involuntary	Aug. 20, 1986	Robbery-murder (June 16, 1979)	Lethal Injection
Smith, Larry B	Texas	Involuntary	Aug. 22, 1986	Robbery-murder (Feb. 3, 1978)	Lethal Injection
Wicker, Charles W	Texas	Involuntary	Aug. 26, 1986	Kidnapping-murder (Apr. 4, 1980)	Lethal Injection
Rook, John W	North Carolina	Involuntary	Sept. 19, 1986	Rape-murder (May 12, 1980)	Electric Chair
Evans, Michael B	Texas	Involuntary	Dec. 4, 1986	Robbery-murder (June 26, 1977)	Lethal Injection

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Andrade, Richard H	Texas	Involuntary	Dec. 18, 1986	Rape-murder (Mar. 20, 1984)	Lethal Injection
Hernandez, Ramon H	Texas	Involuntary	Jan. 30, 1987	Burglary-murder (June 19, 1980)	Lethal Injection
Moreno, Eliseo H	Texas	Consent	Mar. 4, 1987	Murder of officer Multiple murders (Oct. 11, 1983)	Lethal Injection
Mulligan, Joseph B	Georgia	Involuntary	May 15, 1987	Multiple murders [2 victims] (Apr. 14, 1974)	Electric Chair
Johnson, Edward B	Mississippi	Involuntary	May 20, 1987	Rape-murder (June 2, 1979)	Gas Chamber
Tucker, Richard B	Georgia	Involuntary	May 22, 1987	Kidnapping-murder Robbery-murder (Sept. 15, 1978)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Williams, Anthony B	Texas	Involuntary	May 28, 1987	Rape-murder Kidnapping-murder Robbery-murder (June 12, 1978)	Lethal Injection
Tucker, William W	Georgia	Involuntary	May 29, 1987	Kidnapping-murder Robbery-murder (Aug. 20-21, 1977)	Electric Chair
Berry, Benjamin W	Louisiana	Involuntary	June 7, 1987	Robbery-murder (Jan. 30, 1978)	Electric Chair
Moore, Alvin B	Louisiana	Involuntary	June 9, 1987	Rape-murder Robbery-murder (July 10, 1980)	Electric Chair
Glass, Jimmy W	Louisiana	Involuntary	June 12, 1987	Robbery-murder Multiple murders [2 victims] (Dec. 24, 1982)	Electric Chair
Wingo, Jimmy W	Louisiana	Involuntary	June 16, 1987	Robbery-murder Multiple murders [2 victims] (Dec. 24, 1982)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Johnson, Elliott B	Texas	Involuntary	June 24, 1987	Robbery-murder Multiple murders [2 victims] (Apr. 8, 1982)	Lethal Injection
Whitley, Richard W	Virginia	Involuntary	July 6, 1987	Robbery-murder (July 25, 1980)	Electric Chair
Thompson, John W	Texas	Involuntary	July 8, 1987	Robbery-murder (May 21, 1977)	Lethal Injection
Evans, Connie B	Mississippi	Involuntary	July 8, 1987	Robbery-murder (Apr. 8, 1981)	Gas Chamber
Celestine, Willie B	Louisiana	Involuntary	July 21, 1987	Rape-murder (Sept. 13, 1981)	Electric Chair
Watson, Willie B	Louisiana	Involuntary	July 24, 1987	Rape-murder Robbery-murder (Apr. 15, 1981)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Brogdon, John W	Louisiana	Involuntary	July 30, 1987	Rape-murder (Oct. 7, 1981)	Electric Chair
Rault, Sterling W	Louisiana	Involuntary	Aug. 24, 1987	Rape-murder Kidnapping-murder Multiple murders (Mar. 1, 1981)	Electric Chair
Selby, Pierre B	Utah	Involuntary	Aug. 28, 1987	Robbery-murder Rape-murder Multiple murders (Apr. 22, 1974)	Lethal Injection
Ritter, Wayne W	Alabama	Involuntary	Aug. 28, 1987	Robbery-murder (Jan. 5, 1977)	Electric Chair
White, Beauford B	Florida	Involuntary	Aug. 28, 1987	Robbery-murder Multiple murders (July 27, 1977)	Electric Chair
Mitchell, William B	Georgia	Involuntary	Sept. 1, 1987	Robbery-murder (Nov. 5, 1974)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Starvaggi, Joseph W	Texas	Involuntary	Sept. 10, 1987	Robbery-murder (Jan. 28, 1977)	Lethal Injection
McCorquodale, Timothy W	Georgia	Involuntary	Sept. 21, 1987	Rape-murder (Jan. 16, 1974)	Electric Chair
Streetman, Robert W	Texas	Involuntary	Jan. 7, 1988	Burglary-murder (Dec. 17, 1982)	Lethal Injection
Darden, Willie B	Florida	Involuntary	Mar. 15, 1988	Robbery-murder (Sept. 8, 1973)	Electric Chair
Felde, Wayne W	Louisiana	Involuntary	Mar. 15, 1988	Murder of Officer (Oct. 20, 1978)	Electric Chair
Lowenfield, Leslie B	Louisiana	Involuntary	Apr. 13, 1988	Multiple murders (Aug. 30, 1982)	Electric Chair
Clanton, Earl B	Virginia	Involuntary	Apr. 14, 1988	Robbery-murder (Nov. 16, 1980)	Electric Chair

INMATE	STATE	TYPE	DATE	CRIME (& DATE)	METHOD
Bishop, Arthur W	Utah	Consent	June 10, 1988	Sexual Assault on children murder(s) (Oct. 16, 1979 - July 14, 1983)	Lethal Injection
Byrne, Jr. Edward R. W	Louisiana	Involuntary	June 14, 1988	Robbery-murder (Aug. 14, 1984)	Electric Chair
Messer, James W	Georgia	Involuntary	July 28, 1988	Kidnapping-murder (Feb. 13, 1979)	Electric Chair

Whites	56	(55%)
Blacks	39	(39%)
Hispanics	6	(06%)
TOTAL	101	

0261v

SUMMARY OF POST-FURMAN
CAPITAL PUNISHMENT DATA

Prepared By: Assistant Alabama Attorneys General
Ed Carnes and Sandra Stewart

Alabama State House
11 South Union Street
Montgomery, Alabama 36130
205/261-7408

(Death Row Data current through August 1, 1988);
(Execution Data current through September 11, 1988)*

I. Number on Death Row Nationally: 2110**

(37 states and the federal military with capital statutes; 34 states and the federal military with death row inmates)

II. Death Row Population by State

Rank	State	Number	% of Nat'l Total
1	Florida	284	13%
2	Texas	269	13%
3	California	226	11%
4	Illinois	116	5%
5	Georgia	108	5%
6	Pennsylvania	101	5%
7	Alabama	95	4%
8	Oklahoma	93	4%
9	Ohio	86	4%
10	Arizona	84	4%

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*Death row state-by-state data from LDF's August 1, 1988 "Death Row, U.S.A." report; execution data compiled independently.

**The national death row population total is 11 less than the sum of state and the sum of federal circuit death row population figures, because a few inmates are under death sentences in more than one state.

Rank	State	Number	% of Nat'l Total
11	North Carolina	79	4%
12	Tennessee	70	3%
13	Missouri	61	3%
14	Mississippi	48	2%
15	Indiana	48	2%
16	Nevada	44	2%
17	Louisiana	42	2%
18	South Carolina	41	2%
19	Virginia	37	2%
20	Kentucky	33	2%
21	Arkansas	31	1%
22	New Jersey	28	1%
23	Maryland	19	1%
24	Idaho	16	1%
25	Nebraska	12	1%
26	Oregon	12	1%
27	Delaware	7	*
28	Washington	7	*
29	Montana	6	*
30	Utah	6	*
31	Colorado	3	*
32	Federal Military	3	*
33	Wyoming	3	*
34	New Mexico	2	*

*Denotes less than one-half of 1%.

Rank	State	Number	% of Nat'l Total
35	Connecticut	1	*
36	New Hampshire	0	*
37	South Dakota	0	*
38	Vermont	0	*

III. Death Row Population by Federal Circuit:

Circuit	Number	Percentage
Eleventh Circuit	487	23%
Ninth Circuit	395	19%
Fifth Circuit	359	17%
Sixth Circuit	189	9%
Fourth Circuit	176	8%
Seventh Circuit	164	8%
Third Circuit	136	6%
Tenth Circuit	107	5%
Eighth Circuit	104	5%
Second Circuit	1	*
First Circuit	0	*

IV. Post-*Furman* Executions by Race:

56	Whites	(55%)
39	Blacks	(39%)
6	Hispanics	(06%)
101	Total	

V. Number of Post-*Furman* Executions (including consensual ones) by State:

Rank	State	Number	% of Nat'l Total
1	Texas	27	27%
2	Florida	18	18%
3	Louisiana	18	18%
4	Georgia	13	13%
5	Virginia	7	7%
6	North Carolina	3	3%
7	Mississippi	3	3%
8	Alabama	3	3%
9	Utah	3	3%
10	Indiana	2	2%
11	Nevada	2	2%
12	South Carolina	2	2%
		101	

VI. Number of Post-*Furman* Executions (including consensual ones) by Federal Circuit:

Circuit	Number	% of Nat'l Total
Fifth Circuit	48	48%
Eleventh Circuit	34	34%
Fourth Circuit	12	12%
Tenth Circuit	3	3%
Ninth Circuit	2	2%
Seventh Circuit	2	2%
Total	101	

VII. Number of Post-Furman Involuntary Executions by Federal Circuit:

Circuit	Number	% of Nat'l Total
Fifth Circuit	44	49%
Eleventh Circuit	34	38%
Fourth Circuit	11	12%
Tenth Circuit	1	1%
Total	90	

VIII. Time Between Date of Crime and Execution in the 90 Post-Furman Involuntary Executions

(11 of the 101 executions were by consent or without active opposition by the inmate executed):

- the time has ranged from 2 years and 9 months (Andrade case in Texas) to 14 years and 6 months (Darden case in Florida); and

- the average time has been 7 years and 11 months

IX. Average Time Between Date of Crime and Involuntary Execution State-by-State:

State	Number	Average Time
Texas	23	7 years and 8 months
Florida	18	9 years and 9 months
Louisiana	18	5 years and 10 months
Georgia	13	9 years and 10 months
Virginia	6	6 years and 10 months
North Carolina	3	5 years and 11 months
Alabama	3	7 years and 1 month
Mississippi	3	7 years and 2 months
South Carolina	2	7 years and 9 months
Utah	1	13 years and 4 months
Total	90	7 years and 11 months

X. Average Time Between Date of Crime and Involuntary Execution in Federal Circuit:

Fourth Circuit:	6 years and 9 months
Fifth Circuit:	6 years and 10 months
Tenth Circuit:	13 years and 4 months
Eleventh Circuit:	9 years and 6 months

XI. Post-*Furman* Executions by Year

	Involuntary	Consensual	Total	Percentage of Post-Furman Total
1977	0	1	1	1%
1978	0	0	0	0%
1979	1	1	2	2%
1980	0	0	0	0%
1981	0	1	1	1%
1982	1	1	2	2%
1983	5	0	5	5%
1984	21	0	21	21%
1985	14	4	18	18%
1986	17	1	18	18%
1987	24	1	25	25%
1988 (to date)	7	1	8	8%
	90	11	101	

0365t

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MICHAEL LINDSEY, Petitioner, vs. WILLIE JOHNSON, Warden, Holman Unit, and FRED SMITH, Commissioner, Alabama Department of Corrections, Respondents.	))))))))))))	CIVIL ACTION NO. 85-0775-C

ORDER REGARDING SCHEDULING OF CAPITAL HABEAS CORPUS ACTION

On June 6, 1985, the petitioner filed this action seeking to have the court issue a writ of habeas corpus.

It is ORDERED that the following procedure and schedule shall apply to this action:

1. Respondent shall as soon as practicable, but in any event on or before July 10, 1985, file and serve upon counsel for the petitioner (unless it is established by direct contact with counsel for the petitioner that he or she already has these materials) the following materials:

(a) Transcripts of state court trial proceedings, including but not limited to:

(1) Voir dire proceedings;

(2) Opening statements;

(3) Testimony;

(4) Jury instructions;

(5) Verdict;

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(6) Post trial motions;

(7) Post trial orders.

(b) Appellant's and appellee's briefs on direct appeal to the State's appellate courts, as well as copies of all opinions, orders and transcripts of the State's appellate courts proceedings.

(c) Petitioner's and respondent's briefs on collateral appeal to the State's appellate courts, as well as copies of all opinions, orders and transcripts of the State's appellate courts proceedings.

(d) Copies of all pleadings, opinions and orders in any previous federal habeas corpus actions filed by the petitioner which arose from the same conviction.

(e) A checklist of all materials described in paragraphs (a) through (d) of this section 1 which are filed with the court, such checklist to be in the form required by the court's Standing Order hereinafter referred to. Such materials are to be marked and numbered so that they can be uniformly referred to. Respondent shall serve this checklist upon counsel for the petitioner and take whatever steps are necessary to assure that the materials which

counsel for the petitioner has are marked and numbered in exactly the same manner as are the copies filed with the court.

If any items identified in (a), (b), (c) and (d) above are not available, respondent shall specifically so state and shall state when, if at all, such missing material can be filed.

2. Counsel for petitioner, as an officer of this court, shall, within fifteen (15) days after service[1] of the materials required to be served by counsel for respondent under section 1 above,[2] hold a conference with the petitioner. Counsel will at this conference: (a) advise the petitioner that the court will not accept successive petitions and that if there are grounds existing at the time of the conference for the granting of a writ that all such grounds must be forthwith stated in appropriate pleadings and any failure to do so will constitute a waiver of omitted ground or grounds; (b) review with petitioner the Rules Governing Section 2254 Cases in the United States District Courts; and (c) explore as fully as possible all

---

[1]Computation of any time period prescribed by this order shall be in conformity with Fed. R. Civ. P. 6.

[2]If Counsel for the petitioner takes the position that counsel for the respondent has not complied with the requirements of section 1 of this order within the time fixed for compliance, counsel for the petitioner shall immediately notify the court in writing, with a copy to counsel for respondent, of such noncompliance.

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potential grounds for relief including, but not limited to, the following:

1. The right to remain silent and to not incriminate oneself was violated;

2. Miranda warnings were not given or not given properly;

3. Government agents or informers deliberately elicited incriminating statements, see Massiah v. United States, 377 U.S. 201 (1964);

4. There was an impermissibly suggestive line-up, show-up, photo array, or in-court identification;

5. The confession was not voluntary;

6. The guilty plea was not voluntary;

7. There was breach of the plea bargain;

8. Defendant was not mentally or physically competent to stand trial;

9. There was prejudicial pre-trial or trial publicity;

10. Jurors saw defendant in jail clothes;

11. The grand jury or trial jury was selected in an unconstitutional fashion;

12. There was not a speedy trial;

13. There was not a public trial;

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14. Defendant was twice put in jeopardy;

15. Defendant did not have effective counsel;

16. Defendant was not able to confront the witnesses against him;

17. Defendant was not able to compel the attendance of witnesses;

18. There was such a lack of evidence of guilt that no rational trier of fact could have found the elements of the crime beyond a reasonable doubt;

19. The jury charge deprived defendant of the presumption of innocence;

20. A more severe punishment was imposed on the second sentencing;

21. The severity of the sentence was disproportionate to the crime; and

22. Defendant was denied an effective appeal.

Counsel and petitioner are reminded that there is ai obligation not to state spurious grounds or otherwise abuse thi process of this court and that any pleading filed herein will bi governed by Rule 11 of the Federal Rules of Civil Procedure.

3. Counsel for the petitioner shall, within fifteen (15 days after service of the materials required to be served b counsel for respondent under section 1 above, prepare and fil with this court a memorandum, bearing the petitioner's signatur

as well as counsel's, which shall: (a) affirm that the discussion required by section 2 of this order has taken place; (b) affirm that petitioner understands fully that any failure to amend or state additional grounds for habeas relief shall constitute a waiver of those grounds; (c) certify that the petitioner is fully satisfied with the representation by his attorney in this action and waives any complaint as to such attorney's competency to represent him or asks the court for appropriate relief; and (d) acknowledge that the petitioner understands that he has a duty to inform the court at any time that he becomes dissatisfied with his counsel's representation in this action and that his failure to so inform the court will constitute a waiver of any claim based on ineffective assistance of counsel in this action.

4. Petitioner shall, within fifteen (15) days after service of the materials required to be served by counsel for respondent under section 1 above, amend the original petition to allege each and every Constitutional violation or deprivation that may entitle the petitioner to habeas relief. If no amendment is to be filed, a notice to that effect shall accompany the memorandum referred to in section 3.

5. Respondent shall file an answer to the petition within twenty (20) days after the filing of the amended petition or, if notice is filed that the petition will not be amended, within twenty (20) days after the filing of such notice. Respondent shall include in the answer those matters contemplated by Rule 5 of the Rules Governing Section 2254 Cases and shall attach any

other relevant papers not already filed that are not specifically covered by the requirements of Rule 5.

6. Within ten (10) days after the respondent has filed the answer the parties shall submit briefs (appropriately referenced to the record or supplemented record) which shall not be in excess of fifty (50) typewritten pages, doubled spaced on letter size paper, specifying their respective positions in the premises.

7. No discovery shall be had without leave of court. It shall be petitioner's burden to demonstrate that State proceedings were not adequate to provide a full, fair evidentiary hearing. Failure to so do will result in this court's examination only of the evidence and matters presented by the record in the State Courts. Any request for an evidentiary hearing shall be made within the time allowed for briefing. At that juncture the court will give due consideration to whether or not an evidentiary hearing shall be held.

8. If counsel for petitioner determines that there are any unexhausted claims for which a State remedy is still available, counsel shall immediately file with the court a designation of the claim and available remedy and shall seek whatever order from this court counsel and petitioner deem appropriate. Respondent shall reply to any such motion within ten (10) days.

9. The Standing Order of this Court dated April 24, 1985 establishing certain uniform procedures for disposition of Habeas Corpus petitions in capital cases (a copy of which is attached shall be complied with.

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(Rev. 8/82)

DONE this 10 day of June, 1984.

UNITED STATES DISTRICT JUDGE

→ HOLLOWAY MEMO

202 535 0350 C J ROBINSON 09/18/89 15:27 001

SEP.18 '89 14:15 HOLLOWAY, CHIEF JUDGE, 10TH CIRC P.01

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
POST OFFICE BOX 1767
OKLAHOMA CITY, OKLAHOMA 73101

WILLIAM J. HOLLOWAY, JR.
CHIEF JUDGE

TELEPHONE
405 / 231-4666
FTS 736-3870

September 18, 1989

Honorable Aubrey E. Robinson, Jr.
Chief Judge
U. S. District Court
District of Columbia
U. S. Courthouse
3rd & Constitution Avenue, N.W.
Washington, D. C. 20001

Re: Ad Hoc Committee Report on Habeas Statutes

Dear Judge:

From my study that I mentioned to you on the phone, I have some serious concerns about the proposal of the Committee. For your information I am transmitting a brief memorandum which outlines these thoughts.

For the reasons explained therein, I will not be able to join in the report recommending the statutory change proposed by the Committee.

It was good to visit with you and I look forward to seeing you at the Conference.

Sincerely,

Wm. J. Holloway, Jr.

WJH:kw

Objects primarily to §2257(c)(3)

With full deference to the studious efforts and the proposal of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, we must respectfully disagree with the Report. The Committee has obviously given thorough and exhaustive consideration to many problems in the operation of the habeas statutes. Their commendable concerns about the adequacy of representation of indigent death row defendants are particularly manifest in the innovative suggestions in the Report.

We, nevertheless, first must express our special objection to proposed Section 2257(c)(3) of Title 28. That subsection would deprive a federal habeas court of any authority to issue a stay of execution or any habeas relief even though the court's confidence in the determination of the sentencer to impose a penalty of death is undermined by a showing based on a factual predicate that could not have been discovered earlier through the exercise of reasonable diligence in time to present the claim for state or federal post-conviction review. Second, we likewise have serious concerns about the six-month time bar imposed by proposed § 2258. This mechanical time-bar runs counter to established equitable principles which have traditionally been applied with respect to the Great Writ.

I

The Committee concludes that if there is any doubt about the sentencing phase of a capital case, it should be raised during a state prisoner's initial attempt to obtain post-conviction review. Of course, repetitive habeas proceedings should be avoided and it is desirable that all claims challenging both the determination of

guilt and the sentence be asserted in the very earliest phase of any direct appeal or post-conviction proceedings. Nevertheless, as noted below, there have been numerous instances where the factual predicate for a substantial constitutional claim could not be discovered earlier, despite the exercise of reasonable diligence. It is for this compelling reason that the Committee has wisely provided in proposed Section 2257(2) for the assertion of claims of violation of the Constitution or laws of the United States for relief from a guilty verdict where, such claims are based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time for state or federal post-conviction review. Nevertheless, Section 2257(3) would deny any relief where only the "death sentence" and not the guilty verdict, is undermined by such a showing.

Brady v. Maryland, 373 U.S. 83 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added). See also United States v. Agurs, 427 U.S. 97 (1976). Thus the constitutional rule clearly calls for relief in circumstances where the extreme penalty itself is thrown in doubt, even though the conviction may not be so undermined. In the margin we note a number of cases where courts have been compelled to set aside judgments in criminal cases because of Brady violations,[1] and

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1 See, e.g., Giglio v. United States, 405 U.S. 150 (1972); United States v. Hoffa, 437 F.2d 11 (6th Cir. 1971), cert. denied, 402 U.S. 988 (1971); Bowen v. Maynard, 799 F.2d 593 (10th Cir.) cert. denied, 479 U.S. 962 (1986); United States ex rel. Thompson

(Footnote continued on next page)

several of them have been cases where a death penalty alone was undermined.[2]

In circumstances where the penalty determination alone is thus skewed, we must vigorously disagree with the Report's recommendation to deny all authority to the federal courts to grant relief in subsequent post-conviction proceedings. Denial of relief where newly discovered mitigating evidence could be shown would run directly counter to the principle that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor . . . ." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (emphasis added); see also Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, 2946; 57 U. S. L. W. 4958, 4962 (1989) (citing Eddings and its principle that "a sentencer may not be precluded from considering and may not refuse to consider any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death.").[3] Where a Brady violation occurs and results in the suppression of mitigating evidence, or evidence undermining an aggravating circumstance, the extreme penalty would

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(Footnote continued): v. Dye, 221 F.2d 763 (3rd Cir. 1955), cert. denied, 350 U.S. 875 (1955); United States ex rel. Almeida v. Baldi, 195 F.2d 815 (3rd Cir. 1952), cert. denied, 345 U.S. 904 (1953). See generally Annotation, Withholding or Suppression of Evidence by Prosecution in Criminal Case as Vitiating Conviction, 34 A.L.R. 3d 16 (1970) (collecting cases).

2

See, e.g., Chaney v. Brown, 730 F.2d 1334, 1358 (10th Cir. 1984), cert. denied, 469 U.S. 1090 (1984); United States ex rel. Almeida v. Baldi, 195 F.2d 815, 819-820 (3rd Cir. 1952), cert. denied, 345 U.S. 904 (1953); Orndorff v. Lockhart, 707 F. Supp. 1062 (E.D. Ark. 1988); Richardson v. Florida, 546 So.2d 1037 (Fla. 1989); Lightbourne v. Dugger, Nos. 73609, 73612, slip op. (Fla. July 20, 1989).

3

See also, Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 116 (1987).

be carried out in violation of the principle of _Brady_ that due process is denied where suppressed evidence goes to guilt _or_ punishment, and of _Eddings_, which guarantees that _all_ mitigating evidence must be considered.

It would also be distressing for relief to be unavailable where a death penalty is obtained in violation of _Napue v. Illinois_, 360 U.S. 264, 269 (1959), which recognized that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. . . ." _See also Giglio v. United States_, 405 U.S. 150, 154-55 (1972) (undisclosed promise of leniency made to key prosecution witness in return for his testimony violates due process requirements enunciated in _Napue_); _Miller v. Pate_, 386 U.S. 1 (1967) (prosecution's deliberate use of false evidence not discovered until second habeas proceeding commenced). Again, both _Brady_ violations and _Napue_ violations, first established by later discovered evidence, are cases where a constitutional claim challenging the sentence alone could not be heard by a federal habeas court if the proposal of Section 2257 were adopted.[4]

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4 _Cf. e.g._, _Chaney v. Brown_, 730 F.2d at 1342; _United States, ex rel, Almeida v. Baldi_, 195 F.2d 815 (3d Cir. 1952), _cert. denied_, 345 U.S. 904 (1953); _Orndorff v. Lockhart_, 707 F. Supp. 1062 (E.D. Ark. 1988); _Jones v. Commonwealth of Kentucky_, 97 F.2d 335 (6th Cir. 1938); _Hill v. Thigpen_, 667 F. Supp. 314 (N.D. Miss. 1987); _Troedell v. Wainwright_, 667 F. Supp. 1456 (S.D. Fla. 1986); _Richardson v. Florida_, 546 So.2d 1037 (Fla. 1989); _Lightbourne v. Dugger_, Nos. 73609, 73612, slip op. (Fla. July 20, 1989).

II

We must also express our concern as to the desirability of the proposed six-month period in which the federal habeas petition must be filed. Although implementation of this limitation is facilitated by the provision for counsel and the carefully drafted tolling provisions, the filing period itself nevertheless remains a rigid limitation. Such a mechanical provision is not in harmony with the regard for the Great Writ which "has traditionally been regarded as governed by equitable principles." Fay v. Noia, 372 U.S. 391, 438 (1963) (citing United States ex rel Smith v. Baldi, 344 U.S. 561, 573 (1953) (Frankfurter, J., dissenting)). Consistently with such equitable principles, Rule 9 of the Rules Governing Habeas Corpus Petitions under 28 U.S.C. § 2254 already provides protection for the states against prejudice resulting from the assertion of untimely or successive petitions. This relief seems adequate and consistent with the history of the writ.

One extremely disturbing situation must be noted related to the time bar proposed. If a defendant under a death sentence were denied requested and properly admissible Brady material that strongly supported a mitigating circumstance or seriously undermined an aggravating circumstance, and if that evidence was not discovered within the 180 day time bar of § 2258, then a federal court would be powerless under § 2257 to grant a stay or any habeas relief against a seriously questionable death sentence. If the evidence did not relate to the guilty verdict no relief would be possible. It is a distressing contradiction that statutes of limitations in civil cases have tolling exceptions that permit one to assert a claim to recover his property when a wrong concealed by fraud is discovered, and yet under the proposed

habeas statute one seeking to set aside his death sentence on the ground of a constitutional violation undermining the sentence alone would be denied relief, although his very life is at stake.

We must, therefore, respectfully disagree with the Committee's report and cannot join in recommending such statutory provisions to the Congress.

Lew - I've asked Noel Augustyn to send the enclosure to our Committee members. Please read & file it. I will reread it before the Committee meets 11/30

Supreme Court of the United States
Washington, D. C. 20543

ADMINISTRATIVE ASSISTANT TO
THE CHIEF JUSTICE

October 11, 1988

Re: Habeas Corpus Review of Capital Sentences

Dear Justice Powell:

Justice Keith Callow of the Supreme Court of the State of Washington, in his capacity as a member of an ABA committee on the judiciary, has been working with me and with Bob Fiedler, the AO Legislative Affairs Officer, on the issue of federal intercircuit conflicts. In the course of a recent telephone conversation on that subject, Justice Callow also mentioned that his court was looking at the death penalty post-conviction relief situation at the state level. I told Justice Callow about your committee and its work, and he has sent to me some materials in that regard that may be of some use or interest to your committee. A copy of Justice Callow's letter and its enclosures are enclosed.

Sincerely yours,

Noel J. Augustyn

NJA:pmt

cc: Bill Burchell

The Supreme Court
State of Washington

KEITH M. CALLOW
JUSTICE
MAIL STOP AV-11
OLYMPIA, WASHINGTON
98504-0511

(206) 753-5085
SCAN 234-5085

October 6, 1988

Mr. Robert E. Feidler
Legislative & Public Affairs Officer
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Mr. Noel Augustyn
Administrative Assistant
to the Chief Justice
Supreme Court of the United States
Washington, D.C. 20543

Dear Bob and Noel:

I am enclosing to both of you copies of a memorandum and material that we have available to us at our court on the death penalty situation insofar as it relates to appointment of counsel and successive post-conviction relief problems within our state court. I hope that you find this of assistance. We are continuing to work on the inordinate delays in capital cases and when we come to any definitive answer I will give you further information.

In any event, we feel we can do nothing more than improve our state situation as much as possible and that improvement in the federal habeas corpus area is the prerogative of the federal courts.

I am looking forward to receiving the most recent draft of any proposed legislation that deals with the resolution of intercircuit conflicts and/or increasing the final decisionmaking capacity of the federal appellate system.

Best wishes to you both.

Sincerely,

Keith

Keith M. Callow

GEOFFREY CROOKS
COMMISSIONER

The Supreme Court

State of Washington

Olympia

Sixth Floor Highways-Licenses Building
12th and Washington Street
Mail Stop AV-11
Olympia, WA 98504-0511

MEMORANDUM

DATE: July 5, 1988

TO: VERNON R. PEARSON, Chief Justice

FROM: GEOFFREY CROOKS, Commissioner

RE: Procedures in Death Penalty Cases

As you know, I recently attended a "Death Penalty Resource Planning Conference" sponsored by the American Bar Association Postconviction Death Penalty Representation Project. The principal focus of the conference concerned methods to identify and support counsel for persons on death row, particularly in those proceedings (both state and federal) that occur after a conviction and death sentence have been affirmed on appeal. This has become an extremely serious problem, as you might imagine, in states with large death row populations. Though we can be thankful that it is not yet a major problem here, we now have several cases in the postappeal stages, including some that have reached or are about to reach federal postconviction proceedings. Thus, this is probably the time (before there is some crisis requiring immediate attention) to think through more fully the postconviction phase in death penalty cases.

As a starting point, no matter what one's views may be on the death penalty in general or in a particular case, it seems necessary to accept two notions. First, a person condemned to death will receive at least one round of postconviction review by means of a personal restraint petition in this court followed by a habeas corpus petition in federal court. Second, the defendant should have counsel at least through this process, and probably should have counsel right up to the time of execution. At the moment, unfortunately, our personal restraint petition rules don't take account of these features of death penalty cases. Our method of insuring that the defendants have counsel during the postconviction process could be described all too accurately as the "who will Tim Ford find this time" approach. We also, I'm afraid, have very little sense of what happens to these cases when they get to federal court; there may well be something we could be doing, in light of the inevitable federal petitions, to

help the entire process to a conclusion in a manner which is orderly, without undue delay, yet properly careful of the defendant's rights.

We have recently seen or are about to see examples of the difficult situations that can arise. In Mitchell Rupe's case, for instance, the Supreme Court has just denied his petition for certiorari from this court's decision affirming his sentence on direct appeal. This is a point in the process where it may be necessary or appropriate (as will frequently be true) that new counsel take over the defendant's representation. Ideally new counsel would take the case intending to carry it through both a personal restraint petition and federal habeas. The processes for appointment and compensation of counsel are separate in the two courts, though. Moreover, the personal restraint petition rules do not contemplate appointment of counsel until after a petition has been filed, which obviously does not work in death penalty cases. What we have had to do in most of the personal restraint petitions we have seen (Mak, Jeffries, and Harris, for example) is to open a prospective prp file, appoint counsel, and grant a stay of execution to enable counsel to actually prepare a petition. This has worked to this point, but probably only because in several cases Tim Ford has taken a lead role in finding counsel willing to accept appointment, and because the prosecutors' offices have been understanding and cooperative. Even so, the Clerk's Office has found itself in the rather problematic position of negotiating with prospective counsel at the outset on such matters as due dates and compensation.

The procedure for stays of execution also presents a number of problems which neither the prp rules nor the statutes seem to address in a way that takes account of the practicality of the postconviction process. Some of these problems are illustrated in the motion for a stay in Mak, which was considered by a department of the court on July 5, 1988. At the moment we may simply be tossing these cases, like bombs with lighted fuses, to the federal court. It is probably worth exploring, however, at least for the first round of postconviction proceedings, whether there is a more structured way to proceed which would save wear and tear on both courts and on counsel, as well as on the defendant and the survivors of the victims. A process that ran according to rules and procedures designed specifically for these cases would not necessarily be any longer than what happens already, and would likely have several advantages over the ad hoc procedures these cases follow now. The time and effort of counsel and the courts might not need to be spent on stays of unrealistic execution dates, for example, and could instead be directed to the main task of fully but efficiently litigating all of a defendant's possibly meritorious claims. A clearer process might also help the media and the public understand how these cases work.

In a number of other states, various of these questions, and particularly the problem of making sure indigent death row inmates have counsel, have been addressed as a result of joint initiatives of the state supreme court and the federal district courts. The time may have come for something similar to happen here, perhaps starting with appointment of a committee or task force with representatives from each court, the State (both prosecuting attorneys and the Attorney General), the defense bar, and the State Bar. Such a committee might start by devising a system for identifying counsel to represent indigent death row defendants in postconviction proceedings, and then might look into and make suggestions about the rest of the process that could help make these difficult cases as problem-free as possible.

MEMORANDUM

MOTION FOR APPOINTMENT OF COUNSEL

CASE NAME:	Campbell v. Kincheloe	ORIGINAL ACTION
NUMBER:	None Assigned	
DATE:	October 6, 1988	
EN BANC		

TYPE OF CASE: Death row inmate requests appointment of counsel to assist in filing second collateral relief petition.

STATEMENT OF CASE:

On August 24, 1988, death row inmate Charles Campbell filed a handwritten "motion for appointment of counsel on appeal seeking collateral review." The court was informed of this pleading shortly before the August 31, 1988 en banc administrative conference. Following that conference, the court requested this office to prepare a memorandum addressing several questions relating to the status of Campbell's case and his present request for counsel.

Procedural Facts. This court affirmed Campbell's aggravated murder convictions and death sentence on November 6, 1984. State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984). Following the United States Supreme Court's denial of certiorari, the trial court signed a death warrant ordering Campbell's execution on July 25, 1985. From May 17 to June 25, Campbell was represented by Evergreen Legal Services in connection with contemplated post-conviction relief proceedings. Before any pleadings were filed, however, Evergreen lost its funding to represent Walla Walla inmates.

On June 25, 1985, Chief Justice Dolliver appointed attorney Raymond Thoenig (then with the Washington Appellate Defender Association) to represent Campbell in connection with a planned personal restraint petition. On July 11, Thoenig and his co-counsel, James Lobsenz, filed a motion to stay Campbell's execution. Counsel said they could complete their review of the record and file a personal restraint petition by August 30, 1985. The motion for stay listed 23 issues counsel had thus far identified and included argument on some of them. The court also received pro se pleadings from Campbell himself.

On July 18, 1985, this court entered an order denying the motion for stay. The order also says the court treated the motion and Campbell's pro se pleadings as personal restraint petitions, which the court denied on the merits.

Attorneys Lobsenz and Thoenig then filed a federal habeas corpus petition and motion for stay of Campbell's execution. The

federal court stayed the execution a few days before it was to be carried out. Later, however, because the petition raised both exhausted and unexhausted claims, the court, as required by Rose v. Lundy, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982), dismissed the case and required Campbell to either refile an amended petition raising only the exhausted claims or file pleadings in state court raising the new issues. Counsel elected not to raise the new issues in state court, but to file an amended federal habeas corpus petition raising only those issues the District Court had indicated were properly presented.

Following an evidentiary hearing on one of Campbell's claims (challenging the effectiveness of his trial counsel), the District Court denied the petition. The Ninth Circuit has since affirmed the District Court's decision and denied a motion for en banc reconsideration. Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987). Campbell's pro se petition for certiorari is pending in the Supreme Court. In all likelihood that petition will be denied shortly after the court begins its fall term.

Legal Claims Thus Far Presented. On appeal, Campbell argued that: (1) the trial court violated his right to a speedy trial; (2) the prosecutor acted improperly by referring to an attempted rape not later proved; (3) failure to disclose certain exculpatory evidence prior to trial was not adequately corrected by instructions to the jury; (4) two witnesses should have been precluded from testifying because police notes of their pretrial statements were destroyed; (5) the trial court denied Campbell's right of confrontation by limiting his cross examination of Jerry Ethington (a fellow work release inmate); (6) the trial court erroneously admitted evidence seized from Campbell when he was taken into custody; (7) a search of Campbell's car was unconstitutional; (8) the trial court erroneously admitted a glass containing Campbell's fingerprint; (9) the death penalty statute is unconstitutional, on various theories, because it gives the prosecutor discretion in charging; (10) the death penalty statute provides insufficient standards to guide jury discretion; (11) the death sentence in this case cannot withstand the statutory review required under RCW 10.95.130(2); and (12) the death penalty constitutes cruel punishment, in violation of Const. art. 1, § 14. State v. Campbell, supra, at 4-5.

In the motion for stay of execution, counsel said they had, upon "partial review of the record," identified 23 "meritorious issues." Motion, at 8. These are, using counsel's numbering:

> (1) admission of Campbell's 1976 burglary conviction in the penalty phase violated his constitutional rights because the plea form did not refer to the right to remain silent;

(2) the prosecutor improperly referred to "societal self defense" in closing argument;

(3) the prosecutor also improperly told the jurors they were not supposed to consider the appropriateness of the death penalty;

(4) trial counsel's failure to present any evidence in the penalty phase constituted ineffective assistance;

(5) the prosecutor failed to aver in the death penalty notice that he had "reason to believe" there were insufficient mitigating circumstances to merit leniency;

(6) the trial court denied Campbell's right to compulsory process by declining to order Jerold Ethington to furnish a hair sample to compare with those found on the victims;

(7) the same error also violated Campbell's Eighth Amendment right to present evidence in mitigation of punishment;

(8) the trial court erroneously admitted evidence of Campbell's attempted rape of a prosecution witness;

(9) Campbell's appellate counsel rendered ineffective assistance by failing to raise issues (1)-(8) above;

(10) the trial court erred by failing to instruct the jurors to agree unanimously as to which crime Campbell intended to commit when he entered the victims' home;

(11) the trial court should have instructed the jurors in the penalty phase to consider and be influenced by sympathy for the defendant;

(12) the court should also have cautioned the jurors not to impose the death penalty in a spirit of vengeance or retribution;

(13) the jurors should have been cautioned again in the penalty phase not to consider the defendant's failure to testify;

(14) the court erroneously told the jurors they could consider in the penalty phase all evidence which had been presented in the guilt phase;

(15) a defendant in a capital case must be indicted by a grand jury;

(16) the penalty phase instructions and RCW 10.95.060(4) improperly require the defendant to prove why leniency should be granted;

(17) the prosecutor's closing argument also improperly shifted the burden of proof in the penalty phase;

(18) submission of the report required by RCW 10.95.120 violates the defendant's constitutional rights;

(19) the trial court improperly excused outright prospective jurors who expressed religious scruples against the death penalty, instead of allowing them to sit only on the guilt phase of trial;

(20) death qualifying a jury results in a conviction-prone panel;

(21) the same process denies the defendant his constitutional right to a trial by jury;

(22) the death penalty statute creates an unconstitutional, mandatory, death penalty; and

(23) the jury made special findings on two aggravating factors that overlap and thus violate Double Jeopardy principles.

Campbell's initial federal court pleading raised, by the federal court's count, some 61 issues. Actually, the petition does not seem to raise that many issues. The difficulty is that the petition first lists 32 issues (labeled with letters) and then discusses approximately 26 issues (labeled with numbers). Some of the issues discussed are not listed, some in the list are not later discussed, and the discussed issues are not in the same order as the list.

In any event, the federal court ultimately addressed—and rejected—Campbell's claims regarding (1) grand jury indictment; (2) the prosecutor's closing argument (four separate issues); (3) loss or destruction of police notes; (4) Jerold Ethington; (5) delayed disclosure of certain exculpatory evidence; (6) admission of the fingerprinted glass; (7) validity of prior burglary conviction; (8) trial counsel's failure to present any evidence in mitigation of punishment; (9) ineffective assistance of counsel on appeal; (10) the trial judge's sentencing report; (11) prosecutorial discretion to seek the death penalty; (12) facial validity of the death penalty statute; (13) burden of proof in the penalty phase; (14) mandatory death penalty; and (15) double jeopardy.

The issues listed or discussed in the original federal pleading, but found to be unexhausted, include claims that: (a) Campbell was "absent" during several critical hearings, including the entire period between the date he was sent for a competency evaluation and the date he was found to be competent; (b) he did not validly waive his right to be present during jury selection; (c) the competency interview was conducted in violation of Campbell's right to counsel; (d) trial counsel was ineffective because he favored the death penalty and felt death was an appropriate penalty for killing a child; and (e) Campbell was denied effective representation in the state post-conviction proceedings.

Campbell's present motion does not say whether he now wishes to raise these issues; they are simply the main claims his previous attorneys identified that have not yet been exhausted. Counsel, if now appointed, would presumably consider these issues but might also identify additional, entirely different issues.

ISSUES PRESENTED BY THE REQUEST FOR COUNSEL:

(1) Does Campbell have a constitutional right to appointed counsel at this stage of the post-conviction proceedings?

(2) If not, should court nevertheless exercise its discretionary authority to appoint counsel under RAP 16.15(g)?

(3) What effect do this court's rulings on the 1985 motion for stay and the present motion for appointment of counsel have on Campbell's ability to raise his as yet unexhausted claims in federal court?

ANALYSIS:

(1) Right to Counsel. Two lines of Supreme Court decisions touch upon whether Campbell has a federal constitutional right to counsel at this stage of the proceedings. The first line is represented by Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956) and Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963), both of which dealt with equal protection challenges to financial requirements imposed on indigent criminal defendants. In Griffin, the court struck down, on equal protection grounds, a state rule which conditioned the right to appeal on the defendant's ability to obtain a trial transcript. In Douglas, the Court found an Equal Protection Clause-based right to appointed counsel on appeal.

The second line of cases involves the right of access to the courts, and is represented by Bounds v. Smith, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977) and Johnson v. Avery, 393 U.S. 483, 21 L. Ed. 2d 718, 89 S. Ct. 747 (1969). In Avery, the Court held that a prison rule which prohibited inmates from acting as "writ writers" for each other infringed upon the inmates' right of access to the courts. In reaching this conclusion, the Court noted the State's failure to "provide an available alternative to the assistance provided by other inmates." Johnson v. Avery, supra, at 488. In Bounds, the Court discussed the possible "alternatives" and held that "law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights" in post-conviction pleadings. Bounds v. Smith, supra, at 825.

In Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2347 (1974), the Supreme Court discussed both equal protection and "meaningful access" concerns in connection with prisoners seeking appointed counsel to assist them in filing discretionary state appeals (beyond the first appeal of right) and applications for review by the Supreme Court. The court found no such right to counsel under either theory. Id., at 612 (equal protection), 614-15 ("meaningful access"). Relying on Moffitt, the court in Pennsylvania v. Finley, ___ U.S. ___, 95 L. Ed. 2d 539, 545, 107 S. Ct. 1990 (1987), found no right to appointed counsel in state post-conviction proceedings. As in Moffitt,

the court addressed and rejected both equal protection and "meaningful access" concerns. Finley, 95 L. Ed. 2d, at 546 (equal protection), 547 (meaningful access).

A divided Fourth Circuit, sitting en banc, recently distinguished Finley and Moffitt and relied instead on Bounds to conclude that death row inmates do have a right to appointed counsel to assist them in pursuing post-conviction claims. Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988). Of Finley, the majority said only:

> Finley was not a meaningful access case, nor did it address the rule enunciated in Bounds v. Smith. Most significantly, Finley did not involve the death penalty.

Giarratano v. Murray, supra, at 1120. As noted above, the first of these statements is simply inaccurate. Regardless of whether the Finley court cited Bounds, the court clearly did discuss the "meaningful access" doctrine and expressly rejected the prisoner's claim that "the equal protection guarantee of 'meaningful access' was violated in this case." Pennsylvania v. Finley, supra, 95 L. Ed. 2d, at 547.

Moreover, Bounds does not necessarily require appointment of counsel to ensure "meaningful access" to the courts. The Supreme Court held only that prisoners must be provided with "adequate law libraries or adequate assistance from persons trained in the law." (Emphasis added.) Bounds v. Smith, supra, at 828. The State therefore may fully discharge its obligation under Bounds by providing prisoners with access to an adequate law library. Id., at 830 (this is one "constitutionally acceptable method to assure meaningful access"). If no such library is available, the State's other option of providing access to "persons trained in the law" may be satisfied through the use of "paraprofessionals and law students" or even inmates trained as "paralegal assistants." Id.

Thus, despite the Fourth Circuit's holding in Giarratano, although states must provide inmates with some type of assistance in preparing habeas corpus petitions and similar pleadings, Bounds, at 828, the right of meaningful access to the courts does not include the right to appointed counsel beyond the first appeal of right. Finley, 95 L. Ed. 2d at 547.

The Giarranto majority's second point is at least factually correct—neither Finley nor Moffitt (nor Bounds, for that matter) was a capital case. It is unclear, however, whether this factor is significant to the right to counsel issue. In the Sixth Amendment context, the Supreme Court has expressly declined to recognize any greater right to trial counsel in capital than in

noncapital cases. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Similarly, in adopting procedures to govern motions for stays pending appeal in habeas corpus actions, the court has simply treated an impending execution as one "proper consideration" to weigh in the balance. Barefoot v. Estelle, 463 U.S. 880, 893, 77 L. Ed. 2d. 1090, 103 S. Ct. 3383 (1983). The "severity of the sentence" does not "itself suffice to warrant" a stay. Id.; see also Smith v. Murray, 477 U.S. 527, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986) (procedural default rules for federal habeas petitioners are the same in capital and noncapital cases).

Although Strickland and Barefoot do not involve the right of access to the courts or the Equal Protection Clause-based right to counsel, they do at least suggest that the Supreme Court would not view the capital nature of the case as dispositive. Several courts have reached this conclusion and found no federal constitutional right to counsel in habeas corpus actions, even where the death penalty has been imposed. See Whitley v. Muncy, 823 F.2d 55, 56 (4th Cir. 1987) (panel opinion decided prior to en banc decision in Giarratano); Gray v. Lucas, 710 F.2d 1048, 1061 (5th Cir. 1983); Thomas v. State, 511 So.2d 248 (Ala. Cr. App. 1987); State v. Davis, 246 Ga. 200, 269 S.E.2d 461, cert. denied, 449 U. S. 1057 (1980).

This court has not addressed this issue since Finley. In a noncapital case decided prior to Finley, this court held that

> an indigent state prisoner seeking habeas corpus relief is entitled, under the equal protection clause of the fourteenth amendment to the United States Constitution, to be furnished appointed counsel, upon request, to assist him in prosecuting his petition at the evidentiary hearing stage and/or at the first appellate level when (1) his petition is urged in good faith; (2) his petition raises significant issues which, when considered in the light of the state's responsive pleadings or the evidence adduced at an evidentiary hearing, are neither frivolous nor repetitive; and (3) such issues by their nature and character indicate the necessity for professional legal assistance if they are to be presented and considered in a fair and meaningful manner.

Honore v. Board of Prison Terms and Paroles, 77 Wn.2d 660, 673, 466 P.2d 485 (1970). Since this holding is premised solely on the federal constitution, it is no longer valid in light of Finley.

The question thus becomes whether the state constitution provides a theoretical basis for adhering to the rule in Honore. The holding in that case rests on the Equal Protection Clause of the Fourteenth Amendment. Except in the context of sex-based

classifications, State v. Wood, 89 Wn.2d 97, 100, 569 P.2d 1148 (1977), this court has found "no compelling reason" to interpret the parallel state provision, Const. art. 1, § 12, so as to provide greater protections than the federal Equal Protection Clause. Electrical Contractors v. Pierce Cy., 100 Wn.2d 109, 126, 667 P.2d 1092 (1983); see also Conklin v. Shinpoch, 107 Wn.2d 410, 416 n.2, 730 P.2d 643 (1986) ("Our interpretations of [art. 1, § 12] have followed the interpretation of the equal protection clause of the federal Fourteenth Amendment.") Most pertinent to the present case, this court has followed federal precedent in addressing challenges to wealth-based classifications. See State v. Phelan, 100 Wn.2d 508, 513-14, 671 P.2d 1212 (1983). The cases interpreting article 1, section 12 thus do not provide an independent state constitutional basis for rejecting the equal protection holding in Finley.

Nor does the state constitutional provision regarding the writ of habeas corpus appear to be of assistance here. Article 1, section 13 is almost identical to the parallel federal provision. Compare Const. art. 1, § 13 ("The privilege of the writ of habeas corpus shall not be suspended . . . .") with U. S. Const. art. 1, § 9, cl. 2 (to this extent identical).

Outside the habeas corpus area, this court has found a right to appointed counsel even though the Supreme Court has declined to do so. Compare In re Hall, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983) (recognizing right to counsel in parental termination cases) and In re Myricks, 85 Wn.2d 252, 533 P.2d 841 (1975) (right applies even in dependency proceedings which may later lead to termination) with Lassiter v. Department of Social Services, 452 U.S. 18, 31, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981) (generally no such federal right even in termination cases unless parents are incompetent). These dependency cases do not contain any independent state constitutional analysis, however. Myricks is based on a due process analysis the Supreme Court later found unpersuasive in Lassiter (In re Myricks, supra, at 254), and Hall may rest on RCW 13.34.090, which creates a statutory right to counsel in such cases. See In re Hall, supra, at 846 (right to counsel "finds its basis solely on state law").

There is no similar statutory right to appointed counsel in habeas corpus actions (ch. 7.36 RCW) or in personal restraint proceedings (RAP 16.4, et seq). In personal restraint proceedings, the appellate court "may" appoint counsel, RAP 16.15(g), but is not required to do so. (This rule is discussed in more detail in issue (2) below.) RCW 7.36.250 provides for prosecution of habeas corpus actions in forma pauperis, but does not mention counsel. See Honore v. Board of Prison Terms and Paroles, supra, at 674-77 (relying on the statute only as author-

ity for appointment and payment of attorneys constitutionally required to be appointed).

To summarize to this point, there is no federal constitutional right to counsel past the first appeal of right, Pennsylvania v. Finley, supra, and state law also does not seem to create or recognize such a right. Inmates do, however, have a constitutional right of access to the courts, which may be addressed by providing access to law libraries or to lay or professional legal assistance. Bounds v. Smith, supra. The best means of complying with Bounds is discussed below, in issue (2).

(2) RAP 16.15(g). This court has discretion under RAP 16.15(g) to appoint counsel for any indigent personal restraint petitioner. For the reasons discussed below, exercise of this authority is probably the most practical means of guaranteeing all death row inmates their right of access to the courts.

It seems apparent from other personal restraint petitions concerning death row inmates that their access to law libraries, law books, and other inmates is extremely limited. Under Bounds, this court could theoretically address the right of access to the courts by requiring prison officials to provide these inmates with "adequate access" to law books or to fellow inmate "writ writers." The latter requirement likely would interfere significantly with prison safety concerns, however, and the quality of pleadings submitted either by "writ writers" or by death row inmates with access to law books undoubtedly would be of little value to the inmates or the courts. The most practical and efficient means of complying with Bounds, then, would seem to be to provide counsel for death row inmates seeking to file habeas corpus or personal restraint petitions challenging their convictions or sentences.

Although appointing counsel may involve expense and some initial delay, it would serve two important functions. First, inmates' personal restraint petitions could be decided on the merits instead of being effectively dismissed by a ruling declining to appoint counsel. Once an issue has been decided on its merits, it generally cannot be renewed in state court, In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984), and the inmate can raise the issue in federal court without facing procedural difficulties. (See discussion in issue (3).) Second, an inmate who files a personal restraint petition with the assistance of counsel may later fairly be subject to procedural rules, such as scrutiny of successive petitions for waiver or abuse of the writ, which would be more difficult to apply to an unrepresented inmate. See In re Haverty, supra, at 503 (successive petition may be dismissed "'if there has been an abuse of the writ'")

(quoting Sanders v. United States, 373 U.S. 1, 17, 10 L. Ed. 2d 148, 83 S. Ct. 1068 (1963)); Antone v. Dugger, 465 U.S. 200, 206 n.4, 79 L. Ed. 2d 147, 104 S. Ct. 962 (1984); Woodard v. Hutchins, 464 U.S. 377, 379 n.3, 78 L. Ed. 2d 541, 104 S. Ct. 752 (1984) (both noting presence of counsel in prior action as pertinent factor in finding abuse of writ); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (habeas petitioner is bound by knowledge chargeable to his competent habeas attorney). Appointing counsel thus may actually serve to promote finality in capital cases.

To the extent that the appointment of counsel may be seen as causing unnecessary delays, that problem can be addressed in other ways. Rules approved recently by a California federal district court task force offer one example. Under these proposed rules, the District Court would automatically appoint counsel for all capital defendants in habeas corpus actions (unless counsel is waived) and would grant a 45-day stay of execution to enable counsel to identify and specify nonfrivolous issues. Once counsel has identified such issues, the court would grant a 120-day stay to allow counsel to prepare and file a proper habeas corpus petition. If counsel is unable to identify any nonfrivolous issues, however, the initial 45-day stay would be dissolved.

An approach like this, at least for initial post-conviction proceedings, has several qualities to recommend it. First, the court does not have to examine the merits of the case in a hurried or incomplete fashion simply in order to rule on a request for counsel. Second, counsel can be required to identify nonfrivolous legal issues within a relatively short period of time. Third, if no such issues exist, the case can be dismissed on its merits, rather than by denying a motion for counsel. Fourth, if there are nonfrivolous issues, the court can decide them after full consideration, with adequate and presumably competent briefing. Finally, formal adoption of such a procedure would give notice both to defendants and to counsel as to the manner in which capital cases will be treated. Assuming counsel are aware of the "abuse of the writ" aspect of Haverty, they should also be aware that failure to raise all nonfrivolous issues in a first petition could lead to dismissal of any subsequent petition. Counsel should therefore be motivated to examine the record carefully during the initial stay and to raise all identifiable issues in the first petition.

In sum, all death row inmates have a constitutional right of access to the courts. Although there are several means by which this right can be guaranteed, several practical considerations support adoption of a consistent approach such as the one the California task force has approved. Under that approach, Campbell probably should be appointed counsel to identify the

issues he wishes to raise in his personal restraint petition. This is true even though Campbell was previously before this court seeking post-conviction relief, given the truncated nature of that prior proceeding, as is noted again below.

(3) Effect on Federal Proceedings. Finally, the court has inquired as to the effects of its various rulings in Campbell's case on his future efforts at seeking relief in federal court. This is difficult to explain or predict confidently, as this court has received no briefing on these points. Nonetheless, a plausible analysis follows:

This court's 1985 ruling, treating Campbell's motion for a stay as a personal restraint petition, was made before Campbell's attorneys fully reviewed the record or raised all of the issues they later identified. The dismissal was on the merits of the 23 identified issues, however, and was treated as such by the federal court. Those issues thus have been finally disposed of in state court and, to the extent Campbell renewed them in his federal court pleadings, in that court as well.

The first effect of the 1985 ruling was to force counsel to go to federal court to obtain a stay of execution. Since counsel had not at that time completed their review of the record, they were also required to make certain decisions as to any newly identified claims. Under a 1982 Supreme Court decision, a petitioner cannot raise both exhausted and unexhausted claims in a federal habeas corpus action. Rose v. Lundy, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982). Counsel thus had to choose between raising only the 23 exhausted claims in a federal petition or returning to state court to raise the newly identified claims. By electing to file an amended federal petition raising only the exhausted claims, counsel "risk forfeiting consideration of his unexhausted claims in federal court" in any subsequent petition. Rose v. Lundy, supra, at 520. (plurality opinion on this issue).

Apparently, forfeiture will occur under this rule unless there has been some intervening development in the law or a discovery of new evidence. Jones v. Estelle, 722 F.2d 159, 169 (5th Cir. 1983). If neither of these factors is present here, the federal court may decline to consider any of the unexhausted issues Campbell identified in his first federal habeas petition, Rose v. Lundy, supra, or indeed, any other claim of which his attorneys were aware or should have been aware when they filed the first petition. Sanders v. United States, supra; Moore v. Zant, 734 F.2d 585 (11th Cir. 1984).

Counsel may argue that it would have been futile to raise the new issues in this court, given this court's disposition of

the motion for stay. If the federal court had found state remedies to be unavailable or inadequate, however, Campbell would not have been barred from raising his unexhausted claims in the initial federal petition. 28 U.S.C. 2254(b) (exhaustion not required if state remedies are ineffective or unavailable). Habeas courts are reticent to hold that state courts will refuse to consider an issue unless the state court's position is quite clear. See, e.g., Thomas v. Wyrick, 622 F.2d 411 (8th Cir. 1980); Twitty v. Smith, 614 F.2d 325 (2d Cir. 1979). Although this court did deny Campbell's motion for stay of execution, the court also took that occasion to rule on the merits of the issues he had thus far identified. Perhaps the federal court felt this court would have been equally willing to rule on any additional claims Campbell would have brought to the court's attention.

In any event, the combined effect of the court's 1985 ruling and counsels' subsequent decisions is to make it questionable whether a federal court would rule on the merits of any new claims Campbell may identify.

If the federal court declines to penalize Campbell for his attorney's 1985 decisions, he still cannot raise new issues in federal court unless he exhausts the available state remedies or is excused from doing so. 28 U.S.C. 2254(b) and (c). Moreover, in order to exhaust state remedies as to a particular issue, the prisoner must clearly identify the issue to the state court. See Pitchess v. Davis, 421 U.S. 482, 44 L. Ed. 2d 317, 95 S. Ct. 1748 (1975). Exhaustion is excused "only if there is no opportunity to obtain redress in state court or if the corrective process is clearly so deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3, 70 L. Ed. 2d 1, 102 S. Ct. 1 (1981). If denying Campbell's motion for counsel effectively prevents him from identifying any new issues in state court, federal court litigation on the exhaustion issue and the "deficiency" of state remedies seems inevitable. See Ex parte Davis, 318 U.S. 412, 87 L. Ed. 868, 63 S. Ct. 679 (1943) (state court's refusal to obtain transcript for indigent petitioner may render state remedy ineffective).

RECOMMENDATION:

The need to provide some type of legal assistance for capital defendants in personal restraint proceedings presents difficult questions which the court should study and which should ultimately be addressed by some established procedure. In this particular case, Campbell should be appointed counsel, who should be given a fixed period of time to identify nonfrivolous, non-repetitive issues. The order should also (1) preclude the trial court from setting an execution date in the interim, and (2)

specify that this court will review the case once the issues have been identified and determine whether the stay should be extended to permit full briefing.

Carol Boothby
bh: 9/29/88

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.
RETIRED

October 30, 1989

Ad Hoc Committee on Federal Habeas

MEMO TO COMMITTEE MEMBERS:

You have a copy of the Congressional Record that contains the Biden bill (see Bill Burchill's letter of October 17). I now send you by express mail Hew Pate's memorandum of October 30 in which he analyzes the Biden proposal in some detail.

As I have been out of my office since Thursday, I have not had an opportunity to review Hew's memo carefully. On the basis of a first reading, I am inclined to agree with Hew that the states and the courts would be better off with the status quo than under what Senator Biden proposes.

The Biden provisions with respect to the qualifications of counsel in many cases would be impossible to meet. I doubt that any member of the Supreme Court, except Justice Marshall, possesses the qualifications Biden proposes for counsel representing a capital defendant on state collateral review. As I read his proposal, such counsel, in addition to having been admitted to practice for "at least five years", must have had "at least three years experience in felony appeals". I would fall far short of meeting these standards, as would a high percentage of the bar. The provision for unlimited funding could also be a major objection for the states.

I am in some doubt as to my testimony on November 8. I have thought it would be appropriate for me, on behalf of our Committee, to make a summary statement. Of course, there will be questions. A longer written statement could be filed. I may well be asked my view of the Biden bill, and I suppose I should respond as briefly as I can.

Normally a Supreme Court Justice does not testify at all, much less about pending legislation. I therefore am not happy about my present situation.

I am sending a copy of this letter to the Chief Justice and am anxious to have his advice as well as yours.

Lewis

L.F.P., Jr.

ss

cc: The Chief Justice
Professor Albert M. Pearson
William R. Burchill, Jr., Esquire
R. Hewitt Pate, Esquire

MEMORANDUM

TO: Justice Powell October 30, 1989

FROM: Hew

RE: Senator Biden's Habeas Proposal

Introduction

Senator Biden has recently introduced legislation, Bill S. 1757, that purports to be based on your proposed statute (S. 1760, introduced by Senator Thurmond) with "minor" alterations. These alterations are major, and passage of *no* legislation at all would be preferable to passage of the Biden Bill. I think that it is vital you make this clear in your testimony. Your proposal is based on a "quid pro quo." The Biden Bill appears aimed at making the "quid pro quo" so unfavorable to the States that they will have no incentive to opt for the new statute. The Biden Bill has the effect of removing any chance of finality, doubling the limitations period, and overruling Supreme Court cases on procedural default and retroactivity. A point by point discussion follows.

1. Qualifications and Payment of Counsel

Your proposal requires States that would opt in to provide qualified counsel in state collateral proceedings. It would leave to the States the initial responsibility to set standards of competence and compensation. Powell §2256.

The Biden Bill expands these provisions, setting specific standards for appointment and unlimited compensation.

a. <u>Standards for Appointment</u>

Unlike your proposal, which would allow the States to devise standards and procedures for the appointment of counsel, the Biden Bill sets forth a uniform federal standard that the States must meet. Post-conviction lawyers must have been admitted to practice in the state court of last resort for at least five years, and have at least three years experience in felony appeals. The statute allows for appointment of an attorney who does not meet these qualifications if the attorney has special "background, knowledge, or experience."

b. <u>Trial Counsel</u>

The Biden Bill would also require states to provide counsel who meet specified criteria for <u>trial</u> in all capital cases. The trial attorney must have been admitted to practice in the trial court for at least five years, and have at least three years experience in trying felonies. The statute allows for appointment of an attorney who does not meet these qualifications if the attorney has special "background, knowledge, or experience."

c. <u>Level of Compensation</u>

The Biden Bill also includes a provision for compensation, but it does not set a schedule of fee rates. Rather, it commands that "Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other

provision of law to the contrary," the court shall set fees and expenses at whatever level is necessary to "carry out the requirements of the subsection." Biden §2261. This section leaves the amount of compensation to the discretion of the appointing judge. Importantly, it preempts all state law limits on the amount of fees, leaving the size of the potential fee award subject to no limit whatever.

d. Investigative and Expert Services

The Biden Bill requires that expert and investigative services be provided to the defendant upon a finding in an ex parte hearing that such services would be reasonably necessary. As with compensation of counsel, the Biden Bill places no limits on the amount that a state may be required to spend for these services, as long as a court finds them to be reasonably necessary. Biden §2261(c).

Analysis: Senator Biden may have admirable goals, but the attempt to impose such expensive requirements of counsel on the States may make the statute unattractive to them. If the States see the statute as too expensive, they will not use it and it will accomplish nothing. The idea of standards for the appointment of counsel may in fact be a good one. But as Judge Clark argued, there is a great federalism value in allowing the States to take the first crack at developing standards. In sum, the standards for appointment are an area where you might express some qualified support for the Biden proposal despite the fact that the Committee reached a different conclusion. The requirement for counsel

at trial is another area where you might express approval of Biden's goal of improving the quality of counsel. But changing the state law governing appointment of counsel at trial is highly intrusive. This is an area where the Biden Bill may be so unattractive to the States that they will not opt in.

The Biden Bill's funding provisions are the biggest problem in this section. They make the amount that States must pay for defense counsel unlimited. Most States now place strict limits on the amount that may be spent by appointed criminal defense counsel, and the Biden Bill's funding provision may entail a huge expense for the States. The investigative and expert services provision only adds to this high expense. Moreover, the Biden Bill sets absolutely no standards for the amount of compensation -- it will vary from case to case depending solely on the discretion of the trial judge. The provision thus ensures that defendants will not be treated equally. I think that you should strongly oppose this funding provision. It will make the proposed statute a dead letter.

2. Waiver of Counsel

Your proposal provides that the appointing court must make findings of competency and knowing waiver where the defendant declines an offer of counsel. Powell §2256(c). The Biden Bill expands on this, requiring that the appointing court conduct a hearing. More important, the Biden Bill requires immediate review of the decision allowing waiver of

counsel by the State's court of last resort. Biden §2256(c).

Analysis: This provision clarifies the procedure to be followed in determining competence to waive counsel. But it imposes an additional layer of appellate review, and therefore more delay. Moreover, this federal statute would displace state law governing appellate review of the competency decision. Although this provision seems unnecessarily intrusive on the States, I do not recommend you spend much energy criticizing it. There are more important problems with the Biden Bill that should receive top priority.

3. Successive Petitions -- "Miscarriage of Justice"

Your proposal would allow subsequent petitions[1] for claims that could not have been raised due to unconstitutional state action, new retroactive law, or newly discovered facts, if the claims go to factual innocence of the crime itself. Powell §2257(c). The Biden Bill alters your approach entirely. First, new claims that could not have been raised due to unconstitutional state action, new retroactive law, or newly discovered facts come in regardless of

[1]Note the difference bewtween a "successive" petititon and a "subsequent" petition. A successive petition raises claims that have already been adjudicated in an earlier habeas proceeding. A subsequent petition raises new claims. A subsequent petition may be barred as an "abuse of the writ" under Rule 9(b) if the petitioner should have raised the new claims in the first petition. See generally Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986) (opinion of Powell, J.).

whether they involve factual innocence. Second, claims that involve factual innocence come in regardless of whether they involve any new facts or law. This means that successive petitions come in so long as they involve factual innocence, even though they have already been adjudicated. Finally, the Biden Bill adds on a new provision, allowing subsequent or successive petitions any time they are needed to prevent "a miscarriage of justice." Biden §2257(c).

Analysis: This change is intended to gut the finality mechanism of your proposal. The major goal of Biden's changes is to allow challenges to the sentence as well as to guilt of the crime. As we have discussed, limiting subsequent petitions to claims of factual innocence is fair in light of the fact that prisoners will have had counsel to present challenges to the sentence at trial and on their first habeas petition. In view of the wide range of evidence that can be mitigating, see, e.g., Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982), defendants can easily "discover" new evidence after the first habeas proceeding, or have new testimony fabricated by paid experts. Affording additional opportunities to challenge the sentencing hearing alone also comes at a great cost to the State, and to the families of the murdered victims. Because the Court has required that the evidence allowed at sentencing be unlimited, the sentencing hearing involves placing almost the entire record before another jury. To impose this heavy burden in a case where the de-

fendant has not bothered -- despite the assistance of counsel -- to raise the claim the first time around is not fair or necessary to prevent injustice.

The Biden Bill would allow successive petitions on the basis that the claim raised relates to factual innocence. Be aware that this test is similar to the one you proposed for a plurality of the Court in Kuhlmann v. Wilson, 477 U.S. 836 (1986). But your Kuhlmann test was to apply to all habeas petitions, not just capital petitions where the prospect for delay is greatest. Also in capital cases delay by definition frustrates implementation of the penalty. And Kuhlmann had nothing to do with a "quid pro quo" involving counsel and automatic stays of execution.

The "miscarriage of justice" standard of the Biden Bill is vague and open-ended, and unless it is subsequently limited by the Supreme Court it could provide a wide-open door for successive petitions in every case. The "miscarriage of justice" language appears to come from discussions of procedural default (not subsequent petitions) in Harris v. Reed, 109 S. Ct. 1038 (1989) and Smith v. Murray, 477 U.S. 478 (1986). The meaning of the term is not clear, but the Court will soon hear a case on the issue. Selvage v. Lynaugh, No. 87-7600 (no argument date set).

In sum, these changes alter the balance of the "quid pro quo" offered to the States. If they can expect the current waive of meritless subsequent petitions to continue, why should they opt in to the new statute?

4. <u>Limitations Period -- One Year</u>

As we expected, the Biden Bill lengthens the limitations period from six months to one year. It also allows a 90-day extension for good cause instead of a 60-day extension.

<u>Analysis</u>: There is not much to add here except to say that 6 months is longer than provided for any appeal in our legal system. No more than 6 months is needed for fairness.

a. <u>Cert Petitions from State Habeas</u>

Your proposal would not toll the limitations period while the petitioner seeks cert in the United States Supreme Court from state collateral proceedings. Powell §2258(b). The Biden Bill <u>would</u>. Biden §2258(b).

<u>Analysis</u>: As the Committee report stated, only two of the over 100 modern capital cases decided by the Court came from state habeas. And the Supreme Court can always address any claims on review of the federal habeas proceeding. The Biden change produces needless delay. But this is not a major point, and I would not spend much time on it.

5. <u>Procedural Default and Exhaustion</u>

Under your proposal, the federal habeas court will hear only claims that were raised in the state proceeding. Your proposal <u>does</u> allow a federal habeas court to immediately hear claims not presented in state court where the failure to develop a claim in the state courts was due to unconstitutional state action, the recognition of a retroactively applicable new federal right, or new facts that could not

have been discovered previously. But for claims that do not fall within these categories, the prisoner cannot return to state court for exhaustion in the hope of raising the claims in a subsequent federal petition. Powell §2259. Your proposal thus changes the current law with respect to exhaustion, which does not allow a federal habeas court to hear claims not presented to the state courts in any circumstances, but allows a prisoner to exhaust the claims and then return to federal court. Rose v. Lundy, 455 U.S. 509 (1982).

Your proposal does not alter the present rules concerning procedurally defaulted claims. Under Wainwright v. Sykes, 433 U.S. 72 (1977), a claim that is procedurally barred under state law will not be heard on federal habeas unless the prisoner shows "cause and prejudice" as defined in cases such as Engle v. Isaac, 456 U.S. 107 (1982) and Reed v. Ross, 468 U.S. 1 (1984).

The Biden Bill changes §2259 in an effort to alter the law of procedural default in favor of prisoners. [Oddly, the Biden change does not address exhaustion at all. Perhaps the staffer who drafted the change did not understand the difference between the two.] Under the Biden Bill, the federal court "may" refuse to consider a claim that has been procedurally defaulted in state court. But the federal court "shall" hear the claim regardless of the default if the prisoner shows that "the failure to raise the claim in a State court was due to the ignorance or neglect of the pris-

oner or counsel or if the failure to consider such a claim would result in a miscarriage of justice." See Biden §2259(c). As discussed above, the "miscarriage of jutice" language is drawn from recent procedural default cases, but has not been defined.

Analysis: Again, the Biden change substantially disfavors the States, giving them a further disincentive to use the new statute. The Biden change would appear to resurrect the "knowing bypass" rule of Fay v. Noia, 372 U.S. 391 (1963). Under Fay, a procedurally defaulted claim will be heard in federal court unless it can be shown the prisoner knew of the claim and deliberately chose not to present it. The Biden Bill achieves the same result by making "ignorance or neglect" a basis for avoiding the State's procedural default rule. For the reasons stated in the Wainwright v. Sykes opinion that you joined, resurrection of the Fay v. Noia standard would be a disaster in terms of finality and judicial efficiency. This change would leave a State that opts into the "reform" statute worse off than it is under current law. Again, Biden's change makes the statute worthless from the State's point of view.

6. Retroactivity -- Repealing Teague

As you know, the Court last term adopted Justice Harlan's approach to retroactivity. Teague v. Lane, 109 S. Ct. 1060 (1989). Under this approach, new constitutional rules will not (with narrow exceptions) be applied on federal habeas where the petitioner's conviction became final before

the new rule was adopted. As you said in Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring in judgment), "Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of conviction is all that is required to 'forc[e] trial and appellate courts ... to toe the constitutional mark.'" In Penry v. Lynaugh, supra, the Court held that Teague applies to capital cases.

The Biden Bill gratuitously adds a new §2262 that would repeal Teague in capital cases. Under §2262, habeas petitioners will get the advantage of new rules if the court finds "in light of the purpose to be served by the change, the extent of reliance on previous law by law enforcement authorities, and the effect on the administration of justice, that it would be just to give the prisoner the benefit of the interim change in the law."

Analysis: Section 2262 would essentially restore the retroactivity analysis of Linkletter v. Walker, 381 U.S. 618 (1965). I will not recount all the reasons that you have previously given for the superiority of Justice Harlan's rule. The main point is that habeas should not become a "time machine" by which the prisoner constantly brings the legality of his sentence "up to date" by challenging it on the basis of new law made long after his conviction became final. Moreover, there is no reason for a statutory change in the retroactivity rule. Courts have long administered retroactivity analysis and have a far better knowledge of

what works and what doesn't. The Biden change needlessly overrules a new decision that is important to the States. Capital cases are the most important area for application of Teague, as prisoners attempt to frustrate execution of the sentence every year by obtaining "holds" for Supreme Court cases that may establish new rules. Again, this makes the proposed statute less attractive to the States, and more likely to remain on the books unused.

Conclusion

Ron Klain, Biden's Chief Counsel, tells me that Biden's changes will look "minor" compared to those the ACLU and ABA have in mind. But that is no reason to support these changes. The danger here is that Congress will pass a diluted "Biden Bill," and then pat itself on the back for having reformed capital habeas. There will not be sufficient political pressure to do anything more for years to come. But the Biden Bill will be unattractive to the States, and will bring no change to the present situation. In fact, a State that opted in to the Biden statute would find itself in a worse situation than exists today. I urge that you tactfully convey the message to Senator Biden that his changes will "kill the goose that lays the golden egg" by taking away all benefit for the States. It would be far better to pass nothing than to pass the Biden Bill.

R.H.P.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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

March 19, 1990

(601) 353-0911

21 MAR 1990

TO MEMBERS OF THE AD HOC COMMITTEE ON HABEAS CORPUS IN CAPITAL CASES

Dear Judges:

I enclose an extract from the final draft of the Federal Courts Study Committee report. It proposes:

(1) Make no change regarding successive writs.

Retain Sanders limits on res judicata effect of prior writ adjudications.

(2) "Codify and clarify" Teague/Penry rules on retroactivity.

(a) Add "clearly foreshadowed" to Justice Harlan's two-part test.

(b) Add an exception for Brady-type material.

I had understood the comments on habeas corpus in the preliminary report might be dropped. I guess they couldn't resist.

Best regards,

Attachment

Distribution:
- Justice Lewis F. Powell
- Judge William Terrell Hodges
- Judge Paul H. Roney
- Judge Barefoot Sanders
- Professor Albert M. Pearson
- William R. Burchill, Jr., Esq.

1 review of the disposition of grievances . . . by a person or entity not under the
2 direct supervisions or direct control of the institution" (emphases added).
3
4 Under the committee proposal, the prisoner would be required to
5 exhaust state administrative remedies as long as a federal court decided that
6 the remedies provided by the state were both "fair and effective" without
7 resort to any minimum standards. From a legal and pragmatic perspective,
8 the failure of a state administrative remedy to contain any one of the minimal
9 standards delineated in 42 U.S.C. Sec. 1997e would appear to be fatal to a
10 judicial finding that the remedy in question is fair and effective," when the
11 administrative litigation must occur with context and confines of an adult
12 correctional facility. The absence of any one of the present statutory
13 minimum standards or its substantial equivalent would undoubtedly deprive
14 the state prisoner of an "opportunity to fully and fairly litigate" his claim in
15 the state's administrative process.
16
17 In the event that any change in 42 U.S.C. Sec. 1997e is warranted, the
18 committee should recommend only that, where the state administrative
19 remedy is not "in substantial compliance" with the minimum standards of 42
20 U.S.C. Sec. 1997e (b), there will be a rebuttable presumption that the
21 administrative remedy is not "plain, speedy, and effective." To overcome this
22 presumption, the state will be allowed to persuade either a federal court or the
23 Attorney General that its remedy contains alternate procedures which
24 accomplish the same objectives as those addressed by the minimum standards
25 and is, in fact, a "plain, speedy, and effective" administrative remedy which
26 the prisoner must exhaust prior to federal resolution of the Section 1983 claim.

27 D. State Prisoner *Habeas Corpus* Petitions in Federal Courts

28 54-59

29 *Habeas corpus* petitions, particularly those from state prisoners,
30 constitute a substantial portion of the federal courts' caseload. The 537 *habeas*
31 *corpus* petitions filed in 1945 grew to 9,867 in 1988 -- an increase of 1,840
32 percent. The Committee, however, does not propose any major changes in
33 the law or procedure of *habeas corpus*, in part because Congress is currently
34 considering the recommendations of the Judicial Conference's Ad Hoc
35 Committee on Habeas Corpus Review of Capital Sentences and the American
36 Bar Association's Task Force on Death Penalty Habeas Corpus. (THE ABA HOUSE

1 OF DELEGATES WILL CONSIDER THE REPORT FEB. 12-13.) Congress's response to those
2 recommendations may have an effect beyond death penalty cases.
3
4 DOES THE COMMITTEE WANT TO HIGHLIGHT ANY THINGS FOR CONGRESS TO CONSIDER--e.g.,
5 ELIMINATING TIME-CONSUMING PROCEDURAL HURDLES, REQUIRING RIGHT TO COUNSEL IN NON-DEATH
6 PENALTY CASES?

7 While eschewing major proposals, the Committee has three
8 recommendations of a less sweeping nature:

9 **1. Congress should make no change regarding the standards for hearing**
10 **state prisoners' successive *habeas corpus* petitions under 28 U.S.C. § 2244.**

11 *Sanders v. United States* (1963) established the present rules governing
12 the hearing of successive petitions. Under *Sanders*, federal courts may give
13 controlling weight to the denial of a prior *habeas corpus* application only if (1)
14 the same ground was presented and decided adversely to the petitioner, (2)
15 the prior decision was on the merits, and (3) reaching the merits of the
16 subsequent application would not serve "the ends of justice." When grounds
17 could have been but were not raised in an earlier petition, the court must
18 reach the merits unless the petitioner has deliberately abused the writ or
19 motion remedy. These rules have been controversial from their inception.
20 Legislative efforts to overrule *Sanders* failed in 1966. Instead Congress
21 codified *Sanders*'s holding in 28 U.S.C. § 2244. A later effort to overrule
22 *Sanders* by rule was similarly unsuccessful, and the Court has rejected
23 suggestions to change the decisional law.

24 The Committee believes that no change is needed. Efforts to change
25 the rules reflect an unfounded concern that they have created a flood of
26 successive petitions that needlessly undermine state interests in the finality
27 of convictions. It is true that many prisoners file more than one petition, but

1 it does not appear that the federal courts have great difficulty disposing of
2 them. They usually dispose of successive petitions summarily and without
3 reported opinion, apparently applying the rules as if they incorporated a *res*
4 *judicata* principle. Courts thus turn aside successive unmeritorious petitions
5 routinely without significant expenditure of judicial effort. At the same time,
6 the broad formulation in terms of "abuse of the writ" and "the ends of
7 justice" provides FEDERAL judges with sufficient flexibility to reach the merits in those
8 cases that do appear to warrant further examination. Finally, the Supreme
9 Court last year eliminated the main grounds for these successive petitions --
10 changes in law that give rise to new claims or strengthen or revive old ones
11 (*Teague v. Lane* and *Penry v. Lynaugh*). In §3, below, we propose that
12 Congress codify and clarify these decisions.

13 **2. Congress should make no change in the law respecting fact-finding**
14 **procedures in *habeas corpus* cases.**

15 The Committee also examined proposals to restrict further district
16 courts' authority to hold evidentiary hearings in *habeas* cases. *Townsend v.*
17 *Sain* (1963) established when courts must hold evidentiary hearings to make
18 independent fact findings in *habeas corpus* cases. In 1966, Congress amended
19 28 U.S.C. § 2254 to establish new guidelines for when state court findings
20 should be presumed correct. Opponents of the current law believe that
21 federal courts are wasting valuable time holding hearings to find facts that
22 the state courts have already found. They have proposed restricting federal
23 evidentiary hearings to those few cases in which the state court hearing was
24 not "full and fair," or abolishing federal fact-finding altogether and making
25 *habeas corpus* review a purely appellate procedure.

1 Such changes are unnecessary because, as a factual matter, federal
2 courts hold evidentiary hearings in very few *habeas corpus* cases. In both
3 1987 and 1988, only 1.1 percent of the petitions filed were terminated after a
4 trial. *Habeas corpus* cases are less likely than other civil cases to go to trial
5 because most judges grant a hearing only if tne state court proceedings were
6 not full and fair. The data suggest that this is a direct result of the 1966
7 amendments. Accordingly, we see little need for congressional intervention.

8 **3. Congress should codify IN §2254(D)(1)? and clarify recent Supreme Court**
9 **decisions involving the retroactive use of new federal law in *habeas corpus***
10 **petitions.**

11 Retroactivity has been particularly sensitive in *habeas corpus*: If the
12 state provided procedures that protected a defendant's constitutional rights as
13 then understood, but a federal court later decides that the Constitution
14 requires new or different procedures, should the state be required to release
15 the prisoner and hold a second trial that complies with the new law?

16 In 1989, the Supreme Court dramatically changed the law, holding that
17 prisoners may not seek *habeas corpus* relief based on changes in law
18 occurring after their convictions. (*Teague v. Lane* and *Penry v. Lynaugh*).
19 More specifically, the court held that:

20 • "new constitutional rules of criminal procedure will not be
21 applicable to those cases which have become final before the
22 new rules are announced."
23 • a rule is "new" if it was not "dictated by prior precedent" -- even
24 if the rule was already followed in every state. (A "new rule,"
25 apparently, is any rule that has not been expressly ratified by the

1 Supreme Court at the time the petitioner's conviction becomes
2 final.)
3 • retroactivity is a threshold inquiry that the court must address
4 before it considers the merits;
5 • there are two exceptions to the general prohibition: a petitioner
6 may base a claim on "new law" if the claim is (1) that certain
7 conduct or a certain kind of punishment is beyond the authority
8 of the criminal law to proscribe, or (2) that the absence of a
9 particular procedure substantially diminishes the likelihood of
10 an accurate verdict.

11 The Committee recommends that Congress codify these decisions but
12 clarify certain ambiguities in the law they made, and add a third exception to
13 the two recognized by the Court. Congress successfully codified several then-
14 recent Supreme Court *habeas* decisions in 1966; congressional action will be
15 equally helpful now.

16 Specifically, the Committee recommends that Congress:

17 **a. authorize federal courts to hear a *habeas corpus* petition only if it presents a**
18 **claim that was either controlled or "clearly foreshadowed" by existing**
19 **Supreme Court precedent.**

20 *Teague* and *Penry* rest on the premise that the interests of the prisoner
21 are at their weakest, and those of the state at their strongest, when the state
22 courts correctly applied law that was good at the time, even if it is good no
23 longer. The state courts did all that could fairly be asked of them by properly
24 applying the law as it stood during the trial and appeal. According to this
25 premise, there is no possibility, furthermore, that the threat of a subsequent

1 federal *habeas* proceeding will deter state courts from ignoring federal
2 constitutional rights; to expect otherwise is to assume that the threat of a
3 *habeas* proceeding will prompt courts to foresee a change in the law.

4 It may be sensible in principle to limit *habeas corpus* to claims that the
5 state courts had incorrectly applied existing law. But it is not easy in practice
6 to distinguish between "misreading existing law" and "making new law."
7 The Committee believes the "clearly foreshadowed" standard will encourage
8 state courts to attend to case law developments as part of their duty to
9 interpret the Constitution faithfully. On the other hand, it will not penalize
10 them in *habeas* proceedings for failing to be prescient. We are confident that
11 the courts will be able to administer this standard, even though its precise
12 contours will require further development through adjudication.

13 **b. leave to the court's discretion whether to address the merits of the claim,**
14 **depending on whether they can be separated from the retroactivity question.**
15 It will often be difficult to separate the retroactivity issue from the merits. In
16 addition, the issues in *habeas* petitions are often not clearly formulated
17 because the pleadings are usually prepared by the inmate. Issues that have
18 been formulated clearly by the time the case reaches the Supreme Court are
19 seldom so in the lower courts.

20 **c. in addition to the two exceptions announced by the Court, also except from**
21 **the general prohibition** the kind of claim that is not feasible to raise in an
22 appeal from the judgment under which the applicant is in custody. Some
23 claims are unlikely to be raised on direct appeal, for example, claims of
24 ineffective assistance of counsel and claims that turn on facts that are
25 discovered after appeal, such as claims that the government improperly

1 withheld evidence before trial. After *Teague* and *Penry*, however, such
2 claims can no longer be raised in *habeas corpus* proceedings if they argue for a
3 change in the law. An exception to the rule of retroactivity is thus needed ?
4 here for the same reason the Supreme Court has recognized an exception to
5 the mootness doctrine for claims that are "capable of repetition yet evading
6 review."

7 *REFERENCES:*
8 *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989)
9 *Sanders v. U.S.*, 373 U.S. 1 (1963)
10 *Teague v. Lane*, 109 S. Ct. 1060 (1989)
11 *Townsend v. Sain*, 372 U.S. 293 (1963)
12 ***In Part II, see also:***
13
14 ***For further analysis, see Part III at***
15

16 **E. The Chief Justice and the Chair of the Conference of Chief Justices**
17 **should create a National State-Federal Judicial Council.**

18 136-137

19 The Committee endorses the suggestion of the Chair of the Conference
20 of Chief Justices for the creation of a national State-Federal Council, composed
21 of an equal number of state and federal judges, to study and submit
22 recommendations to ease friction and promote cooperative action between
23 the two court systems. Areas in which it might offer recommendations are
24 readily apparent. Our proposals above, for example, hardly exhausted the
25 problems created by complex litigation that presents claims concurrently in
26 several federal and state courts. Problems of trial scheduling often create
27 friction. Attorney discipline in state and federal courts is often uncoordinated.
28 These are but a few of the areas in which the proposed council might offer