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Habeas Corpus Committee - Meetings

Lewis F. Powell Jr.

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


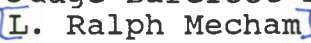
ADMINISTRATIVE ASSISTANT TO
THE CHIEF JUSTICE

September 14, 1988

MEMORANDUM

TO: Nadine Jackson
FROM: Shelly Blincoe 
RE: Meeting of the Judicial Conference Committee on Death
Penalty Habeas Corpus, Friday, September 16, 1988;
9:30 a.m., Lawyers' Lounge

In response to your request, the following people will be participating in the above mentioned meeting:


Justice Powell
Judge Charles Clark
Judge Barefoot Sanders

William Burchill
Albert Pearson
Vincent Johnson (Maybe)
Noel Augustyn (Maybe)

Paul Rooney

New Pate

If there are any changes, I will let you know.

NJA:sb

cc: Sally Smith

C.J.

9/15/88

C.J. Suggestion (letter 8/22) (Amend 3 2244) (Capital Cases only).

"One year" S/L in - capital cases only - on the filing of fed H/C petition

The key to this plan would be the provision of counsel ~~for~~ for state + fed. collateral review.

The S/L would run from conclusion of state collateral ~~review~~, but only when the Δ has counsel provided by the State or otherwise is represented by counsel.

With counsel available, the Δ reasonably could be expected to have raised all claims in a consolidated petition.

An Escape Clause would provide that the one yr. lim. would not run as to claims that were not then available - e.g. new law, new facts;

State Trade off: For providing counsel, the delay in fed. review would be ~~consistently~~ reduced. If the ~~change~~ is limited to capital cases, expense would not be great.

Last minute filings - still can be made, but ~~probably~~ ~~is~~ claims asserted should be limited where Δ has had counsel at all stages

Counsel for both state & fed collateral review.

Governor's - a "week" ~~later~~

9/15/85

Judge Clark's Memo (By Mark Maney)

Excellent summary of H/K law.

Proposes a "modified St of Limitations" (p 13)

Purpose would be to get Δ into fed court at "earliest possible time".

— Thinks Rule 9(b) now adequately ~~pro~~ limits recursive petitions. [But a majority of ^{the} Court has not construed 9(b) broadly]
Thus, a limitations period ~~was~~ as to court action is needed only w/ respect to claims raised in state court.

Short period Proposes that the limitation period run from end of ^{state collateral} ~~direct~~ review. But there would be "equitable exception" under the "cause and prejudice" ^{standard} of Wainwright v. Sykes. (I don't understand)

Memo also suggests possibility of direct review of state convictions by Fed Cts., with a time limitation. (~~2~~) [Staten would not like - but then exist now independent of habeas review - e.g. from Supreme Ct of a state] This could work well but unlikely to be adopted. [See Dan Meadows L/Review Article]

Bar Roven

File
See my notes attached

L.F.P.

AD HOC COMMITTEE ON FEDERAL HABEAS

Preliminary Meeting
September 16, 1988

Char Clark
Paul Rooney
Barefoot Sanders
Bill Burchill
Al Pearson
New Pate

Proposed Agenda

I. STAFF (Executive Session)

- ✓ A. Selection of Reporter (Professor ^{Albert} Pearson?)
(Compensation?)
- ✓ B. Secretary (William Burchill, General Counsel of Administrative Office, will be made available by Ralph Mecham).

IV. DISCUSSION OF SUGGESTED PROPOSALS

- A. Chief Justice's Letter of August 22.
- B. Judge Clark's Memorandum ^{Ask Charles - How it differs.}
(Mark Manely) ^(By-man state collateral review sugg)
- C. Judge Hodges' letter of August 29, with draft. ^{cg thinks leg. is necessary}
- D. Rule Changes or Legislative Proposal?
- E. Limit change to capital sentences? (cg would limit)

V. COMMITTEE PLANS

- A. Tasks for Staff Prior to Next Meeting
- B. Desirability of Requesting Views of Outside Groups
- C. ABA Committee
- D. Timetable for Future Meetings and Report

{ Nov 28, 29, 30
Oct 24-26 CA
Judges ~~to~~ here, but
not much time for
Al Pearson

Work Prior to ABA

get cc of CG's letter

L.F.P.

SEP 28 1988

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

Approve Minutes

September 27, 1988

Honorable Lewis F. Powell, Jr.
Associate Justice, Retired
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Dear Justice Powell:

I am forwarding herewith for your consideration a draft of minutes for the first meeting of the Judicial Conference Ad Hoc Committee on Federal Habeas Corpus Review of Capital Sentences.

As we discussed preliminarily after the meeting, I have deliberately made these minutes as all-inclusive as I could, understanding that you may wish to edit and reduce them considerably. I felt, however, that it would be easier for you to condense an expansive version of the minutes than to add to a more minimal draft.

At your convenience please advise me as to your wishes, and I shall then proceed to finalize the minutes for mailing to the committee members and Professor Pearson. If you prefer to do the revisions telephonically rather than in writing, you or your staff may reach me at 633-6127.

I very much enjoyed the committee's initial meeting and look forward to having the opportunity to be of assistance to you and the committee. I hope that I can make your task as easy and pleasant as possible and that will be my objective. Please do not hesitate to advise me whenever I might be of assistance with any task, large or small. With kindest personal regards,

Sincerely,

William R. Burchill, Jr.
William R. Burchill, Jr.
General Counsel

Enclosure

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

Minutes of the Meeting of September 16, 1988

The Ad Hoc Committee on Federal Habeas Corpus Review of Capital Sentences held its first meeting at the Supreme Court Building, Washington, on September 16, 1988. Justice Lewis F. Powell, Jr., presided. The other members of the committee attending were Chief Judge Charles Clark of the Fifth Circuit, Chief Judge Paul Roney of the Eleventh Circuit, and Acting Chief Judge Barefoot Sanders of the Northern District of Texas. Chief Judge William Terrell Hodges of the Middle District of Florida was unable to be present and was excused from attendance.

The Chief Justice of the United States attended a portion of the meeting to share his views with the committee as to its charge. Also attending were Noel Augustyn, Administrative Assistant to the Chief Justice, Professor Albert Pearson of the University of Georgia Law School, and William R. Burchill, Jr., General Counsel, Administrative Office of the United States Courts.

Justice Powell began the meeting with a discussion of the staff resources that would be required by the Ad Hoc Committee to pursue its assignment. He informed the committee that the Director of the Administrative Office had assigned Mr. Burchill to render secretariat and logistical support to the committee and to be available to provide whatever assistance might be needed. Justice Powell then noted that Professor Pearson, who recently completed a term as Judicial Fellow at the Supreme Court, had been recommended to the committee to serve in the capacity of reporter. He added that Professor Pearson has performed legal work relevant to the area of death penalty habeas corpus review and is thus well prepared to undertake continued scholarly assignments in that area. The committee then unanimously agreed to retain Professor Pearson as their

reporter with the understanding that the Administrative Office will arrange for his reasonable compensation and reimbursement of expenses on the same terms that apply to other private consultants rendering services to committees of the Judicial Conference.

Justice Powell then turned to consideration of the substantive issues before the committee. He noted that it is entirely appropriate for the Ad Hoc Committee to consist of judicial representatives from the Fifth and Eleventh Circuits because those have been the Federal judicial circuits which have borne the brunt of habeas corpus petitions to review criminal death sentences imposed under state law. He stated that this would be an introductory meeting to chart a course and provide guidance to the reporter in the undertaking of his work. Justice Powell cited his recent speech to the American Bar Association Criminal Justice Section on this subject and referred to the present situation of state death penalty statutes continually being frustrated from enforcement as intolerable.

Next Justice Powell alluded to correspondence which he had recently received from the Attorney General of Alabama, including an order now issued routinely by the United States district judges in the three judicial districts of Alabama, requiring counsel in actions collaterally attacking death sentences to specify all legal premises therefor at the earliest possible time in the litigation. This correspondence was distributed to the committee.

Justice Powell then referred to a parallel effort to evaluate the death penalty habeas corpus problem now being undertaken by the American Bar Association, and he raised the question of appropriate coordination between the respective committees. Judge Clark stated that he understands the ABA study to be a longer term effort and broader in scope, extending beyond death penalty review to all habeas corpus issues.

Judge Sanders suggested that the Ad Hoc Committee should maintain open communication and liaison with the ABA group but should feel free to proceed independently with its own study and report to the Judicial Conference when appropriate. After the discussion it was concluded that the Ad Hoc Committee would proceed independently with its work on its own timetable but would maintain close contact with the ABA through Professor Ira Robbins, reporter for the ABA Committee and also a former Judicial Fellow. Justice Powell added that he would further talk with the new ABA President, Robert Raven, and advise him at the outset as to the Ad Hoc Committee's charge and its plans.

At this point the Chief Justice joined the meeting and the discussion turned to the nature of the work product that is expected from the Ad Hoc Committee. Judge Clark and Judge Roney recounted the recent history of Judicial Conference consideration of legislation affecting habeas corpus review and described the inherent difficulties in framing a proposal that will be likely to achieve Conference and, ultimately, congressional acceptance. The Chief Justice noted that the same attitudes and negative pressures that were reflected in the Judicial Conference consideration of this issue in March 1988 will no doubt emerge in congressional consideration if and when a Conference proposal on this subject reaches the Congress. Judge Clark suggested the need for input from the segment of the defense bar specializing in capital sentence cases but expressed doubt as to the need or appropriateness of the Ad Hoc Committee conducting public hearings. Judge Clark also stressed the desirability of close coordination with the ABA in its study, in an attempt to defuse negative attitudes reflexively opposing any change in the habeas corpus process.

The Chief Justice expressed his gratitude to the committee members for undertaking to assist the Judicial Conference in framing an appropriate course of action. He emphasized the need for a comprehensively developed and thoroughly considered response to the problem. In response to a question from Justice Powell, the Chief Justice reserved judgment as to whether the recommendation of the Ad Hoc Committee should take the form of a proposed statutory amendment rather than some other approach, such as rulemaking. He stated that he would yield to the views of the Ad Hoc Committee in this matter. As to whether the recommendations should be confined to capital cases, the Chief Justice expressed his inclination that they should be so limited, although Justice Powell pointed out that it would be inappropriate to appear to single out capital defendants for any treatment perceived as differential or more onerous.

Judge Clark suggested a connection between the death penalty review problem and the pendency of proposals for an intercircuit tribunal or other form of an intermediate national court of appeals. He suggested that such a court, if it were ever created by Congress, could inter alia act for the Supreme Court in discharging its function as ultimate reviewer of habeas petitions in capital cases and that this intermediate court involvement could effectively handle all such applications except where a very late claim arises, requiring emergency consideration by the circuit justice. Justice Powell nevertheless expressed pessimism at the prospects of Congress enacting any form of an intermediate court of appeals.

The discussion then turned to the need for and importance of statistics in tracking the death penalty habeas corpus problem. Judge Roney stated that statistics show that state habeas corpus petitions under 28 U.S.C. § 2254 are not normally initiated until the

state death warrant is signed by the governor or other official. He cited the statistical exhibit included with the letter from the Alabama Attorney General distributed to the committee. The committee further discussed the problem of ineffective assistance of counsel and its recurrence as a claim in state habeas cases. It was noted that many states frequently appoint relatively inexperienced lawyers as counsel in criminal proceedings, even where the prospect of a death sentence exists, and that these lawyers are lacking especially in their knowledge of Federal law and precedents. It was further mentioned that activist legal and political groups which normally have an interest in contesting death sentences do not usually get involved in actual cases until they have advanced far beyond the trial stage, when the specter of death penalty execution has become a more immediate and visible issue.

Justice Powell focused the discussion on the need to give guidance to Professor Pearson in the work that he undertakes. Justice Powell proposed that Professor Pearson should prepare a survey memorandum for the committee discussing all presently extant legislative proposals for reform of the habeas process. The committee agreed to this proposal and turned its discussion to the concepts that might inform such a paper. Judge Clark expressed the desire for an ultimate approach which goes beyond the mere imposition of a statute of limitations but instead affirmatively preserves defendants' rights and their opportunity to ventilate Federal constitutional claims. Judge Sanders counseled that the committee should retain its flexibility at present as to the shape of its ultimate product. He further raised the question whether it will be feasible politically for the Judicial Conference to invest its prestige in, and place legislative priority on, a proposal as controversial as habeas reform is likely to be, but Justice Powell stated that

the question of political priorities cannot be determined until the scope of the eventual proposal is known.

Professor Pearson then raised the desirability of modifying traditional habeas exhaustion rules, describing them as in many respects counter-intuitive and asserting that it is often appropriate for Federal courts to complete the factual record and rule on a petition without remanding it to the state. He noted that the attitudes of the state attorneys general differ as to their policy on waiving exhaustion and that opinion among Federal judges is divided as to whether existing statutory provisions permit judicial acceptance of such waivers. Nevertheless the majority view seems presently to be that existing law does permit the waiver of exhaustion requirements.

The committee then revisited the question of receiving opinions from outside the Judiciary. Justice Powell concluded that this decision need not be made now. Judge Roney raised the question whether all judges should be circularized by the committee or whether such circularization should be confined to Judicial Conference members. It was decided to confine such a solicitation for the moment to the Judicial Conference only, and it was agreed that Judges Clark and Roney will draft a letter that Justice Powell might send to the members of the Conference after receiving the Chief Justice's approval.

Further consideration was given to whether the Ad Hoc Committee's recommendation should be confined to the death penalty issue. Justice Powell concluded that the initial focus of its work should be placed on that class of habeas cases and that a decision might be made later whether the changes recommended to accommodate death penalty situations might be more broadly helpful to the state habeas corpus jurisdiction generally.

As to the committee's time schedule, Justice Powell noted that the Chief Justice has imposed no time limitations. It was decided to leave the timetable for committee action open at this time. More immediately, the committee decided to hold its next meeting in Washington on Wednesday, November 30 at 9:30 a.m., with the understanding that Professor Pearson will finalize and distribute his memorandum to the committee approximately two weeks in advance of that date to afford the opportunity for familiarization looking toward effective meeting discussion. The committee then adjourned.

Respectfully submitted,

William R. Burchill, Jr.
General Counsel

AD HOC COMMITTEE ON FEDERAL HABEAS

Meeting November 30, 1988

Proposed Agenda

1. Approval of Minutes of September 16 meeting.
2. Prof. Pearson's Memorandum.
 - a. Pearson recommendations.
 - b. Rodino proposal.
 - c. Further research by Professor Pearson? Review of reversal rate in capital cases?
 - d. Other proposals: e.g., Checklist of claims for district courts.
 - e. Status of work by other committees (ABA)?
3. Anti-Drug Abuse Act Provision.
 - a. Suggests we should expedite work.
 - b. Contact with Judiciary Committee?
4. Public Hearings?
 - a. Limited to specific organizations and committees (e.g., ABA, USAG, State AGs, NAACP, and ACLU)?
 - b. Date and place.
5. Should we begin work on a tentative recommendation?
 - a. Prof. Pearson, on the basis of our discussion today, to prepare a draft of a possible amendment to Section 2254?
6. Date and Place of Next Meeting.
 - a. Meeting April 6, 1989, at Williamsburg sponsored by Brookings Institute? (See Noel Augustyn's letter of October 17. Prof. Pearson to attend?)

L.F.P. Nov 27

Use at Meeting

On Pearson's Memo of Nov 21st pg 1

1. ~~B~~ Memo considers ^{the} two areas

- (1.) Where further info. would be helpful in supporting legislation.
- (2.) ~~How~~ Bills introduced in Congress in recent yrs.

2. ~~B~~ Needs for Empirical Data

(A) Case load burden - increases at greater rate in 3,1483 cases than in Fed. H/C.

(B) Increase in capital cases in the problem. Death row population increasing faster

than non-capital H/C cases.

(C) Recommendation:

Obtain more info. as to effect of capital cases on work of DCs & CAs. Ask Judges on our Committee. How could info. be obtained? It would vary widely.

Is other business of fed. cts. adversely affected

Al refers to testimony before a House Committee by DC Judge. Rendall Sharp

Ask members of our Committee

Al Memo - p 2

3. Reversal rate of death sentences
are higher than cases involving
sentences of term of years. (Al p 5) { By Fed or State CTS

opponents will emphasize

4. Sources of Delay (Al. p 6)

(a) ~~Two sources not.~~

(a) After direct appeal to State S/CT, legal proceedings come to halt. Without counsel, often no action until an execution date is set.

need for counsel after State S/CT affirms conviction. years can pass

(b) Demonstrates need for counsel, and for a S/ Limitations (actually two - one ~~Federal~~ & one State).

ask How

Fla has a 2 yr S/L.
Ask Hodgers whether it ~~helps~~ helps?

(b) Another source is the time expended expended by judges in considering requests for Stays of Execution. Al thinks a Capital case Δ is entitled to one trip ~~to the~~ to the Fed H/Corpus (§ 2254) system. (Al p. 7)

Important

Ask How to explain pages 7 & 8. what would have to change?

In any event, a Δ always will have 3 chances for S/CT ~~review~~ review: (i) after St Sup Ct ^{affirms} on direct appeal (ii) after St Sup Ct ^{affirms} on state collateral review; and (iii) after a fed. CA has ruled against a defendant. This will not be changed - only accelerated.

Al's Memo pg 3.

*Should
legislation
be
necessary?
yes.*

(c) Rose v Lind, requirement of total exhaustion of State remedies, is another source of delay. Time is lost ~~sending~~ sending a case back to State even on a single issue. But if we recommend appointment of counsel, need not worry about Rose. ???

AD HOC COMMITTEE ON FEDERAL HABEAS

Meeting November 30, 1988

Proposed Agenda

1. Approval of Minutes of September 16 meeting.
2. Order of Discussion?
3. Pearson's Memorandum
 - a. Pearson's recommendation.
 - b. To what extent do his views now differ from his earlier suggestion to The Chief Justice?
 - c. Comments on the earlier memoranda of Chief Judge Clark and Judge Hodges?
 - d. Further research by Professor Pearson?
 - e. Is it a fact that about half of all capital convictions have been reversed by courts of appeals? Do we need a study of the grounds for these reversals? The basic fact that concerns this committee is that delay remains a serious problem almost to the extent of nullification of state and federal laws. The situation is likely to worsen as sentences of death increasingly exceed final dispositions.
 - f. Status of work by other committees (ABA)?
4. Public Hearings?
 - a. Assuming we decide that a hearing is desirable, should it be held prior to drafting our recommendations?
 - b. Should it be limited to specific organizations and committees (e.g., ABA Committee, USAG, State AGs, and organizations such as the NAACP and ACLU.)
5. Date and Place of the Public Hearing
6. Are we prepared now to make a tentative recommendation?
 - a. Should we request Professor Pearson, on the basis of our discussion today, to prepare a draft of a possible amendment to Section 2254? (I assume we are in agreement that a statute rather than a rule amendment is necessary.)

b. Opponents of any effective action to limit the abuse of the writ already are expressing concern that we may deny full and fair review of capital sentences, and indeed may seriously undercut the ancient writ of habeas corpus. We should make several points clear. The provision in the federal Constitution with respect to the writ applies to federal courts. It was not made applicable to the states until the statute of 1879 (?). We therefore are addressing only the need to effectuate the intention of Congress by a statutory change. Our purpose is to limit an abuse of the writ that was never contemplated by Congress.

good

7. Date and Place of Next Meeting

a. Meeting April 6, 1989 at Williamsburg sponsored by Bookings Institute? (See Noel Agustyn's letter to me of October 17. Professor Pearson to attend?)

No

Nov 28 meeting

Research needed:

1. Greenberg (Goldbold)
Half of capital
case reversed. ?
2. Do capital cases
affect adversely
other business
of Cts ?
3. State AGs
info sent Ab.

Ask Ab

1. Reversal
Rate in
C/P cases.
(only by
Fed Cts on
H/C ?)

2. Effect of S/Ct
granting cert

where
in
delay
greater

3. What are primary
causes of delay

4. Effect C/P on
work load of

5. Effect by DCS & CAs ?

Care in ~~CA~~
CA 11 - 11 yrs

Exhaustion

1. Starter to provide
counsel after ~~Ab~~
sentence has been
approved by S/Ct
2. Counsel to represent
Ab in state collateral.
3. One yr S/Ct ^{to} date
for end of state
H/C
4. Repeat "exhaustion
requirement."
Order decision in
@ Rose v. Landy requires
Ct.
5. DC - Evidentiary
hearing.
6. Abolish "cert.
of probable cause"

Diff. bet. C/P
& ~~other~~ prison
sentences. That
Ab is serving his
sentence.

Bill Burchell
Noel Augustyn
②

How - Suggestions?
Please type

Rough Agenda

1. Approve minutes
2. Al Pearson ~~Report~~ Memorandum
 - a. Recommendations
 - b. Further factual or statistical info. needed.
 - c. Specific requests to State AGs, and their responses.
 - d. ~~the~~ Extent to which Capital Cases ~~aff~~ adversely affect work load of DCs & CA ~~off~~'s?
3. Result of our request to members of Judicial Conference?
(a) Only one response?
4. ABA Committee (J. Al
(a) Judge Sanders
5. Additional information needed before ^{we} consider specific recommendation?
6. Public Hearings (or submit ~~our~~ draft of our proposals to interested parties? (US Attys Gen.; ABA, ACLU, NAACP; State AG's in selected states)
7. Next meeting

Noel Augustyn
Bill Burchill

My cc L.F.P.

lfp/ss 11/29/88 AGENDA SALLY-POW

AD HOC COMMITTEE ON FEDERAL HABEAS

Meeting November 30, 1988

Proposed Agenda

- ✓ 1. Approval of Minutes of September 16 meeting. (Bill Burchill)
- ✓ 2. Prof. Pearson's Memorandum.
 - ✓ a. Pearson's recommendation *(1. Provide counsel for both State & Fed Collateral review. Same as S. I. 2. One year S/L from end of state review)*
 - ✓ b. Rodino proposal. *(attached to Al's memo) 1974 1982*
 - ✓ c. Further research by Professor Pearson? Review of "reversal rate" in capital cases? *See Jack Greenberg's article in 1986 HLR P1673*
 - d. Other proposals: e.g., Checklist of claims for district courts. *(Ala.) 9. 17 and 5. Rule 16*
 - d. Status of work by other committees (ABA)? ?
3. Anti-Drug Abuse Act Provision.
 - a. Suggests we should expedite work. *(read last H)*
 - b. Contact with Judiciary Committee? ?
4. Public Hearings?
 - a. Limited to specific organizations and committees (e.g., ABA, USAG, State AGs, NAACP, and ACLU)?
 - b. Date and place.
5. Should we begin work on a tentative recommendation?
 - a. Professor Pearson, on the basis of our discussion today, to prepare a draft of a possible amendment to Section 2254?
6. Date and Place of Next Meeting.
 - a. Meeting April 6, 1989, at Williamsburg sponsored by Brookings Institute? (See Noel Augustyn's letter of October 17. Prof. Pearson to attend?) *(no)*

Proposals of Clark and Terry Hodgess

See Carl McGowan Article

" our decision in Swain v. Pressley (upholding validity of the absence of dual review in 29. C.)

72

Take to Meeting

Pearson's Memo

Monday Nov 28

More info needed (?) (?)

ask
judges

1. Effect of Capital Cases on
work of DCs & CAs?
(How ^{would} we obtain this info?)

In other business of courts
being adversely affected?

2. Roe v. Lundy's requirement of total
exhaustion of state remedies, cause
delay (may result in a ~~case~~ being reverse
case being sent ~~to~~ back for ~~retrial~~
- delay. Question: would this require
legislation?

Opponents
emphasize
this

3. Higher % of death cases reversed
~~magistrate~~ (more than half) ^{Jack Greenberg} ~~article~~
Best answer? ~~Research~~ needed?

CA 4
cases?

4. If we limit to Capital cases, opponents
& public will think this ~~is~~ is
"discrimination". ² ~~If~~ Burden on
States to provide counsel would be great.
Also C/C A ~~is~~ sentence is ~~not~~ being enforced.

5. Al makes good point in ~~noting~~
that even now a ~~capital~~ capital case ~~def.~~
has three chances for S/CT review:

There would
not be
changed.

Only
"accelerated"

- (a) after st. S/C affirms on direct appeal.
- (b) " " " " on state H/C; &
- (c) " Fed CA has ruled vs A ~~on~~ on
fed. H.C.

All criminal As ~~have~~ have these
opportunities now. If we ~~limit~~ limit
capital case defendants, this
would be discriminatory.

*of meeting
of Nov 30th*

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

WALLACE NORRELL THOMAS,

Petitioner,

vs.

WILLIE JOHNSON, Warden,
and the ATTORNEY GENERAL OF
THE STATE OF ALABAMA,

Respondents.

*This Order
used in Alabama
50. Dist. ~~has~~ has
the requested
CIVIL ACTION NO. 87-0946-C
check list for
defense counsel
to use.*

MEMORANDUM OF CONFERENCE AND ORDER

A conference pursuant to Fed. R. Civ. P. 16 was held on March 10, 1988. Attending were counsel for petitioner, Champ Lyons, Jr. and Patrick H. Sims, and counsel for respondents, Edward Carnes. As a result of this conference, the following action is taken:

1. Counsel for petitioner orally withdrew as premature the motion (Doc. #3) and that portion of the petition (Doc. #1) requesting appointment of an independent examiner to determine the petitioner's present mental and physical condition. Counsel for petitioner also orally withdrew all requests in the petition (or otherwise) that an independent examiner be appointed to determine the petitioner's mental condition at the time of the offense and at the time of trial, and agreed to submit on the record in State Court proceedings all issues relative to the petitioner's mental condition and sanity at the time of the offense and at the time of trial and preparation for trial.

Accordingly, the motion and that portion of the petition requesting appointment of an independent examiner is hereby ~~deemed~~ WITHDRAWN.

2. Counsel for petitioner, as an officer of this court, shall hold a conference with the petitioner within twenty-one (21) days¹ after the date of this order. 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 potential grounds for relief including, but not limited to, such of the following as may be applicable in tis case:

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

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

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

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

(

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

e. The confession was not voluntary;

f. The guilty plea was not voluntary;

g. There was breach of the plea bargain;

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

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

j. Jurors saw defendant in jail clothes;

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

l. There was not a speedy trial;

m. There was not a public trial;

n. Defendant was twice put in jeopardy;

o. Defendant did not have effective counsel;

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

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

r. 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;

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

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

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

v. Defendant was denied an effective appeal.

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

3. Counsel for the petitioner shall, within twenty-one (21) days after the date of this order, prepare and file with this court a memorandum, bearing the petitioner's signature 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

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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 complaint that he was not effectively represented in this action.

4. Petitioner shall, within twenty-one (21) days after the date of this order, 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. Respondents shall file an answer to any amendment to the petition within twenty (20) days after the filing of the amendment. Respondents 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 thirty-five (35) days after the date of this order the petitioner shall submit a brief addressing all issues raised by the petition and the first amendment thereto including but not limited to procedural default, "cause", "prejudice", the merits, and whether the petitioner is entitled to an evidentiary hearing on any ineffective assistance of counsel issues. (Including, but not limited to, whether ineffective assistance of counsel constituted "cause" for any procedural default.) Within twenty-one (21) days after service of the petitioner's brief, the respondents shall submit a brief in response which shall address

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all the issues raised by the petition and the first amendment thereto. Each brief shall be appropriately referenced to the record and shall not exceed fifty (50) typewritten pages, doubled spaced on letter size paper.

7. Each party shall include in the brief filed pursuant to section six above an explicit statement relative to whether an evidentiary hearing is requested on the ineffective assistance of counsel claim.

8. 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.

9. All counsel agreed that no evidentiary hearing is required on any issue in this case at this time except for the ineffective assistance of counsel issues (including, but not limited to, whether ineffective assistance of counsel constitutes "cause" for any procedural default); as to these issues, counsel are not able to agree at this time relative to whether or not an evidentiary hearing is required.

10. 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. Respondents shall reply to any such motion within ten (10) days.

11. In the event the petition is hereafter amended, each separate and independent claim shall be set forth in a separate, separately numbered section of the petition, and all claims shall be repeated in the amended petition. All briefs filed on behalf of petitioner shall separately number each and every separate and independent claim.

DONE this 17th day of March, 1988.


UNITED STATES DISTRICT JUDGE

MAR 1 : REC'D

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

December 16, 1988

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

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

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


William R. Burchill, Jr.

Attachment

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

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

Minutes of the Meeting of November 30, 1988

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,


William R. Burchill, Jr.
General Counsel