1989

Habeas Corpus Committee - Meetings

Lewis F. Powell Jr.

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(a) 1975 (continued)

13 yrs

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AD HOC COMMITTEE ON FEDERAL HABEAS

Meeting January 30, 1989

Proposed Agenda

1. Approval of Minutes of November 30 meeting.

2. Limited response from letter to Judicial Conference?

3. ABA Committee (Judge Sanders).


5. Prof. Pearson’s Memorandum.
   a. Chart showing number of days in state and federal courts from date of crime to execution. Relevance?
   b. Need for further information. Validity of claims that half of capital convictions reversed in federal court?
   c. Prof. Pearson’s recommendations.

6. Specific proposals.
   a. Chief Justice.
   b. Judge Hodges.
   c. Other -- Rule 9?

7. Public hearings or submission of draft proposals to interested groups.
   a. ABA, ACLU, NAACP, State AGs, etc.?

8. Next Meeting.
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3. ABA Committee (Judge Sanders). - federal & state. Report in Feb/April
   Conference of Chief Justices (Judge Roney).
   Ben Overton FL, ST, panel
   Fed Cr. Dist. Conn. (Joe Weiss) Meeting Feb 3
   Memorandum. May 19-20 Tex

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8. Next Meeting.
January 27, 1989

Honorable Lewis F. Powell  
Associate Justice, Retired  
U.S. Supreme Court  
1 First St., NE  
Washington, DC  20543

Honorable Paul H. Roney  
Chief Judge, U.S. Court of Appeals  
601 Federal Building  
144 First Avenue, S.  
St. Petersburg, FL  33701

Honorable Charles Clark  
Chief Judge, U.S. Court of Appeals  
245 E. Capitol St.  
Room 302  
Jackson, MS  39201

Honorable Barefoot Sanders  
Acting Chief Judge  
U.S. District Court  
U.S. Courthouse  
1100 Commerce St.  
Room 15D28A  
Dallas, TX  75242

Honorable Wm. Terrell Hodges  
Chief Judge, U.S. District Court  
U.S. Courthouse  
611 N. Florida Ave.  
Room 108  
Tampa, FL  33602

Gentlemen:

Attached is a report for your review and discussion at our meeting scheduled for Monday.

Sincerely,

Albert M. Pearson  
Professor of Law

AMP/khb  
Attachment

Athens, Georgia 30602

AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION INSTITUTION
1. Discussion of Al Pearson's report on death penalty case procedural histories.

2. Discussion of what additional statistical information, if any, needs to be compiled.

3. Discussion of possible draft provisions for next meeting.

4. Report from Chief Judge Roney about Orlando meeting with Conference of Chief Justices.

5. Report from Judge Sanders about work of ABA Committee.

6. Next meeting; time and place.
AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS REVIEW OF CAPITAL SENTENCES

January 30, 1989

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REPORT

I. BACKGROUND: HISTORY OF ABA INVOLVEMENT IN ISSUES CONCERNING FIREARMS CONTROL

The American Bar Association has approved resolutions relating to the control of firearms four times:

A. In 1965 and again in 1966, the Association adopted resolutions urging the United States Congress to enact legislation amending the Federal Firearms Act of 1934 to restrict firearms commerce in several ways. First, these resolutions called upon Congress to prohibit the shipment of firearms in interstate commerce except between federally licensed manufacturers, dealers and importers. Second, these resolutions called for the prohibition of the sale by federally licensed dealers of shotguns and rifles to persons under 18 years of age and the sale of all other types of firearms to persons under 21 years of age. Third, these resolutions urged that legislation be passed to prohibit persons of questionable background, such as felons, fugitives, and persons under indictment of felonies, from shipping or receiving firearms in interstate commerce. Fourth, the Association supported legislation to control both commerce in large caliber weapons and the importation of weapons in general. Finally, these resolutions backed a restriction in the sale of handguns to residents of the state where purchased. The goals of these resolutions were incorporated in large part into the Gun Control Act of 1968, which was passed by Congress in the wake of the nationally traumatic assassinations by firearms of civil rights leader Martin Luther King, presidential candidate Robert Kennedy, and President John F. Kennedy.

Although not without weaknesses, the Gun Control Act of 1968 (P.L. 90-618, 82 Stat. 1213) did federally mandate significant restrictions on commerce in firearms. Under the Act, interstate gun purchases had to be made through federally licensed dealers. It also implemented modest recordkeeping requirements for such dealers as well as inspection procedures to ensure compliance with these recordkeeping requirements. In addition, the Act prohibited the sale of firearms to minors, persons found mentally defective, drug addicts, and persons convicted of crimes punishable by a sentence of imprisonment for a term exceeding one year, unless that person can prove to the Secretary of the Treasury that he or she is not likely to act in a manner dangerous to the public safety.

B. In a 1973 resolution, the ABA reconfirmed its commitment to the principle of effective control of the trafficking, sale, and possession of firearms. This resolution also supported legislation limiting the sale or possession of "Saturday Night Special" handguns. The resolution was based on "a firm conviction that the organized legal community will continue to serve in its traditional role of
advisor to Congress and leader in its concern for law enforcement and criminal justice." (Report 107C, p.4)

C. The Association passed its fourth resolution concerning the regulation of firearms in 1975 in response to the upsurge in violent crimes committed with firearms occurring at that time. The lengthy policy suggested minimum legislative measures to be taken to implement more effectively the Gun Control Act of 1968 and to give effect to the existing policies of the ABA. These measures included:

- incorporating into the prohibition of sales of firearms and ammunition by unlicensed persons the sale of parts or components of firearms;
- defining explicitly the term "firearms for sporting purposes;"
- upgrading the standards of eligibility for licensing of dealers, importers, and manufacturers and making the conferral of such licenses a discretionary rather than mandatory action by the Secretary of the Treasury;
- mandating a waiting period between purchase and transfer of possession of a firearm during which time the transferee must report the transfer and the identity of the transferee to the Bureau of Alcohol, Tobacco, and Firearms;
- requiring dealers, manufacturers, transporters, and importers of firearms, ammunition, their parts or components to provide adequate and secure storage facilities in order to reduce the incidence of theft of such items and to report any losses or thefts of such items to the Bureau of Alcohol, Tobacco, and Firearms;
- changing the jurisdictional basis for prohibition of possession of a firearm, from reliance upon transport in interstate commerce to (1) constituting a burden on commerce, and (2) a threat to the effective enforcement of the Federal crime laws, including those laws designed to protect the safety of the President;
- encouraging the Judiciary to impose severe penalties for the possession or use of a firearm or facsimile in the commission of a crime;
- urging that adequate federal appropriation and manpower resources be provided to the Bureau of Alcohol, Tobacco and Firearms and to other prosecutive and investigative Federal law enforcement officials for the purposes of enforcing the Gun Control Act;
- reviewing periodically the eligibility of handgun possessors consistent with the safeguards of due process;
- encouraging additional legislation directing Federal
investigators and prosecutors to assign a high priority to alleged firearms offenses, particularly those which are repeated offenses committed by previously convicted felons;

- urging effective cooperation among federal, state, and local law enforcement agencies in investigating and prosecuting firearms offenses; and

- authorizing the President of the ABA or his designee to communicate the positions taken in this resolution to the appropriate individuals or entities including Congressional committees.

D. In 1983, the ABA again stated its position on gun control in a resolution that vigorously opposed any repeal of the regulatory provisions of the Gun Control Act of 1968. The resolution reaffirmed the Association's support of restrictions on handgun possession as well as the enactment and enforcement of appropriate penalties designed to deter violations of gun control laws. Moreover, in 1983 the Association slated gun control as a priority issue on the Association's legislative agenda. As such, it became one of 20 issues to be designated a "priority matter" out of the over 400 legislative issues on which the ABA focuses. In addition, 74.1 percent of 1,000 ABA leaders surveyed that year either agreed or strongly agreed with stringent handgun control legislation.
March 6, 1989

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 transmitting for your preliminary review my draft of minutes from the last meeting of the Ad Hoc Committee on January 30. I am very sorry that this task took me so long to complete, but as I explained to Hewitt Pate, the subject of judicial pay has really dominated my time the past few weeks.

I shall await your corrections or comments upon these minutes and your direction for me to send them to the full committee membership.

Thank you for your patience in this matter, and I look forward to seeing you again in April if not sooner. With kindest personal regards,

Sincerely,

[Signature]

William R. Burchill, Jr.
General Counsel

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

Minutes of the Meeting of January 30, 1989

The Ad Hoc Committee on Federal Habeas Corpus Review of Capital Sentences held its third meeting at the Supreme Court Building, Washington, on January 30, 1989. Justice Lewis F. Powell, Jr., presided, and all other 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 first asked for the committee's approval of the minutes of its last meeting, held on November 30, 1988. Judge Roney noted that those minutes imply the reaching of a decision that the committee will not report to the March session of the Judicial Conference, and he inquired whether such a final decision has indeed been made. It was agreed that no such decision had been taken with finality in November but that it is now clear time does not permit any final report to be made by March. With this clarification the minutes were approved.

Justice Powell then referred to the solicitation which he had made to all Judicial Conference members seeking their comments as to the committee's charge and the manner in which it might proceed. He noted that only one member of the Conference, Chief Judge Holloway of the Tenth Circuit, had responded to this invitation to comment, making it appear that there will not be substantial further input from the Conference membership. (Shortly thereafter a submission to the committee from Chief Judge Lay of the Eighth Circuit was received by the Administrative Office and distributed to all committee members.)
Justice Powell then called upon Judge Sanders to review the progress to date of the American Bar Association committee that is conducting a parallel review of this issue. Judge Sanders stated that the ABA panel recently held an organizational meeting and will next meet on April 1 to review its reporter's initial research on the issues before it. He reported that the ABA group has scheduled public hearings for May 19 and 20 in Texas, June 17 in Los Angeles, and a hearing planned for the east coast in August or September. Justice Powell noted that the time schedule of the ABA effort will inevitably deviate from that of the Ad Hoc Committee, which is bound by the Judicial Conference schedule of biannual meetings while the ABA group is less structured in its timetable.

Next Judge Roney reported on developments at the recent Conference of State Chief Justices meeting held in Orlando regarding death penalty cases. He recounted that this conference both considered the "paper flow" problems of such cases and discussed possible changes in procedures. The conference also heard reports from Chief Justice Lucas of California, speaking for the ABA task force, and from Professor Pearson with respect to the work of the Ad Hoc Committee. Judge Roney further stated that the Conference of Chief Justices seems resigned to a continued Federal habeas role in such cases, whereas there may be some division of opinion within the ABA group as to the validity of such continued Federal involvement.

At this point Judge Roney also discussed the plans of the Judicial Conference's Federal Courts Study Committee, which was about to hold its first meeting. He mentioned that Judge Weis, chairman of the Federal Courts Study Committee, planned to divide its efforts among three major subcommittees and anticipated preliminary public hearings this spring, the framing of draft proposals by fall, and then a second round of public hearings before submission of the committee's report in the spring of 1990. He
added that it is anticipated the Federal Courts Study Committee will consider among its jurisdictional issues the manner in which capital cases come to the Supreme Court. Finally Judge Roney added that Senator Graham of Florida has just introduced a bill to place a statutory deadline upon Federal court disposition of state habeas corpus proceedings.

Justice Powell next called upon Professor Pearson to comment upon the written materials which he had submitted to the committee, recounting death penalty case procedural histories. Professor Pearson discussed the various issues of timing raised in his memorandum. He suggested that a truer picture of overall time consumed in these proceedings might be obtained by recording the date of indictment. Justice Powell stated nevertheless that the date of the offense seems quite irrelevant for the committee's purposes, and Judge Roney suggested that the date of sentencing might be more relevant for purposes of post-conviction review. Professor Pearson responded that an anticipated follow-up request to the state attorneys general for further data will seek the dates of sentencing. Professor Pearson further noted that clear-cut information is lacking on why remands occurred in these cases. He added that it appears the amount of time consumed by state post-conviction review is very slight and that the preponderance of time consumed by state judicial proceedings is accounted for in trial and direct appeal. It was further pointed out that defendants are free to bypass state habeas entirely in many instances, depending upon the nature of the issues raised, without offending the exhaustion requirement of Federal habeas corpus.

Justice Powell then raised the question whether it is the appointment of counsel that triggers the onset of post-conviction filing. The responsive discussion concluded that it is normally the issuance of the state death warrant that serves as a triggering device for this purpose. Justice Powell inquired as to the feasibility of imposing a new
requirement that the death warrant shall issue as soon as state judicial proceedings have concluded. The question was raised whether this would require state legislation, inasmuch as the effect of such a requirement, coupled with the appointment of counsel, would be to impose a financial burden on the states that Congress may lack the ability to set. Under existing law it was suggested that the setting of an execution date is useful in triggering the appointment of counsel, but such counsel do not necessarily have the competence and stature needed for capital cases. The use of a statute of limitations as a triggering mechanism for the involvement of counsel was further raised. Judge Roney stated that reliance upon the state death warrant for this purpose is unsatisfactory because it creates the negative appearance of Federal interference with state legal process. It was agreed that all legal issues should optimally be resolved before the death warrant issues, although Judge Sanders suggested that this would in many instances necessitate changes in state law.

At this point Justice Powell turned the discussion to what additional procedural information is needed before the framing of tentative recommendations, and he also inquired whether there is support for the claim advanced by Judge Godbold and others that more than half of state-imposed death sentences have been reversed in Federal judicial review. Professor Pearson responded that the state attorneys general are unconvinced of this reversal rate but that it has proven difficult to elicit such actual statistical data from them for cases where executions have not ultimately occurred.

In response to Justice Powell's question on other information required, Judge Sanders urged that the committee needs a measure of the elapsed time between the conclusion of state judicial proceedings and the filing of Federal habeas petitions. Judge Sanders noted that in Texas the prompt issuance of a death warrant by the convicting court is automatic, so that while no "down time" results at this stage, it is not clear that a speedier overall process results.
Judge Clark urged the necessity to compile a data base recounting every significant event in all 108 death penalty cases where executions have taken place. He further advocated that attention then be directed to the Federal collateral review consequence in each instance, noting that no predictability now exists in that process. In summarizing the expressed needs for additional data, Professor Pearson stated that procedural histories would be obtained of all death penalty cases except in Louisiana where they may not be available. It was recognized that it may not be possible to obtain reliable data on the Federal reversal rate of state death sentences, as considerable statistical interpretation would inevitably be required to arrive at such end.

Judge Clark then recounted that the committee had made a threshold decision at its initial meeting not to seek the abolition of Federal habeas review of state convictions. He proposed the design of a mechanism whereby the state attorney general could initiate Federal collateral proceedings, either by a certification to the United States court of appeals or by seeking declaratory judgment in the district court. He expressed a preference for certification to the court of appeals level but noted that either alternative would avoid the present offense to Federalism of requiring a state death warrant to issue in order to activate the Federal judicial process, resulting in a quashing of the state warrant.

Returning to the issue of a Federal statute of limitations, Professor Pearson stated that the states might be motivated thereby to set up a state-funded system for the appointment of counsel. Judge Hodges then referred to the new concept of Death Penalty Resource Centers now being funded partially by grants from Judiciary appropriations under the Criminal Justice Act as community defender organizations. Judge Clark added that most states have been very cooperative in assuming their financial share of supporting Death Penalty Resource Center operations. Justice Powell
noted that the effective future execution of state capital sentences may depend upon the willingness of state governments to furnish and pay for counsel for collateral review.

Mr. Burchill was then requested to obtain from the Administrative Office's Defender Services Division a memorandum of basic information regarding Death Penalty Resource Centers and to circulate this information to the committee.

Justice Powell asked Professor Pearson to circulate to the committee an outline of the additional data needed, in order to afford every committee member the opportunity to expand or comment upon it. On the subject of public hearings he suggested that it is first necessary to develop concrete proposals. Judge Roney recommended that draft proposals be circulated to address the problems identified. Professor Pearson agreed to attempt such drafts as a basis for further discussion.

Justice Powell raised the issue whether the committee should consider proposing the elimination of the exhaustion requirement on access to Federal collateral review. Judge Hodges and Judge Sanders endorsed this suggestion, and Judge Hodges proposed in the alternative a system of state and Federal proceedings on parallel tracks with the Federal courts having the right to abstain from a decision unless the state were to waive exhaustion. Justice Powell also inquired about the desirability of reviewing the requirement for a certificate of probable cause to appeal. The consensus of the ensuing discussion was that such certificate is usually of little practical effect, although it is easier to effect summary disposition if the certificate has been denied.

By way of further discussion on the causes of delay, Judge Hodges identified three categories of Federal habeas issues necessitating evidentiary hearings:
- ineffective assistance of counsel;
- Brady claims of failure by the prosecution to disclose exculpatory materials;
- the defendant's competence to stand trial.

Otherwise Judge Hodges concluded that all necessary evidence has normally been adduced in state court so that there is rarely a need for Federal evidentiary hearings, avoiding further delay on this account.

In summary, Justice Powell noted that Professor Pearson has been tasked (1) to circulate a memorandum on additional needed data and (2) to frame proposed remedies for the committee's consideration but with the understanding that only a narrative description of each proposal is now needed with draft legislation not required until later.

No decision was reached regarding public hearings, but Justice Powell and Judge Sanders agreed that it might be desirable to seek written comments from the public after the committee has framed formal proposals for discussion. There are no plans for the conduct of public hearings at this time.

Justice Powell stated that he foresees the need for at least two more meetings of the committee, tentatively projected for the month of April and some time during the summer. It was decided that the next committee meeting will be held on Friday, April 21 at 9:30 a.m. in the Supreme Court Building. The committee then adjourned.

Respectfully submitted,

William R. Burchill, Jr.
General Counsel
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Chief Justice of California
350 McAllister Street, 4th Floor
San Francisco, CA 94102
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MEMORANDUM TO THE CHIEF JUSTICE
FROM: Al Pearson, Judicial Fellow
RE: Refinement of Habeas Corpus Statute of Limitation Proposal
DATE: April 13, 1988

Attached is a redraft of the statute of limitation proposal. It incorporates your suggestions and attempts to refine some features.

1. Section (d) establishes two triggers for the SL. Subsection (d)(1) makes the SL applicable if a capital habeas applicant in fact was represented during state post-conviction proceedings and for an aggregate period of a year thereafter. The premise is a case-by-case determination of the applicability of the SL provision. Upon the conclusion of state post-conviction proceedings, a lack of representation would toll the SL but once counsel comes back into the case, the clock resumes running. A tacking principle governs. Thus, five months of representation by Jones and eight months by Smith would make an aggregate period of representation of more than a year. If no federal habeas petition had been filed during that time, the SL would operate as a bar as specified in Section (e).

Subsection (d)(2) enables a state to trigger the SL across-the-board in its own death penalty cases. The quid pro quo is the establishment in accordance with section (f) of a program of legal representation in state and federal post-conviction proceedings. As written, the across-the-board option probably does not contain sufficient incentives to make the idea attractive to the states. They can argue with some force that all the costs of representation should not be borne by them. Some combination of state and federal financing is likely to be the key.

Section (e) attempts to define the point in time from which the SL would run. Two alternatives are suggested. The first uses the date at which "state remedies are exhausted." I borrowed the "exhaustion" standard from the SL provision of HR 1333. In my view it is highly ambiguous. The concept of exhaustion is never used to describe a single moment in the process of state review---whether on direct appeal or during habeas corpus proceedings. In fact, it refers to a series of instances throughout state review where the state judiciary has given all the consideration that it intends to afford to a particular issue. Linked as it is to discrete issues and the factual allegations in support of them, exhaustion can and regularly does take place at many different times during state review. With respect to some issues, it does not occur at all. For
these reasons, "exhaustion" seems to be a particularly inapt starting point for a SL.

We could try to assign a meaning to the term "exhaustion" for the purposes of this section that differs from the usage under 28 USC § 2254(b). But the potential for confusion hardly seems worth it. What we seek is a clearly defined terminal point in state judicial consideration of criminal cases—a point that objectively reflects the end of the state prisoner's efforts. Depending on the nature of the issues involved, it could occur after direct appeal or after state post-conviction proceedings. But once state review is concluded and the state prisoner shifts his attention to the federal courts, the premise of this proposal is that he is entitled to a year to file his application for federal habeas relief.

The alternative language I propose would have the SL run from the "last dispositive order on the merits" issued by a state court. Unlike the exhaustion concept, this language describes a single, identifiable point in time from which to measure the operation of the SL bar. As I conceive of this approach, it would not apply to rulings denying motions for rehearing or motions for extraordinary reconsideration of prior dispositive rulings. In my view, this language (or something based on the same rationale but more aptly phrased) is the way to go.

A further advantage of the alternative language is that while it makes the operation of the SL independent of the exhaustion requirement, the SL rule still serves as a powerful disincentive against the filing of mixed petitions. It deals with one of the most serious but unintended consequences of Rose v. Lundy in the death penalty context. If a state prisoner seeks federal relief and raises an unexhausted claim, the SL clock would continue to run from the date of the "last dispositive order on the merits" in state court. Nothing in this proposal would deny the state prisoner the right to rush back to state to cure his exhaustion problem. He would required to do so, however, within the time frame of the one year SL—a difficult, if not impossible, task in most instances.

Is this unfair to a state prisoner under death sentence? Not in my view since he bears none of these consequences if he is unrepresented. On the other hand, if the state prisoner is represented in state post-conviction proceedings and afterwards as this proposal contemplates, the factual record built up in the state courts ought to be entirely adequate to sustain all legal theories appropriate in federal habeas proceedings. Under these assumptions, the presentation of unexhausted claims to a federal court is difficult to
excuse. This proposal exacts a price for such "afterthought" contentions, but it is one that seems fair in view of the representation in death penalty cases that this proposal seeks to encourage. Moreover, it would seem to be reasonable from the perspective of judicial administration.

Section (e) recognizes that there are certain issues that a state prisoner might not fairly be expected to raise within the context of the one year SL and it creates exceptions for each of them. The SL runs separately if any one of the exceptions is applicable; it runs from the time at which the disability is removed. The rationale behind these exceptions is self-evident.

In practice, however, the newly discovered evidence exception will probably be the source of most last ditch litigation efforts in capital cases. I see no way to avoid this. Bare allegations of this type are easy to make. Meritorious allegations are, of course, quite unusual. In principle, however, if there is previously unknown and unavailable evidence suggestive of a state capital prisoner's innocence, the federal courts should always remain open to consider it. This particular exception suggests the limit of the present proposal; it seeks to promote fairer and more efficient consideration of capital cases but it does not attempt to deal with the chaos frequently associated with last minute attempts to stay/executions.

Section (f) needs little elaboration beyond what I have said in previous memoranda. If a state wishes to qualify for the SL across-the-board, the program ought to compensate counsel and have controls that assure competency. Once a program is approved by the Court of Appeals, there will not be any further need for case-by-case review of the competency of individual attorneys before the SL could be invoked in a given case.
PROPOSED HABEAS CORPUS STATUTE OF LIMITATION PROVISION

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

"(d) In all capital cases involving a person in custody pursuant to a judgment of a state court, a one year period of limitation shall apply to the filing of an application for a writ of habeas corpus under this chapter. This period of limitation shall apply if either of the following conditions is satisfied:

"(1) the state prisoner was represented by counsel during all state post-conviction proceedings and for an aggregate period of at least a year following the completion of such proceedings;

"(2) the state, under the standards and procedures set forth in subsection (f), has a program that provides counsel for state prisoners under death sentence during all state and federal post-conviction proceedings and the state prisoner was in fact represented by counsel pursuant to such a program.

"(e) The one year period of limitation shall run from [the time at which state remedies are exhausted] [the date of the last dispositive order on the merits issued by a state court prior to the application for a writ of habeas corpus under this chapter]. It shall operate as a bar to all issues actually litigated on state direct appeal or during state post-conviction proceedings
and to those issues that might have been raised at either stage of review. The one year period shall run separately with respect to any issue or issues for which the exhaustion requirement could not have been satisfied because:

"(1) the state created an impediment to post-conviction review in violation of the Constitution or laws of the United States;

"(2) the federal right asserted has been newly recognized and could not have been asserted in any prior post-conviction proceeding; or

"(3) the factual basis of the claim or claims could not have been discovered through the exercise of reasonable diligence.

"(f) A state may qualify for the one year period of limitation if it establishes a comprehensive program providing for representation of capital defendants in state and federal post-conviction proceedings. To qualify, the capital representation program must receive the approval of a majority of the active judges of the United States Circuit Court of Appeals in which the state is situated. The Court of Appeals shall approve a program of capital representation if it provides adequate compensation and otherwise assures the availability of competent counsel for all capital defendants desirous of representation."
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Agenda -- April 21, 1989

1. Approval of Minutes

2. Reports from Committee Members
   a. Correspondence received, etc.
   b. ABA Committee -- Judge Sanders

3. Professor Pearson's Memorandum
   a. Brief Summary of Proposals -- Prof. Pearson
   b. Specific Provisions
      (i) Appointment of Counsel
      (ii) Statute of Limitations
      (iii) Exhaustion
      (iv) Limitation of Supreme Court Review

4. Prof. Pearson's Statistical Memos
   a. Rates of Reversal in Capital Cases

5. Future Plans
   a. Drafting of Proposal
   b. Public Comment.

6. Next Meeting
Professor Pearson's Report of April 10

As I read his 25 page report for the first time, I make the following comments as a memory refresher.

Right to Counsel (pp. 1-11)

Pearson noted at the outset that there are "serious [ethical] questions being raised about the tactics of defense lawyers, but their tactics are not before us. The availability of counsel "at the post conviction phase" is "perhaps the most pressing issue in the death penalty area."

The Supreme Court's decision in Murray v. Giarantano (from CA4) may shed some light, but will not resolve the basic problem of general availability beginning at the state post conviction phase.

Al emphasizes that "adequate legal representation" involves more than concern about fairness to persons facing execution. Lawyers are officers of the courts as well as advocates, and their handling of capital cases should also "be compatible with efficient administration of justice."

(p. 2-3).

As to the present situation, Al notes that 19 states now provide for the appointment of counsel in state post conviction proceedings." (n. 6, p. 4).

Also in 1988 Congress amended the Criminal Justice Act to authorize the "appointment and compensation of counsel in death penalty cases when they get to the system."
(p. 4) Also, as I have noted in my consideration of "resource centers" these now exist in 13 states, congressional funding is available. (p. 5)

Al's recommendation with respect to counsel commences on p. 7 of his memo:

(1) Counsel should be provided "on request". It is not clear to me when and to whom the request is to be made. Who will make the request? When Al speaks of "habeas corpus" I assume is talking about state as well as federal collateral review. He notes that "recent amendments to the Criminal Justice Act largely occur at the federal level. The serious gap in our system is the state level.

Al sees the following benefits from compelling the states to appoint counsel in every capital case upon completion of direct appeals: (a) would meet the criticism that enforcement of the death penalty is procedurally unfair; (b) where the defendant has counsel, the state's counsel (attorney general) can move "aggressively for the full development of all relevant legal issues" at this early stage, (c) availability of counsel would strengthen "the presumption of correctness of findings under §2254(d); and (d) the application of state procedural default rules in death cases can be made with greater force.

There would be an assurance of fairness from the outset that would justify a 'journey through the legal sys-
tem, and should settle the question "whether or not an execution can be carried out." (p. 8).

Al correctly notes that funding of his proposal will be a critical matter. Indeed, states already have been reluctant to pay counsel adequately even for trials and appeals in the state system. Also, counsel are reluctant to undertake defense of capital punishment cases.

Finally, Al notes that if the committee agrees with his counsel proposal, it probably would be necessary to address some of the details of implementation. What would be the mechanism for finding and appointing counsel at the state habeas phase of death penalty litigation? Should the specifics in this respect be left up to the states (as I think may well be necessary), or should we recommend the establishment of a joint federal/state entity? Also there will be a question as to the need for monitoring death penalty cases and how this could be done? Al would favor, if it were feasible, to centralize at the state level the appointment process. In most states, this is now handled on a de facto basis. (p. 11).

Statute of Limitation (pp. 11-16)

Al notes that several of the habeas corpus reform proposals submitted to Congress in recent years have included "statutes of limitations". But each of these has been included in a proposal to limit dramatically the scope of all federal habeas review in §2254 cases. Al states that he
knows of no congressional proposal that addresses only problems of judicial administration in death cases. He thinks the only situation in which a limitation makes sense is in death cases where the incentive to litigate is vastly different for death row inmates. It is rare—almost never—that the defendant is not guilty of murder. Thus, a death row defendant usually is "resigned to the fact of indefinite commitment as a minimum." The objective is to defer the death sentence.

The state's concern is "both starting and stopping" the post conviction review process. A statute of limitations in death row cases would perform double duty: "It would spur the death row inmate to initiate post conviction review and, in conjunction with doctrines of "bar and procedural default," would bring that review to a conclusion. At present, only the setting of an execution date motivates a death row inmate to pursue post conviction remedies." Apart from these advantages, a statute of limitations would minimize "the waste of time and judicial resources now devoted to seeking a stay of execution." (pp. 12-13).

Al explains how his limitations proposal would work:

(1) It should be linked to the appointment of competent counsel in both state and federal post conviction proceedings.
(2) The limitation period would "span the time period from the end of state direct appeal to the filing of §2254 petition in federal district court. There would be two steps that are not subject to a timely filing requirement: (i) the transition from direct appellate review to state habeas corpus review, and (ii) the jump from "state to federal habeas corpus proceedings." Al notes that "from the viewpoint of finality of state criminal convictions and judicial administration generally, these unregulated time gaps are hard to justify." (Hew, I do not understand Al’s description of how the statute of limitations would work in practice). (pp. 13-16) Perhaps if I reread it, it would become clearer.

(3) The statute of limitations "should be triggered by reference to either of two events, whichever occurs later: Whenever for state law purposes, the judgment of criminal conviction becomes final on direct appeal; or the date on which competent post conviction counsel is appointed. Al thinks his dual "triggering" event is unique in that it has never been proposed previously. It has the advantage of avoiding "slippery questions of state and federal law as to when a statute of limitations should begin to run because, in the end, the running of the statute would commence with the appointment of counsel." (I want to discuss this with Hew.)
(4) There must be certain "tolling" rules to assure fairness. These, in proposed statutes for habeas corpus reform, have included three exceptions: (i) newly discovered evidence; (ii) newly recognized constitutional rights (by the Supreme Court?); and (iii) for rights a prisoner was unable to assert due to the unconstitutional action of the state—e.g., a Brady violation." In addition, Al would add a rule tolling the limitations for any time prior to the filing of federal habeas when the death row inmate's case is pending before a court of competent jurisdiction. (I would like to see some examples). Al would prefer a two year, rather than a one year, limitations period.

Limit Supreme Court Jurisdiction (pp. 16-18).

State prisoners have a benefit not possessed by any other "class of litigants in the United States." They may petition for cert "a minimum of three times". (Hew, I do not understand this.)

The existence of multiple opportunities for Supreme Court review of state criminal convictions is an accident of history. There are strong reasons for change.

Al would defer Supreme Court review in death cases "until after all lower court review—state and federal—has been completed. (See also Al's note 24, p. 17).

Under current practice, Supreme Court review in death cases is like focusing on a "moving target", as the record can change at least twice more: (1) once in state
post conviction proceedings, and (2) again during federal habeas review.

Al's suggestion is that Supreme Court review in death cases should be deferred to the end of the process so that the Supreme Court could function as "the court of last resort on constitutional issues." Al's arguments in support of a single Supreme Court review are persuasive on their face. I need to give the suggestions more careful thought.

What changes in statutes would be necessary?

Automatic Stay of Execution (pp. 18-20).

There would be a mandatory stay of execution if there is a statute of limitations. Such a statute would be a substitute for the setting of an execution date. Al, who has served as counsel for capital defendants, makes the following interesting statement:

"All who are involved in death penalty litigation that stay of execution practice consumes an enormous amount of time and energy and is largely unnecessary - certainly during the first time through the post conviction review. Why not eliminate this feature of death penalty practice, and conserve scarce legal resources for an examination of the merits of each cases. An automatic stay of execution would serve this purpose."

Al states that if the committee favors this idea, three additional consideration should be addressed.

(i) What would trigger the automatic stay of execution; and (ii) what should be the duration of the stay; and (iii) finally should there be a basis for staying execu-
tions after the automatic stay of execution has expired. Al thinks that the "trigger for the automatic stay of execution and the statute of limitations should be an identical event.

**Exhaustion Requirement** (pp. 20-24)

The total exhaustion of *Rose v. Lundy* (455 U.S. 509 (1982)) can be an often is a source of delay in death penalty cases. The *Rose* doctrine should be modified. Counsel tend to change at various stages, often counsel with various skills and views as to issues and argument. New counsel during post conviction proceedings almost invariably asserts new issues.

If I understand Al correctly, states should be encouraged "to waive the exhaustion requirement." This already is now being done with greater frequency in death cases.

Al would go directly to the root of the problem. He would **not limit federal habeas corpus review in §2254 cases to those claims actually presented to the state courts for adjudicated.** In describing how his proposals with respect to exhaustion would work, he states that a death penalty litigant could raise the following issues in federal courts.

(1) All constitutional issues raised either at trial or on direct appeal; (2) any constitutional issue properly raised in a state post conviction proceedings; and (3) any constitutional issue newly raised in state post con-
viction proceedings that was not raised at trial or on direct appeal that probably should have been. A major example of an unreviewable issue would be the assistance of state habeas counsel." But see Al's note 31.

Certificate of Probable Cause (pp. 24-25)

This is a minor issue, but Al would limit the certificate of probably cause requirement to appeals from adverse federal District Court rulings in death cases - at least on the first federal habeas review. As I understand Al, he would prefer to eliminate the CPC.

Al's Conclusion (p. 25)

His conclusion add little or nothing beyond saying that his proposal would have to be "voluntary so far as state participation is concerned."

L.F.P., Jr.

Note to Hew:

As usual you anticipated a need when you said on Saturday that you would give me a summary of Al's proposals, including your opinion as to each of them.

It would have been helpful if Al had, in a conclusion, summarized the type of statute or statutes that he tentatively recommends. I suppose there would be major amendments to §2254, or a complete revision of it and possibly other sections. I suppose some thought should be given to the rule adopted under §2254 (e.g., Rule 9(b)). The
strength of Al's proposals, as I tentatively understand them is that they would provide a framework for voluntary action by the states.

L.F.P., Jr.
Ad Hoc Committee - Meeting of April 21

See my memo of April 17 that purports to summarize (to some extent) Pearson's 25-page report of April 10. This briefer memo is more sharply focused, identifying what Pearson believes is established or clear, and what specifically may be done.

Right to Counsel

The availability of competent counsel at the post conviction phases - state and federal - is the "most pressing issue" on the agenda in death cases.

Lawyers are "officers of the courts", and their representation in a death case not only should promote fairness for the client, but be compatible with "efficient administration of justice".

States are responding to the need for counsel. (See Pearson, p. 4). A new awareness of the need for counsel is indicated as 19 states now provide by law for the appointment of counsel. Two states leave the appointment to "judicial discretion", and a number of states provide for counsel where it is determined that the defendant has a meritorious claim(?), or where a hearing is required.

Perhaps the best evidence of awareness is the fact that Congress in 1988 amended the Criminal Justice Act to authorize the appointment and compensation of counsel when
cases reach the federal courts. (Ask: adequacy of compensation).

Thirteen states now have "Resource Centers" that receive federal and state funding for employment of counsel. Regardless of the outcome of Giarantano (CA4 held that the Constitution requires appointment by states of counsel), our committee should make recommendations. **Pearson’s Recommendation as to Counsel**

1. Counsel should be provided "on request without the necessity of first filing a habeas corpus petition (state or federal?) or whether there is a need for an evidentiary hearing, or a showing of probability of success on the merits." There is a need in state proceedings as the Criminal Justice Act largely accomplishes this at the federal level.

(See Al’s views as to the "several benefits from his proposal that counsel be provided for death row inmates in every case where request is made regardless of other considerations). See pp. 7 and 8 his memo.

If there is agreement on Al’s recommendation that counsel be appointed upon request, our committee probably would have to consider the mechanism (procedure) for finding and appointing counsel. I suppose the request would have to be made to the state attorney general or perhaps to the prosecuting attorney. The death row inmate must be advised of his or her right to counsel.
There also should be some notification procedure to assure continuity of representation—e.g., when a counsel resigns.

**Statute of Limitations**

Bills before Congress have included statutes of limitations in all habeas corpus cases, but Al says that it only makes sense to have a statute of limitations in death penalty cases. Congress has not focused on this. The incentives to litigate are far different for death row inmates. As long as things are quiet and no date for execution has been set they have no incentive to request counsel. A limitations period therefore is necessary.

A statute of limitations, according to Al, would perform double duty. It would spur the death row inmate (assuming he understands it) to initiate post conviction review, and in conjunction with doctrines of bar and procedural default bring that default to conclusion." (pp. 12, 13).

The question how a statute of limitations would work is addressed by Al (p. 13, et seq.). It should be linked to the appointment of competent counsel to represent the inmate in both federal and state post conviction proceedings. The limitation would span the time from the end of state direct appeal to the filing of a §2254 petition in federal court. This is not clear to me. I should ask Al on Friday.
Al says the statute of limitations "should be triggered by reference to one of two events whichever occurs later: (i) the judgment of criminal conviction becomes final on state direct appeal; or (ii) the date on which competent post conviction counsel is appointed. This is an identifiable date that rarely can be questioned. See p. 14.

Limit Supreme Court Jurisdiction

As I have noted in my first memo, Al says that state prisoners (not just capital prisoners) may petition the United States Supreme Court for cert a minimum of three times, namely: (i) when the state supreme court affirms the conviction and sentence, (ii) a second petition may be made to the Supreme Court when the state supreme court again affirms the conviction on state collateral review, and (iii) a third time at the end of the first federal habeas consideration of the case. I add here that these three petitions to the Supreme Court are not only permitted; they are commonplace.

Al also notes that Supreme Court review in death cases is similar to focusing "on a moving target". There can be changes in the record, resourceful counsel can think of new issues (including, as I know, frivolous ones, etc). Under Al's plan "once the Supreme Court has acted in a death penalty case without granting relief to a state prisoner it would be the end of federal intervention." Society would
have afforded the litigation competent counsel and a full and fair opportunity to litigate all constitutional issues.

L.F.P., Jr.

ss
Ad Hoc Committee - April 21 meeting

The following are questions that need clarification of Al Pearson's proposal.

1. Counsel is to be made available (at state and federal expense) when the state conviction becomes final. If counsel is offered, and no execution date has been set, why would the defendant want counsel? Possibly the answer is that an automatic stay of execution would come into effect and remain until the course of review had been completed.

2. The statute of limitations would commence to run when counsel is appointed and has agreed to serve. This could be an ambiguous "time". A more positive date must be established. For example, appointed counsel could be required to have his appointment, and willingness to serve noted of record in court. This would be a duty.

3. The automatic stay of execution would go into effect when counsel notes his appointment with the court that then has jurisdiction. The stay would remain until the final decision of the case. What happens when an appointed counsel quits?

4. The limitations statute would be tolled when the prisoner files for state habeas review, and remain during the state proceedings. At the conclusion thereof the
statute would resume running, and the prisoner would have to
file his federal petition within the remaining portion of
the limitations period. Identifying specifically these
dates will not be easy but not impossible.

5. On federal habeas, the prisoner could present
only the claims that were presented in state court. Would
these include claims presented but not acted on by the state
court? Presumably not. What about the exhaustion require­
ment?

6. At the end of federal review (DC and CA) — and
only then — could the prisoner file for cert with the
Supreme Court. There would be no need for certificates of
probable cause. If cert is denied, the "one trip through"
the system would end, and the prisoner could be executed in
the absence of a newly recognized constitutional right, new­
ly discovered evidence, or a Brady violation.

7. The statute of limitations would be tolled, I
suppose, when counsel retires or quits. There may be weeks
before a new counsel is appointed. These dates are likely
to be "fuzzy" unless counsel is required to file with the
appropriate court a formal resignation, and a court order
entered when new counsel reports for duty.

8. The Committee may suggest we do nothing until
Murry v. Giarantano is decided. If CA4 were affirmed, there
would be a constitutional right to counsel in state habeas
proceedings. The Pearson proposal would require substantial
modification. Even so, Al should not delay drafting a proposition statute until that case is decided. It may not come down until the final day of the Term is late June or early July.

9. A successive habeas petition would be allowed only for: (i) a newly recognized constitutional right; (ii) newly discovered evidence; and (iii) Brady violation. Under Teague v. Layne (Feb. 22) the Court at long last adopted Harlan's (and mine) approach to non-retroactivity in habeas cases. There therefore will be little "new law" applicable to habeas. But there are two exceptions.

The "newly discovered evidence exception" should be applicable only a colorable showing of innocence, as I would hold under Kuhlmann v. Wilson (Henry Friendly's view). Thus, absent such a showing there would be no exception for new evidence. This would usually apply also to Brady violations.

10. With respect to the present requirement of exhaustion of state remedies, Pearson's proposed review would be limited to claims actually presented to state courts for adjudication. [My earlier memo is incorrect on this point.] Hew notes that Al's proposal is an expansion of the rule in Engle v. Isaacs, 456 U.S. 107, 125-126, n. 28. In that case we held that federal habeas corpus courts may dismiss as procedurally barred an unexhausted claim if
it is clear that the claim would be procedurally barred in state court.

L.F.P., Jr.

ss
SUMMARY OF PROFESSOR PEARSON'S PROPOSAL

Prof. Pearson's proposal essentially would provide one counseled trip through the dual system of collateral review. It would work as follows: Once a conviction becomes final, a prisoner under capital sentence would be offered counsel to assist with state and federal habeas review pursuant to a (yet to be determined) system. Once counsel is appointed, a statute of limitations would begin to run as to all claims cognizable in federal habeas. At this time, an automatic stay of execution would come into effect and remain in place until the course of review had run. The prisoner would have one (or two) years under the statute within which to file in federal court. Time would stop running (statute would be tolled) when the prisoner filed for state habeas review, and the statute would remain tolled during state proceedings. When state proceedings concluded, the statute would pick up (presumably where it left off) and the prisoner would have to file his federal petition within the prescribed time or be time barred (subject to exceptions).

At the federal stage, the prisoner could present only those claims that were actually presented in state court; others (absent an exception) would be deemed waived/barred. Only at the end of federal review (including an appeal to the CA without need for a CPC) could the prisoner file for cert in the S. Ct. Once cert was denied, the "one trip
through" would be at an end, the automatic stay would lift, and the prisoner would be in the hands of the state system. Further federal review would be available only on one of three conditions: (1) newly recognized constitutional rights; (2) newly discovered evidence; or (3) prosecutorial misconduct that prevented earlier litigation of a claim (i.e., Brady violations). Only under one of these conditions could a federal court grant a stay and stop the execution.
TO: JUDICIAL CONFERENCE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS REVIEW OF CAPITAL SENTENCES
FROM: ALBERT M. PEARSON, REPORTER
RE: LEGISLATIVE RECOMMENDATIONS
DATE: NOVEMBER 21, 1988 (Received 11/24)

I. INTRODUCTION

Two principal topics are discussed in this memorandum: (1) areas where the development of some statistical or illustrative information might be helpful to justify legislative proposals coming from the Committee; and (2) habeas corpus reform measures that have been presented in Congress or advanced in other forums over the past two decades. In connection with the habeas corpus reform measures, I have noted the major arguments for and against each measure.

II. POTENTIAL NEEDS FOR EMPIRICAL DATA

A. Case Load Burden

One issue that the Committee will probably have to address at some point is whether the focus on death penalty cases is justified. When you look at total habeas corpus filings annually for the past two decades, it would be hard to say that such filings have contributed inordinately to the federal court workload. For example, total civil filings between 1966 and 1986 increased by 359%. 1 In contrast, total prisoner filings (federal and state) increased by 469%. 2 A closer look at total prisoner

1. The jump was from 70,906 to 254,828. Wilkes, Federal and State Postconviction Remedies and Relief, § 8.2 (1st ed. 1983)(1986 supplement).

2. The change was from 6,248 to 29,333. Id.
filings, however, puts an important perspective on these figures. The great bulk of this increase has been in prisoner civil rights actions, particularly section 1983 suits by state prisoners, and not because of a dramatic increase in section 2254 petitions. In fact, section 2254 petitions between 1966 and 1986 increased by only 169%, a rate which is considerably below the 359% increase experienced in total civil filings.

This review suggests—in my view strongly—that the Committee’s focus on capital cases is valid. For at least two reasons, they present the federal (and state) courts with unique fairness, procedural and administrative problems. One is that death row inmates have an incentive to exploit every opportunity to delay the processing of their cases and to relitigate issues which sharply differentiates them from inmates sentenced to a term of years. That point seems so intuitively obvious that a search for more documentation would be a waste of effort.

The second is that, as a sub-category of section 2254 filings, death penalty cases pose a greater burden on the federal courts than their actual numbers reflect. Some supporting information readily available such as: (1) data showing that the death row population is increasing more rapidly than the courts can process

3. The increase was from 5,339 section 2254 petitions in 1966 to 9,045 in 1986. By comparison, the jump in state prisoner section 1983 actions was from below 1,000 to more than 20,000 over the same time. Id.

4. This figure would still be 350% even if you excluded all prisoner filings from total civil filings.
these cases to a final disposition; and (2) according to the report of the Spangenburg Group issued in September, 1987, there is literally a flood—in comparison to what we have experienced thus far—of death penalty cases headed for the federal courts. The report stated that 174 death penalty cases were pending at the federal district court level and 97 before various circuit courts or on petition for certiorari. For fiscal year 1988, it predicted that 304 death penalty cases would be in a position to shift from state to federal court; for fiscal year 1989 the number predicted was 340. 5

Even though these figures suggest a crisis in the volume of work soon to face the federal courts in death penalty cases, we could attempt to get more detailed information about the actual judicial time devoted to an average death penalty case (if such a thing exists). For example, how many hours each year does a federal judge spend on all his or her duties? What percentage of this time would be consumed by a death penalty case? When sitting as a district judge? When sitting as a circuit judge—with opinion writing responsibility and without it? The question posed is not simply whether death penalty cases are too much work or too hard, but whether they consume so much time that the other business of the federal courts is unjustifiably put to one side. Information of this sort might be helpful in deciding whether death penalty cases should have special procedures making it possible

to handle them more efficiently without compromising fairness or
the scope of federal review.

A related question is the intensity of the pressure under
which federal (and state) judges often must work in death penalty
cases. Here I refer to the role that death warrants and stays of
execution presently play in moving a case through the federal and
state systems. Judge Sharp's statement of February 26, 1988
provides a graphic picture of the dynamics of this process.6

Do we need to delve into this more? For reasons mentioned
elsewhere in this memorandum, this information would support the
use of a statute of limitation as the mechanism for an orderly
transition of capital cases from state to federal court.

B. SOURCES OF DELAY

In this section, I try to identify reasons for delay in the
handling of capital habeas cases that are structural or doctrinal
in nature.

As a preliminary matter, some comment about the problem of
delay seems appropriate. One reason for delay in death penalty
cases is due to the fact of lower federal court review of state
criminal convictions. Unless the Committee wants to recommend
change in the substantive scope of federal habeas review, this
cause for delay is something that we have to be aware of but

6. Statement of the Honorable G. Kendell Sharp before the
Subcommittee on Government Information, Justice and Agriculture
of the House Committee on Government Operations.
Of the 101 executions in the United States since Furman, 90 were resisted legally by the prisoner. In states that have had 5 or more executions (Texas, Florida, Louisiana and Georgia), the average time from the date of the crime to the date of execution has ranged from 5 years 10 months in Louisiana to 9 years 10 months in Georgia. To the extent that any of this time is due to the necessity of a retrial whether on guilt-innocence or the imposition of the death penalty, the delay is a result of a substantive legal judgment about the fairness of the state criminal trial.

As you all know, the number of reversals in death penalty cases has been high—indeed far higher than in cases involving inmates sentenced to a term of years. Of course, not all of the reversals have occurred in federal court, but many, perhaps a considerable majority, have. To death penalty opponents, this pattern is a powerful proof of the need for federal collateral review of state criminal convictions, particularly in capital cases. Any delay in the imposition of the death penalty attributable to this, in their view, is legally and morally justified. I mention this only to emphasize the importance of questions about structure and administrative efficiency separate

7. According to a 1987 report of the NAACP Legal Defense and Education Fund quoted by the Los Angeles Times on March 23, 1988, 558 death sentences had been declared unconstitutional; there have been 1,209 reversals on other grounds. These figures were not broken down to reflect whether the decisions occurred in state or federal court.
from concerns that might appear to call into question the present scope of federal habeas corpus review of state convictions.

With this in mind, here is a list of sources of delay that arguably can be addressed under the rubric of administrative or procedural reform:

1. There are two phases of state and federal post-conviction review not subject to any time tables: (a) the step between direct appeal and the initiation of state post-conviction review; and (b) the step between the conclusion of state post-conviction proceedings and the initiation of federal habeas review. In death penalty cases, it is not unusual for legal proceedings to come to a halt after a ruling by the state supreme court on direct appeal. Typically, the setting of an execution date (or the threat to set one) serves as the stimulus to trigger further legal action on behalf of the inmate. At that point, post-conviction relief is initiated and a stay of execution is sought. This ad hoc process varies from state to state, however, and it inevitably leaves some cases in limbo. It also places a premium on crisis management skills. Plainly, this situation suggests the utility of a statute of limitation, actually two statutes of limitations, one federal and the other state. Except for Florida's two year statute of limitations, I know of no other precedent for this approach. Do we need to document this problem in a more detailed fashion? Yes

2. Another source of delay is the time (and judicial energy) expended in considering requests for stays of execution. In death penalty cases, why shouldn't the operating assumption be that no person will be executed until he or she has had at least one trip through the federal system pursuant to section 2254. If we can devise a way to move cases into federal court in a more timely and orderly manner, there would probably be no need for the practice of setting an execution date to force the prisoner to take his case to the next stage of review. In this vein, a statute of limitation, as I conceive it, would serve the function that the setting of an execution date (or its threat) now does. I don't know how much judicial time (or energy) this would save. Perhaps this is something we should try to document. But, it seems to me that any judicial time now devoted to considering requests for stays of execution during the first trip through post-conviction review—whether at the state or federal level—is entirely unnecessary.

3. Another means of saving time in the death penalty review process would be the elimination of multiple opportunities for Supreme Court review. Presently, a skilled advocate knows that in a death penalty case he or she can get at least three chances for Supreme Court review: (a) after state supreme court review on direct appeal; (b) after state supreme court review in the state habeas phase; and (c) after federal circuit court review in a section 2254 proceeding.

Why not shift the time for Supreme Court review to the end
of this process? Under this scheme, death penalty cases would have at least four stages of appellate or post-conviction review in the lower courts: (a) state direct appeal; (b) state post-conviction review (which would include trial level and appellate review); (c) federal district court review under section 2254; and (d) federal circuit court appellate review.

Defer Supreme Court review until the entire record has been developed in a death penalty case. Supreme Court review at this point would literally bring the case to an end and might enhance the sense of finality that ought to be associated with its actions. As it now stands, a petition for certiorari is a roll of the dice that costs nothing to try yet in every instance buys a capital defendant time which obviously is precious to him. But is the opportunity for multiple Supreme Court review essential to fairness in death penalty cases? I think not as long as we preserve the right to petition for certiorari when all lower court review---state and federal---is over.

Another advantage of modifying the certiorari rules in capital cases is that it would limit, perhaps end, the involvement of the Supreme Court Justices in reviewing applications for stays of execution. This responds to one of the Chief Justice's major concerns. It also is in line with my earlier point about devising a system which, as a matter of policy, does not contemplate the execution of a prisoner under death sentence until the completion of federal habeas review.

4. The total exhaustion requirement of Rose v. Lundy is
another source of delay in death penalty cases. Because of it, considerable time can be consumed sending a case back to the state system even on a single issue. Needless to say, an inmate under death sentence is not going to complain about this. Do the benefits of comity expressed in *Rose* outweigh the costs of delay at least in death penalty cases? Admittedly, the states have the option of waiving the total exhaustion rule, but should we pursue a legislative solution? A point to bear in mind here is that if the Committee ultimately recommends a system for the appointment of counsel in death penalty cases, concern about the effect of the total exhaustion rule will probably become moot.

5. Is there a need for review in section 2254 cases by the federal district courts? Shouldn't all post conviction evidentiary hearings and fact finding take place in the state system? If that can be achieved, wouldn't federal habeas review become tantamount to another stage of appellate review. District court involvement plainly can serve a screening function in death penalty cases, but its decision on the merits during an inmate's first trip through the federal system is never going to be final. Would there be a worthwhile time savings if the system were changed in death cases so that upon exhaustion of state remedies, an inmate took his case directly to the appropriate federal circuit court as an appeal? This idea was first raised by

9. Counsel will have responsibility for developing the record factually and legally in the state courts. If something is not raised there, a federal court would not necessarily have to view the omission as a problem of failure to exhaust. It would probably be handled as a procedural default question.
Professor Meador; in my opinion, it has a lot of potential.

III. PRINCIPAL LEGISLATIVE PROPOSALS: 1973-1988

Attached is a list of habeas corpus reform bills (Appendix 1-12) introduced in Congress from 1973 to 1988. Every important approach to habeas corpus reform is included in this group. My survey shows that 10 different versions of habeas corpus reform legislation have been since 1973. As you might expect, most of the recently proposed reform bills have picked up earlier proposals giving later proposals an omnibus quality. A summary of these bills follows; copies of selected bills are in the appendix.

1. HR 5217 (introduced August 11, 1988) with one notable exception is the prime example of omnibus legislation that has been presented in Congress at least 13 times since 1982. (A 12) It proposes these changes: (a) a codification of Wainwright v. Sykes; makes it applicable to both section 2254 and 2255 cases; (b) a three year statute of limitation triggered by the exhaustion of state remedies; this provision is linked to prisoner access to an approved state funded legal assistance program; the statute of limitation will not run if there is a state imposed impediment preventing a prisoner from filing a section 2254 petition; a newly recognized right is asserted; or a
claim is based on newly discovered evidence; 10 (c) an amendment to section 2253 requiring a certificate of probable cause from a circuit judge in order for a prisoner to appeal; applicable in both section 2254 and 2255 cases; (d) a modification of the section 2254 exhaustion requirement to permit denial of the writ even if a petitioner has not exhausted on all claims; (e) a strengthening and simplification of the presumption of correctness which attaches to state findings of fact; the burden is on petitioner to rebut this presumption by clear and convincing evidence; (f) a codification of Stone v. Powell across the board to all constitutional claims fully and fairly adjudicated in state court.

The three year statute of limitation in HR 5217 is unusual in two respects. First, it links the application of any statute of limitation to the provision of legal assistance at state expense. None of the other 12 omnibus proposals do this. The only other bill that has linked a statute of limitation to the provision of counsel was a proposal introduced by Congressman Rodino in 1974 (HR 14534). Second, all of the other omnibus proposals have a one year rather than three year statute of limitation.

2. HR 72 (introduced January 6, 1987) is illustrative of 6 bills that propose less sweeping habeas corpus reform than HR

10. In my judgment, the triggering mechanism used in all of the statute of limitation proposals needs to be reconsidered. Using exhaustion of state remedies as the trigger will produce confusion because exhaustion occurs on an issue by issue basis at different times throughout state review of a criminal conviction.
HR 5217. (A 21) Its provisions include: (a) an expansion of the federal magistrate's fact finding role in habeas cases; (b) a codification of Wainwright v. Sykes, but in slightly different language than that used in HR 5217; (c) a three year statute of limitation that is tolled only for newly recognized rights given retroactive application; and (d) a strengthening of the presumption of correctness afforded to state factfinding by simplifying and rewording section 2254(d).

3. S 211 (introduced January 6, 1987) is one of a kind. (A 25) It is limited to death penalty cases and would deny federal habeas corpus consideration of state death penalty cases unless the petitioner "makes a credible showing of innocence..." The restriction on access to federal court under section 2254 is tied to an adequate state system of direct appeal and post-conviction review. In other words, it is a bill that would codify Stone v. Powell, but only in death penalty cases.

4. HR 2613 (introduced May 23, 1985) is an odd bill that attempts to tighten the legal standards for determining whether a claim has been exhausted under section 2254. (A 28) Not very clearly drafted, this bill was introduced three different times by the same representative, Congressman Fiedler.

5. HR 2615 (introduced May 23, 1985) is a narrowly focused bill designed to prevent federal judges from granting bail to state prisoners while their section 2254 petitions are being considered. (A 30) I have been unaware that this was a problem. This bill was introduced twice by Congressman Fiedler.
6. HR 2614 (introduced May 23, 1985) would prevent a state prisoner from attacking a conviction based on a plea agreement. (A 31) Another proposal from Congressman Fiedler.

7. S 1817 (introduced September 25, 1979) is an example of six bills proposed between 1976 and 1979 that sought to reverse Stone v. Powell and to revive Fay v. Noia. (A 33)

8. S 567 (introduced January 26, 1973) is illustrative of five bills proposed in 1973 that: (a) amended section 2253 to require a circuit rather than district judge to issue the certificate of probable cause for appeal; (b) codified the procedural default principle now established under Wainwright v. Sykes and did so for both section 2254 and 2255 cases. (A 37)

9. HR 14534 (introduced May 1, 1974) proposes: (a) a clarification of the exhaustion requirement; and (b) gives a state prisoner 120 days after exhaustion of state remedies to file in federal court provided the state notifies the prisoner of the fact of exhaustion and offers him free legal assistance in deciding whether to apply for federal habeas corpus relief. (A 44)

10. HR 13918 (introduced April 2, 1974) would have required the federal to bear the costs of section 2254 litigation under certain circumstances. (A 49)

IV. CONCLUSION

Generally, the habeas corpus reform proposals have not been
tailored to address the special problems posed by death penalty cases. The most promising approach for the Committee would probably be to leave the substantive scope of federal habeas corpus review in death penalty cases as it now stands. The temptation to codify Wainwright v. Sykes should be resisted because such a proposal would trigger much more political resistance than it would be worth. Two other changes seem unobjectionable as reform measures—amending the certificate of probable cause provision of section 2253 and strengthening the presumption of correctness for state fact findings—but neither one would really be helpful in death penalty cases.

Two measures that would be helpful in death penalty cases are the statute of limitation proposal and the modification of the exhaustion doctrine to permit the denial of the writ in conjunction with unexhausted claims. The utility of both of these proposals would be enhanced by a mechanism providing for counsel in death penalty cases throughout the entire post conviction phase. Counsel would make the imposition of the death penalty in this country fairer in many respects. It would also make it possible for courts to ensure that death penalty cases move through the review process in a more structured and expeditious manner. The enforcement of procedural default rules and bars to successive petitions would be perceived as more just.

But, as beneficial as this might be, there is still a need to eliminate unnecessary steps in the death penalty review process: (a) all executions should be stayed automatically until
federal habeas review has been completed including the opportunity to file a certiorari petition to the Supreme Court; (b) each inmate under death sentence should be afforded a single chance to seek certiorari to the Supreme Court—after all lower court post conviction review; (c) subject to narrow exceptions, all fact finding in post conviction review should be handled in state court so that federal habeas review can bypass the district courts and go straight to the circuit courts.

I hope this effort is helpful and at the least provokes some lively discussion.
MEMORANDUM

TO: Justice Powell        April 20, 1989
FROM: Hew
RE: Reminder -- Habeas Developments

There have been some new developments in the habeas area since the last meeting. You will want to have these in mind. The first, obviously, is the new statutory provision giving counsel to death row inmates in federal habeas. The others are the Supreme Court cases described below.

1. Teague v. Lane, 109 S. Ct. 1060 (Feb. 22, 1989): This is the case in which a plurality (WHR, SOC, AS, AMK; BRW concurring in the judgment) of the Ct adopted Justice Harlan's approach to retroactivity. The Ct held that new constitutional rules will be available to prisoners whose case was still on direct review when the new decision was handed down. They would not be available to habeas petitioners. Further, the Ct will no longer recognize new constitutional rights in habeas cases, even for application to the petitioning prisoner. New rights will be recognized only on direct review. The Court recognized Justice Harlan's two exceptions to the rule against retroactive application of new rules on habeas: (1) where the new right places primary conduct completely beyond the reach of the criminal law; and (2) where "watershed" rules of fundamental fairness, "implicit in the concept of ordered liberty," are recognized (the Court's example of a watershed rule was recognition of the right to counsel, e.g., Gideon v. Wainwright).
2. **Harris v. Reed**, 109 S. Ct. 1038 (Feb. 22, 1989): This is the case in which the Ct, (8-0, AMK dissenting) held that the plain statement rule of *Michigan v. Long* applies on habeas as well as direct review. That is, absent a plain statement from a state habeas court that it relied on a procedural bar, a federal court could assume that the state court reached the merits of a constitutional claim, and therefore could review the merits without regard to any procedural bar. I note that the AMK dissent in this case is Miguel’s favorite opinion of those on which he worked with AMK.

3. **Castille v. Peoples**, 109 S. Ct. 1056 (Feb. 22, 1989): A minor 9-0 case, which held that a claim is not considered "exhausted" if the only presentation of the claim in state court occurred in a context where the state court would not hear the claim absent special and important reasons to do so. Specifically, the Ct held that use of Pennsylvania’s "allocatur" proceeding was not "fair presentation" of a claim for exhaustion purposes.

4. **Murray v. Giarratano** (now pending before the Ct): In this case the Ct is reviewing CA4’s holding that the constitutional requirement of "meaningful access" to the courts, see *Smith v. Bounds*, demands that Virginia provide individual counsel to all death row inmates. The case was argued in March. I have previously given you a more detailed memo on Giarratano.

R.H.P.
MEMORANDUM

TO: Justice Powell  
FROM: Hew  
RE: Ad Hoc Committee -- April 21 Meeting

April 20, 1989

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My main questions relate to how the statute will operate to end review after one trip through the system; the mechanism for forcing the prisoner to begin review is pretty straightforward. Pearson's memo seems to contemplate that the limitations period itself would operate to preclude successive petitions, presumably because any claims would be more than two years old at the end of the process, and thus time barred. Hence, he calls his three exceptions "tolling rules." Of course, statutes of limitations are not normally concerned with preventing successive litigation. This is the function normally performed by doctrines of res judicata, which do not apply in habeas. But however the rule is described, the key is that all claims that were or were not raised in the "one trip through" are barred unless they fall within an exception.
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Washington, DC 20544

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[LEWIS F. POWELL, JR.]
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AD HOC COMMITTEE ON FEDERAL HABEAS

Agenda -- April 21, 1989

1. Approval of Minutes

✓ 2. Reports from Committee Members
   a. Correspondence received, etc.
   b. ABA Committee -- Judge Sanders

✓ 3. Professor Pearson's Memorandum
   a. Brief Summary of Proposals -- Prof. Pearson
   b. Specific Provisions
      (i) Appointment of Counsel
      (ii) Statute of Limitations
      (iii) Exhaustion
      (iv) Limitation of Supreme Court Review

✓ 4. Prof. Pearson's Statistical Memos
   a. Rates of Reversal in Capital Cases

5. Future Plans
   a. Drafting of Proposal
   b. Public Comment.

6. Next Meeting
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[LEWIS F. POWELL, JR.]
Chairman
Ad Hoc Committee 4/21/89

ASA has moved up deadline for report.
ASA is considering:
- Next Meeting
  - June 23, 9:30
- Pearce to deliver no later than June 12

- Invitation list for hearings in massive.

Pearson Report

- Money questions whether counsel is problem.
- don't need to eliminate successives. What does Pearson Plan do that helps?

Benefits of Pearson Plan (List)
1) lower time
2) set time
3) no returns for exhaustion

19th - how about a filing at end of process at end of which = no further filing. Period.
Type of Information Needed

How many states? (Select CA 5 & 11?)

Total death sentences imposed at trial level (beginning 1978 under Gregg type statute)?

Total "removed" from death row (by reversal or otherwise) by State courts on direct appeal?

Total "removed" (by reversal or otherwise) by State (on or during) collateral review independently of any Fed Court action?

Total where relief was by or result of Fed SC action in habeas corpus proceedings?

Same information — Fed CA action

U.S. Sup Ct action
June 13, 1989

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 writing to confirm arrangements for the staff coverage by the Administrative Office of your committee's June 23 meeting.

As I believe we discussed in connection with the scheduling of this meeting, I shall be unable to attend because that day I will be attending the meeting of Judge Coffin's Judicial Conference Committee on the Judicial Branch in Portland, Maine. Judge Coffin's committee meeting has been on the schedule since January, and I believe that my presence is necessary in view of the critical issues that committee is now considering involving judicial compensation and treatment of senior judges, among other matters.

With your permission I would therefore like the Administrative Office to be represented at your June 23 meeting by Paul Summitt, our Deputy Legislative and Public Affairs Officer. Paul has been very interested in the work of your committee, particularly because he also provides staff assistance to the Judicial Conference Committee on Federal-State Jurisdiction which has clear interests in the habeas corpus area. Paul will be prepared to record the minutes of your meeting and to render any other assistance which you or the other committee members might require that is capable of being provided by the Administrative Office.

I am sorry not to be able to be with you on June 23, but I look forward to continuing to work with you and the committee until its assigned project comes to fruition. With kindest personal regards,

Sincerely,

William R. Burchill, Jr.
General Counsel

cc: Members of the Ad Hoc Committee
Professor Albert M. Pearson
MEMORANDUM TO THE AD HOC COMMITTEE ON HABEAS CORPUS
REVIEW OF CAPITAL SENTENCES

I am distributing herewith the minutes of our last meeting on April 21, as reviewed and approved by Justice Powell.

As I may have mentioned at our last meeting, I will be unable to attend the June 23 meeting because of a conflicting and preexisting commitment to meet with another Judicial Conference committee that day. Nevertheless I look forward to seeing all of you again in the near future at a subsequent meeting or meetings.

Attachment

cc: Professor Albert M. Pearson
The Ad Hoc Committee on Federal Habeas Corpus Review of Capital Sentences held its fourth meeting at the Supreme Court Building, Washington, on April 21, 1989. Justice Lewis F. Powell, Jr., presided, and all other 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 U. S. Courts.

Justice Powell first asked for the committee’s approval of the minutes of its last meeting, held on January 30, 1989. These minutes were unanimously approved without revision or further comment.

Noting the importance of tracking the work of the ABA Task Force on Death Penalty Habeas Corpus Reform, Justice Powell asked Judge Sanders to summarize the status of the Task Force. Judge Sanders responded that the Task Force is now considering 25 proposals, many of them paralleling the discussions of this committee. He categorized these proposals into the following issues agenda:

1. Right to counsel.
2. Procedural default.
3. Exhaustion.
4. Successive petitions.
5. Statutes of limitations.
6. Certificates of probable cause.
7. Expedited procedures of whatever kind.
8. Model time table of court proceedings.

Judge Sanders added that the Task Force has developed a hearing schedule culminating with an Atlanta hearing in August and with expedited reporting deadlines.
under which a Task Force report is expected to be approved in October or November. This report would then be submitted to the House of Delegates at its February 1990 session, in order to have a legislative proposal for submission to Congress as contemporaneously as possible with the timetable of the Ad Hoc Committee.

Justice Powell then called upon Professor Pearson to discuss the report on legislative reform proposals which he had submitted in advance of the meeting, noting that Mr. Pate had prepared and distributed a brief summary thereof for the committee's use. Professor Pearson summarized his objective as an attempt to structure changes that will motivate the defense bar while, at the same time, affording judges a basis to demand steps in the interest of efficiency. He observed that the time from the conclusion of state proceedings to the filing of the first Federal habeas petition has heretofore been unregulated, and he asserted the need for an incentive to counter the obvious motivation on the part of prison inmates facing capital sentences in favor of procedural delay and maintenance of a personal status quo.

Thus Professor Pearson explained that he proposes a statute of limitations as an external constraint to allow the judicial process to go forward and provide an expectancy of near-term finality. He urged that this limitations concept be linked to a mechanism for automatic appointment of counsel in order to avoid defaulting the rights of death-row inmates. He predicted that this sort of machinery would serve the same motivating purpose for inmates that the setting of an execution date at the state level now provides. In summary, Professor Pearson proposed an arrangement leaving it to the states to trigger this two-track mechanism leading to finality.

At this point Judge Roney inquired as to the source of procedural delay in capital cases. He stated his interpretation of the statistics provided by Professor Pearson as showing relatively little "down time" and questioned how a one-year statute of
limitations could eliminate "down time" in the range of five percent. Professor Pearson responded that such a statute would predictably eliminate successive petitions, move cases, and create an expectation of finality. Judge Roney then asked whether the proposed exceptions to a statute of limitations would not be virtually the same as those considerations of law that now permit successive petitions and further inquired how such a statute would move cases if the state were to decide not to appoint counsel. Professor Pearson noted that the latter question raises the issue whether the appointment of counsel should be mandatory or discretionary, which has clear financial implications for the state treasuries. In response to Justice Powell's query as to who would appoint counsel, Professor Pearson responded that such appointment should probably be made at the state level rather than at the county or local level. The committee also discussed whether there should automatically be new counsel appointed following direct appeal, especially where the ineffective assistance of counsel is being alleged.

Judge Roney observed that the Supreme Court has on its docket for decision this term whether there is a constitutional right to counsel in state habeas proceedings, and, if such a right is found, he questioned whether the Ad Hoc Committee would have any further purpose. Justice Powell stated that its proposals would undoubtedly have to be revised in that event but that the basic plan would presumably remain to confine inmates to one "trip" through the Federal judicial process, avoiding successive petitions. Judge Roney then renewed his inquiry as to how the proposed exceptions to a statute of limitations would differ from the present exceptions allowing successive petitions. Professor Pearson acknowledged that the exceptions foreseen amount largely to a statutory codification of present decisional law. He predicted that Congress will likely not adopt a statute without at least some specified exceptions but that these exceptions could be confined to a statistically insignificant number of cases.
Judge Sanders then advocated regularizing the system for appointment of counsel, thus avoiding the current problem of discontinuity of representation in collateral proceedings. He added that this would require the involvement of state governments and the expenditure of state funds. Justice Powell noted that the states may need an incentive to spend such money and cooperate in appointing counsel; the limitation of capital inmates to a single recourse to the Federal Judiciary might be such a motivator, in contrast to the current multiplicity of proceedings. Judge Roney conceded that this might speed the process but asserted that it will not solve the problem of staying execution. He raised the question whether states should be empowered to move to show cause why they should not execute prisoners, thus triggering the appointment of counsel for an inmate. He expressed understanding of the utility of a statute of limitations to avoid need for the first court-ordered stay of execution but questioned its efficacy thereafter. The committee then considered whether further Federal review from that point could practically be precluded; its consensus was that this would be highly doubtful of congressional enactment.

At this time Justice Powell suggested that a draft of the basic statutory changes necessary to effect the proposals under discussion would be useful in resolving the questions now being raised in the minds of committee members. Judge Sanders responded that in such draft the appointment of counsel should be assured unless waived by a petitioner. Professor Pearson said he awaited the committee's guidance as to whether the appointment mechanism should be mandatory. He noted that, as a practical political matter, this might require the Federal Government to subsidize state funding for the compensation of counsel. A discussion then took place as to the mechanics of required legislative drafting; it was suggested that the addition of a new section 2256 to
title 28, U. S. Code, might be more efficacious than to make the extensive amendments which would be necessary to embody the discussed concepts in 28 U.S.C. § 2254.

Justice Powell then raised the question whether there should be a "colorable claim of innocence" test as the basis for consideration of successive petitions. He added that the Supreme Court has never determined the validity of such a test. The discussion next turned to the appointment of counsel for successive petitions, and the committee's consensus was that there should be no such obligation on the Federal courts but that the present judicial discretion to so appoint counsel should be preserved in the interest of more ready congressional acceptance.

Judge Roney summarized his position by expressing hope that the committee would not limit its proposals to the framing of a statute of limitations. He reiterated the concern that successive petitions would not be effectively eliminated thereby. Professor Pearson responded that he sees the maintenance of some provision for successor petitions as a political necessity. He argued that creation of a free, counseled initial "trip" through the Federal courts would effectively eliminate successor petitions as a problem because there would only rarely be meritorious grounds therefor.

Judge Clark then alluded to his previous expression that the committee should consider procedural changes to the Rules Governing Section 2254 Cases in the United States District Courts and should not rely wholly upon the remedies of statutory amendment. He expressed concern about a possibly inadequate fact basis for committee action, suggesting the danger of undue reliance upon anecdotal information and impressions. Judge Clark further speculated that procedural delays may be occurring at the Federal level and cannot be ascribed wholly to the states. Judge Hodges countered that his impression is the Federal courts now handle such cases efficiently.
Noting apparent committee consensus on the essential approach to take, Justice Powell directed that the next step is for Professor Pearson's proposals to be embodied in statutory form. Judge Sanders expressed support for such an approach, but he added that the Judicial Conference will have to expend substantial political "capital" in support of such legislation and that Judge Clark's rulemaking emphasis is thus an attractive and tempting alternative.

Justice Powell next turned to a discussion of scheduling considerations. He stated that the Chief Justice's preference is for the committee to make its report to the September Judicial Conference this year but added that it remains uncertain whether this can be done and that much depends on the shape of the statutory amendments that Professor Pearson presents for committee review. Judge Clark then raised the need for a further statistical basis to support the committee's final recommendations. He advocated examining all 107 extant capital cases rather than being confined to the 44 such cases from the two states already examined. Judge Roney expressed objection to basing all statistical analysis upon executions and suggested a further look at defendants who escape "death row" through the judicial process. He observed that such an approach would help avoid any appearance that the committee is oriented toward expedition of the process without regard for the substantive rights of capital defendants. Judge Clark raised the additional issue whether the committee's draft legislation should include any recommendations on the method of appointing counsel. Justice Powell responded that, at a minimum, such revised statute should make clear the instrumentality responsible for appointment of counsel.

In conclusion Justice Powell inquired as to the committee's sentiments whether written comments should be invited from interested organizations either as to the committee's general charge or the specific proposals before it. He referred to the
previously expressed disposition against the conduct of public hearings. Justice Powell circulated a draft letter which he had prepared for possible dispatch to a list of relevant groups and associations with a declared interest and recognized expertise in the areas of committee jurisdiction. Judge Sanders supported the elicitation of such comments, saying that it would enhance the credibility of the committee's final product and improve its reception in Congress. After brief review of Justice Powell's draft, the committee agreed that it should be mailed but expedited the deadline for receipt of comments to June 1. Responsive comments are to be submitted to Mr. Burchill's office for transmission to the committee.

Finally Judge Roney posed the question whether the committee should also consider other areas of the ABA Task Force's agenda. He particularly raised the issue of precluding or limiting Supreme Court review of state habeas corpus proceedings. The committee's responsive discussion focused on whether such a proposal would be politically practicable and could be expected to survive congressional debate.

After consultation Justice Powell scheduled the next meeting of the Ad Hoc Committee for Friday, June 23, in the Supreme Court Building at 9:30 a.m. The committee then adjourned.

Respectfully submitted,

William R. Burchill, Jr.
Hon. Lewis F. Powell, Jr.
U.S. Ct of Appeals for the 4th Cir.
Tenth & Main Sts.
Richmond, VA 23219

RE: New Draft Habeas Statute

Dear Justice Powell:

Al Pearson's revised statute reached me this morning in Abingdon. My general reaction is very positive. In view of Al's changes, and the comments from Judges Clark, Hodges, and Sanders, I am hopeful that the Committee can find enough common ground next Thursday to move to a final draft in time for the Judicial Conference.

I have enclosed a memo with my comments on the major provisions of the new draft. I have made little or no comment on the parts of the statute that are unchanged. As to those I refer you to my earlier memo.

My Bar Exam study is going pretty well, but I am at a loss to understand Negotiable Instruments. I will do my best not to disgrace us.

Yours sincerely,

R. Hewitt Pate

P.S. Note that Al has mistakenly crossed out the comments to sections 2258 and 2259 of the draft. These comments are new, and you should read them even though they appear to be deleted material.

R.H.P.
MEMORANDUM

TO: Justice Powell
FROM: Hew
RE: Prof. Pearson’s 2d Draft Habeas Statute

July 21, 1989

I have reviewed the 2d draft statute sent by Prof. Pearson on July 20. The draft looks good, and hopefully there will be enough common ground for the Committee to move toward a final draft at the next meeting. I have the following specific comments:

1. Sec. 2256’s provisions for appointment of counsel are much simplified, in line with Judge Clark’s concerns about the intrusiveness of the procedures in the prior draft. Although it is important to avoid unnecessary intrusion, there may still be a need for some standards as to i) qualifications of counsel to be appointed, and ii) amount of compensation. Perhaps this could be accomplished with a minimum of complication and without disturbing state procedures by incorporating the standards applicable to federal habeas appointments under the new federal statute.

2. The new draft makes two alternative proposals in sec. 2256(c) to deal with the situation where a prisoner refuses an offer of appointed counsel. Both proposals are tied to the proposition that refusal of counsel must be made with “awareness and understanding” of the consequences. Some provision probably must be made for the situation, but the options in the draft seem likely to produce collateral litigation if prisoners later try to avoid the procedural bars or time
limits of the statute. Litigation might center on 2 points: 1) whether the prisoner had the capacity to understand the consequences, and ii) if he did, whether adequate procedures were followed to ensure that the waiver was actually made with "awareness and understanding." Assuming a provision of this type is needed, should it at least incorporate a waiver standard that is already familiar (e.g., "knowing and intelligent" as for Miranda waivers)? This would avoid development of a whole new jurisprudence of "awareness and understanding."

We may also need to give some thought to the relationship between this provision and situations where prisoners "oppose efforts" to stay their executions. The Court has granted a case involving this situation for next term.

3. Sec. 2256(d) provides that the state collateral counsel shall not be the same counsel who represented the prisoner at trial and on direct appeal. This was discussed at the last meeting and the rationale in Prof. Pearson's comments seems sound. As a practical matter, is new counsel on collateral review not already standard practice? Should the statute preclude counsel staying with the case, or is there any situation where this would be appropriate?

4. Sec. 2256(e) provides that the performance of collateral counsel cannot be the basis of a new round of litigation. This is a key provision if the system is to provide finality.

5. Sec. 2257 now provides that the federal dct that will have jurisdiction of the habeas petn is to issue the automatic stay. Prof. Pearson has clarified the provision concerning expiration of the stay. These changes look good.
6. Sec. 2257(b)(3) would cause the stay to expire if the prisoner waives his right to seek federal habeas. This new provision seems unnecessary and could cause problems in the event the prisoner changes his mind once a warrant issues. Again, there is the prospect of litigation over the adequacy of the waiver. Of course, the prisoner's right to seek habeas relief in federal court will expire when the limitations period runs in any event. There would be little harm in allowing the full limitations period even where a prisoner does not intend to seek relief, although there would be a strong appearance of pointless delay. Again, the rights of prisoners who "oppose efforts" and the standing of "next friend" petitioners who seek to halt executions may be relevant here.

7. Sec. 2258 includes clarifying changes but leaves the time requirements essentially unchanged. The period remains a generous 365 days, with tolling for cert petitions following direct review and for state collateral review, but not for cert petitions following state collateral review. The provision for tolling during state collateral review requires that "all state filing rules" be met. This seems unnecessary -- the state courts can enforce their own filing rules. The comment to this section notes that a prisoner might try to simultaneously file a cert petition following state review and a federal habeas petition. If this has ever happened in the past, we should find out what the federal court does, or is obligated to do.

R.H.P.
Ad Hoc Committee
(My summary)

Professor Pearson, with his letter of July 20, suggests a new Subchapter B. It's caption would simply be "Capital Cases: Special Procedures".

Section 2256. Prisoners in state custody subject to capital sentence; appointment of counsel; requirement of rule or statute; procedures for appointment.

There are three subsections. This subchapter applies only if a state complies with subsections (b) and (c) below.

(a) and (b). A state must provide, with respect to collateral proceedings, for the appointment, compensation and payment of expenses of competent counsel. Query: Do we need a standard, like the new federal standard for the qualifications of counsel?

(c) Professor Pearson's draft suggests alternative language with respect to the appointment and acceptance by the prisoner of counsel. Both alternatives seem complicated to me, particularly the provisions as to what happens if there is doubt whether the prisoner accepts the state's offer of counsel. The second alternative would require the state to "establish and promulgate procedures to formalize [the appointment]. These would provide (i) that the order appointing counsel note that the prisoner had accepted the offer of counsel or was incompetent to accept or
reject it; or (ii) in an order after hearing, note that the prisoner rejected the offer of counsel "with an awareness and understanding" of what he was doing. Hew Pate suggests that the "awareness and understanding" language could cause litigation. The familiar language: "knowingly and intelligently" (Miranda waiver) would be better.

Subsection (d) puzzles me. It would require - if I understand it - that the counsel appointed pursuant to the new statute could not be the lawyer who represented the prisoner at trial or on direct appeal. I suppose the idea is that the counsel on collateral appeal would be free to argue that trial counsel had been ineffective.

(e) As the new counsel could raise the effectiveness issue, this subsection would provide that the ineffectiveness of counsel could not thereafter "be a ground for granting relief is a proceeding under Section 2254".

There is no provision for the state to provide counsel for appeals to the Supreme Court where the capital defendant loses his collateral appeal in state court. At present, the appointment of counsel in this situation is done by a court of appeals.

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

(a) When counsel has been appointed as above provided a federal court, upon application, will issue an automatic stay.
(b) Any stay of execution shall expire if:

(i) counsel fails to file a federal habeas corpus petition within "the time period provided in [new] section 2258" (one year - 365 days)

(ii) The stay shall expire when (A) no petition has been filed for certiorari; (B) a cert petition was filed and the Supreme Court denied it; or (C) a cert petition was due to be filed, and the Supreme Court disposed of it in a way that left the capital sentence fully in effect.

(iii) The stay shall expire if the prisoner waives the right to pursue federal post-conviction review under Section 2254.

(c) No federal court [after exhaustion of the foregoing remedies or waiver thereof] shall have authority to enter a stay of execution or grant relief in a capital case unless:

(i) the alleged basis for the stay of execution had not previously been presented in the state or lower federal courts;

(ii) the facts in the application create doubt as to the guilt of the defendant; and

(iii) the failure to raise the claim is (A) the result of state action in violation of the Constitution or federal law; (B) a federal right newly recognized by the Supreme Court; (C) or new facts that could not have been discovered by due diligence have been ascertained.
My Comment: Although the foregoing seems unduly complicated, Al notes that these clarifying changes [that seem too detailed] were based on questions raised by committee members when we last met. He emphasizes in his comment the important point that an automatic stay takes effect when counsel is appointed. The purpose of the provisions of Section 2257 is to limit the authority of the federal courts to stay execution and grant relief after one fair trip through federal post-conviction review.

Section 2258. Filing of habeas corpus petition; time requirements; tolling rules.

This provides for a one-year statute of limitations within which a petition for federal habeas may be filed. The 365 days run from the filing in state court of the order prescribed in Section 2256(c). This is the order in which the state offers to provide counsel for an indigent state prisoner sentenced to die.

But the one-year period of limitation will be tolled:

(a) from the date of the filing of a petition for cert with the Supreme Court and until final disposition of the case when counsel for the prisoner has filed a petition for cert from the state supreme court following its affirmance of the capital sentence.
(b) The one-year limitation also will be tolled during any period in which the state prisoner has filed for post-conviction review. But the filing requirement shall not be tolled during the pendency of a petition for certiorari for the Supreme Court following state post-conviction review.

(c) This provides for a further tolling of sixty days when good cause is shown for additional delay.

Section 2252. Evidentiary Hearing: scope of federal review; district court adjudication.

(a) When the state prisoner files for federal habeas corpus relief, the district court shall:

(i) shall determine the sufficiency of the evidentiary record to consider the claims presented. Where there are "unexhausted claims", these shall not be considered unless the prisoner can show good cause and prejudice. See Wainwright v. Skyes.

(ii) When a state prisoner files for federal habeas, the district court also must consider any requests for a evidentiary hearing and conduct such a hearing when necessary to complete the record.

(b) When the record is satisfactory, the district court shall rule on the merits.
Section 2260. Certificate of probable cause inapplicable.

This is simply a provision to the effect that no longer is a certificate of probable cause required before a court of appeals may review a habeas corpus case.

* * *

My Comment: The foregoing changes, at least on their face, seem unduly complicated. Some also seem fairly obvious, and perhaps could be omitted. There is some merit to Chief Judge Clark's view that we should leave more decisions to the discretion of the state and federal courts. I nevertheless am inclined to agree with Hew that this may be a draft we could approve.

Our accompanying statement is quite important. It could well incorporate much of Judge Clark's draft, but should place greater emphasis on the overall fairness of the proposed changes in the law.

L.F.P., Jr.
CHAPTER 153. HABEAS CORPUS

Subchapter A. General Provisions [a proposed redesignation]
[sections 2241-2255 would not be changed.]

Subchapter B. Review-of Capital Cases Sentencing: Special Procedures [new]

Section 2256. Review-of-capital-sentencing-when Prisoners in state custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(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 the provisions of subsections (b) and (c) concerning the appointment of counsel are satisfied. No statute or rule of court in conflict-with-this-subchapter-shall-be-enforced-in-a-proceeding to-which-this-subchapter-is-applicable.

(b) To make the procedures assert-the-expedited-post-conviction-review-procedures-in-sections-2258-and-2259 of this subchapter applicable, a state must establish by rule of its highest court of last resort or by statute a mechanism for the
appointment, compensation and payment of reasonable litigation expenses of competent counsel in state of counsel to serve continuously, if feasible, through state and federal post-conviction proceedings in cases involving state prisoners under capital sentence. The rule of court or statute must provide satisfy-the-following-additional-conditions: for representation of indigent prisoners whose capital sentences have been upheld on direct appeal to the court of last resort in the state or whose convictions have otherwise become final for state law purposes.


2. Establish-criteria-based-on-integrity;-experience and-demonstrated-professional-competence-to-guide-the-recruitment and-selection-of-counsel-for-appointment;

3. Establish-and-fund-a-scheme-to-compensate-counsel for-their-services-and-to-reimburse-them-for-the-expenses-of
review;

(4)-Vest-the-authority-to-appoint-counsel-in-the-Chief
Justice-of-the-highest-court-of-the-state;-and-

(5)-Authorize-the-Chief-Justice-to-establish-an-office
and-to-appoint-such-personnel-as-deemed-necessary:-

{A)-to-assist
in-the-identification-of-qualified-counsel-who-would-be-willing
to-accept-appointment-to-represent-prisoners-under-capital
sentence-in-state-and-federal-post-conviction-review-proceedings
and-\(B\)-to-monitor-the-legal-representation-provided-to-the
prisoners-to-assure-that-all-filing-requirements-and-deadlines
are-met:

\((c)\) If the state adopts a mechanism for the appointment of
competent counsel as set forth

provider for counsel as set forth

See alternative
draft
of (c)
the
of p 5

If the state adopts a mechanism for the appointment of
competent counsel as provided in subsection (b), it shall offer to appoint
competent counsel to all indigent state prisoners under capital
sentence. If the prisoner accepts the offer of appointment, an
order appointing one or more counsel to represent the state
prisoner shall issue and be entered in the appropriate records of
the court of conviction. After proper notice of the offer to
appoint competent counsel, if the state prisoner refuses the
offer or does not respond to the offer within 30 days from
receiving it, the state shall take reasonable steps to ascertain
whether the prisoner's refusal of the offer of counsel or
failure to respond reflects an awareness and understanding of
the consequences. If the refusal of the offer of counsel or
failure to respond reflects an awareness and understanding of
the consequences, an order to that effect, after a hearing and a
factual showing by the state, shall issue and be entered in the
appropriate records of the court of conviction. If the refusal
of the offer of counsel or failure to respond is not based on an
awareness or understanding of the consequences and the prisoner
is incapable of such awareness and understanding, an order
appointing one or more competent counsel to represent the state
prisoner shall issue and be entered in the appropriate records of
the court of conviction.}
((c) If the state adopts a mechanism for the appointment of counsel as provided in subsection (b), it shall offer to appoint competent counsel to all indigent state prisoners under capital sentence. The state shall further establish and promulgate procedures to formalize this process which shall include the requirement that the court of conviction or some other designated court enter: (1) an order appointing one or more counsel to represent the prisoner and noting that the prisoner accepted the offer or was unable competently to decide whether to accept or reject the offer; or (2) an order, after any necessary hearing, noting that the prisoner rejected the offer of counsel and made the decision with an awareness and understanding of its legal consequences.)

to-the-person-or-persons-appointed-to-represent-the-prisoner
under-capital-sentence-and-advice-them-of-the-existence-of-this
subchapter-and-their-responsibilities-under-it.--In-addition,-he
shall-give-notice-of-the-appointment-order-to-the-following
persons-or-officials:

{(1)-the-Attorney-General-of-the-state;

(2)-the-trial-judge-who-presided-in-the-court-of
conviction;

(3)-the-clerk-of-the-court-in-the-court-of-conviction;

(4)-the-district-attorney-who-prosecuted-in-the-court
of-conviction;-and-

(5)-all-counsel-known-to-the-Chief-Justice-to-have
represented-the-prisoner-at-trial-or-on-direct-appeal.

(d) No person appointed pursuant to subsections (b) and (c)
to represent a state prisoner under capital sentence shall have
previously represented the prisoner at trial or on direct appeal
in the case for which the appointment is made.
The ineffectiveness or incompetence of counsel during state or federal post-conviction review in a capital case shall not be a ground for granting relief in a proceeding arising under 28 USC §2254.

COMMENT: This section establishes the scope of this legislative proposal. It is a scaled down version of the first draft. As in the first draft, it makes the subchapter's applicability depend on the existence of a state mechanism for the appointment of counsel in state post-conviction review. However, in this draft most of the details concerning the system for providing representation are left up to the state. One point bears emphasis: the proposal attempts to encourage the appointment of counsel for state post-conviction review. It does not obligate the states to fund certiorari petitions to the Supreme Court under any circumstances. This issue may become important if and when this proposal is debated down the line.

Presently, the only time a state prisoner under capital sentence would be entitled to counsel before the Supreme Court appears to be after a final order by one of the circuit courts of appeals. 21 USC §848(q)(8).

In subsection (c), I have proposed two alternatives. The procedures are designed to make clear when the subchapter is triggered. I am not happy with the language in either alternative. The wording of the second alternative is less cumbersome than the first. In any event, certainty in this regard is important to the integrity of this proposal. There needs to be a public record of (1) the appointment of counsel or (2) a finding that the prisoner refused the offer of counsel and did so competently. If a prisoner can't grasp the significance of his refusal to accept the offer of appointment, then subsection (c) would require the state seeking to make this subchapter applicable to go ahead and appoint counsel anyway.

Subsection (d) requires that state post-conviction counsel be different from a state prisoner's trial and appellate counsel. This insures a second look at the case and makes it possible for a legitimate inquiry into the competency of trial and appellate counsel to be undertaken.

Subsection (e), however, makes clear that the competency of counsel at the state and federal post-conviction phases is not a litigable issue at least when a petition is filed under section
2254. If a problem arises, the remedy should be the appointment of new counsel when a case reaches federal district court. 21 USC §848 (q). Whether previously unlitigated issues can be injected into the case at that juncture will depend on whether the requirements of section 2259 and/or Wainwright v. Sykes can be satisfied.

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

(a) Upon the filing in the court of conviction of an order issued running-from-the-effective-date-of-the order appointing counsel pursuant to section 2256(c), any order or warrant setting an execution date for a state prisoner under capital sentence shall be subject to automatic stay upon application to any federal court that would have jurisdiction over any proceeding filed pursuant to 28 USC §2254. The court that has jurisdiction over the subject matter must recite only that the state has invoked the post-conviction review procedures established by this subchapter and that the scheduled execution is subject to automatic stay.

(b) Any stay of execution granted pursuant to subsection (a) shall expire if:
(b) The stay-of-execution authorized by this section shall remain in effect throughout all stages of post-conviction review, including any time period during which a case is pending for consideration or disposition before the United States Supreme Court. It shall expire automatically if:

(1) Counsel for the state prisoner fails to file a habeas corpus petition in the proper federal district court within the time period provided in section 2258; or 365 days of the effective date of his appointment under section 2256.

(2) Upon completion of state and lower federal court post-conviction review: (A) the time for filing a petition for certiorari has expired and no petition was filed; (B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or (C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed;

(2) Upon completion of state and lower federal court post-conviction review, the Supreme Court has had the opportunity
to-consider-a-petition-for-certiorari-and-has-either-denied-the
petition-or, upon consideration of any questions on the merits,
has-disposed-of-the-case-in-a-manner-that-leaves-the-capital
sentence-undisturbed.

(3) Before a court of competent jurisdiction, in the
presence of counsel and after having been fully advised of the
consequences of his decision, a state prisoner under capital
sentence waives the right to pursue federal post-conviction
review pursuant to 28 USC §2254.

(c) No federal court thereafter shall have the authority to
enter a stay of execution or grant relief in a capital case unless:

(1) the basis for the stay and request for relief is a
claim not previously presented in the state or lower federal
courts;

(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.

COMMENT: This redraft incorporates clarifying changes based on comments and suggestions from Committee members. Subsection (a) makes an automatic stay of execution applicable when counsel is appointed or the offer of counsel is refused under section 2256(c). The application for stay, if necessary, must be filed in the federal district court that would have jurisdiction over the section 2254 petition. Subsection (b) similarly tries to clarify the scope of the stay of execution provisions. In subsection (b)(3), it should be noted that I included a provision authorizing the lifting of an automatic stay when a state prisoner under capital sentence waives his right to pursue review under section 2254. I don't want to invite unnecessary controversy by incorporating this provision into the draft but its rationale seems obvious.

Subsection (c) limits the authority of the federal courts to stay executions and grant relief after one trip through federal post-conviction review. The addition of the language referring to the granting of relief makes the authority of a federal court to stay executions upon the filing of a successive petition coextensive with the authority to grant substantive relief.
Section 2258. Filing of habeas corpus petitions; time requirements; tolling rules

Counsel appointed under section 2256 to represent a state prisoner under capital sentence must file the petition for habeas corpus in the appropriate federal district court within 365 days from the filing in the state court of conviction of an order issued pursuant to section 2256(c). The time requirements filing rule established by this section shall be tolled as follows:

(a) During the time period running from the date of the filing of a petition for certiorari in the Supreme Court until the date of final disposition of the case, if counsel for the state prisoner files a petition for certiorari following the affirmance of his capital sentence on direct appeal by the court of last resort of the state.

(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 jurisdiction; if all state filing rules are met in a timely manner, this period shall run continuously from the date that the state prisoner initially 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 case on appeal by the highest court of the state. The filing requirement established by this section is not tolled during the pendency of a petition for certiorari before the Supreme Court following state post-conviction review.

(c) During a period not to exceed 60 days, if counsel for the state prisoner: (1) 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 under 28 USC §2254 and (2) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 365 day period established by this section. The motion 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.

COMMENT:—The-first-paragraph-links-the-365-day-(or-other)
filing-requirement-to-the-entry-of-an-order-under-section-2256(c)
appointing-counsel-or-a-finding-that-the-offer-of-counsel-was
knowing-and-intelligently-refused—This-is-designed-to-eliminate
any-uncertainty-about-the-computation-of-time-under-this-section.

The-tolling-rules-permit-the-filing-of-a-petition-for
certiorari-after-a-conviction-and-capital-sentence-have-been
upheld-on-direct-appeal-and-also-permit-state-post-conviction
review.—In-essence,-365-days-is-allowed-for-case-preparation-in
advance-of-any-court-filings.—Assuming-new-counsel-come-into-the
case-after-affirmance-of-the-conviction-and-capital-sentence-on
direct-appeal, they would have a great deal of time to learn the
case, elect-to-petition-for-certiorari-if-that-step-seemed
desirable-and-still-have-plenty-of-time-to-initiate-state-post-
conviction-review-and-thereafter-move-into-federal-district-court
if-necessary.—The-time-requirement-under-this-statute-looks-like
a-statute-of-limitation-but-in-operation-it-would-have-enough
flexibility-so-that-no-state-prisoner-should-ever-be-subject-to
default-under-it.—It-serves-mainly-to-move-litigation-which-is
not-happening-now-in-the-absence-of-the-setting-of-execution
dates-in-specific-cases.

The-tolling-rules-do-not-apply-to-the-filing-of-certiorari
petitions-following-state-post-conviction-review.—Certiorari-at
this-stage-is-rarely-granted.—This-section-strongly-encourages
counsel-to-move-the-case-into-federal-court-even-if-there-might
be-time-to-file-a-certiorari-petition-and-get-Supreme-Court
action-within-the-365-day-period.—In-fact, nothing-in-this
section-precludes-filing-in-the-Supreme-Court-and-in-federal
district-court-simultaneously.—Under-this-subchapter, however,
counsel-who-file-certiorari-petitions-would-not-be-eligible-for
payment-by-the-state-since-the-funding-requirement-applies-only
to-state-post-conviction-review.

Section 2259. Evidentiary hearings; scope of federal review;
district court adjudication; transfer-to-court
of-appeals-for-adjudication

(a) Whenever a state prisoner under capital sentence files a
petition for habeas corpus relief under this chapter, the
district court shall:

(1) determine the sufficiency of the evidentiary record for the purposes of federal habeas corpus review based on the claims actually presented and litigated in the state courts. **Unclassified** claims shall not be considered except when the prisoner can show that the failure to raise or develop a claim 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-conviction review; and

(2) consider and rule upon any request for an evidentiary hearing and conduct any evidentiary hearing necessary to complete the record for the purpose of federal habeas corpus review.
(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits 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-properly preserved-and-presented-claims-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-where-that-request-was-denied-by-the-district court.}

Section 2260. Certificate of probable cause inapplicable

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

COMMENT: No changes from first draft. Judge Hodges suggested that the certificate of probable cause requirement be revived when successive petitions are filed under this subchapter. Given the restrictions on successive petitions in section 2257, I don't think many prisoners will have a chance of getting the stay of execution that they will need to litigate any appeals on the merits. On the other hand, if the requirements for a stay in section 2257 are satisfied as far as a court of appeals is concerned, that is tantamount to saying that probable cause for the appeal exists. The certificate of probable cause requirement would appear to be redundant in that situation.
July 25, 1989

Subject: Agenda for Talk With W.H.R.

The Chief Justice returns from France today (Monday), and I may talk to him tomorrow about the following:

The Ad Hoc Committee (draft of Professor Pearson July 20th, copy to be delivered to The Chief by Mike Levy Tuesday morning.

I should ask Mike also to give The Chief a copy of Charles Clark's letter and draft.

Also talk to The Chief about Dean Sullivan's letter of July 11, and give The Chief a copy.

L.F.P., Jr.
Ad Hoc Committee on Federal Habeas

July 27, 1989 General Agenda

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2. Report on ABA Committee
   a. Judge Sanders


5. Compare Drafts
   a. Much in common.

6. Committee must decide.
   a. Report to C.J. by Sept. 1st
   b. Accompanying Statement will be important

7. Next meeting?
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August 22, 1989

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 transmitting for your consideration my draft of minutes for our July 27 meeting of the Ad Hoc Committee on Habeas Corpus Review.

I shall await your direction as to sending these minutes to the other committee members. Since we do not have a further meeting scheduled, you may wish to invite them to submit any editorial changes or emendations by mail.

It has been both a privilege and a real pleasure to work with you and with the Ad Hoc Committee. I hope to see you at the Judicial Conference on September 20. If I may be of any further assistance in the meantime, please let me know. I should add that I am scheduled to be on vacation the first two weeks in September, returning to the office on Monday, September 18. With kindest regards,

Sincerely,

[Signature]

General Counsel

Enclosure
The Ad Hoc Committee on Federal Habeas Corpus Review of Capital Sentences held its sixth meeting at the Supreme Court Building, Washington, on July 27, 1989. Justice Lewis F. Powell, Jr., presided, and all other members of the committee were present. The Chief Justice visited with the committee briefly at the commencement of the meeting and expressed optimism at the prospect that the committee would shortly be ready to submit its report to the Judicial Conference. Also in attendance were Professor Albert Pearson of the University of Georgia Law School, reporter for the committee, Hewitt Pate, law clerk to Justice Powell, and William R. Burchill, Jr., General Counsel, Administrative Office of the U.S. Courts.

Justice Powell began by asking for the committee's approval of the minutes of its last meeting, held on June 23, 1989. These minutes were unanimously approved without revision or further comment.

Next Justice Powell asked Judge Sanders to relate any new developments regarding the ABA Task Force on Death Penalty Habeas Corpus since the committee's last meeting. Judge Sanders stated that no further meetings of the Task Force had occurred. He also referred to correspondence of the Task Force's reporter, speculating that its present consensus is there should be no priority for Federal habeas proceedings. Judge Sanders further related that other developments have been occurring through correspondence within the Task Force. In summary, the committee and Task Force are on largely parallel tracks with the recognition that the Task Force's charter is a broader one. The Task Force has expedited its time schedule with its next meeting to take place...
in Atlanta in late August, at which time there will be public hearings with a long witness list.

At this time Judge Clark distributed for the consideration of the committee his suggested draft of its final report. Justice Powell then called upon Professor Pearson to review the changes to his draft of proposed legislation that were agreed upon at the last meeting. Professor Pearson stated that the major change is to frame the obligations of the states so as to give them more latitude in invoking the procedures of new section 2256 of title 28. Another change which he enumerated had occurred in the definition of persons eligible for appointment as counsel: this reflected the expressed view that there is no need to mandate a change of counsel on appeal where all parties are satisfied to retain petitioner's original lawyer.

Judge Hodges inquired whether this draft legislation would apply only to indigent petitioners and questioned the desirability of erecting a possible double standard between indigents and others. Professor Pearson responded that states would wish to be able to invoke this subchapter by making the requisite offer of counsel to all defendants under capital sentence, although there would be no need to appoint counsel for those defendants who have funds. As a practical matter, he noted, virtually all capital defendants have been indigent, but some of them have volunteer counsel. In summary, the offer of counsel is envisioned as a mechanism to trigger the procedures of the new subchapter, although it is recognized that some defendants may not qualify to avail themselves of this offer.

Judge Hodges then asked if the proposed statute should explicitly declare whether non-indigent defendants will come within its time limitations. Professor Pearson thought that this was an open question, while Judge Clark suggested that the present draft already provides the answer. After further discussion Professor Pearson recommended
requiring the states to offer counsel to all state capital prisoners, subject to their meeting the qualification of indigency. Judge Sanders voiced his preference to handle this problem through a change to proposed section 2258. Additional discussion then occurred on the question whether the mere offer of counsel by the state would constitute a sufficient triggering mechanism. Ultimately Judge Clark suggested a change of language as shown on page five of the edited statutory draft that had been distributed. This proposal received general agreement.

Further discussion then took place on proposed section 2256(d) and its provision to permit counsel to continue on appeal where all parties so desire. An agreed change was made to section 2256(e) to refer to state or federal collateral post-conviction proceedings. Judge Hodges noted that section 2256(e) nowhere places a time frame on the appointment of counsel and raised the question whether this should be done. Professor Pearson responded that a clear incentive for the states is being created and that it should then be left to them. Judge Clark predicted that the mechanism would work equitably and uniformly in its present form. Justice Powell agreed, but Judge Roney expressed concern that there will be no contribution to the process unless states voluntarily see fit to take advantage of this device.

Judge Sanders observed that under this draft the state would decide the issue of counsel's competence and that this question would then be forever foreclosed. Professor Pearson agreed that this is a fair interpretation of the draft. Then Judge Hodges pointed out that the statute as proposed would not permit federal litigation of unexhausted state claims. He added that this principle would apply if the issue of trial counsel's competence were not raised at the state level. Judge Hodges expressed the view that this does not present a problem because the statute would require the appointment of competent counsel, although admittedly this is a subjective determination.
Professor Pearson then summarized the proposed changes to be made to section 2255 of the draft legislation:

- add a third option to paragraph (c) where there is an adjudication of non-indigency;
- in paragraph (d) authorize the continuation of representation by trial or appellate counsel if the defendant so requests, counsel agrees, and this arrangement is approved by the court after hearing;
- the clarification suggested by Judge Hodges to paragraph (e), adding "collateral" and substituting "proceedings."

Discussion then continued on the issue of competency of counsel. Several members observed as to the difficulty or impossibility of defining "competency" with Judge Sanders expressing concern that the statutory draft before the committee would implicitly define it by lessening the ability to raise it as an issue. Judge Roney raised the question whether the standard for legal competence in the post-conviction context is properly a federal or state issue, and Judge Sanders questioned whether the discrepancy among federal judicial districts as to what constitutes competent representation can be alleviated.

At this point Justice Powell posed the question whether the committee should add to subsection (e) a federal standard of competence. Judge Roney responded that the issue is not truly competence but effectiveness in a given case. Judge Sanders speculated as to the effect of removing subsection (e); Judge Clark responded that its retention will not pose a problem if defendants have the right to litigate whether this system applies to them or not. Judge Hodges then suggested removing the "competent" modifier from subsection (c), and the committee agreed to this approach. Professor Pearson noted that this change is consistent with the purpose to eliminate case-by-case
adjudication of attorney competence and define this standard instead on a statewide basis.

Justice Powell then moved the discussion to proposed section 2257. Professor Pearson summarized the changes incorporated as a result of discussion at the last meeting. At the suggestion of Judge Hodges it was agreed to add to section 2257(b)(2) explicit language requiring the petition to have been denied, on the basis that it would be desirable to state this clear assumption. Other minor changes as shown in the revised text were agreed to. Judge Roney noted in summary that in the situation of successive petitions the approach of this draft would be to remove as an issue the correctness of the death penalty and focus solely on the issue of the defendant's guilt. There was general agreement with this analysis.

The discussion then shifted to proposed section 2258. Judge Sanders expressed satisfaction that the new version is more understandable, but he raised the question of the tacking of time periods. After discussion there was general agreement that the use of the word "toll" is sufficient to evidence the intent for tacking. It was observed that a change had been made in the lead-in to this section to clarify that its requirements apply to all capital defendants, including those who do not qualify financially for appointed counsel.

Justice Powell raised the fundamental question whether the proposed stay of execution pending the filing of a habeas corpus petition should remain 365 days, as proposed. Judge Hodges responded that he would support a revision to 180 days, but Judge Sanders questioned whether such a reduction would create political difficulties for the committee's recommendations and misperceptions thereof by Congress. After additional discussion the committee agreed to recommend only a 180-day period but with
the recognition that this will be a pivotal issue before the Judicial Conference in its review of the committee's report.

Discussion then occurred on proposed section 2259 with particular reference to the question whether the court must rule on all habeas claims if relief is granted as to one of them. There was the general consensus that courts should rule comprehensively on all claims. It was agreed that the proposed language on page 16 of the draft required no change but that this statement of the committee's philosophical view would be made explicit in the commentary.

Next the committee considered proposed section 2260 with respect to the inapplicability of the certificate of probable cause requirement for capital habeas petitions. Judge Clark recommended omitting this section on the premise that maintaining the requirement could save a small amount of time. Judge Roney suggested that there is an inconsistency in applying the certificate requirement only to some categories of habeas cases. Justice Powell then proposed omitting section 2260 from the committee's recommended statutory draft. Judge Clark agreed, but after further discussion it was decided to retain this section with the addition of language qualifying it so as not to cover second or successive petitions.

Justice Powell directed Professor Pearson to effect the added changes to the statutory language agreed upon by the committee today and then to consider Judge Clark's suggested language for a committee report. He expressed the intention to meet the required time schedule to bring the report before the Judicial Conference on September 20. Judge Clark noted that this goal could be met if the report reaches the Executive Committee of the Conference in time for its scheduled meeting on August 24 to finalize the Conference agenda. It was agreed that Professor Pearson would distribute
the amended statutory language by mail on August 7 and then proceed to finalize the report. It was further agreed that no additional meeting of the committee appeared necessary.

In conclusion Judge Roney inquired whether the committee had now concluded all of the business that the Chief Justice had assigned it. Judge Hodges raised the question whether conforming changes would be necessary in the rules under 28 U.S.C. § 2254, but Professor Pearson responded that he had considered this need and found no changes required. Judge Sanders asked whether any further comment should now be invited on the committee's proposed work product. Justice Powell answered that scrutiny by the Judicial Conference would be sufficient, and this became the consensus of the committee. The committee then adjourned with no further meeting plans.

Respectfully submitted,

William R. Burchill, Jr.