1989

Habeas Corpus Committee - Testimony by Others

Lewis F. Powell Jr.

Judge Clark's
Draft - 7/27/89

Committee Report

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

In 1972, Furman v. Georgia allowed states to impose the death penalty based on guided jury discretion. In Gregg v.

Georgia (1976), the Court approved the new Georgia statute that provides standards to guide the judge and jury in capital cases. Other states imposing the death penalty have adopted similar statutes. Since 1972, there have been 101 contested executions. The shortest of these judicial proceedings required 2 years and 9 months to complete. The longest covered a period of 14 years and 6 months. The length of the average proceeding was 8 years and 2 months. Every trial and direct review procedure in these 101 cases was subjected to collateral challenge in federal court.

The committee found that the collateral review process is frequently erratic and repetitious. It is always over-long. The long separation of sentence and execution hampers justice without improving the quality of adjudication. It is routine for federal courts to stay state court execution orders, at least during the initial habeas corpus proceedings. Last-minute constitutional claims very often follow years of collateral attacks. Such last-minute claims frustrate orderly judicial consideration of issues

and denigrate federalism.

Most states do not offer indigent prisoners the assistance of counsel after direct review. Prisoners acting pro se rarely present promptly or properly exhaust their constitutional challenges in the state forum. This results in delayed or ineffective federal collateral procedures. Other factors also contribute to the present process of difficult and unsatisfactory collateral adjudication. Prominent among them is the fact that the Supreme Court has handed down 71 decisions affecting various phases of death penalty litigation since Furman. Until the recent decision in Teague limited the effect of new precedent on long pending litigation, a number of these decisions created new rules that spawned relitigation of settled collateral issues and the pending of such cases delayed the process of adjudication.

How many since Gregg?

Capital litigation must be improved if the death penalty remains a constitutional form of punishment for felony murder. The committee proposes legislation we think will expedite and assure fairness in federal collateral proceedings. The

Committee's analysis of cases from Alabama, Florida, Georgia, Mississippi, and Texas shows that 80% of the time spent in collateral litigation in death penalty cases occurs ~~outside of~~ in federal courts in habeas corpus ~~state collateral~~ proceedings. A table showing the average time periods and ratios in death penalty cases in these states is attached to this report. Underlying data is available from the Reporter.

No single reason for this disproportionately high federal percentage can be identified. The ~~recommended~~ we recommend legislation is designed to achieve a single state proceeding that exhausts all issues and, if necessary, is followed by a single federal habeas corpus action. To accomplish this goal, ~~we are convinced that~~ the petitioner must be represented in state post-conviction review by competent counsel who stays with the collateral proceedings through any federal court habeas corpus litigation. This goal can best be achieved with the initiative and cooperation of the 37 states that authorize imposition of the death penalty. We would hope that those governments would also

take steps to make their trial and direct review process in death penalty cases as error-free as possible. The states should provide competent counsel promptly to indigent petitioners for state collateral review. If these steps are taken, federal collateral review proceedings also would be expedited. The single, well-counseled series of collateral proceedings we envision would best ensure that every proper issue is raised and decided in an orderly way.

The legislation we propose to effectuate the one prompt, counseled state/federal post-conviction process provides that when counsel is appointed by a state for collateral review, a statute of limitations would begin to run as to all claims cognizable in federal habeas. At this time, an automatic stay of execution, if needed, could be obtained. This stay would remain in place until all collateral proceedings were completed. The prisoner would have six months following the end of state collateral review within which to file in federal court. This limitation would assure that the presentation of issues will not

be delayed. Time would be tolled during such state proceedings. When state proceedings conclude, the running of time would recommence and any federal petition would have to be filed within the time period provided or be time-barred unless petitioner could show a basis for relief that had not been presented, that a substantial question of guilt existed, that new and pertinent facts had been found, or that new fundamental rights had been developed. Since 28 U.S.C. §§ 1657 and 2243 already require all federal habeas corpus proceedings to be expedited and decided "forthwith" and "summarily," no additional legislation requiring priorities for the handling of federal habeas corpus proceedings is needed. We do suggest that district and courts of appeal expedite consideration of capital cases.

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

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

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

*Time when no proceedings are pending in any court.

August 11, 1989
(Hew's draft as revised
by L.F.P., Jr.)

Proposed Committee Report

I. Introduction

Studies of public opinion establish that an overwhelming majority of our citizens favors the death penalty for certain murders. And the Supreme Court has made clear that the evolving standards of decency embodied in the Eighth Amendment permit imposition of this punishment for some offenders. Of course, both the Court and society have recognized that, because it is irreversible, death is a unique punishment. This realization demands safeguards to ensure that capital punishment is administered with the utmost reliability and fairness.

But our present system of multi-layered state and federal appeal and collateral review has led to repetitious litigation and years of delay between sentencing and execution. The resulting lack

of finality frustrates the laws of thirty-seven states and undermines public confidence in our criminal justice system.[1] And the delay inherent in the present system brings little benefit in terms of reliability in sentencing or fair and orderly review of constitutional claims. Prisoners often cannot obtain qualified counsel until execution is imminent. The resulting last-minute rushed litigation disserves inmates, and saps the resources of our judiciary.

To address these problems, Chief Justice William H. Rehnquist formed this committee on _____, 1988. His charge to us was to inquire into "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases in which the prisoner had or had been offered counsel. The Chief Justice appointed as members of this Committee Chief Judge Clark of the Fifth Circuit, Chief Judge Roney of the Eleventh Circuit, District Court Judge Hodges of Florida and

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[1]Federal criminal statutes also authorize capital punishment. See, e.g., 49 USCA § 14-7(i)(B)(aircraft piracy).

Judge Barefoot Sanders of Texas. The states in the Fifth and Eleventh Circuits have by far the greatest numbers of prisoners subject to capital sentences, and each of these judges has had extensive experience with federal review of capital cases. The chairman of the committee, retired Associate Justice Lewis F. Powell, Jr., served as Circuit Justice for the Eleventh Circuit while sitting on the Supreme Court. Professor Albert M. Pearson of the University of Georgia, with experience in capital cases, was the Reporter for the Committee. William R. Burchill, Jr., General Counsel of the Administrative Office, served as Secretary.

The committee met six times and considered with care the problems associated with collateral review of capital sentences. We invited written comments from a broad spectrum of interested parties and organizations, and received a number of helpful presentations. These included the views of state and federal prosecutors, groups urging abolition of the death penalty, state executives and legislators, and criminal defense and public

defender organizations. The responses contributed to our findings, which follow and to the formulation of the legislation we propose.

II. Findings

A. Delay and Repetition

The committee identified serious problems with the present system of collateral review. The most general of these is that the dual system of state and federal collateral review engenders repetitious litigation and excessive delay. Few would argue that the current state of death penalty administration is satisfactory. There are now 2,160(?) convicted murderers on death row awaiting execution. Yet since the Supreme Court's 1972 Furman decision only 112(?) executions have taken place. The shortest of these judicial proceedings required two years and nine months to complete. The longest covered a period of 14 years and six months. The length of the average proceeding was eight years and two months.

The committee's analysis of cases from Alabama, Florida, Georgia, Mississippi, and Texas shows that 80% of the time spent in collateral litigation in death penalty cases occurs outside of state collateral proceedings. A table showing the average time periods and ratios in death penalty cases in these states is attached to this report.

The relatively small number of executions, as well as the delay in cases where an execution has occurred, makes clear that the present system of collateral review operates to frustrate the law of 37 states. The collateral review process tends to be erratic and frequently is repetitious. The long separation of sentence and execution hampers justice without improving the quality of adjudication.[2] Because res judicata is inapplicable to federal habeas proceedings, many capital litigants return to federal court

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[2]Contrary to what may be assumed, the Constitution does not provide for federal habeas corpus review of state court decisions. The present system has evolved from the statute enacted by Congress in 1867. Now 28 U.S.C. § 2254.

with second - or even third and fourth - petitions for relief. Current rules governing abuse of the writ and successive petitions have not served to prevent this repetitive and usually meritless, litigation. This committee believes that any serious reform proposal must address the problems of delay and repetitive litigation.

B. The Need for Counsel

A second serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review. As the Supreme Court recently reaffirmed in Murray v. Giarrantano, provision of counsel for criminal defendants is constitutionally required only for trial and direct appellate review. Because the focus of review in capital cases often shifts to collateral review, the lack of adequate counsel creates severe problems.

Capital inmates almost uniformly are indigent, and often illiterate or uneducated. Capital habeas litigation may be difficult and complex. Prisoners acting pro se rarely present promptly or properly exhaust their constitutional challenges in the state forum. This results in delayed or ineffective federal collateral procedures. The end result is often appointment of qualified counsel only when an execution is imminent. But at this stage, serious constitutional claims may have been waived. The belated entry of a lawyer, under severe time pressure, does little to ensure fairness. In sum, the committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.

But see p 8 Repetitive

C. Last Minute Litigation

Another disturbing aspect of the current system is that litigation of constitutional claims often comes only when prompted by the setting of an execution date. Judicial resources are expended as the prisoner must seek a stay of execution in order to present his claims. Justice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending execution. In some cases last minute habeas corpus petitions have resulted from the unavailability of counsel at any earlier time. But in some cases attorneys appear to have intentionally delayed filing until time pressures were severe. In most cases, successive petitions are meritless, and we believe many are filed at the eleventh hour seeking nothing more than delay.

The foregoing types of abuses have no place in a rational system of justice. In the committee's view, competent counsel should be required. Of course, the merits of capital cases should be reviewed carefully and deliberately, and not under time

pressure. This should be true both during state and federal collateral review. But once this review has occurred, absent extraordinary circumstances there should be no further last minute litigation.

III. The Committee Proposal

In response to the problems described above, the committee proposes new statutory procedures for federal habeas corpus review of capital sentences where competent counsel has been provided. Separate procedures for capital cases are appropriate in light of the problems of capital litigation. The incentives facing the capital litigant are unique. Prisoners serving an ordinary term of years have every incentive to bring their claims to resolution as soon as possible in order to gain relief. Also they are serving their sentences. In contrast, the inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out. Such an inmate is avoiding the punishment prescribed by the law of the state.

The committee's proposal is aimed at achieving this goal: Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end.

The specific operation of our proposed legislation[3] is described in notes following each statutory section. Some general comments are appropriate here. The proposal allows a state to bring capital litigation by its prisoners within the new statute that provides competent counsel for inmates on state collateral review. Participation in the proposal is thus optional with the states. Because it is optional, the proposal should cause minimal intrusion on state prerogatives. But for states that are concerned with delay

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[3]Our proposal would add a new Subchapter B dealing with Capital Cases. Sections 2241-2255 of Subchapter A will not be changed. We refer to these changes simply as a proposed "statute" or as a "proposal".

in capital litigation, it is hoped that the procedural mechanisms we recommend will provide an incentive to provide the counsel that are needed for fairness.

The statute provides for a 180 day limitations period within which the federal habeas petition must be filed. THe limitations period begins to run only on the appointment of counsel for the prisoner, or a refusal of the offer of counsel. The limitations period also is tolled during the pendency of all state court proceedings. In view of the provision for counsel, the tolling provisions, and the fact that the exhaustion requirement mandates that the prisoner's federal petition present the same claims contained in the state petition, the six-month period provides adequate time for the development and presentation of claims. Importantly, the statute provides for an automatic stay of execution which is to remain in place until federal habeas proceedings are completed, or until the prisoner has failed to file a petition within the allotted time.

Federal habeas proceedings under the proposal will encompass only claims that have been exhausted in state court. With the counsel provided by the statute, there should be no excuse for failure to raise claims in state court. The statute allows for exceptions in extraordinary cases on the basis of new law or newly discovered facts. In the event the entire counseled state and federal collateral process concludes without relief being granted, the statute includes new mechanisms to promote finality. Subsequent and successive federal habeas petitions can no longer be the basis of a stay of execution absent a colorable showing of factual innocence. Relief will still be available in extraordinary cases on the basis of new law or newly discovered facts.

IV. Conclusion

The fundamental requirement of a criminal justice system is fairness. In habeas corpus proceedings fairness requires that a defendant be provided a searching and impartial examination of his claims. Fairness also requires that, if a defendant's claims,

after such examination, are found to be devoid of merit, society is rightfully entitled to have the penalty prescribed by law carried out without unreasonable delay.

Every capital defendant is now entitled to competent counsel at state trial and in federal habeas corpus proceedings. The Committee's proposal will fill a gap which now exists by providing competent counsel also in state habeas or collateral proceedings. The proposal also assures that, upon completion of state proceedings, a defendant will have one opportunity to have his claims reviewed carefully by the federal courts. Thereafter, if no infirmity in the conviction has been found, judicial proceedings will be at an end, absent exceptional new developments.

The Committee believes that its proposal will go far to rectify the current chaos in capital litigation--periodic inactivity and last minute frenzied activity, scheduling and rescheduling of execution dates--which diminishes public confidence in the criminal justice system.

In sum, adoption of this proposal will significantly improve fairness in death penalty litigation.

See p 9 - Barefoot will call at Pearson 8/21/89 L.F.P

My revised draft

lfp/ss 08/18/89 REPORT SALLY-POW

AD HOC COMMITTEE ON FEDERAL HABEAS

Proposed Committee Report

I. Introduction

Studies of public opinion establish that an overwhelming majority of our citizens favors the death penalty for certain murders. The Supreme Court has made clear that the evolving standards of decency embodied in the Eighth Amendment permit imposition of this punishment for some offenders. Of course, both the Court and society have recognized that, because it is irreversible, death is a unique punishment. This realization demands safeguards to ensure that capital punishment is administered with the utmost reliability and fairness.

But our present system of multi-layered state and federal appeal and collateral review has led to repetitious litigation and years of delay between sentencing and execution. The resulting lack of finality undermines public confidence in our criminal justice system. The delay inherent in the present system brings little benefit in terms of reliability in sentencing or fair and orderly review of constitutional claims. Adding to the problem is the fact that

prisoners often cannot obtain qualified counsel until execution is imminent. The resulting last-minute rushed litigation disserves inmates, and saps the resources of our judiciary.

To address these problems, Chief Justice William H. Rehnquist formed this Committee in June 1988. His charge to us was to inquire into "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases in which the prisoner had or had been offered counsel. The Chief Justice appointed as members of this Committee Chief Judge Clark of the Fifth Circuit, Chief Judge Roney of the Eleventh Circuit, District Judge Hodges of Florida and Judge Sanders of Texas. The states in the Fifth and Eleventh Circuits have by far the greatest numbers of prisoners subject to capital sentences, and each of these judges has had extensive experience with federal review of capital cases. The chairman of the Committee, retired Associate Justice Lewis F. Powell, Jr., served as Circuit Justice for the Eleventh Circuit while sitting on the Supreme Court. Professor Albert M. Pearson of the University of Georgia, who has experience in capital cases, was the Reporter for the Committee. William R. Burchill, Jr., General Counsel of the Administrative Office served as Secretary.

The Committee met six times and considered with care the problems associated with collateral review of capi-

tal sentences. We invited written comments from a broad spectrum of interested parties and organizations, and received a number of helpful presentations. These included the views of state and federal prosecutors, groups urging abolition of the death penalty, state executives and legislators, and criminal defense and public defender organizations. The responses contributed to our findings, which follow, and to the formulation of the legislation we propose.

II. Findings

A. Delay and Repetition

The Committee identified serious problems with the present system of collateral review. The most general of these is that the dual system of state and federal collateral review engenders chaotic litigation and excessive delay. Few would argue that the current state of death penalty administration is satisfactory. There are now approximately 2,200 convicted murderers on death row awaiting execution. Yet since the Supreme Court's 1972 Furman decision only 116 executions have taken place. The shortest of these judicial proceedings required two years and nine months to complete. The longest covered a period of 14 years and six months. The length of the average proceeding was eight years and two months.

The Committee's analysis of cases from Alabama, Florida, Georgia, Mississippi, and Texas shows that 80% of

the time spent in collateral litigation in death penalty cases occurs outside of state collateral proceedings. A table showing the average time periods and ratios in death penalty cases in these states is attached to this report.

The relatively small number of executions, as well as the delay in cases where an execution has occurred, makes clear that the present system of collateral review operates to frustrate the law of 37 states.[1] The collateral review process tends to be erratic and frequently is repetitious. The long separation of sentence and execution hampers justice without improving the quality of adjudication.[2] Because res judicata is inapplicable to federal habeas proceedings, many capital litigants return to federal court with second - or even third and fourth - petitions for relief. Current rules governing abuse of the writ and successive petitions have not served to prevent these endless filings. This Committee believes that any serious reform proposal must address the problems of delay and repetitive litigation.

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[1] Federal law also provides for capital punishment in certain cases. See P.L. 100-690, 102 Stat. 4387 (Anti-Drug Abuse Act of 1988) (murders committed in connection with narcotics offenses.)

[2] Contrary to what may be assumed, the Constitution does not provide for federal habeas corpus review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the Constitution. It has evolved from a statute enacted by Congress in 1867, now codified 28 U.S.C. §2254.

B. The Need for Counsel

A second serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review. As the Supreme Court recently reaffirmed in Murray v. Giarrantano, provision of counsel for criminal defendants is constitutionally required only for trial and direct appellate review. Because, as a practical matter, the focus of review in capital cases often shifts to collateral proceedings, the lack of adequate counsel creates severe problems. This remains true despite the fact that Congress has recently provided for appointment of counsel in federal habeas proceedings in capital cases as part of the Anti-Drug Abuse Act of 1988.

Capital inmates almost uniformly are indigent, and often illiterate or uneducated. Capital habeas litigation may be difficult and complex. Prisoners acting *pro se* rarely present promptly or properly exhaust their constitutional challenges in the state forum. This results in delayed or ineffective federal collateral procedures. The end result is often appointment of qualified counsel only when an execution is imminent. But at this stage, serious constitutional claims may have been waived. The belated entry of a lawyer, under severe time pressure, does little to ensure fairness. In sum, the Committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is cru-

cial to ensuring fairness and protecting the constitutional rights of capital litigants.

C. Last Minute Litigation

Another disturbing aspect of the current system is that litigation of constitutional claims often comes only when prompted by the setting of an execution date. Judicial resources are expended as the prisoner must seek a stay of execution in order to present his claims. Justice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending execution. In some cases last minute habeas corpus petitions have resulted from the unavailability of counsel at any earlier time. But in other cases attorneys appear to have intentionally delayed filing until time pressures were severe. In most cases, successive petitions are meritless, and we believe many are filed at the eleventh hour seeking nothing more than delay.

The foregoing types of abuses have no place in a rational system of justice. The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review. But once this review has occurred, absent extraordinary circumstances there should be no further last minute litigation.

III. The Committee Proposal

In response to the problems described above, the Committee proposes new statutory procedures for federal ha-

beas corpus review of capital sentences where counsel has been provided. Separate procedures for capital cases are appropriate in light of the special problems of capital litigation. The incentives facing the capital litigant are unique. Prisoners serving an ordinary term of years have every incentive to bring their claims to resolution as soon as possible in order to gain relief. And they are serving their sentences while litigation takes place. In contrast, the inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out. Such an inmate is avoiding the punishment prescribed by the law of the state.

The Committee's proposal is aimed at achieving this goal: Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end.

The specific operation of our proposed legislation[3] is described in notes following each statutory section. Some general comments are appropriate here. The proposal

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[3] Our proposal would add a new Subchapter B dealing with Capital Cases. Sections 2241-2255 of Subchapter A will not be changed. We refer to these changes simply as a proposed "statute" or as a "proposal".

allows a state to bring capital litigation by its prisoners within the new statute by providing competent counsel for inmates on state collateral review. Participation in the proposal is thus optional with the states. Because it is optional, the proposal should cause minimal intrusion on state prerogatives. But for states that are concerned with delay in capital litigation, it is hoped that the procedural mechanisms we recommend will provide an incentive to provide the counsel that are needed for fairness.

The statute provides for a six-month limitations period within which the federal habeas petition must be filed. The limitations period begins to run only on the appointment of counsel for the prisoner, or a refusal of the offer of counsel. The limitations period also is tolled during the pendency of all state court proceedings. In view of the provision for counsel, the tolling provisions, and the fact that the exhaustion requirement mandates that the prisoner's federal petition present the same claims contained in the state petition, the six-month period ensures adequate time for the development and presentation of claims. A further extension of time is available for cases where good cause is shown. Although the time period may seem short in view of the fact that no time limit whatsoever exists at present, it should be noted in comparison that six months is far longer than the time provided for appeals in

the state and federal systems, or for seeking certiorari review in the Supreme Court.

Importantly, the statute provides for an automatic stay of execution which is to remain in place until federal habeas proceedings are completed, or until the prisoner has failed to file a petition within the allotted time. This automatic stay ensures that claims need not be evaluated under the time pressure of a scheduled execution. It should substantially eliminate the rushed litigation over stay motions that is troubling for both litigants and the judiciary.

Federal habeas proceedings under the proposal will encompass only claims that have been exhausted in state court. With the counsel provided by the statute, there should be no excuse for failure to raise claims in state court. The statute allows for exceptions in extraordinary cases on the basis of new law or newly discovered facts. In the event the entire counseled state and federal collateral process concludes without relief being granted, the statute includes new mechanisms to promote finality. Subsequent and successive federal habeas petitions can no longer be the basis of a stay or execution absent a colorable showing of factual innocence. Relief will still be available in extraordinary cases on the basis of new law or newly discovered facts.

See 2257(c) in our statute provides that there can be no successive claim unless those conditions are met.

IV. Conclusion

The fundamental requirement of a criminal justice system is fairness. In habeas corpus proceedings fairness requires that a defendant be provided a searching and impartial examination of his claims. Fairness also requires that if a defendant's claims are found to be devoid of merit after such examination, society is rightfully entitled to have the penalty prescribed by law carried out without unreasonable delay.

Every capital defendant is now entitled to competent counsel at state trial and in federal habeas corpus proceedings. The Committee's proposal will fill a gap which now exists by providing competent counsel also in state habeas or collateral proceedings. The proposal further assures that, upon completion of state proceedings, a defendant will have one opportunity to have his claims reviewed carefully by the federal courts. Thereafter, if no infirmity in the conviction has been found, judicial proceedings will be at an end, absent exceptional new developments.

The Committee believes that its proposal will go far to rectify the current chaos in capital litigation - periodic inactivity and last minute frenzied activity, scheduling and rescheduling of execution dates - which diminishes public confidence in the criminal justice system. In sum, adoption of this proposal will significantly improve fairness in death penalty litigation.

Ad Hoc file
Final draft of proposed new statutes with AL's comments. Received by me. 8/22/89

CHAPTER 153. HABEAS CORPUS

Subchapter A. General Provisions [a proposed redesignation]

[sections 2241-2255 would not be changed.]

Subchapter B. Capital Cases: Special Procedures [new]

Section 2256. 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 brought by prisoners in state custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This subchapter is applicable if a state establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the state or have otherwise become final for state law purposes. The rule of court or

statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation and reimbursement of counsel as provided in subsection (b) must offer counsel to all state prisoners under capital sentence and must provide for the entry of an order by a court of record: (1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer; (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel 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 unless the prisoner

and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during state or federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 or this subchapter. This limitation shall not preclude the appointment of different counsel at any phase of state or federal post-conviction proceedings.

COMMENT: Subsection (a) defines the scope of what would be new subchapter B which establishes rules and procedures that apply solely to section 2254 cases involving prisoners under capital sentence. The aim of this subchapter is to provide a mechanism for the post-conviction litigation of capital cases that ~~has~~ enhanced procedural safeguards for the prisoner and yet is less time consuming and less cumbersome from the ~~vantage~~ point of the jurisdiction seeking to enforce its death penalty. There is no intent to alter the substantive scope of federal habeas corpus review under section 2254.

Subchapter B offers an alternative to the present process of post-conviction review in capital cases. If it is applicable, it would in all but the most unusual of capital cases limit each prisoner to a single opportunity for federal habeas corpus review under section 2254. This limitation would advance the state interest in the finality of criminal convictions and capital sentences. But to avail itself of subchapter B's more structured habeas corpus review procedures, a state would have to establish a system for the appointment and compensation of competent counsel throughout all stages of state post conviction review. The purpose of this mechanism is to assure that if a state prisoner under capital sentence has only a single opportunity for review under section 2254, that review will be fair, thorough and the product of capable and committed advocacy. While subchapter B attempts to ~~craft~~ a realistic balance between the values of judicial efficiency and procedural fairness in the context of a federal system, it does not impose a solution on the states. Each state must assess the utility of subchapter B for itself.

Unless a state takes the affirmative steps required in sections 2256(b) and (c), its litigation of capital cases under section 2254 will be governed by the statutory and court rules that presently apply to all federal habeas corpus cases.

Under subsection (a), the special rules and procedures of sections 2257-2260 apply if a state establishes a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel to represent indigent prisoners under capital sentence in state post-conviction proceedings. Central to efficacy of this scheme is the development of standards governing the competency of counsel chosen to serve in this specialized and demanding area of litigation. This mechanism is to be established by state statute or by rule of the state court of last resort. The Committee believes that it is more consistent with the federal-state balance to give the states side latitude to establish a mechanism that complies with subsection (b).

The final judgment as to the adequacy of any system for the appointment of counsel under subsection (b), however, rests ultimately with the federal judiciary. If prisoners under capital sentence in a particular state doubt that a state's mechanism for appointing counsel complies with subsection (b), the adequacy of the system -- as opposed to the competency of particular counsel -- can be raised in a section 2265 proceeding or perhaps might be challenged in a class action brought under section 1983. One way or the other a state and its prisoners under capital sentence will get a definitive ruling on the applicability of subchapter B.

If the requirements of subsection (b) are satisfied, the state mechanism must offer counsel to all state prisoners under capital sentence. In addition, it must provide for the entry of an appropriate judicial order based on the state prisoner's response to the offer of counsel. Judicial control of this process is necessary to establish a clear point in time to determine the applicability of sections 2257 and 2258. It is also necessary to assure that a full record exists showing which state prisoners have appointed counsel and which do not.

Under subsection (c), all indigent state prisoners under capital sentence would be entitled to counsel in state post conviction proceedings as a matter of right. If an indigent prisoner is not competent to decide whether to accept or decline the state's offer, the state must appoint counsel in any event. If a prisoner is not indigent, which would be the rare case, he would not be entitled to the appointment of counsel even if he accepted the state's offer. Finally, in some instances, a prisoner might reject the offer of counsel. This rejection would become effective and binding only after a judicial inquiry into the prisoner's understanding of the legal consequences of his

decision.

Subsection (d) establishes a rule requiring the appointment of new counsel at the state post-conviction phase of capital litigation. The primary reason for the rule is that during the post-conviction review, ineffective assistance of trial and appellate counsel is frequently a major issue. It would be unrealistic to expect a capital defendant's trial or appellate counsel to raise a vigorous challenge to his own effectiveness. A secondary reason is that trial and appellate counsel in death penalty cases serve under great pressure and often work themselves to the point of emotional and physical exhaustion. They are understandably less able to undertake a fresh and dispassionate consideration of the issues raised or possibly overlooked at trial and on direct appeal. The appointment of new counsel at the state habeas phase will do as much as can be done to overcome these difficulties. The Committee, however, did not believe the rule should be absolute. In some cases, the prisoner under capital sentence may have such trust and confidence in his trial or appellate counsel that he would desire the attorney-client relationship to continue during state post-conviction review. Subsection (d) would permit, though not require, continued representation if the prisoner and his counsel expressly make a request to the appointing authority established by the state.

Subsection (e) provides that the ineffectiveness or incompetence of counsel during state or federal post-conviction review in a capital case is not a ground for relief in section 2254 proceedings. This rule reflects settled constitutional doctrine which limits ineffective assistance of counsel challenges to those criminal proceedings to which the Sixth Amendment right to counsel attaches. Murray v. Giarrantano, ___ U.S. ___ (1989); Pennsylvania v. Finley, 481 US 551 (1987).

The Committee recognizes that the competence of counsel during all stages of state and federal post-conviction review is of the utmost importance in capital cases. However, as far as federal review in a proceeding under section 2254 is concerned, it believes that the focus constitutionally should be on the performance of a capital defendant's trial and appellate counsel. The effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process. Only one who has the clear ability and willingness to handle a capital case should be appointed under subsections (b) and (c). If at any time during state or federal post-conviction review it appears that appointed counsel is unable to discharge his obligations in a timely and competent manner, the remedy is for the court to appoint a replacement and to permit post-conviction review to go forward without prejudice to the prisoner.

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

(a) Upon the entry in the appropriate state court of record of an order pursuant to section 2256(c), a warrant or order setting an execution date for a state prisoner shall be stayed upon application to any court that would have jurisdiction over any proceeding filed pursuant to Section 2254. The application must recite that the state has invoked the post-conviction review procedures of this subchapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if:

(1) A state prisoner fails to file a habeas corpus petition under Section 2254 within the time required in Section 2258; or

(2) Upon completion of district court and court of appeals review under Section 2254 the petition for relief is denied and (A) the time for filing a petition for certiorari has

expired and no petition has been 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; or

(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 habeas corpus review under Section 2254.

(c) If one of the conditions in subsection (b) has occurred, 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 federal courts;

(2) 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) the result of the Supreme Court recognition of

a new federal right 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; and

(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed.

COMMENT: This subchapter rests on the assumption that every state prisoner under capital sentence should have one opportunity for full state and federal post-conviction review before being subject to execution. Although this appears to have been the practice in capital cases since Furman v. Georgia, 408 US 238 (1972), it has never been formally recognized as such. Many state prisoners under capital sentence have struggled to secure a stay of execution -- often against the vigorous opposition of the state -- before availing themselves of even one chance to pursue state and federal post-conviction review. Stay of execution litigation has been subject to ~~extraordinarily~~ tight deadlines, places unrealistic demands on judges, lawyers and the prisoner, and in the end accomplishes what ~~ought to~~ be conceded as a matter of right. ~~The process is a waste of time and effort.~~

If applicable, section 2257 would eliminate stay of execution litigation during a state prisoner's first request for post-conviction relief. It provides for a mandatory stay of execution in capital cases at any time following the appointment of counsel pursuant to section 2256(c). If an execution date has been set, the prisoner can ~~get~~ a stay as a matter of right simply by making application to any federal court that would have jurisdiction over the case in a proceeding brought under section 2254. In practice, however, even this step is not likely to be necessary. If a state takes the steps required in section 2256 to bring its capital litigation under this subchapter, there will be no reason to set an execution date until the completion of

state and federal post-conviction review. At that juncture, the federal courts would have no authority to stay executions except under the very limited circumstances identified in section 2257(c).

Subsection (b) establishes the duration of a stay of execution issued under this subchapter. In effect, it provides that a stay of execution issued under subsection (a) will remain in effect as long as state and federal post-conviction review in a capital case is being actively pursued by the state prisoner.

The relationship between subsection (b)(1) and section 2258 is particularly important. Under subsection (b)(1), a stay of execution remains in force as long as the state prisoner files a section 2254 petition in federal court within the 180 day period set forth in section 2258. It is important to emphasize here that the object of the 180 day period established in section 2258 -- which includes the right to apply for a 60 day extension -- is not to produce default. Rather it is one of a series of provisions in this subchapter designed to stimulate the orderly and expeditious consideration on the merits of all federal issues arising in capital cases.

If a state prisoner files a petition under section 2254 within the time period set forth in section 2258, subsection (b)(2) extends the right to a stay of execution to include the entire period that the case is pending before the district court, the court of appeals and the Supreme Court if a petition for certiorari is filed. The right to a stay would expire after the opportunity for Supreme Court review has passed or after the Supreme Court has considered a petition for certiorari and has denied the petition or disposed of the case without overturning the capital sentence. The Committee assumes that in capital cases the state prisoner will want to pursue every opportunity for federal post-conviction review open to him including Supreme Court review. But once this review process comes to its conclusion without a reversal of the capital sentence, it ~~is~~ the Committee's belief that federal review should ~~be~~ end.

In subsection (b)(3), the authority of a federal court to stay the execution of a state prisoner expires if there is a waiver of the right to pursue habeas corpus review under section 2254. To eliminate doubt about the validity of the waiver, subsection (b)(3) requires that the prisoner announce the decision before a court of competent jurisdiction and in the presence of his counsel. It also requires the court -- which can be state or federal -- to advise the prisoner of the consequences of the waiver decision.

After the occurrence of one of the conditions resulting in the expiration of the right to a mandatory stay of execution under subsection (b)(2), federal review in capital cases pursuant

to section 2254 is extremely limited. Subsection (c) would thereafter permit a stay of execution and the grant of relief in a capital case only if: (1) the claim has never been raised in state or federal court previously; (2) there is a valid excuse for not discovering and raising the claim during the prisoner's initial opportunity for state and federal post-conviction review; and (3) the facts underlying the claim raise a serious doubt about the prisoner's guilt on the offense or offenses for which the death penalty was imposed.

The third of these conditions is clearly the most important. In the Committee's view, if there is any doubt about the sentencing phase of a capital case, it should be raised during a state prisoner's initial attempt to obtain post-conviction review. Often factual guilt is not seriously in dispute. Both the prisoner and his counsel have every incentive to ask whether all relevant information in mitigation of punishment was presented and whether the sentencing phase of the trial was otherwise conducted in a constitutionally fair manner. Given the clear incentive to do this, the Committee does not believe that the federal courts should have to consider a second petition under section 2254 which challenges only the sentencing phase in a capital case. As subsection (c) reflects, the only appropriate exception is when the new claim goes to the underlying guilt or innocence of the state prisoner under capital sentence. Murray v. Carrier, 477 US 478 (1986); Smith v. Murray, 477 US 527 (1986).

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

Any petition for habeas corpus relief under Section 2254 must be filed in the appropriate district court within 180 days from the filing in the appropriate state court of record of an order issued in compliance with Section 2256(c). The time requirements established by this section shall be tolled:

(a) From the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a state prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the state or has otherwise become final for state law purposes.

(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 for post-conviction review until final disposition of the case by the highest court of the state; provided, however, the tolling rule established by this sub-section does not apply during the pendency of a petition for certiorari before the Supreme Court following such state post-conviction review.

(c) During an additional 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 Section 2254 and (2) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 180 day period established by this section.

COMMENT: Section 2258 requires a state prisoner under capital sentence to file a section 2254 petition within 180 days from the entry of an order under section 2256(c). In almost all cases, this will be an order appointing counsel to initiate state post-conviction review. But even if a state prisoner is not entitled to the appointment of counsel or simply rejects the state's offerof appointment, the 180 day period applies to all capital cases if the state is subject to this subchapter. Although the 180 day filing rule resembles a statute of limitation, it does not function like a statute of limitation nor is it intended to do so.

In death penalty jurisdictions, the sole incentive for a prisoner to initiate post-conviction review is either the scheduling of an execution date or the threat to schedule one. The disadvantages of this method of administering capital litigation persuaded the Committee to recommend the mandatory stay of execution provisions in section 2257. But it is clear that there must be some substitute mechanism to cause understandably reluctant state prisoners to seek post-conviction review when such action may remove the only obstacle preventing the state from carrying out the death sentence.

The entry of an order under section 2256(c) is such a substitute. It starts the state post-conviction litigation clock in capital litigation. Unless the state prisoner actively litigates his case after his conviction and capital sentence have become final on direct appeal, he risks losing the right to file a section 2254 petition in federal court. Thus, the 180 day filing requirement serves the state interest in promoting finality in capital cases. At the same time, this subchapter serves to advance that interest only if the state provides state prisoners under capital sentence with the means --

competent counsel at state expense -- to assert their legal rights in state post-conviction proceedings. As stressed earlier, the interaction of sections 2256, 2257 and 2258 is designed not to produce finality through procedural default but rather through a structured process of post-conviction litigation that brings all potentially meritorious claims to the attention of the state and federal courts before the imposition of the death penalty becomes legally permissible.

There are several important tolling rules in section 2258. With one exception the litigation clock does not run after the filing of a section 2256(c) order as long as a capital case is pending for consideration before a court of competent jurisdiction. The policy underlying section 2258 is to encourage litigants to initiate the post-conviction review process and to keep it moving from stage to stage. If delay in the litigation process is due to slow judicial consideration of death penalty litigation, that time obviously should not be and is not counted in computing the 180 day period under section 2258.

Under section 2258(a), the 180 day period is tolled when a state prisoner files a petition for certiorari in the Supreme Court after affirmance of his capital sentence on direct appeal to the state court of last resort. It is extremely important to recognize, as section 2258(b) makes clear, that there is no comparable tolling rule to permit the filing of certiorari petitions after state post-conviction review. The Committee believes that multiple opportunities for Supreme Court review are not essential to fairness in the consideration of capital cases. In this vein, it would point out that the Supreme Court since 1972 has granted certiorari in only 2 of 99 capital cases after state post-conviction review. This does not result in disadvantage to the state prisoner, however, since all issues raised in state post-conviction review can be carried forward in a section 2254 petition and ultimately presented to the Supreme Court. The Committee believes that once post-conviction proceedings have begun, it would be a better use of the Supreme Court's limited resources to defer certiorari review in capital cases until after all lower court consideration -- state and federal -- has been completed.

The litigation clock also stops under section 2258(b) during any period that a capital case is pending for post-conviction review before a state court of competent jurisdiction. After all state post-conviction review has been completed, including review by the court of last resort, the 180 day time clock begins to run again if the capital sentence is undisturbed. The next step for the state prisoner is to file a section 2254 petition in federal district court. If counsel for the state prisoner properly discharges his responsibilities, default under the 180 day rule will not occur.

In the event that counsel experiences some difficulty in filing a section 2254 petition on time, subsection (c) authorizes a 60 day extension upon a showing of good cause in the federal district that would have jurisdiction over the section 2254 petition when ultimately filed.

Section 2259. Evidentiary hearings; scope of federal review; district court adjudication

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

(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the state courts 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) the result of the Supreme Court recognition of a new federal right 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) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

COMMENT: Subsection (a) defines the scope of federal review in capital cases to which this subchapter applies. It authorizes the district court to consider only those federal claims actually raised and litigated in the state courts. If the section 2254 petition presents no new claims, the district court will proceed to rule on the merits of the claims properly before it as long as the state evidentiary record and findings of fact are adequate. If they are deficient in any respect recognized under section 2254(d), the district court must complete the evidentiary record before addressing the issues on the merits. To this extent, subsection (a) does not depart from existing law and practice.

If a petitioner asserts a claim not previously presented to the state courts, the district court can consider the claim only if one of the three exceptions to the general rule listed in subsection (a)(1) is applicable. In that case, the district court must conduct an evidentiary hearing necessary to a full and fair consideration of the claim and in accordance with subsection (b) adjudicate it on the merits along with all other issues presented in the section 2254 petition.

As far as new or "unexhausted" claims are concerned, section 2259 represents a change in the exhaustion doctrine as articulated in Rose v. Lundy, 455 US 509 (1982). Section 2259 bars such claims from consideration unless one of the subsection (a)(1) exceptions is applicable. The prisoner cannot return to state court to exhaust even if he would like to do so. On the other hand, if a subsection (a)(1) exception is applicable, the district court is directed to conduct an evidentiary hearing and to rule on the new claim without first exhausting state remedies as Rose v. Lundy now requires. Because of the existence of state procedural default rules, exhaustion is futile in the great majority of cases. It serves the state interest of comity in theory but in practice it results in delay and undermines the state interest in the finality of its criminal convictions. The Committee believes that the states would prefer to see post-

conviction litigation go forward in capital cases even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine.

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 except when a second or successive petition is filed.

COMMENT: The premise of this subchapter is that a state prisoner under capital sentence is entitled to one opportunity for state and federal post-conviction review before being subject to execution. Consistent with this premise, the Committee believes that in a section 2254 proceeding, a state prisoner should be allowed to appeal from the district court to the court of appeals as a matter of right. With one exception, section 2260 eliminates the certificate of probable cause requirement in cases to which this subchapter is applicable. The exception arises when a second or successive petition is filed. Even if such a petition is authorized under the provisions of section 2257(c), the right to appeal in that instance will be governed by section 2253 rather than section 2260.

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CHAPTER 153. HABEAS CORPUS

Subchapter A. General Provisions [a proposed redesignation]

[sections 2241-2255 would not be changed.]

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

Section 2256. Review of capital sentencing when prisoner in state custody; 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 assert the expedited post-conviction review procedures in sections 2258 and 2259 of this subchapter, a state must establish by rule of its highest court or by statute a mechanism for the appointment 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 satisfy the following additional conditions:

(1) Extend eligibility for representation to indigent state prisoners whose capital sentences have been upheld on

direct appeal in the highest court of the state and 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 litigation in connection with the state phase of post-conviction 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) When the Chief Justice of the highest court of a state appoints an attorney as provided in subsection (b), he shall enter an order of appointment specifying an effective date therein and make the order a part of the public records of the court. He shall send a certified copy of the appointment order to the person or persons appointed to represent the prisoner under capital sentence and advise 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.

COMMENT: This section establishes the scope of the entire legislative proposal. The subchapter is triggered by the appointment of counsel pursuant to a mechanism described in subsections (b) and (c). Regardless of whether a state uses the statute or rule of court approach -- the latter may be problematic -- the mechanism for appointment of counsel is subject to judicial control through the authority of the chief justice of the highest court in the state. Centralizing authority at this level should enable a state to identify and keep track of attorneys willing and able to provide representation in death penalty cases better than would be true if this authority resided at the trial court level. It also should provide better oversight of attorney performance and facilitate judicial discipline if attorneys fail to discharge their responsibilities in a timely manner. Subsection (c) lays out some of the formalities of the appointment procedure mainly so that the starting date of the 365 day time period described in section 2258 will be clear, on the public record, and known to all attorneys and court officials who have had involvement in the case or who might be involved in post conviction proceedings.

One issue not addressed in this or any other section is whether there needs to be a procedure by which a state can know in advance that its system for the appointment of counsel in post-conviction review proceedings is acceptable. A related question is whether it is sound to let each state draft its own standards for compliance with section 2256? Another issue involves a basic assumption underlying the entire subchapter. If

the state complies with section 2256 and makes counsel available to a state prisoner under capital sentence, the expedited post-conviction review procedures apply to all death penalty cases in the jurisdiction even if some inmates elect to have other volunteer counsel or can afford to retain counsel. Is this assumption sound? If so, should it be made explicit?

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

(a) Running from the effective date of the order appointing counsel pursuant to section 2256, 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 court, state or federal, that has jurisdiction over the subject matter. The application 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) 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 365 days of the effective date of his appointment under section 2256.

(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.

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

(1) the basis for the stay is a claim not previously presented in 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 section establishes an automatic stay of execution rule that comes into play upon the appointment of counsel pursuant to section 2256. Procedurally, obtaining an automatic stay would be a simple matter which is unlike current practice. Subsection (b) provides the rules for the expiration of the automatic stay: (1) if counsel fails to file a federal habeas petition within the 365 day period; and (2) after Supreme Court review of a case upon the completion of all state and lower federal court post-conviction review. With effective oversight of counsel, the first basis for the expiration of an automatic stay hopefully will never be a problem. Subsection (c) eliminates substantially all federal court authority to issue stays of execution after one full opportunity for state and federal post-conviction review. The exception is narrowly

defined and requires that the new claim cast doubt on the validity of the underlying conviction -- the factual guilt of the accused. As written, the exception does not apply to new evidence that arguably might have a bearing on the jury's determination to impose the death penalty.

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

Counsel appointed under section 2256 to represent a state prisoner under capital sentence shall file the petition for habeas corpus in the appropriate federal district court within 365 days from the effective date of the appointment by the Chief Justice of the highest court in the state. The filing rule established by this section shall be tolled as follows:

(1) 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 highest court of the state;

(2) 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 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;

(3) During a period not to exceed 60 days, if counsel for the state prisoner: (A) moves for an extension of time in the federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition and (B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 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: This section requires that counsel for the prisoner under capital sentence file a federal habeas corpus petition within 365 days from the effective date of appointment under section 2256. The tolling rule applies while the case is pending in state court during post-conviction review there or while the case is pending before the Supreme Court if the case is taken up following affirmance of the capital sentence on direct appeal by the highest court of the state. It does not apply if counsel for the prisoner files a certiorari petition following a decision of the highest court of the state at the conclusion of state post-conviction review. This exception to the tolling rule is intended to discourage a repetitive and unnecessary step in the death penalty review process. Bear in mind that the Supreme Court will have a chance to take a final look at every death penalty case under this scheme after all lower court post-conviction review, state and federal, has been finished.

This section also permits in effect a 60 day extension of the 365 day period if counsel for the prisoner can show good cause for his inability to file a federal habeas corpus petition in time. Some safety valve of this type is probably essential to the scheme. It would be particularly important in the event appointed counsel turns out to be derelict in the performance of his duties. The oversight office of the Chief Justice could find substitute counsel and still keep a case on track if there is some way to gain extra time. This ground for tolling should not be utilized except in the rare instance. The incentive ought to be for the states to do their job carefully by making good counsel appointments at the front end so that the failure to meet filing deadlines is typically a remote possibility.

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 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] [Upon the development of a complete evidentiary record, the district court shall certify the record to the court of appeals as ripe for the adjudication of all claims properly before it].

[(c) Upon the receipt of a record from a district court in a case involving a state prisoner under capital sentence, the court of appeals shall proceed to consider and resolve all 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.]

COMMENT: This section makes several significant changes in the law.

First, it modifies the exhaustion doctrine by (a) authorizing federal court consideration in capital cases of only those issues previously presented to the state courts and (b) directing the immediate consideration of those issues once they are identified. If a new claim is raised in federal court for the first time, it will not be considered at all unless one of the exceptions is satisfied. In such an event, the evidentiary basis for the new but still assertable claim will be developed in federal court and the issue will be resolved there without sending it back to the state courts for initial review. This is a justified departure from practice under the mixed petition rule of Rose v. Lundy. Compliance with Rose v. Lundy consumes unnecessary time since state procedural default rules usually present a major barrier to the prisoner who returns to state court to exhaust with respect to a claim. Why require a generally futile step in the interest of promoting comity when it undercuts finality in a class of criminal cases where society's interest in finality is the highest.

Second, if additional fact finding needs to be done in order to consider any issue properly exhausted in state court, that factfinding is to be done by the district court. There will be no remand to the state courts for additional factfinding.

Third, in alternative language, subsections (b) and (c) would limit the district court role in death penalty cases to making the record ready for adjudication. Once the issues properly before the federal courts are identified and the evidentiary record is adequately developed, the district court would certify the record to the court of appeals for final adjudication. This would eliminate the repetitive process of having both a district judge and the court of appeals learning the record and ruling on the merits. The district judge's

ruling, while helpful, is never final. Are both needed given the limits on judicial time?

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: The certificate of probable cause requirement is incompatible with the scheme now under consideration.

Final Draft
Delivered
8/23/89

AGENDA E-22
CAPITAL HABEAS CORPUS
SEPTEMBER 1989

JUDICIAL CONFERENCE OF THE UNITED STATES

AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES

Committee Report and Proposal

August 23,1989

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AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES

Committee Report

I. *Introduction*

Studies of public opinion establish that an overwhelming majority of our citizens favors the death penalty for certain murders. The Supreme Court has made clear that the evolving standards of decency embodied in the Eighth Amendment permit imposition of this punishment for some offenders. Of course, both the Court and society have recognized that, because it is irreversible, death is a unique punishment. This realization demands safeguards to ensure that capital punishment is administered with the utmost reliability and fairness.

But our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and execution. The resulting lack of finality undermines public confidence in our criminal justice system. Of course, any system of review entails some delay. It is not suggested that the delay needed for review of constitutional claims is inappropriate. But much of the delay inherent in the present system is not needed for fairness. Adding to the problem is the fact that prisoners often cannot obtain qualified counsel until execution is imminent. The resulting last-minute rushed litigation disserves inmates, and saps the resources of our judiciary.

To address these problems, Chief Justice William H. Rehnquist formed this Committee in June 1988. His charge to us was to inquire into "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases in which the prisoner had or had been offered counsel. The Chief Justice appointed as members of this Committee Chief Judge Clark of the Fifth Circuit, Chief Judge Roney of the Eleventh Circuit, District Judge Hodges of Florida and District Judge Sanders of Texas. The States in the Fifth and Eleventh Circuits have by far the greatest