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Habeas Corpus Committee - Report

Lewis F. Powell Jr.

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See

W.F.P.
Reviewed
1/5 & 6/90

EXECUTIVE SUMMARY

*included in the ABA ~~Report~~
Committee Report on*

Introduction

In 1988, the American Bar Association formed a Task Force to study judicial review of cases in which defendants have been sentenced to death. The Task Force membership was selected to include state and federal judges, state and inmate capital post-conviction counsel, a court administrator, and academicians. This broad base of expertise permitted full consideration of the diverse perspectives on habeas corpus review of death penalty cases. Presupposing the continued existence of both capital punishment and the federal habeas corpus review process, the Task Force undertook to study the entire system of post-conviction review of "capital" convictions and sentences. To ensure more informed recommendations, the Task Force held public hearings in Atlanta, Dallas, and San Francisco and heard from more than eighty knowledgeable witnesses from all corners of the criminal justice system.

The purpose of this study was to formulate comprehensive recommendations that, when implemented, would enhance both the efficiency and the fairness of state and federal review procedures. It was particularly important to address the chaotic character of current last-minute, piecemeal, state and federal reviews in death penalty cases, which present unique problems and require special solutions.

The Task Force Proposal

The testimony and other materials presented to the Task Force justify concern that the post-conviction process of reviewing capital convictions and sentences is, on the one hand, too long and too slow and, on the other hand, susceptible to unfair outcomes due to the inadequate presentation of constitutional issues. The Task Force accordingly proposes substituting a new process that achieves greater fairness and facilitates rational review. We anticipate that this process is likely to shorten the total time required for the review of death penalty cases. It is essential to note, however, that, while a sound proposal may eliminate unwarranted delay in the capital review process, some reasonable amount of time is still indispensable for a thorough consideration of the issues. Although we believe that our proposal will shorten the review process and that we should no longer see the aberrant case that is still in litigation after nine or ten years, it would be unrealistic to expect that, if the petitioner takes advantage of all available remedies and the conviction and death sentence are affirmed at every stage of review, the state and federal post-conviction review process will take less than approximately six years.

*Proposal
↓ its
purpose*

*Thus the
average
not
"aberrant"*

*will
reduce
to "six
years"*

The entire set of Task Force recommendations comprises a carefully crafted package of interconnected reforms designed as a whole to make the process less complex and to preserve fairness. Two recommendations, however, stand out as critical

*Two critical
recommendations*

systemic changes: ¹ the implementation of a statute of limitations to speed up the process; and ² the provision of competent counsel to assure that the streamlined process is capable of fairly rectifying constitutional errors.

Statute of Limitations

(This description seems close to our proposal except for "one year" rather than 6 mos.)

To speed up the death penalty review process, the Task Force recommends that a one-year statute of limitations be imposed for the filing of "all post-conviction applications" in capital "all" cases. This filing deadline would compel prisoners and counsel to seek prompt review in state post-conviction forums and federal court and would signify to state and federal judges, as well as to the parties and the public at large, that unnecessary delay in reviewing capital convictions and sentences is not tolerated. The one-year period would begin upon completion of the state direct review process. The deadline would be tolled during active post-conviction litigation or when the prisoner did not have qualified counsel. Once the one-year filing period has been exhausted, the petitioner's stay of execution would automatically expire upon the conclusion of the pending habeas corpus proceedings. If such proceedings have not been instituted, any petition filed after the deadline would be dismissed unless the petitioner raised a colorable claim, not presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty.

Does this include appeals to state S/Ct?

Competent Counsel

While the recommended creation of a statute of limitations represents a significant departure from current and longstanding habeas corpus procedure, the Task Force believes that this step is justified to reduce delay in the review process. The Task Force is mindful, however, that the new process must also be sure and fair -- as the existing process often has not been due to the failure to provide qualified counsel in stages leading up to federal habeas corpus review. The Task Force proposes to ensure to the extent reasonably possible, therefore, that there be qualified and adequately compensated counsel at trial and throughout the expedited review process. Providing qualified counsel serves both of the Task Force's major goals: it not only assures fairness, but also avoids unnecessary delay in the process. Qualified counsel is thus the sine qua non of a just and efficient capital system.

In addition, the provision of knowledgeable counsel at trial would restore the trial as the "main event" in the criminal process because constitutional issues would be first recognized, aired, and resolved at that level, rather than later. As a result, there would be fewer colorable claims of ineffective assistance of counsel and fewer of the reversals and retrials that now so frequently and substantially prolong the process. Moreover, providing qualified counsel at the state post-conviction stage as well as at the trial stage would help to assure that the record reaching the federal habeas corpus court

This would be desirable - if it is feasible

is ready for immediate federal resolution on the merits, without need for protracted and time-consuming proceedings to complete the record and resolve threshold procedural questions, such as procedural default.* To underscore the critical role of competent counsel in capital litigation and to avoid procedural delays as well as multiple review of the same issues, the Task Force recommends that the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding at which the state court failed to provide such counsel: the exhaustion of state remedies provisions of 28 U.S.C. § 2254(b) and (c); the rules governing failure to raise a claim in state court at the time or in the manner prescribed by state law; and the presumption of correctness of state court findings of fact as set forth in 28 U.S.C. § 2254(d).

Two other Task Force recommendations on counsel are designed to enhance the efficiency of the proceedings. First, new counsel would be appointed to represent the death-sentenced inmate for the appeal. As counsel is not likely to challenge his or her own effectiveness, this recommendation permits those claims of ineffective assistance of counsel that are capable of decision on the trial record to be raised at the earliest practicable time, thereby reducing protracted litigation and later costly

Yes - should have new counsel on appeal

* Because inadvertent or negligent error of otherwise competent counsel may still occur, however, leading to a procedural bar for unintentional reasons, the Task Force recommends that the federal district court should consider a claim if the prisoner shows that the failure to raise it in the state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

remands.** Second, to eliminate the delays occasioned by the appointment of new counsel for post-conviction proceedings, steps are proposed to encourage state appellate counsel who represented a death-sentenced inmate to continue representation through all subsequent state, federal, and United States Supreme Court proceedings.

Other Recommendations

In addition to the length, unnecessary delay in, and unfairness of current death penalty review procedures, the Task Force was concerned with the often chaotic nature of that review. Various additional recommendations are designed to bring greater order to the process, including the following:

Mixed Petitions. To facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions, the Task Force recommends that the federal district court issue an order soon after the filing of a capital habeas corpus petition

** The creation of a statutory right to counsel for discretionary review and state collateral attack would not yield new claims of sixth amendment ineffective assistance of counsel. If there is no constitutional right to counsel for these proceedings, there can be no constitutional right to counsel's effective assistance at these proceedings. Thus, claims of sixth amendment ineffective assistance of counsel after the state direct appeal would not be cognizable in a federal habeas corpus proceeding. | *yes*

requiring petitioner's counsel, within a reasonable time, to review the trial record and inform the court whether there are any other exhausted or unexhausted claims. If there are unexhausted claims, the court should then put the petitioner to the option of abandoning them on the record or immediately exhausting them in state court before the federal court considers all of the exhausted claims. This recommendation has two major benefits. First, exhaustion issues would not crop up, as they often do now, at the end of district court proceedings and in court of appeals proceedings. Instead, they would be flushed out early in the process, when dismissal for lack of exhaustion is not nearly so wasteful or destructive in terms of judicial time and energy. Second, because the proposal enables the petitioner to present all of his or her constitutional claims in a single proceeding, successive petition problems would be greatly reduced.

*Good
idea*

Stays of Execution. The practices often encountered today of execution dates being set within unrealistic deadlines or at times when stays are assured and of counsel filing stay papers at the last minute do not contribute to a rational system of death penalty review. The Task Force therefore recommends that, if the state courts do not do so, the appropriate federal court should grant a stay of execution constrained by the one-year statute of limitations discussed above, running from the commencement of state post-conviction proceedings through the completion of the initial federal habeas corpus proceeding. Among other things,

True

this mandatory stay would allow for the expeditious resolution of the merits of death penalty cases without the interference of time-consuming and duplicative collateral litigation on stays at every stage of review; help attract competent counsel to join (and not dissuade counsel from joining) the pool of available capital appellate and post-conviction attorneys; and ameliorate much public confusion, frustration, and disrespect for the criminal justice system by avoiding the publicity attendant upon the setting of execution dates and the issuance of stays.

Successive Petitions. The Task Force recommends restrictions on the filing of second or successive federal habeas corpus petitions. The intent of the Task Force is to provide an orderly post-conviction process with the opportunity for fair and effective review, particularly for the first time through state and federal collateral processes. After that first time through the system, most successive petitions would be dismissed summarily. The federal court should entertain a claim only if, for example, the prisoner could show the existence of Supreme Court recognition of a new federal right that is retroactively applicable, material facts that were not previously discoverable through the exercise of reasonable diligence, factual innocence, or a miscarriage of justice.

Certificates of Probable Cause. Like collateral stay litigation, litigation over certificates of probable cause adds a distracting and time-consuming layer of proceedings to habeas corpus appeals. Consequently, the Task Force recommends that certificates of probable cause be eliminated in capital habeas corpus cases and that appeals proceed directly and immediately to the appellate court's resolution of the merits, except after denial of a second or successive petition. *Yes*

Retroactivity. In an effort to avoid complicated proceedings aimed at determining when new constitutional law should or should not be applied retroactively and to preserve the integrity of the process of reviewing capital cases, the Task Force further recommends that the standard for determining whether changes in federal constitutional law should apply retroactively should be whether the failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

Effective Date. To afford the states a reasonable time to adopt and implement rules and procedures pursuant to the recommendations of the Task Force, the Task Force further recommends that the federal statutory and rule changes contained in this proposal take effect upon adoption by the states of provisions in accordance with the Task Force proposal, but not later than two years from the date of enactment of federal legislation.

Conclusion

This proposal is the product of the Task Force's due regard for expeditious, orderly, and thorough examination of death sentences that confidently resolves the case the first and, in most instances, the only time through the state and federal systems. Absent a miscarriage of justice, the review process can then be abridged, knowing with some degree of assurance that there has been a fair review of the merits of the initial application at a pace that is reasonable, considering the interests of the prisoner, counsel, the state, the criminal justice system, the public, and the victim's family.

Based on its members' experience and diverse perspectives and on the invaluable testimony and written statements of numerous witnesses, the Task Force believes that the recommendations presented in this Report offer a fair, balanced, and sensible approach toward achieving a more effective system of review in state death penalty cases. In addition, the Task Force believes that its recommendations, if adopted and implemented, will do much to rebuild public confidence in the criminal justice system.

SUMMARY OF TASK MAJOR FORCE RECOMMENDATIONS
CONCERNING DEATH PENALTY CASES

Complicated ?

1) Because many of the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appellants/petitioners, as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation. Specific mandatory standards, similar to those set forth in the Anti-Drug Abuse Act of 1988, should be used with respect to the appointment and compensation of counsel.

2) The individual or organization responsible for appointing counsel should enlist the assistance of the local bar association and resource center to seek the best qualified attorneys available.

? ?
3) Jurisdictions that have the death penalty should establish and fund "organizations" to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.

4) New counsel should be appointed to represent the death-sentenced inmate for the state direct appeal unless the appellant requests the continuation of trial counsel after having been fully advised of the consequences of his or her decision, and the appellant waives the right to new counsel on the record.

5) To avoid the delay occasioned by the appointment of new counsel for post-conviction proceedings and to assure continued competent representation, state appellate counsel who represented a death-sentenced inmate should continue representation through all subsequent state, federal, and United States Supreme Court proceedings.

6) To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding at which the state court, in deprivation of the right to counsel, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner: exhaustion of state judicial remedies, procedural default rules, and the presumption of correctness of state court findings of fact.

7) Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

8) State appellate courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly raised at trial and on appeal and should have a plain error rule and apply it liberally with respect to errors of state law.

9) On the initial state post-conviction application, state post-conviction courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly preserved at trial or on appeal.

10) The federal courts should adopt rules designed to facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions.

11) The rational process of review should be facilitated by a stay of execution that remains in force until the completion of the initial round of state and federal post-conviction review. Therefore, unless the state courts grant a stay of execution, the federal courts, in preservation of their habeas corpus

jurisdiction, should grant a stay of execution to run from the initiation of state post-conviction proceedings through the completion of the initial round of federal habeas corpus proceedings, and should be empowered to do so.

12) The petitioner should have a right of appeal from denial of an initial federal habeas corpus petition without the need to obtain a certificate of probable cause.

13) A one-year limitations period should be employed as a substitute mechanism to move the case toward reasonably prompt completion, but only with adequate and sufficient tolling provisions to permit full and fair consideration of a petitioner's claims in state court, federal court, and the United States Supreme Court. The sanction for failure to comply with the time requirements should be dismissal, except that the time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty.

14) A federal court should entertain a second or successive petition for habeas corpus relief if: the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or 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; or consideration of the requested relief is necessary to prevent a miscarriage of justice.

15) The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

16) To afford the states a reasonable time to adopt and implement rules and procedures pursuant to the recommendations of the Task Force, the federal statutory and rule changes proposed by the Task Force should take effect upon adoption by the states of provisions in accordance with the Task Force recommendations, but not later than two years from the date of enactment of federal legislation.

SUMMARY OF RECOMMENDED STATUTORY AND RULE CHANGES*

A. Counsel

The Task Force recommendations concerning counsel may be implemented by enacting the following Bill:

A Bill--to amend title 28, United States Code, to clarify the right to competent and adequately compensated counsel in death penalty cases, to establish eligibility requirements for counsel representing capitally charged or capitally sentenced indigent defendants, and to clarify the consequences for failure to appoint qualified counsel in prior state court proceedings.

Be it enacted that § 2254 of title 28, United States Code, is amended--

By inserting the following immediately after the last sentence:

(h)(1) Capital punishment mechanism for providing counsel sought, to indigents who have been and who seek appellate or collateral court, and to indigents who have been sentenced to death and who seek certiorari review of the State Supreme Court.

(b)

(c)

(a)
ABA
pro-death
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Amend-
ment
of
§ 2254

(2)(A) In the case of an attorney appointed pursuant to this section must have had not less than five years, and must have had not less than three years' experience in the trial of felony prosecutions.

Three years in the trial of felony cases

(B) In the case of an appointment made after trial, at least one attorney appointed pursuant to this section must have been admitted to practice in the court of last resort of a state for not less than five years, and must have had not less

* See infra Appendices B and C (containing all of the current habeas corpus statutes and rules and incorporating the Task Force recommendations).

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Be it enacted that § 2254 of title 28, United States Code, is amended--

By inserting the following immediately after the last sentence:

(b) (c) (a) "(h)(1) Capital punishment states shall have a mechanism for providing counsel services to indigents charged with offenses for which capital punishment is sought, to indigents who have been sentenced to death and who seek appellate or collateral review in state court, and to indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court.

(2)(A) In the case of an appointment made before trial, at least one attorney appointed pursuant to this section must have been admitted to practice for not less than five years, and must have had not less than three years' experience in the trial of felony prosecutions.

(B) In the case of an appointment made after trial, at least one attorney appointed pursuant to this section must have been admitted to practice in the court of last resort of a state for not less than five years, and must have had not less

* See infra Appendices B and C (containing all of the current habeas corpus statutes and rules and incorporating the Task Force recommendations).

than three years' experience in the handling of felony appeals.

(C) Notwithstanding this subsection, a court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable the attorney to represent the defendant properly, with due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

But the court may appoint counsel w/o the experience required
2/B

(3) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or issues relating to sentence, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefor, under subsection (4). Upon finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment of such services nunc pro tunc.

(4) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to an attorney appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under subsection (3), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of this subsection.

compensation of counsel

(5) ^(a) The exhaustion of state remedies provisions of 28 U.S.C. § 2254(b) and (c), ^(b) the rules governing failure to raise a claim in state court at the time or in the manner prescribed by state law, and ^(c) the presumption of correctness of state court findings of fact as set forth in 28 U.S.C. § 2254(d), shall not apply with respect to any state court proceeding at which the state court, in deprivation of the right to counsel as defined by the foregoing provisions of this subsection, failed to appoint and adequately compensate counsel to represent the defendant or prisoner.

could be burdensome on state courts, and would be a substantial fed. intrusion on the authority of state courts

(6) Counsel appointed to represent the defendant for the capital trial shall be ineligible to represent the defendant on appeal, unless both the appellant and counsel expressly request continued representation, the state court informs the appellant of the consequences of his or her decision, and the appellant waives the

New counsel - OR

right to new counsel on the record. State appellate counsel who represented a death-sentenced prisoner should continue such representation through all subsequent state, federal, and Supreme Court proceedings, except when state appellate counsel was also counsel at trial.

(7) The ineffectiveness or incompetence of an appointed counsel for proceedings after the state direct appeal shall not be a ground for relief in a proceeding pursuant to this section. This limitation shall not preclude the appointment of different counsel at any phase of state or federal collateral proceedings."

B. Procedural Default

The Task Force recommendation concerning procedural default may be implemented by enacting the following Bill:

A Bill--to amend title 28, United States Code, to clarify the situations in which state procedural bar rules shall not apply with respect to habeas corpus petitioners under sentence of death who attack state court judgments or sentences.

Be it enacted that § 2254 of title 28, United States Code, is amended--

(1) by inserting the following immediately after the period in subsection (c):

"(d) A petitioner under sentence of death shall not be denied relief under this section on the ground that no state remedy is available for the adjudication of a claim because of the petitioner's previous failure to raise the claim in a state court at the time or in the manner prescribed by state law unless the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice."

(2) by relettering subsections (d), (e), and (f).

State procedural default rules would not apply in capital cases.

C. Mixed Petitions

The Task Force recommendation concerning mixed petitions and procedurally forced successive petitions may be implemented either by adopting a local court rule with the following language or by amending Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (1982), to add the following paragraph after the existing first paragraph:

"In the case of a state prisoner under sentence of death, the federal district judge shall issue an order promptly after the filing of a habeas corpus petition requiring petitioner's counsel within a reasonable time to review the trial record and inform the court at a status conference whether there are any other exhausted or unexhausted claims that might be included in the petition. The judge and the respondent may assist the petitioner and counsel in identifying all potential claims not yet included in the petition. At the status conference, if unexhausted claims for which a state court remedy may still be available are brought to the court's attention, the judge shall give the petitioner the choice of abandoning those claims on the record or exhausting them in state court before the judge proceeds to consider all of the exhausted claims. If the petitioner chooses to return to the state courts on the unexhausted claims, the judge shall hold the proceedings in abeyance until such time as the claims have been exhausted in the state system."

D. Mandatory Stay of Execution

The Task Force recommendation concerning stays of execution may be implemented by enacting the following Bill:

A Bill--to amend title 28, United States Code, to provide for mandatory stays of execution in death penalty habeas corpus cases, in order to facilitate fair, orderly, and efficient review.

Be it enacted that § 2243 of title 28 United States Code, is amended--

By inserting the following immediately after the last sentence:

"In the case of a petitioner under sentence of death, a warrant or order setting an execution date shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to section 2254. Such a stay shall be contingent upon reasonable diligence by the petitioner in pursuing any pending litigation and shall expire if:

(1) a state prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2241(e); 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 a writ of certiorari has expired and no petition has been filed; (b) a timely petition for a writ of certiorari was filed and the Supreme Court denied the petition; or (c) a timely petition for a writ of 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 qualified counsel as defined in section 2254(h), and after having been advised of the consequences of his or her decision, a state prisoner under sentence of death waives the right to pursue habeas corpus review under section 2254."

E. Certificate of Probable Cause - *eliminate OK*

The Task Force recommendation concerning certificates of probable cause may be implemented by enacting the following Bill:

A Bill--to amend title 28, United States Code, to eliminate the requirement that habeas corpus petitioners under sentence of death obtain a certificate of probable cause before taking an appeal from the denial of the initial habeas corpus petition.

Be it enacted that § 2253 of title 28, United States Code, is amended--

By deleting the period at the end of the third paragraph and inserting the following:

"; provided that a petitioner under sentence of death shall have a right of appeal without a certificate of probable cause, except after denial of a second or successive petition."

F. Time Requirements

The Task Force recommendation concerning time requirements may be implemented by enacting the following Bill:

A Bill--to amend title 28, United States Code, to provide for time requirements within which a state prisoner under sentence of death may petition for federal habeas corpus relief, tolling provisions, and a sanction for failure to comply with the time requirements.

Be it enacted that § 2241 of title 28, United States Code, is amended--

By inserting the following immediately after the last sentence:

"(e)(1) In the case of a petitioner under sentence of death, any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within one year from the following date, whichever is appropriate:

(A) the date of denial of a writ of certiorari, if a petition for a writ of certiorari to the highest court of the state on direct appeal from the conviction and death sentence was timely filed in the Supreme Court;

(B) the date of issuance of the mandate of the highest court of the state on direct appeal from the conviction and death sentence, if a petition for a writ of certiorari was not filed in the Supreme Court; or

(C) the date of issuance of the mandate of the Supreme Court, if on a petition for a writ of certiorari the Supreme Court, upon consideration of the case, disposed of it in a manner that left the capital sentence undisturbed.

(2) The time requirements established by this section shall be tolled:

(A) During any period in which the prisoner was not represented by counsel, as defined in section 2254(h);

(B) During any period in which the prisoner has a properly filed request for post-conviction review pending before a state or federal court of competent jurisdiction or the Supreme Court of the United States; if all filing rules are met in a timely manner, this period shall run continuously from the date that the prisoner initially files for state post-conviction review until final disposition of the matter by the Supreme Court of the United States, if a timely petition for review is filed;

(C) During any period authorized by law for the filing of any procedures contemplated by state or federal law for the review of a capital conviction or sentence, including petitions for rehearing, provided that the filing rules are met in a timely manner; and

(D) During an additional period not to exceed 90 days, if counsel for the state prisoner moves for an extension of time in the United States district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 of this title, and makes a showing of good cause for counsel's inability to file the habeas corpus petition within the one-year period established by this section.

(3) The sanction for failure to comply with the time requirements established by this section shall be dismissal, except that the time requirements shall be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty."

G. Successive Petitions

The Task Force recommendation concerning successive petitions may be implemented by enacting the following Bill:

A Bill--to amend title 28, United States Code, to clarify the circumstances in which the federal courts should entertain second or successive habeas corpus applications from state prisoners under sentence of death.

Be it enacted that § 2244(b), title 28, United States Code, and Rule 9(b), title 28, United States Code foll. § 2254, are amended--

By inserting the following immediately after the last sentence:

"In the case of a petitioner under sentence of death, a second or successive petition shall be dismissed unless--

(1) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts, and 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 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; or

(2) 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; or

(3) consideration of the requested relief is necessary to prevent a miscarriage of justice."

H. Retroactivity

The Task Force recommendation concerning retroactivity may be implemented by enacting the following Bill:

A Bill--to amend title 28, United States Code, to clarify the standard to be applied on habeas corpus review for retroactive application of new rules of constitutional law.

Be it enacted that § 2254(a) of title 28, United States Code, is amended--

By inserting the following immediately after the last sentence:

"In the case of a petitioner under sentence of death, any claim that undermines the accuracy of either the guilt or the sentencing determination shall be governed by the law at the time a court considers the petition."

It shall expire automatically when:

(2) Following completion of ~~prosecution~~ state
and lower court post-conviction review, the
Supreme Court has denied ^{certiorari} certiorari, disposed
of the case on the merits in a manner that
leaves the capital sentence undisturbed, or the
time for filing a petition for certiorari has
expired.

§2256

...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 establish a mechanism for appointment of counsel that satisfies criteria to be established by the [Chief Justice of the United States][the Judicial Conference of the United States][the United States Court of Appeals for the circuit in which the State is located].

[Chief Justice] ~~the~~ [Judicial Conference]

(c) The [Courts of Appeals] shall ~~establish~~ ^{promulgate} criteria for the administration of this provision in their respective states that:

(1) establish qualifications based on integrity, experience, demonstrated professional competence, and participation in appropriate training programs for recruitment and appointment of counsel;

(2) establish requirements for compensation of counsel and reimbursement for expenses in connection with the [Supreme Court review of the decision of the highest court of the state on direct review] and the state phase of post-conviction review;

(3) require placement of the the authority to appoint counsel pursuant to this section in the Chief Justice of the highest court of the state or in an appropriate office for administration of appointments throughout the State;

(4) require the establishment of an appropriate office to monitor the legal representation provided to ~~the~~ prisoners to assure tht all filing requirements and deadlines are met.

(d) The appropriate court of appeals shall on application of a State and annually thereafter review the state's mechanism for appointment of counsel pursuant to this section, and shall on so finding certify the state's compliance with the criteria described in subsection (c); a prisoner who has had the opportunity to accept appointment of counsel pursuant to an approved state mechanism shall not thereafter be entitled to challenge the finality of collateral review conducted under this section on the basis of the performance of his counsel.

(e) [old subsection (c)]