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Habeas Corpus Committee - Lecture at UVA Law School

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U.Va. Class - Habeas Corpus in Capital Cases

(Prof. Meador)

(Ad Hoc Committee - H/C)

MEMO S. 1757 (the Biden bill)

This bill (S. 1757) purports to implement the recommendations of the Ad Hoc Committee. Like our recommendations, it provides that a state may "opt" (elect) to be governed by the bill. There are major differences that probably would deter any state from electing to comply with S. 1757. See the Assistant Attorney General's letter in which he states that the Biden bill would result in "increased delay and confusion" in capital cases. I am inclined to agree with him.

In Woodward v. Hutchins, 464 U.S. 377, 380 (1984)(an opinion I wrote) we noted the way multiple review often is obtained in habeas capital cases. I can testify to my own experience with piecemeal applications. Sometimes there are as many as three the day before an execution.

Our Committee's Bill

After trial and direct state review the capital defendant would have (i) state post conviction reviews, and (ii) one full habeas corpus review through the DC, the CA and by cert to the Supreme Court.

A unique feature of the Ad Hoc bill is that it would require a capital defendant to be provided with competent counsel "throughout both federal and state collateral proceedings" after his conviction and sentence had been affirmed on direct appeal. Moreover, a mandatory stay of execution would remain in effect throughout the process of collateral review. Under the Biden bill, the capital defendant would have repetitive reviews as at present.

I note here that the requirement of competent counsel under our proposal applies to the state collateral review. Thus, the new counsel appointed at that time would be free to argue ineffective assistance of the trial counsel.

I should see Chief Judge Charles Clark's testimony before the Biden Committee. Apparently he makes clear that S. 1757 departs in fundamental respects from the recommendations of the Ad Hoc Committee. It would in effect prevent the enforcement of the laws of 37 states.

The Biden bill would permit review of the sentence in the event of "newly discovered claims, newly recognized rights, and unlawful state action." Under the Ad Hoc Committee's proposal, none of the foregoing grounds would permit a defendant to raise a claim for the first time in a successive habeas petition in the absence of a colorable claim of factual innocence. Thus, S. 1757 would reject one of the more important recommendations of the Ad Hoc Commit-

tee. See the quote from our report on page 4 of the Assistant Attorney General's letter.

Section 2254(c)(3) of the Biden bill would establish a further exception to finality. This could occur after completion of a first federal habeas review where "a stay and consideration of the requested relief are necessary to prevent a miscarriage of justice." There is no limiting principle as to what constitutes a miscarriage of justice. As the Assistant Attorney General's letter notes, this would be a "free floating exception" that is linked neither to any past inability of the defendant to raise the claim, or to a situation where there is a colorable claim of factual innocence. Indeed, under the language of §2257(c)(3) the "miscarriage of justice" claim apparently could be raised successively in a second, third or fourth federal habeas petition.

Filing Period for Post Conviction Proceedings

The Ad Hoc Committee proposal provides for a 180-day filing period within which an initial federal habeas corpus petition must be filed. This period would be tolled during state post-conviction proceedings, with a 60-day extension for good cause. The Biden limitations period would be one year, with a possible extension of up to 90 days. Moreover, unlike our proposal, under S. 1754 the limitations period would be tolled while a petition for cert is filed from state collateral proceedings.

Chief Judge Clark's testimony before the Committee correctly noted that the one-year limitations period would do no more than codify the present average delay by a defendant moving from state post-conviction to federal habeas corpus proceedings. Since our Committee would assure that capital defendants will have counsel available throughout this period, 180 days seems adequate.

Rules of Procedural Default

The Biden bill, in effect, would preclude the application in capital cases of the rules of procedural default. That is, where the defendant fails to raise federal claims before the state court. See Wainwright v. Sykes, 433 U.S. 72 (1977) in which we held that a federal court on habeas may not consider a claim that could have been raised in state courts but was not - that is, where there was a procedural default. We recognized an exception to this rule where the defendant could show "cause" - i.e., a satisfactory reason for failure to raise the claim in a timely manner, and also show "prejudice". The constitutional error alleged must be so fundamental that it creates doubt as to the fairness of the entire proceedings.

The Ad Hoc Committee would codify the Wainwright test. The Biden bill would substantially change the law, resulting in further delay.

Standards of Counsel

Section 2261 of the Biden bill would set specific standards of counsel's experience required in capital cases. In general, representation at all stages would be limited to counsel with five years of experience after bar admission, and three years of felony litigation experience in the particular courts in which the case is being adjudicated. These are standards similar to those for counsel under the death penalty provisions of the Anti-Drug Abuse Act of 1988. These, of course, apply to federal cases.

It is difficult enough to find competent counsel in capital cases. Even where the states provide for compensation, it may be quite inadequate. Also capital cases last a long time, and counsel may find far more profitable representation. Also the standards Biden would require would exclude a good many lawyers with extensive criminal experience that may not have include any capital cases.

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The Biden bill also would nullify Taegue and Penry v. Lynaught.

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My cc
Sent to Hew

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REFORM OF CAPITAL HABEAS CORPUS PROCEDURES

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I chaired an Ad Hoc Committee of the Judicial Conference formed to consider repetitive use of federal habeas corpus in capital cases, This is a problem that has frustrated the enforcement of the laws of 37 states.

We had an experienced committee of able judges from both the trial and appellate level. The members were Chief Judges Clark and Roney, and District Judges Hodges and Barefoot Sanders - all four of these judges are from states in the Fifth and Eleventh Circuits with extensive experience in capital cases.

Contrary to what many people assume, federal habeas corpus review of state convictions is not required by the Constitution. The Constitution itself refers to the ancient Writ of Habeas Corpus that was available only to challenge executive detention without trial. The federal habeas corps review was authorized by Congress in 1867. Of course, Congress is free to alter this review.

It is of interest to note the situation here in the District of Columbia. In 1970, Congress eliminated federal habeas corpus review by ARticle III courts in the District. Thus, while a prisoner across the river in Virginia may bring multiple petitions for habeas review in federal court after exhausting state remedies, a District of Columbia prisoner has no such right.

In 1982 Judge Carl McGown on CADC (now deceased), in a scholarly article, reviewed the experience in the Dis-

trict. He concluded that the DC system had worked well, and that the redundancy of dual review existing in the states is not essential to protect constitutional rights.

It has also been suggested that federal habeas jurisdiction should be exercised only where a prisoner is unable to secure a "full and fair adjudication" of his claims in state court. In this approach, the federal courts remain as a backstop to ensure protection of rights. This approach to reform is now before the Judiciary Committee in S. 88.

This was the only role of federal habeas corpus for many years prior to its expansion by the Supreme Court.

I have not advocated broad reforms. I emphasize that our system of dual collateral review of criminal convictions is unique. Also there are no time limits on habeas corpus -- a prisoner may challenge a conviction years after it has become final, and after witnesses and records are long gone.

Nor is res judicata applicable. Claims may be brought again and again. Neither the Constitution nor common sense requires this.

The proposal of the Ad Hoc Committee I chaired is a limited one. It is aimed specifically at the single area where the problems presented by repetitive habeas corpus litigation are most acute -- in capital cases.

I can speak personally as to the way the present system is abused. Each Justice of the Supreme Court is designated as "Circuit Justice" for a particular federal circuit. When I was active on the Court I was the Circuit Justice initially for the old Fifth that included Florida, Georgia, Alabama, Mississippi, Louisiana and Texas. When this Circuit was divided, my responsibility included Florida, Georgia and Alabama.

Petitions for emergency relief, as contrasted with the normal petition for certiorari, are filed initially with the Circuit Justice. He or she may refer them to the entire Court with a recommendation.

Typically, a capital case goes through the following process: State trial and conviction, review by the intermediate appellate state court and then by the state supreme court. This ma be followed by state collateral review, again through three levels of state courts.

At this point, usually after substantial delay - the prisoner will file a petition for federal habeas corpus. This goes through the federal system, District Court, Court of Appeals, and finally a petition for cert to the Supreme Court.

At this point, the capital defendant's claims of error by the trial court may have been reviewed as many as 11 times.

Resourceful counsel - usually new counsel - will seek a new trial. When this is denied, the appeal and review process I have described will be repeated - often for a third time. More frequently than not the Supreme Court will have considered a capital case three times.

The Chief Justice has aptly described the present system as "chaotic". I emphasize, however, that no one doubts the seriousness of execution - however horrible the crime may have been. My own experience with state and federal judges enables me to say that we act on capital cases with the greatest concern and care.

Separate procedures are appropriate for capital cases because the incentives in these cases are exactly the opposite of those involving imprisonment. The prisoner serving a term of years seeks to have his case reviewed speedily in the hope of gaining release. For the condemned inmate, delay is the overriding objective.

About 20,000 murders are committed in our country each year. Only a fraction of the worst murderers convicted are sentenced to die.

There are now approximately 2,200 convicted murderers on death row awaiting execution. Since the Supreme Court's 1972 Furman decision, only 117 executions have taken place. The average length of time between conviction and execution has been more than eight years. Delay of this

magnitude is hardly necessary for fairness or for thorough review.

I could join those who argue for outright abolition of capital punishment. But it seems irrational to retain the penalty, and frustrate its fair implementation.

A major problem with the present system is the need for qualified counsel to represent indigent prisoners at all stages. The Constitution requires counsel for the trial and direct review. A new federal statute requires appointment of counsel on federal habeas in capital cases. But this leaves a serious gap in state systems that do not provide counsel for post-conviction review.

The objective of our Committee's proposal is this: Capital cases should be subject to one fair and complete course of collateral review through the state and federal systems. This review should be free from the time pressure of an impending execution, and with the assistance of competent counsel for the prisoner. When this review has concluded, litigation should end.

It is important to understand that this proposal is optional. It would not be binding on a State. It would allow a State to elect to bring collateral litigation involving its capital prisoners within the scope of the new federal statute. A State could do this by providing competent counsel in state post-conviction review.

The reduction of unnecessary repetition, increased order, and enhanced finality, are the benefits to a State that adopts our proposal. But a State would have to provide increased safeguards for the rights of prisoners. These would include (i) competent counsel, (ii) an automatic stay of execution so that the prisoner need not scramble for his life in order to have his claim heard, and (iii) a new automatic right of appeal from the federal district court to the federal court of appeals.

In sum, the purpose of the Committee's proposal is to advance the fundamental requirement of a justice system --- fairness. Where the death penalty is involved, fairness means a searching and impartial review of the propriety of the sentence. Fairness also requires that if a prisoner's claims are found to be without merit, society is entitled to have a lawful penalty carried out without unreasonable delay.

* * *

My invitation to appear before the Committee specifically asked that I also address the alternative proposal, S. 1757, introduced by your Chairman. Testifying on proposed legislation is an unfamiliar and uncomfortable role for a judge. But I will, of course, honor your request.

S. 1757 is based on the structure of our proposal, which Senator Thurmond has introduced as S. 1760. But S. 1757 contains several major alterations. Some of these are

aimed at achieving admirable goals -- particularly the assurance that quality counsel is provided at both trial and appellate stages.

But some of the changes proposed by S. 1757 are costly, and - if I understand them - could result in increased repetition and last minute appeals, not fewer.

S. 1757 would provide uniform national standards for the qualification of appointed counsel both in collateral review and at trial. These are the same standards in the Anti-Drug Abuse Act of 1988. The goal here is an admirable one.

Our Committee considered including such standards. We concluded, however, that the States should have the first opportunity to devise standards.

S. 1757 would not allow the States to regulate counsel fees, or fees for investigators and expert witnesses. This could impose an expense on the States that will make the reform legislation unattractive.

S. 1757 expands the limitations period in our proposal from six months to one year. Six months is longer than the time for appeal in other areas of law. It was our Committee's judgment that six months was an ample period where counsel is provided.

With respect to finality and repetition, there are three areas of some concern. First, S. 1757 expands the

situations in which prisoners may bring repetitive petitions.

Under our proposal, a prisoner can bring a repeat petition where there is any question as to his innocence. This is fair and necessary.

But S. 1757 would go well beyond this. Repetitive petitions would be allowed even where innocence was not an issue. Indeed, innocence of the crime rarely is an issue.

As I understand S. 1757, it would allow repeat challenges to the sentence as well as to guilt of the crime. This would invite repetitive litigation.

Our Committee concluded that it was fair to ask the prisoner, who has counsel, to raise all challenges to sentence the first time around.

The Supreme Court has held that mitigating evidence, relevant to sentencing, can be virtually unlimited. In Eddings v. Oklahoma (1982) we held that any relevant mitigating evidence may be admitted in determining the sentence in a capital case. In identifying types of such evidence, the Court that "evidence of a difficult family history, and of emotional disturbance", as an example of mitigating evidence.

In a word, there would be no limit to evidence that arguably may be relevant with respect to the sentence in capital cases. This means that last minute claims can be constructed very easily in any case.

Another area of concern is the law of procedural default. The rules of "procedural default" involve state requirements that a defendant raise an objection to errors at the time of trial, when the error may be corrected. If the defense does not raise the objection, the opportunity to raise it have been waived. Wainwright v. Sykes.

This serves the purpose of seeing that errors are pointed out when something can be done, not years later in attempt to win a new trial. The changes proposed in S. 1757 are contrary to several Supreme Court cases. [See footnote in written testimony. Wainwright, Smith v. Murray, Engle v. Isaac.] They would make it easier for a prisoner to raise claims for the first time long after trial.

Finally, S. 1757 adds a new section to our proposal that would overrule recent Supreme Court decisions that promote finality. See Teague v. Lane (1989) Penry v. Lynauth (1989). Under these decisions, the legality of a prisoner's sentence is usually determined by the law in effect at the time of his trial and direct appeal.

S. 1757 changes this, and would allow prisoners in many cases to challenge their convictions and sentences on the basis of law that was not on the books when they were tried.

As I have noted earlier, the changes in existing law proposed by our Ad Hoc Committee and by S. 1757 will become effective only in states that agree to the changes.

My concern is that the provisions of S. 1757, I have briefly identified would discourage state acceptance.

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Before closing, I do want to emphasize that it is clear from S. 1757, as well as S. 1760 that, there is general agreement as to the need for reform in this important area. The Supreme Court has stated that the justifications for capital punishment are retribution and deterrence. Neither purpose is served by repetitive review of every capital case. Delay robs the penalty of much of its deterrent value.

As ~~I have~~ some 20,000 murders are committed each year in our country. Our Committee recognized the need for a critical reexamination of our open ended system of review, regardless of innocence.

We hope we have made a contribution to the consideration of this extremely important problem.

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