WHO IS ON TRIAL? CONFLICTS BETWEEN THE FEDERAL AND STATE JUDICIAL SYSTEMS IN CRIMINAL CASES

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

FEBRUARY 26, 1988

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WHO IS ON TRIAL? CONFLICTS BETWEEN THE FEDERAL AND STATE JUDICIAL SYSTEMS IN CRIMINAL CASES

FRIDAY, FEBRUARY 26, 1988

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION, JUSTICE,
AND AGRICULTURE SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Madison, FL.

The subcommittee met, pursuant to notice, at 10 a.m., in the Fine Arts Auditorium, North Florida Junior College, Madison, FL, Hon. Glenn English (chairman of the subcommittee) presiding.

Present: Representatives Glenn English, Bill Grant, Al McCandless, and J. Dennis Hastert.

Also present: Robert Gellman, staff director; Donald F. Goldberg, professional staff member; Euphon L. Metzger, clerk; and Brian R. Lockwood, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN ENGLISH

Mr. ENGLISH. This hearing will come to order.

I want to begin today's hearing with a word of explanation of who we are and why we are here. I am Glenn English, Congressman, from the Sixth Congressional District of Oklahoma, and I am here today in my capacity as chairman of the Subcommittee on Government Information, Justice, and Agriculture of the House Committee on Government Operations.

The primary responsibility of the subcommittee is to conduct oversight activities and operations of the Federal Government.

One of our interests is the administration of justice. This is what brings the subcommittee here today.

Congressman Bill Grant, our colleague, has called our attention to some very serious problems arising out of the overlapping jurisdiction of Federal and State criminal justice systems. Bill tells us that the problems are especially acute here in Florida, and we have come here today to take a closer look.

Our main purpose here today is to listen. We want to understand the problems more precisely, and we hope to identify some solutions. We are not a legislative committee. We cannot pass legislation that may be necessary. However, we can call attention to the needs of the area and add our voices to the legislative debate. Also, we will be able to report to those legislative committees and make our recommendations. I certainly want to thank Congressman

Grant for his work in this area. He has been instrumental in bringing criminal justice issues before this subcommittee, and I also want to thank him very much on behalf of the subcommittee for his hospitality.

Since we are in Bill's hometown, I am going to turn the gavel over to him and let him explain to you what we are doing in more detail and ask him to introduce the witnesses, most of whom are from Florida.

Mr. Chairman, it is your gavel.

Mr. GRANT. Thank you,

Mr. Chairman, I am especially proud to have the privilege of presiding over the first congressional hearing to my knowledge that has ever been conducted in my hometown of Madison, FL. Before we begin, I want to welcome and thank our witnesses, you members of the audience, and the press for taking the time to participate in this hearing today.

I am especially grateful to Chairman Glenn English of Oklahoma for recognizing the importance of this issue, not only to Florida, but to the Nation. Florida, as you know, has the highest death row population in the Nation, and I want to thank him for bringing this hearing to Madison.

I also want to thank my colleagues, Representatives Al McCandless of California and Dennis Hastert of Illinois, for the interest that they have shown in this issue. Their expertise and insight will add immeasurably to this hearing, and any legislative initiative which may result from the testimony we are about to receive.

Chairman English is from the State of Oklahoma, a Democrat from Cordell, OK. He was elected to Congress in 1974, and has been reelected since then. Mr. English also serves as the sixth ranking member on the House Agriculture Committee. He served in the Army before he was elected to Congress and was in the oil and gas leasing business in Oklahoma. He is a tough and able questioner and for our witnesses today, we should be grateful that this is an information hearing I suspect and that the penetrating insight of our chairman is not going to be directed in any particular way.

Congressman Al McCandless from the 37th District of California, from Palm Springs, was elected in 1982 to the 98th Congress, was reelected since this.

Mr. McCandless is a former marine who saw action both in the South Pacific and Korea. He also serves on the House Committee on Banking and Urban Affairs. He is a Republican from Palm Springs.

The Honorable Denny Hastert from the 14th District of Illinois went to the Congress with me. He is a Republican from Yorkville, IL, and was elected 1½ years ago to the 100th Congress and has already found a place of reputation and distinction in the House of Representatives. He is a former teacher and a businessman from Illinois, and served from 1980 to 1986 in the Illinois House of Representatives.

The distinguished members of this subcommittee all have commitments this weekend in other parts of the country, so we will attempt to follow our schedule as faithfully as possible. Consequently, in order to give our witnesses ample time to testify and answer

questions from our panel, it will not be possible today to accommodate members of the public who may wish to make statements concerning the capital appeals process. I want everyone to know, however, that they are welcome to contact me if they have particular interest. We are here mainly because of the legitimate questions that many of you have repeatedly raised during the past few years about the proper role of the Federal courts in death penalty appeals cases.

Ladies and gentlemen, as you know, in 1987, Americans proudly celebrated the bicentennial, or 200th birthday of our Constitution, the document which gives form to our diverse and sometimes divergent peoples. I concur with the perceptive soul who characterized our Constitution as one of the greatest creations devised by the minds of men. The Constitution guarantees us freedoms never known in the history of civilization and protects the way of life we hold so dear by limiting the role of the Federal Government and by guaranteeing certain protections for our citizens. Like freedom of speech and religion, protection against arbitrary imprisonment is one of the fundamental rights Americans enjoy.

As a way to protect that right, the framers of the Constitution incorporated a provision from English common law, habeas corpus. The existence of habeas corpus gives a defendant a method to challenge the grounds of executive detention. The framers considered habeas corpus so essential for preventing potential abuses of authority by the Government that they provided only two instances when it could be suspended, during rebellions and invasions.

Many judges and attorneys argue that 200 years later, habeas corpus has evolved into much more than the framers ever envisioned or intended. They say that the seemingly endless series of appeals now common in capital cases is firmly rooted in the expansion of habeas corpus applications by judicial activists mainly in the fifties and sixties. They maintain the dividing line between our much admired system of State and Federal courts, at least as far as capital cases are concerned, has become blurred beyond distinction as defendants are regularly granted habeas corpus petitions to retry issues in Federal court which have previously been decided fairly and accurately by State courts.

Additionally, they argue that the ability of a Federal district judge to hold veto power over State appellate courts has resulted in friction between the two systems, while the explosion of habeas corpus petitions has transformed the Federal courts into capital appeals processing stations, squeezing out the proper consideration of virtually all other types of cases.

No less than U.S. Supreme Court Justices William Rehnquist, Warren Burger, and Lewis Powell have decried the misuse of habeas corpus petitions since the U.S. Supreme Court in 1976 established the constitutionality of the death penalty.

Justice Powell had this to say about the system in 1983, and this is a quote:

> As capital cases accumulate, they add a new dimension to the problem of repetitive litigation . . . many of these persons were convicted five and six years ago. Their cases of repetitive review move sluggishly through our dual system. We have found no effective way to assure careful and fair and yet expeditious and final review . . . Perhaps counsel should not be criticized for taking every advantage of a

system that irrationally permits the now familiar abuse of process. The primary fault lies with our permissive system, that both Congress and the courts tolerate . . . (There is) need for legislation that would inhibit unlimited (habeas corpus) filings.

Chief Justice Rehnquist, in remarks delivered at the National Congress of Chief Justices just this year in January, referred to the death penalty appeals process as "disjointed and chaotic." I quote again, "I do not have any particular remedy in mind," he said, "but I would welcome receiving suggestions on the subject."

On the other side of the debate are attorneys who consider Federal review of issues previously decided in State appeals courts a proper function of the Federal judiciary and warn against legislative and administrative attempts to limit the conditions under which a Federal court could hear habeas corpus petitions or the imposition of time limits for raising certain types of constitutional questions.

They refute the claim that habeas corpus appeals are clogging the Federal court system. Instead, they point to subsequent issues relating to the Supreme Court's landmark 1976 ruling which had to be decided before executions could occur with regularity again as one explanation for the small number of sentences which have been carried out nationwide during the past 12 years, and regardless of the cause of the delay, they maintain the threat to society as a whole is no greater if a person is executed 7 years as opposed to 3 years following his conviction.

In Florida today there are 280 men and women who have been found guilty of some of the most lurid and abominable acts of violence perpetrated by one human being against another. For their crimes, they have been sentenced to pay the ultimate price. About every week, another person is sentenced to death in Florida, yet only 17 sentences have been carried out in the 12 years since 1976.

Those are the bare facts. What this subcommittee is here to discover is why there seems to be no consistency or finality to capital cases and what can be done about it. If the system requires reform, are the remedies available within the administrative structure of the Federal court system or is congressional action necessary?

As a Congressman and as a Florida resident, I support the death penalty. There are certain crimes so horrible, so unimaginable as to, in my judgment, demand it. I also believe that when administered with a degree of predictability, the death penalty has some deterrent effect.

America is a collection of individuals bound by the thin thread of respect for the law. Just as the Constitution must never be compromised for the sake of retribution or revenge, neither can we afford to witness justice paralyzed for long. Cynicism and contempt for government as a whole will be its twin offspring. We cannot afford that consequence as a nation, regardless where each of us stands on the death penalty.

Congressman McCandless, would you care to make an opening statement?

Mr. McCANDLESS. Thank you.

Mr. Chairman, I enjoy the hospitality of the Floridians, I had to come in with a visa and an assumed name. They suggested Ollie North, but we picked another one. I was not able because of my

heritage to have orange juice this morning. I apologize for that. It has been a very nice experience. We got in last night and have been treated very well by the Floridians and we appreciate that and I look forward to the hearing and the people who are going to testify.

Mr. GRANT. Thank you. Congressman Hastert.

Mr. HASTERT. Thank you, Congressman Grant, it is a pleasure to be here and not only the hospitality of the folks in northern Florida but also the issue here is an issue that is not only focused in Florida and very, very timely, but it is an issue that is national. In the State of Illinois, we are right behind you in the number of people who sit on death row and the frustration of sentencing people and trying to make the system work, the judiciary system work, and trying to bring some equity across the board, yet being frustrated by the interplay at both the Federal level and the State level.

Basically, that is why we are here today, to try to get to the bottom of this matter and see if there is some type of resolve and try to work toward that.

So it is a privilege to be here, and a privilege to be in your home district and your hometown, and I look forward to the hearing.

Mr. GRANT. Thank you, Congressman. Our first witness today will be Paul Cassell.

Mr. Cassell is Associate Deputy Attorney General in the U.S. Department of Justice under Attorney General Edwin Meese, a former law clerk to Chief Justice Warren Burger.

Mr. Cassell, we have, I think, all of the members have a copy of your testimony. If you care to, you might want to summarize, and then I will open for questions.

STATEMENT OF PAUL G. CASSELL, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. CASSELL. Thank you.

Mr. Chairman, and distinguished members of the committee.

Mr. ENGLISH. Before Mr. Cassell starts, Mr. Chairman, I might request that without objection all of Mr. Cassell's written testimony be made a part of the record, without objection.

Mr. CASSELL. I will just summarize a few pertinent points from my testimony, Congressman Grant. I am happy to appear today as a representative of the Department of Justice to testify on the important subject of habeas corpus reform, and on the particularly acute problems of delay that have arisen from the abuse of habeas corpus jurisdiction in capital cases. Far too often today, due process has come to mean interminable process, as State prisoners remain free to challenge apparently final State convictions many years and even decades after the imposition of sentence.

Our system has been justly criticized by a number of commentators. For instance, Justice Lewis F. Powell recently indicated that "There is no statute of limitations, and no finality of federal review of state convictions. * * * Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy."

A similar observation was made by Attorney General William French Smith in 1983. He stated that, "The present system of habeas corpus review creates particularly acute problems in capital cases. * * * The 'public interest' organizations that routinely involve themselves * * * in capital cases have fully exploited the system's potential for obstruction."

In my testimony today, I will discuss how we have come to have a system that is viewed with disbelief by lawyers and judges in other countries and that practically nullifies the judgment of the basic majority of Americans in favor of capital punishment. I will also discuss the means for correcting these anomalies. Federal review of the judgment of State courts has traditionally been limited to direct review in the Supreme Court. Today, however, a State prisoner who has exhausted his State appeals can continue to litigate his case by applying for habeas corpus in a Federal district court. This procedure places Federal trial judges in the position of reviewing State appellate courts with authority to overturn even the considered judgments of State supreme courts.

Congress never decided to give the lower Federal courts this extraordinary power. It has no basis in the Constitution or the common law tradition. Under the common law system, a person who was arrested could petition a court to issue a writ of habeas corpus. The writ would order the Government to state the reason for the detention. If the Government responded that the petitioner was being held on a criminal charge, the court could set bail if the offense was bailable and otherwise would have him detained until trial. If the Government could state no charge against the petitioner, the court would order his release.

The importance of habeas corpus as a safeguard against indefinite detention without charges or trial was recognized by the framers, who included in the Constitution, as Congressman Grant recognized, a provision against suspending the writ of habeas corpus. However, the writ that is protected by the Constitution is the common law writ that I have just described, a pretrial remedy which guarded against arbitrary executive detention. It could not be used to challenge another court's judgment unless that judgment was entirely void because the court lacked jurisdiction.

In 1867, Congress chose to expand Federal habeas corpus beyond these constitutional dimensions. The 1867 legislation was designed to provide a Federal remedy for former slaves who were being held in involuntary servitude in the States. While this extended the availability of Federal habeas corpus beyond Federal prisoners, the courts initially continued to observe the traditional limits on the function of habeas corpus in considering State prisoners' petitions.

Habeas corpus did not emerge as a general reviewing jurisdiction of the lower Federal courts in State criminal cases prior to innovative judicial decisions of the 1950's and 1960's. These decisions drastically expanded the Federal rights of State defendants and generally eliminated the traditional rules limiting challenges to convictions and sentences in habeas corpus proceedings. It is clear from this history that limiting Federal habeas corpus for State prisoners is consistent with our legal traditions and with the Constitution. Merely calling the recently created review jurisdiction habeas corpus does not transform it into the great writ of the Constitution.

Thus, as Justice Powell noted in the quotation that I read earlier, there is no constitutional impediment to significant restriction on Federal habeas corpus review.

The existing system of habeas corpus is also not justified as a necessary safeguard against violations of Federal rights by State courts. The supremacy and uniformity of Federal law is maintained through the Supreme Court's direct review of State court judgments and lower Federal court judgments. State courts and Federal courts are equally bound to uphold the Constitution and follow Supreme Court precedent. Broad habeas corpus review by lower Federal courts have no value in protecting defendants' rights that outweighs its costs. These costs are substantial and obvious.

Most habeas corpus petitions are fully lacking in merit. However, they continue to burden judges and prosecutors in carrying out review functions that are essentially redundant in relation to State review processes. The implicit message of permitting endless litigation is that the system never really regards the prisoner's guilt as an established fact and that he need never accept it and deal with it. The difficulty of handling these cases is increased by the absence of any time limit on habeas corpus applications. Petitions are filed often years or even decades after an apparently final State conviction has been entered.

The problem of delay is particularly acute in capital cases. Thirty-seven States now authorize capital punishment and about 2,000 prisoners are currently under sentence of death. However, the typical capital case involves interminable litigation and relitigation, and fewer than 100 executions have occurred in the past 20 years.

The Federal habeas corpus jurisdiction provides an avenue for obstruction in these cases which the States have no power to address. As Justice Lewis F. Powell cogently described in the 1983 speech. "As capital cases accumulate, they add a new dimension to the problem of repetitive litigation. * * * *Gregg* v. *Georgia* decided that capital punishment is constitutional. Some 37 States have authorized it. Murders continue, many of incredible cruelty and barbarity, as mindless killings increase in much of the world. We now have more than 1,000 convicted persons on death row, an intolerable situation." Since Justice Powell's remarks in 1983, when he described 1,000 prisoners on death row as an "intolerable situation," that figure has roughly doubled and yet the need for legislative reform has remained unmet.

This situation need not continue. In the past, Congress has enacted a number of reforms designed to curb excessive habeas corpus review. For example, under current law, a State prisoner cannot appeal a denial of habeas corpus release, unless a judge certifies that there is probable cause for the appeal. Congress originally enacted this restriction in 1908 as a means of curbing the use of habeas corpus appeals to delay the execution of death sentences. Another dramatic example is provided by the congressional enactment in 1970 of a law entirely prohibiting District of Columbia prisoners from seeking Federal habeas corpus, limiting District prisoners instead to a collateral remedy in the District courts.

More far reaching reforms can and should be enacted. The President has recently transmitted to Congress the proposed Criminal

Justice Reform Act, H.R. 3777 and S. 1970. This legislation encompasses a number of important reforms including exclusionary rule reform, reforms in Federal habeas corpus and restoring an enforceable death penalty.

I will concentrate on the habeas corpus reforms. The reforms in the bill have been endorsed by the Conference of (State) Chief Justices, the National Association of Attorneys General, the National District Attorneys Association, and the National Governors Association. They were passed by the Senate in 1984 by a vote of 67 to 9. They have also been repeatedly introduced in the House of Representatives with broad sponsorship.

The specific provisions of the bill include the following. First, the act would provide a general 1-year time limit on Federal habeas corpus applications. This would curb the delays of years and decades beyond the normal conclusion of State proceedings that now frequently occur. A reasonable time limit is obviously of particular importance in capital cases. Under the current system, there is generally no disadvantage to a defendant in filing a petition later rather than earlier and delaying until the last possible moment makes it more likely that continued litigation will prevent the sentence from being carried out. In contrast, the proposed time rule would give capital litigants an incentive to seek habeas corpus review promptly and to present all available claims in initial applications.

The second major reform in the legislation would narrow and simplify the standard of review in habeas corpus proceedings. Under the act a Federal habeas corpus court would generally defer to a State court determination if it was reasonable and arrived at by procedures consistent with due process. Invalidation of a capital sentence would no longer be permitted merely because the State courts reasonably resolved a close or unsettled question differently from a lower Federal court.

Finally, the legislation would limit raising claims on habeas corpus that were not raised in State courts, permit Federal habeas corpus courts to deny frivolous petitions promptly without further State proceedings, and limit the authority to authorize appeals in habeas corpus cases to judges of the courts of appeal.

In closing, I hope that my remarks will be helpful to the committee in addressing this important national problem. Needless to say, no one would countenance a rush to judgment in capital cases or in criminal cases generally. But there is a vast difference between reasonable review processes which ensure that a sentence is justly imposed, and irrationally excessive procedures which ensure that it will never be carried out. Due process must never be confused with interminable process. Review in lower Federal courts by habeas corpus comes on top of what can only be described as an abundant, and in capital cases, a superabundant, panoply of remedies and appeals. Under the current system, this replication of review processes undermines the criminal justice system by precluding any definite end to litigation and by multiplying the avenues for obstruction in capital cases.

These problems will continue only if we permit them to. In the past, Congress has been willing to limit Federal habeas corpus when it ceased to further the interests of justice and became in

itself an impediment to justice. Congress should be willing to do so today in response to the general problems of abuse and delay in habeas corpus litigation, and the virtually incredible effects of this abuse in capital cases. The most practical and readily achievable response is enactment of the Criminal Justice Reform Act, and particularly the habeas corpus reforms proposed in title II of that legislation. In the words of Attorney General William French Smith, these reforms would "go far toward correcting the major deficiencies of the present system of Federal habeas corpus in terms of federalism, proper regard for the stature of the State courts, and the needs of criminal justice."

This concludes my prepared statement, Congressman Grant and Mr. Chairman.

[The prepared statement of Mr. Cassell follows.]

Department of Justice

STATEMENT

OF

PAUL CASSELL

ASSOCIATE DEPUTY ATTORNEY GENERAL

CONCERNING HABEAS CORPUS

AND CAPITAL PUNISHMENT LITIGATION

BEFORE

THE SUBCOMMITTEE ON GOVERNMENT

INFORMATION, JUSTICE, AND ARGRICULTURE

OF THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

February 26, 1988

Held in Madison, Florida

Mr. Chairman, I am pleased to appear before this committee to present the views of the Department of Justice on the need for reform of federal habeas corpus, and on the particularly acute problems of obstruction and delay that have arisen from the abuse of habeas corpus in capital cases. Before turning to a specific discussion of these issues, let me direct your attention briefly to two general assessments. The first is an observation of Justice Lewis F. Powell, delivered at an American Bar Association meeting in 1982. In commenting on the major contemporary problems of the federal judicial system, Justice Powell observed:

> Another cause of overload of the federal system is [28 U.S.C.] § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy. 1/

The second observation I wish to bring to your attention was made by Attorney General William French Smith in 1983. In the course of a general critique of the current federal habeas corpus jurisdiction, Attorney General Smith stated:

1/ Address of Justice Lewis F. Powell before the American Bar Association Division of Judicial Administration, Aug. 9, 1982.

> A . . . final criticism is that the present system of habeas corpus review creates particularly acute problems in capital cases . . . . The "public interest" organizations that routinely involve themselves . . . in capital cases have fully exploited the system's potential for obstruction. Delay is maximized by deferring collateral attack until the eve of execution. Once a stay of execution has been obtained, the possibility of carrying out the sentence is foreclosed for additional years as the case works its way through the multiple layers of appeal and review in the state and federal courts.
>
> The solution to this problem lies in part in the reform of state court procedures . . . . The efficacy of state reforms is severely limited, however, by the availability of federal habeas corpus, which cannot be limited by the state legislatures . . . . It . . . prevents correction of the practical nullification of all capital punishment legislation that has resulted from litigational delay and obstruction. 2/

In my testimony today, I will discuss how we have come to have a system that "assures no end to the litigation of a criminal conviction" -- a system that is "viewed with disbelief by lawyers and judges in other countries," and that results in the "practical nullification" of the judgment of the vast majority of Americans that capital punishment is the appropriate penalty for the most egregious crimes. I will also discuss the means of correcting these anomalies.

2/ Proposals for Habeas Corpus Reform in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 145-46 (1983) [hereafter cited as "Proposals for Habeas Corpus Reform"].

The initial portion of my testimony will address the historical development of the federal habeas corpus jurisdiction. A review of the relevant history shows clearly that the current statutory "habeas corpus" remedy by which the lower federal courts review state judgments has no relationship to the traditional writ of habeas corpus whose suspension is prohibited by the Constitution. Whether state prisoners should have a post-conviction remedy in the lower federal courts, and if so, how broadly, is entirely within Congress's discretion.

Second, I will discuss the contemporary problems of abuse arising from expansive habeas corpus review, and respond to the argument that the interests of justice require the endless second-guessing of state judgments it produces.

Third, I will review the history of congressional action aimed at curbing excessive habeas corpus review. This history shows that there is ample precedent for Congress's exercise of its authority to regulate the scope of federal habeas corpus in order to deal with the general problem of habeas corpus abuse and the specific problem of abuse in capital cases.

Finally, I will discuss pending habeas corpus reform legislation -- title II of the proposed Criminal Justice Reform Act (H.R. 3777 and S. 1970) -- which would provide effective responses to many of the current problems of abuse and delay.

I. The History of Habeas Corpus

Federal review of the judgments of state courts has traditionally been limited to direct review in the Supreme Court. Under contemporary practice, however, a state prisoner who has exhausted his avenues of appeal in the state court system may continue to litigate the validity of his conviction or sentence by applying for habeas corpus in a federal district court. In the habeas corpus proceeding, the prisoner may raise and secure a redetermination of the same claims of federal right that have already been fully litigated and rejected at multiple levels of the state court system. In practical effect, this procedure places federal trial judges in the position of reviewing courts, with authority to overturn the considered judgments of state courts of appeals and state supreme courts in criminal cases.

A review of the relevant history shows that Congress never decided to give the lower federal courts this extraordinary power, and that it has no basis in the Constitution or the common law tradition. At common law, habeas corpus was essentially a means of securing judicial review of the existence of grounds for executive detention. If a person was taken into custody by executive authorities, he could petition a court to issue a writ of habeas corpus, which would order the custodian to produce the

prisoner and state the cause of his commitment. If the government made an adequate return stating that the petitioner was being held on a criminal charge, the court would set bail for the petitioner, or allow him to remain in detention pending trial, depending on whether the offense charged was bailable or non-bailable. If the government could state no charge against the petitioner, the court would order his release. 3/

The importance of habeas corpus in this character -- as a safeguard against indefinite detention without charges or trial -- was recognized by the Framers, who included in the Constitution a prohibition of suspending the writ of habeas corpus, "unless when in Cases of Rebellion or Invasion the public safety may require it." The writ of habeas corpus referred to in the Suspension Clause of the Constitution, however, differed in two fundamental respects from the contemporary statutory writ by which the lower federal courts review state criminal judgments.

First, the right to habeas corpus set out in the Constitution was only intended as a check on abuses of authority by the federal government, and was not meant to provide a

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3/ See, e.g., Oaks, Habeas Corpus in the States -- 1776-1865, 32 U. Chi. L. Rev. 243, 243-45, 262 (1965); Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich. L. Rev. 451, 451, 460-61, 468 (1966); Hart & Wechsler's The Federal Courts and the Federal System 1513 (2d ed. 1973); R. Rader, Bailing Out a Failed Law: The Constitution and Pre-Trial Detention in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 91, 94-96 (1983).

judicial remedy for unlawful detention by state authorities. This point is evident, to begin with, from the placement of the Suspension Clause in Section 9 of Article I of the Constitution, which is an enumeration of limitations on the power of the federal government. The corresponding enumeration of restrictions on state authority in Section 10 of Article I contains no right to habeas corpus. 4/ Shortly after the ratification of the Constitution, the First Congress in 1789 made the limitation of the federal habeas corpus right to federal prisoners explicit, providing in the First Judiciary Act (ch. 14, § 20, 1 Stat. 81-82):

> [T]he justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol [i.e., jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same . . . .

Second, the writ referred to in the Constitution, as noted above, was the common law writ of habeas corpus, a pre-trial remedy whose essential function was to serve as a check on arbitrary executive detention. Recognition of the common law scope of the writ is reflected in the Constitution's

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4/ See generally 2 M. Farrand, The Records of the Federal Convention of 1787, at 438 (1966); 3 id. at 157, 213, 290 (assumption in debate at the Constitutional Convention that the states would retain the authority to suspend the writ).

authorization of the suspension of the writ in cases of rebellion or invasion, whose obvious purpose is to permit in such circumstances executive detention unconstrained by normal legal processes and standards. 5/ Similarly, the First Judiciary Act described the function of the writ as "inquiry into the cause of commitment" and referred to its availability to federal prisoners "committed for trial."

The restriction of federal habeas corpus to federal prisoners was qualified by the enactment of the Habeas Corpus Act of 1867, which extended the availability of the writ to persons "retrained of . . . liberty" in violation of federal law, without any requirement of federal custody. The legislative history of the Act indicates that it was meant to provide a federal remedy for former slaves who were being held in involuntary servitude in the states in violation of the wartime emancipation decrees and the recently enacted Thirteenth Amendment. Thus, Congress acted with a narrow purpose in extending the availability of federal habeas corpus beyond persons in federal custody, and the initial judicial applications of the enlarged jurisdiction were also quite narrow. 6/ The courts continued to follow the common law rule that a prisoner could not challenge his detention pursuant

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5/ See generally id.; 1 Blackstone, Commentaries on the Laws of England 131-32 (1765).

6/ See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965).

to the judgment of a court by applying for habeas corpus unless the judgment was void because the court lacked jurisdiction. 7/

Following the decision of Moore v. Dempsey, 261 U.S. 86 (1923), a somewhat broader approach emerged under which a claimed violation of a federal right could be asserted on federal habeas corpus if no meaningful process for considering such a claim was provided in the state courts. However, federal habeas review in this period generally depended on the absence of meaningful state remedies, and the habeas corpus jurisdiction of the federal courts did not become a general means for reviewing the substantive accuracy of state court determinations of federal claims. 8/

The final stage in the expansion of the federal habeas corpus jurisdiction came in innovative judicial decisions of the 1950's and 1960's which abrogated the traditional limitations on the habeas corpus remedy. 9/ In conjunction with the expansion of substantive federal rights by decisions of the 1960's, this effectively created a general reviewing jurisdiction of the lower

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7/ See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 465-84 (1963).

8/ See id. at 463-65, 488-99.

9/ See Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953); Bator, supra note 7, at 499-507.

federal courts over the judgments of state courts in criminal cases. 10/

II. Assessment of the Current System of Review

Defenders of the current system of broad habeas corpus review often advance confused arguments that proposed reforms would interfere with the Great Writ of the common law, whose suspension is prohibited by the Constitution outside of extreme situations of public emergency. On the basis of the foregoing discussion, it is clear that such arguments are without merit.

The traditional reverence for the Great Writ provides no support for the continuation of federal habeas corpus in its present character as a post-conviction remedy providing additional levels of review on claims that have been repeatedly adjudicated and rejected in state proceedings. As noted earlier, this use of habeas corpus would have appeared totally alien to the Framers, and to common law jurists generally prior to the middle of the twentieth century. The common law has revered habeas corpus as a safeguard against executive oppression, not as a mechanism by which one set of courts second-guesses the judgments of another set of courts.

10/ See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 154-57 (1970).

The same consideration is a sufficient response to the objection that proposed reforms would run afoul of the Constitution's prohibition of the suspension of habeas corpus. As discussed above, the statutory "habeas corpus" remedy that is currently available to state prisoners in the lower federal courts -- a quasi-appellate mechanism for reviewing state judgments -- is simply not the writ of habeas corpus referred to in the Constitution. These two writs have fundamentally different functions and are directed against the actions of different governments. They have nothing in common but a name. 11/

The existing system of federal habeas corpus review also cannot be justified as a necessary safeguard against injustices that would otherwise result from violations of federal rights by the state courts. The essential function of maintaining the supremacy and uniformity of federal law is carried out through direct review of the judgments of state courts and lower federal courts by the Supreme Court. State courts and federal courts are equally bound to uphold the Constitution and follow Supreme Court precedent in their decisions, and every state prisoner has the right to apply for

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11/ It is also clear that no subsequent amendment to the Constitution requires review of state judgments by the lower federal courts. State prisoners have no constitutional right of access to a federal forum. See Allen v. McCurry, 449 U.S. 90, 102-03 (1980); Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 627-28 (1981).

direct review by the Supreme Court following the affirmance of his conviction by the state courts. There is no adequate basis for believing that there is currently any general insensitivity to claims of federal right in the state courts, or that broad habeas corpus review by the lower federal courts -- provided in addition to the Supreme Court's traditional oversight through direct review -- has any value in protecting defendants' rights that outweighs its very substantial costs. 12/

As a practical matter, a state prisoner who properly presents an application for federal habeas corpus has typically been tried and convicted of a serious offense in state court, has already had the conviction affirmed by a state appellate court on appeal, and has had an application for review denied or decided adversely by a state supreme court. Many habeas petitioners have also had additional review in state collateral proceedings. 13/

12/ See Bator, supra note 11, at 630-34 (disputing, in relation to habeas corpus review, alleged superiority of federal judges in sensitivity and competence under contemporary conditions); Friendly, supra note 10, at 165 n. 125 (similar); O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801, 812-14 (1981) (similar); Proposals for Habeas Corpus Reform, supra note 2, at 149 (unlikelihood under contemporary circumstances of state court misapplication or resistance to Supreme Court precedent); see also Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1119 (1977) ("We are not faced today with widespread state judicial refusal to enforce clear federal rights.").

13/ An extensive empirical study of habeas corpus litigation carried out for the Department of Justice found that most petitioners had been convicted of serious, violent offenses. (continued...)

The incremental benefits of affording even more levels of mandatory review in the lower federal courts through habeas corpus are difficult to discern. In most habeas cases the federal courts agree with the conclusion of the state courts, though considerable time and effort at both the district court and circuit court levels is often expended in reaching this result. In the relatively few cases in which relief is granted, it is likely to reflect disagreement with the state courts on arguable or unsettled issues in the interpretation or application of federal law on which the lower federal courts may disagree among themselves. 14/

The questionable value of this type of review is emphasized by the experience in the District of Columbia. In

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13/(...continued)
Over 80% had been convicted after trial, and practically the same proportion had had, or were having, direct appellate review of their cases in the state system. Moreover, about 45% of petitioners had pursued collateral remedies in the state courts, including over 20% who had filed two or more previous state petitions. Over 30% had filed one or more previous federal petitions. See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 4(a), 7, 15, 20 (Federal Justice Research Program 1979). Even where a petitioner has not had prior state court review of his claims, this does not imply that means for raising such claims are unavailable in the state courts, since prisoners frequently by-pass state remedies and file procedurally defective habeas corpus petitions. See id. at 13.

14/ See Friendly, supra note 10, at 144 n. 10, 148 n. 25, 165 n. 125; Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 44 (1985); The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 42-44 (1982).

establishing a separate court system for the District of Columbia in 1970, Congress barred D.C. prisoners from applying for habeas corpus in the federal courts, limiting them instead to a collateral remedy in the D.C. courts. No adverse effect on the quality or fairness of criminal proceedings in the District of Columbia has been observed to result from this restriction. 15/ When the preclusion of federal habeas corpus review in one major jurisdiction has caused no evident problems over a period of nearly twenty years, it becomes difficult to believe that reasonable limitations on such review would adversely affect the quality of justice in the substantially similar judicial systems of the states.

While the benefits of the current system of federal habeas corpus are, to say the least, nebulous, its costs are substantial and obvious. The exercise by individual federal trial judges of the authority to review and overturn the considered judgments of state supreme courts is a perennial source of tension in the relationship of the federal and state judiciaries. While most habeas corpus applications are wholly lacking in merit, they continue to impose substantial burdens on judges and prosecutors in carrying out a review function that is essentially redundant in relation to state review processes.

15/ See Proposals for Habeas Corpus Reform, supra note 2, at 148-49; McGowan, The View From an Inferior Court, 19 San Diego L. Rev. 655, 667-69 (1982). The Supreme Court upheld the constitutionality of this reform in Swain v. Pressley, 430 U.S. 372 (1977).

This burden is increasing. The number of habeas corpus petitions filed by state prisoners in the federal district courts over the past ten years is as follows: 16/

1978	1979	1980	1981	1982	1983
7,033	7,123	7,031	7,790	8,059	8,532

1984	1985	1986	1987
8,349	8,534	9,040	9,524

Habeas corpus petitions, in common with other prisoners suits, are all too frequently filed as a type of recreational activity, which provides prisoners with a cost-free means of striking out at the system and passing time in prison. 17/ The implicit message of permitting endless challenges to convictions and sentences is that the system never really regards the prisoner's guilt as an established fact, and that he need never accept and deal with it. Judges and writers have frequently expressed the view that the exaggerated lack of confidence in the possibility of just conviction and punishment which this open-

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16/ These figures are drawn from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. In addition to reporting 9,524 habeas corpus petitions by state prisoners, the most recent report (1987) noted 1,808 habeas corpus petitions and 1,664 "motions to vacate sentence" by federal prisoners (Table C2).

17/ See Habeas Corpus Reform: Hearing on S. 238 before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 14-15 (1985).

ended review system reflects is in conflict with the corrective and deterrent functions of the criminal justice system. 18/

The difficulty of dealing with these cases is increased by the absence of any definite time limit on habeas corpus applications, which can result in the need to reconstruct events after a lapse of years or decades. Data collected in an extensive study conducted for the Department of Justice showed that about 40 percent of habeas corpus petitions were filed more than five years after the state conviction, and nearly one-third were filed more than a decade after the state conviction. Still longer delays were noted in some cases in the study, up to more than fifty years from the time of conviction. 19/

There is no need for me to inform the members of this committee that the problem of delay is particularly acute in capital cases. 20/ In such cases, the continuation of litigation prevents the sentence from being carried out. Thirty-seven states now authorize capital punishment, and about 2,000

18/ See Bator, supra note 7, at 452; Mackey v. United States, 401 U.S. 667, 690-91 (1971) (separate opinion of Harlan, J.); Friendly, supra note 10, at 146; Spalding v. Aiken, 460 U.S. 1093, 1096-97 (1983) (statement of Burger, C.J.).

19/ See Allen, Schachtman & Wilson, Federal Habeas Corpus and its Reform: An Empirical Analysis, 13 Rutgers L. J. 675, 703-04 (1982).

20/ See, e.g., Address of Justice Lewis F. Powell before the Eleventh Circuit Conference, Savannah, Georgia, May 8-10, 1983, at 9-14; Bureau of Justice Statistics, Capital Punishment, 1986 (Dept. of Justice, Sept. 1987).

prisoners are currently under sentence of death, but the typical capital case is characterized by interminable litigation and re-litigation, and fewer than a hundred executions have been carried out in the past twenty years. 21/ While the constitutionality of capital punishment under appropriate standards and procedures has now been settled for many years, and the popular and legislative judgment overwhelmingly supports the death penalty for the most serious crimes, the open-ended system of review has largely nullified this judgment as a practical matter. The federal habeas corpus jurisdiction, in particular, provides an avenue for obstruction and delay in these cases which the states are powerless to address. 22/ The general problem was cogently described by Justice Lewis F. Powell in an address in 1983 before the Eleventh Circuit Conference:

> As capital cases accumulate, they add a new dimension to the problem of repetitive litigation. . . . Gregg v. Georgia decided that capital punishment is constitutional. Some 37 states have authorized it. Murders continue, many of incredible cruelty and barbarity, as mindless killings increase in much of the world. We now have more than 1,000 convicted persons on death row, an intolerable situation.
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> Many of these persons were convicted five and six years ago. Their cases of repetitive review move sluggishly through our dual system. We have found no effective way

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21/ NAACP Legal Defense and Educational Fund, Death Row, U.S.A. (Nov. 1, 1987).

22/ See Proposals for Habeas Corpus Reform, supra note 2, at 145-46.

> to assure careful and fair and yet expeditious and final review.
>
> So far this Term, we have granted and heard arguments in four capital cases, and have agreed to hear a fifth next Term. We have received 28 applications for stays of execution, about half of which have come at the eleventh hour . . . .
>
> Perhaps counsel should not be criticized for taking every advantage of a system that irrationally permits the now familiar abuse of process. The primary fault lies with our permissive system, that both Congress and the courts tolerate . . . . [There is] need for legislation that would inhibit unlimited [habeas corpus] filings 23/

In the few years since Justice Powell's remarks, the "intolerable" figure of 1,000 prisoners awaiting execution has roughly doubled, and the need for remedial legislation remains unmet.

III. Legislative Restrictions of Habeas Corpus

The Supreme Court, in its current habeas corpus jurisprudence, has given weight to considerations of finality and federalism that were ignored or shrugged off in the expansive decisions of the 1960's. A number of the Justices have been openly critical of excessive habeas corpus review, and recent decisions have effected several limitations on its scope and

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23/ Citation in note 20 supra.

availability. 24/ However, the Court's ability to make changes in this area is constrained by precedent and existing statutory provisions, by the need to proceed on a piecemeal basis in deciding particular cases, and by the absence of unanimity among the Justices concerning the particular reforms that should be adopted. An adequate response to the current problems of abuse and delay will require legislative action.

Congress has in fact repeatedly expressed concerns about the expansion of the habeas corpus jurisdiction, and has endorsed corrective measures on a number of occasions. As early as 1884, a House Judiciary Committee Report strongly criticized the practice that had emerged in some lower federal courts of entertaining challenges to state convictions under the Habeas Corpus Act of 1867. The Report stated that the Act had been adopted as a response to the unique problems of Reconstruction, and was not meant to empower the inferior federal courts to overturn the judgments of state courts. 25/

24/ See, e.g., Tollett v. Henderson, 411 U.S. 258 (1973); Stone v. Powell, 428 U.S. 465 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977); Sumner v. Mata, 449 U.S. 539 (1981); Barefoot v. Estelle, 463 U.S. 880 (1983); S. Rep. No. 226, 98th Cong., 1st Sess. 5-6 & nn. 13-16 (1983) (citation to critical statements by Justices).

25/ See H.R. Rep. No. 730, 48th Cong., 1st Sess. (1884). The Committee did not recommend direct action against this type of review because it believed that restoring the Supreme Court's jurisdiction to review decisions under the Habeas Corpus Act of 1867 might suffice to secure a satisfactory construction of the Act. Congress had divested the Supreme Court of jurisdiction to hear appeals under the Habeas

(continued...)

In the course of the present century, Congress has adopted a number of limitations on the federal habeas corpus jurisdiction. Without attempting a complete description of existing legislative restrictions, the following examples may be of interest to the committee:

First, under 28 U.S.C. § 2553 and Fed. R. App. P. 22, a state prisoner is barred from appealing the denial of habeas corpus by a district court unless a circuit or district judge certifies that there is probable cause for the appeal. This requirement currently serves the general purpose of avoiding the need for a full-dress appeal where the petitioner cannot make a substantial showing of a denial of a federal right. It originated in 1908 as a specific response to delay in capital cases which resulted from the pre-existing rule that state proceedings (including execution of a death sentence) were automatically stayed while habeas corpus litigation continued. The remarks of the floor manager in the House of Representatives in support of this reform have a strikingly contemporary ring:

> [T]he occasion for this legislation arises from the fact that . . . there is a large number of groundless appeals . . . in habeas corpus proceedings in capital cases . . . .

25/(...continued)
Corpus Act in 1868 to prevent the Court from interfering with the military governance of the defeated Confederacy. See generally Mayers, supra note 6, at 41 & n. 44, 51 & n. 76.

> [I]t is only necessary in the proceedings to suggest a frivolous or fictitious federal question, have the petition overruled, and then take an appeal . . . which delays the execution . . . from one to two years . . . .
>
> And there is no power . . . to prevent the prosecution of these groundless appeals. If a man has been there once he can go right back, start his habeas corpus proceedings again, and go right over the same case . . . . [Attorneys] now wait, until about the last minute, and then . . . prosecute [an] appeal 26/

Second, in the 1948 revision of the Judicial Code, Congress replaced the post-conviction habeas corpus remedy for federal prisoners with a statutory motion remedy (28 U.S.C. § 2255) in the sentencing court. This reform was motivated in part by a desire to redress the litigative disadvantages that resulted to the government when federal prisoners sentenced in one district were permitted to mount collateral attacks on their convictions and sentences in other districts in which they were incarcerated. 27/

Third, in 1966, Congress enacted 28 U.S.C. § 2254(d), which creates a presumption of correctness for state court fact-finding in habeas corpus proceedings if certain conditions are

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26/ 42 Cong. Rec. 608-09 (1908). The certificate of probable cause requirement remains available as a constraint on dilatory habeas corpus appeals in capital cases, see generally Barefoot v. Estelle, 463 U.S. 880 (1983), though it has obviously proven inadequate by itself to prevent gross abuse and interminable litigation in such cases.

27/ See Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 175, 178 (1949); see also United States v. Hayman, 342 U.S. 205 (1952).

satisfied, and provides that the petitioner has the burden of overcoming this presumption by "convincing evidence." This went considerably beyond the pre-existing caselaw standards, which only held that a habeas court could forego an evidentiary hearing in certain circumstances. 28/

Fourth, as noted earlier, Congress in 1970 barred access to federal habeas corpus for prisoners in the District of Columbia. The practical effect of this reform is that convictions and sentences imposed by the D.C. courts are not subject to review in the lower federal courts, but such review remains available in relation to the substantially similar court systems of the states.

In addition to the various legislative reforms that are currently in effect, there have been efforts in Congress on a number of occasions to enact more complete solutions to the problems of the federal habeas corpus jurisdiction, often with the institutional support of the federal judiciary.

For example, a provision enacted in the 1948 revision of the Judicial Code -- now 28 U.S.C. § 2254(c) -- generally bars access to federal habeas corpus by a state prisoner "if he has the right under the law of the State to raise, by any available

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28/ See Townsend v. Sain, 372 U.S. 293 (1963) (prior standard); Sumner v. Mata, 449 U.S. 539 (1981) (strong interpretation of statutory presumption in favor of state fact-finding).

procedure, the question presented." The enactment of this provision was the culmination of efforts by the Judicial Conference in the course of the 1940's to secure the limitation of federal habeas corpus for state prisoners. 29/ Judge Parker, who played the leading role in the Conference's work on this legislation, explained that the provision would generally bar access to federal habeas corpus in any state that permitted repetitive recourse to its collateral remedies, and expressed the view that it would have the practical effect of abolishing federal habeas corpus as a post-conviction remedy for state prisoners. 30/ Notwithstanding the unequivocal language of the provision and Judge Parker's observation concerning its meaning, the Supreme Court in Brown v. Allen, 344 U.S. 443, 447-50 (1953), refused to give it effect, stating that it was unwilling to accept so radical a change from prior habeas corpus practice without "a definite congressional direction."

Shortly after Brown v. Allen, the Judicial Conference tried again. The legislation it proposed this time would have barred raising a claim on federal habeas corpus so long as there had been a fair and adequate opportunity to raise the claim and have it determined in the state courts. The legislation would also have barred raising in federal habeas corpus proceedings any

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29/ See generally Parker, supra note 27; Reports of the Judicial Conference of the United States 22-23 (1943), 22 (1944), 28 (1945), 21 (1946), 46 (April 1947), 17-18 (Sept. 1947).

30/ See Parker, supra note 27, at 175-78.

claim that had actually been determined by the state courts or that could still be raised and determined in state proceedings. As a further safeguard against prolonged proceedings and dilatory litigation, the legislation provided that review of a denial of a habeas corpus application could only be obtained by applying to the Supreme Court for certiorari within thirty days of the denial. 31/

In addition to the Judicial Conference, the Department of Justice, the Conference of (State) Chief Justices, the National Association of Attorneys General, and the section on judicial administration of the American Bar Association endorsed this proposal. Following hearings and committee consideration, the House of Representatives passed this legislation on Jan. 19, 1956, and passed it a second time on March 18, 1958. 32/

In the course of Congress's consideration of this proposal, its proponents pointed out that the use of habeas corpus as a writ of review was a recent development that was unrelated to the historical function of the habeas corpus remedy. It was argued that the reforms would generally correct the increased caseload burdens, indefinite prolongation of

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31/ See Habeas Corpus: Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 84th Cong., 1st Sess. 1 (1955) [hereafter cited as "Hearings"].

32/ See id.; H.R. Rep. No. 1200, 84th Cong., 1st Sess. (1955); 102 Cong. Rec. 935-40; 104 Cong. Rec. 4668, 4671-75.

litigation, and conflict between the state and federal judiciaries that had resulted from the recent expansions of federal habeas corpus. It was also noted that the proposed reforms were responsive to the particular problem of delay in capital cases:

> Another evil to which the [Judicial Conference] committee addressed itself was the delay in executing State court sentences in capital cases as the result of appeals in habeas corpus proceedings . . . . [A] man could be convicted of a capital offense in a State court and be sentenced to death and his execution stayed while he exhausts State court remedies, then after having his conviction affirmed by the highest court in the State he can seek to have the lower Federal court review the action of the State courts. If the lower Federal court denies the relief sought, he can then make an application to the United States Court of Appeals. If the United States Court of Appeals affirms the action of the lower Federal court . . . and if certiorari is denied by the Supreme Court he can then go to another Federal court and ask for a writ of habeas corpus and go through the same procedure. There are cases where execution has been delayed for years and years by that practice. 33/

A final example of a far-reaching reform proposal that made substantial progress in Congress was the habeas corpus provision of title II of the proposed Omnibus Crime Control and Safe Streets Act of 1968. Title II of that legislation was formulated as a general response to innovative judicial decisions of the 1960's which were thought to pose unwarranted impediments

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33/ Hearings, supra note 31, at 6-7; see also id. at 9-10.

to effective law enforcement. It included a provision that would have limited federal review of state judgments to direct review in the Supreme Court, thereby abolishing federal habeas corpus as a post-conviction remedy for state prisoners. 34/

The Senate Judiciary Committee's Report on the legislation stated that the proposal relating to habeas corpus would correct the problems of delay and abuse resulting from recent Supreme Court decisions that had transformed habeas corpus into a quasi-appellate mechanism. In supporting the constitutionality of the reform, the Report noted that the constitutional writ of habeas corpus was only a means of eliciting a statement of the grounds for detention and could not be used to challenge a conviction by a court with jurisdiction; that the Constitution's preservation of the habeas corpus right only operates against the federal government and not the states; and that the Habeas Corpus Act of 1867 was only enacted as a means of enforcing the abolition of slavery. 35/

The Judiciary Committee sent this proposal to the Senate floor. However, it was ultimately deleted as part of a

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34/ See 114 Cong. Rec. 14182 (1968).

35/ See 1968 U.S. Code Cong. & Admin. News 2150-53.

broader compromise relating to the formulation of title II of the Omnibus Crime Control and Safe Streets Act. 36/

IV. Pending Reform Legislation

Up to this point I have been discussing the historical expansion of the federal habeas corpus jurisdiction and past efforts by congress to curb its excesses. The final portion of my testimony will focus on the most promising vehicle for dealing with its contemporary problems.

The President has recently transmitted to Congress the proposed Criminal Justice Reform Act (H.R. 3777 and S. 1970). In brief, the main provisions of the proposed Act are as follows:

Title I of the legislation would provide for the admission in federal judicial proceedings of evidence obtained under circumstances justifying an objectively reasonable belief that the search or seizure by which it was obtained was in conformity with the Fourth Amendment. Very similar exclusionary rule reform legislation was passed by the Senate as S. 1764 in the 98th Congress and by the House of Representatives as section 673 of H.R. 5484 in the 99th Congress. 37/

36/ See generally Office of Legal Policy, Report on the Law of Pre-Trial Interrogation 62-63 (Feb. 12, 1986).

37/ See generally S. Rep. No. 350, 98th Cong., 2d Sess. (1984) (Senate Judiciary Committee Report on S. 1764).

Title II would effect a variety of reforms in federal habeas corpus for state prisoners and the corresponding collateral remedy for federal prisoners. Very similar habeas corpus reform legislation was passed by the Senate as S. 1763 in the 98th Congress by a vote of 67 to 9. Substantially the same proposals have also been introduced with broad sponsorship in various bills in the House of Representatives (e.g., H.R. 5594 of the 98th Congress). 38/

Title III of the bill would restore an enforceable federal death penalty for the most egregious federal crimes of murder, treason, and espionage. Very similar death penalty legislation was passed by the Senate as S. 1765 in the 98th Congress. In the 99th Congress, the House of Representatives passed as part of H.R. 5484 legislation authorizing capital punishment under similar standards and procedures for killings in the course of a continuing drug enterprise offense. 39/

38/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. (1983) (Senate Judiciary Committee Report on S. 1763); Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 14-59 (1985) (most recent testimony of Department of Justice in support of habeas corpus reform legislation).

39/ See generally S. Rep. No. 251, 98th Cong., 1st Sess. (1983); S. Rep. No. 282, 99th Cong., 2d Sess. (1986) (Senate Judiciary Committee Reports on capital punishment proposals).

The habeas corpus reform proposals of title II of the proposed Criminal Justice Reform Act are obviously most germane to the subject of this hearing. These proposals have the support of the Conference of (State) Chief Justices, the National Association of Attorneys General, the National District Attorneys Association, and the National Governors Association. 40/ As noted above, they have already been passed by the Senate.

Title II comprises a moderate and balanced set of proposed reforms in habeas corpus standards and procedures. It does not go as far as the legislation that was twice passed by the House of Representatives in the 1950's or the legislation approved by the Senate Judiciary Committee in 1968 -- which would have virtually abolished federal habeas corpus for state prisoners -- but it does provide effective responses to the clearest problems of the current system. While it would not foreclose all possibilities of abuse and delay in capital punishment litigation, it would bring about basic improvements in that context, as well as in non-capital cases. The specific reforms proposed in title II are as follows:

40/ See Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 226-27, 235-36, 287-88, 309-11, 1111-12 (1983). The formal resolution of the National Governors Association, id. at 235-36, related to an earlier but generally similar set of reform proposals.

First, there is currently no time limit on habeas corpus applications. This reflects a failure of the procedures associated with federal habeas corpus to keep pace with its expanding scope. By way of comparison, other remedies for reviewing or re-opening judgments in the federal courts are subject to definite time limitations. Federal defendants, for example, generally must decide whether to appeal within ten days (Fed. R. App. P. 4(b)); state convicts seeking direct review of their convictions in the Supreme Court generally must apply within 60 days (Sup. Ct. R. 20); and even a federal prisoner who claims to have new evidence of his innocence discovered after trial is subject to a two-year time limit under Fed. R. Crim. P. 33.

The specific corrective proposed in title II is a one-year limitation period for habeas corpus applications, normally running from exhaustion of state remedies. 41/ State remedies would be exhausted with respect to a claim, and the time limit would begin to run, if the claim had once been taken up to the

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41/ The legislation provides for deferral of the start of the time limitation period in certain extraordinary situations involving claims which could not have been discovered at an earlier point through the exercise of reasonable diligence, retroactively applicable new rights which are subsequently recognized by the Supreme Court, or unlawful state interference with filing. However, these qualifications are narrowly and specifically defined in the legislation and the related legislative materials, and would not undermine the value of the time rule as a safeguard against unjustifiable delay. See generally S. Rep. No. 226, 98th Cong., 1st Sess. 8-10, 16-18 (1983).

highest court of the state on review. State remedies would also be exhausted with respect to a claim in the relevant sense if the direct review process were completed and state law barred raising such a claim in state collateral proceedings, or if the time provided by state law for raising such a claim in state collateral proceedings had expired. 42/ This would provide state convicts with a reasonable period within which to seek federal habeas corpus review, but would provide protection against the delays of years or decades beyond the normal conclusion of state proceedings that now frequently occur in habeas corpus litigation.

A time limitation is obviously of particular importance in capital cases. The incentives of the current system favor dilatory tactics by capital punishment litigants in habeas corpus proceedings. There is generally no particular disadvantage in filing a petition later rather than earlier, and delaying until the last moment makes it more likely that the continuation of litigation will prevent an execution from being

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42/ See id. at 17, 20. Since state rules generally bar raising on collateral attack claims that were raised or that could have been raised on direct review, the time limitation period would begin to run with respect to most types of claims -- i.e., those not allowed on collateral attack -- when direct review of the case was completed or the time for seeking direct review expired. If a state replaced the traditional bifurcated system of direct review and collateral attack with a unitary review system, the completion of unitary review or the expiration of the time for seeking such review would similarly start the running of the time limitation period. See id. at 17 n. 63.

carried out. In contrast, the proposed time rule would provide capital litigants with an incentive to seek federal habeas corpus review promptly, and to present all available claims in initial habeas corpus applications. 43/ A failure to do so would risk having delayed or omitted claims dismissed as time-barred if presented at a later point.

The second major reform proposed in the legislation is a general narrowing and simplification of the standard of review in federal habeas corpus proceedings. Under the current system, state court fact-finding is presumed to be correct if a number of poorly-defined conditions set out in 28 U.S.C. § 2254(d) are satisfied, but the federal habeas court is required to make an independent determination of questions of law and to apply the law independently to the facts. This can result in the overturning of a state judgment -- following the passage of years and affirmance by the appellate courts of the states -- on grounds which the habeas court recognizes as close or unsettled questions on which courts may reasonably differ, and on which the lower federal courts themselves may disagree. The legislation would substitute a relatively simple and uniform standard under which the federal habeas court would generally defer to the state determination of a claim if it was reasonable in its resolution

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43/ Once a claim has been presented in a federal petition and rejected on the merits, it may be dismissed if it is presented again in a subsequent petition. See Habeas Corpus Rule 9(b).

of legal and factual issues and was arrived at by procedures consistent with due process. 44/

Like the other reforms of the legislation, this change in the standard of review would reduce the dilatory potential of habeas corpus litigation in capital cases, as well as curbing excessive review in non-capital habeas cases. A capital sentence predicated on a clear violation of the defendant's federal rights would remain subject to correction on habeas corpus. But the invalidation of a capital sentence would no longer be required or permitted simply because the state courts reasonably resolved a close or unsettled question in a manner different from a lower federal court in the same geographic area.

A third reform in the legislation is a codification of the caselaw standards governing the consideration in federal habeas corpus proceedings of claims that were not properly raised before the state courts (the standard for excusing "procedural defaults"). This would bring greater definiteness and clarity to the law in this area and would help ensure that lower courts consistently resolve this issue in conformity with the properly restrictive standards that have been articulated by the Supreme Court. 45/

44/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. 6-7, 22-28 (1983).

45/ See generally id. at 7-8, 12-16; Murray v. Carrier, 106 S. Ct. 2639, 2644-50 (1986).

A fourth reform is providing that a federal habeas court can deny a petition on the merits, even if state remedies have not been exhausted. In capital cases, as in other cases, this would enable district judges to deny frivolous claims promptly, without the delay and waste of resources involved in sending the petitioner back to state court to pursue state remedies. 46/

A fifth reform proposed in the legislation would vest the authority to issue certificates of probable cause for appeal in habeas corpus proceedings exclusively in the judges of the courts of appeals. This would correct inefficient and wasteful features of current procedure under which a petitioner is given repetitive opportunities to attempt to persuade first a district judge and then a circuit judge to authorize an appeal, and under which a court of appeals is required to hear an appeal on a district judge's certification, though it believes that the certificate was improvidently granted. 47/

Finally, title II of the Criminal Justice Reform Act would institute comparable reforms relating to time limitation, excuse of procedural defaults, and certification of probable

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46/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. 10, 21-22 (1983).

47/ See generally id. at 10, 18-19.

cause for appeal in relation to the collateral remedy for federal prisoners under 28 U.S.C. § 2255. Collateral litigation by federal prisoners, like habeas corpus litigation by state prisoners, frequently involves frivolous and repetitive applications; the enactment of these reforms in the § 2255 remedy would be of comparable value in limiting this abuse. 48/ In conjunction with the proposed restoration of an enforceable federal death penalty by title III of the Criminal Justice Reform Act, it would also guard against efforts to obstruct the execution of federal death sentences through dilatory § 2255 litigation.

CONCLUSION

In closing, I hope that my remarks today have been of use to the committee in its consideration of this important national problem. It is intolerable that the cumbersomeness and redundancy of the process of review have largely thwarted the constitutionally valid judgments of most state legislatures to impose capital punishment for the most atrocious crimes.

Needless to say, no one would countenance a "rush to judgment" in capital cases, or in criminal cases generally. But there is a fundamental difference between reasonable review processes which ensure that a sentence is justly imposed, and

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48/ See generally id. at 19, 30-31.

irrationally excessive processes which ensure that it will never be carried out.

The Constitution only requires that a defendant be given a fair trial. A convicted defendant does not have a constitutional right to appellate review, but we believe, of course, than an appeal should be allowed as a matter of fairness, and the states regularly provide the right to appeal under their procedures. Beyond the initial state appeal, the defendant will at least have the right to seek discretionary review by the highest court of the state, and review by the state supreme court may be mandatory in capital cases.

Beyond the whole process of direct review, state collateral remedies are available for claims which could not be raised on direct review, and these remedies are regularly resorted to in capital cases. In cases where innocence can be proven, and in capital cases generally, the state executive clemency process provides an important, ultimate safeguard against injustice. Finally, beyond all state remedies, a defendant can seek direct review by the Supreme Court at the conclusion of any trip up to the highest state court on review.

Review in the lower federal courts by habeas corpus comes on top of this abundant -- and in capital cases, super-abundant -- panoply of remedies and review mechanisms. If it

were rarely utilized or insignificant in its effects, the provision of a possibly superfluous additional review mechanism would be a lesser concern. In reality, however, it fundamentally distorts the criminal justice system by precluding any definite end to the litigation of a criminal case while the defendant remains in custody, and by multiplying the potential avenues of obstruction in capital punishment litigation.

These problems will continue only if we permit them to. Congress is free to decide whether or not the judgments of the state courts should be reviewed by the lower federal courts, and if so, subject to what conditions and limitations. In the past, Congress has been willing to limit federal habeas corpus review when it ceased to further the interests of justice and became in itself an impediment to justice. Congress should be willing to do so today in response to the extreme problems of abuse and delay that now characterize federal habeas corpus litigation, and the virtually incredible effects of this abuse in capital cases.

The most practical and readily achievable response to these problems would be enactment of the proposed Criminal Justice Reform Act, and particularly the habeas corpus reforms proposed in title II of that legislation. In the words of Attorney General William French Smith, these reforms would "go far toward correcting the major deficiencies of the present system of federal habeas corpus in terms of federalism, proper

regard for the stature of the state courts, and the needs of criminal justice." 49/

49/ Proposals for Habeas corpus Reform, supra note 2, at 153.

Mr. GRANT. Thank you, Mr. Cassell. You say it is a slow and ineffective system. Where do you think the fault lies? Whose fault is that?

Mr. CASSELL. Congressman Grant, I think as a historical matter, one could point the finger at the Warren Court which in the 1960's issued an expansive series of decisions that expanded Federal habeas corpus far beyond what Congress originally intended to cover and far beyond what the Habeas Corpus Act required. More recently, however, I think it would be fair to say that Congress bears at least part of the blame because this problem is susceptible to a legislative remedy. The abuse of habeas corpus could be corrected by congressional legislation.

I suppose the Executive must also bear part of the responsibility since we are a partner with Congress in the legislative process.

Mr. GRANT. Now the administration has a bill pending before the Congress now. Given the present makeup of both the House and the Senate Judiciary Committees, the chances of any movement on that bill may not be classified as anything other than remote. If we were to approach this particular issue, because that is a broader bill, if we were to approach this particular issue, where would you suggest that we try to limit the scope of our legislative initiative?

Mr. CASSELL. Congressman Grant, we are quite optimistic about the prospect of moving the habeas corpus portion of that bill. As I noted in my testimony, a similar bill was passed by the Senate by a vote of 67 to 9 in 1984 and still has broad support in the House. If I were to identify the several features of the bill that are the most important, they would be the provision in the bill providing for deference to State court findings when there has been a fair and reasonable resolution of the legal claim. Second, the 1-year statute of limitations that the bill provides is particularly important. It would provide some cutoff and would prevent interminable litigation that seems to be far too often a feature of capital cases in particular and criminal cases in general.

Mr. GRANT. On the other front, some would say that the Federal courts have begun to limit themselves in hearing habeas petitions, is that your opinion, and is that also the opinion of the administration?

Mr. CASSELL. Congressman Grant, the Administration is heartened by a number of decisions that we have obtained in the Supreme Court, the Federal Courts of Appeal, and elsewhere that have limited the scope of Federal habeas corpus; however, in view of the Warren Court decisions, the ability of Federal courts to further limit the abuse of Federal habeas corpus is extremely restricted. The only way to achieve far-reaching reform is for Congress to pass legislation that would provide some sort of definite time limits on habeas corpus and would provide for greater deference to State court legal conclusions and factual determinations.

Mr. GRANT. You said it passed the Senate, why did it not pass the House?

Mr. CASSELL. I am not certain as to why it did not get out of Committee, Your Honor—excuse me, Congressman Grant—I am used to appearing in court, not before a congressional body.

Mr. HASTERT. He will accept that.

Mr. GRANT. I do not get that very often. [Laughter.]

Mr. CASSELL. I am not familiar as to the precise legislative reasons that it did not get out of committee.

Mr. GRANT. Mr. McCandless.

Mr. MCCANDLESS. Thank you, Mr. Chairman.

Mr. Cassell, in California, the citizens of that State have spoken twice, once in 1972 and once in 1978 rather dramatically about the death penalty and its implementation, the first statewide constitutional issue on the ballot in 1968 by 32 favored; in 1978, it was 71 to 29. I bring this point forward because we are here, I believe, not as a panel to discuss the death penalty per se, but to discuss the legislative processes necessary to implement what the people have spoken that they want carried out, though it seems to be dragging along needlessly.

Your observation was wholly to the judicial system and how it is functioning and could function relative to the speed up process. Now we have talked about legislative remedies necessary, and in discussing this with some of my colleagues at the State level, they come back to State courts and some of the attitudes of the judges who are concerned about possible overturn of the circuit court in their decision and, as such, are super or overcautious about moving in a positive direction to remedy this.

What has been your experience relative to this as far as the State courts and the implementation of these laws by the judges to speed up the process?

Mr. CASSELL. Congressman McCandless, there is no question that there has been some effort on the part of both State courts and Federal courts in recent years to speed up this process. However, as I indicated earlier, the ability of the courts to do this in the absence of legislative reform is extremely limited. Also, we are in a situation here where the State courts often act very carefully; in fact, it seems to me that they have acted very carefully in virtually every capital case. There are in existence in every State provisions for exacting review of capital cases in the State court system, and this is another measure of the extreme care with which State courts already go to to protect the rights of criminal defendants in these capital cases. To add on top of that a Federal review process, it seems to me, is adding an extra layer which may not be necessary.

If this committee concludes that such an extra layer is necessary, it should certainly be limited to extreme cases or cases in which the challenge is brought promptly within 1 year after the conclusion of those State decisions and should be limited to those instances where State court has been out of line, not in situations where there is an arguable or debatable interpretation of constitutional law. Far too often, we see Federal habeas corpus used in debatable or arguable situations rather than to protect the clear rights of criminal defendants.

Mr. MCCANDLESS. This 1-year time limit, is that after the appeal process has been completed at the State level?

Mr. CASSELL. That is correct, Congressman McCandless, it is after the completion of the State court proceedings, after they become final.

Mr. MCCANDLESS. I believe it was Chief Justice Rehnquist who used the analogy "a needle in a haystack" where if one were to

proceed on this basis and a hard-and-fast rule of 1 year or whatever the timeframe might be, that it would preclude that "needle in the haystack" which might surface from being subject to the habeas corpus system, what are your thoughts on that?

Mr. CASSELL. Chief Justice Rehnquist has used another interesting analogy in this area. He has compared some of the excessive review processes that we have in the Federal system to the "instant replay" system which is a feature of the National Football League these days. It has gotten to this point now where we not only have in our courts an instant replay but a replay of the replay, and then a replay of the replay of the replay. Now, at some level, you have to decide that enough review is enough. The proposal that we have come forward with here establishes a 1-year limit and provides for appropriate deference to State court findings. It provides essentially one level of replay, not the multiple levels of replay that seem to have prevailed in the system quite often these days.

Mr. MCCANDLESS. Thank you. Thank you, Mr. Chairman.

Mr. GRANT. Chairman English.

Mr. ENGLISH. Thank you very much Mr. Chairman. I appreciate it.

Mr. Cassell, the administration was in support of that legislation the 1981 legislation, the Habeas Corpus Procedures Amendment Act, is that correct?

Mr. CASSELL. I believe that is correct, Mr. Chairman.

Mr. ENGLISH. What is the difference between that and the Criminal Justice Reform Act that is the present legislative proposal?

Mr. CASSELL. I am not certain as to all the details. I could perhaps provide some additional material on that point for you.

Mr. ENGLISH. I believe the 1981 legislation called for a 3-year statute of limitations as opposed to the 1 year that is contained in this year's proposal, is that not correct, sir?

Mr. CASSELL. That sounds like it might well be correct.

Mr. ENGLISH. Why the difference? What has changed the administration's mind between 1981 and today, from 3 years to 1 year?

Mr. CASSELL. I think over the last several years we have witnessed increasing problems of delay in capital cases in particular.

Mr. ENGLISH. Yes, but we had that delay back in 1981 if I remember correctly. You have pointed out yourself that it was the Warren Court that you felt brought this on. The Warren Court seems to be a long time ago. Certainly any impact that that Court would have had would have existed in 1981 just as well as it does today, and so I do not understand why if the administration felt 3 years was proper in 1981 why they would switch to 1 year today?

Mr. CASSELL. Mr. Chairman, I believe there may be two reasons. First, as I mentioned earlier, there is always a process of legislative compromise, of putting particular provisions in a bill which might in some sense be more restrictive than other proposals we would ideally like to see adopted in any particular year. We often put together a package which would have the most broad based support and, therefore, the 3-year limitation in that bill might have been a part of the legislative strategy in that particular year. Such considerations would not necessarily apply in this year.

Mr. ENGLISH. So the administration now feels that 1 year is more acceptable than 3 years?

Mr. CASSELL. Yes, Mr. Chairman, we are pushing for a 1-year limit.

Mr. ENGLISH. It would appear to me, and maybe I am wrong, that the 3 years would reach more people, be more acceptable to people than the 1 year, would it not, would you not agree with that?

Mr. CASSELL. Certainly, Mr. Chairman. The other point that I would like to make is that in the years since 1981, the particular problem of delay in capital cases has become more noticeable and more acute. In 1981, the States were still experimenting with the fallout from the Supreme Court's decision in *Gregg* v. *Georgia* and was not certain how the capital punishment litigation would proceed. In the years since 1981, it has become evident that there is a dramatic problem with delay in capital cases, that habeas corpus is used as a vehicle for delaying 1, 2, 3 years or even longer, the implementation of capital sentences. And because of that clear problem of delay that has arisen since 1981, it is the current judgment of the administration and the Department of Justice that a 1-year limitation is necessary.

Mr. ENGLISH. During the hearings in 1981, the Assistant Attorney General, Jonathan Rose, testified before Congress that language should be added to the 1981 legislation that the court be given discretion to consider a petition after the time limit expired to avoid injustice in unforeseen circumstances. Is that provision in the proposal by the administration?

Mr. CASSELL. No; it is not in the current proposal.

Mr. ENGLISH. Mr. Rose certainly, as the Assistant Attorney General at that time, was representing the administration. Are you saying that Mr. Rose was wrong and that that provision should not be in there?

Mr. CASSELL. Again, Mr. Chairman, we are presenting a legislative package we believe responds in the best possible fashion to the problems of delay and abuse that we have recognized in the years since 1981. I would point out that while we have not proposed the exact language that Mr. Rose discussed in that particular statement, we have included a number of exceptions designed to achieve fairness.

Mr. ENGLISH. Would you explain those, please?

Mr. CASSELL. Certainly. The first is that we have an exception to the 1-year limitation in the event that a defendant was prevented from filing by State action in violation of Federal law. In other words, if the State officials unlawfully thwarted the filing of a habeas corpus action or something similar to that, there would be an exception.

Second, when there is a newly recognized constitutional right, which we have narrowly defined according to current case law, in those circumstances, we would provide an exception to the 1-year statute of limitations.

Third, when the factual predicate for a particular claim could not have been discovered through the exercise of reasonable diligence, again, there is an exception to the 1-year statute of limitations which we propose. Now those specific exceptions, I suggest,

essentially accomplish the goals that Assistant Attorney General Rose had in mind in 1981.

Mr. ENGLISH. So the administration feels that there is no possibility that something unforeseen in the future could come up and in any way provide for a situation in which additional exception should be granted. Is that what the administration is saying?

Mr. CASSELL. Mr. Chairman, we have listed all of the exceptions which we feel are necessary at this time.

Mr. ENGLISH. That did not answer my question.

Mr. CASSELL. We have covered every exception which we feel is necessary.

Mr. ENGLISH. There is no other exception that could possibly arise, unforeseen exception that could possibly arise that would ever in the administration's point of view provide justification for another exception?

Mr. CASSELL. I would point out that the exceptions that we have recognized in the habeas corpus jurisdiction are in addition to exceptions which are available through other devices. For instance, executive clemency is available in capital cases in the event there should be some extraordinary circumstance.

Mr. ENGLISH. That is an extremely rare fact though, is it not?

Mr. CASSELL. That is right, but the circumstances that you are positing are also extremely rare.

Mr. ENGLISH. Well, I guess the point I am trying to dig at a little bit here, and I think it is something that is worth looking at, that I have difficulty understanding; here you have the Reagan administration in 1981 that in effect feels that, according to the Assistant Attorney General Jonathan Rose, that there should be a provision in effect providing a safety valve.

I think it is a little bit difficult, would you not agree, to say, you know, we know we have covered everything, everything that could possibly arise in the future. We do not know what the future is going to hold. We do not know what kind of circumstance is going to arise. We do not know what the next situation is and so it makes it a little bit difficult to cover that legislatively.

But you are coming back today and saying no, that is not true. We know these are the only instances that will ever arise in which this would be justified, these exceptions would be justified. Is not that correct, is not that what you are doing?

Mr. CASSELL. That is the purpose of the bill.

Mr. ENGLISH. And I guess that is what I am trying to get at a little bit, I am trying to determine what it is that has happened since 1981 to change the Reagan administration's and the Justice Department's position that, you know, there might be something out there we have not thought of. It just might happen. And you are coming down so certain on the thing. Can you tell me what has happened to convince the Justice Department that in fact we know of every unforeseen circumstance that will ever happen and we have taken care of it in this legislation?

Mr. CASSELL. Again, Mr. Chairman, I would point out in the event some sort of unusual circumstance such as you are concerned about should arise, there are devices outside of habeas corpus which would provide a remedy. For instance, the executive clemen-

cy procedure in State proceedings is available to cover such extraordinary circumstances. At the judicial——

Mr. ENGLISH. Well, now, let me interrupt you there, let me say here, Mr. Cassell, you know, I am not a lawyer. I am no constitutional expert. I try to use a little common sense on some of this stuff, you know, and I have found that that does not fit with the law always—the two do not always go hand in glove, do they?

Mr. CASSELL. That is exactly right, Mr. Chairman.

Mr. ENGLISH. You will excuse me if I go through and try to look at it a little from the commonsense side of things as opposed to the legal side, but, you know, the thing about it is I recognize if I were a Governor, there may be a circumstance that would arise and which is not covered by the particular legislation you are talking about that I may feel justified. But I am not going to pardon this guy, I am not going to turn him loose, that is not what I want to do and so my options are very limited if I am a chief executive, are they not? You are talking about granting clemency, you are talking about granting pardon. You know, what happens if you do not want to pardon the guy, you do not feel like you should grant him clemency, what else do you have open to you?

Mr. CASSELL. Well, in addition to these executive remedies, there are also collateral judicial remedies available. Remedies of this sort exist in all the States under one name or another—for example, it might be called a "writ of coram nobis"—and they are available to provide relief in exceptional and extraordinary circumstances.

Mr. ENGLISH. Now what is that for all of us nonlawyers?

Mr. CASSELL. The writ of coram nobis is a device whereby one can challenge a conviction and it was the sort of device that is being used, for instance, to challenge the Japanese internment cases. It was the device that took that case to the Supreme Court as I understand it.

Devices of this sort are available in all the States outside the avenue of Federal habeas corpus to provide relief in certain extraordinary circumstances.

Mr. ENGLISH. I am going to be interested in talking to the judge here a little later on and we will find out what he thinks about that device, but it just struck me as kind of puzzling that the administration felt one way back in 1981 on this kind of misuse and now they feel so certain now. This is not one of those little political documents that is sent up to Capitol Hill every now and then saying, you know, we are not really trying to reach out and pass legislation, broad based legislation, this is just instead a statement that we are making.

Mr. CASSELL. Absolutely not, Mr. Chairman, and if I could just point out that 67 Senators voted for this bill in 1984 and that our bill has broad sponsorship within the House of Representatives. I would suggest that that is more than enough evidence to rebut any suggestion that this proposal is a political document. To the contrary, our bill is very serious legislative reform that we would like to see enacted as soon as possible.

Mr. ENGLISH. How does that support compare with the support you had in 1981 where they had the Corporate Procedures Amendments Act?

Mr. CASSELL. I am not certain as to the exact level of support.

Mr. ENGLISH. Well, as I said I think something needs to be done on it and I would agree to that, but I like to think though that whenever these pieces of legislation, these proposals are put together and come up to Capitol Hill that they are kind of well thought out and this is one that kind of puzzled me. It seemed like Mr. Rose, you know, was providing for unforeseen circumstances, nobody knows what is going to happen, but now the Justice Department does not feel like there is ever going to be anything unforeseen and that troubled me a little.

Mr. CASSELL. Again, Mr. Chairman, we spelled out the three circumstances, which I suggest would cover many of the instances that you are hypothesizing.

Mr. ENGLISH. Well, let us look at unforeseen. To me, I cannot predict what the future is going to be. I wake up every morning and you never know what is going to happen during that day, it is unforeseen. And it troubles me a little when people say we are going to write it into law because we know what is going to happen from now on, never going to be anything to come up that we do not know about and that troubles me just a little bit.

Mr. CASSELL. Again, our bill recognizes exceptions for newly recognized constitutional rights and that would cover unforeseen legal changes.

Mr. ENGLISH. Yes.

Mr. CASSELL. It also covers situations where the factual predicate for a claim could not have reasonably been determined at the time of the 1-year expiration of the 1-year limitation, which covers factual changes. So our bill covers the universe of both legal and factual unforeseen circumstances.

Mr. ENGLISH. All of us nonlawyers, you know, we get a little troubled when you get into all of that kind of, "it depends on this, depends on that" kind of stuff. I like it clear cut. That is the way I like the law, I like it in black and white. Maybe that is unreasonable.

Mr. CASSELL. If the chairman is suggesting that the language is unclear or is not black and white, we would be happy to——

Mr. ENGLISH. No, I would just kind of like to go through a little bit, and I may want to do this with the fellow that dreamed this up, how solid he is on his thinking or whether he just kind of threw it in there and said these are all the exceptions I can think about and so we will just kind of pitch them in the law and not worry about it from there on. Thank you, Mr. Chairman.

Mr. GRANT. Thank you.

Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman. I am not a practitioner of the law either and I guess I share the frustration with many of my constituents. First of all, it is awful hard to convict sometimes those people who you think are guilty and sometimes there is that doubt in jury trials and there is the exclusionary rule that people have to deal with. Finally, you have convicted somebody of a heinous crime and he sits behind bars for 10 years or 15 years. And then, I think I can understand what happens, if you look at this from the historical perspective, you have the Warren Court that you brought out in the fifties and sixties and the Doctrine of Cruel and Unusual Punishment and all of a sudden, we did not have any

more capital punishment in this country. As a matter of fact, in the State of Illinois, we have not had anybody executed in the State of Illinois since the very early sixties; but, you know, in the early seventies, things turned around and things changed and States have changed their constitutions and all of a sudden there was certainly the public sentiment I think on a national basis that indeed something needs to be done.

What I have seen is, basically, an undermining of public confidence, because you have convicted people and those sentences are not carried out, an undermining of public confidence in basically the judicial system, the law, and we are all tied in together whether we are legislators or practitioners of the law or the courts themselves in that condemnation.

The frustration that I see and I think what we want to lay open and get to the point is where do State courts and Federal courts come into conflict and, you know, obviously some States have been able to work it out. As a matter of fact, right here in Florida, you have had executions and as I said, in the State of Illinois, there have not been any carried out in the State of Illinois since the very early sixties, since this whole thing came up.

Yet we have the capital punishment statute. And we changed it from electrocution to lethal injection and so it has been on the minds of people, it has been accepted, and that thought is there. What are the things that just basically bring those courts into conflict?

Mr. CASSELL. Congressman Hastert, there are a number of factors that go into this. First is the clarity and conformity to constitutional requirements of a particular State's death penalty law, and depending on how the death penalty litigation developed in the late seventies and early eighties, some State provisions were apparently invalid and other State provisions were upheld. How well a State's death penalty law fared under constitutional attack in those years has a significant effect on how many executions have been carried out recently.

Second, there is the question of to what extent a Governor is willing to push executions along. The power of signing death warrants rests in the Governor's office, and how often and how quickly that power is exercised will have a large effect on the pace at which executions are carried out.

Then, finally, there is the question of whether the Federal courts, in the particular circuit that reviews the State court determinations have created a general pro-death penalty or an anti-death penalty jurisprudence. There is some variance among the circuits on this issue. So, again, there are a number of factors that go into it.

Mr. HASTERT. So the issue is of what do we focus on is basically the issue of habeas corpus. Is it how well crafted the State laws are or how tightly, and well, crafted those State laws are to give the accused or convicted the window of opportunity to go back and to appeal in the Federal process?

Mr. CASSELL. That is certainly one of the most important factors, but I should point out that even if you had a very tightly crafted State law, the opportunities for frivolous and dilatory habeas tactics still remain. Unless Congress acts to change the current

habeas corpus jurisdiction, even under a perfect State death penalty law, there would still be ample opportunity for delay.

Mr. HASTERT. And so the dialog that the chairman has had with yourself about the law, the proposed bill before Congress, in your mind, and there may be some exceptions, but in your mind then that is an adequate piece of legislation?

Mr. CASSELL. It certainly is a valuable first step. At the Justice Department, we would like to go even further to limit the Federal habeas corpus jurisdiction, but as I indicated, we have tried to come forward with a package that has a number of different components which would attract broad-based support.

Mr. HASTERT. So your view then, the limit here is to say, No. 1, you have a time limit and that time limit starts ticking from the time of conviction?

Mr. CASSELL. From the time of the completion or the exhaustion of State remedies.

Mr. HASTERT. So you have got a year after that?

Mr. CASSELL. Exactly.

Mr. HASTERT. And then the second issue then is what factors can be considered, right?

Mr. CASSELL. Exactly. Under the current state of the law after a State court has reached a legal conclusion as to a particular issue, the Federal court engages in a de novo or an entirely clean slate, an entirely new review, of those legal issues. Now we would require the Federal courts to give deference to the State court's legal conclusions provided that the State court was reasonable in its resolution of the legal and factual issues and the determination was reached by procedures consistent with due process.

Mr. HASTERT. So in every case, every time that review is brought before a Federal court, you re-create the wheel?

Mr. CASSELL. Under current law, that is exactly right, the wheel is re-created in every single case on legal issues. Our bill would provide that the Federal courts would have to defer to State court conclusions on legal issues if those determinations were reasonable.

Mr. HASTERT. And then the third thing you talk about is you say you need to limit raising claims or that you cannot bring up a whole by-the-way situation that you did not talk about in the State courts, is that right?

Mr. CASSELL. That is correct, we would codify certain, what are known as, in legal jargon, procedural default requirements, and if the defendant had procedurally defaulted on those claims, we would not permit the defendant to raise those claims in Federal court.

Mr. HASTERT. Let me just ask one question and, again, I do not practice law, what I have learned is as we go through here too, but what if somebody had a new lawyer and a new lawyer, a new attorney, defense attorney finally went through and said boy, nobody brought this out. Here is a situation that makes a difference and he might be a little smarter, a little more expensive, you know, his fee is a little higher or something but, anyway, he finds something the other guy did not get and that would exclude that oh-by-the-way situation?

Mr. CASSELL. Our bill excludes those type situations if they amounted to a procedural default unless it was a result of State action in violation of Federal law.

Mr. HASTERT. Thank you very much. Thank you, Mr. Chairman.

Mr. GRANT. Thank you, Mr. Cassell, we thank you very much for coming and we appreciate your testimony.

Mr. CASSELL. Mr. Chairman, I would request permission to submit some additional remarks on the concerns that you raised in this hearing.

Mr. GRANT. Go ahead.

Mr. ENGLISH. Mr. Chairman, without objection, too, I think we will probably have some written questions that we would submit to Mr. Cassell and maybe he can include those remarks in response to the questions that we submit to him.

Mr. CASSELL. Thank you very much, Mr. Chairman.

Mr. ENGLISH. Thank you.

[The information follows.]

U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

April 6, 1988

Honorable Glenn English
Chairman
Subcommittee on Government Information,
Justice, and Agriculture
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In the course of my testimony at the February 26 hearing before your subcommittee on habeas corpus and capital punishment litigation, you noted some differences between the habeas corpus proposals of the proposed Criminal Justice Reform Act (S. 1970 and H.R. 3777) and another set of reform proposals that was under consideration by the Senate Judiciary Committee several years ago. I am writing at this point to provide a more complete response to your questions concerning the relationship between these proposals.

In 1981, the Department was invited by the Senate Judiciary Committee to testify on S. 653, the proposed "Habeas Corpus Procedures Amendments Act." This was not an Administration bill; we did not participate in its development or formulation.[1] The Department's testimony on S. 653, delivered by Assistant Attorney General Jonathan Rose, generally stated support for the types of reforms proposed in S. 653. However, we suggested that further work would be warranted on questions of formulation, and stated that the Department would develop a revised set of reform proposals and transmit them to the Committee in the near future.

In the following year, Attorney General William French Smith transmitted to Congress the Department's habeas corpus reform proposals, which were initially introduced in the Senate

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[1] See generally Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) [hereafter cited as "1981 Hearing"].

as S. 2216. [2] The proposals contained in S. 2216 have provided the basis for all subsequent habeas corpus reform bills that have been given serious consideration in Congress -- including S. 1763, which the Senate passed in 1984, and title II of the currently proposed Criminal Justice Reform Act -- and have superseded the proposals of S. 653 as the vehicle for legislative reform efforts in this area.

While we benefited greatly from S. 653 and the comments and assessments it evoked in formulating our proposals, the bills deriving from S. 2216 do involve significant differences in formulation from that earlier legislation. For example, S. 653 proposed a three year time limit on habeas corpus applications normally running from finality of judgment. This approach presented certain problems. In some cases a petition could have been time-barred under this rule before the petitioner was able to complete exhaustion of state remedies, where the judgment had become final by the completion of the state direct review process, but lengthy collateral proceedings were subsequently required to exhaust state remedies with respect to the claims presented in the petition. Conversely, the time rule of S. 653 would have been overly permissive in other contexts, allowing a petitioner who had raised his claims on direct review to wait for three years before seeking federal habeas corpus, though state remedies would be exhausted in such a case at the conclusion of the direct review process (finality), and the petitioner would be free to apply for habeas corpus immediately at that point. The Department's proposals avoid these potential problems and others by specifying a one year time limit that normally commences when state remedies are exhausted. [3] These points and other differences and similarities between the current proposals and the proposals of S. 653 were analyzed in the Department's testimony and submissions at the hearing on S. 2216 before the Senate Judiciary Committee in 1982. [4]

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[2] See generally The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) [hereafter cited as "1982 Hearing"].

[3] See 1982 Hearing, supra note 2, at 18, 78-82. In addition to avoiding the problems noted in the text, this approach eliminates the possibility that tardiness by state courts in disposing of prisoners' claims would bar access to federal habeas corpus. Under a time limit running from exhaustion, any delay by state courts in addressing a prisoner's claims would only defer the starting point of the time limitation period. See id. at 18, 21-22, 80 (noting that Department's proposals avoid problem of potential prejudice to petitioners from delay in state proceedings that could arise under approach of S. 653).

[4] See generally id. at 16-21, 68-71, 78-82.

At the hearing before your subcommittee on February 26, you raised some specific questions concerning a remark made by Assistant Attorney General Rose in 1981 on the formulation of the time limitation rule in S. 653. As noted above, this formulation raised the possibility that a petitioner's claims might be time-barred before he had ever had an opportunity to present them on federal habeas corpus. Moreover, the time rule of S. 653 only recognized a single exception to its normal operation -- for claims involving newly created rights -- and took no account of the possibility of claims whose factual basis was not reasonably discoverable at an earlier point or of the possibility of unlawful impediments to filing. In commenting on this provision Mr. Rose stated:

> We would . . . make one comment concerning the current language of this provision: section 2 of S. 653 makes only one exception to the normal running of the limitation period -- cases in which a retroactively applicable right is newly recognized following the State court trial. Other circumstances can be imagined, though, in which insistence on compliance with the limitation rule might be unjust. While such situations must obviously be very rare, in light of their possibility we would suggest that rather than singling out a particular circumstance for specific mention, the Congress might add language to allow a court in its discretion to entertain a petition after the normal limitation period has expired, when to do so would be necessary to avoid injustice. [5]

This remark was simply a suggestion that a time rule with a general "injustice" exception would be preferable to a formulation which arbitrarily singled out a particular factor. This obviously does not imply that an exception of this type would be the optimum formulation, or that such an exception would be desirable in addition to the other qualifications contained in a formulation incorporating a more adequate set of specific exceptions.

In fact, Mr. Rose's view on this point -- like the current view of the Department and the Administration -- was clearly to the contrary. The current proposals -- incorporating no standardless "injustice" exception -- were prepared under Mr. Rose's supervision, and he testified on behalf of the Department in support of these proposals at the hearing on S. 2216 in 1982. In his submission to the Senate Judiciary

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[5] 1981 Hearing, supra note 1, at 21.

Committee at that time, he explicitly rejected the idea of adding an amorphous exception of this type:

> We would not favor subjecting the limitation rule to such a vague exception. Doing so would undermine its value in establishing a definite end to litigation, and raise problems of subjectivity like those arising under the essentially standardless laches doctrine of current Rule 9(a). [6]

In general, we believe that the time rule of the current proposals is fully adequate in its formulation. It is already far more generous in the exceptions it recognizes than the time limitation rules of other remedies for reviewing or re-opening judgments in the federal courts, and admitting broader qualifications to its operation could seriously undermine its utility. More detailed discussion of these points appears in the records of the hearings on these proposals. [7]

I hope that this adequately responds to your questions. I respectfully request that this letter, as well as my written statement submitted in connection with the hearing, be included in the published hearing record.

Sincerely,

Paul Cassell
Associate Deputy
Attorney General

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[6] 1982 Hearing, supra note 2, at 40.

[7] See Habeas Corpus Reform: Hearing on S. 238 before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 45-46 (1985); Comprehensive Crime Control Act of 1983: Hearings on S. 829 before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 40-41 (1983); see also S. Rep. No. 226, 98th Cong., 1st Sess. 8-10 (1983).

Mr. GRANT. Thank you. Our next witness has had considerable experience in habeas proceedings. He is Judge G. Kendall Sharp, of the Federal bench in the Middle District of Florida, the Orlando Division. Judge Sharp, if you could come up, please, sir? If you have maybe one of your law clerks with you or something, if you would like to invite them up to sit with you, be your own judge. [Laughter.] We also have your written testimony which will be inserted into the record, without objection. If you wish to summarize it rather than reading it, please do.

STATEMENT OF G. KENDALL SHARP, FEDERAL DISTRICT COURT JUDGE, MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

Mr. SHARP. All right, gentlemen, I was not—I have never testified before a committee before and I was not exactly sure how you wanted to proceed and so I do have some written remarks. I could either review the high points of those or else open myself for questions from you, whichever would be your pleasure?

Mr. GRANT. Mr. English.

Mr. ENGLISH. Why don't you hit the high points for us, judge? We do have your testimony and we will make that a part of the record, and we appreciate that, but just however you feel the most comfortable doing it, we are a pretty easy going committee.

Mr. SHARP. Thank you. The points that I would like to concentrate on, of course, have to do with habeas death cases, rather than just habeas corpus in general and the inordinate amount of time that these death cases take, particularly in Florida and the time being addressed to legal points that have been litigated by the State courts and by other judges in other cases time after time, and this is the problem that I see. I would like to concentrate on the case of Ted Bundy, which is one that I recently had which points up the problems that we have in the Federal court.

Mr. Bundy was convicted of three murders and after going through the complete process, the murders were split up, two of which have to do with the Tallahassee murders and one, the Lake City murder, in which I was involved. The case that I had was a collateral attack on his conviction of the murder of Kimberly Leach. Convictions of these murders were obtained on circumstantial evidence. In a pair of trials for the three murders, Bundy, who had attended law school, insisted on conducting portions of his own defense. He was convicted of all three killings, numerous related crimes, and sentenced to die. Incidentally, the question of guilt or innocence in most of these capital crimes is completely lost. In one that I had, for example, one of the appellate attorneys, a name was mentioned in the case, and he said he was unfamiliar with that particular name and it turned out to be one of the victims, so that guilt or innocence is very often completely lost in these appellate processes, these are procedural problems rather than substantive problems.

You may know that Willie Darden, a celebrated person on death row here has just been given another stay by the Supreme Court because new evidence is thought to have been introduced having to do with his innocence. This, of course, is a completely different

problem where guilt and innocence come into play. It is very rare. Most of the problems are just procedural.

Chief Justice McDonald of the Florida Supreme Court stated that the entire court was satisfied that Bundy committed both crimes. It was in late 1986 before any collateral proceedings began, this was 5 or 6 years after his original conviction, and it was in 1986 that I first became involved.

Governor Graham signed a death warrant on October 21, 1986, in the *Leach* case for Bundy's execution to be at 7 a.m. on November 18, 1986. Although appeal issues in capital cases are known well in advance of the signing of a death warrant, it is the days immediately preceding the execution date that are filled with an amazing amount of activity by reviewing courts and the petitioner's counsel. On November 12, Bundy's lawyers from the Washington firm of Wilmer, Cutler & Pickering asked the eleventh circuit to block Bundy's execution because he had been granted an indefinite stay of the execution after evading two death warrants in the cases relating to the Tallahassee murders.

Their rationale was that Bundy could not finish litigating that case if he were executed for the Leach murder first. The Eleventh Circuit Court of Appeals denied the stay on November 13, and ruled that the two cases were separate, therefore, his death resulting from one of the cases would necessarily terminate the litigation on the other. Consequently, Bundy's lawyers went to Lake City on November 13, right up the road here, and asked the trial judge, Wallace Jopling, to grant a stay of execution on procedural grounds. Following a hearing, Judge Jopling denied the request. On November 14, Bundy's lawyers filed again in circuit court another petition addressed to new issues attacking Bundy's former trial as they were entitled to do so under Florida Statute 3.850. These issues included whether or not Bundy was adequately defended at his trial and whether or not he was competent to stand trial. Judge Jopling scheduled a hearing for November 17, 1986, the day before Bundy was scheduled for execution. Hearing nothing that changed his prior decision, the circuit court denied the stay. Bundy's lawyers then proceeded to the Florida Supreme Court in Tallahassee, where advance documents had already been lodged. This was just the day before his supposed execution. They appealed the circuit court's denial of the procedural issue and the rule 3.850 petition. In an emergency session, the Florida Supreme Court found no merit to Bundy's pleas and denied the stay of execution, scheduled for the following morning.

At approximately 2:30 p.m., on November 17, Bundy's lawyers filed a 183-page petition for writ of habeas corpus in my court. The petition was based on 15 constitutional grounds, such as ineffective assistance of counsel and incompetence to stand trial, and so forth, and requested that his execution be stayed. All of these grounds are usually either the same or similar in all habeas death cases. There are about 20 standard grounds and they appear time after time in every death case.

Incidentally, the reason I am concerned is that in my court alone here in Florida, I have 31 of these death cases in one posture or another just waiting for the case to eventually come to Federal court on habeas grounds and believe me, once these habeas death

cases come, the rest of the courthouse just shuts down and we have to deal with that in exclusion of everything else.

Previously, on November 5, the district court had received an advance appendix, weighing 153 pounds, and containing thousands of pages, consisting of trial transcripts, hearing transcripts, voir dire, pleadings and motions, the entire proceedings both trial and appellate up to that point. All other work of the court came to a standstill. The issues were not novel, and the law was definitive. Furthermore, most of the issues had been raised in the State court. They are now again being raised—just giving them a constitutional name for the issues that had been raised in the State court. They are now again being raised just giving them a constitutional flavor but they are basically the same issues.

My office which was prepared for this, because of the previous filings, worked continually during the night and produced a 20-page order denying relief to Mr. Bundy on all grounds. This opinion was transmitted to the eleventh circuit, where the lawyers for Mr. Bundy had already lodged all of these advance papers. Copies of my opinion were disseminated to the three eleventh circuit judges who were on emergency standby, and at 12:40 a.m., the morning that Mr. Bundy was to be executed, the eleventh circuit granted a stay of execution, reasoning: "The limited period of time remaining until the scheduled execution is insufficient to allow this Court to fully consider the petitioner's claims. For that reason, a stay of execution is mandated." The eleventh circuit stated that the appeal would be expedited, an adjective that has lost its meaning in habeas corpus proceedings. So, at that point, the eleventh circuit notified the Supreme Court, which was on notice, also in an emergency status, and, of course, the Florida State Prison to tell Mr. Bundy that his execution had been stayed.

The death warrant, in this case, was the first in the *Kimberly Leach* case, even though there were warrants in the Tallahassee case. It is interesting to note that no death-row inmate has been executed on the first death warrant in a case since the Supreme Court legitimized the death penalty in 1976. It appears that no matter what the district or appellate court does in addressing a petition for habeas corpus relief on the first warrant, a stay will result.

Following this November 17 and 18, 1986, marathon by lawyers, the court staff, judges, and so forth, the Bundy Federal habeas petition came to an abrupt halt awaiting the ruling of the eleventh circuit. Now this was November and in April 1987, April 2, amended on April 27, the eleventh circuit issued an opinion remanding the *Leach* case back to the Federal District Court for an evidentiary hearing on the sole issue of whether or not Mr. Bundy was competent to stand trial at the time that he stood trial approximately 10 years ago.

The eleventh circuit stated:

> A defendant cannot waive his right not to stand trial if he is incompetent. Thus, a defendant can challenge his competency to stand trial for the first time in his initial habeas petition and, if he presents facts raising a legitimate doubt as to his competency to stand trial, he is entitled to an evidentiary hearing in the district court. We do not suggest in any way, however, that Bundy was incompetent to stand trial. That determination can be made only after a full and fair evidentiary hearing.

Incidentally, as I stated before, he had had that evidentiary funding in Judge Jopling's court on the State level as to whether or not he was competent to stand trial. Pursuant to the instructions of the eleventh circuit, I conducted the competency hearing on October 22, 1987, and December 14, 15, 16, and 17, 1987. The hearing was split because of availability of certain witnesses. At the first hearing on October 22, Mr. Bundy's lawyers asked for an indefinite continuance to allow more preparation time for the hearing. One of the psychiatrists, who examined Mr. Bundy for the initial trial who had stated he was competent, was unavailable at that time. Obviously, Bundy's present competence is not at issue, it was his competence to stand the original trial 10 years ago. Both sides presented psychiatrists, who gave conflicting and contradictory expert opinions on Bundy's competency back then, and these testimonies seemed to cancel out each other. Judge Jopling testified that Mr. Bundy was one of the most intelligent, articulate, and coherent defendants that he had ever seen. After hearing the complete case, I found that Mr. Bundy was competent to stand trial and these findings are again to be reviewed before the eleventh circuit and if the eleventh circuit finds that he was competent to stand trial, then again it will go before the Supreme Court.

Death cases are not only costly in time, but also in money. As of 1988, the State of Florida had spent $6 million attempting to execute Mr. Bundy. By the end of December 1987, Mr. Bundy's Washington lawyers had spent approximately $750,000 worth of their fee time defending Mr. Bundy because they were representing him pro bono. Even though a widely viewed television miniseries has documented the Tallahassee killings, Bundy is proceeding in forma pauperis, so that the State is footing all of the bills for his appeals.

As a former State trial judge and now as a Federal district judge, I feel that the deterrent effect of sentences is diminished when individuals sentenced to death can pursue appeals through the State and Federal habeas systems for 10 years or more. It is no wonder that victims' families and friends as well as the general public are angry with the process. I believe that due process, of course, should be rendered throughout all of the proceedings, but I believe that special safeguards are warranted in capital cases particularly in order to be assured that innocent people are not executed.

Capital habeas proceedings, however, have become far removed from determinations of guilt or innocence. They have become out-of-proportion scrutinies of thorough State court proceedings and re-examinations of portions of those proceedings far too long after the crime has been committed to be accurate evaluations. If a particular judge is opposed philosophically to the death penalty, and, as you know, this is a very polarized thing, and if there was no death penalty, all of these lengthy petitions would automatically just go away. If a person that is sentenced to life, there seems to be much less interest in his procedural rights than if he is subject to execution and that, of course, is understandable; but if a particular judge is philosophically opposed to the death penalty, then the scrutiny can often be knitpicking and say, well, let's send this back for review to see whether or not that particular attorney should have objected to that one particular question and it can go on ad infinitum. With the background of capital habeas proceedings, I do have

some specific suggestions addressing the efficiency of the Federal collateral habeas proceedings.

First, and I know Mr. Cassell has covered this, set time limitations for filing Federal habeas corpus petitions as some States have done for the State habeas petitions. Under Florida Federal Rule 3.850, a convicted individual sentenced to death has 2 years from final judgment and sentence to file the habeas corpus petition, unless the claim upon which the appeal is predicated was unknown to the petitioner or his counsel or could not have been ascertained by due diligence. Several States also have time limitations or statute of limitations and none of them have been significantly challenged for constitutional infirmity.

To have no time limitation at all for filing Federal habeas petitions is, in my opinion, unreasonable and in the not-too-distant future will become unworkable because of the larger increasing numbers of petitions that have to be heard.

Second, petitioners should have to raise all of their grounds for habeas in their initial petition. There is a judicially developed doctrine of abuse of the writ for intentionally delaying grounds for habeas corpus. Petitioners and their attorneys should not be able to postpone executions merely by reserving known grounds for subsequent petitions.

Federal appellate courts tend to allow condemned inmates to raise new issues in successive appeals. We need a legislative counterpart to the *Strickland* v. *Washington* test which is to dispense with subsequent appeals from State court proceedings as the *Strickland* case disposed of ineffective assistance of counsel claims. Florida's attorney general has observed that generally the issues that the appellate courts send back to lower courts for hearings and reconsideration are ultimately decided to be without merit.

Thus, petitioners and their lawyers are utilizing this strategic delaying tactic reinforced by the Federal appellate courts. Justice Powell has recognized this as commented on, and I will not read his quote.

Also, habeas corpus rule 9(b) could be amended to limit successive capital habeas petitions; 9(b) could prove more useful if it were written to provide strong presumptions against the validity of a new petition. The rule should state that successive petitions are presumptively invalid unless the petitioner demonstrates that the subsequent petition provides new or different grounds for relief.

Third, deference should be given to full and fair trials in State courts. It is irrational to believe that a Federal district court as much as 10 years after the State trial when most of the witnesses have disappeared or, at best, their memories have faded, that the Federal court can conduct a fuller more fairer adjudication no matter how obscure the issue may be.

Also, the ultimate result is usually the same after much delay. In his criticism of the protected processes, Florida's attorney general has said that the effect is that Federal appeals courts are ignoring the findings of State courts and making State appellate review virtually meaningless. "The time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing stale claims that were fully ventilated in state courts." The above is a quote by the State attorney

general, and, "Relief on claims presented many years after conviction should be limited to cases in which the petitioner can demonstrate miscarriage of justice or a colorable claim of innocence."

Fourth, Congress could enact statutes, specifically making Federal, capital habeas corpus review more efficient by modifying State exhaustion requirements and including an election of remedies requirement for death petitioners. The exhaustion doctrine presently requires complete state exhaustion in all Federal habeas cases. Under *Rose* v. *Lundy,* this was mandated by the Supreme Court; however, commentators have suggested that a compromise would allow limited habeas corpus review of nonexhausted claims. This proposal would allow merit dismissal of unexhausted death petitions "plainly lacking in merit."

In support of limited habeas review, another commentator has suggested, "It seems unnecessary and even inappropriate to dismiss for lack of exhaustion when a petition is plainly lacking in merit." As an alternative to modifying the exhaustion prerequisite, Congress could enact legislation requiring the death-row petitioners elect either State or Federal remedies. This is feasible in States like Florida that provide habeas corpus and post-conviction relief procedures for capital petitioners under 3.850. Death-row inmates have the option of filing for collateral relief in State courts and subseqently filing for the same remedy in the Federal court. An amendment conforming to this proposal would permit a capital petitioner to choose either filing for collateral review under State procedures with an opportunity petition for certiorari in the U.S. Supreme Court, or filing a habeas petition in Federal district court with entitlement to the Federal appeals process.

A capital petitioner, therefore, would not be deprived of Federal review, but he or she would be precluded from collaterally attacking a conviction and sentence on substantially the same grounds in both the State and Federal court.

Fifth, strict time parameters should be set for advance lodging of voluminous appendixes and records, and even habeas petitions with the three Federal courts, even if they cannot yet be filed, they should be lodged ahead of time. This massive paper work is not assembled overnight and often it is held until the last possible minute for filing with the obvious hope that the court will have to grant a stay of execution. If the district court does not stay the execution, such petitioners confidently reason that the appellate courts will. Our clerk's office has had petitioners' counsel wait until moments before 5 p.m. to file the petition and an unwieldy record for the court's review. This delaying tactic should be eliminated with the result that fewer stays would be granted for lack of time for review. I believe that it is well overdue that the writ of habeas corpus be put back into its intended use, to prevent unlawful detentions and not to delay lawfully imposed sentences.

Congress and the appellate courts have the power to change the system. The procedure can and should be expedited. I administer the law as it is but, with no changes in the present system, I can foresee an inordinate amount of time being spent on duplicative review and this will take time away from other people who have a right to have their day in court. Thank you.

[The prepared statement of Mr. Sharp follows:]

CAPITAL HABEAS CORPUS PROCEDURES: A PRAGMATIC ASSESSMENT

Statement by

THE HONORABLE G. KENDALL SHARP

United States District Judge

Middle District of Florida, Orlando Division

Before

THE SUBCOMMITTEE ON GOVERNMENT INFORMATION,

JUSTICE, AND AGRICULTURE

OF THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

February 26, 1988

Mr. Chairman, Distinguished Congressmen, and Other Participants in this Hearing:

I am grateful for the opportunity to present my statement on capital habeas corpus procedures. My views have been shaped by five years as a Florida circuit judge for the Nineteenth Judicial Circuit, serving Indian River, St. Lucie, Martin and Okeechobee counties, and five years as a federal district judge for the Middle District of Florida in Orlando. I have imposed the death penalty in state court, and I have dealt with collateral attacks in death cases in federal court. Consequently, I share the frustration of state circuit judges, who wait years to see their sentences executed and who must reevaluate aspects of trials or sentences. I also know the frustration of federal district judges, who must interrupt busy dockets to review massive records from state trial courts in federal habeas corpus proceedings, who may be required to conduct evidentiary hearings, and who write opinions, exhaustively analyzing each appeal issue. Decisions not to grant a stay likely will be stayed by the Circuit Court of Appeals or the United States Supreme Court. Constitutional due process in capital habeas cases at the state and federal level is essential, but redundant adjudication serves no useful purpose.

In Florida, capital habeas appeals place a great strain on state and federal judicial systems. Florida leads the nation in death-row inmates, presently with 286. Pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, a convicted defendant has two years from the date of final judgment and sentence to

commence state collateral review proceedings. Upon denial by the circuit court, the petitioner has the right of direct appeal to the Supreme Court of Florida, which spends 30 percent of its time on death cases. Appeals from the Florida Supreme Court generally are not considered by the United States Supreme Court because of the preliminary posture of the overall, state-federal habeas corpus procedures to which the petitioner is entitled.

Denial of a stay by the Supreme Court requires the petitioner to begin the second round of habeas appeals again in the state court where he/she was tried and sentenced. The petitioner may raise any appeal issue that has not been raised previously. If the state trial court is again not persuaded to set aside the conviction or stay, then the petitioner may appeal the new issues to the Florida Supreme Court.

If the Florida Supreme Court is not convinced, then state collateral review procedures have been exhausted, and the petitioner may tap into the federal system, pursuant to 28 U.S.C. §§ 2254 and 2255. The court of first instance is the federal district court, where constitutional issues are raised. These grounds generally are similar, if not identical, to those raised in state court. If a stay is denied in a Florida federal district court, then the petitioner may appeal to the Eleventh Circuit Court of Appeals, which handles more habeas petitions than any other circuit. With one clerk, who oversees death cases solely, the Eleventh Circuit adjudicates at least one death appeal a week. The denial of a stay in the Eleventh Circuit

entitles the condemned inmate to petition for a stay to the United States Supreme Court, which hears every death penalty case in the nation at least twice. As of last Friday, February 19, 1988, there were 37 death appeals pending in the Eleventh Circuit, where stays had been granted, and 16 Eleventh Circuit habeas death appeals pending in the Supreme Court, which had granted stays.

The state-federal habeas process can become convoluted, protracted and inscrutable. From letters that I receive, I can tell you that the lengthy appeals process has made the general public disillusioned and despondent about the criminal justice system, a feeling that can only be compounded in victims' families and friends. Stays can occur in any court along the habeas route. For example, Governor Martinez signed 23 death warrants in 1987, and one execution transpired. Many of these warrants were not the first for the particular inmate. The stays that occurred were in the Florida circuit and Supreme courts, Florida federal district courts and the Eleventh Circuit. The execution that took place, that of Beauford White on August 28, 1987, was the result of White's third death warrant. His first appeal was on June 6, 1978.

The duration of White's state-federal habeas corpus proceedings is not atypical. The initial, direct appeal from the state circuit court to the United States Supreme Court can take as long as five years before collateral appeals begin. Even with attempts by Governor Martinez to make the entire habeas

process more efficient, such as signing more death warrants, his death-penalty aide has reported that the best that can be expected is to reduce the delay from eight to ten years to six to eight.

Last month, January, 1988, Willie Darden evaded an unprecedented sixth death warrant after the United States Supreme Court granted a stay of execution to review his latest appeal. Darden, who was convicted of shooting to death a Lakeland furniture-store owner and who has been on Florida's death row since 1974, reportedly has had 95 judges consider his case. More judges will be added to that number because the Supreme Court wants the lower courts to consider again evidence that suggests that Darden may not have committed the crime. When evidentiary hearings are required as much as ten years after the initial trial where conviction was obtained, it is obvious that witnesses' memories have faded, they may die or disappear, and evidence may be lost or become contaminated and, therefore, unusable for its intended purpose.

The delays in habeas corpus proceedings and my concerns about the system can best be demonstrated by a recent habeas death case in my court, that of Theodore Robert (Ted) Bundy. He has two simultaneous federal habeas proceedings pending, which relate to three murder convictions in Florida. One case is the collateral attack of his conviction for the murders of Margaret Bowman and Lisa Levy as they were sleeping in their beds at the Chi Omega sorority house in Tallahassee, Florida, early Sunday

morning, January 7, 1978. The federal habeas proceedings in that case are being conducted by Judge Zloch in the Southern District of Florida. My case is the collateral attack on his conviction for the murder of twelve-year-old Kimberly Leach, who left her Lake City Junior High classroom to retrieve her purse on February 9, 1978, and did not return. Her dead body was found on April 7, 1978, 45 miles away in an old hog pen.

Convictions for these three Florida murders were obtained on circumstantial evidence. In a pair of trials for the three murders, Bundy, who had attended law school, insisted on conducting portions of his defense. He was convicted of all three killings, numerous related crimes, and sentenced to die.

Chief Justice McDonald of the Florida Supreme Court has stated that the entire court was satisfied that Bundy committed both crimes. It was late 1986 before the collateral attack proceedings began, and I became involved in the federal habeas process. Governor Graham signed a death warrant on October 21, 1986, in the Leach case for Bundy's execution at 7:00 a.m. on November 18, 1986. Although appeal issues in capital cases are known well in advance of the signing of a death warrant, it is the days immediately preceding the execution date that are filled with an amazing amount of activity by reviewing courts and the petitioner's counsel.

On November 12, 1986, Bundy's lawyers from the Washington, D.C. firm of Wilmer, Cutler & Pickering asked the Eleventh Circuit to block Bundy's execution because he had been granted an

indefinite stay of execution after evading two death warrants in the case relating to the Tallahassee murders. Their rationale was that Bundy could not finish litigating that case if he were executed for the Leach murder first. The Eleventh Circuit denied a stay on November 13, and ruled that the two cases were separate. Therefore, his death resulting from one of the cases would necessarily terminate litigation in the other.

Consequently, Bundy's lawyers went to Lake City on November 13, and asked the trial judge, who presided over the Leach trial and who sentenced Bundy to death, Columbia County Circuit Judge Wallace Jopling, to grant a stay of execution on procedural grounds. Following a hearing, Judge Jopling denied the request. On November 14, Bundy's lawyers filed in the state circuit court a petition, which addressed new issues attacking Bundy's former trial as they are entitled to do under Rule 3.850. These issues included whether or not Bundy was adequately defended at his trial and whether or not he was competent to stand trial. Judge Jopling scheduled a hearing for November 17, 1986, the day before Bundy's scheduled execution.

Hearing nothing that changed his prior decision to sentence Bundy to death, the circuit court denied the stay. Bundy's lawyers then proceeded to the Florida Supreme Court in Tallahassee, where advance documents had been lodged. They appealed the circuit judge's denial of the procedural issue and the Rule 3.850 petition. In an emergency session, the Florida

Supreme Court found no merit to Bundy's pleas and denied the stay of execution, scheduled for the following morning.

At approximately 2:30 p.m., November 17, 1986, Bundy's lawyers filed a 183-page petition for writ of habeas corpus in my court. The petition, based upon fifteen constitutional grounds, such as ineffective assistance of counsel and incompetence to stand trial, requested that the execution be stayed. The grounds usually are the same or similar in all habeas death cases. Previously, on November 5, 1986, the district court had received an advance appendix, weighing 153 pounds, and containing thousands of pages, consisting of the trial transcripts, hearing transcripts, voir dire transcripts, pleadings and motions. Not only had I and my law clerks reviewed the voluminous advance appendix, but also we carefully reviewed the petition. All other work of the court came to a standstill. The issues were not novel, and the law is definitive. Furthermore, most of the issues had been raised in the state courts. My office, already prepared for the issues raised, worked consistently from the time that the petition was filed to produce a twenty-page order denying relief to Bundy on all grounds.

My opinion was transmitted to the Eleventh Circuit, where Bundy's lawyers also had lodged advance papers in their anticipation of rejection in all other courts. Copies of my opinion were disseminated to the three Eleventh Circuit judges who considered the appeal by conference call. At 12:40 a.m., the Eleventh Circuit judges granted a stay of execution, reasoning:

"The limited period of time remaining until the scheduled execution is insufficient to allow this Court to fully consider petitioner's claims. For that reason, a stay of execution is mandated. Barefoot v. Estelle, 463 U.S. 880 (1983)." The Eleventh Circuit did promise that the appeal would be "EXPEDITED," an adjective that has lost its meaning in habeas corpus proceedings.

Still in the early hours of November 18, and hours before Bundy was scheduled for execution, an Eleventh Circuit clerk notified the prison officials at Florida State Prison in Starke that Bundy had obtained a stay of execution, and they immediately notified him. The Eleventh Circuit also notified the United States Supreme Court of the stay that they had granted. Ted Bundy had escaped his third death warrant.

The death warrant, however, was his first in the Leach case. No death-row inmate has been executed on the first death warrant in a case since the Supreme Court legitimized the death penalty in 1976. It appears that no matter what the district court does in addressing a petition for federal habeas corpus relief on the first warrant, an appellate stay will result.

Following the November 17-18, 1986, marathon by lawyers, judges and staff, the Bundy federal habeas petition came to an abrupt halt, awaiting the ruling of the Eleventh Circuit. On April 2, 1987, amended April 27, 1987, the Eleventh Circuit issued its opinion, remanding the Leach case back to my court for an evidentiary hearing on the sole issue of whether or not Bundy

was competent to stand trial approximately a decade ago. The Eleventh Circuit advised:

> A defendant cannot waive his right not to stand trial if he is incompetent. Thus, a defendant can challenge his competency to stand trial for the first time in his initial habeas petition and, if he presents facts raising a legitimate doubt as to his competency to stand trial, he is entitled to an evidentiary hearing in the district court.
>
> We do not suggest in any way, however, that Bundy was incompetent to stand trial. That determination can be made only after a full and fair evidentiary hearing.

Bundy v. Dugger, 816 F.2d 564, 567-68 (11th Cir.) (per curiam) (citations omitted), cert. denied, 108 S. Ct. 198 (1987). The Eleventh Circuit also ordered a stay and similar competency hearing in Bundy's case regarding the Tallahassee murders. Bundy v. Wainwright, 808 F.2d 1410, 1422 (11th Cir. 1987). In that case, the Eleventh Circuit remarked:

> We do not imply in even the slightest degree that Bundy is entitled to succeed on the merits of any of his claims. But, without analyzing all of his numerous claims, the petition demonstrates a likelihood of success in at least some respects sufficient to justify a stay.

Bundy, 808 F.2d at 1421.

Pursuant to the instructions of the Eleventh Circuit, I conducted a competency hearing on October 22, 1987, and December 14-17, 1987. The hearing had to be split because of the availability of certain witnesses. I was somewhat incredulous that Bundy's lawyer requested a continuance to allow more preparation time at the outset of the hearing. One of the

psychiatrists, who examined Bundy for the initial trial, was unavailable. Quite obviously, Bundy's present competence is not the issue, but his competence to stand trial at his original trial.

Both sides presented eminent psychiatrists, who gave conflicting and contradictory expert opinions on Bundy's competency, which cancelled out each other. Perhaps the most impressive witness at the hearing was Judge Jopling, the state trial judge in the Leach case. He testified that Bundy was "one of the most intelligent, articulate and coherent defendants I have ever seen." Of the portions of his case that Bundy presented himself, Judge Jopling said that he presented legal arguments "cogently, logically and coherently." He also observed no indications of drunkenness, such as slurred speech, as had been alleged. At the end of the hearing, I found Bundy competent to stand his original trial in the Leach case. My finding of Bundy's competence is currently on appeal before the Eleventh Circuit.

Following the Bundy competency hearing, I commented that if every death-row inmate "milked the system" as Bundy has done, then it would shut down the civil side of the courthouse. Information that I have received as of February 17, 1988, for the Middle District of Florida shows 180 potential death-warrant signings for the Middle District of Florida, comprising Tampa/Ft. Myers, Jacksonville/Ocala, and Orlando. Thirty-seven of the potential death-warrant signings are for the Orlando Division

alone. Unless restrictions are imposed on Bundy-style appeals, it is apparent that habeas corpus appeals could occupy an inordinate amount of judicial time to the detriment of other cases.

Death cases are not only costly in time, but also in money. As of October, 1987, the state of Florida had spent six million dollars attempting to execute Bundy. Interestingly, by the end of December, 1987, Bundy's Washington lawyers, a firm that the average person could not afford, had spent $750,000.00 worth of their fee time defending Bundy because they are representing him pro bono. Although a widely viewed television mini-series has documented the Tallahassee killings, Bundy is proceeding in his Leach appeal in forma pauperis.

Moreover, as a former state trial judge and now as a federal district judge, I feel strongly that the deterrent effect of sentences is diminished when individuals, sentenced to death, can pursue appeals through the state and federal habeas systems for ten years or more. It is no wonder that the victims' families and friends as well as the general public are angry with the process. I firmly believe that due process should be rendered throughout all criminal proceedings. I also believe that special safeguards are warranted in capital cases in order to be assured that innocent people are not executed. Capital habeas proceedings, however, have become far removed from determinations of guilt or innocence. They have become out-of-proportion scrutinies of thorough state court proceedings and reexaminations

of portions of those proceedings far too long after the crime to be accurate. If a particular judge is opposed philosophically to the death penalty, then the scrutiny can be knit-picking. The drain upon judicial time as well as state funds are serious concerns in terms of ultimate service to society.

With the background of capital habeas corpus proceedings as they exist, I do have some specific suggestions addressing the efficiency of federal collateral habeas proceedings. First, set time limitations for filing federal, capital habeas corpus petitions as some states have set for state habeas proceedings. Under Florida Rule of Criminal Procedure 3.850, a convicted individual sentenced to death has two years from final judgment and sentence to file his/her habeas corpus petition, unless the claim upon which the appeal is predicated was unknown to the petitioner and his counsel and could not have been ascertained by due diligence, or the fundamental constitutional right asserted was not established within that period and has been held to apply retroactively. Other states have definite time limitations for filing for capital habeas relief in state courts.[1] None of these

[1] Arkansas is three years from commitment date, unless the conviction is absolutely void, Ark. R. Crim. P. 37.2; Idaho is five years from determination of direct appeal, Idaho Code § 19-4902; Illinois is ten years from final judgment, unless petitioner shows lack of culpable negligence in delay, 38 Ill. Rev. Stat. p 122-1; Iowa is three years from final judgment unless the ground of attack could not have been raised in that period, Iowa Code § 663A.3; Mississippi is three years from final judgment unless there is conclusive evidence, not reasonably discoverable at trial, which would have yielded a different verdict or sentence, Miss. Code § 99-39-5; Montana is five years from conviction, Mont. Code § 46-21-102; Nevada is one year from final judgment, unless good cause is shown for delay, Nev. Rev.

state statutes has been significantly challenged for constitutional infirmity.

To have no time limitations for filing federal habeas petitions is unreasonable and in the not-too-distant future will become unworkable. If a petitioner has viable grounds for habeas relief, he/she should present them well before a death warrant is signed. Petitioners purposely wait until the eleventh hour to file capital habeas petitions with the hope that one of the reviewing courts will stay the execution on the basis of lack of time to consider the petition fully. In his statement changing his procedures for signing death warrants, Governor Martinez clarified:

> I want to make it clear that I am not condemning defense lawyers who raise legitimate claims on behalf of their clients. But I do condemn the dilatory tactics and other obstructionist ploys that are being used to effectively prevent the sentences of the court from being carried out.
>
> . . .
>
> Such tactics appear to be employed solely for the purpose of delay and often result in a disruption of the judicial process at the court where the case is considered.

Statement of Governor Martinez, August 13, 1987.

One method of effectuating a statute of limitations is to amend to Habeas Corpus Rule 9(a), which provides:

Stat. § 177.315; New Jersey is five years from judgment absent excusable delay and an illegal sentence may be challenged at any time, N.J. Court Rule 3:22-12; and Wyoming is five years from sentencing unless petitioner shows lack of neglect, Wyo. Stat. § 7-14-101.

> Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Fed. Habeas Corpus R. 9(a). As the rule presently is stated, the government is required to show prejudice and the petitioner is allowed to demonstrate that he could not have discovered grounds for relief before the government was prejudiced. Therefore, it is difficult for the district court to justify dismissal. Rule 9(a) could be changed to include a presumption of untimeliness after a specified period, and to require the petitioner to show exceptional circumstances to overcome that presumption.

Second, petitioners should have to raise all their grounds for habeas relief in their initial petition. There is a judicially developed doctrine of abuse of the writ for intentionally delaying grounds for habeas relief. See Antone v. Dugger, 465 U.S. 200 (1984); Booker v. Wainwright, 764 F.2d 1371 (11th Cir.), cert. denied, 474 U.S. 975 (1985); Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985). Petitioners and their attorneys should not be able to postpone executions merely by reserving known grounds for subsequent petitions. Federal appellate courts tend to allow condemned inmates to raise new issues in successive appeals. We need a legislative counterpart for the Strickland v. Washington, 466 U.S. 668, 686 (1984) test to dispense with subsequent appeals from state court proceedings

as Strickland disposed of ineffective assistance of counsel claims. Florida's attorney general has observed that, generally, the issues that the appellate courts send back to lower courts for hearings and reconsideration, are ultimately decided to be without merit. Thus, petitioners and their lawyers are utilizing this strategic delaying tactic reinforced by the federal appellate courts. Justice Powell has recognized this abuse:

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward---often in a piecemeal fashion---only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate---even in capital cases---this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Powell, J., concurring).

Habeas Corpus Rule 9(b) could be amended to limit successive, capital habeas petitions, which are major tactical delays in collateral review cases. Currently, Rule 9(b) provides:

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Fed. Habeas Corpus R. 9(b). Rule 9(b) could prove more useful if it were written to provide strong presumptions against the validity of a new petition. The rule should state that

successive petitions are presumptively invalid unless the petitioner demonstrates that the subsequent petition provides new or different grounds for relief.

Third, deference should be given to full and fair trials in state courts. It is irrational to believe that a federal district court, as much as ten years after the state trial when, at worst, witnesses or evidence may have disappeared and, at best, memories have faded, can conduct a fuller or fairer adjudication no matter how obscure the issue. The ultimate result is generally the same, after much delay. In his criticism of this protracted process, Florida's attorney general has said that the effect is that federal appeals courts are ignoring the findings of state courts, making state appellate review virtually meaningless. "The time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing stale claims that were fully ventilated in state courts. . . . Relief on claims presented many years after conviction should be limited to cases in which the petitioner can demonstrate a miscarriage of justice or a colorable claim of innocence." Spalding v. Aiken, 460 U.S. 1093, 1094 (1983) (statement of Burger, C.J. concerning the denial of certiorari); see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970).

Fourth, Congress could enact statutes, specifically making federal, capital habeas corpus review more efficient by modifying state exhaustion requirements and including an election

of remedies requirement for death petitioners. The exhaustion doctrine presently requires complete state exhaustion in all federal habeas cases. Modifying exhaustion requirements in federal, capital habeas petitions would reduce the overall time involved in executing valid death sentences. Total elimination of the exhaustion requirement, however, has been criticized as a potential, significant conflict between state and federal courts. Additionally, the Supreme Court has overturned a rule allowing exhausted claims to be added on petitions combining both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509 (1982).

Even if a habeas death petition could be heard in federal court while an appeal was pending in state court, the two tribunals could reach different results on federal constitutional issues. This could cause substantial problems in capital cases. To minimize this occurrence, commentators have suggested a compromise that would allow limited habeas corpus review of non-exhausted claims. This proposal would allow merit dismissal of unexhausted death petitions "plainly lacking in merit." Pagano, Federal Habeas Corpus for State Prisoners-Present and Future, 49 Albany L. R. 1, 46-47 (1984). In support of limited habeas review of non-exhausted claims, another commentator has suggested:

> [I]t seems unnecessary and even inappropriate to dismiss for lack of exhaustion when a petition is plainly lacking in merit. Unlike the doctrine of exhaustion of administrative remedies, the exhaustion requirement in habeas corpus is not designed to obtain the

> benefit of the expertise of a specialized tribunal. Rather, it seeks to further federal-state comity by allowing the states ample opportunity to consider, and if necessary, to correct their alleged constitutional errors. It is clear that if there has been no such error, no deferral of the federal decision should be required.

Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. R. 321, 359 (1973). Accordingly, 28 U.S.C. § 2254(b) could be amended to include a plainly-lacking-in-merit test.

As an alternative to modifying the exhaustion prerequisite, Congress could enact legislation requiring that death-row petitioners elect either state or federal remedies. This is feasible in states like Florida that provide habeas corpus and post-conviction relief procedures for capital petitioners. See Fla. Stat. § 79.01 et seq.; Fla. R. Crim. P. 3.850. Death-row inmates now have the option of filing for collateral relief in state court and, subsequently, filing for the same remedy in federal court. An amendment, conforming to this proposal, would permit a capital petitioner the choice of either filing for collateral review under state procedures, with an opportunity to petition for certiorari in the United States Supreme Court, or filing a habeas petition in federal district court with entitlement to the federal appeals process. A capital petitioner, therefore, would not be deprived of federal review, but he/she would be precluded from collaterally attacking a conviction and sentence on substantially the same grounds in both the state and federal court systems.

Fifth, strict time parameters should be set for advance lodging of voluminous appendices and records, and even habeas petitions with the three federal courts, even if they cannot yet be filed. This massive paperwork is not assembled overnight, and often is held until the last possible minute for filing with the obvious hope that the court will have to grant a stay for review. If the district court does not stay the execution, such petitioners rather confidently reason, then the appellate court will. Our clerk's office has had petitioners' counsel wait until moments before 5:00 p.m. to file the petition and an unwieldy record for the court's review. This delaying tactic should be eliminated, with the result that fewer stays would be granted for lack of time for review.

I believe that it is well overdue that the writ of habeas corpus be put back into its intended use: to prevent unlawful detentions and not to delay lawfully imposed sentences. Congress and the appellate courts have the power to change the system; the procedure should be expedited or the death penalty should be abolished. I must administer the law as it is, but, with no changes in the present system, I foresee an inordinate amount of my time being spent on duplicative review.

Mr. GRANT. Thank you, Judge Sharp, I can understand your frustration as a jurist, to those of us who do not have the daily responsibility of bearing that, it must be an awful like the tar baby story, every time you reach in with one hand you get it stuck and get stuck on another. I think the first question I would like to ask is: Is there in your view a legitimate effort by the judicial system to impose rules upon themselves to eliminate what you have described—these abuses that you have described?

Mr. SHARP. Well, there are no rules that can be placed by the judges. The judges are—they must go either by what the law states or else what the statute states and whenever these petitions come before the court, the court must drop everything and review these petitions. As I have stated before, most of them, of course, the habeas death petitions are under terrible time constraints.

Mr. GRANT. What percentage—pardon me for interrupting but what percentage of your caseload is capital cases? You said you had 16 or 17 pending now.

Mr. SHARP. We have 31 pending right in our own court with two judges and that would be 16 or 17. They are not pending, they are in some form of appeal in the State at the moment and we know that as soon as the remedies are exhausted that we will be getting them somewhere down the line and, of course, Florida has more than anyone else in the country.

Mr. GRANT. If you have 30 or so in some stage right now, what percentage of your total caseload is that in some stage?

Mr. SHARP. It is a very small percentage. Out of probably 1,000 cases, it is a very small percentage.

Mr. GRANT. And what percentage of your time as you see it are those cases?

Mr. SHARP. Well, the percentage of time then becomes inordinate in that with 30 of these coming up, I would estimate that it would take almost 15 or 20 percent of the time. For example, 90 percent of our cases are civil cases in Federal court, but because of all of the cocaine problems in Florida, in south Florida, and now coming up into central Florida, I spend about 65 or 70 percent of my court time on these criminal cocaine cases and the rest of the time has to be spent trying to get out the 90 percent of the civil cases that really are entitled to as much time as the others and so it is a very definite problem and, of course, these habeas death cases just cut into that even more.

Mr. GRANT. Even more. Am I correct that no State constitution can deny a right guaranteed to us by the Federal, the United States Constitution? That is correct, is it not?

Mr. SHARP. That is correct.

Mr. GRANT. So it is purely within the Constitution to require the defendant to elect one system or the other, either the Federal or the State system, is not it?

Mr. SHARP. Most of these 20 assignments of error that come up constantly have been fully litigated in the State and when they come in, when they have exhausted their remedies and come into Federal court, they just put them under a different caption and say now our constitutional rights under the fifth, sixth or 14th amendments have been violated because of these 20 reasons whereas where they were litigated in the State court, they were assign-

ments there under nonconstitutional issues, they are the same issues, they are relitigated. And, for example, this *Willie Darden* case, his newest stay has to do with possible innocence. This is really a different subject, but, up to this point, procedurally, he has been before 95 different judges, and if one of these constitutional issues comes up before me, how am I to be so presumptious as to say that I have a right to say that these 94 other judges were wrong and rule that—wipe out these other jurists conclusions. It seems ridiculous when the process goes that far.

Mr. GRANT. Mr. McCandless.

Mr. MCCANDLESS. Thank you. I want to thank you, judge, for your testimony. To me it was very illuminating of the process and educational. I would like to go back to this Ted Bundy case because I think it is exemplary of what it is we are talking about and that point at which the subject of competent to stand trial came up at the Federal level, at the circuit court of appeals level of the Federal judicial system if I understood the narrative correctly.

Mr. SHARP. Yes, sir.

Mr. MCCANDLESS. Inasmuch as on the State level, Judge Jopling had gone through this at some previous point and made his determination, I am wondering in my own mind, and I, along with my other colleagues, I am not a lawyer but a reformed used car salesman, what basis could that circuit court of appeals find for challenging what Judge Jopling had already gone through and, in turn, sent it back to you, for what I understand to be a further hearing?

Mr. SHARP. Well, apparently, in finding that a defendant at any time who challenges competency to stand trial, the eleventh circuit just wanted more indepth evidence if any could be found to determine whether or not he was competent to stand trial because in this particular case, Mr. Bundy insisted at several junctures of the proceeding to represent himself, even though he had counsel. In other words, he was running the—being a former law student, he was running his own defense and, therefore, now he is saying well—his attorney is saying he was incompetent to conduct his own defense; therefore, he should not, he should have a hearing on that competency issue. It is sort of a catch-22 situation but the court of appeals just wanted a more indepth hearing as well as having Judge Jopling come back. He had several psychiatrists and some of them said after looking and visiting with him years after, that they decided that he was incompetent to stand trial back at the time that he was tried. Defense counsel said that he led them on wild goose chases in depositions and, therefore, he was very little help to them in that he sabotaged his own defense; therefore, he was incompetent. It could be looked on two ways, by some people, that either he was incompetent or he was ingenious, and that is the course of it.

Mr. MCCANDLESS. Given the scenario you are talking about here and applying it to our hearing today, it would have been legally permissible and within the realm of the circuit court's review to have simply said in so many words, we have reviewed Judge Jopling's competence trial or hearing.

Mr. SHARP. Yes, sir.

Mr. MCCANDLESS. And find that the bases were covered so to speak.

Mr. SHARP. Yes, sir.

Mr. MCCANDLESS. One could have, and I do not want to speculate, but one could have then said that in his case "it is possible" that the personal feelings of someone what you characterize as "nit-picking" in the process, might have been part of the scenario?

Mr. SHARP. Absolutely. If legislation were passed where this dual review of the same issues was not allowed, then that would have been completed and he could not bring the issue up again.

Mr. MCCANDLESS. OK. I am getting technical now and over my head and you understand that, so bear with me, is a defendant, including one in a capital case, entitled to what one might consider to be the perfect trial and a perfect defense?

Mr. SHARP. Well, that is why you get the unique question of ineffective assistance of counsel, because the perfect trial and the perfect defense would mean that the person gets off, gets acquitted, that is the only counsel that is not ineffective. When a person is convicted then, obviously, it is ineffective, to the *n*th degree and this, of course, is not the type of ineffectiveness that they are talking about in appeals, of course, it is error in judgment which they felt would possibly be detrimental to a fair and impartial trial.

Mr. MCCANDLESS. I guess where I am coming from is if Congress does various and sundry things that they have been asked to do and those become part of the judicial process, we still have the judgment aspect of it, the personal philosophical view of different judges who can, depending upon their thought process, sidetrack even when Congress does that, right?

Mr. SHARP. Absolutely, the only thing that I can suggest is that procedural methods are passed by Congress to speed up the process and hopefully get rid of some of the duplicity, but certainly, as long as there is the death penalty, there will be people philosophically opposed to it who will try to stalemate at every juncture.

Mr. MCCANDLESS. Just one more quick one, if I may, Mr. Chairman, related to the perfect crime and perfect defense, in the appeal process in capital cases, is that considered to be some type of criteria that if the individual did not receive a perfect trial with a perfect defense and that anything in the way of a deviation from this is therefore considered to be grounds for a reversal process or a lessening or something of that nature?

Mr. SHARP. Yes, sir, particularly in a habeas death case where execution is the ultimate, anything is——any straw is sought as a point of appeals to try to get the conviction overturned.

Mr. MCCANDLESS. Irrespective of how immaterial or minor it might be procedurally, it would have no bearing upon the issue?

Mr. SHARP. That is correct.

Mr. MCCANDLESS. Thank you, judge.

Mr. GRANT. Chairman English.

Mr. ENGLISH. Thank you very much. Judge, let me say from the outset this committee is very sympathetic with regard to the issue of serial killers. We are the only committee that I know of at least recently who has looked into that particular problem. I think it is one that most experts will tell us that we will encounter more often rather than less often, unfortunately, in future years. Also, I support the death penalty, but in listening to your exchange between Mr. McCandless, and as he pointed out, we are not attor-

neys, but we like to apply a little common sense here and hope that that works out. As I understand it the question of innocence or guilt is not determined on appeal. That is never the issue that is brought before the courts on appeal. That is determined at the point of conviction and from that point on, it gets to be a question of whether the individual got a fair trial, whether his constitutional rights were being observed, whether this or whether that, but it is never on the issue, whether it is the court of appeals, Federal appeals court, State appeals court, U.S. Supreme Court, it is not an issue of innocence or guilt, is it?

Mr. SHARP. Every now and then new evidence is found or alleged to have been found.

Mr. ENGLISH. But, again, if that new evidence is found that court may order a new trial, they are not doing that because they think this guy is innocent. They are doing it on the basis that new evidence has been found.

Mr. SHARP. Right, but that can be anywhere during the appeal process.

Mr. ENGLISH. So we never get into the question of innocence or guilt after that first trial, do we?

Mr. SHARP. Very seldom.

Mr. ENGLISH. OK, so what we are really looking at as we examine this problem and the delays and the shifts, really comes down to the question of how many ingenious devices that all of the law schools that we produce from all the lawyers around the country can come up with, is not that right?

Mr. SHARP. Exactly right. [Applause.]

Mr. ENGLISH. You also then got into the question of, you got into the question of the philosophy of the particular business. Now once a fellow is named judge, most of these, a good number of them anyway, are lifetime appointments, I mean he is there from now on, and as we have seen so often in the past, whether we are talking about Supreme Court judges or other judges, we go through confirmation process, the U.S. Senate and all of that stuff, these guys may or may not indicate to you what their real philosophical beliefs are or they may have a change.

I remember Earl Warren. He was a Republican Governor from California, named by a Republican President, and I think Dwight Eisenhower has said in the past, he certainly did not expect Earl Warren to turn out to be that kind of judge. He surprised a lot of folks, didn't he?

Mr. SHARP. Yes, he did.

Mr. ENGLISH. And we see that sort of thing and so, really, when we get down to it philosophically, he is judge and he decides well, I do not really believe in the death penalty and I know this has been through umpteen other judges and they have all ruled on this and they have ruled on that and they have ruled this back and forth and up and down. He can find a way of stopping that execution if he wants to?

Mr. SHARP. Yes, sir, he can but unless he is one of five on the U.S. Supreme Court, he can delay but not stop it.

Mr. ENGLISH. Oh, that is a good point, he can delay it. But he can drag his feet and he can find all kinds of reasons why the

person should not be executed and it can go on for days and weeks and months and years.

I ought to point this out, Earl Warren was also a California attorney general too, so let's get that down on his record and his resume while we are discussing him here. I appreciate that. But, the thing that we are coming down to here is it is not just a simple question well, if Congress can just pass a law, this takes care of all the problems, because what you have got is you have constitutional questions to rack up and certainly, as we have seen with the Supreme Court time and time again, we do not know for sure how the Court is going to rule on those constitutional questions.

We have seen the delay through all the courts and, again, a lot of it comes down to the philosophy of the judge and what he reads into it and what he want to see. I mean we could pass a law in Congress and we can do as our friends in the administration wants to do under the law, and as I said, I am somewhat sympathetic with it, and put these time limits on. We may very well have the U.S. Supreme Court say that is unconstitutional. I mean we all know the work load that the courts have. They are overburdened, you start putting time limits on them, that means that we are not going to be able to carefully hear the appeals of these folks.

You pointed out yourself that the amount of business that you are dealing with in regard to cocaine, and certainly that has had a big impact here in Florida, and the work load you have, the drug-related cases we have. It is all a part of that, a tremendous work load, and we have all read and heard about that. So I guess the question I come down to you is, is not the real problem that we have with the court system itself and not with the law?

Mr. SHARP. It is definitely part of the problem for the reasons that you stated, but if you did put a time limit or a statute of limitations on habeas corpus, it would definitely do away with these 8-, 9- and 10-year cases, because the only objections that I have seen from putting a statute of limitations has to do with not habeas corpus death cases but habeas corpus itself.

People have said that people who have been convicted may be uneducated, they may not understand what has been happening, they may not have had an opportunity to file for their habeas relief, but realize a person who does not have a death penalty, a person who has just been in prison for years, the reason he files a habeas corpus is so he can get out and whether he knows it or not, once he gets to prison, he is going to be surrounded by a whole lot of jailhouse lawyers who know a whole lot more law than most of us in this whole building here, and they are going to tell this person his rights, if he has acted pro se, without an attorney, and if a statute of limitations is put on, this person will file that petition well within the time limits because he wants to get out.

If a person is under a habeas death penalty, he does not want any time limit at all because he is always represented by an attorney during the whole process, he knows what his appellate issues are, but he wants to delay them forever, because if there is no time limit on a habeas petition at all, he is going to wait until the last minute before the switch is pulled.

Mr. ENGLISH. Use the system. I think we can understand that. I think we have got to expect that under any circumstance, they are

going to do their best to use the system for all it is worth. They all know what judges to go to too, do not they?

Mr. SHARP. Yes, sir.

Mr. ENGLISH. Make the right appeal to the right judge.

Then it comes down to, this committee has oversight and legislative authority over the Freedom of Information Act. We have time limits for when the Justice Department can respond, how quickly they have got to respond to a Freedom of Information Act request. They never make those deadlines. They do not do it. The thing I wonder about when I hear about the time limit question in this kind of an issue, what happens through the appeal process and what happens as far as the Supreme Court is concerned whenever you have a judge and he comes up and says my work load is just too great and I cannot get to this within that time limit?

What kind of response would you speculate that we could get out of the Supreme Court, you know, what happens under those circumstances?

Do we just say, well, that guy's appeal is not going to get heard, that's it? I doubt that the Supreme Court would let that happen. I may be wrong.

Mr. SHARP. I am not familiar with any execution that has taken place because a court did not get around to ruling on it.

Mr. ENGLISH. Well, that is my point. I do not think it is likely we are going to see one either and that is why I am wondering about when we can come in, as we have with the Freedom of Information Act and set time limits, you know, and restrict him, and the judge has got to do this and that and the other, but when we come right down to it, when we have got a judge who really does not want that execution to take place it is pretty easy to say we have got all this other business ahead of it. Isn't that likely to happen?

Mr. SHARP. No, sir. If there was a statute of limitations and a person filed untimely, even if the judge was philosophically opposed to the execution, if it was untimely filed, then no matter what he did, somewhere up the line, it would be overturned because it had to be within those prescribed times.

Mr. ENGLISH. What about if it was timely filed, such as his attorney filed it on time and did everything he was supposed to do, and then we have old judge "what's-his-name," and old judge "what's-his-name" is totally opposed to the death penalty, he does not like it and he is from south Georgia and he has got all of these cocaine cases and I am going to hear cocaine cases, that is what I am going to take care of, and I am going to go on, and on, and on, and on; and it gets up here near the end of the time period and old judge "what's-his-name" says, hey, I am sorry, my work load is just so great, I have not got any help, we have not got any more Federal judges, Congress has not given me any more money, you know, the administration does not want any more of them old judges down here, I have not got any help, and I am just loaded under, and I cannot make the time limits. We are going to have a justice up at the Supreme Court say you cannot execute that fellow because judge "what's-his-name" has not reviewed his appeal?

Mr. SHARP. Yes, that is correct.

Mr. ENGLISH. So they can thwart the system.

Mr. SHARPH. Yes, sir.

Mr. ENGLISH. And now we have got the attorneys playing the system. We have got the jailhouse lawyers playing the system, and we have got the judges themselves playing the system. Everybody is in here playing the system trying to control their own philosophical belief, or get out of jail, depending on what your interest is, or you client's, and that is their job.

I do not want to say that it is not their job, but the point I am coming down to is that it is going to be pretty darn difficult for Congress to pass laws that in effect prevent these kind of justices who philosophically have some kind of ax to grind from messing up the works.

And we also, let me say very quickly, when it comes down to a contest between the constitutional rights and the congressional law, the congressional law is going to lose, is it not?

Mr. SHARP. I do not think that Congress would want to do anything that would impinge on constitutional rights, but I think that that is the reason that we are here today is to see if we can come up with some system that will thwart the thwarters.

Mr. ENGLISH. Yes, I agree with that, and I am all for it. I do not want to see it get in the position of saying well, we are going to get a quick fix through Congress, because these kinds of problems, we are over in a separate branch of Government.

Mr. SHARP. Right, well I think we all agree there is no quick fix. We are here to address the issues.

Mr. ENGLISH. Yes, and I think that is important for Congress and the general public to understand that and the real thing that we are going to have to come down to probably is going to be a little earlier, we are probably going to have to have more judges, because gosh knows, the work load is there. There is no question. We are going to have to have it. If you want to deal with these folks in a timely manner and put them through this process, that is what you are going to have to do. You are going to have to pass some laws, I agree.

Mr. SHARP. The quick fix is to abolish the death penalty and the whole problem will go away.

Mr. ENGLISH. I do not think I am for doing that, and I do not think it will ever happen. Well, I am not going to get into speaking for the rest of the country, but, anyway, I am not for it, and I think if you, I agree with you on the deterrent value. But it has got to be timely. Somehow, I think we are going to have to have some help, and probably from the U.S. Supreme Court itself.

You know, I do not think that those fellows can just wander around and say we are above others, I think they have got to get involved in somehow streamlining this system and probably working with the executive branch as well as the legislative branch and somehow addressing that in a manner that does not abridge the constitutional rights of our system.

Mr. SHARP. It has to go hand in hand.

Mr. ENGLISH. I agree. Thank you very much, Mr. Sharp, I appreciate it.

Mr. GRANT. Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman. I think the chairman covered a lot of these points but I would just like to try and pull some wisdom out of these, out of what we have talked about here if

I can. First of all, in the court, your court, you go into the Federal district court and basically your role there is to review the proceedings in State court, is that correct?

Mr. SHARP. Right.

Mr. HASTERT. And the evidence you get, the more record that is there, the longer that they can string this out and the more testimony and appeals and stuff that they can throw in here, it makes it almost more impossible to deal with on a timely basis, is that a correct premise or am I misconstruing that?

Mr. SHARP. All of the State actions have to be exhausted before they collaterally come into the Federal court under habeas corpus.

Mr. HASTERT. And then, of course, the more they put into that State action, the more you have to go through as a record, is that correct?

Mr. SHARP. Correct.

Mr. HASTERT. Now you talked about the system and trying to beat the system——

Mr. SHARP. Incidentally, let me state, Congressman, that the attorneys who represent death appeals are very fine attorneys, they are well versed in their field, and they do everything they can to bring out every issue imaginable.

Mr. HASTERT. So all of these things have to be revisited when they appeal in your court, or the district court goes to that and so the system really is counterproductive then to the American people in a sense, is not it? I mean the American people who want justice and want things carried out on a timely basis are becoming the victims in this, are not they, really?

Mr. SHARP. Right, that is the way I personally feel.

Mr. HASTERT. In our system the courts are the victims too, because what you do is clog up the system and really stop other processes of justice being carried out, whether it is heroin or cocaine or whatever other type of crime that you have to deal with. Is there a possibility, or is this counter to the whole judicial system, that we have a specialization type of court for these types of cases that are brought up to speed and somebody has to deal with heroin, he does not have to switch bases, if there is a special court that would deal with murder convictions or death penalties?

Mr. SHARP. Well, I do not think there are enough death penalties at the present time to merit a special court. It just so happens that they all happen to be in Florida, most of the——

Mr. HASTERT. Well, we have got them in Illinois too, unfortunately.

Mr. SHARP. There are just not enough and we just have to deal with them as they come.

Mr. HASTERT. What I am saying is that instead of being a judge for all issues, if you had people who were specialized in that we could cut through the system better.

Mr. SHARP. Well, I think what you are addressing is the fact, and it has come up many times, is doing away with diversity of citizenship in Federal cases and freeing up the judges to handle mostly criminal matters, but that always has been cut off at either the Senate or in Congress, but it is a never-ending issue.

Mr. HASTERT. I mean something that is reasoned out before it happens. In your opinion, and when we get down to the nitty-gritty

on this thing, you have five points, the Department of Justice have three points that we can work to change things, can you change the system and still in your feeling guarantee the people's constitutional rights?

Mr. SHARP. These changes I think would absolutely guarantee the people's constitutional rights. They would not change anything as far as the appellate system is concerned and I think all it would do is possibly cut down where we are working on 8 and 10 years now for a full review of an appeal on a death case and maybe cut it in half or maybe cut it to 6 years, just to streamline it more.

Mr. HASTERT. You brought out a point before and it makes you ponder on it and let me say that I support death penalties and have when I was in the State legislature in my home State and I think that reflects really the feelings of the vast portion of my constituency.

But, you know, you talked about eliminating the death penalty would certainly expedite the system, you would not have—this whole system kind of works like Congress, when we are up against a deadline, we do a lot of talking, a lot of scrutinizing, a lot of appeals, and, you know, sometimes we move that deadline forward and not get to it, but the process when you are up against a deadline you move the death penalty or move that appeal forward feeds upon itself and it is, it becomes the medium of, say, well, we have got to go back and review this whole thing again.

If you eliminated the death penalty, do you think the expedited justice on a whole would be furthered?

Mr. SHARP. Well, the main reason the death penalty is as deterrent in fact, and there are other reasons, but I think that is the main reason, and if some supposed killer goes into a convenience store and just before he is ready to pull the trigger today I remember somebody was executed, I had better not do this and that saves that convenience store clerk, then the death penalty has its deterrent effect; but if the appeals go on forever and ever and a person who is at that convenience store thinks well, if I shoot this person, I am not going to get executed, I do not have that threat, if they catch me, I will go to prison.

Mr. HASTERT. Well, I might disagree with you. I think maybe that might be a court perspective of why we have the death penalty. I think in the minds of a lot of the American people that there are people who feel it is justified to take them out of the system and there is such a thing as punishment and that that is one of the——

Mr. SHARP. Certainly there are lots of——

Mr. HASTERT [continuing]. Methods the Federal system has to take them out of the system.

Mr. SHARP. Abolition would take care of 90 percent of the appeals, they would just go away. The reason they are in the posture they are is to thwart the death penalty.

Mr. HASTERT. And I might add, what I said, the frustration there is that we do have the death penalty in many, many States in this country and the frustration of the people who are voters, who are taxpayers, who are good citizens in this country is that justice is not being done. I think that is the real pressure and the real problem we see.

Let me ask you one final question. If we brought up a way that we could expedite this system, are we opening ourselves, and, again for people who use the system, are we expediting ourselves to a constitutional challenge, if there was a time limit put on it? I mean the people who, the lawyers who thwart the system, the jailhouse lawyers who thwart the system, are we expediting or setting ourselves up for a challenge, a constitutional challenge if we do that?

Mr. SHARP. I think I can without hesitation say yes, in this litigious society everybody is suing everybody else nowadays and it costs $60 to sue somebody but so far, the States that have the State habeas limitations have not had any serious constitutional problems, but, yes, of course, the first time it comes up, everyone is going to question it, but I do not think it is going to be serious.

Mr. HASTERT. I appreciate your candid answer. Thank you, Mr. Chairman, and thank you, judge. I think Mr. McCandless has another question he wanted to ask.

Mr. MCCANDLESS. My colleague brought this up as well as some of the previous discussion, back to the timing of the process, with the recommendation of both you and—Mr. Cassell, you touched upon the fact that there are State time limits to my understanding. For example, in my State of California, once you have committed a felony, you have 60 days in which to appeal. If you do not appeal within the 60 days, you have no further rights, if I understand that law correctly. It has been on the books many, many years and is a part of the judicial system.

But what you said in response to Dennis here is if we were to instigate such a procedure at the Federal level, which is not currently there, it would probably have to go through the total process and be decided by the Supreme Court whether or not it was to stay as a part of the judicial process. Is that the problem we face?

Mr. SHARP. Yes, I suspect it will be challenged.

Mr. MCCANDLESS. We do not have anything comparable to that currently in the Federal judicial system where there is a time limit that one could point to as an analogy?

Mr. SHARP. Well, all appeals have a time limit, but you mentioned about your 60 days, that is just for every appeal. We are talking strictly a time limit on a statute of limitations on a habeas, your habeas petitions.

Mr. MCCANDLESS. I guess I was talking about the thought, the theory of the time limits is not a new one, it is a part of the judicial system, right, and so we would not be breaking new ground if that were to be adopted as far as one of the recommendations?

Mr. SHARP. No, sir. The habeas law is the only one that I know of that does not have a statute of limitations.

Mr. MCCANDLESS. Thank you.

Mr. GRANT. Thank you. One final question, judge, do the other—is this a problem that is common just to this particular Federal circuit?

Mr. SHARP. Which problem?

Mr. GRANT. The abuse of the appeals process, it is not common just to——

Mr. SHARP. No, it is not common just to this circuit. It just so happens that the Eleventh—that the State of Florida and the Eleventh Circuit has the most of any other in the United States.

Mr. GRANT. Why do you think that is?

Mr. SHARP. There are more death-row inmates.

Mr. GRANT. More death row inmates, and the appeal process is designed, in capital cases is designed to thwart the final judgment, I thought I heard you say that?

Mr. SHARP. Yes.

Mr. GRANT. That is right.

Mr. SHARP. Mr. McCandless, I was thinking that sections 2254 and 2255 were the only ones that did not have the statute of limitations, everything else does.

Mr. MCCANDLESS. Thank you.

Mr. GRANT. And in the case of Theodore Bundy, he would just be, he would be using the appeal process not too much as to have his conviction set aside as he would to avoid electrocution until such time as the Supreme Court might rule it unconstitutional and have it set aside permanently, is that right?

Mr. SHARP. Well, both, but primarily I think to indefinitely delay his execution.

Mr. GRANT. And given the composure of a particular court and the disposition, as—Mr. English pointed out, part of the judges use the system too to perpetuate their own particular judicial philosophy about the law, and that, given that, do you think that there ought to be some limits put on the tenure of Federal judges?

Mr. SHARP. It does not bother me as long as it cranks in with their pension.

[Laughter.]

Mr. GRANT. It would not necessarily bother you if every 10 years or 12 years or whatever time it was so designed to do what the State judges do and that is to stand against approval or disapproval of——

Mr. SHARP. I have no problem with that. I do see a problem in having to run because it is getting to be such an expensive process and the judges are all poor.

Mr. GRANT. We could write a book on that too.

Mr. English, do you have a question?

Mr. ENGLISH. I was just curious, judge, your information that you had more death row inmates here in Florida than anywhere else around the country, why is that? Is that because of the drug problem south of the border? Are those drug related, most of those?

Mr. SHARP. I really do not know whether they are drug related or not and I do not think it is because of the drug problem in south Florida, I think that Florida has had that even before the big drug problem. Ninety-five percent of all the crimes are drug or alcohol related, so you can always tie that in.

Mr. ENGLISH. Well, that is, it just seemed curious that Florida for some reason would have more of those, I assume you are talking about on a per capita basis, or just total number. Are you talking about the total number of people waiting execution?

Mr. SHARP. Total capita that were given the death penalty.

Mr. ENGLISH. We will try to look into that and see why Florida has got more than anybody else. That is an interesting point. Thank you.

Mr. SHARP. Thank you.

Mr. GRANT. Judge Sharp, thank you so much for your time, your testimony has been very enlightening. Thank you, sir.

Mr. SHARP. Thank you, gentlemen.

Mr. GRANT. The next witness is Steven Goldstein.

Mr. Goldstein is an associate professor of law at Florida State University, is a graduate of the Columbia University School of Law in New York City. He has become real active in the State of Florida.

Mr. Goldstein, we welcome you on behalf of our committee.

STATEMENT OF STEVEN M. GOLDSTEIN, ASSOCIATE PROFESSOR OF LAW, FLORIDA STATE UNIVERSITY COLLEGE OF LAW

Mr. GOLDSTEIN. Congressman Grant and members of the committee, I very much appreciate this opportunity to testify. I must admit to you that in Congressman English's words, I do teach at one of those lawyer schools around the country. I think it is a very good school, the Florida State University College of Law.

Mr. ENGLISH. Will the gentleman yield on that point?

Mr. GOLDSTEIN. As to whether the Florida State University College of Law is a good school?

Mr. ENGLISH. No, what you just said before that, I just wondered whether you would elaborate on whether you consider, is that a part of the problem here today, the law schools, or would you like to elaborate on that a little?

Mr. GOLDSTEIN. I do not think it is a part of the problem.

Mr. ENGLISH. OK, thank you. For the record, we wanted to get that down.

Mr. GOLDSTEIN. Obviously, my comments here today are not the comments of the Florida State University College of Law and they are my own personal comments. I believe my comments today will differ dramatically from the comments that you have heard from both Judge Sharp and Deputy Attorney General Cassell as well as the witnesses who are scheduled to follow this.

When I got a letter from you, Subcommittee Chairman English, asking me to testify, you indicated that the central focus of the committee here today would be on the role that the Federal habeas corpus remedy plays in the judicial review process available to those who are convicted in State courts. You indicated in your letter that the Federal habeas remedy could result in delays in carrying out sentences imposed by State judges, and you asked me to comment in my testimony on any subject or issue related to Federal-State judicial procedures. Well, what I have chosen to do, and the previous speakers have also chosen to do, is not to address the broad question of the use or misuse of the Federal habeas remedy by those convicted in State courts, but I have chosen to limit my comments to the specific context of the death penalty and specifically the role that the Federal habeas remedy plays in that context.

I have chosen to do so for essentially two reasons.

First, much of the concern, as it has been expressed here today, about the misuse of the Federal habeas remedy has arisen in the death penalty context. That is, many believe, and it has been expressed here today, that the relatively small number of executions

since the Supreme Court in 1976 upheld the facial constitutionality of the death penalty statutes, that the small number is attributable to the seemingly endless review process that is available to death sentence individuals, and Federal habeas corpus is thought to play a central role in that review process. As a result, many have begun to focus on Federal habeas and suggested that it is one of the reasons why the death penalty, although available in theory, does not seem to be available in practice and have suggested as a result that there needs to be attention paid or focused on streamlining or dealing with the scope or the reach of the Federal habeas remedy. Second, although my focus is going to be on the Federal habeas remedy in the death penalty context, many of the considerations relevant to the use of that remedy in that context, such as federalism concerns, such as allocation of resources concerns, such as finality concerns that have been expressed by all of you, are equally applicable in the broader context of the use of the Federal habeas remedy by any person who may be convicted of a criminal offense in State courts. What I am suggesting, of course, is that my comments although limited and directed toward the Federal habeas remedy in the death penalty context, I think have broader applicability.

We have all heard testimony today, and I think we all, that there is a general consensus that the Federal habeas corpus remedy in part is responsible for thwarting the State's ability to effectuate its lawful sentences, specifically its lawful sentence of death. The number of those who have been executed since 1976 seem at first blush to bear out that notion that there is something about the review process which is thwarting the States in their ability to see to it that lawfully executed sentences imposed by State court judges should be carried out, specifically death sentences.

Since the 1976 decisions, the figures that I have seen, as of December 20, 1987, a little more than 11 years after those decisions, there has been 93 executions in the United States, 3 in 1976 through 1979, none in 1980, 1 in 1981, 2 in 1982, 5 in 1983 and now the numbers begin to increase, 21 in 1984, 18 in 1985, 18 in 1986, and finally the most that we have had to date since the year 1976, 26 executions last year in this Nation. Of these 93 individuals, 11 have been voluntary in the sense that those 11, they chose not to pursue the legal remedies that were available to them and probably Gary Gilmore is the one that is the most well known to you.

In contrast to the number executed, the numbers on death row have been steadily increasing. As Deputy Attorney General Cassell indicated, as of the end of 1987, there were approximately 2,000 individuals on death rows across the country, 150 more than there were in 1986 and approximately twice as many as there were in 1982. In fact, right now, we have more people on death row than any other time in our Nation's history, and the number is likely to increase. I think an illustration from my home State of Florida will indicate why it is likely to increase.

The figures that I have seen indicate that in Florida, and perhaps at the conclusion of my testimony we can talk about why we have so many folks on death row in Florida, but in Florida, about 1 person a week is sentenced to die in our electric chair, approxi-

mately about 50 a year. Somewhere between—the statistics indicate somewhere between 15 or 20 of those death sentences will be reversed on direct appeal by the Florida Supreme Court. That does not necessarily mean the person is innocent, it does not necessarily mean that he might not be sentenced to death again, but that sentence will be set aside on direct appeal. As a result, we have 30 individuals whose death sentences are being affirmed each year by the Florida Supreme Court. Unless those sentences are reversed in the Federal review process or unless we have at least 30 executions a year, the numbers by definition are going to increase if we assume the same number is being placed on death row each year in Florida.

And, of course, in this context, it should be noted that since 1976, Florida, and this during an 11-year period, has only executed 17 individuals. The most individuals executed has been by the State of Texas, which has executed 26, Louisiana has executed 15, Georgia has executed 12, and those are the only four States with double digits, if you will, that is States that have executed more than 10 individuals since those decisions.

As you indicated, Congressman Hastert, no one has been executed in Illinois and, Congressman McCandless, I think you are familiar with the situation in California in that no one has been executed. The question then is why, why these small numbers? To what extent is it attributable to the review processes available to death sentence individuals and, particularly, given the focus of your subcommittee, to what extent is it attributable to the Federal habeas corpus remedy?

Well, I think one reason for the relatively small number of executions has very little to do with the misuse of the review process and particularly the misuse of the Federal habeas corpus remedy. That is, although in 1976, the Supreme Court found that the death penalty statutes in Georgia, Florida, and Texas were constitutional on their face, not surprisingly a number of issues remained to be litigated concerning the administration and implementation of those statutes and since 1976, those representing death sentence individuals have been successful on a number of appeals dealing with the implementation and administration of death statutes in States throughout the country.

As a result, one of the reasons for the small number of executions, it seems to me, does not have anything to do with the review process being misused, rather what it has to do with is the fact that death sentence individuals have been successful on the appeals they have been granted, both in the State courts, as well in the Federal courts through the remedy of Federal habeas corpus.

Now, notwithstanding, however, these initial judicial successes, in the last few years, and I believe Congressman Grant made reference to this, the U.S. Supreme Court has repeatedly rejected what are perceived to be the last of the sort of broad-based challenges to the way the death penalty is being administered in States who have the death penalty. For example, last term in a 5-to-4 decision the Supreme Court rejected a broad-based claim that the death penalty was being administered in a racially discriminatory manner in Georgia. After that decision, we had four individuals executed in a relatively short period of time in the State of Louisiana

because the only issue that remained then to raise, to be litigated, was the issue that was then pending before the U.S. Supreme Court.

The year before that *Georgia* decision, the court rejected a claim, once again, a claim that could have wide applicability that the exclusion of those who were opposed to the death penalty in all aspects from the guilt/innocence phase of a capital trial caused constitutional problems. That claim was rejected by the U.S. Supreme Court, and what I am suggesting is that given this recent action of the Supreme Court, and given the rejection of what are perceived to be most of the broad-based challenges that were available as to the administration and implementation of the death penalty, you are likely to see the number of executions rise, just as you saw the number of executions reach its highest level in 1987, when it reached the level of 25.

I think you should keep this in mind when you are considering proposals to change the judicial review process, because it may be that that judicial review process is working very well and we just need to be patient to give it the time to work and what will happen in terms of the State's ability to carry out its sentences, you will find that they will begin to be carried out with at least more repetity than at least they have been in the past 10 years.

A second reason for the small number of executions which also in my judgment could not be as attributable to the misuse of the Federal habeas remedy or the review process, relates to the complexity of the issues that are present in capital litigation given the stakes that are at issue. That is, the American Bar Association did a study of capital litigation and they interviewed lawyers who handled these cases, and this is what a well-known practitionery from a prominent New York Wall Street firm had to say about capital litigation.

He said:

> I have been involved both as plaintiffs counsel and defense counsel in major protracted litigation of several different types. No case I have ever handled compares in complexity with my Florida death penalty case. The death penalty jurisprudence is unintelligible. It is inconsistent and at times irrational. In addition, it is evolving. In short, there is nothing more difficult, more time consuming, more expensive and more emotionally exhausting than handling a death penalty case after conviction.

What I am suggesting to you, of course, is that given the stakes that are at issue, we are talking about a decision by the State to put someone to death in a premeditated fashion which is supported by the citizenry in this country overwhelmingly, but clearly it is an extremely important decision. Given the stakes that are at issue and given the complexity of these proceedings, perhaps it should not be surprising that the review process and delays in implementing those sentences are what they have been to date.

I would hope that given these stakes and given the complexity that we would want to err on the side of being deliberate rather than to err on the side of pushing forward. I remember Deputy Attorney General Cassell made reference to Justice Rehnquist's comments about putting these cases on instant replay. Well, the other analogy that has been made by another member of the Supreme Court is that we have to be careful that we do not put these cases on fast forward because just as we do not want to put them on in-

stant replay, to use our VCR analogy, we also do not want to put them on fast forward.

Congressman Grant also made reference in his initial comments to whether it should make any difference to us whether a death sentence if it is ultimately held valid, whether it is carried out 6 to 7 years rather than 2 to 3 years after its imposition. In this regard, in the context of deterrents, in the context of retribution, I would like to quote from Justice Stevens of the U.S. Supreme Court who said that, "The deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself." And he made reference to the plight of an individual named James Autry from the State of Texas who was, in Texas they have execution by lethal injection, who was strapped down, was about to be injected, and then received a stay of execution. He was later subsequently executed by the State of Texas, but the point, of course, is does it, should it make a difference, assuming, of course, that the person is not a threat to society, the person is not caught committing other crimes while in prison, that in fact the execution takes place 6 or 7 or 8 years after the imposition of sentence rather than 2 or 3 years after the imposition of sentence. I would suggest to you that although the public very much wants the death penalty, I am not sure that the public wants the death penalty necessarily with the degree of speed that is sometimes suggested by those who are suggesting reforms in the review process.

That is, it becomes an equitable question about how fast the judicial process should be for these cases. If we are assuming that eventually this person is going to be executed 6 or 7 years after the sentence is imposed, and some might suggest, as I indicated in my prepared statement, that if you had a class, of substantial number of indigent Social Security recipients who are unlawfully denied benefits by the U.S. Government, that the judicial review process should not be what it is today, that is available to them, before they can get those Social Security benefits to which they are entitled.

What I am suggesting to you is that the pace of the review process in the death context becomes a question of values, values that are very different from the question of whether we should have a death penalty. There is no doubt that the people want the death penalty, but how quickly they want sentences to be imposed, I think is an entirely different question.

With these preliminary comments in mind, what I would like to do is take you through the review process available to death sentence inmate and particularly to focus on whether or not the Federal habeas corpus remedy is the problem which is creating the delay. There may be steps in the review process which is resulting in delay in implementation of sentences which are steps over which you do not have control.

The first step, of course, after a death sentence is handed down by a State trial court is an automatic appeal to the highest court in that State. That part of the process can take anywhere from 1½ to 2 years and it is obviously beyond the control of Congress.

I would remark in the Ted Bundy case, at least the case that arose out of Tallahassee, the Chiomega murder/killings, which I am most familiar with, the Florida Supreme Court took 5 years to

rule on his direct appeal. That is not to say they were wrong in taking 5 years, but it is to say that one cannot simply focus on Federal habeas corpus and say that the reasons for the slow pace, the review process, is attributable to the Federal remedy versus remedies that may be available to a death-sentenced individual in the State courts.

Assuming the highest court in a State affirms the death sentence, the next step in the process is for the death-sentenced individual to seek review, at least as to any Federal constitutional errors, in the U.S. Supreme Court, and they generally do this by way of certiorari.

The Supreme Court's certiorari jurisdiction is discretionary, as you all well know, it is generally reserved for cases that raise issues in which there is a conflict among the Federal circuit courts of appeal or conflicts with the highest State courts or that really involve matters of nationwide importance. So it is very unusual for the Supreme Court to accept certiorari in a "typical" death case, assuming there is such a thing as a "typical" death case.

It is important to keep that in mind because if you believe there should be some Federal forum for a death-sentenced individual to raise Federal constitutional claims, many suggest, well, that Federal forum is available, because he can seek review of the State court judgment in the U.S. Supreme Court. But the reality is to expect the U.S. Supreme Court to provide the Federal review that is now being provided by the Federal district judges in Federal habeas corpus, it would be totally unrealistic given the caseload pressures on the U.S. Supreme Court. It is just not reasonable to expect them to be able to do that, particularly, given the fact we now have almost 2,000 people on death rows around the country. Generally, the Supreme Court denies certiorari and it generally takes about 9 months, and we are estimating now as to how long it takes, but it generally takes about 9 months. It could take longer. It took longer in Ted Bundy's case. It almost took 16 or 17 months in Ted Bundy's case when the U.S. Supreme Court denied certiorari after the Florida Supreme Court, 5 years after his conviction, had affirmed that conviction.

The next step in the process is for the death-sentenced inmate to initiate what is commonly referred to as collateral remedies, motions for postconviction relief. He will file these in the State trial court. It is very difficult to predict when these will be filed because unlike on direct appeal, and unlike a trial, the individual has no constitutional right to counsel, and if I may digress for a moment, that, in my judgment, is the major problem with placing time limitations on when the Federal habeas corpus remedy should be available, that is, in the situation Judge Sharp referred to, and that Congressman Hastert referred to in terms of direct appeal, 60 days, or Congressman McCandless, in those situations, the individual has a right to counsel. Counsel is provided by the State; therefore, it makes sense to impose some time limitation. In the context of these collateral proceedings, there is no constitutional right to counsel, and so if these individuals are going to be represented, they are either represented by volunteer counsel or in some States, and Florida to its credit happens to be one, where the State has provided funds to provide counsel for such individuals in these col-

lateral proceedings. What I am suggesting to you is if you are serious about the Federal habeas remedy being a meaningful remedy to raise Federal constitutional claims, it does not make sense to say yes, we are going to have this remedy, but then give individuals who want to raise arguments pursuant to this remedy a time limitation, and we can get into debates as to what that time limit should be, unless you are willing to give them—make meaningful their access to that remedy.

The folks on death row, despite Judge Sharp's reference to jailhouse lawyers, and being literate, the folks on death row are not the kind of people who are able to decipher the Supreme Court decisions, the law, if you will, and what is necessary in order to proceed in Federal habeas corpus, so you may speed up the process, but by speeding up the process, you effectively deny someone the remedy, and so—well, what I suggest that you might do, if you are looking at time limitations, is that you might condition those time limitations on whether the State provides a mechanism for such individuals to have access to lawyers, because unless you do so, I think in reality what you are doing is eliminating the remedy for those individuals and perhaps that is what you should do, if you believe that is appropriate. But you should not do it through indirect means, that is by providing for a time limitation, but yet not providing people access, or meaningful access to that remedy.

As to how long the process will take when the individual is going through the State postconviction collateral remedies, it is difficult to predict because you do not know when the petitions are going to be filed, because the people do not have a right to counsel as a general rule. As I said, in Florida, they do. And you also do not know whether the trial judges will grant evidentiary hearings which may cause the proceedings to take longer than they ordinarily would take.

Why do we have these proceedings? What goes on in them? Well, one, they are there to give the individual an opportunity to raise claims which he could not raise during his direct appeal or during his trial; claims which may come to his attention because factual information becomes available after that trial which was not reasonably available prior to the trial. For example, the prosecution has an obligation to make available to the defense exculpatory information, that is information that may negate his guilt. It may be that after the trial, the defendant believes that in fact the prosecutor did not turn over exculpatory information. Well, there needs to be a record made as to whether that took place, what were the reasons why because that may be relevant to how the courts rule and that obviously could not have been done during the course of the trial. The same is true with regard to ineffective assistance of counsel claims. You cannot have testimony whether the lawyer was competent during the trial, so there is a need for this postconviction remedy.

The second reason why the death sentenced individual will resort to a State postconviction remedy first is because of the congressional requirement that they must exhaust these remedies before the Federal habeas remedy is available. I think that is a good rule in light of federalism concerns, that is, you want to give the State judge the first opportunity to rule on this, but it does mean that

the death sentenced inmate, before he will go into Federal habeas corpus, will first go through the State collateral postconviction proceedings and that takes time. That takes time at the trial court level and that will take time when he appeals that decision, if it is against him, we assume, to the highest court in his or her particular State.

And generally, it does not take so long, those proceedings, because unlike the collateral proceeding before the Federal district judge, the judge that hears this collateral proceeding in State court and the appellate court that reviews any ruling are the same folks who was the trial judge generally at his trial and the appellate court who heard his direct appeal.

So, in terms of delaying the process, this tends to be more expeditious than what happens later on in the Federal habeas proceeding, which should not be surprising, because when the Federal district judge gets the Federal habeas corpus petition, it is the first time he or she has had an opportunity to examine the State court record, what went on, and not surprisingly, when death is at issue, and the stakes are high, given the complexity of the matters at issue, these records tend to be voluminous, they tend to be long.

And that is why the Federal—the timeframe within which the Federal district judge initially makes a decision on the Federal habeas corpus proceeding can be anywhere from a year to a year and a half. It may be shorter, as Judge Sharp did in Ted Bundy's case, but it is understandable why in fact that timeframe may be what it is, and it is also understandable in light of the fact that, as I indicated earlier, people do not have a right to counsel in these proceedings.

You have to ask yourself if you do not provide counsel and you do provide a time limitation, do you want Ted Bundy by himself to file papers and argue before Judge Sharp? Do you want the 288 people on Florida's death row to try to do that? Do you think they are capable of doing that? Would that make any sense? So, unless you do provide some system of counsel, I think that that is the problem that you are going to run into.

After the Federal district court rules on the Federal habeas corpus petition, as the Deputy Attorney General indicated, assuming the death sentenced individual can get a certificate of probable cause, either from the Federal district court or the court of appeals, he can then appeal that determination all the way up to the U.S. Supreme Court. Then conceivably the process could repeat itself, and as Judge Sharp indicated, there currently exists rules under the Federal habeas corpus rules and statutes which give the Federal courts the power to dismiss successive Federal habeas corpus petitions if they believe it would constitute an abuse of the writ. That is, they believe the judicial process is being somehow abused and undermined, that is, they do not have to hear the claims on their merits, they have the authority right now to dismiss those successive Federal habeas corpus petitions.

What I would like to do now is to turn to some of the suggestions for reform that have been made this morning and see if I can respond to those suggestions and then hopefully respond to any questions that you may have with regards to the suggestions that have been made both by Judge Sharp and the Deputy Attorney General.

One suggestion that is frequently advanced in a variety of ways has to do with changing the scope of the Federal habeas remedy, that is to limit the kinds of claims that might be available under Federal habeas corpus. To some extent, you might limit those claims to situations where unless someone can couple their claim with a colorable showing of factual innocence—Judge Sharp made reference to that—the claim should not be cognizable, that is, for example, a double jeopardy claim would not be able to be presented in a Federal habeas corpus proceeding if, in fact, we were limiting Federal habeas corpus to claims that related to innocence.

And I would disagree with Judge Sharp and Congressman English that the claims that are litigated in these proceedings have nothing to do with factual innocence or guilt. Very often the constitutional claims that are litigated have to do with innocence or guilt. For example, there are constitutional procedures which—principles which say that with regard to identification procedures, lineups, that any unnecessarily suggestive procedure that might give rise to a likelihood of misidentification is a violation of the Constitution.

Well, those kinds of claims directly impact on factual guilt or innocence. There are limitations on what a prosecutor can do in closing argument and appealing to prejudice. Well, those kinds of claims may very well impact on factual guilt or innocence because it may be because of the prosecutor's comments the jury in trying to determine whether guilt has been established beyond a reasonable doubt was influenced by improper comment. It may be that an involuntary confession in violation of the fifth amendment is also unreliable. It does not necessarily follow that it may be, but it could be.

My point then is that there are a number of constitutional claims which do impact on the determination of guilt or innnocence. One suggestion that has been made is to limit Federal habeas corpus to constitutional claims that in essence go to the integrity of the factfinding process. This suggestion was initially advanced by a very distinguished judge in the second circuit court of appeals by the name of Judge Herbert Friendly in a very influential University of Chicago Law Review article that both Judge Sharp and Deputy Attorney General Cassell make reference to, and to some extent his views found a champion in Justice Powell on the U.S. Supreme Court and it manifested itself in a Supreme Court decision. That is, the Supreme Court has now held that fourth amendment claims, claims dealing with unreasonable searches and seizures, can not be raised in Federal habeas corpus proceedings, assuming the individual had a full and fair opportunity to litigate that claim in the State courts, and the reason the court reached that decision was that fourth amendment claims are essentially truth defeating.

The reason we have the fourth amendment has very little to do with getting the correct factual resolution of guilt or innocence; what it has to do with is protecting other values, privacy values. So the Supreme Court has already taken some steps toward limiting the reach of the Federal habeas corpus remedy outside of claims that are relevant to guilt or innocence, but it has not gone further than that decision and it is in part because it has not gone further

than that decision that we see these suggestions such as that made by Judge Sharp to limit the reach of the Federal habeas corpus remedy to claims that goes to factual guilt or innocence. It is a difficult question and in my prepared statement, I have tried to balance the competing considerations that play a role.

On the one hand, you have to ask yourself how important should it be that someone convicted in the State courts should have at least one opportunity to have a Federal forum for the resolution of his Federal constitutional claims. That is, as I have suggested, to rely on certiorari to the U.S. Supreme Court makes no sense. To what extent should the Federal courts have some role to play in the vindication of Federal rights?

The other side of the coin is, if you get a full and fair hearing in the State courts, since we are dealing with state court judgments, it is inappropriate for Federal judges to overrule decisions made by State court judges. That is, federalism and comity concerns dictate that we take the Federal courts out of this process. Congressman McCandless is very familiar with this situation in California where three justices on the California Supreme Court who were up for reelection last year or 2 years ago failed to get reelection and, in great part, their failure to get reelected was based upon their decision in death cases.

That gives rise to the question again in State courts, State judges are elected. Passions run high with regard to these cases. It is not to say that State judges cannot be fair, it is not to say that State judges do not protect constitutional rights. The question is, do you want to take the Federal courts completely out of the game, so that they are no longer a player in the determination of whether Federal constitutional rights are safeguarded or not. Unfortunately, in our history, it tells us that with regard to the vindication of Federal constitutional rights, our citizenry has most often had to turn to the Federal courts. It is changing. State court judges are sensitive to Federal constitutional rights, but the question is, do you want to reverse that trend, and when you start talking about limiting the reach, the scope of the Federal habeas corpus remedy, you are in essence suggesting that with regards to whether—and we are not talking about State's rights now, State constitutional rights. We are talking about whether with regards to Federal constitutional rights, the Federal courts essentially should play no role; that would be a dramatic change in the history of our country's jurisprudence, particularly our country's jurisprudence in the last—in the 20th century, and particularly the last 30 or 40 years.

The other reforms that have been suggested today go not so much to the scope or the reach of the Federal habeas corpus remedy, but rather they go to placing procedural limitations on the use of that remedy. I have already addressed the question of time limitations and the problems I see with time limitations unless they are conditioned upon the availability of counsel for such individuals. Another procedural limitation that Congressman Hastert made reference to in his questioning was the raising—and Deputy Attorney Cassell made reference to it—was the raising in Federal habeas corpus of claims that were not presented before the State court judges. I forget which Congressman made reference to the Supreme Court decisions over the past 10 years, which have virtu-

ally made it impossible to raise something in Federal habeas corpus if in violation of a reasonable State procedural rule, it was not raised in the course of the State court proceeding. That is not to say that those decisions by the Supreme Court were correct.

I have my own views on these decisions and I will not get into those today, but it does suggest that the Supreme Court has moved in that area and the question once again is to what extent do you want to continue to give the courts flexibility to adopt doctrine versus trying to do what I believe Congressman English indicated he might have some problem with, that is in legislation trying to codify every conceivable situation where something should not be applicable or something should not come into play.

I guess I would like to close with a comment from Justice Harlan of the U.S. Supreme Court, who I think that most folks who have studied the U.S. Supreme Court would indicate was a very conservative Justice and one who was most revered and this is what he had to say about processing death cases. He was not talking about Federal habeas corpus, but he was talking about the basic question that you are confronting of the process that is available to these individuals.

He wrote, "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness . . . I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally the difference between life and death." Thank you.

Mr. ENGLISH. Thank you very much, Mr. Goldstein. We appreciate that. You were mentioning in your statement, that you are not sure that we really want to take the Federal court system out of the State capital punishment acts and conditions. Can we take them out, under the Constitution?

Mr. GOLDSTEIN. Whether, if Congress chose to entirely do away with the statutory remedy of Federal habeas corpus, whether that would be constitutional or not is a question that the Supreme Court fortunately has never addressed. Deputy Attorney General Cassell in his statement spent quite a bit of time trying to address the question of to what extent limitations on Federal habeas corpus would cause constitutional problems; it is a very complex issue and I would suggest just given the amount of time in his statement that he spent on it indicates that there are serious constitutional questions if you try to significantly limit the Federal remedy of habeas corpus.

Mr. ENGLISH. Does that also apply if Congress should decide to include time limits with regard to the habeas corpus, does that raise the constitutional question. Does the Court have to decide whether in fact that is constitutional or not?

Mr. GOLDSTEIN. I think that raises a constitutional question, but I tend to agree with the views that have been expressed earlier. I do not think those who would raise that issue would be able to prevail, but I do think if you do not provide counsel and you do provide for time limitations, there is another constitutional problem and that is the problem of providing a remedy, and this is a due

process problem, but, on the one hand, providing the remedy, but, yet, on the other hand, not really meaningfully making it available.

Mr. ENGLISH. Mr. McCandless.

Mr. MCCANDLESS. Thank you. I feel like I went through a 2-hour condensed version of a law school dissertation here, my head is swimming a little bit. Before I start, since the history of California was intermittently brought in, in 1972, then State Senator Dorothy McMahan initiated a proposition 17 which amended the California Constitution to read that capital punishment was neither cruel nor unusual. The amendment became necessary because the Supreme Court had interpreted the California Constitution as prohibiting the death penalty, because it was cruel and unusual punishment and the people voted on that statewide issue 68 to 32 that it was not cruel and unusual punishment and followed in 1978 by another proposition introduced which expanded then to engage in constitutional changes where more types of felonies would be subject to the death penalty and initially passed by a 79- to 29-percent margin.

This is how the California Constitution currently reads. The problem that the State supreme court had was that it ignored the mandate of appeal and continued in the former manner of finding ways of making—and direction by which to negate what people have said on two previous occasions that they wanted as part of the State laws and a part of the State constitution. OK, now, let us get to where we are now. In the process of our hearing today, we have, as I see it, two issues. We have the deliberate desire on the part of the parties involved to postpone the sentence duly imposed, properly arrived at to the maximum degree possible, to the extent that possibly something new might come up and that the death sentence would be ruled in some manner favorable to those.

On the other side, we have the presentation of legitimate questions relative to the trial process and the exercise that society went through with respect to this individual. As in the example of Judge Sharp, when you present 150 pounds of documents that have been a part of the process for years and years and years, at the 11th hour at a certain level of the review process, I have difficulty with that. To me, that is not the judicial process, that is a stalling process.

Mr. GOLDSTEIN. If I may respond——

Mr. MCCANDLESS. And so the question I have for you is, at what point do we take the rights of the individual into consideration and at what point do we take the rights of the majority into consideration which I referred to in my comments relative to California. The majority was sick of the rights of the individual being so protected that the majority was losing out.

Mr. GOLDSTEIN. Well, in terms of the rights of the majority versus the individual, the court's role is not simply, as you are well aware, to echo the sentiments of the majority. Their role is to interpret, in this case, the laws of California or the Constitution and I happened to teach at the University of San Diego Law School a while back, and the election campaign was going on, and I understand the frustrations that the people felt to the extent that a visitor can. But my understanding of the position of the California judges was that certainly they were not trying to thwart the wishes

of the people, they were trying to in good faith implement what they believed to be what the Constitution required.

It is a difficult determination certainly, but I think in deference to the position those judges took, I think that was in fact their position. Now, as to the question of taking 150 pounds of documents and dumping it on the Federal district court's doorstep 1 day before an execution, ask yourself as I have done, because I have litigated some of these cases, whether it is really in your client's best interest to do that or whether what is likely to happen when you do that is what Judge Sharp expressed, that is the judges get very upset legitimately about why you are doing it, particularly if you cannot come up with any conceivable explanation as to why you have waited so long.

The reason why this happens—the reason why this happens is because these folks do not have the lawyers and what tends to happen is only when a death warrant is signed will volunteer lawyers step up front and take the case because they are very difficult cases so people are not going to jump at taking them, they do not get paid. And Judge Sharp made reference to the Washington, DC, law firm that handled the *Bundy* case saying they were spending $750,000 out of their pocket. So because they do not have lawyers, these petitions are not filed and then what happens is a death warrant is signed, people scurry around trying to get a major law firm in Washington or New York or whatever to take the case, they take the case but it is under the pressure of the death warrant just being signed.

Now that is changing in Florida to Florida's credit because Florida recognized that problem. I was involved in a case where a death warrant was signed for someone who had no lawyer and was within 24 hours of his execution and no papers had been filed, because he had no lawyer, and it became clear that the Florida Supreme Court was not going to let this person be executed simply because he was not able to find a lawyer.

So in 1985, the State of Florida stepped in and did provide an agency and California has a similar program, but those are the only two States right now that have such programs and until you provide for counsel, I think it is unreasonable to expect these petitions to be filed in an orderly way and even if you do provide for counsel by setting up a mechanism like we have in Florida, you have to fund it so that you can have the kind of orderly progression that I think everybody would like to see.

Mr. McCandless. A couple of statistics for purposes of discussion. My information is that there currently are 1982 inmates within the States awaiting the death sentence. They may vary one or two or three. With respect to my State which the information was readily available, there are 233—223, I am sorry. The average length of stay, since we have not had an execution since 1967—this is going to be interesting because the average length—is 7 years and 2 months.

Well, we know that some of those were on death row in 1967 when the last execution took place and so 1977 and 1987, it is conceivable that some of them have been there over 20 years or coming up to 20 years.

At what point is society justified in moving forward?

Mr. GOLDSTEIN. I think society is justified in moving forward when a fair determination is made that that individual does not have a claim that has any merit and I think in the context of what you are talking about in California, your criticism as you have expressed it, to some extent, is not with the process but with the judges.

The reason for the absence of executions in California is not that the judges eventually are affirming death sentences but taking a long time, but rather what is happening is that with regards to questions of broad applicability in California, the judges have said the death sentenced individual has been successful, so he has to have a resentencing hearing or he has to have a new trial. He may be found—the same sentence may be imposed again and then he never really leaves death row, but the problem is not the process, the problem, if it is a problem, is the Constitution or the laws of the State of California which have to be followed as interpreted by the courts if these death sentences are to be effectuated.

As I said, I think that is changing because in the last couple of years, the Supreme Court has addressed what seemed to be the last sort of broad based challenges that were available.

But just to give you some figures, between 1976 and 1983, of the cases that were heard by the Federal courts of appeals, death cases, death sentenced inmates were successful in the sense, not that they would ultimately win, but got a new hearing in 73 percent of them, 73 percent of them. That is not the fault of process, we may have people we do not want to be judges on the Federal courts, but it is not the process. I mean you cannot blame the process when the people using that process are being successful.

Mr. MCCANDLESS. One other question, you touched upon one of the areas in which appeals take place, the incompetency of the attorney representing the client, and I am out of my field here so be patient with me. It would appear to me that somewhere during the basic trial process, it is the responsibility of the judge to make some kind of determination of that nature based upon performance or lack thereof of the individuals in the court, whether it be the prosecutor or the defense, and to take the necessary steps under his jurisdiction to correct that. Am I erroneous in my thought processes?

Mr. GOLDSTEIN. No; I think the judge has some obligation with regards to what he can observe, but, if, for example, the lawyer has not done any investigation and a reasonable investigation would have produced a witness and the lawyer never chose to do so, there is no way for the judge to know about that during the course of the trial and that is why irrespective of the judge, to deal with, for example, the lawyer, and these are not good examples, but the lawyer is maybe, seems to have—like maybe he was drinking the night before. I mean judges can deal with that, or the lawyer who clearly does not seem to understand what he is doing, the judge should in my judgment take action to make sure that the defendant's life is protected.

But there is a whole range of issues which lawyers have to take care of in terms of providing proper representation which it is just not reasonable to expect the trial judge to know whether they are

doing what they are supposed to do. Primarily in the area of investigation in preparing the case.

Mr. MCCANDLESS. One final point, you talked about the need to have the Federal system involved at some point to assure what I would deem to be the integrity of the process at the State level. Is not that Supreme Court appeal, Federal Supreme Court appeal process, is not that somewhat of a check and balance on that?

Mr. GOLDSTEIN. It is, but once again, the Supreme Court never accepts certiorari, they cannot handle the cases. They rely on the Federal district courts and Federal habeas to do that. If you did away with Federal habeas in a good many cases, then I suspect you would have Justice Rehnquist coming before Congress wanting some emergency court of appeals or some other court to be set up as he has already done now, suggesting that there is a need for another court, because they would not be—they do not deal with the ordinary, to the extent there is an ordinary case, they only deal with the cases where there is real conflicts and major issues and to expect them to play a role in all of these cases, I think is unrealistic given their case loads unless you want them to become like Judge Sharp where all of his time is being spent on those cases.

Mr. MCCANDLESS. I am not advocating that. I am getting expression.

Mr. GOLDSTEIN. Yes, I am sorry, I did not mean to suggest that.

Mr. MCCANDLESS. Thank you, Mr. Chairman.

Mr. GRANT. Thank you.

Mr. Goldstein, as usual you complete all the argument before we get a chance to ask you the questions. I want to thank you for the advice and leadership that you have given to me, not only on this issue, but a lot of other issues. I think what we are—and I will be very brief, but I think what we are about is an enunciation of what we perceive is the broad understanding of lay people and it is obvious that you know the law and that the general practition of it, and you are very good in explaining it, and that you have as your basic desire to protect the constitutional rights of the individual. And I think that the thing that frustrates people in general and I am sure I am not telling you anything that you do not already know, the issue that frustrates people in general is the seeming insensitivity to the broad rights of the people to see justice ultimately done.

In the case of Theodore Bundy, a case that you are very familiar with, it is my understanding, and please correct me if I am wrong, he had exhausted all of his appeals in the Chi Omega murders and then he was allowed to pursue a whole different set of appeals in the *Kimberly Leach* case, even though he was supposedly ready for execution in the Chi Omega murders, is that—was he ready in the sense——

Mr. GOLDSTEIN. No. No, Judge Sharp detailed the chronology as to the *Leach* case. There was a similar chronology with regards to the Chi Omega cases and the Federal court of appeals in that case, in the Chi Omega cases also reversed the district court's unwillingness to hold a hearing with regards to certain issues that Mr. Bundy raised and so he was not ready to be executed.

And I think a point I would like to make as to Mr. Bundy and in general about the folks on death row is that I think what you are

going to see, just as we saw more people executed last year is that they are going through the process and true, the process is slow, but once they are given that initial opportunity to go through the process, then when they try the second time around to use that process, they find that the courts say you have had your opportunity. And in Ted Bundy's case, he is still going through the first time.

There are some exceptions, but, for example, I have been involved in representing two people that have been executed. Both were given one opportunity to go through the State review process and Federal habeas corpus. Once that was finished, they were executed.

But that State review process—and one opportunity of Federal habeas corpus sometimes takes 6 or 7 years, sometimes a little bit longer—but, importantly, early on a lot of times these folks were successful with regard to claims that had applicability to a lot of them, without boring you with the details of the decisions that have been handed down and I think just as what happened in Louisiana last year, I suspect will happen with more frequency in the years to come and I think one should be careful about changing dramatically the availability of a Federal forum to vindicate Federal constitutional rights because of an understandable, very understandable frustration and impatience that has grown up around the implementation of the death penalty, which I suspect reflects an overall frustration with the way our society deals with crime in general.

The death penalty is seen as sort of a symbol of our inability to deal properly with it.

Mr. GRANT. I think you are exactly right and I applaud your suggestions nationally regarding capital collateral review. It is a question that we have done a lot in Florida. I thought that might solve a lot of our problems here. It may have added another layer, but I think that at least we eliminate that one appeal issue.

Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman.

Mr. Goldstein, I appreciate the depth that you have given us on this and I think you have given us a greater insight and for the sake of brevity, I just want to comment that, you know, your idea instead of limiting, putting time restraints on, by allowing limitation in the area of claims as far as innocence, that area, or that segment, I think it is worthy to look at. I think this is an ongoing problem and, as you say, and very correctly, there is a frustration out there among the people who saw that capital offenses that were to be treated with the death penalty certainly were something that was of broad based support and we feel is deficient in light of this frustration, not only frustration of the court, but a frustration "of the system" and the people who make the laws and the people who administrate the laws.

I would like to say that I think we need to keep moving on a timely basis to make sure what remedies or judgments we need to make, we need to make them, and take away those roadblocks that exists and yet to certainly guarantee the rights that people have and especially the Federal laws are guaranteed, so thank you very much for your comments.

Mr. GRANT. Could I ask one more question? Am I correct in assuming that under the State constitution we cannot deny any right that an individual has under the Federal Constitution?

Mr. GOLDSTEIN. That is correct.

Mr. GRANT. Why then do we need an additional review at the Federal level, if we have not denied any constitutional right of the individual by the State court system, procedural, administrative rights, then why do we need a Federal review?

Mr. GOLDSTEIN. There is another constitutional question that lurks in the background about the constitutional requirement with regards to the Federal writ of habeas corpus that I have alluded to. It is a question that has not been resolved and, as I said, Deputy Attorney General Cassell spent a great deal of time in his statement saying that there are no constitutional problems generally for placing limitations on habeas corpus but that it is not provided for this Federal review.

Assuming there are no constitutional problems, then the question becomes to what extent finality is more important than insuring that before someone is deprived of their rights that person does not have a meritorious legal claim and to what extent providing this additional avenue of review will guard against that happening? And finally, the issue of the respective roles of the Federal courts and the State courts in effectuating federal constitutional rights.

State judges I think are sworn to uphold—not I think, but they are sworn to uphold the Constitution and they do it, but at least in our country's history most often the citizenry has had to turn to the Federal judiciary to have their Federal constitutional rights vindicated. Some would suggest that it is because Federal judges do have independence, that is they do not have any limited tenure whereas State court judges are elected. I think that is somewhat simplistic but at least that sort of gives you a sense as to why people are somewhat reluctant, particularly in this area, given the public outcry and the public pressures on the state court judges that are elected and I think the California example is illustrative as to why it said that if you are going to, if you want to err on the side of making sure these rights are protected, at least give them one opportunity in a Federal forum.

Mr. GRANT. Then why should not we pursue that forum immediately on appeal then and eliminate the——

Mr. GOLDSTEIN. State appeal.

Mr. GRANT [continuing]. State appeal?

Mr. GOLDSTEIN. That is what Judge Sharp was suggesting, an election of remedies approach. The problem with that is that it is implicitly saying one might suggest that we do not have confidence in our State court system and more than that, we hope the reason we want to give the State judges the first opportunity is because we recognize it is a State conviction that is being reviewed, and we recognize the tension that comes into play when the Federal courts say that the State courts have acted improperly, so we want to give the State courts the first crack, if you will, at correcting—the appellate courts at correcting what happened in the State trial courts. I can only——

Mr. MCCANDLESS. Would the Chairman yield? I want to quickly pursue that point before it gets diluted. I want to review what happens in the State system. Now, as I understand what is taking place today is that all remedies of the state judicial system must have been exhausted before blah-blah- blah; are we saying that the State supreme court and that the State circuit court of appeals given the fact that we have a mediocre system down here at the lower level that actually did the trial is not capable of a judicial review that would take into consideration the party's in question rights?

Mr. GOLDSTEIN. No, we are certainly not saying that they are not capable, what we are talking about——

Mr. MCCANDLESS. But I am trying to—the fact that they are there and they are a part of the process, is a review in itself above that of the trial level?

Mr. GOLDSTEIN. Clearly, and the question simply is on what side you want to err, when you are dealing, when the stakes are so high. Do you want to, because the stakes are so high, provide an additional level of review, not because the State courts are incapable, but simple because when the stakes are so high and the issues are so important, we want to make sure that we got it right.

Mr. MCCANDLESS. So we are looking for that perfect trial?

Mr. GOLDSTEIN. I do not think that we are looking for the perfect trial, I mean if in fact the numbers of reversals that I indicated was the case in the Federal court of appeals is accurate, and I think those numbers are going to go down, substantially go down because the law is becoming more settled, but they are not looking for perfect results.

Let me just read very briefly from the comments that the chief judge of Maryland in his State of the judiciary address just last year, he said:

> These statutes, death penalty statutes, afford capital defendants procedural and substantive protections well beyond those required for noncapital appellants, and their proper application has proved extremely difficult and complicated, resulting in a high incident of appellate reversals for trial error, not because of mere technicality, but because the Constitution of the United States, or the provisions of the death penalty statutes themselves, were violated in a way that mandated new trials or resentencing hearings.

That is the Honorable Robert Murphy, the chief judge of the Maryland court of appeals in his State of judiciary address last year. Judges, and you know a lot of them, and we have heard Judge Sharp, judges are not going to reverse these things for mere technicalities. Federal judges may be independent and have a lot of tenure but they live in a community, they are sensitive to community pressures. I think, at least I feel comfortable that when they choose to say that someone's rights have been violated, it is, and I recognize that this is a question of judgment, but I think they would resent any implication that it is because of a technicality, and I recognize that that is a question of judgment.

Mr. MCCANDLESS. Thank you very much.

Mr. GRANT. Thank you so much very your comments.

Mr. GOLDSTEIN. Thank you.

Mr. GRANT. And we really appreciate your knowledge and your time. Thank you so much.

Mr. MCCANDLESS. I am sorry you left San Diego.

Mr. GOLDSTEIN. I may go back. It is beautiful.

Mr. GRANT. The next witness is Andrea Hillyer. Ms. Hillyer is assistant general counsel to the Governor in the areas of clemency. She is a graduate of the University of Florida College of Law, former staff member of the criminal appeals division in the office of the attorney general. And I understand that Deputy Attorney Jim York had to get back to Tallahassee, but he has left a statement that we would like to include in the record if there is no objection. Hearing none, we will include that in the record.

[The prepared statement of Mr. York follows:]

Statement

of

Jim York

Deputy Attorney General

State of FLorida

before

The Subcommittee on Government

Information, Justice, and Agriculture

of the

Committee on Government Operations

U.S. Congress

Madison, Florida

February 26, 1988

HABEAS CORPUS REFORM

Contemporary habeas corpus jurisdiction in the federal courts is a unique exception to the principle of federal review of state court judgments. Federal review was traditionally limited to direct appellate review by the United States Supreme Court. Today, lower federal courts can review and overturn the state court judgments in criminal cases. Congress never intended to provide the lower federal courts with this extraordinary authority nor is there a basis in the United States Constitution to support that authority. The creation of federal courts' review of state court judgments is a result of judicial innovation during the 1950's and 1960's.

Habeas corpus, at common law, was a means of securing judicial review to challenge the grounds for executive detention. In other words, a person taken into custody by executive authority could petition a court to issue a writ of habeas corpus for his release. Indeed, the founding fathers included in the Constitution of the United States a prohibition of suspending the writ of habeas corpus except in cases of invasions or rebellion. They sought to insure no abuse of authority by the federal government and codified the common law writ of habeas corpus whose function was limited to serving as a check on arbitrary executive detention and as a pretrial bail setting mechanism. The Habeas Corpus Act of 1867 extended the

availability of the writ to persons restrained of liberty in violation of federal law, without any requirement that those persons were in federal custody. The legislative history of the Act states that it was meant to provide a federal remedy for former slaves who were being held in involuntary servitude in violation of the wartime emancipation decrees and the recently enacted 13th Amendment. While initially limited, a gradual expansion through case law evolved. It was predicated on the fiction that state court proceedings were filled with constitutional defects which made them untrustworthy and thus permitted federal habeas review to protect state prisoners. By the 1960's the United States Supreme Court, in Townsend v. Sain, created the "appellate concept of habeas corpus". This established the current mechanism which permits state criminal judgments, following review and affirmance by the state appellate court, to be appealed to a federal trial court for further review on federal grounds.

Stated bluntly, habeas corpus evolved to insure and guard against or correct injustices that would otherwise result from violations of federal rights by state court prosecutions and state appellate review. This mistrust of state court systems is unfounded and not supported by competent evidence. Indeed, state courts are sensitive to state prisoners' federal rights. In many instances, the state courts apply both state and federal constitutional principles to a claim, even where state

constitutions might provide greater protection to the state prisoner.

Normally, state prisoners filing habeas corpus petitions have been tried and convicted of a serious offense in state courts. They have had a full and fair review of their convictions which have been affirmed by state appellate courts. Many habeas petitioners also have litigated in state collateral proceedings and, by the time they submit their first federal habeas pleading, have had their claims aired more than once. A state prisoner's first venture into federal courts usually ends with the district court concluding that no federal constitutional infirmity occurred. Appeals to the federal circuit court level end in the same fashion. In those few instances where federal habeas corpus relief is granted, either at the district court level or at the circuit court level, the disagreement with the state courts on arguable or unsettled issues is usually based on the interpretation or application of the federal law. And, in many instances the lower federal courts disagree among themselves. This endless litigation and relitigation is dramatized most vividly in capital cases. Federal habeas corpus has become a major contributing factor in thwarting the state's right to enforce capital punishment statutes. Capital defendants and their attorneys have used this weapon in their arsenal of delaying tactics through the use and abuse of habeas corpus litigation. Securing last minute stays of execution from federal

judges in order to allow time for a federal court to entertain a voluminous habeas corpus petition has totally frustrated the state's efforts to enforce capital cases. The outcry from the general citizenry is loud and clear. John Q. Public neither understands nor appreciates why a criminal defendant can delay five, seven or ten years from the time of his conviction before he raises his constitutional claims in federal court. The notorious cases such as Bundy and Darden raise the ire of all, however, they are just the tip of the iceberg. The less notorious also delay. These victims' families also wonder why it takes so long. There is little doubt that habeas corpus reform is needed. The only question to be resolved, is how?

A number of bills have been filed in the Congress addressing habeas corpus reform. Senator Graham's Senate Bill 1285 and a companion bill in the House of Representatives, H.R. 73, attempt to provide reform procedures for collateral review of criminal judgments. Both set forth time limitations and reforms that address the principles of abuse of the existing system. Enactment of these reforms would be a major step forward in eliminating abuses, affording due deference to the independent stature of state judiciaries and furthering the ends of criminal justice. Both bills would impose a time limitation of one year on state prisoner's habeas corpus applications from the time the state prisoner had exhausted state remedies. In other words, once a capital defendant has completed his direct appeal and

timely prosecuted his collateral claims, he would have one year within which to file habeas corpus action in federal court. This time limitation would not only insure that the claims were being raised in a timely fashion but would also help to insure an end to litigation. The right to file a habeas corpus petition would not be eliminated, rather, time limitations would be set in place to stop undue delays in litigating these claims.

Both bills also contemplate a reduction in redundancy by establishing a rule of deference to state court determinations in cases where there has been full and fair adjudications in the state proceedings. The full and fair standard of state court review would be satisfied if the state determination was reasonable and was arrived at by procedures consistent with due process. Historically, where a state court has afforded a full and fair consideration and adjudication of a claim, the federal court was not, ordinarily, re-examining the question thus adjudicated. Only recently have federal courts been vested with the "rule of mandatory readjudication" in order to insure state courts do not go awry of state prisoners' federal constitutional rights. This reform would eliminate this manufactured rule of mandatory readjudication.

Moreover, both bills seek to eliminate and establish a general rule barring the assertion in a habeas proceeding of a claim that was not raised before the state courts, so long as an

opportunity to raise the claim is available. The rigid enforcement of procedural defaults is perhaps the most important aspect of federal habeas corpus reform. While the United States Constitution guarantees criminal defendants a fair trial and a reasonably competent attorney, it does not insure perfect trials or perfect counsel. Although every trial presents a myriad of possible claims, as long as state courts provide fair trials and counsel, claims either abandoned or not timely raised in state court should not and will not support federal habeas corpus relief.

While additional reforms are incorporated in these two pieces of legislation, the three mentioned are the bulwarks of habeas corpus reform. In order to streamline the system time limitations, deference to the state proceedings and enforcement of procedural bar on claims not raised in the state courts must be enacted.

Mr. GRANT. Raymond Marky, assistant State attorney in Tallahassee is substituting for Mr. York.

Mr. Marky was with the Florida Attorney General's Office for 20 something years. I guess, Ray, as the director of the criminal appeals division, has a great deal of expertise in this area, and so we welcome you too.

Ms. Hillyer, I think we have your testimony and we will enter it into the record, without objection, and you may summarize, if you wish.

STATEMENT OF ANDREA HILLYER, ASSISTANT GENERAL COUNSEL TO THE GOVERNOR OF FLORIDA

Ms. HILLYER. Thank you, Congressman Grant. Briefly, on behalf of Governor Martinez, I appreciate the opportunity to present these remarks to you. Most of what I have submitted in my written statement has already been covered this morning and part of this afternoon, and so I would just like to highlight a few points.

There is a feeling that for the past 20 years public confidence in the criminal justice system has been slowly eroding due to the lack of finality of judgment in criminal cases. Nowhere is this trend more evident than in capital cases. Florida leads the Nation in the number of persons sentenced to death, and Florida leads the Nation in the average time between the date of the crime and execution. A recent study indicates that the average length of time between date of the crime and execution in Florida cases is 9 years and 5 months. The same study also shows that the average length of time between date of the crime and execution is 9 years and 1 month for all death cases falling within the jurisdiction of the 11th circuit. Both figures are highest in the Nation compared to other States and other Federal circuits and that number only applies to executions.

There are 45 persons on death row in Florida who have been there longer than 10 years. Under Florida law, the Governor must sign death warrants in order to move the cases through the courts. In the majority of cases, they do not file their appeals or pursue their remedy, unless the death warrant has been signed Florida currently has, I think it is 287 persons on death row as of yesterday, with convictions dating from 1973 to 1988.

In the 1 year and 2 months since Governor Martinez took office, he has signed 30 death warrants. Sixteen of those warrants have expired during Federal stays granted by Federal courts on petitions for writ of habeas corpus or review therefrom. In 4 of those 16 cases, the Federal courts were faced with the second and third petitions for writ of habeas corpus filed by those individuals. We are concerned that the public reaction is becoming increasingly unfavorable toward the judiciary due to the perception, correct or incorrect, that courts have shown greater concern for the rights of the criminal than for the protection of society.

As a result, there is a clear public trend of greater disrespect for the law and the criminal justice system. I am sure you are all aware that society suffers greatly when the citizens lose faith in their Government's ability to protect them from the lawless as the next step is vigilante justice.

As an example, this morning before coming into this building, I noticed a car parked outside with a bumper sticker that said, "Fight crime, shoot first." We think the main solution to this problem is Federal habeas corpus reform.

Governor Martinez supports Senate bill 260, which was outlined to you this morning by Paul Cassell, for a variety of reasons.

Historically, in England, the writ of habeas corpus was a pretrial remedy designed to curb abuses of the King's power to imprison citizens without cause. It was never intended to provide for plenary review or to act as a substitute for appeal, it was only intended to be an ultimate, exceptional remedy against illegal restraint. I will not go through the entire history of habeas corpus in the United States. I think that has been covered this morning and so I would like to remind everyone that during this period of time when the writ of habeas corpus was being expanded, the States did not then have the elaborate State post-conviction remedies that they have today and the appellate process was more limited. The last major expansion, in 1953 through I think 1962, the availability of the writ of habeas corpus has been expanded to include almost any violation of Federal Constitutional rights. The result of this is that Federal courts can now sit in judgment of virtually any State court conviction sentence in which a habeas petition is filed. The result of this expansion has been the creation of a dual system containing unnecessary duplication of judicial resources. It undermines Federal-State comity, it impinges on the finality of State trials and has a negative impact on the deterrence and rehabilitation factors inherent in the State criminal justice system. The historical societal concerns leading to past expansion of the writ are no longer present in Florida or anywhere in the United States. We do not have government sanctioned lynchings or extrajudicial executions occurring today. The elaborate safeguards provided by State law are functioning well and are very extensive. In short, the writ should only be available to correct those exceptional and absurdly unjust cases which only occasionally occur, as opposed to being a remedy to review every State court conviction.

With that, I would like to close and just urge to you if there is anything you can do to help reform Federal habeas, Governor Martinez and the State of Florida would be extremely appreciative, thank you.

Mr. GRANT. Thank you, Ms. Hillyer.

[The prepared statement of Ms. Hillyer follows.]

PREPARED STATEMENT OF ANDREA HILLYER

Mr. Chairman and members of the Subcommittee:

On behalf of Governor Martinez and the State of Florida, I appreciate the opportunity to present these remarks concerning conflicts between the state and federal court systems in the context of capital cases, and reform of habeas corpus procedures relating to federal court review of state criminal convictions.

For the past 20 years public confidence in the criminal justice system has been slowly eroding due to the lack of finality of judgment in criminal cases. Nowhere is this trend more evident than today in relation to cases in which death sentences have been imposed. Florida leads the nation in the number of persons sentenced to death, and Florida leads the nation in the average time between date of the crime and execution. A recent study indicates that the average length of time between date of the crime and execution of the sentence in Florida cases is 9 years and 5 months. The same study also shows that the average length of time between date of the crime and execution of sentence is 9 years and 1 month for cases falling under the jurisdiction of the Eleventh Circuit U.S. Court of Appeals. Both figures are highest in the nation compared to other states and other federal circuits.

Under Florida law Governor Martinez must sign death warrants in order to prompt finality of judgment and move these cases through the overlapping tiers of judicial review provided for by state and federal laws. Florida currently has 287 persons on death row; with convictions dating from 1973 to 1988. In the year and two months since Governor Martinez took office, he has signed 30 death warrants. Fifteen of those warrants have expired during federal stays granted by federal courts on petitions for writ of habeas corpus or review therefrom. In four of those fifteen cases, the federal courts were faced with the second and third petitions for writ of habeas corpus filed by those individuals. However, the most glaring example of the abuses being perpetrated upon the state and federal judiciary is the Willie Darden case. During the nearly 14 years since conviction, Darden's case has been reviewed six times by the Florida Supreme Court, four times by the United States Supreme Court, three times by a federal district court, and five times by the federal appellate court. His case is presently before the U.S. Supreme Court for the fifth time. Such a pattern of unlimited piecemeal litigation is a common tactic utilized to circumvent execution. Courts are routinely presented with voluminous pleadings mere hours before the time of execution, often containing claims already fully and fairly litigated in the state courts. There is no time limitation for filing federal habeas corpus

petitions, and so petitions are often filed eight or ten years after the state court conviction, thereby prejudicing the state in its ability to defend the state court conviction. These chaotic conditions are increasingly being denounced by state and federal judges alike. In 1971 U.S. Supreme Court Justice Warren Burger addressed the American Bar Association and warned that the public was tired of the spectacle of endless appeals that lag for years and whose chief purpose is delay. In January of this year Chief Justice Rehnquist publicly decried the last minute filings in death cases. And, the public reaction is increasingly unfavorable towards the judiciary due to the perception that courts have shown greater concern for the rights of the criminal than for the protection of society. As a result, there is a clear public trend toward greater disrespect for the law and the criminal justice system. Society suffers greatly when the citizens lose faith in the government's ability to protect them from the lawless, as the next step is vigilante justice.

The main solution to this problem is federal habeas corpus reform. Congress has failed to act in this regard despite the existence of habeas corpus reform bills having been filed in years past, and despite the past support of the National Governor's Association, the National Association of Attorneys General, and several United States Attorneys General. The need for limitations on federal habeas corpus was evident as far back as 1955, when the Judicial Conference of the United States, headed by Chief Justice Warren, adopted

a committee report which stated that the historical expansion of habeas jurisdiction has greatly interfered with the procedure of the state courts, delaying in many cases the proper enforcement of their judgments. Yet, despite the increasing need for habeas reform, Congress is not acting. At present, Senate Bill 260 has been sitting inactive for one year in a subcommittee of the Senate Judiciary Committee. This federal legislation is the only method by which to restore the federal writ of habeas corpus to its proper place in the judicial system.

Historically, in England, the writ of habeas corpus was a pre-trial remedy designed to curb abuses of the king's power to imprison citizens without cause. The writ of habeas corpus was never intended to provide for plenary review or to act as a substitute for appeal; it was only intended to be an ultimate, exceptional remedy against illegal restraint. The writ of habeas corpus in the United States was not applied in the post-trial setting until 1789, and it wasn't until 1867 that the writ was expanded to apply to state prisoners. Up until the early 1900's the writ of habeas corpus was available only to review judgments of conviction which were void for lack of jurisdiction, such as nonjudicial detentions without proper legal process or confinements under judgments entered by courts lacking jurisdiction over the matter. In 1915 it was judicially expanded to allow review of state court judgments if during the course of the trial the defendant

was deprived of his constitutional rights. By 1942, the writ of habeas corpus was no longer limited to cases where jurisdictional defects existed in the trial court proceedings. The writ was judicially extended to exceptional cases where the conviction had been obtained in disregard of the defendant's constitutional rights and where issuance of the writ was the only effective means of preserving those rights. It is important to note that states did not then have the elaborate state post-conviction remedies available today, and the appellate process was much more limited. In 1953 the United States Supreme Court expanded the availability of the writ to remedy any violation of federal constitutional rights and thus greatly expanded the authority of the federal courts to review state court convictions. From thence forward, the scope of the writ of habeas corpus has been expanded to the point where the federal courts now sit in judgment of virtually every state court conviction and sentence.

The result of this expansion of the writ of habeas corpus has been the creation of a dual system containing unnecessary duplication of judicial resources. This overlapping system of judicial review exploits the judiciary, distorts the function of the courts, and undermines federal-state comity. Endless federal judicial review of state court convictions impinges on the finality of state trials and has a negative impact on the deterrence and rehabilitation factors inherent

in the state criminal justice system. The historical societal concerns leading to past expansion of the writ are no longer present; there are no government sanctioned lynchings or extrajudicial executions occuring today. The elaborate safeguards provided by state law are functioning well. The writ of federal habeas corpus should only be available to correct those exceptional and absurdly unjust cases which only occasionally occur, as opposed to being a remedy to review every state court conviction.

Federal habeas corpus reform, such as contained in Senate Bill 260, will provide the federal courts with the legal authority to limit the number and scope of petitions filed, which will ease the overburdened dockets while restoring finality of judgment. Governor Martinez urges you to reform federal habeas corpus procedures and restore public confidence in the criminal justice system.

In support of the foregoing statement, the following materials are submitted:

1. Summary of Post-Furman Capital Punishment Data, compiled by Alabama Assistant Attorney General Ed Carnes.

2. Opinion of the Eleventh Circuit U.S. Court of Appeals in Darden v. Dugger, 1. F.L.W. C1206 (August 5, 1987), in which the court sets forth the exhaustive litigation history of Darden.

3. Law review article written by (former) Florida Attorney General Jim Smith, entitled "Federal Habeas Corpus - A need for Reform", The Journal of Criminal Law and Criminology, Volume 73 (1982). This article details the legal effect of the expansion of federal habeas corpus.

4. Remarks of U.S. Attorney General William French Smith to the Conference of Chief Justices on January 30, 1982, regarding the need for federal habeas corpus reform.

5. Concurring opinion of Judges Clark, Politz and Williams, Fifth U.S. Circuit Court of Appeals, in the case of Brogdon v. Butler, (July 30, 1987) in which the judges express frustration with the present system of federal habeas review in capital cases.

6. Press releases issued by Florida Governor Bob Martinez: 1) urging Congress to reform federal habeas corpus procedures; 2) changing the procedures for the signing of death warrants; and 3) responding to Andrei Sakharov's letter regarding the case of Willie Darden, noting that the Darden case has been reviewed by well over 100 judges.

SUMMARY OF POST-FURMAN CAPITAL PUNISHMENT DATA

Prepared By: Assistant Alabama Attorney General
Ed Carnes

Alabama State House
11 South Union Street
Montgomery, Alabama 36130
205/261-7408

(Death Row Data current through August 1, 1987);
Execution Data current through August 5, 1987)*

I. Number on Death Row Nationally: 1911**

(36 states and the federal military with capital statutes; 33 states and the federal military with death row inmates)

II. Death Row Population by State

Rank	State	Number	% of Nat'l Total
1	Florida	267	14%
2	Texas	248	13%
3	California	200	10%
4	Illinois	109	6%
5	Georgia	108	6%
6	Alabama	91	5%
7	Pennsylvania	86	5%
8	Oklahoma	75	4%
9	Ohio	74	4%

*Death row state-by-state data from LDF's August 1, 1987 "Death Row, U.S.A." report; execution data compiled independently.

**The national death row population total is 13 less than the sum of state and the sum of federal circuit death row population figures, because a few inmates are under death sentences in more than one state.

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Rank	State	Number	% of Nat'l Total
10	North Carolina	65	3%
11	Arizona	64	3%
12	Tennessee	60	3%
13	Missouri	50	3%
14	South Carolina	48	3%
15	Mississippi	46	2%
16	Louisiana	45	2%
17	Indiana	43	2%
18	Nevada	37	2%
19	Virginia	33	2%
20	Kentucky	32	2%
21	Arkansas	31	2%
22	New Jersey	27	1%
23	Maryland	19	1%
24	Idaho	14	1%
25	Nebraska	14	1%
26	Washington	7	*
27	Utah	7	*
28	Montana	7	*
29	Delaware	6	*
30	Oregon	4	*
31	Wyoming	3	*
32	Colorado	2	*
33	Connecticut	1	*
34	Federal Military	1	*

*Denotes less than one-half of 1%.

III. Death Row Population by Federal Circuit:

Circuit	Number	Percentage
Eleventh Circuit	466	24%
Fifth Circuit	339	18%
Ninth Circuit	333	17%
Sixth Circuit	166	9%
Fourth Circuit	165	9%
Seventh Circuit	152	8%
Third Circuit	119	6%
Eighth Circuit	95	5%
Tenth Circuit	87	5%
Second Circuit	1	-
First Circuit	0	-

IV. Post-Furman Executions by State:

47	Whites	(54%)
33	Blacks	(38%)
6	Hispanics	(07%)
86	Total	

V. Number of Post-Furman Executions (including consensual ones) by State:

Rank	State	Number	% of Nat'l Total
1	Texas	25	29%
2	Florida	16	19%
3	Louisiana	14	16%

Rank	State	Number	% of Nat'l Total
4	Georgia	10	12%
5	Virginia	6	7%
6	North Carolina	4	5%
7	Mississippi	3	3%
8	Alabama	2	2%
9	Indiana	2	2%
10	Nevada	2	2%
11	South Carolina	1	1%
12	Utah	1	1%
		86	

VI. Number of Post-Furman Executions (including consensual ones) by Federal Circuit:

Circuit	Number	% of Nat'l Total
Fifth Circuit	42	49%
Eleventh Circuit	28	33%
Fourth Circuit	11	13%
Ninth Circuit	2	2%
Tenth Circuit	2	2%
Seventh Circuit	1	1%
Total	86	

VII. Number of Post-Furman Involuntary Executions by Federal Circuit:

Circuit	Number	% of Nat'l Total
Fifth Circuit	38	50%
Eleventh Circuit	28	37%
Fourth Circuit	10	13%
Total	76	

VIII. Time Between Date of Crime and Execution in the 76 Post-Furman Involuntary Executions

(10 of the 86 executions were by consent or without active opposition by the inmate executed):

- the time has ranged from 2 years and 9 months (Andrade case in Texas) to 12 years and 8 months (Dobbert case in Florida); and
- the average time has been 7 years and 8 months

IX. Average Time Between Date of Crime and Involuntary Execution State-by-State:

State	Number	Average Time
Texas	21	7 years and 7 months
Florida	16	9 years and 5 months
Louisiana	14	5 years and 8 months
Georgia	10	9 years and 4 months
Virginia	5	6 years and 8 months
North Carolina	4	6 years and 6 months
Alabama	2	5 years and 5 months

State	Number	Average Time
Mississippi	3	7 years and 2 months
South Carolina	1	7 years and 3 months
Total	76	7 years and 8 months

X. Average Time Between Date of Crime and Involuntary Execution in Federal Circuit:

Fourth Circuit: 6 years and 8 months

Fifth Circuit: 6 years and 10 months

Eleventh Circuit: 9 years and 1 month

XI. Post-Furman Executions by Year

	Involuntary	Consensual	Total	Percentage of Post-Furman Total
1977	0	1	1	1%
1978	0	0	0	0%
1979	1	1	2	2%
1980	0	0	0	0%
1981	0	1	1	1%
1982	1	1	2	2%
1983	5	0	5	6%
1984	21	0	21	24%
1985	14	4	18	21%
1986	17	1	18	21%
1987 (to date)	17	1	18	21%
	76	10	86	

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Fredonia's argument may be unavailing even if the Birmingham meeting resulted in nothing more than an "agreement to agree."

3. Fredonia contends that the district court's resolution of the conflicting evidence in this case sanctioned the type of "swearing match" sought to be avoided by the statute of frauds. The Alabama courts, however, frequently resolve issues concerning the existence of an oral agreement and the exclusiveness of possession on the basis of disputed testimony. *See e.g., Houston v. McClure*, 456 So.2d 788, 789 (Ala.1984); *Eugerton v. Courtauldt*, 421 So.2d 104 (Ala.1982); *Krieger v. Krieger*, 276 Ala. 466, 469, 163 So.2d 623 (1964).

* * *

Criminal law—Habeas corpus—Abuse of writ—Successive petitions—No abuse of discretion in district court's dismissing third petition for habeas corpus without hearing where issues raised were either successive and previously heard and determined or were previously brought up and abandoned—No demonstration that ends of justice require reconsideration of claim of ineffective assistance of counsel—Abuse of writ to raise claims which were intentionally abandoned in earlier petitions for relief—Successive claim that Florida death penalty imposed in discriminatory manner properly denied without hearing where similar challenge to substantially similar death-penalty statute had been resolved by United States Supreme Court adversely to the defendant in that case

WILLIE JASPER DARDEN, Petitioner-Appellant, v. RICHARD L. DUGGER, Secretary, Florida Department of Corrections, Respondent-Appellee. 11th Circuit. Case No. 86-3705. August 5, 1987. Appeal from the U.S. District Court for the Middle District of Florida. William Terrell Hodges, Chief Judge.

Before FAY, JOHNSON and CLARK, Circuit Judges.

FAY, Circuit Judge:

Willie Jasper Darden ("Petitioner"), a Florida prisoner under sentence of death, appeals the district court's order dismissing his third petition for writ of habeas corpus without a hearing. Because all issues raised are either successive and have been previously heard and determined or have been brought up and abandoned, thereby constituting an abuse of the writ, we affirm.

I. FACTS[1]

The thirteen years of judicial proceedings in this case manifest substantial care and patience. Although a detailed recitation of the facts of this case appear in at least four opinions from different courts,[2] we again set forth the evidence presented at petitioner's trial in January, 1974, that led to his conviction and death sentence.

On September 8, 1973, at about 5:30 p.m., petitioner entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman, who worked nights in a juvenile home, had awaked at about 5:00 p.m., had a cup of coffee at the store with his wife, and returned home to let their dogs out for a run. Mrs. Turman showed the man around the store. Petitioner stated that he was interested in purchasing about $600 worth of furniture for a rental unit, and asked to see several items. He left the store briefly, stating that his wife would be back to look at some of the items.

Petitioner returned a few minutes later asking to see some stoves, and inquiring about the prices. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to an area of the store where some boxsprings and mattresses were stacked against a wall. At that time Mr. Turman appeared at the back door, Mrs. Turman screamed while the man reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, the man tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. Petitioner left Mr. Turman face-up in the rain, and told Mrs. Turman to get down on the floor approximately five feet from where her husband lay dying. While she begged to go to her husband, petitioner told her to remove her false teeth. Petitioner unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry, "Lord, have mercy." He told her to get up and go towards the front of the store.

Meanwhile, a neighboring family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her sixteen year-old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Mr. Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip not knowing what she meant, asked petitioner, who he could see because the light bulb inside the door was on, to help get Mr. Turman inside. The man replied, "Sure, buddy, I will help you." As Phillip looked up, the man was pointing a gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away, and was shot a second time in the neck. While he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. Mrs. Hill testified that she heard four shots fired—a single shot, then three in a row, at approximately 6:00 p.m. Mrs. Hill had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip, she saw a late model green Chevrolet leave the store and head towards Tampa on State Highway 92. Phillip survived the incident; Mr. Turman, who never regained consciousness, died later that night.

Minutes after the shooting, petitioner was driving towards Tampa on highway 92, just a few miles away from the furniture store. He was out on furlough from a Florida prison, and was driving a car borrowed from his girlfriend in Tampa. Petitioner testified that because he was driving fast on a wet road he was unable to slow down as he came up on a line of cars in his lane. He attempted to pass, but was forced off the road to avoid a head-on collision with an oncoming car. Petitioner crashed into a telephone pole. The driver of the oncoming car, John Stone, stopped his car and went to petitioner to see if he could help. Stone testified that as he approached the car, petitioner was zipping up his pants and buckling his belt.[3] Police at the site of the collision later identified petitioner's car as a 1969 Chevrolet Impala of greenish golden brown color. Petitioner paid a bystander to give him a ride to Tampa. Mary Simmons, the driver of the car, testified that she picked him up at approximately 6:30 p.m. Petitioner later

returned with a wrecker, only to find that the car had been towed away by the police.

By the time the police arrived at the scene of the accident, petitioner had left. The fact that the car matched the description of the car leaving the scene of the murder, and that the accident had occurred within three and one-half miles of the furniture store and within minutes of the murder, led police to suspect that the car was driven by the murderer. They searched the area. An officer found a revolver about forty feet from the crash site. The arrangement of shells within the chambers exactly matched the pattern that should have been found in the murder weapon: one shot, one misfire, followed by three shots, with a live shell remaining in the next chamber to be fired.[4] A specialist for the FBI examined the pistol and testified that it was a Smith & Wesson .38 special revolver. An examination of the bullet that killed Mr. Turman revealed that it came from a .38 Smith & Wesson Special.

On the day following the murder petitioner was arrested at his girlfriend's house in Tampa. A few days later Mrs. Turman identified him at a preliminary hearing as her husband's murderer. Philip Arnold selected petitioner's picture out of a spread of six photographs as the man who shot him.[5]

II. PROCEDURAL HISTORY

Petitioner was tried and found guilty of murder, robbery and assault with intent to commit murder in the Circuit Court of Citrus County, Florida, in January, 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge accepted the jury's recommendation. On direct appeal, the Florida Supreme Court affirmed both the conviction and the sentence. *Darden v. State*, 329 So.2d 287 (Fla.1976).[6] The United States Supreme Court granted a petition for writ of certiorari, *Darden v. Florida*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976), and limited review to the sole issue of whether the prosecution's summation to the jury deprived petitioner of due process of law. *Darden v. Florida*, 429 U.S. 1036, 97 S.Ct. 729, 50 L.Ed.2d 747 (1977). After that issue was briefed and orally argued, the Court dismissed the writ of certiorari as improvidently granted. *Darden v. Florida*, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

Petitioner next filed a motion for post-conviction relief pursuant to Fla.Crim.P. 3.850 in the state trial court alleging ineffective assistance of counsel based on counsel's alleged failure to investigate an alibi defense. The state trial court denied relief and the Florida Supreme Court affirmed on the merits. *Darden v. State*, 372 So.2d 437 (Fla.1979). After the Governor signed a warrant for petitioner's execution, petitioner filed a petition for writ of habeas corpus in federal district court. The district court considered all claims on the merits and denied the petition. *Darden v. Wainwright*, 518 F.Supp. 947 (M.D.Fla.1981).[7] Petitioner raised three issues in his first appeal to this court. He challenged the process by which prospective jurors were excused, the propriety of the prosecutor's summation and the effectiveness of counsel. This court affirmed the district court's order denying relief. *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir.1983). This court granted rehearing *en banc*, and affirmed the district court. *Darden v. Wainwright*, 708 F.2d 646 (11th Cir.1983). Following a second rehearing *en banc*[8] this court reversed on the claim of improper excusal of a prospective juror. *Darden v. Wainwright*, 725 F.2d 1526 (11th Cir.1984).[9] The United States Supreme Court granted the State's petition for certiorari on that claim, vacated the Court of Appeal's judgment and remanded for reconsideration in light of *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). On remand, the *en banc* court denied relief, *Darden v. Wainwright*, 767 F.2d 752 (11th Cir.1985).

Petitioner filed another motion for post conviction relief pursuant to Fla.R.Crim.P. 3.850 in the state trial court. Petitioner raised five new constitutional issues[10] and realleged error relating to the prosecution's summation. The state trial court denied relief and the Florida Supreme Court affirmed *Darden v. State*, 475 So.2d 214 (Fla. 1985). Petitioner then filed his second habeas petition in district court asserting the same challenges rejected by the state courts. The State plead abuse of the writ in its motion to dismiss and the district court dismissed the petition with prejudice as an abuse of the writ pursuant to 28 U.S.C. § 2244(b) (1982) and Rule 9(b) of the Rules Governing Section 2254 cases. *Darden v. Wainwright*, No. 85-1420-Civ-T-10 (M.D.Fla. September 3, 1985). On the same day, our court denied petitioner's emergency motion for stay of execution and denied the motion for certificate of probable cause. *Darden*, 772 F.2d 668 (11th Cir.1985). Petitioner filed an application for stay of execution in the Supreme Court. The Court treated this as a petition for certiorari and granted the application, thus staying petitioner's execution. *Darden*, 473 U.S. 928, 106 S.Ct. 21, 87 L.Ed.2d 699 (1985).

The Court in *Darden*, — U.S. —, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), addressed the following three claims concerning the validity of petitioner's criminal conviction and death sentence: (1) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the eighth amendment; (2) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); and (3) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial. The Court of Appeals was affirmed and the case was remanded for proceedings consistent with the opinion.[11] Accordingly, the Eleventh Circuit sitting *en banc* pronounced the judgment of the Supreme Court as the judgment of the *en banc* court and affirmed the district court's order denying the petition for writ of habeas corpus. *Darden v. Wainwright*, 803 F.2d 613 (11th Cir.1986).

On the same day the Eleventh Circuit opinion was published, petitioner filed a third motion for post-conviction relief in state court pursuant to Fla.R.Crim.P. 3.850. The motion was based on two claims. The first claim alleged ineffectiveness of counsel for failure to investigate the alibi defense. The state court found that failure to locate witnesses fixing an earlier time of the crime was not the result of ineffectiveness or lack of diligence.[12] The second claim alleged the unconstitutionality of Florida's death penalty statute. The second claim was denied on the merits. The Florida Supreme Court affirmed the trial court's order denying relief and denied the requested stay of execution.[13] *Darden v. State*, 496 So.2d 136 (Fla.1986). The Florida Supreme Court denied relief on petitioner's ineffective assistance of counsel claim because he was procedurally barred from raising the issue in a successive petition.[14] As to the unconstitutionality of Florida's death penalty statute, the Florida Supreme Court declared the issue procedurally barred because the claim could have been raised in his previous 3.850 motions. The Florida Supreme Court stated, however, were it to reach the merits, the

court would reject the contention. *See Stewart v. State*, 495 So.2d 164 (Fla.1986); *Smith v. State*, 457 So.2d 1380 (Fla.1984); *State v. Henry*, 456 So.2d 466 (Fla.1984).

On the same day the Florida Supreme Court denied petitioner relief, petitioner filed his third federal habeas petition in district court. Petitioner again attacked the validity of his conviction and death sentence by alleging three constitutional violations. Petitioner alleges sixth, eighth and fourteenth amendment violations due to ineffective assistance of counsel for failing to investigate an alibi defense; eighth and fourteenth amendment violations due to grossly suggestive and unreliable identification procedures, and eighth and fourteenth amendment violations due to the unconstitutionality of Florida's death penalty statute. The State filed a motion to dismiss the petition pleading both abuse of the writ and successive petitions. The district court entered an order dismissing the petition for writ of habeas corpus as an abuse of the writ. The court noted that the three claims presented were presented in the original petition although the arguments and contentions in support of these claims were somewhat different. Petitioner raises the same three issues in his appeal to this court as he presented in his petition to the district court.

III. DISCUSSION

Dismissing a successive petition for writ of habeas corpus without a hearing is within the sound discretion of the federal trial judges. *Sanders v. United States*, 373 U.S. 1, 18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963). "Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." *Id.* We must therefore affirm the district court's order dismissing petitioner's third habeas petition unless we find that the district court abused its discretion.[5]

Petitioner's third application for federal habeas relief contained three claims. Two of the three claims have been decided on the merits in previous petitions. It was within the district court's discretion to dismiss those two claims unless the petitioner established that the ends of justice would be served by reconsideration of the claims. *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077; *Witt v. Wainwright*, 755 F.2d 1396, 1397 (11th Cir.1985); Rule 9(b) of the Rules Governing Section 2254 cases. Whether the ends of justice require reconsideration is determined by objective factors, such as "whether there was a full and fair hearing on the original petition or whether there was an intervening change in the facts of the case or the applicable law." *Witt*, 755 F.2d at 1397; *see also Kuhlmann v. Wilson*, — U.S. —, —, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364 (1986) (plurality opinion) ("[T]he 'ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.").

The remaining claim was presented in petitioner's first petition for federal habeas corpus relief filed in May, 1979, but withdrawn and abandoned. Since the State has affirmatively plead abuse of the writ in its motion to dismiss the third petition, petitioner has the burden to rebut the State's contention. *Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078; *Witt*, 755 F.2d at 1397. Petitioner must demonstrate that the failure to present the claim in the prior federal habeas proceeding was "neither the result of an intentional abandonment or withholding nor the product of inexcusable neglect." *Witt*, 755 at 1397. The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus. Thus, a federal court may dismiss a subsequent petition on the ground that the petitioner abused the writ when a petitioner files a petition raising grounds that were available but not relied upon in a prior petition, *Kuhlmann*, 106 S.Ct. at 2622 n. 6, or engages in other conduct that "disentitle[s] him to the relief he seeks." *Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078. With these principles in mind, we turn to the three claims presented.

A. WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILURE TO REASONABLY INVESTIGATE THE TIME OF THE OFFENSE WHEN ALIBI WAS THE DEFENSE

This claim has been exhaustively litigated and is thereby categorized as successive. Petitioner presented this claim in his first petition for writ of habeas corpus in May, 1979. Petitioner directly challenged the investigative techniques and thoroughness of defense counsel with regard to the alibi defense, and argued that his innocence would be apparent if the attorneys had represented him effectively. The claim was denied on the merits. *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla. 1981). The judgment of the district court was affirmed by this court, *Darden*, 699 F.2d 1031 (11th Cir.1983), and on this issue, by every subsequent revisitation by the Eleventh Circuit, sitting *en banc*. *See* 708 F.2d 646 (11th Cir.1983); 725 F.2d 1526 (11th Cir.1984); 767 F.2d 752 (11th Cir. 1985).

Petitioner has the burden of showing this court that the ends of justice requires reconsideration of this claim. Petitioner offers two affidavits that support his alibi. The affidavits support the alibi that petitioner could not have been in two different places at the same time. One of the affiants stated he was at the crime scene at 5:55 p.m. and opined that the crime was committed between 5:00 p.m. and 5:15 p.m. He concluded that petitioner was innocent since petitioner was reported to be in front of Christine Bass' house with car trouble from 4:00 p.m. to approximately 5:30 p.m.[6] The second affidavit corroborated the contention that the crime was committed between 5:00 p.m. and 5:15 p.m.[7]

We must examine the affidavits presented in light of the total record to determine whether the ends of justice require relitigation of this claim. The overwhelming evidence of the time of the commission of the crime is contrary to the affidavits submitted by petitioner. Mrs. Turman, Mrs. Hill and Phillip Arnold all testified that the crime occurred at approximately 6:00 p.m. John Stone witnessed petitioner's automobile wreck at about 6:00 p.m. Mary Simmons offered petitioner a ride to Tampa after the 6:30 p.m. news. The call reporting the homicide was received by the Lakeland Police Department at 6:31 p.m. The accident was reported to the Hillsborough County Police Department at 6:32 p.m. After reviewing the record in its entirety we conclude that petitioner has failed to meet his burden of showing that the ends of justice require a federal court to revisit this claim for a sixth time.[8] The district court, within its sound discretion, properly dismissed this claim without a hearing.[9]

B. WHETHER THE USE OF GROSSLY SUGGESTIVE AND UNRELIABLE IDENTIFICATION PROCEDURES VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

This claim was presented in petitioner's first petition for writ of habeas corpus but later withdrawn and abandoned as being not w[illegible] founded in the context of a sepa-

rate issue.[9] In his third petition for federal habeas relief, eight years later, petitioner raises this claim for the second time. In its motion to dismiss the third petition filed October 16, 1986, the State plead both abuse of the writ and successive applications as a basis for dismissal. The reasoning advanced by the State, in part rested on the record in Case No. 85-1420, heard in September, 1985, and on the record in Case No. 79-566, heard in May, 1981. Petitioner must show this court that he did not abuse the writ.

Petitioner asserts that counsel, *not* petitioner, deleted the identification challenge from the first petition before adjudication in the district court. He further asserts that even if abuse is shown, the merits must be heard because this involves a claim of innocence. We disagree.

The record shows that the issue presented in this third petition was specifically withdrawn from the district court's consideration as being not well founded. The issue was abandoned. Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. *Witt*, 755 F.2d at 1397. Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing. *Kuhlmann*, 106 S.Ct. at 2622 n. 6; *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078; *Wong Doo v. United States*, 265 U.S. 239, 241, 44 S.Ct. 524, 525, 68 L.Ed. 999 (1924). "The petitioner had full opportunity to offer proof ... [on this claim] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then." *Wong Doo*, 265 U.S. at 241, 44 S.Ct. at 525. The federal courts will not "tolerate needless piecemeal litigation, or ... entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078.

As to petitioner's contentions of innocence, we again look at the record in its totality and agree, as did the United States Supreme Court, *Darden*, 106 S.Ct. at 2472-73, with the Florida Supreme Court that: "[T]here was overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges and a recommendation of a death sentence for first degree murder." 329 So.2d at 291 (Fla.1976). The district court, in its discretion, denied petitioner a hearing on this claim and we affirm that ruling which was based upon abuse of the writ.

C. WHETHER THE DEATH PENALTY IN FLORIDA IS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Petitioner presented this claim in his first petition for writ of habeas corpus and it was denied on the merits. *Darden*, 513 F.Supp. 947 (M.D.Fla.1981). Petitioner did not appeal the ruling conceding defeat on the merits based on the law in effect at the time the claim was presented. *See Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).[10] Petitioner included this claim in his third petition for federal habeas relief filed in October, 1986,[11] asserting that there are viable studies now available to rely upon and the intervening grants of certiorari in *McCleskey v. Kemp*, — U.S. —, 106 S.Ct. 3331, 92 L.Ed.2d 737 (1986) and *Hitchcock v. Wainwright*, — U.S. —, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986) warrant merits resolution of his claim. This claim is successive and does not warrant reconsideration because the Supreme Court decision in *McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), resolved a substantially similar challenge to the imposition of the Georgia death-penalty statute based on the Baldus Study which yielded almost identical results to the study done by Gross and Mauro that petitioner submits on his behalf.[12]

In *McCleskey*, the Court declined to hold that the study presented supported an attack of Georgia's imposition of the death penalty as violative of the eighth or fourteenth amendments. In *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Court declined to reach the claim that the Florida death-penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the eighth and fourteenth amendments, but refers the reader to "a similar challenge to the Georgia death-penalty statute. *See McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)." *Hitchcock v. Dugger*, 107 S.Ct. at 1822 n. 1. Since we are bound to follow the Supreme Court's disposition of the constitutional challenge to a substantially similar death-penalty statute on identical grounds, petitioner's request for a hearing on this claim must be denied.[13]

IV. CONCLUSION

For the foregoing reasons we AFFIRM the district court's order dismissing petitioner's writ of habeas corpus without a hearing on abuse of the writ as well as successive application grounds.

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1. The recitation of the facts is essentially the same as set forth by the Supreme Court in *Darden v. Wainwright*, — U.S. —, 106 S.Ct. 2464, 2467-68, 91 L.Ed.2d 144 (1986).

2. *See Darden v. Wainwright*, — U.S. —, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Darden*, 699 F.2d 1031 (11th Cir.1983); *Darden*, 513 F.Supp. 947 (M.D.Fla.1981); *Darden v. State*, 329 So.2d 287 (Fla.1976).

3. At trial Petitioner admitted that his pants were unzipped and his buckle was undone but claimed that he thought he was hurt and wanted to examine himself.

4. Both Mrs. Turman and Phillip Arnold described the sequence of the shots in this manner. Mrs. Hill testified that she heard one shot, then three shots in a row.

5. There are some minor discrepancies in the eyewitness identification procedure. However, both Mrs. Turman and Phillip Arnold repeatedly and unwaveringly identified petitioner as the attacker at trial. *See Darden*, 106 S.Ct. at 2468 n. 1.

6. Six issues were raised in the appeal. Of the six, two of the same issues raised in the most recent federal habeas petition were raised and disposed of on the merits by the Florida Supreme Court. Those issues concerned the constitutionality of the Florida death penalty statute, and the pretrial identification procedures.

7. While petitioner alleged some twenty-five constitutional violations, of import in this appeal is the disposition in the first federal habeas petition of the three claims raised in this petition. Petitioner alleged: ineffective assistance of counsel for failure to investigate an alibi defense; the unconstitutionality of Florida's death penalty statute; and *withdrew* and abandoned the constitutional attack on the pretrial identification procedures.

8. While a second death warrant was signed in early August, 1983, by the Governor of Florida, the court's decision to rehear the case *en banc* effectuated a stay of execution. *Darden v. Wainwright*, 715 F.2d 502 (11th Cir.1983).

9. The court agreed with the first panel's evaluation of the claims regarding prosecutorial summation and ineffective assistance of counsel and reinstated the relevant portions of the panel's decision. *Darden*, 699 F.2d at 1033-37.

10. The five new constitutional issues included: (1) alleged violations of the fifth, sixth, eighth and fourteenth amendments due to the trial court's use of non-record psychological evaluation in imposing the sentence of death when the evaluation was obtained without the petitioner's waiver of his right to be free from self-incrimination, or to confront the author of the report; (2) alleged eighth and fourteenth amendment violations due to lack of consideration by the reviewing authority of the extensive nonstatutory mitigating evidence and findings of the trial court; (3) alleged eighth amendment violation because the preparation for and conduct of

the sentencing hearing robbed the jury and judge of the ability to conduct individualized sentencing; (4) alleged eighth and fourteenth amendment violations resulting from comments made by the trial judge allegedly resulting in the reduction of the jurors' sense of responsibility with regard to its function at sentencing; and (5) alleged sixth, eighth and fourteenth amendment violations resulting from ineffective assistance of appellate counsel.

11. Petitioner's motion for rehearing was denied. — U.S. —, 107 S.Ct. 24, 92 L.Ed.2d 774 (1986).

12. The state trial court did not reach the question of the effect of the new evidence in the form of affidavits because it was not a proper matter for consideration in a 3.850 motion. It can only be presented in an error coram nobis petition to the Florida Supreme Court. *State v. Darden*, No. 69,481 (Fla. 10th Cir. October 15, 1986).

13. A fifth death warrant had been signed by this time.

14. Petitioner raised this issue in his first 3.850 motion. *Darden v. State*, 372 So.2d 437 (Fla. 1979).

15. Petitioner contends that the district court's order of dismissal requires reversal because the court did not address the claims presented within the proper analytical framework. We disagree. District Judge Hodges has handled these petitions for habeas corpus relief since May, 1979. The dismissal of the third petition is proper. While we do not agree with the district court's reasoning that the submission of the third petition is *a fortiori* an abuse because the filing of the second petition constituted an abuse, *Darden*, No. 86-1456 Civ-T-10(c) p. 2 (M.D.Fla. October 16, 1986), we do agree that it was within the district court's sound discretion to dismiss the third petition without a hearing. The record amply supports Judges Hodges' decision.

16. Christine Bass is prepared to affirm that petitioner was outside her house with car trouble from 4:00 p.m. to 5:30 p.m. on the day of the murder.

17. We note that the affidavit was prepared thirteen years after the commission of the crime. The facts are layed out in detail. The affiant recused its previous non-existence because he personally believed that petitioner was guilty. He comes forth now to "save an innocent man's life."

18. Since petitioner has failed to meet his burden of showing that the ends of justice require review of the claim under a sound discretion standard, it follows that he failed to meet the heavier burden of "colorable showing of factual innocence which would be determined by reference to probative evidence of guilt or innocence. *Sawyer v. Wilson*, 106 S.Ct. at 2627 n. 17. We recognize that this issue was raised in the ineffective assistance of counsel. This *Darden*, 699 F.2d at 1037 (effective at the penalty phase), as well as the Supreme *Darden*, 106 S.Ct. at 2473 (effective at the guilt phase), has determined that petitioner received effective assistance of counsel. The issue of time error in the affidavits presented not after what has been determined to be counsel's performance as a matter of

20. The denial of this claim was affirmed on direct appeal by the Florida Supreme Court in 1976. *Darden v. State*, 329 So.2d 287 (Fla.1976). *See supra* n. 6.

21. The Eleventh Circuit, *in Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

22. Petitioner also filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 on this claim in the state trial court. The trial court denied relief and the Florida Supreme Court affirmed. *Darden*, 496 So.2d 136 (Fla. 1986). The Florida Supreme Court declared petitioner procedurally barred from raising this claim but alternatively rejected it on the merits.

23. Petitioner rests his claim on the same proof as Hitchcock presented in his case before the Supreme Court. In Hitchcock's Petition for Writ of Certiorari he states that the

> magnitude of the race-based disparity in capital sentencing in Florida is virtually identical to the magnitude of the disparity in Georgia. After multiple regression analysis of the Florida data, Gross and Mauro found that the likelihood of receiving a death sentence in Florida for killing a white victim was 4.8 times greater than for killing a black victim. Using the same methodology, Baldus found a 4.3 times greater likelihood of death for killing a white victim in Georgia. *McCleskey v. Kemp*, 753 F.2d at 897 (footnote omitted).

Brief for Petitioner, Petition for Writ of Certiorari at 48, *Hitchcock v. Wainwright*, — U.S. —, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986).

24. We note that the outcome of the Supreme Court case is consistent with the Florida state court disposition finding the constitutional attack on the Florida death-penalty statute without merit. *Smith v. State*, 457 So.2d 1380 (Fla. 1984); *State v. Henry*, 456 So.2d 466 (Fla.1984); *Darden v. State*, 329 So.2d 287 (Fla.1946). Some of the lower federal courts addressing that issue concur. *See e.g., Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla.1981).

* * *

Torts—Negligence—Under Georgia law, third party may not recover against an accountant for the accountant's negligence in preparing audited financial statements where, although it was foreseeable that third party would rely on the financial statements, accountant did not have actual notice that financial statements would be shown to third party

BADISCHE CORPORATION and AKZONA INCORPORATED, Plaintiffs-Appellants, v. ARNOLD L. CAYLOR; DAVID SIEGEL and ARNOLD L. CAYLOR & COMPANY, P.C., Defendants-Appellees. 11th Circuit. Case No. 86-8305. August 24, 1987. Appeal from the U.S. District Court for the Northern District of Georgia. Harold L. Murphy, Judge.

Before GODBOLD and VANCE, Circuit Judges, and SWYGERT*, Senior Circuit Judge.

PER CURIAM:

The question presented in this appeal is whether a third party can recover against an accountant under Georgia law for the accountant's negligence in preparing audited financial statements where it was foreseeable that the third party would rely on the financial statements. The district court granted summary judgment for defendants, ruling that the accountants were not liable because they lacked "actual notice" that the financial statements would be shown to the third party. Because the scope of an accountant's liability to third parties was a question of controlling but unsettled Georgia law, the question was certified to the Supreme Court of Georgia. *Badische Corp. v. Caylor*, 806 F.2d 231 (11th Cir.1986). The appended response establishes that the judgment of the district court was correct.

AFFIRMED.

* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX

No. 44231.

Supreme Court of Georgia.

June 4, 1987.

HUNT, Justice.

This case comes before this court on a certified question from the United States Court of Appeals for the Eleventh Circuit. The facts as set out by that court, and the question, follow:

"Color-Dyne" was a partnership formed by two corporations to utilize a "carpet printer" process. Plaintiffs Badische Corporation and Akzona Incorporated provided materials to Color-Dyne on credit. In late 1980, Color-Dyne showed its most recent financial statements to the plaintiffs. These financial statements were prepared for Color-Dyne by defendant David Siegel, a certified public accountant, on behalf of defendant Arnold L. Caylor & Co., a public accounting firm. These statements showed that Color-Dyne owned $2 million in inventory. The audit failed to reveal, however, that various banks had secured

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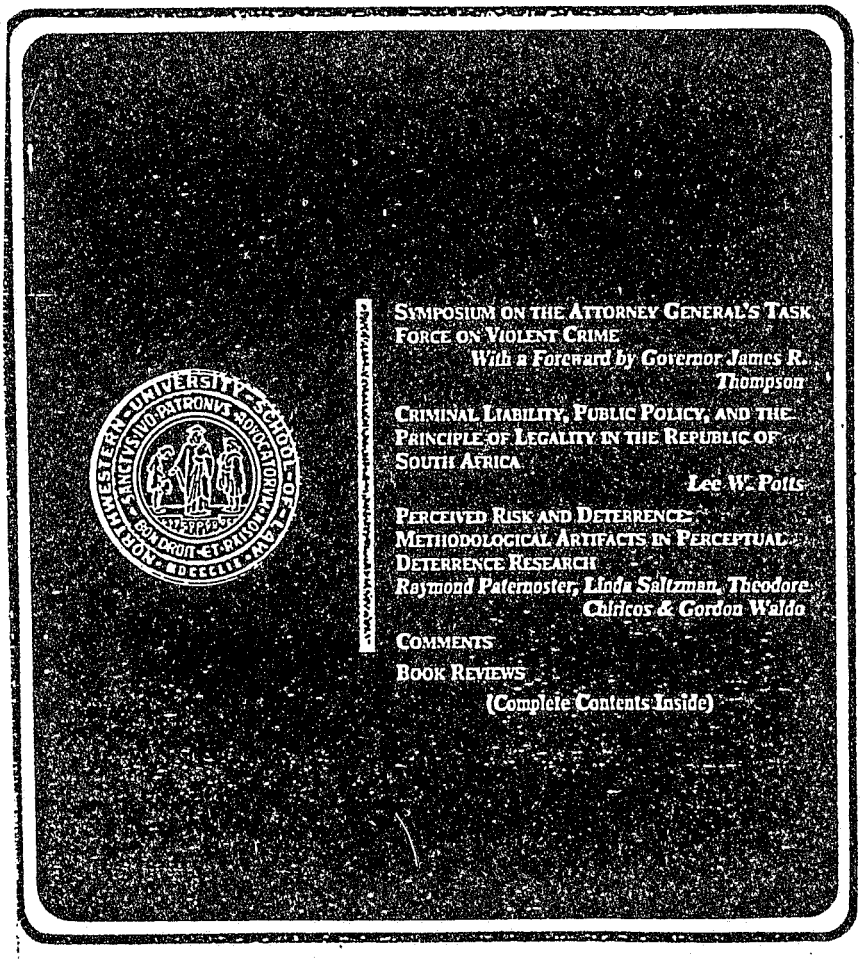

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FEDERAL HABEAS CORPUS — A NEED FOR REFORM

JIM SMITH*

In 1963, the Supreme Court of the United States decided two cases involving the scope of federal habeas corpus relief to state prisoners under 28 U.S.C. sections 2244-2255.[1] The Court divided five-to-four in both cases and each contained sharp dissents.

In *Townsend v. Sain*, Justice Stewart in dissent observed that even under the test enunciated by the majority, the Court should have affirmed the appellate court's denial of relief. He stated his main concern, however, in the last paragraph of his opinion:

> To require a federal court now to hold a new trial of factual claims which were long ago fully and fairly determined in the courts of Illinois is, I think, to frustrate the fair and prompt administration of criminal justice, to disrespect the fundamental structure of our federal system, and to debase the Great Writ of Habeas Corpus . . . .[2]

In *Fay v. Noia*, the Court upheld the power of a federal court to grant habeas corpus relief notwithstanding the petitioner's decision not to appeal his conviction out of fear that if he were successful he might face retrial and a possible death sentence. Justice Brennan set forth the requirement that, in order to forfeit his right to a consideration of his federal claim, there had to be a "deliberate by-pass" of state court procedures by the applicant. This deliberate by-pass had to be "an intentional relinquishment or abandonment of a known right or privilege" by the applicant after consultation with competent counsel.[3] Justice Clark dissented because the decision dealt a "staggering blow" to the effective administration of criminal justice and jeopardized the finality of state convictions. He opined that "[a]fter today state judgments will be relegated to a judicial limbo, subject to federal collateral attack—as here—a score of years later despite a defendant's willful failure to appeal."[4] Jus-

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1 Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

2 372 U.S. at 334.

3 *Id.* at 439.

4 *Id.* at 446 (Clark, J., dissenting).

tice Harlan in his lengthy dissent suggested that the majority opinion failed to understand the function of counsel and that the "effect [of the decision] on state procedural rules may be disastrous . . . ."[5]

The history of federal habeas corpus since 1963 has demonstrated that *Townsend* and *Fay* have not withstood the test of time and that the Justices who dissented in those cases perceived correctly the abuses which would result and the effect they would have upon the administration of justice. Indeed, the decision in *Wainwright v. Sykes*[6] vindicated the position espoused by Justice Harlan in *Fay* and undercut the basic premise of *Townsend* that state courts were not competent to dispose of and protect the federal constitutional rights of persons tried in state courts.

Although recent Supreme Court decisions have constricted the scope of habeas corpus relief by strengthening the rule of *Wainwright v. Sykes*,[7] and have recognized the legitimate need for finality in the administration of justice,[8] congressional reform of the habeas corpus act is essential to curb existing abuses. It was for this reason that, as Attorney General of the State of Florida, I proposed certain amendments to 28 U.S.C. sections 636(b)(1)(B), 2244, and 2254(d), filed last year as S. 653 and H.R. 3416.[9]

I. The Review by Federal Magistrates of State Court Criminal Convictions

Currently, 28 U.S.C. section 636(b)(1)(B) authorizes United States magistrates to conduct evidentiary hearings on habeas corpus applications for post-trial relief by individuals convicted in state court of criminal offenses. The magistrate submits to the judge proposed findings of fact and recommendations for disposition of the case, which the judge may accept or reject.

The proposed amendment to 28 U.S.C. section 636(b)(1)(B) contained in section 1 of H.R. 3416 would prohibit United States magistrates from conducting evidentiary hearings in state habeas corpus cases without consent of the parties. The states have no interest in how much authority Congress confers upon magistrates with respect to federal

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[5] *Id.* at 471 (Harlan, J., dissenting).

[6] 433 U.S. 72 (1977). *See also* Stone v. Powell, 428 U.S. 465 (1976).

[7] Engle v. Isaac, 102 S. Ct. 1558 (1982).

[8] United States v. Frady, 102 S. Ct. 1584 (1982).

[9] H.R. 3416, 97th Cong., 1st Sess., 127 CONG. REC. H1791 (1980); S. 653, 97th Cong., 1st Sess., 127 CONG. REC. S1981 (1981). I explained the necessity for finality in the administration of justice in a memorandum to the House and Senate Judiciary Committees. J. Smith, Memorandum in support of S. 653 and H.R. 3416 Reforming Federal Habeas Corpus Procedures Concerning Challenges to State Criminal Convictions (June 12, 1981)(submitted to Senate and House Judiciary Committees).

criminal proceedings. Some states are of the position, however, that magistrates should not have the authority to make findings of fact that, in practical effect, overrule decisions rendered by state trial judges and even state supreme courts. A federal district judge should overrule state decisions only if the judge's appointment comes under article III of the United States Constitution.

Although the Supreme Court has upheld Congress' power to authorize a magistrate to conduct evidentiary hearings, this does not mean that Congress must grant such authority or that the present law should not be overturned. If one views federal habeas corpus as an essential requisite to insuring the protection of individual freedoms, then it would seem that an experienced judicial officer should hear the disputed facts. If Congress were to eliminate the magistrates' role in conducting evidentiary hearings, leaving it up to federal judges alone to perform such a fact finding function, Congress would avoid duplicative evidentiary hearings and would prevent judges from merely "rubber stamping" the magistrate's factual findings. Under my proposal, federal magistrates would still handle all aspects of habeas corpus petitions except evidentiary hearings, over which a magistrate would have jurisdiction only if the parties consent to it.

II. The Federal Litigation of Issues Not Properly Raised in State Court Proceedings

The proposed amendment to 28 U.S.C. section 2244, contained in section 2 of H.R. 3416, codifies the Supreme Court's decision in *Wainwright v. Sykes*[10] that the federal courts will not consider issues not properly raised at the state level unless a petitioner demonstrates "cause and prejudice" for failure to comply with state court procedures. The requirement that a petitioner must raise his claims in the state courts, absent special circumstances, is the only approach consistent with traditional notions of federalism. It gives the state system an opportunity to correct constitutional errors and to resolve factual disputes while witnesses' memories are still keen. It also protects the defendants by ensuring that their rights are promptly vindicated at the trial or on direct appeal, rather than after many years of incarceration. Moreover, the *Wainwright* requirement is essential to the fair administration of justice because it prevents the defendant from "sandbagging" state courts by deliberately refusing to raise claims in state court so that they can later raise them for the first time in federal court. Finally, the proposed legislation also specifically defines the Supreme Court requirement of "cause."

[10] 443 U.S. at 72.

Two decisions demonstrate the need for the proposed amendment to 28 U.S.C. section 2244. In *Holzapfel v. Wainwright*,[11] for example, defendant Holzapfel entered pleas of guilty in 1960 to the first degree murders of a judge and his wife. Holzapfel told the court that he made his plea freely, voluntarily, and with knowledge of the consequences which would follow. He acknowledged that his earlier confession before a county judge was an accurate statement of the events leading to the deaths, and the court accordingly made the confession part of the record.

Nine years later, Holzapfel petitioned a state court to vacate the judgments and sentences he received. He claimed (1) that his plea was involuntary, (2) that the government did not inform him of his right to appeal, (3) that he made his confession before intelligently waiving his right to counsel, and (4) that the trial court lacked jurisdiction over his case because the victims drowned in the Atlantic Ocean. The state court held an evidentiary hearing in 1970 and denied Holzapfel's motion. The appellate court subsequently affirmed the lower court's decision.[12]

In 1978, Holzapfel filed a second motion to vacate in the state trial court, reiterating his prior assertions and also claiming his court appointed counsel was ineffective. The state court held an additional evidentiary hearing on the newly raised claim in 1979 and again denied the defendant's motion. The state appellate court affirmed.[13] In 1981, Holzapfel filed a petition for a writ of habeas corpus in federal district court. Holzapfel renewed the claims he had made earlier in state court, and at present this case still awaits disposition by the magistrate.

Under the proposed amendment to 28 U.S.C. section 2244(d), a petitioner would have to raise these claims in the initial state court proceedings or, alternatively, he would have to establish that neither he nor his attorney then had knowledge of the material and controlling facts upon which he is basing his claim and that they could not ascertain such facts by the exercise of due diligence.

Holzapfel, for example, had long been aware of the facts which gave rise to his claims. He should have raised these issues in the original state proceedings when the facts were readily ascertainable and when the state court could correct any legitimate errors. Since delay prejudices the state, Holzapfel should have to demonstrate why he could not have raised the issues in the original proceeding. If he cannot demonstrate such cause under the factors enumerated in this amend-

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[11] No. 81-8038-Civ-JCP (S.D. Fla. filed 1982).

[12] Holzapfel v. State, 247 So. 2d 754 (Fla. Dist. Ct. App. 1971).

[13] Holzapfel v. State, 392 So. 2d 86 (Fla. Dist. Ct. App. 1980).

ment, the federal court should bar his claim.[14]

In *Tyler v. Phelps*,[15] a Louisiana state court tried and convicted Gary Tyler of first degree murder and sentenced him to death. On direct appeal, Tyler attempted to raise the impropriety of a jury instruction to which his attorney had failed to object at trial. The state supreme court declined to entertain the argument because counsel had failed to comply with the state's "contemporaneous objection rule" which requires counsel to object at trial when the alleged error occurred.[16]

Tyler immediately filed a habeas petition in federal district court, claiming that the jury instruction made the state judgment and sentence constitutionally infirm. The federal district court denied relief because of Tyler's failure to object to the charge at trial and his failure to establish "cause" as required by *Wainwright v. Sykes*. The federal court rejected Tyler's claim of ineffective assistance of counsel as baseless.

On appeal, the fifth circuit noted that *Wainwright v. Sykes* had held that a petitioner must establish cause and prejudice but reversed the district court's order denying the writ of habeas corpus. The court decided that the Supreme Court's decision in *Mullaney v. Wilbur*[17] made the instruction in *Tyler* improper.[18] After finding that this charge prejudiced Tyler, the court decided that the ignorance of counsel was sufficient to satisfy the *Sykes* requirement of "cause."[19]

The court thus concluded in *Tyler* that oversight or ignorance of counsel satisfies the cause requirement and that failure to comply with the state's legitimate procedural rules did not preclude federal habeas corpus relief. The court did note that *Sykes* would still require denial of the writ if the state could *prove* that the defendant's counsel attempted to "sandbag" the trial judge or to build error into the record.

One thing the court failed to acknowledge, however, is that it is unlikely that any defense lawyer will ever admit that he deliberately attempted to take such actions. The state, therefore, will have great difficulty proving the subjective intent of defense counsel. As Justice

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[14] This case also illustrates the need for the statute of limitations on habeas corpus actions. Two key witnesses, attorneys Hal Ives and Harry Hausen, died prior to the 1979 evidentiary hearing. Both attorneys could have testified as to the voluntariness of Holzapfel's confessions and guilty pleas. Holzapfel's assertion that now deceased law enforcement officials made promises to him is also difficult, if not impossible, to refute. Thus Holzapfel may be able to prevail not because his cause is meritorious, but because the state is unable at this late date to contradict his testimony. If Holzapfel is granted a new trial, it would be difficult to prove anew his guilt 26 years after the murders and 20 years after the entry of his plea.

[15] 622 F.2d 172 (5th Cir. 1980).

[16] State v. Tyler, 342 So. 2d 574, 590 (La. 1977).

[17] 421 U.S. 684 (1975).

[18] 622 F.2d at 172.

[19] *See* Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), *cert. denied*, 449 U.S. 1004 (1980).

Burger observed in *Estelle v. Williams*, "[i]t is not necessary, if indeed it were possible, for us to decide whether this [failure to object] was a defense tactic or simply indifference . . . ."[20] Under the test established by the panel in *Tyler*, the rule of *Wainwright v. Sykes* cannot protect the orderly procedure of state courts.[21]

The rule barring federal consideration of claims because of procedural defaults was supported by the recent Supreme Court decisions in *United States v. Frady*[22] and *Engle v. Isaac*.[23] In *Engle*, Justice O'Connor noted that "counsel might have overlooked or chosen to omit . . . [a] due process argument while pursuing other avenues of defense . . . ."[24] She also remarked that the constitutional guarantee of competent counsel "does not insure that defense counsel will recognize and raise every conceivable constitutional claim . . . ."[25]

Congress should establish an objective definition of what constitutes "cause" so as to end the continued confusion. Such a definition would prevent the lower federal courts from warping the *Sykes-Engle* doctrine in order to reach the merits of a case years after the trial when the "[p]assage of time, erosion of memory, and dispersion of witnesses . . . render retrial difficult, even impossible."[26]

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[20] 425 U.S. 501, 512 n.9 (1978)(emphasis added).

[21] *See supra* note 9 and accompanying text. The fifth circuit, in Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977), and the second circuit, in Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1977), *cert. denied*, 445 U.S. 933 (1980), both perceived the analytical deficiencies of the *Tyler* decision. In *Indiviglio*, the second circuit followed *Lumpkin v. Ricketts* by stating that "a mere allegation of error by counsel is insufficient to establish 'cause' to excuse a procedural default." 612 F.2d at 631. The court decided that "the interests of finality in judgments required such a holding."

Significantly, on rehearing the *Tyler* case, the fifth circuit receded from its original position and held that *Sykes* barred consideration of Tyler's claim. 643 F.2d 1095 (5th Cir. 1980). In a subsequent case, the fifth circuit recognized that its later *Tyler* decision was the correct treatment of the habeas corpus issue and it cited with approval the *Indiviglio* decision. Washington v. Estelle, 648 F.2d 276 (1981).

[22] 102 S. Ct. 1584.

[23] 102 S. Ct. 1558.

[24] *Id.* at 1574.

[25] *Id.*

[26] *Id.* at 1571. *See also Hanna v. Wainwright*, No. 77-8401-Civ-CF (S.D. Fla. July 31, 1978) where the federal district court held a hearing on Hanna's fourth habeas petition, which raised an issue that Hanna had earlier decided not to appeal. The court should not have considered Hanna's habeas petition on its merits because of his deliberate bypass of state remedies. An inmate should have an obligation to pursue his state appeal so that any error in the state trial court can be remedied promptly. The district court ultimately denied Hanna's petition on the merits. *Id.*

In *Martin v. Wainwright*, 533 F.2d 270 (5th Cir. 1976), the fifth circuit affirmed the district court's denial on the merits of Martin's habeas petition, which raised an issue which Martin had not appealed in state court. Under the amendment proposed in section 2 of H.R. 3416, the district court would not have reached the merits of this petition because of Martin's failure to present the issue in a state appeal.

III. A Three Year Statute of Limitations for Habeas Corpus Petitions

The proposed amendment to 28 U.S.C. section 2244 contained in section 2 of H.R. 3416 provides for a statute of limitations in habeas corpus cases. Such a provision is essential to ensuring finality of criminal judgments, since prisoners frequently wait many years to bring a habeas corpus action seeking to set aside a judgment and sentence. If the habeas petition raises an issue which the prisoner had not raised at the state level, and the record does not resolve it, the state is often incapable of refuting the prisoner's testimony and, as a consequence, the petitioner prevails. Such a system has hardly contributed to public confidence in the judicial system. The rules of habeas corpus cases do permit the dismissal of a petition on the equitable basis of laches. Yet, courts dismiss few cases on this ground. In any event, a trial on the issue of laches is as burdensome as a trial on the merits and accordingly affords no real relief from stale claims. The proposed three year statute of limitations would begin to run after the state court conviction and any direct appeal has become final.

Walker v. Wainwright[27] illustrates the need for a statute of limitations in habeas corpus cases. In *Walker*, the defendant raped a female child in 1937. Since a number of citizens had witnessed the rape, Walker entered a guilty plea and received a life sentence. In 1968, after revocation of his parole and his reincarceration, Walker filed a petition for writ of habeas corpus in federal court alleging that the state had not provided him with an attorney in the original trial and that the arresting officer had coerced him into pleading guilty. The federal court ordered an evidentiary hearing even though the records showed that Walker did have an attorney at the time he entered the plea and thirty years had passed since the entry of the plea.

Fortunately, the state located the sheriff who had arrested Walker. The sheriff was the only living witness to the events besides Walker, since both the defense lawyer and trial judge had died years earlier. At the hearing, the sheriff denied threatening Walker and testified that the charge was absurd because the state had numerous witnesses who caught Walker raping the child. The district judge denied the writ of habeas corpus, finding that Walker was not credible[28] and the fifth circuit affirmed the order.[29]

One year later, Walker filed a second petition for a writ of habeas corpus in which he alleged that his attorney in the original trial was

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[27] Walker v. Wainwright, 430 F.2d 936 (5th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971).

[28] Walker v. Wainwright, 350 F. Supp. 916 (M.D. Fla. 1970).

[29] 430 F.2d at 936.

ineffective. The state raised laches as an affirmative defense to an issuance of the writ, because trial counsel had died and, without his testimony, the state could not refute the defendant's testimony. The federal district judge held a second evidentiary hearing and, on the basis of Walker's uncontradicted testimony, granted the writ of habeas corpus. The court presumed that counsel had prejudiced Walker by pleading Walker guilty shortly after he agreed to represent him.

Due to the death of key witnesses, the state could not establish several possible explanations for Walker's guilty plea. The state could not prove that the trial judge had opposed the death penalty or that counsel had entered a guilty plea to avoid the possibility of a death sentence being returned by the jury.[30]

While the law allows dismissal of habeas corpus petitions on grounds of laches or inexcusable delay,[31] the federal courts have been

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[30] Several other cases illustrate the need for the statute of limitations section of H.R. 3416. In Griffith v. Wainwright, No. 79-6387-Civ-JLK (S.D. Fla. 1977), Griffith was convicted of second-degree murder. Ten years after his conviction was affirmed in the state courts, Griffith filed a petition for a writ of habeas corpus in federal district court. Griffith's petition raised seven grounds for relief, most of which were evidentiary in nature. The federal district court denied all seven claims Griffith raised in his petition. Griffith's appeal is now pending in the Fifth Circuit Court of Appeals, no. 80-5989.

When Griffith's case was before the state courts, he was aware of all the issues he subsequently raised in the habeas corpus petition. The proposed statute of limitations would bar such litigation of issues which could have been raised before state courts.

In Maxwell v. Wainwright, No. 77-371-Orl-Civ-Y (M.D. Fla. Dec. 6, 1977) Maxwell was convicted in 1964 of second-degree murder and assault with intent to commit murder. In 1971, Maxwell filed a habeas corpus petition in federal district court claiming ineffective assistance of trial counsel. It was dismissed for failure to exhaust state remedies. In 1973, Maxwell was paroled, but in 1977 his parole was revoked. He then filed another habeas corpus petition again complaining of ineffective assistance of counsel at his 1964 trial. The court again dismissed, without prejudice, for failure to exhaust state remedies.

It is now seventeen years since Maxwell's conviction and he has never challenged the effectiveness of his trial counsel in state courts. The federal court, rather than dismissing his case without prejudice and thereby allowing Maxwell to refile his claims again, could have barred Maxwell's 1971 and 1977 petitions under the proposed statute of limitations. Because of the passage of time, there is little likelihood the state could now successfully retry Maxwell if he were to secure a reversal of his judgment.

In Scarborough v. State, No. 80-1082-Civ-T-M (M.D. Fla. filed 1979), the defendant pled guilty on November 16, 1970 to two counts of rape. In 1979, he filed for habeas corpus relief in federal district court. The court dismissed the petition so that Scarborough could pursue another remedy in state court. In early 1980, Scarborough then filed a motion in state court alleging his incompetence due to "mental fatigue." After Scarborough appealed form the denial of this motion, he again filed a petition for writ of habeas corpus in federal court. As a ground for relief, Scarborough alleged his incompetence at the time of his pleading.

In the interim between his inital pleading in 1970 and Scarborough's latest petition, the assistant state attorney who had handled his case passed away. Without the principal witness to Scarborough's demeanor at the time of his pleading, the state is prejudiced by the nine year delay. The proposed statute of limitations would bar this stale claim.

[31] 28 U.S.C. § 2254 (1976).

quite reluctant to dismiss petitions for these reasons.[32] For example, *Paprskar v. Estelle*[33] reversed a district court's dismissal of a habeas petition on these grounds. Judge Coleman concurred specially in the reversal with the following observation:

> Of course, the Constitution is supreme and must be obeyed. I do not quarrel with that. I do find it to be painfully incongruous that he who defies all civilized notions of due process in the summary theft of human life is allowed, years after the event and years after his conviction has become final, to raise all kinds of constitutional claims which, if they existed, could have been raised at trial or, at least, soon thereafter.
>
> The fault, of course, is not with the Great Writ. It lies in the manner in which it is allowed belatedly to be invoked. While Congress has commendably made some effort to limit jurisdiction for the entertainment of these eleventh hour attacks on state court convictions *it is readily apparent to one regularly dealing with the subject that those efforts have not met with much success.*
>
> Very few belated applications of habeas corpus claim that the petitioner is innocent. The fundamental purpose of the Writ has been distorted. *The confidence of the general public in the ability of state courts to bring criminals to justice has been eroded. The deterrent effect of law prohibiting criminal conduct has been seriously damaged. The decisions say that the Writ may not be used as a second appeal, but from experience the outlaws know better.* Instead of being a bulwark of freedom for the citizen it has been allowed to become a last, and too often a sure, refuge for those who have respected neither the law nor the Constitution.
>
> I would not limit the Writ, if I could, but I most assuredly would limit its application in situations such as we encounter in this case.
>
> As I do here, I must follow the law as it exists. I do not understand, however, that I am not allowed to mention serious defects in the law.[34]

Judge Coleman eloquently states the need for some type of statute of limitations to extinguish stale claims of prisoners that sometimes succeed, not because they are meritorious, but because the passage of time prevents the state from refuting the claims.

IV. State Evidentiary Hearings

Section 3 of H.R. 3416 modifies 28 U.S.C. section 2254(d) to prevent federal courts from holding an evidentiary hearing on a factual dispute when a state court had already conducted an evidentiary hearing which fully and fairly resolved the merits of the issue. The Supreme Court and Congress agree that when a state court makes a finding of fact after a full and fair hearing, the Constitution does not guarantee

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[32] *See e.g.*, Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980); Jackson v. Estelle, 570 F.2d 546 (5th Cir. 1978); Hamilton v. Watkins, 436 F.2d 1323 (5th Cir. 1970).

[33] 612 F.2d 1003 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980).

[34] *Id.* at 1008 (emphasis added).

another hearing in federal court.[35]

In *Townsend*, Chief Justice Warren decided that a federal district judge had the discretion to hold a new hearing even when the judge concludes that "the habeas applicant was afforded a full and fair hearing by the state court . . . ."[36] Justice Frankfurter, in his concurring opinion in *Brown v. Allen*,[37] recognized that there must be some guidelines governing the necessity of hearings in district courts because, without such rules, district judges would be "free to misuse the writ by either being too lax or too rigid in its employment."[38] The proposed amendment embodied in section 3 of H.R. 3416 provides not only that a federal court need not hold a duplicative hearing but that it *shall* not hold such a hearing if the appropriate factual determination was previously made. The amendment repeals subsections (6) and (7) of 28 U.S.C. section 2254(d) to eliminate a redundancy, since subsections (1), (2), and (3) of section 2254 (d) already incorporate the same concept. The amendment rewrites subsection (6) to codify the *Jackson v. Virginia*[39] standard of review of state factual findings.

Unfortunately, many federal courts apparently regard existing legislation as permissive and insist upon holding evidentiary hearings regardless of the care of the state courts. There is no rational reason for a second hearing to determine issues of fact if the state court procedures adequately develop the facts and resolve the issues. As Justice Frankfurter noted in *Brown*, where the state court records affirmatively show no violation of an accused's rights, "[i]t certainly would make only for *burdensome* and useless repetition of effort if the federal courts were to rehear the facts in such cases."[40] Additionally, Justice Stevens in his concurring opinion to *Jackson* voiced his complaint against the unproductive labor expended in an attempt to redetermine facts—a process which amounts to nothing more than second guessing the first factfinder.[41] Of course, if the state court hearing was not a full and fair hearing, the federal district courts should intervene and determine the factual issues anew. Justice requires nothing more.[42]

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[35] Townsend v. Sain, 372 U.S. at 312-13.

[36] *Id.* at 318.

[37] 344 U.S. 443, 497 (1953) (Frankfurter, J., concurring).

[38] *Id.* at 513.

[39] 443 U.S. 307 (1979). *Jackson* declares that an applicant is entitled to habeas corpus relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

[40] 344 U.S. at 504.

[41] 443 U.S. at 337 (Stevens, J., concurring).

[42] *See e.g.*, Allen v. McCurry, 449 U.S. 90 (1980); Townsend v. Sain, 372 U.S. 293 (1963).

Jurek v. Estelle,[43] illustrates the need for a limit on federal court discretion to hold evidentiary hearings in habeas cases. Jurek was indicted for the 1973 murder of a ten year old child. At his state court trial, Jurek filed a motion to suppress confessions that he had given to the authorities shortly after his arrest. Although the Texas trial court conducted a suppression hearing, Jurek elected not to testify. The Texas trial judge found that Jurek had given the confessions voluntarily. The judge also allowed the jury to determine the voluntariness, weight, and credibility of the confessions. The jury found Jurek guilty and sentenced him to death, whereupon Jurek instituted an appeal to the Texas Court of Criminal Appeals. Jurek raised several issues including the admissibility of his written confessions. The court found that the record supported the trial judge's finding that the confessions were voluntary, and affirmed the judgment and sentence.[44] The Supreme Court of the United States also affirmed the decision after upholding Texas' death penalty statute.[45]

Jurek then filed a petition for a writ of habeas corpus in federal district court, in which he again claimed that his confessions were involuntary and thus inadmissible. The federal district judge, after reviewing the state court records and other evidence presented by the parties, ruled against Jurek, who then appealed to the United States Court of Appeals for the Fifth Circuit. In 1979, in a two-to-one decision, the court held that "under all the circumstaces, Jurek's confessions were involuntary."[46] The panel never addressed the ramifications of section 2254(d) nor was there any evidence that the state trial court did not conduct a full and fair hearing. It ordered a new trial and held that the state could not use the confessions given by Jurek in a subsequent trial.[47] Judge Coleman remarked in a vigorous dissent:

> We have never seen Jurek; we have not seen or heard any of the witnesses. The majority disagrees with the findings of all the judges and jurors who have done so and it follows its own notions of what the evidence should have established. In my opinion, such 'independent findings' are unjustified.[48]

The State of Texas filed a petition for rehearing en banc, which the court granted on June 5, 1979. On August 11, 1980, seven years after the crime, a sharply divided Court of Appeals rendered a forty-five page decision also reversing the district court's denial of the writ of habeas

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[43] 593 F.2d 672 (5th Cir. 1979), *reh'g granted*, Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, Estelle v. Jurek, 450 U.S. 1001 (1981).

[44] Jurek v. State, 522 S.W.2d 934 (Tex. 1975).

[45] Jurek v. Texas, 428 U.S. 262 (1976).

[46] 593 F.2d at 676.

[47] *Id.* at 679.

[48] *Id.* at 686 (Coleman, J., dissenting).

corpus.[49] A majority of the court found the first confession voluntary but the second confession involuntary.

This case illustrates the absolute need for a modification of section 2254(d). If federal courts are free to make an "independent determination" of questions of fact without regard to the findings made by the judges and juries who heard and saw the witnesses and notwithstanding the fact that the record supports those findings, then one must wonder why the state courts should go through the trouble of holding hearings and whether the state can ever deem any judgment as final.[50]

Beach v. Backburn[51] also illustrates the need for section 3 of H.R. 3416, particularly as it changes the wording of subsection (2) from "material facts *were not* adequately developed" to *"could not be* adequately developed." Beach was under indictment for first-degree murder and armed robbery. At his trial, Beach moved to suppress a statement he had given to the authorities in Louisiana, after his arrest in North Carolina and return to Louisiana. A hearing showed that he received his *Miranda* warnings and waived his rights to counsel and to remain silent. He then made a written admission. Beach, who did not testify at the suppression hearing, was convicted and he appealed to the Louisiana Supreme Court. On appeal, he claimed that the statement was inadmissible because he was misinformed as to when the court would appoint counsel for him. The Louisiana Supreme Court disagreed and concluded that the record of the hearing on the motion to suppress "fully support[s] the ruling that defendant understood his Fifth Amendment rights and voluntarily waived the same when he gave the oral and written statements."[52]

After he lost his appeal in the state court, Beach filed for a writ of habeas corpus in federal district court. The petition claimed that his confession was involuntary because his treatment in North Carolina rendered him incompetent to waive his rights on arrival in Louisiana. The federal district court denied the petition without conducting an evidentiary hearing because there was no support in the record for Beach's claim of mistreatment in North Carolina. The Fifth Circuit reversed the federal district court and ordered an evidentiary hearing because the state courts did not determine the effect of the alleged mistreatment of Beach upon the voluntariness of his statement.[53]

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[49] 623 F.2d at 929.

[50] See Montes v. Jenkins, 581 F.2d 609 (7th Cir. 1978), where the court effectively refused to give a state court's findings of fact the weight intended by 28 U.S.C. § 2254 and shifted the burden of showing sufficiency to the state. *See also* McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

[51] 631 F.2d 1168 (5th Cir. 1980).

[52] State v. Beach, 320 So.2d 143, 145 (La. 1975).

[53] 631 F.2d at 1168.

This case demonstrates what occurs in most habeas corpus cases filed by state prisoners. They originally attack the admissibility of a statement and receive a hearing. The state court makes a finding upon the facts presented at that time and, as here, the defendant frequently does not testify. Years later—for Beach it was six years—the petitioner alleges the statement was inadmissible and presents a new version of the facts, even though he knew or could have known of these facts at the time of the initial hearing. Since the petitioner did not present his version of the facts at the original hearing, the state court finding, which is otherwise correct, will not support a summary dismissal under section 2254(d) as it is now written. In short, the state court prisoner can always allege "new" facts and thus force the court to hold a hearing, thereby burdening the court and the state—especially when there are few, if any, witnesses remaining who remember the facts and who can refute the defendant's allegations.

This is a weakness in existing law which Congress and the courts must address. Justice and finality demand that when the state court first affords a defendant an opportunity to present all known facts relevant to the disposition of an issue, he or she must present them at that time. Thus, the habeas corpus statute should provide that a federal court's review of a habeas corpus petition should defer to the state court findings if the defendant could have developed the material facts at the trial, even if he or she actually did not develop those facts at trial. As the Supreme Court commented in *Wainwright v. Sykes*, which involved an attack an a confession not challenged in the state courts:

> A defendant has been accused of a serious crime, and this [the state trial] is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. *To the greatest extent possible all issues which bear on this charge should be determined in this proceeding*: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.
>
> We believe the adoption of the Francis rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "try out on the road" for what will later be the determinative federal habeas hearing. *There is nothing in the Constitution or in the language of §2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings.* If a criminal defendant thinks that an action of the state trial court is

> about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.[54]

Section 2254(d) will be meaningless and never ensure the finality of criminal convictions so long as a defendant can avoid it by simply not presenting factual testimony that is available and which he could have presented.

Even Chief Justice Warren, in *Townsend v. Sain*, recognized that if the habeas petitioner could have developed facts but did not, the petitioner has no right to another plenary hearing. He said: "Where newly discovered evidence is alleged in a habeas application, *evidence which could not reasonably have been presented to the state trier of facts*, the federal court must grant an evidentiary hearing . . . . If, *for any reason not attributable to the inexcusable neglect of petitioner*, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled."[55]

When Congress enacted section 2254(d) to codify *Townsend*, it created problems by leaving out of the language of section 2254(d) the qualification of *Townsend*, to wit: whether the facts "could have been developed" rather than whether the "facts were not adequately developed at the state court hearing."[56] The proposed amendment to section 2254(d) corrects this deficiency and prevents the injustices discussed above.

V. Conclusion

Justice Jackson perceived the abuses that would flourish if the courts did not confine the scope of the writ of habeas corpus and noted in his concurrence to *Brown v. Allen*: "The writ has no enemies so deadly as those who sanction the abuse of it, whatever their intent."[57] In the same case, Justice Frankfurter cautioned that the writ had the potential for evil as well as for good and that abuse of the writ could undermine the orderly administration of justice.[58] In the last twenty years, both the expansion of the writ and the manner in which the inferior federal courts have utilized it to review *de novo* state court judgments have demonstrated the truth of those predictions.

The problem with federal habeas corpus today is not so much that federal courts want to continue "reviewing" state court judgments, but that they feel obliged to do so because of the language of section 2254, which has remained unchanged over the years. The United States

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[54] 433 U.S. at 90 (emphasis added).
[55] 372 U.S. at 317 (citation omitted)(emphasis added).
[56] *Id.*
[57] 344 U.S. at 544 (Jackson, J., concurring).
[58] *Id.* at 512 (Frankfurter, J., concurring).

Supreme Court, prone to adhering to *stare decisis*, is reluctant to redefine the scope of the writ. *Congress* is the appropriate body to define the limits of federal habeas corpus review of state court judgments. This legislative body must address the abuses and assist the Court by clarifying its intent. The Court is aware of the abuses and has attempted, within the limits of its proper function, to eliminate them. If the Congress does not recognize its responsibility, then Congress, not the Court, must take the blame for the lack of finality of judgments and the continuance of current abuses.

Department of Justice

EMBARGOED FOR RELEASE
UNTIL 8:45 P.M. EST
SATURDAY, JANUARY 30, 1982

REMARKS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENEPAL OF THE UNITED STATES

TO

THE CONFERENCE OF CHIEF JUSTICES

AND

THE FIFTH ANNUAL WILLIAMSBURG SEMINAR
ON THE ADMINISTRATION OF JUSTICE

WILLIAMSBURG LODGE
WILLIAMSBURG, VIRGINIA

There is something in the air of Williamsburg -- a scent of American history -- that breathed deeply draws the mind back to the origins of this unique republic. America has not always been the great economic and military power to which we and the world have grown so accustomed. Since its beginnings, however, this Nation has always been something grander. Our country was founded upon a novel idea -- the idea of liberty. Its federalist system of government was designed to perpetuate and preserve free institutions and a free people.

Just last Tuesday night, in his State of the Union Address, the President placed renewed emphasis upon the role of federalism in our system of government. He noted: "This Administration has faith in State and local governments and the constitutional balance envisioned by the founding fathers." In recent years, however, too few federal officials have shown full faith in the other levels of government in this country -- and a recognition of the faithful governing that they do every day.

In No. 45 of The Federalist Papers, James Madison admonished:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will

> extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."

In Federalist No. 46 Madison reemphasized the same point even "[i]f...the people should...become more partial to the federal than to the State governments...." As Madison warned, "it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered."

In the nearly two centuries since the publication of The Federalist Papers -- and the adoption of our Constitution -- federal officials have too frequently thwarted valuable state and local government efforts. In its contemplation of the Supremacy Clause, the federal government has sometimes forgotten that state and local officials also swear adherence to the U.S. Constitution and often know how best to govern the affairs of their own states.

Nearly fifty years ago, Justice Brandeis wrote the following:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its

citizens choose, serve as a laboratory;
and try novel social and economic
experiments without risk to the country."

Experiments attempted by the federal government inevitably affect the entire country. Those attempted at the state level, however, present less of a risk -- what doesn't work can be more easily changed, and what does work can be taken up by other states on a broader and firmer basis.

The Reagan Administration is acting on those principles of federalism. Today, I want to outline some of the steps the Justice Department is taking to make federalism more of a reality.

Symbolic of our concern for state and local government is, for example, our new litigation notice policy. Under this Administration, the Justice Department will give prior notice to state governors and attorneys general before commencing any litigation against entities of state government. We will consult with the appropriate state officials, and we will defer to the state policy decisions whenever that is legally permissible. As a result, more potential controversies can be resolved without confrontation.

In many other ways, moreover, the Department will show greater concern and appreciation for the role of state and local government in our system. For example, our crime program has been constructed to reflect that concern.

As I mentioned in my remarks last evening, the Administration has proposed a comprehensive program to improve the federal effort in our Nation's fight against crime. The

proposed Federal Criminal Code that forms part of that program contains over 100 significant improvements in federal criminal law. In addition, the package addresses some twenty other areas of criminal justice -- and contains another forty legislative proposals and fifteen administrative initiatives.

The first goal of our crime package is to ensure full federal cooperation with state and local law enforcement -- and to direct federal resources more effectively against the different crime problems experienced in different localities. To achieve that end, I have directed each U.S. Attorney to create a Law Enforcement Coordinating Committee and to develop -- in conjunction with state and local law enforcement -- a plan that recognizes local and state criminal justice priorities. The proposed Federal Criminal Code would reenforce that commitment to state and local priorities by explicitly authorizing federal law enforcement to decline or discontinue use of federal concurrent jurisdiction whenever an offense can be effectively prosecuted by the states and there is not a substantial federal interest in the prosecution.

By employing federal resources -- including concurrent jurisdiction -- in response to the specific crime problems that are perceived to be most serious in particular localities, federal law enforcement can and will make a bigger difference in the fight against crime. Through enhanced cooperation -- for example, the Law Enforcement Coordinating Committees and the cross-designation of prosecutors in both state and federal systems -- all levels of law enforcement can begin to employ

their resources in unison and in accordance with the strengths each can contribute to the fight against crime. When there is concurrent jurisdiction, cases developed by federal, state, and local investigators could then be presented in the judicial system best suited to the facts, statutes, sanctions, and space on the dockets.

Tonight, I also want to announce another federalist initiative that will affect state judicial systems. We recognize the need for some change in the relationship between federal and state courts.

Some tend to forget that most of the judging done in this Nation is done by state -- not federal -- courts. By 1980 at least five million cases were being filed annually in the state court systems and the local courts of the District of Columbia and Puerto Rico. In fact, depending upon definition and estimation, the actual number could be more than twice that large. On the other hand, less than 170,000 lawsuits were filed in federal courts. Although there are some 17,000 courthouses in the country, less than two percent are federal courthouses.

This does not mean, however, that the federal courts are unimportant -- only that, by an overwhelming proportion, most of the legal rights vindicated in this country are vindicated in the state courts. Unfortunately, it also means that the federal courts sometimes interfere too extensively in the operation of the state court system.

One type of interference is quite familiar to all of the state chief justices in the audience -- the current

availability of federal habeas corpus for those convicted in state courts. Next week the Department of Justice will transmit to the Congress proposals to amend the habeas corpus statutes to correct abuses which have developed and restore finality to criminal convictions without undermining the protection of federal constitutional rights. Our proposals will recognize and foster the independent stature and dignity of the state courts.

The problem in this area has long been clear. Considering the availability of habeas corpus in 1970, Judge Henry Friendly was moved to paraphrase Winston Churchill. He noted that after state trial, conviction, sentence, appeal, affirmance and denial of certiorari by the United States Supreme Court, the criminal process was not at an end, or even the beginning of the end, but only the end of the beginning. There were nearly 7800 habeas filings by state prisoners in federal courts in the year ending in June of 1981. And that number fails to take account of the number of appeals filed in the federal appellate courts from denials by the federal district courts. Thirty years ago, your Conference of Chief Justices complained that federal habeas filings by state prisoners caused "inordinate delays," "grave and undesirable" federal-state conflicts and "the impairment of the public confidence in our judicial institutions." In 1953, Justice Robert Jackson expressed his concern over the "floods of stale, frivolous and repetitious petitions [for federal habeas corpus by state prisoners which] inundate the docket of the lower courts and swell our own." Although that flood reached a peak in 1970, the number of petitions filed last

year was over fourteen times as great as when Justice Jackson complained of the inundation. Of further concern, last year saw a disturbing eleven percent increase over the preceding year.

Not only is the number of filings large in itself, but it must be remembered that these are not new cases. They are cases which have already been through the state court system -- and usually through state collateral proceedings as well. The question perhaps should not be how many such filings there are but why there should be any at all. This Conference of Chief Justices itself, in a resolution adopted last August, noted that "a substantial number of duplicative, overlapping, and repetitive reviews of state criminal convictions in the federal courts unduly prolong and call into question state criminal proceedings without furthering the historic purposes of the writ of habeas corpus."

The costs of the current broad availability of habeas corpus have become clear. The continual availability of the possibility of relief has turned many prisoners into writ-writers who never confront the fact of their guilt and get on with the process of rehabilitation, but view the criminal process as an ongoing game in which they are still active contestants. The same appearance is conveyed to the public, with a consequent and deserved loss of respect for the criminal process. Questions may be raised on federal habeas corpus long after witnesses and participants have vanished from the scene, making not only response to the petition but retrial difficult. Gathering witnesses and relevant material is often expensive and time-

consuming if required long after the event in question. And, as Justice Jackson has put it, "it must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

I do not have to tell this audience that the broad availability of federal habeas corpus for those who have been convicted after a full and fair trial in state court, with appellate review, represents a serious strain on federalism. In our view, it is an excessive strain.

Our first proposal involves redetermination of matters previously adjudicated in state proceedings. Under current law there is a somewhat odd contrast between redetermination of factual issues and redetermination of legal issues. No federal evidentiary hearing is required on a factual matter determined after a full and fair hearing in state court, and state court findings are treated as presumptively correct. No similar deference exists concerning legal issues. It is as if state judges were considered adequate fact-finders but incapable interpreters of law.

In historical terms, the disparate treatment of the re-examination of factual and legal issues is a relatively recent innovation. It does not appear that a distinction of this sort was recognized prior to 1953 and the decision of Brown v. Allen. In the 1944 decision of Ex Parte Hawk, for example, the Supreme Court stated that "[w]here the state courts have considered and

adjudicated the merits of...[a petitioner's]...contentions...a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." No distinction was drawn in the statement of the rule between factual and non-factual questions.

We will propose legislative repeal of the rule requiring routine re-determination by federal courts of legal and mixed legal-factual determinations of the state courts. Where an issue -- whether factual or non-factual -- has been fully and fairly adjudicated in state proceedings, a federal court need not and ordinarily should not undertake an independent examination of the issue.

As one state appellate judge wrote in an article published last year:

> "If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable.... State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments

on federal constitutional questions where a full and fair adjudication has been given in the state court."

That is the step we will urge Congress to take. By the way, the author of the passage just quoted is no longer a state court judge. She now sits on the U.S. Supreme Court.

Our second proposal relates to claims that could have been raised in state proceedings, but were not raised at the time or in the manner required by state procedural rules. With the decision of Wainwright v. Sykes in 1977, the Supreme Court instituted a salutary reform in the standard governing the effect of such "procedural defaults," requiring proof of actual "prejudice" and "cause" justifying the default. The question of what constitutes "cause" under this standard has been the subject of considerable litigation. The question has been presented most frequently when an attorney's failure to raise a federal claim may reflect questionable judgment, but does not rise to the level of constitutional ineffectiveness. Under our proposals, lesser degrees of attorney error or misjudgment would not be recognized as adequate cause for failure to raise the federal claim in a state proceeding.

Our third proposal relates directly to the problem of finality. Under current law, habeas corpus petitions can be brought at any time, without limitation. The practical effect of this approach is that petitions are sometimes brought many years -- or even decades -- after the conclusion of state proceedings. The practical difficulties of reconstructing occurrences after so

great a span of time has elapsed are apparent. Although the habeas rules do incorporate vague notions of laches, such an approach depends on a balancing of equities, over which reasonable differences of judgment will often be possible. Hence, they presently afford no definite end to litigation.

I believe that the present approach to delayed filings in habeas corpus petitions does not accord appropriate weight to the importance of finality in criminal adjudication. Accordingly, our legislative proposal will include a limitation period applicable to habeas corpus petitions by state prisoners.

All of the issues I have discussed this evening reflect one basic point. This Administration and Department of Justice believe wholeheartedly in our Constitution and the federalist system it created. In our dealings with the states, we will exhibit a renewed federal sensitivity to the legitimate exercise of their responsibilities under the Constitution.

The great British statesman Gladstone once observed that the United States Constitution is "[t]he most wonderful work ever struck off at a given time by the brain and purpose of man." It truly is a "wonderful work." It created a multi-faceted system that restrains government from abusing its power, but allows government to exercise its powers effectively. Implicit in that document is a remarkable realism -- an understanding that no one institution, no one branch of government, no one level of government possesses all the wisdom needed to govern well.

In a speech to the Constitutional Convention, Benjamin Franklin summed up both the insight of the Pounding Fathers and the nature of our constitutional system when he said:

> "I cannot help expressing a wish that every member...doubt a little of his own infallibility."

It is time the federal government recognized its own fallibility. It is time the federal government recognized the contributions to governing America of which the states are capable. This Administration will do exactly that.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3553

JOHN BROGDON,

Petitioner-Appellant,

versus

ROBERT HILTON BUTLER, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(July 30, 1987)

Before CLARK, Chief Judge, POLITZ, and WILLIAMS, Circuit Judges.

CLARK, Chief Judge, with whom POLITZ and WILLIAMS, Circuit Judges, join concurring:

I concur without reservation or exception in the opinion of the court. I write separately to express a concern that the continued normal application of ordinary legal procedures in this type of case produces a public perception of injustice which carries the portent to undermine the foundation of our system of law.

I.

The legislature of the State of Louisiana has ordained that a crime of the type committed by John Brogdon may be punished by executing the person duly proven to have committed it. The Supreme Courts of both Louisiana and the United States have decreed that Louisiana's death penalty statute is a constitutionally permissible enactment. This inferior federal court has no control over these fundamental premises.

II.

In a legally constituted forum, before a properly selected jury, the State of Louisiana proved beyond a reasonable doubt that on October 7, 1981, John Brogdon and another tortured the life out of eleven-year-old Barbara Jo Brown. After hearing the

proof, which included John Brogdon's voluntary confession of guilt, a jury decided that Brogdon was guilty. Another jury duly decided that he should be executed.

This court's per curiam opinion recites an ensuing litany of direct and collateral review covering over five years. This is not unusual. It has become common in every capital case to see the process include conviction, sentence, appeal, execution date set, state collateral review, federal collateral review, stay, stay dissolved, successive state collateral review and successive federal collateral review. Indeed, proceedings have stretched even longer in many such cases.

III.

This court would be blind if it did not see that counsel for defendant deliberately withheld their challenges to Brogdon's sentence until the very last possible time before each of his three execution dates. It is the clear perception of this judge that Brogdon's counsel were bent on opposing his execution by confusion in addition to testing the points of law they raised. The delay this counsel action introduces into the system is only part of the problem.

IV.

The courts themselves have been slow to react to their new responsibility in today's death penalty cases. During the period when the Supreme Court of the United States interdicted capital

punishment and sorted out the constitutional propriety of statutes and trial procedures, the population of death row in many states multiplied. That dam has broken, and the rush of cases is upon the courts. Justice requires that in each instance capital punishment be imposed with maximum assurance of scrupulous legality. But, justice equally demands an assurance that such punishment be imposed when the minds of men still retain memory of the crime committed. Otherwise, capital punishment becomes a sort of second, albeit legal, crime.

V.

As the per curiam notes, this court has already moved to develop procedures to advance the time it gets adequate information on which to base its decisions in these cases. More must be done. Courts must develop ways to effectively complete direct and collateral review in far less time than now required. Expediting the review process doubtless will delay civil proceedings. That price must be paid. Counsel delays must be eliminated through sanctions, if not through persuasion. More counsel must be found who will shoulder the increased caseload. I write to plead for change to come and come quickly before respect for the law erodes beyond repair.

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

BOB MARTINEZ
GOVERNOR

FOR IMMEDIATE RELEASE
February 11, 1988

CONTACT: Jon Peck, Press Secretary 488-5394

GOVERNOR URGES FEDERAL LAWMAKERS TO PASS LEGISLATION TO SPEED UP THE CARRYING OUT OF CAPITAL PUNISHMENT SENTENCES

Governor Bob Martinez today sent letters to members of the U.S. Senate Judiciary Committee urging the passage of legislation that would speed up the carrying out of death sentences.

The Governor endorsed the Reform of Federal Intervention in State Proceedings Act of 1987 (Senate Bill 260), which would reform procedures by which federal courts can review state court criminal judgments and sentences.

"I strongly support this much-needed reform bill," Governor Martinez said. "The inordinate delays in Florida between sentencing and the carrying out of death sentences is a direct result of the language of current federal laws."

The Governor requested an opportunity to testify before the Senate Judiciary Committee to support the bill, which is also called the Federal Habeas Corpus Reform Act.

He also called on Florida law enforcement authorities, prosecutors and victims rights groups to unite in support of federal habeas corpus reform.

(MORE)

Senate Bill 260 is sponsored by a number of senators, including Sen. Lawton Chiles of Florida. The bill would set a one-year limit for state prisoners to bring federal habeas corpus actions challenging their state court convictions, once state remedies have been exhausted.

Currently, there is no time limitation for bringing a federal habeas corpus action. Such actions often are filed many years after a state court judgment has been affirmed by the U.S. Supreme Court, raising claims already considered by the state courts.

"Convicted murderers should have a reasonable opportunity to raise constitutional issues in federal courts, but the current open-ended system just encourages the stall tactics that have frustrated law-abiding Floridians," Governor Martinez said. "The people of Florida believe society's worst offenders deserve the ultimate punishment within a reasonable time after sentencing."

The Governor publicly supported federal habeas corpus reform last August when he announced new procedures for signing death warrants. The Florida Legislature passed a memorial to Congress last year also urging reform.

Attached is a copy of the Governor's letter to members of the Senate Judiciary Committee.

# # #

STATE OF FLORIDA

OFFICE OF THE GOVERNOR
BOB MARTINEZ

February 11, 1988

Honorable Lawton Chiles
U.S. Senate
250 Russell
Washington, D.C. 20510

Dear Senator Chiles:

Under the laws of Florida, I am required to sign death warrants in order to carry out our state court sentences of death. As you are probably aware, Florida has more death row inmates awaiting execution than any other state. The inordinate delays in Florida (10 years or more) between sentencing and execution of death sentences is directly attributable to the present language of federal laws governing habeas corpus.

I strongly support Senate Bill 260 (introduced by you on January 6, 1987) which would reform procedures for collateral review of state criminal judgments. I am interested in testifying in favor of this bill, and I am willing to take whatever measures necessary to ensure movement of this bill. The State of Florida has in the past and will continue to provide the Senate with numerous examples justifying reform. Reform of the federal habeas corpus laws is essential to restoring public confidence in our courts and the criminal justice system.

Please advise me as to the possibility of testifying in support of this bill. Thank you for your assistance in this very important matter.

Sincerely,

Governor

BM/gce

STATE OF FLORIDA

OFFICE OF THE GOVERNOR
BOB MARTINEZ

February 11, 1988

Honorable Joseph R. Biden, Jr.
U.S. Senate, Delaware
489 Russell
Washington, D.C. 20510

Dear Senator Biden:

The purpose of this letter is to officially notify you of my support for Senate Bill 260 governing reform of procedures for collateral review of state criminal judgments. Finality of judgment in our criminal justice system is necessary to preserve the public order and restore confidence in our system of laws. The inordinate delays and seemingly endless appeals in capital cases in Florida and elsewhere are increasing the public frustration with the federal and state judiciaries. The present substantial number of duplicative, overlapping and repetitive reviews of state criminal convictions by the federal courts are contrary to the original historic purposes of the writ of habeas corpus.

I speak for myself as well as the citizens of the State of Florida in offering support for reform of the federal habeas corpus laws. To delay action on this bill for yet another year is not in the best interest of the citizens of this country, given the present state of affairs concerning the public's escalating loss of faith in the criminal justice system.

The State of Florida wishes to be publicly heard before the Senate in support of this bill. I would appreciate being contacted regarding such an opportunity.

Sincerely,

Bob Martinez

Governor

BM/gce

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

BOB MARTINEZ
GOVERNOR

FOR IMMEDIATE RELEASE
August 13, 1987

CONTACT: Susan Traylor, Press Secretary 488-4631
Jon Peck, Deputy Press Secretary 488-5394

FOR YOUR INFORMATION

Governor Martinez is changing the procedure that he follows in signing death warrants, effective September 1.

A copy of the new procedure and comments from the Governor regarding this change are attached.

Questions regarding the way the Governor's Office reviews and handles capital punishment cases should be referred to the Governor's General Counsel Joe Spicola. His telephone number is 488-3494.

# # #

Since taking office eight months ago, I have signed 10 death warrants, eight of which have now expired without an execution. It is my belief that the court's sentence in most of those eight cases was not carried out because of obstructionist tactics against the state and the courts.

This pattern of abuses against our court system in capital cases is well-documented. It not only frustrates the public and underminds confidence in our criminal justice system but also causes a serious backlog of inmates whose sentences have not been carried out to their finality. Currently, there are 271 inmates on death row in Florida. Law enforcement experts estimate that 35 people a year will be sentenced to death by Florida courts.

Therefore, in an effort to stop unnecessary delays and restore public confidence in our judicial system, I am today altering the procedure I have followed for signing death warrants. It is my belief that the new procedure (see attached copy) will help to end the frustration of this state's interest in seeing that the sentence of the court is carried out.

I want to make it clear that I am not condemning defense lawyers who raise legitimate claims on behalf of their clients. But I do condemn the dilatory tactics and other obstructionist ploys that are being used to effectively prevent the sentences of the court from being carried out.

For example, despite the fact that I have allowed a progressively longer gap between the time of signing a death warrant and setting an execution date for each of those eight death row inmates who have received stays this year, attorneys representing the death row inmates consistently have abused the process by raising what have proven to be unmeritorious and/or procedurally defaulted claims and claims which present no new issues of law. They often wait until the last week to file these claims, confident that a stay will be granted because there will not be enough time for a judge to read the pleadings, allow the state to respond and then rule on the pleadings prior to the time of the execution.

The case of Kenneth Hardwick sets an excellent example. On May 13, I signed Hardwick's warrant. The execution date was set for July 23 -- 71 days from the time the warrant was signed. But Hardwick's lawyers waited until six days prior to the execution date to file any pleadings on his behalf. The pleadings filed raised claims that his attorneys could have been aware of for at least 10 months, yet they waited to pursue these claims in court until forced to by virtue of a death warrant being signed and they waited to file the pleadings until less than one week before the execution date.

Such tactics appear to be employed solely for the purpose of delay and often result in a disruption of the judicial process at the court where the case is being considered.

The new procedures I will follow will mean that more warrants will be signed. More warrants will mean more cases moving through the courts. That, of course will also mean that more stays will be issued. But it also will keep the pressure on attorneys representing these inmates and that should mean that cases will progress through the courts without undue delay between each stage of review. Hopefully the courts also will give these cases priority and avoid unnecessary delays.

I am convinced that these changes will revitalize the process and get it back on the right track. That should restore to the criminal justice system the public confidence which has been eroding in recent years by the seemingly endless litigation in capital cases.

I also am fully endorsing and supporting the memorial to Congress which the Florida Legislature recently passed urging federal habeas corpus reform. Now is the time for the federal system to respond and make the necessary changes. Until the federal habeas corpus act is amended, unjustified and inordinate delays in carrying out the lawful judgments of the State of Florida will occur and public confidence in the criminal justice system will continue to deteriorate.

Senate Bill 260, co-sponsored by U.S. Senators Lawton Chiles and Strom Thurmond, and U.S. Senators Hatch, Trible, D'Amato, Helms, Wilson, Grassley, DeConcini, Simpson and Nunn should correct the abuses and therefore must be passed by Congress. I applaud these and other United States Senators who are working toward the passage of SB 260 and I offer my full support and assistance towards that end. The State of Florida and its citizens are entitled to have their state court judgements and sentences honored and carried out with finality within a reasonable period of time.

The new procedures I have decided to implement are as follows:

1. As soon as the Florida Supreme Court issues its mandate following affirmance of a judgment and sentence on direct appeal, the death row inmate will be scheduled for the next clemency hearing. If a petition for writ of certiorari to the United States Supreme Court is taken by the inmate from the opinion of the Florida Supreme Court, the first warrant will be signed immediately upon denial of the petition by the United States Supreme Court, if clemency has been heard and denied. If no petition for writ of certiorari is taken or if a certiorari petition is denied before clemency is heard, then the first warrant will be signed immediately after clemency is heard and denied.

2. The first warrant will be signed 60 days before the scheduled execution date. Each subsequent warrant will set a week of execution no more than 20 days after the date of signing. Pursuant to Chapter 922, the Superintendent will set the actual date and time of execution within that week.

3. At the conclusion of each stage of litigation in which a court rules affirmatively in favor of the state, another warrant will be signed immediately.

These new procedures will take effect September 1, 1987.

BOB MARTINEZ
GOVERNOR

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

FOR IMMEDIATE RELEASE
January 21, 1988

CONTACT: Jon Peck, Press Secretary 488-5394

MARTINEZ DEFENDS DEATH PENALTY IN LETTER TO RUSSIAN DISSIDENT

Governor Bob Martinez today sent a letter in response to Andrei D. Sakharov's appeal regarding the execution of convicted killer Willie Jasper Darden.

In his letter the Governor said:

"I support capital punishment. The cornerstone of civilized society is the assumption that the group will protect each of us from the depredations of the lawless. The ultimate risk for each of us in foregoing the right to mete out individual justice is that society will not in fact protect us by imposing punishment that fits the crime. The only punishment proportionate to heinous murder is death. Thus, capital punishment is more than a matter of vengeance or deterrence; it is a necessary affirmation that collective security is an adequate substitute for private violence."

Attached are copies of the Governor's letter and Sakharov's letter regarding Willie Jasper Darden and the issue of capital punishment.

# # #

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

BOB MARTINEZ
GOVERNOR

January 21, 1988

Academician Andrei D. Sakharov
Ulitsa Chkalova, 48B
KV. 68
Moscos 107127
Union of Socist Socialist Republics

Dear Academician Sakharov:

Thank you for your letter in which you shared your views on capital punishment.

Since your intercessions to Premier Khruschev in the early 1960's, the citizens of the United States have been aware of your leadership on behalf of human rights in the Soviet Union. Your criticism of Soviet oppression, despite threats to your own safety, were watched worldwide when you received the Nobel Peace Prize in 1975. The world also watched when you were exiled to Gorky in 1980.

While it is hoped that your return to Moscow after seven years in exile and your recent meeting with Mikhail Gorbachev signal the beginnings of a more humanitarian approach to the 800 political prisoners who remain in custody in the Soviet Union, we remain skeptical that such a fundamental change in philosophy has occurred. As you said in an interview last week with Newsweek correspondents in Moscow, while conditions are better, it is not the case that the human-rights situation in the Soviet Union has improved.

Thus your efforts in the Soviet Union on behalf of these prisoners and the invasion of Afghanistan remain vital. However, your letter to me about capital punishment necessitates a clarification of the fundamental principles which govern the criminal justice system in a democratic society such as the United States.

The underlying issue here is not primarily the Darden case, but the continued viability of capital punishment. Anti-death penalty concerns have targeted the Darden case in the hopes of bringing worldwide attention to their avowed goal of abolishing capital punishment.

I support capital punishment. The cornerstone of civilized society is the assumption that the group will protect each of us from the depredations of the lawless. The ultimate risk for each of us in foregoing the right to mete out individual justice is that society will not in fact protect us by imposing punishment that fits the crime. The only punishment proportionate to heinous murder is death. Thus, capital punishment is more than a matter of vengeance or deterrence; it is a necessary affirmation that collective security is an adequate substitute for private violence.

These groups who oppose capital punishment seek to change public opinion by preying upon our moral convictions that an innocent man should should not be executed. I agree that the innocent should not be punished. However, I firmly believe Willie Darden is not innocent of the crime for which he has been sentenced to death. A jury composed of 12 citizens found him guilty and struggled with the difficult decision of whether to impose a sentence of death. The supreme role of the jury is a fundamental tenet of our American system of justice and the Darden jury's decision should not be taken lightly. Darden's case has received more judicial review than any other active capital case in Florida, and yet no court has found any grounds for reversal.

Darden was convicted and sentenced to death on January 23, 1974 for the first degree murder of Carl Turman which occurred on September 8, 1973 near Lakeland, Florida. The Florida Supreme Court affirmed Darden's conviction and sentence on February 18, 1977, and the United States Supreme Court affirmed on April 19, 1977.

Darden has had the benefit of two clemency hearings before two prior Governors of this state. His case has been reviewed six times by the Florida Supreme Court. Darden has recently asked the U.S. Supreme Court to review his case again for the fifth time. In addition, Darden's case has been reviewed by the federal district court three times; and the Eleventh Circuit U.S. Court of Appeals five times. Darden has raised every conceivable claim and has recieved exhaustive review by each and every court available in the criminal justice system.

In short, his case has been reviewed by well over 100 judges, and the United States Supreme Court specifically found that Darden's trial was not fundamentally unfair. In the words of U.S. Supreme Court Justice Burger, "at some point there must be finality."

The "new" evidence presented now on his behalf has previously been presented to the courts. The Eleventh Circuit Court of Appeals, one of the most experienced courts in these matters, reviewed this "new" evidence last year. In its opinion the court explained that the overwhelming evidence of the time of the commission of the crime is contrary to the affidavits submitted by Darden.

Furthermore, two eyewitnesses testified at trial that Darden killed Carl Turman. This strong direct evidence cannot be diluted 15 years after the fact by affidavits of persons whose memories may be influenced by compassion and moral beliefs. The Eleventh Circuit correctly found that the ends of justice did not require further review. It should be noted that in the past, the Eleventh Circuit has never hesitated to send a case back for a new trial where there was any doubt as to the constitutional validity of a judgment and sentence.

I appreciate your humanitarian concerns regarding capital punishment. However, I am convinced that it is the appropriate punishment for those relatively few individuals who choose to disregard the most sacred element of human rights, the right to life.

Just as the anti-capital punishment groups have made this case a symbol for abolition of the death penalty, I feel that I must now speak out for the citizens of this state who support the death penalty. Finality of judgment in this case is long overdue.

Sincerely,

Governor

BM/vlc

GOVERNOR OF THE STATE OF FLORIDA

BOB MARTINEZ

DEAR GOVERNOR MARTINEZ:

I ASK FOR YOUR INTERVENTION IN THE CASE OF "WILLY DARDIN" (AS HEARD), SENTENCED TO DEATH ON CHARGES OF MURDER. I AM CONVINCED THAT CAPITAL PUNISHMENT IS AN INHUMANE INSTITUTION THAT SHOULD NOT HAVE A PLACE IN A CIVILIZED DEMOCRATIC SOCIETY. INJUSTICE OR ERROR IN RELATION TO THE CONVICTED CANNOT BE REDRESSED. IT IS PARTICULARLY IMPORTANT THAT THE DEATH PENALTY NOT BE APPLIED IN THOSE CASES WHERE THERE ARE DOUBTS ABOUT THE LEGALITY OF THE SENTENCE OR THE DISINTERESTEDNESS OF THE ORGANS OF JUSTICE ON RACIAL OR OTHER GROUNDS.

I ASK YOU TO REVOKE THE DEATH SENTENCE OF WILLY DARDIN.

WITH GREAT RESPECT,

ANDREY SAKHAROV,
LAUREATE, NOBEL PRIZE FOR PEACE

Mr. GRANT. Mr. Marky. Now it is your turn.

STATEMENT OF RAYMOND MARKY, ASSISTANT STATE ATTORNEY, TALLAHASSEE, FL

Mr. MARKY. Yes, Representative Grant, I appreciate the opportunity to come and speak to the committee today and I regret that Chairman English had to leave. I am certain it was for a justifiable reason, because——

Mr. GRANT. His airplane was about to leave him.

Mr. MARKY. That is a legitimate reason. I have some perspectives that touch on much of the testimony that has been given to you this morning based on my 21 years experience dealing with habeas corpus cases.

I was the draftsman of what is essentially Senate bill 260. It originally was a Senator Chile bill back in 1982. I testified before the House, the subcommittee of the House Judiciary back in 1982 and that testimony I would like, because I was unable to do a written text because I was handling a death case this past week, I would like with the permission of the Chair to submit my previous testimony to the Judiciary Committee, because it goes into some detail which time simply will not permit.

Mr. GRANT. We can do that, without objection, if you would provide that for us?

Mr. MARKY. I certainly will.

Also, to kind of give you some idea of where I fit into all of this, I was also one of the prime authors of Florida's death penalty statute back in 1972, together with the then Governor Askew's legal staff and a select committee from the Florida Senate. I have handled over 250 Federal habeas corpus petitions in my 20 years and I have written on the subject in an article published by the then Attorney General Jim Smith in the Northwestern University School of Law Review called—it is in Ms. Hillyer's material, and it is a call for congressional reform of the Habeas Corpus Act, which is what I think the committee is concerned with today.

Let me just, rather than giving you a text, let me try to somehow pick up on some of the questions I heard in some of the testimony that was given, to shed what I consider a little bit of light on it. Some of it, of course, is at odds with testimony you have heard, but I think that might be the most intelligent thing to do.

Mr. GRANT. If you could, Mr. Marky, why do not we ask you a couple of questions?

Mr. MARKY. That is fine.

Mr. GRANT. And you can take off on those and that might be more expeditious.

Mr. MARKY. I would like to answer, if I might, I would somewhere like to get to Mr. McCandless' question regarding the function of State courts and the adequacy of that as to a need for Federal habeas corpus because that is the critical base that we are really talking about.

Mr. GRANT. Well, why do not we just start at that then and Mr. McCandless also has to catch his plane, but why do not we start with your system and why do not you tell us if you think there is a

denial of an individual's rights if appeals are pursued in the State court system as opposed to the Federal court?

Mr. MARKY. Right, it is very interesting to note, to set the tone for this, I would like to go back to 1952 which is when Federal habeas corpus took off and as you remember, Federal habeas corpus is an act of Congress, it has to be an act of Congress because Congress under article 3 establishes the jurisdiction of lessor inferior Federal courts. I mean I was somewhat amazed that there was the suggestion that Congress did not have authority to legislate in this area. It has absolute authority under its jurisdiction of the lesser inferior federal courts.

You cannot limit the U.S. Supreme Court's jurisdiction, because that is based on the Constitution, but the jurisdiction of the Federal district court, the jurisdiction of the court of appeals lies in the exclusive hands of the Congress. In fact, they cannot even appeal to a court of appeals because you have established what you call certificate of probable cause. That is a preliminary step even to taking the appeal and I find it almost hilarious that a person would suggest that.

But Justice Frankfurter in 1952 said this, in the famous *Brown* v. *Allen* case. "The writ of habeas corpus has potentialities for evil as well as for good and that the abuse of the writ could undermine the orderly administration of justice." And what we have seen in the intervening 36 years has been just that.

As to the duality of the two systems, I have three U.S. Congressmen sitting in front of me from three different States and I cannot accept and will not accept that either of you believes for one moment that your State supreme court justices lack either the intelligence or the integrity to protect the rights of individuals coming before them. The Florida Supreme Court has not flinched at reversing any case death or life when it came before them and there was a constitutional error made. We provide them with a lawyer at trial and a lawyer on appeal to raise all of their constitutional claims.

Now, the merry-go-round that comes after that is and I tell you, and history bears this out, in the famous case of *Stone* v. *Powell,* written by Justice Powell, he refused the argument, rejected the argument that State courts were incompetent to decide Federal questions and that State courts could not be trusted, he rejected that, and, in fact, it was a habeas case, and in that habeas case, they forbad an individual from raising a so-called fourth amendment claim, illegal search and seizure, that had been litigated in the State. He said we do not need Federal review over that and I would like to relate to you the reasons why Professor Bator who has written extensively, probably knows more about habeas corpus than any living man in America. He is a professor, I think at either Yale or Harvard, and he is quoted regularly by the U.S. Supreme Court.

He said when a trial, a State trial judge and a jury hears witnesses and sees the witnesses and they make a factual resolution of a matter, all that the next layer of adjudication can do—for example, Judge Sharp determining essentially the issue that a State judge has decided 10 years earlier, is disagree—it does not mean the last one was right, or the first one was wrong. I mean you can

put people together and listen and you will get different judgments, so you do not necessarily get a better or a more correct one.

In most instances, 99.5 percent of the time, it is the identical one, and when you do have a variance and they say, well, you know, he got a reversal. As Professor Goldstein said, 50 percent of the death cases are reversed, but he did not tell you 50 percent of the reversals rendered by the 11th circuit are reversed by the U.S. Supreme Court which in a sense says the Florida Supreme Court was right after all.

In other words, if we could go to the World Court in The Hague, we could probably get yet another adjudication. [Laughter.]

What I am trying to illustrate here, the point is as many courts as you go to, and an individual who has been convicted and incarcerated, he will go to as many courts as we allow him to go to. Why? Because he has got everything to gain and nothing to lose. It is ridiculous not to recognize that.

Mr. GRANT. But you do not think that the constitutional rights of an individual is, would be infringed upon simply because they had to elect to pursue the appeals through the State court system as opposed to the Federal court system?

Mr. MARKY. No, there is no question about that.

Mr. GRANT. All right. Mr. McCandless.

Mr. MCCANDLESS. No, I do not think I have anything else. I thought that the point you brought out, Mr. Markey, about the reversal of the reversal is certainly worthy of repeating that what some court level does, does not necessarily represent the final determination. We have kind of chewed on this thing for a number of hours and I do not know that there is anything else that I could ask you that might be productive for our record.

Mr. MARKY. Well, I think one thing that would be productive for the record and I would like to say on behalf of the State of Florida, because I keep hearing this frequently, why are so many inmates on Florida's death row and in Georgia and in Texas, and because they are Southern States. A gentleman from the New York Times called and asked me that one time and I said, "Well, what are you suggesting?" He said, "Well, you know, they all seem to be from the South."

And I think the answer is clear, Florida, Georgia, and Texas enacted statutes in 1972 and in 1976, the Supreme Court validated those statutes, they upheld them, so we had people on death row commencing in 1972. Ohio lost their death penalty in 1978 and had to start over again. North Carolina lost theirs in 1977, had to start over again. I believe California, if I am not mistaken lost it in 1978 or 1979 and had to start all over again, so they are only operating on 12 years and we are operating on 16 and it is not that we have, you know, we have blood dripping from our eyeteeth, or are interested in imposing the death penalty with any greater vigor than any other State. California has almost caught up with Florida and they have been operating on a shorter period of time, although, admittedly, it is a larger State, so the mere fact that we have a great many people on death row should not be construed as anything unique to Florida.

Mr. GRANT. Mr. Hastert, do you have questions?

Mr. HASTERT. I think you mentioned your contributions and I will go through this record again, but I have no further questions.

Mr. GRANT. One question of Ms. Hillyer, what is the average number of warrants signed before a capital defendant goes to the electric chair?

Ms. HILLYER. It is averaging three now, but I can give you some specific statistics.

Mr. GRANT. That is typical in other States too?

Ms. Hillyer. Well, in other States, they do not have the same system. Many States have a system where the original sentencing judge sets an execution date, not less than 60 days, not more than 90 days, then as it is stayed by a court and the stay is lifted, it is set again through that same procedure, not less than 60 and not more than 90.

Mr. GRANT. Do you ever find the State of Florida holding off on signing warrants so as not to overload the Federal or the State court?

Ms. HILLYER. Yes, that is a consideration. In Florida, traditionally Governors have not signed warrants in cases that are actively pending before courts. Governor Graham started signing two at a time towards the middle of his administration. We recently have increased the number and frequency of warrants.

Mr. GRANT. Any further questions?

Mr. MCCANDLESS. Just very quickly, Ms. Hillyer. In our previous discussion, you talked about the procedure from point of conviction to the entry of the Federal system and how the warrant in this question of procedure seemed to bring on the 11th hour legal assistance that was not available until that time and, therefore, the premise in this discussion was we need to provide during a period, if it is going to be a year or 2 years, limited appeal professional help because these individuals did not receive pro bono or other types of assistance on their own unless there is a death warrant signed, would you comment on that please, the death warrant or whatever you call the warrant.

Ms. HILLYER. Death warrant. I assume you mean provide counsel for filing a habeas?

Mr. MCCANDLESS. The people will not provide their own counsel and cannot get counsel during the year which was the example used because the death warrant has not been signed and, therefore, no one is going to step forward and take the case free.

Ms. HILLYER. Well, of course, in Florida we do have a capital collateral representative which by statute represents all death row inmates who are indigent. As to further State collateral remedies and Federal collateral remedies, recently Congress expanded the powers of the Federal courts to appoint counsel to Federal habeas cases and provide that payment be made through criminal justice funds and we, most of the circuits now, have implemented those plans.

Mr. GRANT. That was one suggestion that I think Mr. Goldstein suggested that we might should implement into a statutory requirement, as I recall, I do not want to overstate his position, but I think that is what he was saying basically.

Mr. MCCANDLESS. The idea being he was giving us these various and sundry time lines and if it took the State supreme court 5

years to decide something in one case and 18 months to decide something in another, then the cases had to be looked at individually.

However, his position was that people on death row would not have available to them counsel, and I am not speaking about Florida, I am talking about maybe some other State, because we are talking Federal law, and, therefore, he questioned the advisability of some limited time frame and that is what I was trying to get responses from as to whether you considered that to be a valid assumption or not?

Ms. HILLYER. No; there is a recent Federal fourth circuit case, and there is some other case law also, this is a Federal court, a Federal court holding that there is no constitutional right to counsel on collateral remedies, including Federal collateral remedy.

Mr. MCCANDLESS. You do not consider the argument against the time limit a valid one?

Ms. HILLYER. No, I do not. I think the time limit is the most important aspect of this legislation.

Mr. MCCANDLESS. Thank you. Thank you, Mr. Chairman.

Mr. MARKY. Incidentally, the Supreme Court of the United States back in that *Brown* v. *Allen* case said, "that period of limitation accords with our conception of proper procedure," and that was in a habeas case, and, again, going back to this notion that you cannot have time limitations, Florida has a time limitation and without it, you will not initiate a proceeding until that warrant is issued.

Mr. GRANT. What is Florida's time limit?

Mr. MARKY. Florida's time limit is 2 years from the date the judgment is affirmed by the Florida Supreme Court. Under 260, he would have 1 year to get in the Federal court after the Supreme Court finished and the reason for that is he knows all of his claims having gone through the Florida Supreme Court and since he has an attorney at all, throughout the entire proceedings, from the time he is arrested until he is executed, he has representation, either hired by himself or provided by the State of Florida.

So it just will not, it will not cut it as far as we are concerned, and I think that until there is a time limit, you are going to have this—the problem will get worse, it will not get better, and 3 years from now, you know, we will be back hearing this again.

Mr. GRANT. Thank you very much, Mr. Marky and Ms. Hillyer. We appreciate your cooperation. I would also like to acknowledge the presence of Kenneth Rouse. Ken, it is always a pleasure to see you. Jimmy Castle who is with the Florida Department of State and Jimmy is the senior attorney with the Department of State of the State of Florida. Also, Ernest Page, Jr., who is the assistant State attorney for this district of Florida and the presence of two of our sheriffs, Ken Fortune from Jefferson County and Joe Healey who is sheriff of Madison County, FL. Thank you.

If there is no further comment by the committee, this subcommittee stands adjourned subject to the call of the Chair.

[Whereupon, at 1:43 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

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