ARTICLE: STANDARDS FOR PREPARATION AND FILING OF HABEAS CORPUS PETITIONS RELATING TO CAPITAL CASES AND FOR COMPENSATION OF COUNSEL IN CONNECTION WITH THOSE PETITIONS

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Text

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2. A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim *and* became aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz (1985) 40 Cal. 3d 391, 396-397, fn. 1),* the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

2. Compensation standards

2-1. This court's appointment of counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of habeas corpus petitions and other ancillary pleadings in the California Supreme Court; (iv) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court; (v) representation in the trial court relating to proceedings pursuant to Penal Code sections 1193 and 1227; and (vi) preparation and filing of a petition for clemency with the Governor of California no earlier than after exhaustion of the initial round of collateral challenges in federal court. Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.

2-2. Appellate counsel should expeditiously investigate possible bases for filing a petition for a writ of habeas corpus. As a general rule, this investigation should be done concurrently with review of the appellate record and briefing on appeal. Requests by appointed counsel for investigation expenses shall be governed by the following standards:

2-3. On or before the date the appellant's opening brief on appeal is filed, or within 120 days after the date on which these Standards are announced, whichever is later, counsel shall file with this court a "Confidential request for expenses to investigate potential habeas corpus issues." The court will entertain an initial request filed at a later time only if good cause for the delay is shown.

2-4. The confidential request for expenses shall set out:

2-4.1. The issues to be explored;

2-4.2. Specific facts that suggest there may be an issue of possible merit;

2-4.3. An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4. If applicable, an itemized listing of the fees and expenses previously submitted to, or approved or paid by, this court in connection with the present (or any previous related) habeas corpus proceeding or investigation.

2-5. If the confidential request for expenses appears both timely and reasonable, the court will grant it in whole or in part. Except when good cause is shown, this court will not reimburse counsel for expenses that have not been previously approved by this court.

2-6. On presentation of an accounting of the fees and expenses incurred for production of the confidential request for expenses, the court will reimburse counsel up to $ 3,000 for reasonable expenses and legal fees associated with preparing that request. Prior authorization will not be required for reimbursement of these fees and expenses. Counsel may include this accounting as an attachment to the confidential request. In exceptional circumstances, counsel may request reimbursement for fees and expenses exceeding $ 3,000.

2-7. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus.

MINORITY REPORT OF STEPHEN B. BRIGHT

Whether a person is put to death for a crime should turn on a principled determination that the ultimate punishment should be inflicted, not on whether a lawyer filed a piece of paper on time. Execution is an extraordinary and irremediable penalty. Its use should be strictly limited to punishing offenders for their own conduct, not that of their lawyers.

Because I believe that we should strive to minimize the impact of lawyer error on the process, not add to it, I strongly disagree with the Task Force's recommendation of a statute of limitations. Judicial review of capital cases should protect the integrity of the process -- sanctioning punishment imposed in compliance with our Constitution, and vindicating constitutional rights when they are violated. This purpose is not served by allowing an execution to take place despite a constitutional violation because the lawyer blundered. Instead, it makes a process that did not meet constitutional standards all the more arbitrary and inequitable.

I also believe that the Task Force's recommendations regarding counsel and procedural default do not go nearly far enough to ensure compliance with the Bill of Rights in capital cases. I write separately to express my views on these matters. I will first set out some principles which are integral to consideration of each of these issues and then address, in turn, a statute of limitations, procedural default, and the provision of counsel.

1. The Constitutional Process for Imposing Death

The judicial process for selecting "the few cases in which [the death penalty is imposed] from the many cases in which it is not" [1] is supposed to be a principled one, in which those most deserving of death are identified based upon the circumstances of the crime and the background of the offender. [2] Under our eighth amendment jurisprudence, death is reserved for those who have committed the most heinous murders and are so far beyond redemption that they should be eliminated from the human community. Arbitrariness is to be avoided as much as humanly possible in this process. [3]

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[1] *Godfrey v. Georgia, 446 U.S. 420, 427 (1980)* (quoting *Gregg v. Georgia, 428 U.S. 153, 188 (1976)* and *Furman v. Georgia, 408 U.S. 238, 313 (1972)* (White, J., concurring)).

The Executive Summary, which precedes the majority's Recommendations and Report, seems misplaced as it bears little resemblance to the majority Recommendations and Report.

See Recommendation No. 13.

[2] *Woodson v. North Carolina, 428 U.S. 280, 304 (1976)* ("[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *accord* *Gregg v. Georgia, 428 U.S. 153, 197 (1976); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).*

Even if a state appoints counsel who meets the guidelines, these same penalties are exacted if the state fails to "adequately compensate counsel," including the provision of funds sufficient for investigators, experts or other services. The writer notes that this requirement of "adequate compensation" is nebulous enough to engender additional years of litigation over the collateral issue of whether the level of compensation was adequate. (*See* M.R. at 22.)

See Rule 9(a) of the Rules Governing § 2254 Cases.

[3] *See, e.g., Beck v. Alabama, 447 U.S. 625, 640 (1980); Gregg v. Georgia, 428 U.S. 153, 189 (1976).*

Noteworthy, and entirely consistent with this writer's observation, is the fact that the majority report recommends a return to the *Fay v. Noia* standard even in those cases where qualified and adequately compensated counsel is present at every stage of the proceeding.

Based on the "sound premise . . . that men incarcerated in flagrant violation of their constitutional rights have a remedy," Pennsylvania *ex rel. Herman v. Claudy, 350 U.S. 116, 123 (1956),* the Supreme Court has long held that "habeas corpus provides a remedy for jurisdictional and constitutional errors . . . without limit of time," *United States v. Smith, 331 U.S. 469, 475 (1947).* Moreover, "despite many attempts in recent years, Congress has [refused] to create a statute of limitations for federal habeas corpus actions," and the Supreme Court as recently as three years ago granted habeas corpus relief 23 years after a conviction. *Vasquez v. Hillery, 474 U.S. 254, 265 (1986).*

One would reasonably expect, therefore, that before a state in this Union executes one of its citizens, it should be able to establish that the process by which the conviction and death sentence were obtained satisfies constitutional standards. The State should be willing and able to defend on the merits any argument that the process was infected by a violation of any one of the precious guarantees of the Bill of Rights. Where a life is at stake, the state should not attempt to dodge this inquiry; it should meet it head on and establish that justice was done.

In practice, however, states successfully avoid the inquiry in one capital case after another. Death sentences may be and are carried out despite fundamental violations of the Constitution because inadequately compensated, inexperienced, and often incompetent court-appointed lawyers fail to recognize or properly preserve the issues. [4]

Remarkably, a number of jurisdictions which employ capital punishment readily concede that their judges, prosecutors and defense attorneys cannot provide a capital trial that comports with the Constitution. We were told that they cannot afford to provide competent defense counsel or that none is available. We were also told that they cannot carry out executions without the strict enforcement of procedural bars to prevent review by the federal courts of constitutional errors. [5] Now a statute of limitations is needed to speed up this process.

If it is too expensive or impractical for Alabama, Florida, Georgia, Mississippi, Texas and other states to provide competent counsel and the fairness and reliability that should accompany a judicial decision to take a human life, the solution is not to depreciate human life and the Bill of Rights, but to bring the process into compliance with the Constitution. The way to bring the system into compliance is for courts to determine whether constitutional violations are taking place. If a local trial court cannot comply with the basic safeguards of the Constitution, its power should be limited. It should not be authorized to extinguish life.

It may well be appropriate in other types of litigation for litigants to suffer the consequences of mistakes made by their chosen counsel. However, in my view, this is not acceptable in a process of deciding life and death for poor people who usually have no voice in selecting their counsel and are represented by attorneys who often lack the skill, knowledge, resources, financial incentive and willingness to protect their rights adequately. The result is simply too harsh, too inequitable and altogether inconsistent with the notion of a principled process of selecting those deserving of death based on their crime and background.

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[4] A number of examples are collected in the Task Force Report. *See, e.g.,* Report at 28 n.46, 67 n.152.

See Recommendation No. 14.

[5] For example, the Attorney General of Mississippi asked the state supreme court to begin invoking procedural bars as a means to prevent federal review after constitutional violations were found in seven of the first eight Mississippi capital cases reviewed by the federal courts. *See* Evans v. State, 441 So. 2d 520, 531 (Miss. 1983) (Robertson, J., dissenting), *cert. denied,* ***467 U.S. 1264 (1984).*** Vindication of constitutional rights in the federal courts was described by the Attorney General as a "crash upon the rocky shores of the federal judiciary." Wheat v. Thigpen, 793 F.2d 621, 626 n.5 (5th Cir. 1986) (quoting from the State's brief to the Mississippi Supreme Court in another case), *cert. denied,* ***480 U.S. 930 (1987).***

As the Supreme Court long has held in the habeas corpus context, "[c]onventional notions of finality of litigation have no place where life and liberty are at stake and infringement of constitutional rights is alleged." Sanders v. United States, 373 U.S. 1, 8 (1963). *Accord* Price v. Johnston, 334 U.S. 266, 291 (1948); United States ex rel. McCann v. Adams, 320 U.S. 220, 221-23 (1943); Salinger v. Loisel, 265 U.S. 224 (1924). In 1948, 1966, and 1976, Congress expressly rejected proposals to curb successive petitions and to incorporate some type of *res judicata* principle in habeas corpus. *See* S. Rep. 1526, 80th Cong., 2d Sess. 9 (1948); S. Rep. 1797, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3663, 3664, 3666; H.R. Rep. No. 1471, 94th Cong., 2d Sess. 5-6, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2478, 2482. It is suggested that the Task Force recommendations can be faulted for deviating somewhat from recent Supreme Court precedents limiting retroactivity and expanding procedural defaults. With respect, such criticisms seem a bit tendentious when it is considered that the Task Force proposals to impose time limits and to curb successive petitions -- which the dissenters support -- reverse numerous Supreme Court precedents, as well as congressional determinations, stretching back decades and even centuries.

This point is illustrated by the cases of Smith and Machetti, two co-defendants who were sentenced to death by unconstitutionally composed juries within a few weeks of each other in the same county in Georgia. [6] Machetti's lawyers challenged the jury composition in state court; Smith's lawyers did not. [7] A new trial was ordered for Machetti by the federal court of appeals, [8] and, at that trial, a jury which fairly represented the community imposed a sentence of life imprisonment. The federal courts refused to consider the identical issue in Smith's case because his lawyers did not preserve it. [9] He was executed.

Had Machetti been represented by Smith's lawyers and vice versa in state court, Machetti would have been executed and Smith would have obtained federal habeas corpus relief. This is not how a principled selection process should work. Unlike a state's lottery, the system for imposing capital punishment should not be a game of chance in which there are some lucky winners and some unfortunate losers, distinguished only by the luck of which lawyers they draw.

For the selection process to work properly, the accused must be provided competent counsel and the process must be held to constitutional standards. Federal habeas corpus review of capital cases is essential to protect the integrity of a process, which too often deviates from constitutional standards because of the passions and pressures of the moment. A statute of limitations is yet another impediment to the federal courts fulfilling their responsibility to interpret and enforce the provisions of the Bill of Rights. We should be removing those impediments, not constructing new ones.

II. Statute of Limitations

The Task Force recommends a statute of limitations as "a great inducement to counsel and the petitioner to litigate properly and litigate well the first time through." [10] However, dismissal, the sanction for lack of compliance with a

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[6] *See* Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), *cert. denied,* ***459 U.S. 1127 (1983).*** Women were systematically excluded from the jury pools from which Machetti's and Smith's juries were selected.

See Recommendations Nos. 13, 14, 15.

[7] Smith's trial lawyers stated in their application for clemency that they did not challenge the jury because they were unaware of the U.S. Supreme Court decision on point, Taylor v. Louisiana, 419 U.S. 522 (1975), decided only five days before Smith's trial began. Application of Smith, Ga. Board of Pardons and Paroles, at 33 (Dec. 6, 1983).

The current habeas corpus statute makes the remedy available *whenever* a prisoner "is in custody in violation of [*any* provision of] the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). *Accord* 28 U.S.C. § 2241(c)(3). The cited provisions are only the most recent codification of language adopted by Congress in the Habeas Corpus Act of 1867, which was explained in a contemporaneous Supreme Court decision as creating a judicial remedy "for *every possible* case of privation of liberty contrary to the National Constitution, treaties or laws," whose scope "is impossible to widen." Ex parte McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867) (emphasis added).

[8] Machetti v. Linahan, supra note 6.

E.g., Murray v. Carrier, 477 U.S. 478 (1986).

[9] Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir.) (Hatchett, J., dissenting), *application denied,* 463 U.S. 1344, *cert. denied,* ***464 U.S. 1003 (1983).***

See Recommendation Nos. 13, 14.

[10] Report at 45.

Compare, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 257 (1973) (Powell, J., concurring) ("history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt"); Mackey v. United States, 401 U.S. 667, 693-95 (1971) (Harlan, J., concurring in part and dissenting in part) ("adherence to precedent . . . must ineluctably lead one to the

statute of limitations -- like other sanctions for defense attorney error in the capital process -- is imposed not on the lawyer who is in control of the litigation, [11] but on the client.

The client may well have had absolutely no involvement in the selection of the lawyer or in the lawyer's failure to discharge his or her responsibilities. [12] Vindication of constitutional rights would be precluded and the client executed because of what could only be gross negligence and malpractice on the part of counsel. However, unlike the situation with most other litigants, there is no chance that one on the way to the executioner would be able to bring a successful malpractice action against the attorney who denied him his day in court.

There will be, as there have been in the past, meritorious claims that for whatever reason do not come to light until after the deadline has expired. As things now stand, courts are presented with gut-wrenching decisions about whether an imminent execution should be allowed to take place. A statute of limitations would relieve judges and lawyers of this awful burden by barring the door to the meritorious claims as well as the frivolous.

However, so long as the judicial system exacts life as a punishment, courts should continue to sort out claims that are meritorious from claims that are not. These claims may have nothing to do with "factual innocence" or "eligibility for the death penalty," but they may have everything to do with the integrity and reliability of the selection process. [13] These claims will be barred, allowing in some instances the execution of one who would not have been sentenced to death were it not for the constitutional error.

Such a draconian remedy is particularly offensive because it is not needed to get habeas corpus petitions filed or to promote public confidence in the system. Most of the chaos in the review of capital cases has been created primarily by the lack of counsel for the condemned, as the Task Force Report thoroughly documents. Execution dates have been set for inmates who have no counsel. Other inmates have been represented by counsel who were

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conclusion that it is not the principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged"); *Moore v. Dempsey, 261 U.S. 86, 87-88 (1923)* (Holmes, J.) ("what we have to deal with [in habeas corpus] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved"); ***Drake v. Francis, 727 F.2d 990, 993-94 (11th Cir. 1984),*** *on rehearing en banc, 762 F.2d 1449 (11th Cir. 1985)* (citing numerous cases) ("Thus, the role of habeas corpus is limited to consideration of challenges to the legality of a conviction; it may not be used to retry the defendant's innocence or guilt"); text accompanying *infra* note 30 (congressional understanding of habeas corpus as a remedy available irrespective of guilt). *See also Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 (1951)* (Frankfurter, J., concurring) ("The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness").

[11] There is no recommendation that the attorney be permanently disbarred for forfeiting all federal review and possibly the client's life for failing to comply with the statute.

E.g., Murray v. Carrier, 477 U.S. 478 (1986).

[12] Most of those condemned to die are "people of marginal intelligence, doubtful sanity, and debilitating poverty" who are unable to assert any control over the litigation process. Teepen, *Killing in the Name of the Law,* Atlanta J. & Const., Sept. 5, 1987, at *17*A.

E.g., Dugger v. Adams, 109 S. Ct. 1211 (1989); Smith v. Murray, 106 S. Ct. 2661 (1986).

[13] The integrity of the process is important. No one would condone a lynching, no matter how guilty or how deserving of death the person who was lynched. We should not condone a trial that falls below constitutional standards just because we believe it reached the right result. Moreover, our judgment that the result was correct may be impaired because of the very deficiencies in the process that we want to overlook.

See 21 U.S.C. §§ 848(q), 848(r) (right to compensated counsel in capital habeas corpus proceedings). Because private resources for assisting indigent persons in capital litigation are scarce, the few organizations that have such resources understandably have chosen to apply them to the narrower, not the wider, end of the funnel of cases. Consequently, what limited private resources have been available to indigent capital defendants and prisoners generally go to federal habeas corpus, rather than state trial, appellate or post-conviction, proceedings.

unqualified to handle capital habeas corpus cases. The obvious solution to this problem is to provide capable lawyers to initiate the litigation.

However, it is unnecessary to couple the provision of counsel with a statute of limitations. There are less drastic ways to make lawyers file habeas corpus petitions than extinguishing the lives of their clients if they do not. Courts may impose sanctions *on the lawyer.* Contempt, disbarment, or replacement of the lawyer who does not file on time is preferable to barring the client from the courthouse. [14]

These measures will seldom be required if counsel is provided. We heard testimony that in many jurisdictions, including Georgia, Alabama, and Kentucky, post-conviction litigation is commenced within a time agreed to by lawyers for the condemned inmate and the state. An execution date is set only if no petition if filed within that time. The same result is achieved by the rules adopted by the federal district courts in California. This approach is sensible, flexible, and serves the interest of justice.

This practice is not followed in jurisdictions where officials can promote their careers by setting execution dates which cannot possibly be carried out and then bashing the courts when stays are granted. For example, in Florida and Arkansas the governors set execution dates. The Attorney General of Arkansas candidly told this Task Force that the governor often sets execution dates to show that he is "tough on crime," even though he knows there is no possibility they can be carried out.

In this way, a governor may advance his senatorial or presidential aspirations while diverting attention from his failures on other issues. [15] This process serves to help local officials promote their careers while undermining public confidence in the judicial system. A recommendation that execution dates be set by the courts, not the governors, would do more to solve this problem than a statute of limitations. [16]

As Judge Irving L. Goldberg has eloquently pointed out, we are trading away the most precious legacy of Lord Coke, the power to discharge from custody even one imprisoned by order of the King, for one mess of pottage after another. [17] On this issue, it is recommended that interests of expediency and finality take precedence over our most cherished and most fundamental notions of justice and fairness. A statute of limitations would allow a state to carry out an unjust and unconstitutional execution in order to teach the condemned person's lawyer a lesson.

I cannot agree that this trade is a good one or that it will make judicial review of capital cases more rational and just.

III. Procedural Default

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[14] Most states take this approach with regard to appeals of capital cases. All but a few of the states that have capital punishment statutes provide for an automatic appeal of any death sentence, regardless of whether notice of appeal is filed. If the lawyer fails to file the brief on time, he or she is disciplined or replaced. The appeal is not, and cannot, be dismissed.

See Recommendation No. 1.

[15] For example, the current governor of Florida, Robert Martinez, increased the number of death warrants he signed a month from four to eight after his popularity dipped once the repercussions of his tax on services was realized by the electorate.

See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).

[16] The recommendation that a stay of execution remain in force throughout the process of post-conviction review (Recommendation No. 11) will also help solve this problem and I agree with that recommendation. However, there is no need that it be tied to a statute of limitations.

California and Ohio are exceptions to this statement and should serve as models to the other States.

[17] *Galtieri v. Wainwright, 582 F.2d 348, 375 (5th Cir. 1978)* (Goldberg, J., dissenting). *See also Bass v. Estelle, 696 F.2d 1154, 1160-62* (5th Cir.) (Goldberg, J., concurring), *cert. denied,* ***464 U.S. 865 (1983).***

See Recommendation No. 7.

For the reasons I have already discussed, I believe that procedural bars have no place in the review of cases involving the taking of life. If the process does not meet constitutional standards, an execution should not be carried out. Moreover, litigation over threshold questions of whether a procedural bar is applicable often degenerates into what have been aptly characterized as "unseemly efforts" to "pull the rug out from under" poor people because of mistakes by their court-appointed lawyers. [18] Spending time in this manner does not advance the cause of speedy adjudication, enhance public confidence in the process, or serve the interests of justice. Therefore, federal courts should decide the merits of constitutional claims in all but the most exceptional cases, where it is clearly established by the state that there was actual withholding of a claim. [19]

The Bill of Rights is not a collection of technicalities, but our most fundamental guarantees of fairness and justice. For almost 200 years we have revered these rights, protected them against enemies both domestic and foreign. Our nation is respected and emulated throughout the world because we provide these safeguards of liberty and justice to even the least among us, even those who have offended us most grievously.

On the other hand, the procedural default doctrine of *Wainwright v. Sykes, 433 U.S. 72 (1977),* and its progeny enjoys no such pedigree. It *is* a collection of technicalities. It is not the work of Jefferson, Madison, and Henry, but a twelve-year old, judicially created rule. It frustrates vindication of the principles upon which the Republic was founded. While appearing to operate equally upon all who come before the bar of justice, it falls most heavily upon the poor, who are usually defended by the inexperienced and the incompetent.

The procedural bar doctrine of *Sykes* rests upon the fiction that when a default occurs, counsel knew the applicable law and facts and made an intelligent, tactical decision with a full understanding of the consequences to the case and the client. Unfortunately, as described in detail in Chapter 2 of the Task Force Report (pp. 62-92), this fiction has no relation to reality.

Sykes is also based upon the Court's undocumented fear of "sandbagging" -- the withholding of meritorious claims by lawyers who somehow know that an appellate court will surely sustain them on appeal. However, the dismal record summarized in Chapter 2 of the Report establishes that most of the court-appointed attorneys representing indigents accused in capital cases lack the sophistication required to "sandbag." [20] An attorney whose total

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[18] *Evans v. State, 441 So. 2d 520, 531 (Miss. 1983)* (Robertson, J., dissenting), *cert. denied,* ***480 U.S. 930 (1984).***

Powell v. Alabama, 287 U.S. 45 (1932). *See also* *Gideon v. Wainwright, 372 U.S. 335 (1963)* (extending the right to counsel to all felony cases). The fact that the States have moved so slowly to implement the requirements of *Powell* and *Gideon* in capital cases explains the Task Force conclusion that significant inducements must be given the States to provide counsel. *See* Recommendation No. 6.

[19] This approach would render moot the debate between the majority of the Task Force and Chief Justice Lucas regarding whether more time would be expended litigating "cause and prejudice" or "ignorance and neglect." If the court decided the case on the merits, no time would be spent on either of these threshold questions.

See *Murray v. Giarratano, 109 S. Ct. 2765, 2772-73 (1989)* (Kennedy, J., concurring in the judgment) (there is a right to legal assistance of some sort in capital post-conviction proceedings, but the scope of that right is properly left to Congress to define); *id. at 2776-80* (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.) (constitutional right to counsel in capital post-conviction proceedings).

[20] Twelve years after *Sykes,* we have yet to receive any evidence that attorneys engage in such a practice. The Task Force quite appropriately concludes that sandbagging seldom occurs.

Compare *Carrier v. Hutto, 724 F.2d 396, 401 (4th Cir. 1983),* *adopted en banc,* *754 F.2d 520 (4th Cir. 1985),* *rev'd sub nom.* *Murray v. Carrier, 477 U.S. 478 (1986);* *Hicks v. Scurr, 671 F.2d 255, 259 (8th Cir. 1982);* *Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981);* *Runnels v. Hess, 653 F.2d 1359, 1363-64 (10th Cir. 1981);* *and* *Jiminez v. Estelle, 557 F.2d 506, 511 (5th Cir. 1977)* (all reflecting majority view among federal courts prior to 1986 that attorney ignorance or neglect -- *i.e.,* nonstrategic and nontactical defaults -- excused the failure to raise meritorious constitutional claims in prior state proceedings) *with* *Murray v.*

knowledge of criminal law is *"Miranda* and *Dred Scott"* [21] is hardly in a position to recognize and hide many constitutional issues.

But beyond these obvious limitations upon those who defend the poor in capital trials for $ 1,000 to $ 2,500 in many states, almost any lawyer is going to try to prevail in the forum where the case is, not "save" an issue for an uncertain later day in a court whose composition and receptiveness to the issue cannot possibly be calculated at the time of trial.

Finally, and most importantly, the *Sykes* rule does not encourage the states to provide competent counsel; it rewards them for providing inadequate counsel. [22] By providing inadequate counsel, [23] the state obtains two benefits from the poor representation the defendant receives: the likelihood of obtaining the death sentence is increased and any constitutional deficiencies that occur in the process may be insulated from review. [24]

For all of these reasons, federal courts should decide the merits of constitutional issues in capital cases.

Carrier, 477 U.S. 478, 488 (1986) (Supreme Court rules for first time that defendants and prisoners must "bear the risk of attorney error that results in a procedural default").

[21] Task Force Report at 68.

Compare, e.g., Fay v. Noia, 372 U.S. 91 (1963) (federal courts must hear all claims save those that the petitioner himself knowingly and intelligently waived) *with Wainwright v. Sykes, 433 U.S. 71 (1977)* (replacing *Fay's* "deliberate bypass" rule with "procedural default" rule barring federal consideration of any claim not raised in the state courts in accordance with state procedural law, unless petitioner could establish "cause and prejudice").

[22] *Sykes* overlooks which side controls the selection of counsel in cases of indigent defendants. Its rationale may well apply in the case of knowledgeable, sophisticated defendants who can afford to hire their own lawyers to protect their rights. However, a local community, outraged over the murder of one of its members, usually does not have the same incentive to protect all of the constitutional rights of the one accused of that killing. This may explain why a defendant in a capital trial in Mississippi was defended by a third-year law student who requested a moment to compose herself during trial because she had never been in court before, State v. Leatherwood, Forrest County Circuit Court No. 11831 (1986), or a defendant in a Georgia capital trial was represented by an attorney who had been admitted to the bar just a few months before trial. *Tyler v. Kemp, 755 F.2d 741, 743* (11th Cir.), *cert. denied,* ***474 U.S. 832 (1985).***

Nor, of course, can I endorse every statement in Professor Robbins' prodigious Report, although I can and must express my admiration for a document, produced under horrendous time pressure, that not only brilliantly lays the background for and explains our recommendations but also substantially advances the state of scholarship in the field.

[23] There is a vast gulf between what is expected of defense counsel under *Sykes* and its progeny and what passes for effective assistance of counsel under the Supreme Court's decision in *Strickland v. Washington, 466 U.S. 668 (1984).* For example, O. L. Collins, the Georgia defense lawyer whose entire knowledge of "criminal law" is *"Miranda"* and *"Dred Scott"* has been held to satisfy the *Strickland* standard. *Williams v. State, 258 Ga. 281, 368 S.E.2d 742, 747-50 (1988), cert. denied,* ***109 S. Ct. 3261 (1989);*** *Birt v. Montgomery, 725 F.2d 587, 596-601 (11th Cir. 1984)* (en banc); *id., 725 F.2d at 603-05* (Hatchett, J., dissenting) (the dissent would have found Collins ineffective for failing to investigate and challenge jury pools that were unconstitutionally composed). *See also* Remarks of Justice Thurgood Marshall to the Second Circuit Judicial Conference, Sept. 1988, at 1-6 ("all manner of negligence, ineptitude, and even callous disregard for the client" passes muster under the *Strickland* standard).

See Recommendation No. 11.

[24] In states which do not provide adequate counsel, it is not unusual for the state to argue that most, if not all, issues are precluded because defense counsel did not preserve them. *See, e.g., Richardson v. Johnson, 864 F.2d 1536* (11th Cir.) (three of five issues in Alabama capital case barred from consideration), *cert. denied,* ***460 U.S. 1017 (1989);*** *Whitley v. Bair, 802 F.2d 1487, 1496-1504 (4th Cir. 1986)* (all 15 issues in Virginia capital case barred from consideration), *cert. denied,* ***480 U.S. 951 (1987);*** *Cabello v. State, 524 So. 2d 313, 320-23 (Miss. 1988)* (ten issues in Mississippi capital case barred from consideration).

See Recommendation Nos. 4, 5.

IV. Counsel

The Task Force Report thoroughly documents the exceptionally poor quality of counsel for indigent persons accused of capital crimes and makes a number of excellent recommendations for improving the situation. I do not believe, however, that the recommendations are sufficient to deal with the immense problems of inadequate representation in these cases.

The states have been required to provide counsel at capital trials since the Supreme Court's decision in *Powell v. Alabama, 287 U.S. 32 (1932).* Yet just last year in Alabama, a woman was sentenced to death in a trial in which her defense lawyer was sent to jail for one night during the seven-day trial because the judge found him drunk and held him in contempt. [25] This year Alabama executed one person whose lawyer filed no appellate brief with the Alabama Court of Criminal Appeals after the death sentence was imposed, [26] and another whose trial lawyer failed to present any evidence of his mental retardation to the court that sentenced him to die. [27]

The proposed legislation included in our recommendations will not change this situation. As John M. Greacen points out in his concurring statement (pp. 222-225), the standards are not sufficiently stringent, they do not require replacement of the judge as the appointing authority, and they do not require the establishment of an organization with the responsibility of recruiting, training and assigning competent counsel to capital cases. In my view, these three elements are indispensable to making any meaningful improvement in the quality of legal representation which poor people receive in capital cases.

Standards for qualification to do a capital case should not be defined in terms of years at the bar, but with regard to counsel's actual ability to discharge the responsibilities of defending a capital case. For example, a competent attorney must be completely conversant with federal constitutional decisions of the state and federal courts in the nation. He or she also must keep abreast of developments in all of the federal circuits, the state appellate courts [28] and the writings of commentators so as to be aware of all issues that are "percolating" in those courts. This is necessary so that counsel will be aware of the "tools to construct [the] constitutional claim" [29] and will raise and

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[25] *See* Anderson, *Defense Attorney Jailed for Contempt of Court,* Daily Home, Talladega, Ala., Oct. 21, 1988, at 1; Anderson, *Judy Haney Sentencing Set for Today,* Daily Home, Nov. 18, 1988.

See Recommendation No. 12.

[26] Herbert Lee Richardson, executed August 18, 1989. Richardson's lawyer was later disbarred. *See Richardson v. State,* Ala. Ct. Crim. App. No. 4 Div. 624 (docket entries) (1978).

See Recommendation No. 10.

[27] Horace F. Dunkins, executed July 14, 1989. Although it would not bar imposition of the death penalty, mental retardation is a particularly compelling mitigating factor which could have been a basis for a sentence less than death. *Penry v. Lynaugh, 109 S. Ct. 2934 (1989).* At least one of Dunkins' jurors, upon learning of his retardation from news accounts, came forward and said that she would not have voted for death if she had known of it. *See* Applebome, *Two Electric Jolts in Alabama Execution,* N.Y. Times, July 15, 1989, at 6, col. 1.

THE FEDERALIST, No. 81, at 486 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis added).

[28] *See, e.g.,* now-Chief Justice Rehnquist's dissent in *Reed v. Ross, 468 U.S. 1, 25 (1984).* The Chief Justice would have denied Ross relief for not raising an issue at his North Carolina trial in March 1969, based on "the reasoning employed" by a lower Connecticut court and the Eighth Circuit in two cases decided in June and November of 1968. *See also Engle v. Isaac, 456 U.S. 107, 132 n.40 (1982)* (refusing to excuse counsel's failure to raise new claim because it had been litigated in some state and federal courts).

See supra note 7 and accompanying text.

present all issues long before they achieve general acceptance in the courts as required by *Sykes, Engle v. Isaac* and their progeny. [30] So long as *Sykes* and *Engle* apply procedural bars based on the assumption that this is the type of counsel the defendant has, then this is how competent representation must be defined.

Standards should also require skills in managing complex litigation and negotiations, demonstrated ability in the directions of investigations of guilt and mitigation, knowledge and experience in dealing with mental health issues, [31] writing and analytical skills as evidenced in previously written briefs and memoranda, [32] and trial advocacy skills. [33]

Standards, no matter how stringent, will make very little difference without an organization to implement them. Defender programs must be established in the states that do not have them to employ specialists which meet the

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[29] *Engle v. Isaac, 456 U.S. 107, 133 (1982).* The Court in *Engle* stated that "[e]ven those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at that time." *Id. at 133 n.41.* Thus, defense counsel must be aware of the *losing issues* being litigated in other jurisdictions in order to protect their clients' rights.

Brown v. Allen, 344 U.S. 443, 500, 510 (1953) (separate opinion of Frankfurter, J., joined by a majority of the Court).

[30] Moreover, the lawyer must be aware of the necessity of raising every one of these "percolating" issues as a federal constitutional issue even though it may be foreclosed by existing case law of the state and federal courts that have jurisdiction over the case. Otherwise, the defendant will be denied the benefit of any change in the law resulting from a new Supreme Court decision. *See* *Smith v. Murray, 477 U.S. 527 (1986).* The unmistakable lesson of *Smith* is that there is no longer any such thing as a frivolous issue -- every issue *must* be raised, no matter how hopeless at the time, unless it has been finally resolved by the United States Supreme Court.

S. Rep. No. 1526, 80th Cong., 2d Sess. (1948).

[31] The vast majority of capital cases involve questions of the mental health of the defendant. Many of those accused of capital crimes suffer from mental impairments which may have some relationship to their antisocial behavior. Future dangerousness is a statutory aggravating circumstance in some jurisdictions and a factor that is considered in many others. Mental limitations of various sorts constitute mitigating circumstances in every jurisdiction. Therefore, counsel should have some working knowledge of the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association and be conversant with other works on the subject; know the psychological/neurological/psychiatric techniques for determining and documenting brain dysfunction, psychoses, limited intellectual functioning, personality disorders, and other mental disabilities; be particularly familiar with various types of impairments resulting from trauma to the head; be knowledgeable about the various schools of thought in the psychiatric and neurological communities on controversial matters such as brain chemistry and epileptic disorders; and have experience in investigating and documenting mental health histories and working with a variety of mental health experts.

[32] Michael Millman of the California Appellate Project discussed in his testimony before the Task Force how that office utilizes written work of attorneys in assessing their qualifications for handling capital cases. In my view, a lawyer should not be appointed to capital cases unless he or she has filed briefs to state supreme courts in which all available issues were raised, fully supported by proper analysis of the governing law and applicable facts, and all contentions that could properly be supported by both state and federal authority were so supported.

[33] I would suggest the following as fundamental requirements in trial advocacy:

a. training in trial advocacy such as completion of one of the two-week sessions offered by the National College of Criminal Defense or the National Institute of Trial Advocacy;

b. after completion of such a training program, six to twelve hours of continuing legal education each year in areas related to trial advocacy and the defense of criminal cases;

c. at least five years of providing *competent* representation in civil or criminal cases; that is, representation in which the attorney filed case-specific motions and memoranda supported by the applicable law, not "boilerplates," conducted full investigations, litigated pretrial motions, examined witnesses, gave opening statements and closing arguments, submitted proposed jury instructions, and submitted letters or memoranda to the court regarding sentencing.

standards, assign them to capital cases, support local lawyers, and monitor the performance of counsel defending capital cases. Courts are not equipped to do this. [34]

The Task Force Report documents the extraordinary complexity of capital cases, and I will not reiterate that here. This complexity requires specialization. Serious tax or patent matters are appropriately handled by lawyers specializing in those areas. Persons accused of capital crimes will not receive adequate legal assistance so long as they are represented by lawyers whose practice consists mostly of wills, divorces and title searches.

We are told that some states just do not have the money to attract qualified lawyers and that in some places, particularly rural areas, there is simply no one qualified available. These considerations should not excuse lack of adequate legal representation in capital cases. There are many small communities that do not have surgeons. But this does not mean we allow chiropractors do to brain surgery in those communities.

The answer is for states to have available qualified lawyers who can try capital cases throughout the state. There are numerous instances where assistant attorneys general have come from the state capital or special prosecutors have been hired to assist in the local prosecution of a complex case. The experience of a number of states demonstrates that this approach works equally well with regard to the defense of a capital case. [35]

We should not accept the notion that states can pay to *prosecute* a capital case, but not to defend one. If one of these rural communities needs a pathologist, a hair and fiber expert, or some other expert to assist in the prosecution, [36] it will bring one in and pay what it costs to do so. [37]

It is equally if not more important that states take the same approach to ensure adequate representation and fair trials for the accused. There was a time when states did not have fingerprint experts, serologists or ballistics experts. They remedied the problem. They appropriated money for crime laboratories, sent people to the FBI Academy for training, and developed a pool of experts that could go throughout the state to investigate crime scenes and testify in local prosecutions. They can also establish defender organizations and build up a group of lawyers who can competently try capital cases.

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[34] Moreover, the Task Force heard a great deal of disturbing testimony about the extent to which political or other considerations may come into play in appointing counsel. *See, e.g.,* testimony of Senator Gary Parker ("In this state, some judges and district attorneys simply do not want vigorous and effective advocacy in capital cases. In case after case, we have seen courts appoint unqualified counsel, even where competent counsel was available."). *See also* Amadeo v. State, 259 Ga. 469, 384 S.E.2d 181 (1989) (reversing trial court which appointed two lawyers with no experience in capital punishment litigation to case instead of experienced counsel who had won a new trial for the defendant in the U.S. Supreme Court).

[35] The Task Force heard testimony from George Peach, the district attorney in St. Louis, about how public defenders who specialize in capital defense come from St. Louis and Kansas City to rural parts of Missouri to try death penalty cases. We heard about a similar program in Kentucky. Almost everyone saw the need for it where it does not exist. For example, Robert Walt, an assistant attorney general in Texas, and Caprice Cosper, an assistant district attorney in Houston, both testified about the need for such specialists for trial and direct appeal in Texas. Stephen O. Kinnard of Jones, Day, Reavis & Pogue, who chaired a special committee of the Georgia Bar which studied the problem, testified: "The best way to address the problem of trial counsel in these cases is to create a state-wide public defender office that is independent, adequately staffed and funded, and that has as its sole function the representation of all indigents accused of capital crimes."

[36] *See, e.g.,* Commonwealth v. O'Dell, Circuit Court of Virginia Beach, Va., No. D-11,413 (1985) (prosecution presented six experts on electrophoresis, including one from New York and one from Connecticut). Virginia always ranks at or near the bottom of funding for indigent defense.

[37] For example, Georgia recently paid a statistician $ 65.00 per hour to analyze a prosecutor's use of his peremptory jury strikes over a number of years to resist a claim that the prosecutor had discriminated in striking black persons. State v. Horton, U.S. District Court, M.D. Ga. Civil No. 88-46-1-MAC (WDO). Georgia has never paid an attorney $ 65.00 per hour to defend a capital case. It was discovered recently in one county in Georgia that the person who fixed the air conditioner at the courthouse was paid more per hour than any lawyer has ever been paid to defend an indigent person in that county.

What is lacking is not money, but the political will to provide adequate counsel in capital cases. Attorney General Robert F. Kennedy once said that the poor person accused of a crime has no lobby. Georgia State Senator Gary Parker told us that the Georgia legislature would never adequately fund indigent defense unless ordered to do so by the federal courts. [38] Many states have resisted even the most minimal efforts to establish programs to improve the quality of legal representation in death cases. [39] The reality is that many states, unlike California, are not going to do anything unless they are required to do so and, even then, they are going to do as little as possible. Thus, any federal statute regarding counsel will not result in any substantial improvement unless it contains specific requirements along the lines I discussed above.

No one seriously disputes that the quality of legal representation in capital cases in many states is a scandal. However, few in our society pay much attention to it because almost no one cares about those who face the death penalty. This does not eliminate our duty to correct the situation. As Justice Brennan said in another context:

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.

McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

I hope that the American Bar Association will set as its highest priority the establishment and staffing of outstanding capital defender programs in every state that does not have one and that it will relentlessly pursue this end until these programs are actually operating and providing competent representation in all jurisdictions that have capital punishment.

Conclusion

No provision of the Bill of Rights has been amended or repealed since ratification almost two hundred years ago. Ineptness on the part of a lawyer should not operate to strip away the protections of the Bill of Rights from the most important and unalterable decision made in our legal system. The system is not in balance. It is imperative that it be brought into proper balance by providing competent counsel and enforcing constitutional standards in any case where the government seeks to extinguish life.

CONCURRING STATEMENT OF JOHN M. GREACEN

I agree with the recommendations and report of the Task Force. Based upon my own experience with the topic, and on my understanding of the testimony presented to the Task Force during its three public hearings, I believe that the recommendations, when implemented, will improve and streamline significantly the process by which state death sentences are reviewed.

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[38] Senator Parker testified: "[A]lthough many of my colleagues in the legislature realize what is needed -- a centralized, truly independent capital defender office staffed by experienced capital trial counsel -- they are unquestionably unwilling, as they have demonstrated year after year, to appropriate the funds. There is simply no constituency advocating funding for indigent defense. Quite to the contrary, support for indigent defense is viewed by many in this state as being soft on crime." The Georgia legislature funded indigent defense for the first time this year. Senator Parker testified that, although fifteen to twenty million dollars is required for an adequate indigent defense system, the legislature appropriated only one million dollars for the entire state.

[39] For example, the Alabama Attorney General has successfully prevented any state funding of a resource center to assist lawyers handling capital cases in post-conviction review by asserting that if the resource center was funded it should be coupled with a major increase in funding for the Attorney General's office. The Alabama Attorney General has been particularly aggressive in exploiting inadequate representation to prevent review of constitutional errors in capital cases in that state. Mississippi and Texas have also not provided any state funds to the resource centers in their states.

I write separately to express my view that the Task Force did not recommend sufficiently stringent standards governing the qualifications of counsel to represent a defendant in capital cases in state courts. Because of the continuity of counsel principles contained in the Task Force Report, and enacted into law for federal courts (21 U.S.C. § 848(q)(8)), the state court appointment process will control all subsequent representation in the case.

The testimony presented to the Task Force has convinced me that the inadequacies of counsel appointed by state judges to handle capital cases at trial and on appeal are at the root of the problems experienced with post-conviction review of capital convictions. Capital litigation is extraordinarily complex. Many criminal attorneys appointed to handle these cases are unfamiliar with its intricacies and, consequently, make significant mistakes during trial and direct appeal. In most states, they are not provided with adequate investigative resources and are compensated so poorly that they face a strong financial disincentive to devoting the time required for effective representation.

Protracted post-conviction proceedings in state and federal courts represent an attempt to raise and resolve issues that should have been resolved during trial or direct appeal. Substantial public and private resources are being devoted to the post-conviction stage of capital case litigation -- the point at which legal efforts are least effective. We need to return the focus in capital litigation to the initial trial and appeal -- what should be the "main events" in any criminal prosecution. I do not perceive that my fellow Task Force members disagree with this assessment; they assess differently the extent that the American Bar Association should go in suggesting legislation requiring the states to provide counsel meeting certain minimum qualifications.

Some states, such as California and Ohio, have recognized the need to provide and compensate competent counsel at all stages of a capital prosecution. They have found it possible to identify sufficient numbers of defense attorneys meeting high qualification standards to assure that capital trials and appeals go forward in a timely manner. However, most states have failed to do so. In many states, judges and legislators, attentive to the public's lack of sympathy for criminals in general, refuse to spend the money needed to provide competent representation for those accused of capital crimes. The testimony presented to the Task Force demonstrated that external pressure needs to be brought to bear on state officials in order to remedy these problems. So long as they can blame the federal courts for the slow pace of executions, most state politicians appear willing to ignore the inadequacies of their own criminal justice systems.

Federal habeas corpus legislation, which appears imminent, provides an opportunity to create the external impetus required.

The American Bar Association has devoted considerable time and attention to the subject of the level of legal representation needed by a person accused of a capital offense, or sentenced to death following conviction; it has already adopted policies on the subject, in February 1985 and February 1989, which, in summary, provide for:

* two attorneys at every stage of a capital case;

* certification process, by a statewide entity, to assess the qualifications of attorneys for such cases; and

* detailed standards for such certifying bodies to use in determining the qualifications for lead counsel and co-counsel at various stages of the capital litigation process.

The Task Force decided not to incorporate the Association's previous standards in its recommendations, believing that they are too exacting to be applicable to all states. Instead, it incorporated the standards of 21 U.S.C. §§ 848(q)(5), (6), and (7) (the Anti-Drug Abuse Act of 1988) for appointment of counsel in federal post-conviction proceedings in capital cases. Those standards require five years' membership in the bar and three years' experience in the trial of felony prosecutions. There is an "escape clause" allowing the appointment of an attorney not meeting even these minimal standards if the court concludes that another attorney's "background, knowledge, or experience would otherwise enable the attorney to properly represent the defendant, with due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation."

The Task Force members were concerned that if more stringent standards were promulgated, there would be many counties throughout the country in which no practicing attorney could be found meeting the qualifications to defend a capital prosecution. However, that is the indisputable fact of the matter: in many parts of this country, particularly in rural areas, there is no practicing attorney capable of providing adequate representation to a person accused of a capital offense. The remedy is not to reduce the standards. It is rather to assure that a non-local attorney is brought in as lead counsel for such cases, and associated with a local attorney who can serve as co-counsel.

The Task Force was also concerned that new barriers not be created to make more difficult the task of finding attorneys willing to take on the representation of inmates currently on death row. The American Bar Association has long been active in the process of recruiting volunteer lawyers to take on such cases. It is certainly true that it is difficult to obtain sufficient numbers of volunteers willing to become involved in these cases at the last minute. Death penalty litigation is physically and emotionally draining. There are few attorneys who can stand the strain of continuing involvement in this sort of representation.

But this is no reason to back away from adequate standards. The only adequate long-term solution to the problem of obtaining representation for death row inmates is the creation of structured programs in each state that continually recruit and train attorneys to perform this function. Coupled with adequate compensation, this sort of structured approach can work, as Ohio has demonstrated. Qualification standards are an integral part of such structured programs.

The final reason for adopting the current federal qualification standards was doubt about the legitimacy of any arbitrary standards based upon prior experience with death cases or prior criminal felony trial or appellate practice. Task Force members point out that some lawyers without previous experience provide excellent representation, while others who have handled a number of these cases do not. Even if one believes that prior experience should be required, there is no authoritative statement of minimum experience qualifications. I agree with my colleagues that it would be inappropriate to incorporate into a federal statute the previously adopted ABA guidelines for attorney eligibility to handle capital cases. Those guidelines cover more than five pages of single-spaced type. *See* Guideline 5.1 of the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,* adopted by the ABA at the February 7, 1989 Mid-Year Meeting. (I have attached, at pages 227-236, copies of the first ten pages of those guidelines, including the provisions most relevant to this discussion.)

I believe, instead, that the critical question is the appointing authority, not the specific minimum qualifications established. If the local judge continues to make these appointments, no minimum standards will prove sufficient to assure that an adequate attorney is appointed in every case. If the appointment responsibility is vested in a body whose sole purpose is the recruitment, training and assignment of competent counsel in capital cases, I do not believe that it will be necessary to establish specific standards. State certification bodies can establish their own, appropriate to their own circumstances, but, more importantly, they can apply them in a knowing way to the attorneys practicing in their state.

The principle that appointments in capital cases should be vested in a central certifying body is set forth in Guideline 3.1 of the *Guidelines.* I believe that the protections that would arise from the functioning of such a body are more important than the contents of specific minimum qualifications that could be established nationally.

Consequently, I would urge that the following language be substituted for Section (h)(2) of the proposed legislation drafted to implement the Task Force's recommendations. My proposed language incorporates many federal qualification standards, but goes further to set forth the factors to which state appointing authorities should pay heed:

(2)(a) Such mechanism shall include a statewide appointing authority. The appointing authority for counsel at any state of a capital case shall be:

(1) a statewide defender organization, relying on staff attorneys, members of the private bar, or both;

(2) a capital litigation resource center, relying on staff attorneys, members of the private bar, or both; or

(3) a special committee, constituted by the state court of last resort, relying on staff attorneys of a defender organization, members of the private bar, or both.

(b) Members of a special committee established under (a)(3) above shall be members of the bar admitted to practice in the jurisdiction, have practiced law in the field of criminal defense for not less than five years, have demonstrated knowledge of the specialized nature of practice involved in capital cases, be knowledgeable about criminal defense practitioners in the jurisdiction, and be dedicated to quality legal representation in capital cases.

(c) The appointing authority shall:

(1) recruit and certify attorneys as qualified to be appointed to represent persons charged with capital offenses or sentenced to death as lead counsel and co-counsel;

(2) draft and annually publish rosters of certified attorneys;

(3) draft and annually publish certification standards and the procedures by which attorneys are certified and appointed. Such qualification standards shall include:

(i) demonstrated knowledge and understanding of all pertinent legal authorities regarding the issues in capital cases;

(ii) demonstrated skills in the management and conduct of complex negotiations and litigation;

(iii) demonstrated skills in the investigation of criminal cases, the background of prisoners in capital cases, and the psychiatric history and current condition of prisoners in capital cases;

(iv) for the trial of capital cases, demonstrated skills in trial advocacy, including the interrogation of defense witnesses, cross examination, and jury arguments;

(v) demonstrated skills in legal research and in the writing of legal petitions, briefs, and memoranda;

(vi) demonstrated skills in the analysis of legal issues bearing on capital cases; and

(vii) any additional standards established for representation in federal court of persons under a sentence of death.

(4) periodically review the rosters, monitor the performance of all attorneys appointed, and withdraw certification from any attorney who:

(i) fails satisfactorily to complete regular training programs on the representation of capital clients;

(ii) fails to meet high performance standards in a case to which the attorney is appointed; or

(iii) fails otherwise to demonstrate continuing competency to represent prisoners in capital litigation.

(5) conduct or sponsor specialized training programs for attorneys representing capital clients;

(6) appoint two attorneys, lead counsel and co-counsel, to represent an indigent in a capital case at the relevant stage of proceedings promptly upon receiving notice of the need for the appointment from the relevant state court; and

(7) in writing, report such appointment or the indigent's failure to accept counsel to the court requesting the appointment and to the state court of last resort.

APPENDIX TO JOHN M. GREACEN'S CONCURRING STATEMENT

GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES

GUIDELINE 1.1 OBJECTIVE

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

GUIDELINE 2.1 NUMBER OF ATTORNEYS PER CASE

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified postconviction attorneys should be assigned to represent the defendant.

GUIDELINE 3.1 THE LEGAL REPRESENTATION PLAN

The legal representation plan for each jurisdiction should include measures to formalize the process by which attorneys are assigned to represent capital defendants. To accomplish this goal, the plan should designate a body (appointing authority) within the jurisdiction which will be responsible for performing all duties in connection with the appointment of counsel as set forth by these Guidelines. This Guideline envisions two equally acceptable approaches for formalizing the process of appointment:

a. The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt standards and procedures for the appointment of counsel in capital cases consistent with these Guidelines, and perform all duties in connection with the appointment process as set forth in these Guidelines.

b. In jurisdictions where it is not feasible to centralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

i. are members of the bar admitted to practice in the jurisdiction;

ii. have practiced law in the field of criminal defense for not less than five years;

iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;

iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and

v. are dedicated to quality legal representation in capital cases.

The committee should adopt standards and procedures for the appointment of counsel in capital cases, consistent with these Guidelines, and perform all duties in connection with the appointment process.

GUIDELINE 4.1 SELECTION OF COUNSEL

A. The legal representation plan should provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar.

B. The appointing authority should develop procedures to be used in establishing two rosters of attorneys who are competent and available to represent indigent capital defendants. The first roster should contain the names of attorneys eligible for appointment as lead defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in Guideline 5.1; the second roster should contain the names of attorneys eligible for appointment as assistant defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in the same Guideline.

C. The appointing authority should review applications from attorneys concerning their placement on the roster of eligible attorneys from which assignments are made, as discussed in subsection (B). The review of an application should include a thorough investigation of the attorny's background, experience, and training, and an assessment of whether the attorney is competent to provide quality legal representation to the client pursuant to the qualification requirements specified in Guideline 5.1 and the performance standards established pursuant to Guidelines 11.1 and 11.2. An attorney's name should be placed on either roster upon a majority vote of the committee.

D. Assignments should then be made in the sequence that the names appear on the roster of eligible attorneys. Departures from the practice of strict rotation of assignments may be made when such departure will protect the best interests of the client. A lawyer should never be assigned for reasons personal to the committee members making assignments.

In jurisdictions where a defender office or other entity by law receives a specific portion of or all assignments, the procedures in (B) through (D) above should be followed for cases which the defender office or other entity cannot accept due to conflicts of interest or other reasons.

GUIDELINE 5.1 ATTORNEY ELIGIBILITY

The appointing authority should distribute assignments to attorneys who qualify under either of the alternative procedures detailed below in paragraphs I. TRIAL, II. APPEAL, and III. POST-CONVICTION.

I. TRIAL

A. Lead trial counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice;* and

ii. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and

iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

v. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

vi. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

vii. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice;* and

ii. who qualify as lead counsel under paragraph (A) of this Guideline or meet the following requirements:

a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternative Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice;* and

ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and

iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of [a] murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel. At a minimum, however, appellate co-counsel candidates must demonstrate to the satisfaction of the appointing authority that they:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice;* and

ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and

iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

III. POSTCONVICTION

Assignments to represent indigents in postconviction proceedings in capital cases should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice;* and

ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as postconviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the postconviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel *also* possesses appellate experience at the level described in II.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to

the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

GUIDELINE 6.1 WORKLOAD

Attorneys accepting appointments pursuant to these Guidelines should provide each client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

GUIDELINE 7.1 MONITORING; REMOVAL

A. The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, the attorney should not receive additional appointments. Where there is compelling evidence that an unalterable systemic defect in a defender office has caused a default in the basic responsibilities of an effective lawyer, resulting in prejudice to a client's case, the office should not receive additional appointments. The appointing authority shall establish a procedure which gives written notice to counsel or a defender office whose removal is being sought, and an opportunity for counsel or the defender office to respond in writing.

B. In fulfilling its monitoring function, however, the appointing authority should not attempt to interfere with the conduct of particular cases. Representation of an accused establishes an inviolable attorney-client relationship. In the context of a particular case, removal of counsel from representation should not occur over the objection of the client.

C. No attorney or defender office should be readmitted to the appointment roster after removal under (A) above unless such removal is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

GUIDELINE 8.1 SUPPORTING SERVICES

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Guidelines with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase.

GUIDELINE 9.1 TRAINING

Attorneys seeking eligibility to receive appointments pursuant to these Guidelines should have completed the training requirements specified in Guideline 5.1. Attorneys seeking to remain on the roster of attorneys from which assignments are made should continue, on a periodic basis, to attend and successfully complete training or educational programs which focus on advocacy in death penalty cases. The legal representation plan for each jurisdiction should include sufficient funding to enable adequate and frequent training programs to be conducted for counsel in capital cases and counsel who wish to be placed on the roster.

GUIDELINE 10.1 COMPENSATION

A. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

B. Capital counsel should also be fully reimbursed for reasonable incidental expenses.

C. Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan.

GUIDELINE 11.1 ESTABLISHMENT OF PERFORMANCE STANDARDS

A. The appointing authority should establish standards of performance for counsel appointed in death penalty cases.

B. The standards of performance should include, but should not be limited to, the specific standards set out in Guidelines 11.3 through 11.9.

C. The appointing authority should refer to the standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Guideline 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Guideline 7.1).

GUIDELINE 11.2 MINIMUM STANDARDS NOT SUFFICIENT

A. Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.

B. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

DISSENTING STATEMENT OF WILLIAM B. HILL, JR.

I am very troubled by so many of my colleagues' recommendations contained in their Recommendations and Report of the ABA Task Force on Death Penalty Habeas Corpus dated November 1, 1989, such that I cannot lend my name in support of that report or its recommendations as written. [1] I must, therefore, note my dissent and I am hopeful that my colleagues have honored my simple request of indicating my position by placing a small asterisk next to my name along with the single work "dissent" at the bottom of page two of the 360 plus page Recommendations and Report.

My understanding was that the purpose of this almost year long endeavor was to ultimately propose *workable* recommendations to the often-times protracted, repetitious and confusing state of post-conviction review in capital cases. From my perspective of twelve years experience in the litigation of capital cases at the trial, appellate, state post-conviction and federal post-conviction levels, the operative word was "workable" recommendations. Absent a constant vigil, it is so easy for any sincerely committed endeavor to be seduced away from the assigned task of proposing solutions to problems, in favor of the always more fulfilling exercise of cavalierly reshaping reality to fit the participants' perceptions of fairness or even right and wrong. I dare say that the majority report opts for the latter course of action as opposed to discharging its assigned task of proposing recommendations that are "workable" in the legal reality that presently exists.

Notwithstanding protestations to the contrary, the majority report is grounded upon three assumptions with which I do not agree. The majority report assumes, initially, that it is the rare and seldom repeated circumstance where

competent qualified defense counsel is appointed at the state trial. Second, the majority report assumes little or no deference is due the state capital proceeding as state trial, appellate and post-conviction courts cannot be relied upon to adequately safeguard a capital litigant's constitutional rights. Third, the majority report assumes that only by depriving the states of procedural bars and defenses, *i.e.,* the contemporaneous objection rule, procedural default, the exhaustion doctrine, and simultaneously expanding the scope of federal habeas corpus review and the role of federal courts can there be any assurance of adequate constitutional review of capital cases. These assumptions are often repeated and are evident upon a fair reading of the majority's Recommendations and Report.

It is with this mindset that the majority report unrealistically proposes sweeping federal statutory changes. These proposed changes, notwithstanding contrary representations, afford no benefit to states with capital punishment statutes, but rather in fact exact a penalty on such states. The majority report recommends that only "for good cause," (majority report at 21, proposed amendment to *28 U.S.C. § 2254)* presumably to be demonstrated by the state court, may the state court appoint an attorney at trial who has been admitted to practice less than five years and with less than three years felony trial experience or may the state court appoint on appeal an attorney admitted to practice in the state court of last resort less than five years and with less than three years felony appellate experience. Any appointment in violation of these proposed guidelines, notwithstanding the quality of actual representation at trial or on appeal, results in an automatic penalty to be exacted upon the state, *i.e.,* on federal review the state shall not be allowed to avail itself of any defense or response based upon the contemporaneous objection rule, procedural default, the exhaustion doctrine nor may the state assert the presumption of correctness of any factual finding made by the trial or appellate court. [2] (M.R. at 15 and 23, proposed amendment to *28 U.S.C. § 2254.)*

If states fail to appoint and adequately compensate counsel in state post-conviction proceedings, including applications for writs of certiorari filed in the United States Supreme Court, the penalties discussed above are again imposed. As should be apparent to any government attorney who has litigated a state post-conviction proceeding, if there is to be afforded no presumption of correctness of the state post-conviction court's factual determinations, there exists no reason to engage in state post-conviction review. The majority report is not unmindful of this result. Notwithstanding very recent United States Supreme Court precedent to the contrary, the majority report recommends that the federal government *force* upon states the obligation of appointing and compensating post-conviction counsel in capital cases or suffer the complete gutting of state post-conviction review in all capital cases.

With regard to the concept of procedural default and the contemporaneous objection rule, as they relate to any claim of constitutional dimension, even in those cases where "qualified" and "adequately compensated" counsel is appointed, the majority report recommends that the United States Congress reverse current United States Supreme Court precedent and abandon the cause and prejudice standard of *Wainwright v. Sykes,* and return to the knowing waiver standard of *Fay v. Noia.* (M.R. at 27-34, proposed amendment to *28 U.S.C. § 2254.)* Under the majority report's recommendation, if the failure to timely present a claim in the state court can be demonstrated by the petitioner to have resulted from the "ignorance or neglect of the prisoner or counsel," there shall be no bar to litigating that claim on the merits in federal court. The proposed abandonment of the fairer, more objective, cause and prejudice standard for this proposed more subjective standard, which standard relies for its evidentiary development upon information exclusively within the providence and control of the petitioner and petitioner's counsel, cannot be justified by any argument grounded upon the concept of fairness. The obvious purpose of the recommended return to the knowing waiver standard of *Fay v. Noia,* which standard has been rejected in case law, is to eradicate the concept of procedural default in capital litigation, thereby protracting by years the length of time involved in post-conviction review. [3]

The majority report recommends expansion of the role of federal courts in capital post-conviction review without also addressing a problem frequently discussed while formulating their Recommendations and Report. Statistics compiled by the Ad Hoc Committee chaired by former Associate Justice Lewis F. Powell, Jr. reflect that based upon a review of 50 cases from Florida, Texas, Alabama, Mississippi and Georgia, of total time spent in collateral review, 20% (9 months) is spent in the state courts. 80% (38 months) of the time spent in collateral review of capital cases is spent in federal court. Notwithstanding this fact the majority report boldly recommends that district court judges

assume the additional burden of holding mixed capital petitions in abeyance (M.R. at 34-37, proposed amendment to Rule 4 of the Rules Governing § 2254 Cases), thereby extending even further the time these cases lie within the breast of the federal courts. The majority report, however, sheepishly fails to offer even a lukewarm recommendation that the federal courts afford some attention to more expeditiously disposing of these cases. Surely, if the majority report had not been seduced from the assigned task of proposing "workable" recommendations to shorten and make fairer the now protracted nature of this litigation, even a timid and gingerly worded suggestion for expeditiousness should have been forthcoming.

The majority report recognizes the new accepted practice of filing abusive and successive petitions in capital cases, yet the majority report proposes statutory enactments which encourage, rather than discourage, this course of conduct. The majority report accomplishes this end by recommending expansion of those "exceptions" under which abusive claims can be considered on their merits (M.R. at 48-50, proposed amendment to *28 U.S.C. § 2244*(b) and Rule 9(b) of the Rules Governing § 2254 Cases). Additionally, the majority report proposes that the Congress overturn *Teague v. Lane,* thereby guaranteeing review of belated claims presented on second, third, fourth and even fifth petitions so long as the petitioner can identify "new law" to which a litigant can claim entitlement of its benefits.

What is the *quid pro quo* which makes these recommendations "workable?" What is it that the states would receive in return for the appointment of qualified adequately compensated counsel at trial, on appeal and the additional responsibility of affording adequately compensated counsel on certiorari, in state post-conviction proceedings, the forfeiture of the procedural default doctrine and their contemporaneous objection rules and a relaxation of the federal rules governing successive and abusive petitions? The response is nothing.

The majority report's recommendations regarding time requirements (M.R. at 42-48, regarding a one year time period within which the federal petition must be filed) and its recommendations regarding mandatory stays of execution (M.R. at 37-41, authorizing any federal district court that would have jurisdiction over the federal petition, if filed, to issue a continuing stay of execution to remain in effect while the petitioner litigates in state court) afford no *quid,* consideration or benefit to any state possessed of a capital sentencing statute. All noteworthy benefits in the majority's recommendations and report flow to the defendant/prisoner litigant.

It is because of this state of affairs, *i.e.,* the formulation and presentation by the majority report of a capital defendant's/petitioner's "wish list," as opposed to the presentation of a listing of recommendations possessed of some real possibility of acceptance and implementation, that I am compelled to dissent from the Recommendations and Report as written.

SEPARATE STATEMENT OF JAMES S. LIEBMAN

The Task Force recommendations invite Congress to limit habeas corpus in four significant and in some cases unprecedented respects. First, the recommendations ask Congress to add a statute of limitations [1] to a remedy that the courts and Congress heretofore have refused to time-constrain, based on the view that, absent bad faith nonprosecution, [2] persons deprived of their liberty or life in violation of fundamental, constitutional law ought to have a ready means of redress. [3] Second, the recommendations move in the direction of adding a *res judicata* bar [4] to a remedy that, for similar reasons, has long been understood to protect any prisoner who could establish -- even if on the second or third try -- that the state has incarcerated or condemned him in violation of fundamental law. [5] Third, in a couple of places, the Task Force recommendations [6] tacitly endorse the principle, contrary to longstanding congressional edict, that some parts of our fundamental, constitutional law are less fundamental than other parts, hence not enforceable in habeas corpus. [7] Fourth, tracking a view that a bare majority of the Supreme Court has advanced over the last three years, [8] but that the Court theretofore had rejected and that Congress never has endorsed, the recommendations [9] in some places predicate a prisoner's access to the habeas corpus remedy on the federal courts' second-guessing of a jury's and the state courts' determination of a defendant's *factual* guilt under *state* law, rather than on the legality of the prisoner's incarceration or execution under fundamental *federal* law. [10] That the Task Force proposes to reserve these novel limitations on the Great Writ for

cases in which the most is at stake -- not only a person's liberty, as in all habeas corpus cases, but also his life -- makes the limitations all the more consequential.

The limitations have three goals or effects. They (1) accelerate the habeas corpus review process by adding time constraints, (2) shorten the process somewhat by limiting second and successive petitions, and (3) narrow the scope of the remedy the process affords by recognizing a hierarchy of constitutional rights only some of which are fully protected in habeas corpus and by making "factual innocence" a predicate to certain aspects of the habeas corpus remedy. In this way, the Task Force has responded to the view advanced by a number of persons who testified in our hearings that the existing habeas corpus remedy unduly undermines the States' ability to execute judgments of death swiftly and often enough.

The Task Force also heard testimony, which came closer to reflecting a consensus view than anything else the Task Force heard, that the current process of imposing and reviewing capital convictions and sentences is unfair because the States have been unwilling to provide capital defendants and prisoners with trial, appellate and post-conviction attorneys who have the minimal qualifications, exercise the minimal competence, and receive the minimal level of compensation necessary in complex capital litigation. At the same time, the Supreme Court increasingly has insisted that the federal courts on habeas corpus review bar their doors to meritorious claims of illegality and unconstitutionality that have not been preserved with the scrupulousness and legal acumen that only highly qualified and competent and fully compensated lawyers can hope to muster. [11] As a result, men and women are being executed without having had either a fair trial -- that is, a trial conducted in accordance with the fundamental law of the land -- or a review process capable of redressing the trial's unfairness. [12] Especially given that adequate counsel now is far more likely to be available in capital habeas corpus than in other parts of the process of imposing and reviewing death sentences, [13] proposals to shorten, quicken, and narrow *that* part of the process do not bode well for the overall fairness of our system of capital punishment.

The question I consider here, therefore, is whether the Task Force has succeeded in developing a substitute review procedure that -- albeit at the cost of substantially distorting the time-tested remedy of habeas corpus -- not only is shorter, quicker, and narrower but also fairer.

The Task Force adopts two fairness-oriented proposals. First it adopts modest standards relating to the qualifications -- but not, it should be noted, the competence -- of counsel in capital cases. [14] It is regrettable that this American Bar Association Task Force has decided not to adopt the ABA's own *minimum* standards for lawyer qualifications, competence and compensation in capital cases [15] because of a near unanimous view among Task Force members that many of the States that are committed to capital punishment nonetheless will not commit the resources necessary to carry out the punishment in a manner that the nation's premier legal association considers *minimally* fair. [16] Second, and in my view more important, the Task Force proposes that the federal courts take cognizance in the newly streamlined habeas corpus process of meritorious claims of fundamental, constitutional error that were not properly preserved in the state courts because of attorney ignorance or neglect. [17] The logic of this proposal is clear: Acknowledging that it is too costly to require the States to provide qualified, competent and adequately compensated counsel to indigent defendants and prisoners in some state capital proceedings, there must be a safety valve for constitutional claims that adequate counsel would have caught and redressed in the state courts but that the lawyers who actually were provided did not catch or redress due to "ignorance or neglect."

How fundamentally do *these* two proposals change existing law? The provision calling for counsel at capital trials merely implements a requirement that the Supreme Court imposed in the first Scottsboro case in 1932. [18] The extension of that right to state post-conviction proceedings merely implements the view of a majority of the Supreme Court this past Term that there is a right to some kind of meaningful legal assistance in capital post-conviction proceedings. [19] The provision of a habeas corpus remedy in capital cases for valid claims of constitutional error that prior counsel ignorantly or negligently failed to present in prior proceedings would simply return the law in *capital* cases to where the law was in *all* cases three years ago [20] -- and would leave the remedy considerably less open to so-called "procedurally defaulted" claims than it was as recently as 1977. [21]

The Task Force recommendations attempt to accommodate not only the divergent view of its ten members but also the two generally opposing positions that animated our hearings, namely, that the capital review process should be sped up and that it should be made more fair. The accommodation we reached is not the one that I would have designed on my own, nor, probably, that any of my colleagues would have designed on his or her own. [22] For my part, the recommendations require too much in the way of shortened, quickened, and narrowed capital review procedures -- namely, the fourfold abridgement of the Great Writ described above -- and too little in the way of enhanced fairness -- namely, the implementation or restoration of rights assumed to be in existence as long ago as fifty-seven years. Nonetheless, except in one respect, I join the recommendations. I do so because of the importance of reaching some kind of consensus about how to reform a highly controversial process that few people think works well at present and because the proposal goes a good way towards satisfying at least some of the important concerns of nearly all of the participants in the debate over capital review procedures: The proposed process certainly would be quicker and somewhat shorter than the current process; likewise, it may be fairer. Moreover, the proposal's least controversial aspects -- those dealing with stays of execution, [23] continuity and early appointment of post-trial counsel, [24] certificates of probable cause, [25] and the avoidance of procedurally forced successive petitions [26] -- and should help make the process less chaotic both in reality and as it appears to the public.

The one respect in which I cannot go along with the Task Force proposal is its endorsement of a role for federal judicial assessments of guilt or innocence in habeas corpus proceedings. Over 200 years ago in *The Federalist Papers,* Alexander Hamilton explained the critical but limited role the Constitution contemplated that federal courts would play in the delicate process of reviewing the judgments of state courts. According to Hamilton, the federal courts should step in when -- and only when -- because of "the prevalency of a local spirit," state judges, "holding their offices during pleasure or from year to year [might be] too little independent . . . to be relied upon for the inflexible execution of the *national laws.*" [27] Moreover, when the nation for the first time extended the most fundamental aspects of its "national laws" -- namely, the Bill of Rights -- to the States through the enactment of the fourteenth amendment, Congress simultaneously extended the writ of habeas corpus to state prisoners so that they would have available a federal judicial remedy wherever they were deprived of their liberty in violation of *"the Constitution or laws of the United states."* [28] As the Framers of both the Constitution and the fourteenth amendment understood federal judicial review of state decisions, therefore, the federal courts could and should review decisions of the state court -- and indeed, could and should have the "final say" when they did so [29] -- but *only* as to the state courts' interpretation of *national law,* and not, for example, the state courts' treatment of either state law or of an individual's guilt or innocence under that state law.

When innocence tests are utilized in habeas corpus, therefore, they turn the remedy on its head: Not only do such tests offend the notion that national rather than local courts should have the final say in regard to the application of "national law" to all citizens, innocent or not; in addition, innocence tests offend the notion that the state courts should have the final say over the resolution of factual matters relating to the application of their own criminal laws. As the Senate Judiciary Committee explained the last time Congress comprehensively recodified the habeas corpus laws:

[H]abeas corpus is . . . not a determination of guilt of innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right . . . has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial. [30]

In this fundamental respect, I would leave habeas corpus and indeed the basic constitutional structure of federal judicial review of state court decisions as it has been from the beginning. On this one point, therefore, I respectfully disagree with my fellow Task Force members.

December 14, 1989

Mr. Sheldon Krantz

Chair, Criminal Justice Section

American Bar Association
2378 Presido Drive
San Diego, CA 92103

Re: American Bar Association

Task Force on Death

Penalty Habeas Corpus

Dear Mr. Krantz:

As co-chairman of the Task Force, I wish to record my dissent from the changes in the Task Force Report made with regard to the qualifications of counsel. My experience as a federal district judge, as a federal circuit judge, in the public hearings held by the Task Force, and in its internal discussions convince me that the standards for the appointment of counsel simply cannot be met in most of the death penalty states, and that the result of this recommendation may be rejection of the entire work of the Task Force.

The Task Force members reflected a diversity of backgrounds and experience. The final report embodies a delicate compromise of views strongly opposed and firmly believed. Taken as a whole, however, it represents a vast step forward toward making the trial, appellate, and post-conviction proceedings in capital cases more just, more fair, and more efficient. The amendment adopted by the Criminal Justice Section tilts the scale, however, and, therefore, for both philosophical and pragmatic reasons, I cannot join in it.

Sincerely,

[SIGNATURE ILLEGIBLE]

November 24, 1989

Mr. Sheldon Krantz
Chair, Criminal Justice Section
American Bar Association
2378 Presido Drive
San Diego, California 92103

RE: American Bar Association Task Force on Death Penalty Habeas Corpus

Dear Mr. Krantz:

As a member of the above Task Force I write to register my dissent from its Recommendations and Report.

I had not intended to write separately and so advised Ira Robbins and Tom Smith. However, the amendment adopted by the Criminal Justice Council at its recent meeting compels me to reconsider my initial position.

Although I disagree with some of the views expressed in Chief Justice Lucas' November 1, 1989 Minority Report, e.g., on automatic stay and automatic appeal, Lucas Report at 14-17, I agree with most of his views. I therefore concur in his Minority Report and ask to be so recorded.

Sincerely,

BAREFOOT SANDERS

December 18, 1989

Mr. Sheldon Krantz

Chair, Criminal Justice Section

American Bar Association

2378 Presido Drive

San Diego, California 92103

Re: American Bar Association Task Force on Death Penalty Habeas Corpus

Dear Mr. Krantz:

As a member of the Task Force who originally voted in favor of the majority report, I write to voice my concerns about the final report and recommendations as amended by vote of the Council on November 5, 1989.

The study by this Task Force was a dedicated endeavor to produce a practical and attainable plan that would truly reduce habeas problems including delay, that would improve the quality of habeas litigation counsel, that would eliminate some unnecessary complexity in habeas litigation and that would expedite some cases where appropriate. Our members brought a myriad of varied backgrounds, experiences, preferences, priorities and prejudices to this study. The final majority report resulted in recommendations that culminated in a sensitive and delicate balancing and compromising of many of these competing factors and interests. In my opinion, the final product represented an extremely fragile compromise among the majority members.

I sincerely believe that the majority compromise was struck because of the importance of the task and the pressing need for a significant improvement in death penalty habeas litigation. However, the amendment by the Council of the Criminal Justice Section of November 5, 1989, has destroyed that delicate compromise and has rendered impractical and unattainable the final recommendation to be voted on by the House of Delegates.

The ABA Standards for Appointment of Counsel in Capital Case litigation create a model that each state should strive to achieve. At present, most of the evidence on this point presented to the Task Force would suggest that the ABA Counsel standards are not attainable. To make compliance with these standards a condition precedent to the imposition of any death sentence will spawn endless litigation and may effectively eliminate capital punishment.

After a long and careful review of this issue and in recognition of the impractical and unattainable nature of the ABA Counsel standards, the majority voted in favor of the Biden Bill (1988 Anti-Drug Abuse Act) counsel standards. This vote was crucial to the majority recommendations.

All of the subsequent news releases by the ABA appear to advance the amended recommendations of the Task Force as the concensus of a majority of its members. If an ABA Delegate reads the fine print, he or she may discover otherwise. My concern is that the ABA House of Delegates is now called upon to vote on amended recommendations of the Task Force which a majority of the Task Force members did not favor and in fact voted down. However, the manner in which this is being presented seems to suggest that this final product was and is the majority view of the Task Force. In view of this turn of events, and after having conferred with other members of the Task Force who voted in the majority and who share this concern, I must respectfully join Judge Barefoot Sanders in supporting the Minority Report of Chief Justice Lucas. I therefore concur in that minority report and ask to be so recorded.

Sincerely,

Donald W. Stephens

Resident Superior Court Judge

Tenth Judicial District

State of North Carolina

November 24, 1989

Sheldon Krantz
Chairperson, Criminal Justice Section
American Bar Association
1140 Connecticut Avenue, N.W., Suite 1140
Washington, D.C. 20036

Dear Chairperson Krantz:

We write to formally record our dissent to the action of the American Bar Association Criminal Justice Section in its approval of Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus (November, 1989).

While we recognize the extensive work of the Task Force on Death Penalty Habeas Corpus and its Reporter, Ira Robbins, we believe this report proposes reforms not in the best interest of our criminal justice system. For this reason, we formally associate ourselves with the Task Force's dissenting statements to the report offered by Co-Chairperson Malcolm M. Lucas, Chief Justice of the California Supreme Court, and Task Force Member William B. Hill, Jr., Deputy Attorney General of Georgia. Attached are copies of these two statements.

We wish our formal dissent and the two dissenting statements to be officially noted and provided to all recipients of the Task Force's report.

Very truly yours,
Andrew L. Sonner
Vice-Chairperson for Planning
Rockville, MD

Robert S. Fertitta
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APPENDIX B

Summary of Recommended Statutory and Rule Changes *

A. *Counsel*

The American Bar Association recommendations concerning counsel may be implemented by enacting the following Bill:

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That § 2254 of title 28, United States Code, is amended --

By inserting the following immediately after the last sentence: **

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

(2) (i) The mechanism shall include a statewide appointing authority. The appointing authority for counsel at any stage of a capital case shall be:

(A) a statewide defender organization, relying on staff attorneys, members of the private bar, or both;

(B) a capital litigation resource center, relying on staff attorneys, members of the private bar, or both; or

(C) a special committee, constituted by the state court of last resort, relying on staff attorneys of a defender organization, members of the private bar, or both. The members of a special committee shall be members of the bar admitted to practice in the jurisdiction, have practiced law in the field of criminal defense for not less than five years, have demonstrated knowledge of the specialized nature of practice involved in capital cases, be knowledgeable about criminal defense practitioners in the jurisdiction, and be dedicated to quality legal representation in capital cases.

(ii) The appointing authority shall:

(A) recruit attorneys qualified to be appointed as lead counsel and co-counsel to represent persons charged with capital offenses or sentenced to death;

(B) draft and annually publish certification standards and the procedures by which attorneys are certified and appointed. The qualification standards shall, at a minimum, include the criteria specified by subparagraph (2)(iii) of this subsection.

(C) draft and annually publish rosters of certified attorneys. To be certified, an attorney must meet the qualification standards set forth in subparagraph (2)(iii) of this subsection.

(D) periodically review the rosters, monitor the performance of all attorneys appointed, and withdraw certification from any attorney who:

(1) fails satisfactorily to complete regular training programs on the representation of capital clients;

(2) fails to meet high performance standards in a case to which the attorney is appointed; or

(3) fails otherwise to demonstrate continuing competency to represent prisoners in capital litigation;

(E) conduct or sponsor specialized training programs for attorneys representing capital clients; and

(F) appoint two certified attorneys, lead counsel and co-counsel, to represent an indigent in a capital case at the relevant stage of proceedings promptly upon receiving notice of the need for the appointment from the relevant state court. The appointing authority shall report the appointment, or the indigent's failure to accept counsel, in writing to the court requesting the appointment and to the state court of last resort.

(iii) (A) Lead trial counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice *pro hac vice;* and

(2) active trial practice with at least five years' litigation experience in the field of criminal defense; and

(3) prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases that were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials that were tried to completion, the attorney shall have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

(4) familiarity with the practice and procedure of the criminal courts of the jurisdiction; and

(5) familiarity with and experience in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

(6) successful completion, within one year of appointment, of a training or educational program on criminal advocacy with focus on the trial of cases in which the death penalty is sought; and

(7) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

(B) Trial co-counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice *pro hac vice;* and

(2) qualification as lead trial counsel under (h)(2)(iii)(A) of this Section; or:

(a) active trial practice with at least three years' litigation experience in the field of criminal defense; and

(b) prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases that were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

(c) familiarity with the practice and procedure of the criminal courts of the jurisdiction; and

(d) successful completion, within one year of appointment, of a training or educational program on criminal advocacy with focus on the trial of cases in which the death penalty is sought; and

(e) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

(C) Lead appellate counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice *pro hac vice;* and

(2) active trial or appellate practice with at least three years' experience in the field of criminal defense; and

(3) prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case in which a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder or aggravated murder conviction; or alternatively, prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

(4) familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

(5) successful completion, within one year of appointment, of a training or educational program on criminal advocacy with focus on the appeal of cases in which the sentence of death was imposed; and

(6) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases; and

(7) any additional requirements of federal law for appointment to represent a person sentenced to death in a proceeding under *28 U.S.C. Section 2254.*

(D) Appellate co-counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice *pro hac vice;* and

(2) qualification for lead appellate counsel under (h)(2)(iii)(C) of this Section; or

(a) demonstrated proficiency in appellate advocacy in the field of criminal defense; and

(b) familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

(c) successful completion, within two years of appointment, of a training or educational program on criminal appellate advocacy; and

(d) any additional requirements of federal law for appointment as co-counsel to represent a person sentenced to death in a proceeding under *28 U.S.C. Section 2254.*

(E) Lead post-conviction counsel shall have the following qualifications:

(1) membership in the bar of the jurisdiction or admission to practice *pro hac vice;* and

(2) active trial or appellate practice with at least three years' experience in the field of criminal defense; and

(3) prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases that were tried to completion, as well as prior experience as post-conviction counsel in at least three cases in state or federal

court. In addition, of the five jury or bench trials that were tried to completion, the attorney shall have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

(4) qualification as appellate co-counsel under (h)(2)(iii)(D) of this Section; and

(5) familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

(6) successful completion, within one year of appointment, of a training or educational program on criminal advocacy that focused on the post-conviction phase of a criminal case, or alternatively, a program that focused on the trial of cases in which the death penalty is sought; and

(7) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases; and

(8) any additional requirements of federal law for appointment to represent a person sentenced to death in a proceeding under *28 U.S.C. Section 2254.*

(F) Post-conviction co-counsel shall have, as a minimum, the qualification under the requirements of (2)(iii)(E)(1), (2), (3), (5), (6), (7), and (8) of this subsection.

(iv) (A) Notwithstanding the provisions of subparagraph (2)(iii) of this subsection, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant, the appointing authority may certify:

(1) as lead counsel or co-counsel for trial, persons with extensive criminal experience or extensive civil litigation experience;

(2) as lead counsel or co-counsel for appeal, persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience; and

(3) lead counsel or co-counsel for post-conviction proceedings, persons with extensive criminal trial, appellate and/or post-conviction experience or extensive civil litigation and/or appellate experience.

(B) Lawyers appointed under the exception provided by this subparagraph shall meet one or more of the following qualifications:

(1) experience in death penalty litigation that does not meet the levels set forth in the minimum qualifications standards set forth in subparagraph (2)(iii) of this subsection;

(2) specialized post-graduate training in the defense of persons accused of capital crimes; or

(3) the availability of ongoing consultation support from experienced death penalty counsel.

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

(4) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to an attorney appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized

under paragraph (3), at rates or amounts that the court determines to be reasonably necessary to carry out the requirements of this subsection.

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

(6) Counsel appointed to represent the defendant for the capital trial shall be ineligible to represent the defendant on appeal, unless both the appellant and counsel expressly request continued representation, the state court informs the appellant of the consequences of his or her decision, and the appellant waives the right to new counsel on the record. State appellate counsel who represented a death-sentenced prisoner should continue the representation through all subsequent state, federal, and Supreme Court proceedings, except when state appellate counsel was also counsel at trial.

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

B. *Procedural Default*

The American Bar Association recommendation concerning procedural default may be implemented by enacting the following Bill:

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That § 2254 of title 28, United States Code, is amended --

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

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

(2) By relettering subsections (d), (e), and (f) to be "(e)", "(f)", and "(g)" respectively.

C. *Mixed Petitions*

The American Bar Association recommendation concerning mixed petitions and procedurally forced successive petitions may be implemented either by adopting a local court rule with the following language or by amending Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, *28 U.S.C. foll. § 2254* (1988), to add the following paragraph after the existing first paragraph:

"In the case of a state prisoner under sentence of death, the federal district judge shall issue an order promptly after the filing of a habeas corpus petition requiring petitioner's counsel within a reasonable time to review the trial record and inform the court at a status conference whether there are any other exhausted or unexhausted claims that might be included in the petition. The judge and the respondent may assist the petitioner and counsel in

identifying all potential claims not yet included in the petition. At the status conference, if unexhausted claims for which a state court remedy may still be available are brought to the court's attention, the judge shall give the petitioner the choice of abandoning those claims on the record or exhausting them in state court before the judge proceeds to consider all of the exhausted claims. If the petitioner chooses to return to the state courts on the unexhausted claims, the judge shall hold the proceedings in abeyance until the claims have been exhausted in the state system."

D. *Mandatory Stay of Execution*

The American Bar Association recommendation concerning stays of execution may be implemented by enacting the following Bill:

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That § 2243 of title 28 United States Code, is amended --

By inserting the following immediately after the last sentence:

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

(1) a state prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2241(e); or

(2) upon completion of district court and court of appeals review under section 2254 the petition for relief is denied and (a) the time for filing a petition for a writ of certiorari has expired and no petition has been filed; (b) a timely petition for a writ of certiorari was filed and the Supreme Court denied the petition; or (c) a timely petition for a writ of certiorari was filed and, upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

(3) before a court of competent jurisdiction, in the presence of qualified counsel as defined in section 2254(h), and after having been advised of the consequences of his or her decision, a state prisoner under sentence of death waives the right to pursue habeas corpus review under section 2254."

E. *Certificate of Probable Cause*

The American Bar Association recommendation concerning certificates of probable cause may be implemented by enacting the following Bill:

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That § 2253 of title 28, United States Code, is amended --

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

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

F. *Time Requirements*

The American Bar Association recommendation concerning time requirements may be implemented by enacting the following Bill:

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That § 2241 of title 28, United States Code, is amended --

By inserting the following immediately after the last sentence:

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

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

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

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

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

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

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

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

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

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

G. *Successive Petitions*

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

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That § 2244(b), title 28, United States Code, and Rule 9(b), title *28, United States Code foll. § 2254,* are amended --

By inserting the following immediately after the last sentence:

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

(1) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts, and the failure to raise the claim is --

(A) the result of state action in violation of the Constitution or laws of the United States;

(B) the result of Supreme Court recognition of a new federal right that is retroactively applicable; or

(C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

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

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

H. *Retroactivity*

The American Bar Association recommendation concerning retroactivity may be implemented by enacting the following Bill:

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That § 2254(a) of title 28, United States Code, is amended --

By inserting the following immediately after the last sentence:

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

(Incorporating Suggested Language to Implement the American Bar Association Recommendations) *

28 U.S.C. §§ 2241-2255 (1988)

Section:

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless --

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within

which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

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

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

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

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

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

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

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

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

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

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

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

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

(1) state prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2241(e); or

(2) upon completion of district court and court of appeals review under section 2254 the petition for relief is denied and (a) the time for filing a petition for a writ of certiorari has expired and no petition has been filed; (b) a timely petition for a writ of certiorari was filed and the Supreme Court denied the petition; or (c) a timely petition for a writ of certiorari was filed and, upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

(3) before a court of competent jurisdiction, in the presence of qualified counsel as defined in section 2254(h), and after having been advised of the consequences of his or her decision, a state prisoner under sentence of death waives the right to pursue habeas corpus review under section 2254.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ,

and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

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

(1) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts, and the failure to raise the claim is --

(A) the result of state action in violation of the Constitution or laws of the United States;

(B) the result of Supreme Court recognition of a new federal right that is retroactively applicable; or

(C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

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

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

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

§ 2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause; *provided that a petitioner under sentence of death shall have a right of appeal without a certificate of probable cause, except after denial of a second or successive petition.*

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

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

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of

the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

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

(e) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

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

(2) (i) The mechanism shall include a statewide appointing authority. The appointing authority for counsel at any stage of a capital case shall be:

(A) a statewide defender organization, relying on staff attorneys, members of the private bar, or both;

(B) a capital litigation resource center, relying on staff attorneys, members of the private bar, or both; or

(C) a special committee, constituted by the state court of last resort, relying on staff attorneys of a defender organization, members of the private bar, or both. The members of a special committee shall be members of the bar admitted to practice in the jurisdiction, have practiced law in the field of criminal defense for not less than five years, have demonstrated knowledge of the specialized nature of practice involved in capital cases, be knowledgeable about criminal defense practitioners in the jurisdiction, and be dedicated to quality legal representation in capital cases.

(ii) The appointing authority shall:

(A) recruit attorneys qualified to be appointed as lead counsel and co-counsel to represent persons charged with capital offenses or sentenced to death;

(B) draft and annually publish certification standards and the procedures by which attorneys are certified and appointed. The qualification standards shall, at a minimum, include the criteria specified by subparagraph (2)(iii) of this subsection.

(C) draft and annually publish rosters of certified attorneys. To be certified, an attorney must meet the qualification standards set forth in subparagraph (2)(iii) of this subsection.

(D) periodically review the rosters, monitor the performance of all attorneys appointed, and withdraw certification from any attorney who:

(1) fails satisfactorily to complete regular training programs on the representation of capital clients;

(2) fails to meet high performance standards in a case to which the attorney is appointed; or

(3) fails otherwise to demonstrate continuing competency to represent prisoners in capital litigation;

(E) conduct or sponsor specialized training programs for attorneys representing capital clients; and

(F) appoint two certified attorneys, lead counsel and co-counsel, to represent an indigent in a capital case at the relevant stage of proceedings promptly upon receiving notice of the need for the appointment from the relevant state court. The appointing authority shall report the appointment, or the indigent's failure to accept counsel, in writing to the court requesting the appointment and to the state court of last resort.

(iii) (A) Lead trial counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice pro hac vice; and

(2) active trial practice with at least five years' litigation experience in the field of criminal defense; and

(3) prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases that were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials that were tried to completion, the attorney shall have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

(4) familiarity with the practice and procedure of the criminal courts of the jurisdiction; and

(5) familiarity with and experience in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

(6) successful completion, within one year of appointment, of a training or educational program on criminal advocacy with focus on the trial of cases in which the death penalty is sought; and

(7) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

(B) Trial co-counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice pro hac vice; and

(2) qualification as lead trial counsel under (h)(2)(iii)(A) of this Section; or:

(a) active trial practice with at least three years' litigation experience in the field of criminal defense; and

(b) prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases that were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

(c) familiarity with the practice and procedure of the criminal courts of the jurisdiction; and

(d) successful completion, within one year of appointment, of a training or educational program on criminal advocacy with focus on the trial of cases in which the death penalty is sought; and

(e) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

(C) Lead appellate counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice pro hac vice; and

(2) active trial or appellate practice with at least three years' experience in the field of criminal defense; and

(3) prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case in which a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder or aggravated murder conviction; or alternatively, prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

(4) familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

(5) successful completion, within one year of appointment, of a training or educational program on criminal advocacy with focus on the appeal of cases in which the sentence of death was imposed; and

(6) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases; and

(7) any additional requirements of federal law for appointment to represent a person sentenced to death in a proceeding under 28 U.S.C. Section 2254.

(D) Appellate co-counsel shall have the following minimum qualifications:

(1) membership in the bar of the jurisdiction or admission to practice pro hac vice; and

(2) qualification for lead appellate counsel under (h)(2)(iii)(C) of this Section; or

(a) demonstrated proficiency in appellate advocacy in the field of criminal defense; and

(b) familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

(c) successful completion, within two years of appointment, of a training or educational program on criminal appellate advocacy; and

(d) any additional requirements of federal law for appointment as co-counsel to represent a person sentenced to death in a proceeding under 28 U.S.C. Section 2254.

(E) Lead post-conviction counsel shall have the following qualifications:

(1) membership in the bar of the jurisdiction or admission to practice pro hac vice; and

(2) active trial or appellate practice with at least three years' experience in the field of criminal defense; and

(3) prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases that were tried to completion, as well as prior experience as post-conviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials that were tried to completion, the attorney shall have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

(4) qualification as appellate co-counsel under (h)(2)(iii)(D) of this Section; and

(5) familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

(6) successful completion, within one year of appointment, of a training or educational program on criminal advocacy that focused on the post-conviction phase of a criminal case, or alternatively, a program that focused on the trial of cases in which the death penalty is sought; and

(7) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases; and

(8) any additional requirements of federal law for appointment to represent a person sentenced to death in a proceeding under 28 U.S.C. Section 2254.

(F) Post-conviction co-counsel shall have, as a minimum, the qualification under the requirements of (2)(iii)(E)(1), (2), (3), (5), (6), (7), and (8) of this subsection.

(iv) (A) Notwithstanding the provisions of subparagraph (2)(iii) of this subsection, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant, the appointing authority may certify:

(1) as lead counsel or co-counsel for trial, persons with extensive criminal experience or extensive civil litigation experience;

(2) as lead counsel or co-counsel for appeal, persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience; and

(3) as lead counsel or co-counsel for post-conviction proceedings, persons with extensive criminal trial, appellate and/or post-conviction experience or extensive civil litigation and/or appellate experience.

(B) Lawyers appointed under the exception provided by this subparagraph shall meet one or more of the following qualifications:

(1) experience in death penalty litigation that does not meet the levels set forth in the minimum qualifications standards set forth in subparagraph (2)(iii) of this subsection;

(2) specialized post-graduate training in the defense of persons accused of capital crimes; or

(3) the availability of ongoing consultation support from experienced death penalty counsel.

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

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

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

(6) Counsel appointed to represent the defendant for the capital trial shall be ineligible to represent the defendant on appeal, unless both the appellant and counsel expressly request continued representation, the state court informs the appellant of the consequences of his or her decision, and the appellant waives the right to new counsel on the record. State appellate counsel who represented a death-sentenced prisoner should continue the representation through all subsequent state, federal, and Supreme Court proceedings, except when state appellate counsel was also counsel at trial.

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

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum

authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

HABEAS CORPUS RULES

(Incorporating Suggested Language to Implement the American Bar Association Recommendations) *

Rules Governing Section 2254 Cases in the United States District Courts, *28 U.S.C. foll. § 2254* (1988)

(effective February 1, 1977; as amended)

Rule:

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Rule 1. Scope of rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under *28 U.S.C. § 2254:*

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

Rule 2. Petition

(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) Form of petition. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) Return of insufficient petition. If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

Rule 3. Filing petition

(a) Place of filing; copies; filing fee. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by *28 U.S.C. § 1915.* In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(b) Filing and service. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary consideration by judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

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

Rule 5. Answer; contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

Rule 6. Discovery

(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under *18 U.S.C. § 3006A*(g).

(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) Expenses. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

Rule 7. Expansion of record

(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

Rule 8. Evidentiary hearing

(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) Function of the magistrate.

(1) When designated to do so in accordance with *28 U.S.C. § 636*(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under *18 U.S.C. § 3006A*(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under *18 U.S.C. § 3006A* at any stage of the case if the interest of justice so requires.

Rule 9. Delayed or successive petitions

(a) 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.

(b) 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.

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

(1) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts, and the failure to raise the claim is --

(A) the result of state action in violation of the Constitution or laws of the United States;

(B) the result of Supreme Court recognition of a new federal right that is retroactively applicable; or

(C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

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

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

Rule 10. Powers of magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to *28 U.S.C. § 636.*

Rule 11. Federal Rules of Civil Procedure; extent of applicability

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

APPENDIX C

List of Witnesses

An asterisk (*) indicates that, in addition to testifying before the Task Force, the witness submitted a written statement or other materials.

Augustus Arnold "Dick" Adams
Chairman, Victims Compensation Commission
Department of Crime Control and Public Safety
Raleigh, North Carolina

Barbara Arnwine *
Executive Director
Lawyers Committee for Civil Rights Under Law
Washington, D.C.

Vivian O. Berger *
Professor and Vice Dean
Columbia University School of Law
New York, New York

Susan V. Boleyn
Senior Assistant Attorney General
State of Georgia Department of Law
Atlanta, Georgia

Richard J. Bonnie *
Virginia Coalition on Jails and Prisons
John S. Battle Professor
University of Virginia School of Law
Charlottesville, Virginia

Honorable Tyrone Brooks *
State Representative for District 34
Atlanta, Georgia

Honorable Bennett H. Brummer *
Florida Public Defended Association, Inc.
Public Defended, 11th Judicial Circuit
Miami, Florida

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