REPORT NO. 3 OF THE SECTION OF CRIMINAL JUSTICE

RECOMMENDATION*

Be It Resolved, That the American Bar Association recommend that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel; and

Be It Further Resolved, That the American Bar Association offer to assist the United States Supreme Court in identifying qualified attorneys who are willing to accept appointment to prepare and file a petition for discretionary review in state death penalty cases, and to urge the Court to begin making appointments in state death penalty cases immediately; and

Be It Further Resolved, That the American Bar Association recommend to Congress that the Criminal Justice Act (18 U.S.C. § 3600A) be amended to provide for the payment of adequate compensation to counsel appointed by the United States Supreme Court to prepare and file petitions for discretionary review in state death penalty cases.

REPORT

The American Bar Association was asked by the NAACP Legal Defense and Education Fund (Legal Defense Fund) to support the application of Billy George Hughes, Jr., for assignment of counsel by the United States Supreme Court to help him prepare and file a petition for certiorari. His application to Associate Justice Lewis F. Powell, Jr., stated that the Texas Court of Criminal Appeals had affirmed his conviction and sentence of death with two judges dissenting, that the Texas Court had refused to appoint counsel to help him prepare and file a petition for certiorari in the United States Supreme Court, and that he could not afford to hire an attorney. Justice Powell referred the application to the Court, which denied the request in Order No. A-992, dated June 12, 1978. Hughes did file a petition for certiorari with the help of a Houston, Texas, firm engaged later through the offices of the American Civil Liberties Union.

The matter was formally referred to the Section of Criminal Justice, the Standing Committee on Legal Aid and Indigent Defendants, and the Judicial Administration Division by the Board of Governors following the 1978 Annual Meeting. The governing Council of the Section of Criminal Justice received a report and recommendations on the request from the Section of Criminal Justice Committee on Defense Function and Services, and voted to accept the Committee's recommendations as amended at the Council's 1978 Fall Meeting.

Comments on Proposed Recommendations Appointment

Standard 31-3.2, Counsel on Appeal, of the ABA Criminal Justice Standards Relating to Criminal Appeals, does not articulate a general right to assigned counsel at public expense beyond the first level of review,

*The recommendation was approved. See page 245.

where a defendant is deemed to have a right to appeal, unless the prosecution obtains review. The Standing Committee on Association Standards for Criminal Justice did not choose to reconsider this standard when confronted by the *Hughes v. Texas* issue shortly before the revised Criminal Appeals standards were presented to the House of Delegates for approval at the Annual Meeting in New York City. Providing Defense Services Standard 5.2, Duration of Representation, calls for counsel to be provided at every stage of the proceedings, including sentencing, appeal and post-conviction review. That position is unaltered in the revised Standard 5-5.2 which is being presented to the House of Delegates for approval at the Midyear Meeting in February 1979. The commentary to Standard 5-4.2, Collateral proceedings, takes the position, at page 19 that "[i]mplementation of this standard undoubtedly involves extension of counsel to some proceedings in which the right to legal representation is neither constitutionally nor statutorily required." The recommendation of the Section of Criminal Justice that counsel be appointed to assist legally indigent prisoners prepare and file petitions for discretionary review of their state convictions in death penalty cases is consistent with that position.

Although there is sentiment for a rule to provide counsel to all legal indigents seeking discretionary review of criminal convictions, the recommendation of the committee is strictly limited to death penalty cases. The death penalty is qualitatively different from any other sentence, *Lockett v. Ohio*, 992 U.S. 405, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978). The finality of the sanction of death demands utmost certainty and regularity in the proceedings that lead to imposition of a death sentence. Because there is a qualitative difference, the correctness of *Ross v. Moffit*, 417 U.S. 600, 94 S.Ct. 2437, 41 L. Ed. 2d 341 (1974), reversing a Fourth Circuit ruling that the states are constitutionally required to provide counsel to assist legal indigents prepare petitions for discretionary review of criminal convictions in the state high court and the U.S. Supreme Court, need not be brought into question. The Court has moved with similar caution in evolving the constitutional right to counsel. The right to effective assignment of counsel at trial was first recognized in a capital case, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932). The Supreme Court refused, however, to adopt a blanket assignment rule for all criminal cases in *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), and it was not until thirty years later that the Court announced a constitutional right to counsel in misdemeanor and petty cases in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L. Ed. 2d. 535 (1972). The Court may similarly choose to limit expansion of its appointment policy.

The June 12, 1978 denial of the application for appointed counsel to prepare and file a petition for certiorari in *Hughes v. Texas* need not foreclose reconsideration of the issue by the Court through the normal exercise of its administrative rulemaking power. The Court has not been faced with many requests for appointment preceding a grant of certiorari and has safely relied upon individual and organization volunteers from the legal profession to assist legal indigents seeking review of state death sentences. But it can be urged that reliance upon ad hoc methods for locating attorneys willing and able to assist death-row petitioners without compensation is misplaced. Philosophically, it would probably move to be unwise to place the responsibility for assuring that counsel will be available on a voluntary network of attorneys who oppose the death penalty. As a practical matter, there is reason to doubt the ability of the criminal defense bar in the states with the largest death-row populations to meet the need for assigned counsel to prepare petitions for discretionary review. Uncertainty over the constitutionality of a wide range of death penalty statutes in the wake of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed. 2d 246 (1972), and its progeny, has made it increasingly less likely that pro se petitions will adequately present claims based on the most recent understanding of the law. There is also reason to doubt the ability of the most active volunteer organizations to supplement in-state volunteer counsel and provide representation, or to arrange for counsel in every instance of need. Legal indigents whose death sentences are affirmed by the state's highest courts are very likely to lose the services of counsel appointed to represent them through the state appeal process, and as described by Justice Douglas in *Furman v. Georgia, supra*, they are poorly equipped, by reason of poverty, lack of education and social isolation, to find counsel independently. Panic-stricken defendants, and their families, left without counsel after affirmance of death sentences by state high courts need simple centralized access to counsel qualified to prepare and file petitions for discretionary review by the United States Supreme Court who are also au-

thorized to make motions for other post-conviction relief and to file petitions for executive clemency whenever a careful review of the record indicates that those efforts would be more appropriate. The Criminal Justice Section therefore recommends that the United States Supreme Court appoint counsel to review the record and represent legally indigent defendants in state death penalty cases who seek Supreme Court review of their convictions or death sentences.

Compensation

There are many reasons and motives behind the refusal of attorneys to continue representation after affirmance of a death sentence by a state's highest court. A most important reason is money. Often the attorneys' financial responsibilities to their own families preclude continued representation of legally indigent clients. There are also death-row inmates whose defender attorneys lack authority to continue representing them by seeking discretionary review in the United States Supreme Court, and a compensation formula that encourages state defender services to apply for Supreme Court review on behalf of defendants without encouraging state defender "bail-out" in favor of newly appointed, federally compensated counsel is necessary.

The argument has been raised that those states which impose death sentences should bear the cost of counsel appointed to seek discretionary review in the Supreme Court. But before rejecting, as a matter of policy, an application for Supreme Court appointment of counsel, the majority opinion in *Ross v. Moffit* noted that "[t]he right to seek certiorari in the U.S. Supreme Court is not granted by any state, but by federal statute with or without the consent of the state whose judgment is sought to be reviewed." 417 U.S. at 618. In countering the argument that the state had a constitutional obligation under *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L. Ed. 2d 811 (1963), and *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L. Ed. 891 (1955), to provide counsel the majority speculated that "[i]t would be quite as logical under the rationale of *Douglas* and *Griffin,* and indeed perhaps more so, to require that the Federal Government or [the Supreme] Court furnish and compensate counsel for petitioners who seek certiorari . . . to review state judgments of conviction." 417 U.S. at 618.

The Court most certainly did not mean to offer federally supplied and compensated counsel, but the argument can be employed persuasively on a policy level. In fact, the Court has long authorized reimbursement to attorneys appointed by the Court to represent state defendants for necessary travel expenses incurred attending oral argument. U.S. Supreme Court Rule 53(7). Compensation is, however, limited to appointed counsel in cases originating in the federal courts. U.S. Supreme Court Rule 53(8). Eligibility for compensation under that rule is stated in terms of compensation authorized by the Criminal Justice Act (18 U.S.C. § 3006A). The Criminal Justice Section therefore recommends that the Criminal Justice Act be amended to specifically provide for the payment of adequate compensation to attorneys appointed by the United States Supreme Court to represent legal indigents under sentence of death who seek Supreme Court review of their state court convictions or death sentences.

TOM KARAS

Chairperson