REPORT NO. 6 OF THE
CRIMINAL JUSTICE SECTION

RECOMMENDATION*

BE IT RESOLVED, That the American Bar Association urges that the following measures be taken in the litigation of death penalty cases:

1) Because many of the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appellants/petitioners, as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases should govern the appointment and compensation of counsel.

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

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

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

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

6) To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding at

*The recommendation was approved. See page 37.
The purpose of this study was to review a large number of cases involving federal habeas corpus petitions in order to determine the factors that contribute to the granting or denial of such petitions.

Introduction

In 1988, the American Bar Association's Commission on Habeas Corpus Reform recommended a series of reforms to the habeas corpus process. This report aims to address some of the key issues raised by the Commission.

REPORT

We have concluded that the habeas corpus process is in need of significant reform. The process is too slow, too expensive, and too unpredictable. It is time for Congress to take action.

Minority report

We acknowledge the work of the majority report and applaud their efforts to improve the habeas corpus process. However, we believe that more needs to be done in order to address the underlying problems. We therefore offer the following recommendations:

1. The federal judiciary should be given additional resources to handle habeas corpus petitions.
2. The process should be made more transparent and predictable.
3. The law should be clarified to ensure that petitioners are treated fairly.
4. The process should be made more accessible to those who need it.

We urge Congress to consider these recommendations and take action to improve the habeas corpus process.

END OF REPORT
mandations that, when implement-
ed, would enhance both the effi-
ciency and the fairness of state and
federal review procedures. It was
particularly important to address
the chaotic character of current last-
minute, piecemeal, state and fed-
eral reviews in death penalty cases,
which present unique problems and
require special solutions.

A General Overview of the
Recommendations

The testimony and other materi-
als presented to the Task Force
justify concern that the post-con-
viction process of reviewing capital
convictions and sentences is, on the
one hand, too long and too slow
and, on the other hand, susceptible
to unfair outcomes due to the inad-
quate presentation of constituti-
onal issues. The Task Force
appropriately proposed substituting
a new process that achieves greater
fairness and facilitates rational re-
view. The American Bar Associa-
tion, through adopting the
recommendations that accompany
this report, endorses this new
process.

The Task Force members did not
unanimously endorse all the rec-
ommendations that were formulat-
ed as optional parts of this new
process. Some members chose to
write separately to express their
views. Their separate opinions are
attached in Appendix “A.” While
other members did not endorse all
recommendations, they did not
choose to write separately. There-
fore, it should not be inferred that
any Task Force member supports a
particular recommendation merely
because the member did not write
separately or because the member
did not comment on the recom-
mendation in the separate views he
may have written.

It is anticipated that this process
as outlined by the recommendations
will likely shorten the total time re-
quired for the review of death
penalty cases. It is essential to note,
however, that, while a sound pro-
sposal may eliminate unwarranted
delay in the capital review process,
some reasonable amount of time is
still indispensable for a thorough
consideration of the issues. Al-
though it is believed that the pro-
sposal will shorten the review
process and that we should no
longer see the aberrant case that is
still in litigation after nine or ten
years, it would be unrealistic to ex-
pect that, if the petitioner takes ad-
vantage of all available remedies
and the conviction and death sen-
tence are affirmed at every stage of
review, the state and federal post-
conviction review process will take
less than approximately six years.

The entire set of sixteen recom-
mendations comprises a carefully
crafted package of interconnected
reforms designed as a whole to
make the process less complex and
to preserve fairness. Two recom-
mendations, however, stand out as
critical systemic changes: (1) the
provision of competent counsel to
assure that the streamlined process
is capable of fairly rectifying con-
stitutional errors (Recommendations
1 through 6); and (2) the
implementation of a statute of li-
litations to speed up the process
(Recommendation 13).

COMPETENT COUNSEL
(Recommendations 1 through 6)

A Synopsis of Recommendations
1 through 6.

The new process must be sure
and fair—as the existing process
often has not been due to the failure
to provide qualified counsel in
stages leading up to federal habeas
corpus review. It is proposed to en-
sure to the extent reasonably pos-
sible, therefore, that there be
qualified and adequately compen-
sated counsel at trial and through-
out the expedited review process.
Providing qualified counsel serves
two major goals: it not only assures
fairness, but also avoids unneces-
sary delay in the process. Qualified
counsel is thus the sine qua non of
a just and efficient capital system.

In addition, the provision of
knowledgeable counsel at trial
would restore the trial as the “main
event” in the criminal process be-
cause constitutional issues would be
first recognized, aired, and res-
olved at that level, rather than
later. As a result, there would be
fewer colorable claims of inef-
fective assistance of counsel and fewer
of the reversals and retrials that
now so frequently and substantial-
ly prolong the process. Moreover,
providing qualified counsel at the
state post-conviction stage as well
as at the trial stage would help to
assure that the record reaching the
federal habeas corpus court is ready
for immediate federal resolution on
the merits, without need for pro-
tracted and time-consuming pro-
ceedings to complete the record and
resolve threshold procedural ques-
tions, such as procedural default.1

To underscore the critical role of
competent counsel in capital litiga-
tion and to avoid procedural delays
as well as multiple review of the
same issues, it is recommended that
the following procedural barriers
to federal habeas corpus review
should not apply with respect to
any state court proceeding at which
the state court failed to provide
such counsel: (1) the exhaustion of
state remedies provisions of 28
U.S.C. § 2254(b) and (c); (2) the
rules governing failure to raise a
claim in state court at the time or in
the manner prescribed by state law;
and (3) the presumption of correct-
ness of state court findings of fact

Two other recommendations on
counsel are designed to enhance the
efficiency of the proceedings. First,
new counsel would be appointed to
represent the death-sentenced in-
mate for the appeal. As counsel is
not likely to challenge his or her
own effectiveness, this recom-
mendation permits those claims of
ineffective assistance of counsel that
are capable of decision on the trial
record to be raised at the earliest
practicable time, thereby reducing
protracted litigation and later costly
remands.2 Second, to eliminate the
delays occasioned by the appoint-
ment of new counsel for post-
conviction proceedings, steps are
proposed to encourage state appel-
late counsel who represented a
death-sentenced inmate to continue

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

2 The creation of a statutory right to counsel
for discretionary review and state collater-
al attack would not yield new claims of
sixth amendment ineffective assistance of
counsel. If there is no constitutional right
to counsel for these proceedings, there can be
no constitutional right to counsel’s effec-
tive assistance at these proceedings. Thus,
claims of sixth amendment ineffective as-
sistance of counsel after the state direct ap-
peal would not be cognizable in a federal
decision.
Paragraph 2254(h)(1) of this sample legislation further provides that such a plan must be mandatory. There is little incentive for a state to opt into a plan that provides superlative restrictions on the federal writ of habeas corpus when the alternative is to not opt into the plan and instead have only the "merely" very good restrictions that exist under current law.

Paragraph (h)(2) of the proposed statute outlines the criteria for "lead trial counsel," "trial co-counsel," "lead appellate counsel," "appellate co-counsel," "lead post-conviction counsel," and "post-conviction co-counsel." These criteria are the same as outlined by the comprehensive ABA Guidelines. That document contains thirty-four Guidelines, most with extensive subdivisions, covering more than one hundred pages, including commentary.8

It is imperative to have a statute containing provisions such as those in (h)(2) which prescribe mandatory requirements concerning eligibility of, competence of, and compensation for counsel. "A general statement of high purpose alone will not suffice to ensure high quality representation."9 The proposed provisions are crucial,10 for almost every aspect of the American Bar Association's recommendations that accompany this report assumes and relies on death qualified counsel, as outlined by the criteria delineated in paragraph (h)(2) of the proposed statute.11

These criteria are administered by an appointing authority. The provisions of subparagraph (h)(2)(i) describes various types of appointing authorities that conform to the ABA Guidelines.

The provisions of subparagraph (h)(2)(ii) describe the appointing authority's duties. One of its most important functions is to certify attorneys who are eligible to provide death penalty representation.12

The criteria administered by the authority set minimum eligibility requirements designed to provide highly qualified and dedicated attorneys to capital cases and sentenced individuals. The requirements address, inter alia: the number of years that the attorney has been licensed to practice law; the attorney's level of experience, including recent experience representing clients in criminal cases; specialized training or education in capital litigation for the relevant stage of the proceedings;13 and demonstrated capability to perform at the advanced level required by this specialized practice.14

and monitor qualified counsel, see, e.g., C.D. Cal. R. 26.8.4(a)(i); Bonnie testimony; General counsel testimony (suggesting nationwide certification process); Hammond testimony; Kinnard testimony; Koosed testimony; Walt testimony (supporting specialization in "capital defense representation"), and even testing death penalty issues on the bar exam. Testimony to that effect by members of the bar become at least minimally aware of any of the difficult questions involved in capital litigation.

[See State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793, 794-95 (1985); and South Carolina trial court's failure to adhere to the statute requiring experienced counsel for capital murder defendants, S.C. Code Ann. § 16-3-26(B) (Law. Co-op. 1985), was held to have denied the defendant a fair trial. The statute requires the appointment of an attorney with three years' litigation experience in felony cases. One of the attorneys appointed to represent the defendant had tried one capital case and assisted in two others. The second appointed attorney had tried one felony, noncapital murder case. The record was "replete with instances of improper testimony and unreserved exceptions." Id. at 795. But cf. Ball v. Roberts, 291 Ark. 84, 722 S.W.2d 829 (1987) (noncapital case). In Ball, the Arkansas Supreme Court held unconstitutional a statute, Ark. Stat. Ann. § 442-419 (Supp. 1985), limiting appointment of attorneys in criminal cases to attorneys with criminal law experience. The court declared that the statute imposed a legislative judgment on the legal question of whether a particular attorney could be appointed to represent an indigent defendant, in violation of the state's separation of powers clause. The statute excluded attorneys who had not taken a criminal law course in 25 years or who did not regularly practice criminal law. See also Sawyer v. Butler, 848 F.2d 582, 593-594 (5th Cir. 1988) (holding that failure to comply with a state rule requiring capital counsel to have been admitted to practice for five years was harmless error, assuming arguendo that it violated the defendant's equal protection rights), reheg en banc. F.2d., 1989 U.S..App. LEXIS 13107 (5th Cir. Aug. 15, 1989) (not mentioning the issue).]

The recommended provisions are derived from ABA Guideline 5.1.14 In some instances, it may be necessary to depart from the ABA Guidelines. In (h)(2)(iii)(C)(7), (D)(2)(d), (E)(8), and (F), an exception is recognized to meet additional requirements of federal law. The reason this departure may be necessary is to achieve conformance with the counsel provisions of the Anti-Drug Abuse Act of 1988, which require a minimum of five years of practice.15 Because the American Bar Association recommends continuity of counsel, it would indeed be ironic if counsel eligible to represent the petitioner in state proceedings could not continue to represent the petitioner in the concomitant federal proceedings for failure to meet the federal eligibility requirement.16 Finally,
To underscore the critical role of competent counsel in capital litigation and to avoid procedural delays as well as a multiple review of the same issues, the American Bar Association proposes in paragraph (h)(5) that certain procedural barriers should not apply with respect to any state court proceeding at which the state court failed to provide counsel and counsel services pursuant to paragraphs (h)(2), (h)(3), and (h)(4).

In particular, it is recommended that these barriers include: 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 required by state law; and the presumption of correctness of state court findings of fact as set forth in 28 U.S.C. § 2254(d).

By Providing proper counsel, the states will get in return not only better justice, but also swifter justice. With greater confidence in the quality of the state processes, courts will be less likely to doubt the reliability of the guilt or capital sentencing determination.

The American Bar Association believes that it is important that new counsel be appointed for a death-sentenced inmate before the commencement of state post-conviction proceedings. Paragraph 2254(h)(6) provides that new counsel should be appointed to represent the death-sentenced inmate for the state direct appeal. As counsel is not likely to challenge his or her own ineffectiveness, the purpose of this provision is to permit claims of ineffective assistance of counsel to be raised in the state system at the earliest practicable time. Of course, there may also be claims of ineffective assistance of appellate counsel. For this reason and perhaps others, some jurisdictions may decide that the appropriate place to appoint new counsel is immediately after the state supreme court affirms the death sentence on direct appeal. New counsel would then petition the United States Supreme Court for certiorari review and thereafter commence state post-conviction proceedings.

Either approach is sound. What is important is that new counsel be appointed before the commencement of post-conviction litigation, so that any claims of ineffectiveness will be presented in the first petition.

Bringing these claims to light promptly will reduce protracted litigation and later costly remands. To be sure, however, there will be occasional cases in which both the client and counsel request the latter’s continuation on appeal. Before the defendant makes that decision, the court should inform him of the consequences of such a decision; if the defendant still requests counsel’s continuation, the court should obtain his waiver on the record.

Paragraph (h)(6) further provides that “[s]tate appellate counsel who represented a death-sentenced prisoner should continue such representation through all subsequent state, federal, Supreme Court proceedings.” Continuity of counsel generally will minimize delay, and assure that counsel is familiar with and/or responsible for the record in the case.

This provision should not apply, however, when state appellate counsel was also counsel at trial. In such an instance, new counsel should ordinarily be appointed on post-conviction review to consider the issue of earlier ineffectiveness and to take a fresh and objective look at the case.

Finally, paragraph (h)(7) is included to acknowledge expressly that a claim of sixth amendment ineffective assistance of counsel on discretionary review or on state collateral attack is not cognizable in federal habeas corpus proceedings under section 2254. While this provision is not intended to minimize the critical importance of competent counsel at all stages of capital litigation, it is a clear recognition that, if there is no constitutional right to counsel for such proceedings, then there can be no constitu-

32See, e.g., Copser testimony (remarking that, with lawyers constantly changing in death penalty cases, it’s a “hassleious” system); Peach testimony (recommending continuity of counsel for the prosecution); Tjoflat testimony (noting that in Florida there have often been 25 to 30 different lawyers before the case gets to the federal court of appeals; emphasizing the need for continuity of counsel for the state as well as for the prisoner). Accord Judicial Conference Resolutions, supra note 19 (“In the interest of continuity of representation, pretrial judicial officials are urged to continue the appointment of state post-conviction counsel, if qualified, when the case enters the federal system except in cases where a new counsel should be assigned.”).

Example of a well-crafted recommendation on the issue, it is important to note that more than a few American Bar Association Task Force on Death Penalty Habeas Corpus witnesses, including state and federal appellate judges, expressed concern about the relative inexperience of state trial judges with capital litigation. See, e.g., Brunner testimony; Overtorn testimony; Tjoflat testimony; Wright testimony. Perhaps state courts should consider judicial education programs on the death penalty to meet this need.

See 28 U.S.C. § 2254(b), (c) (1982).

See 28 U.S.C. § 2254(d) (1982). Many Task Force witnesses supported these ideas. See, e.g., Bonnie statement; Bryan statement; Ford statement; Kinnard statement; Mello testimony (commenting that this approach can help to make the trial the “main event”); Mertens testimony; Waxman testimony.

Although the American Bar Association does not make any formal recommendation in this regard, the general consensus among witnesses was that new counsel should be appointed before the commence-
home of corrections

criminal justice section

Recon củmsations

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the Court's decision. It also includes
the United States Court of Appeals.

Conclusions

The social control function of the
 justice system and the work of the
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STATE AND FEDERAL REVIEW  
(Recommendations 7 through 9)  

There is a need to minimize the use of procedures that delay the resolution of issues presented to state and federal courts in death penalty direct and collateral appeals. Recommendations 7 through 9 outline three courses of action that should be taken to further this goal.

Recommendation #7.

The issue of procedural default creates a major dilemma for post-conviction review: whether to invoke the state procedural bar rule to foreclose consideration of constitutional claims, or to review the substance of those claims notwithstanding the state bar. The issue is particularly critical in capital cases, in which invocation of the bar might well lead to the petitioner’s execution, even though there may be one or more possibly meritorious, or at least nonfrivolous, constitutional claims.46

The American Bar Association recommends that procedural default rules not have preclusive effect when the prisoner shows that his failure to raise the claim at the time or in the manner required by state law was the result of the petitioner’s or counsel’s ignorance or neglect or if the federal court’s failure to consider such a claim would result in a miscarriage of justice. There are many reasons for this recommendation. First, death is different from all other criminal penalties. Where human life is at stake, the federal courts’ ability to reach and determine the merits of federal constitutional claims should be at the maximum. That unintentional counsel errors could bar—and have barred—consideration of possibly meritorious claims in death penalty cases is unacceptable in a criminal justice system that values its integrity. This is especially true when one considers the relatively high percentage of death penalty cases that were shown to have meritorious issues when the claims were considered by the United States courts of appeals.

Second, the current approach places an unrealistic burden on defense counsel while allocating the consequences of counsel’s errors on the indigent defendant. Senior Circuit Judge Elbert Tuttle of the United States Court of Appeals for the Eleventh Circuit addressed this issue in his testimony before the American Bar Association Task Force on Death Penalty Habeas Corpus. He stated that placing the responsibility for knowing the complex body of constitutional law that governs capital trials upon lawyers in the rural South is “expecting entirely too much.”47 The system should be able to correct constitutional error when it is the result of the ignorance or neglect of any of the participants in the process.48


47Tuttle testimony.

48Testimony before the American Bar Association Task Force on Death Penalty Habeas Corpus established that often the prosecutor and judge as well are not aware of some aspects of capital punishment law due to inexperience, overcrowded dockets, and other reasons. See, e.g., Overton testimony; Tjoflat testimony; see also supra note 31. Where error occurs as a result of mistakes by these participants in the trial process, ordinarily the remedy is reversal.

Third, using the ignorance-or-neglect standard proposed by Recommendation #7 would enhance not only the fairness of capital litigation, but also the fairness of the process. The present system of procedural forfeitures is not without its own protracted satellite litigation, and, therefore, has occasioned a great deal of delay.49 The cause-and-effect problem before the courts apply the cause-and-effect test, at least six major threshold inquiries must first be addressed:


(3) Was the procedural rule intended to apply to the facts of this particular case? See, e.g., County Court of Ulster County, 462 U.S. at 151 n.10; Hargrave v. Dugger, 882 F.2d 1528, 1530 (11th Cir. 1987) (en banc), cert. denied, 109 S. Ct. 1353 (1989); Matiere v. Wainwright, 811 F.2d 1430, 1434-35 n.3 (11th Cir. 1987); Hawkins v. Lafavre, 758 F.2d 866, 872-73 (2d Cir. 1985).

(4) Did the defendant satisfactorily comply with the rule? See, e.g., Williams v. Lane, 826 F.2d at 660; Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987); Spencer v. Kemp, 781 F.2d 1458, 1473-74 (11th Cir. 1986) (en banc); Tjoflat, J., specially concurring); McBee v. Grant, 763 F.2d 811, 816-16 (6th Cir. 1985); Weber v. Israel, 730 F.2d 499, 503 & 505 (2d Cir.), cert. denied, 469 U.S. 850 (1984); Maxwell v. Sumner, 673 F.2d 1031, 1034 n.1 (9th Cir.), cert. denied, 459 U.S. 976 (1982); Williams v. Zahradnick, 632 F.2d 353, 558-60 (4th Cir. 1980); Alburquerque v. Bara, 628 F.2d 767, 772-74 (2d Cir. 1980).

(5) Did the state rely on the procedural bar to deny relief? See, e.g., Wainwright v. Greenfield, 474 U.S. 284, 289 n.3 (1986); Wainwright v. Witt, 469 U.S. 412, 413 n.11 (1985); Engle v. Isaac, 456 U.S. 107, 135 n.44 (1982); County Court of Ulster County v. Allen, 442 U.S. 140 at 154 (1977); Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976); Cole v. Young, 817 F.2d 412, 416 (7th Cir. 1987) (“If the state wants a federal court to consider a case that might otherwise have been barred from habeas review under Wainwright, it can have one.”); Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987), rev’t on other grounds, 109 S. Ct. 1211 (1989).

Of course it would always be easy to determine whether the state relied on the procedural ground, either because the state court also discussed the merits of the case or because it did not issue a written opinion. The Supreme Court recently addressed this question in Harris v. Reed, 109 S. Ct. 1038 (1989), holding that “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ‘clearly and expressly’ states that its judgment rests on a procedural bar.” Henderson v. Brown, 804 F.2d at 1043 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983))).

The answer to any one of the previous questions may, of course, and often will, turn on interpretations of state law. See, e.g., Jenkins v. Anderson, 447 U.S. 231, 235 n.10 (1980); Rummell v. Estelle, 445 U.S. 263, 267 n.7 (1980); Banks v. Aronmont, 872 F.2d 237, 239 (8th Cir. 1989); Meadows v. Holland, 831 F.2d 493, 496-99 (4th Cir. 1987) (en banc), vacated and remanded on other grounds, 109 S. Ct. 1306 (1989); Williams v. Lane, 826 F.2d at 661; Spencer v. Kemp, 781 F.2d at 1463, 1469-71.
was ineffective—either as a sixth amendment claim in itself or to constitute cause under the Sykes/Carrier test. Further, counsel’s ignorance of an applicable principle or case will often be apparent from the record.

Eighth, the reality of the current procedural default standard—that an attorney may unententionally forfeit a claim for his or her client—may be a factor that helps to explain the shortage of attorneys who are willing and able to undertake capital defense representation.

Finally, if the logic of the American Bar Association’s entire package of recommendations is to assure one full and fair hearing on the merits, with substantial restrictions, such as time limitations, later on in the process, then restrictions early in the process that would foreclose review of the merits should be relaxed.

The provision for “misdemeanor of justice” as proposed new 28 U.S.C. § 2254(d) contained in Appendix “B” is recommended as a safety valve for those egregious situations in which invocation of the procedural bar would be fundamentally unfair. Definition and application of this standard would be for the courts to determine.

Also, like the exhaustion doctrine and the presumption of correctness of state court findings of fact, the availability of procedural bar rules in state capital cases is conditioned on the provision of competent and adequately compensated counsel (Recommendation #6).

Recommendations #8 and #9.

The United States Supreme Court has declined invitations to replace or supplement the cause-and-prejudice test with an inquiry into plain error.62 As a result, some states have abolished their plain error rules. It is essential, however—for a full and fair review of death penalty determinations—that some court address the merits of constitutional claims. Without such a review somewhere in the process, lawyers will never stop trying to obtain judicial attention for their clients’ cases.

The intent of Recommendation #8, therefore, is that state appellate courts should exercise an active, if not aggressive, supervisory role on direct review. In the words of Professor Richard Bonnie, a witness who appeared before the American Bar Association Task Force on Death Penalty Habeas Corpus:

The [United States Supreme] Court could have decided to leave the administration of capital sentencing to state courts, refusing to constitutionalize the process at all. Short of that, it could have issued a few self-limiting rulings, such as barring the death penalty for rape and prohibiting mandatory death sentences. However, the Court has chosen instead to enunciate several broad constitutional principles—such as the enhanced need for reliability in the determination that death is the appropriate punishment in a particular case—which constitutionalize many features of capital sentencing that would otherwise be governed by state law. By broadening the reach of federal law, and blurring the line between state and federal law, the

Court has required a considerable range of interstitial lawmaking. Obviously this law-making must be accomplished either by state courts on direct review or by federal courts on collateral review. Quite clearly, the Court prefers for this function to be performed by state courts.

Unfortunately, some state courts have not accepted this responsibility. They seem to view state court appeals simply as off-Broadway performances on the way to the federal courts.... I suspect that federal habeas is most protracted and most cumbersome, and death sentences are most likely to be set aside, in jurisdictions where the state supreme courts have declined to exercise an aggressive supervisory role.63

The American Bar Association agrees with this assessment. It further believes (Recommendation #9) that state post-conviction courts—at least on the initial post-conviction application—should be equally aggressive in unearthing constitutional claims in capital cases.64

The provision of competent counsel throughout the state proceedings, combined with active state appellate and postconviction review, should reduce the perceived burdens of federal habeas corpus litigation, speed up the process of death penalty review, and enhance the quality of justice in capital trials themselves. Recommendations #8 and #9 are preclusive; they can be accomplished by either state statute or local rule.65 If approved, the recommendations would “confront the states with the choice of searching for and dealing with constitutional violations, or handing over the final disposition of the case to the federal courts.”66

MIXED PETITIONS
(Recommendation 10)

A Synopsis of Recommendation 10.

To facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions, it is recommended that the federal district court issue an order soon after the filing of a capital habeas corpus petition requiring petitioner’s counsel, within a reasonable time, to review the trial record and inform the court whether there are any other exhausted or unexhausted claims. If there are unexhausted claims, the court shall then put the petitioner to the option of abandoning them on the record or

62Many states have plain error rules that could serve as a model for implementation of Recommendation #8. For an example of a statute that would satisfy Recommendation #9, see, e.g., Ariz. Rev. Stat. Ann. § 13-2432(A)(3) (Supp. 1988) (A petitioner shall not be given relief under this article based on any ground...[knowingly, voluntarily and intelligently not raised at trial, on appeal or in any previous collateral proceeding].

63Bonnie statement. See also supra notes 55-61 and accompanying text.

64Of course, the harmless error doctrine would still be applicable. See, e.g., Satterwhite v. Texas, 108 S. Ct. 1792, 1797-98 (1988).

Recommendation

The Association is committed to ensuring that access to its services and programs is provided to all individuals, regardless of their race, gender, sexual orientation, or any other characteristic protected by law. The Association is dedicated to providing a safe and inclusive environment for all members and to addressing any instances of discrimination or harassment that may occur.

The Association works to promote diversity and inclusion within its membership by providing training and resources to members on topics such as cultural competency and anti-discrimination policies. In addition, the Association supports initiatives that promote equal opportunities for all individuals, including those who are members of historically marginalized communities.

The Association encourages its members to actively participate in efforts to promote diversity and inclusion and to actively engage in conversations about the issues that are important to them. The Association is committed to being a leader in the fight against discrimination and to promoting a culture of respect and inclusivity.

The Association’s commitment to diversity and inclusion extends to its governance and decision-making processes, with a focus on ensuring that the perspectives of all members are considered. The Association is committed to promoting transparency and accountability in its decision-making processes, and to ensuring that all members have equal access to opportunities to participate in the development and implementation of policies and programs.

The Association is committed to working with its partners and stakeholders to ensure that its initiatives and programs are inclusive and accessible to all individuals, regardless of their race, gender, sexual orientation, or any other characteristic protected by law. The Association is dedicated to creating a community that values diversity and respects the differences among its members.

The Association encourages its members to actively support efforts to promote diversity and inclusion and to actively engage in conversations about the issues that are important to them. The Association is committed to being a leader in the fight against discrimination and to promoting a culture of respect and inclusivity.
should be denied summarily or that the claim relies upon new and previously undiscoverable facts or law and, accordingly, may be cognizable in a successive petition.75

Finally, the American Bar Association asserts that the policy of state waiver of the exhaustion issue in capital cases would help to reduce further delay in the review process and go a long way toward eliminating successive petition problems. Therefore, the Association encourages the states to have a ‘Publicly stated policy of waiving exhaustion in capital cases’ and encourages a willingness on the part of the federal courts generally to honor such waivers.76

The key to the entire package of American Bar Association recommendations is competent and adequately compensated counsel, with appropriate investigative, expert, and other services provided at government expense. Therefore, it is recommended that there be suspension of the exhaustion doctrine where such counsel and services have not been provided (Recommendation #6).

The prospect that the exhaustion doctrine will be suspended in these circumstances will encourage the states to provide counsel and the basic tools for litigating capital post-conviction claims in state courts, or to follow the example of Arkansas and eliminate the pretense of state post-conviction review altogether.78 When further combined with a more rational procedure for stays of execution and the setting of execution dates,79 the recommendations, if implemented, will assist in securing the presentation of more and stronger claims in a single petition and obtaining consideration of those claims on the merits. In short, the American Bar Association Recommendations will lead to review of capital litigation that both maximizes fairness and minimizes delay.

STAYS OF EXECUTION

(Recommendation 11)

A Synopsis of Recommendation 11.

The practices often encountered today of execution dates being set within unrealistic deadlines or at times when stays are assured, of counsel filing stay papers at the last minute, do not contribute to a rational system of death penalty review. It is therefore recommended that, if the state courts do not do so, the appropriate federal court should grant a stay of execution constrained by the one-year statute of limitations discussed in conjunction with Recommendation 13 of this report, running from the commencement of state post-conviction proceedings through the completion of the initial federal habeas corpus proceeding. Among other things, this mandatory stay would allow for the expeditious resolution of the merits of death penalty cases without the interference of time-consuming and duplicative collateral litigation on stays at every stage of review; help attract competent counsel to join (and not dissuade counsel from joining) the pool of available capital appellate and post-conviction attorneys; and ameliorate much public confusion, frustration, and disrespect for the criminal justice system by avoiding the publicity attendant upon the setting of execution dates and the issuance of stays.

Recommendation #11.

The entire set of American Bar Association recommendations includes two major themes. The first theme, previously discussed, is that proper litigation in death penalty cases requires competent and adequately compensated counsel at all stages of the proceedings. The second theme is that rational, fair, orderly, and efficient review in capital cases requires one opportunity for full state and federal post-conviction review before being subject to execution. There is no logical or legitimate reason for withholding from death penalty litigation—where the stakes are so high and ultimately irreversible—the professional atmosphere afforded by our justice system to other forms of complex litigation.

The current practice of setting execution dates, with its unrealistic deadlines and unrealistic demands, should have no place in a rational system of death penalty review. As Federal Judge Richard Gadbois told the American Bar Association Task Force on Death Penalty Habeas Cor-
pus: “We want to do it right the first time, because we don’t want to have to do it twice.”80 Support for this “one full and fair time through” approach came from all sectors of the criminal justice system.81 Even vigorous opponents of death penalty habeas corpus in its present form conceded that a proposal of one fair and complete course of post-conviction review free from the time pressures of an impending execution would be agreeable if it would then lead to finality.82

In pursuit of this objective, the American Bar Association recommends that the appropriate federal court grant an automatic stay of execution to run from the initiation of state post-conviction proceedings through the completion of the initial round of federal habeas corpus proceedings in the district court, the court of appeals, and the United States Supreme Court.83

This mandatory stay of execution would have many benefits. First and foremost, it would allow for an atmosphere in which the solemn and deliberate consideration that death penalty cases require can occur. In the current system, stays of execution must routinely be provided to enable counsel to fully investigate and carefully prepare the post-conviction petition and then to litigate the case properly in state and federal court. Every time a lawyer for a condemned prisoner is

75This evidence would be especially strong if both the state and the federal district judge were to assist in identifying potential constitutional issues, although the American Bar Association does not recommend requiring such assistance.

76See, e.g., Cosper testimony (noting the existence of waiver as a matter of policy in Texas).

77The foregoing American Bar Association recommendation on exhaustion is consistent with the Resolution of the American Bar Association Litigation Section council (adopted Sept. 9, 1989) (unanimous resolution).

78See supra notes 54-55 and accompanying text; Rosenzweig testimony.

79See infra Recommendation #11 commentary.

80Gadbois testimony.

81See, e.g., Chambers testimony; Ford testimony; Hutchins testimony; Lasnik testimony; Martin testimony; Waxman testimony; Yackle testimony.

82See, e.g., Carnes testimony.

83This recommendation is consistent with the Resolution of the American Bar Association Litigation Section Council (adopted Sept. 9, 1989) (unanimous resolution).
The American Bar Association recommends the execution of anyloggedin individuals who are convicted of capital offenses. The execution of such individuals is carried out by the state and is typically conducted by lethal injection. The process involves the administration of a lethal drug, typically a combination of two or more drugs, which results in death. The execution is supervised by medical personnel to ensure that the process is conducted in a humane and dignified manner.
CERTIFICATES OF PROBABLE CAUSE
(Recommendation 12)

Like collateral stay litigation, litigation over certificates of probable cause adds a distracting and time-consuming layer of proceedings to habeas corpus appeals. Consequently, it is recommended that certificates of probable cause be eliminated in capital habeas corpus cases and that appeals proceed directly and immediately to the appellate court’s resolution of the merits, except after denial of a second or successive petition.

Statute of Limitations
(Recommendation 13)

A Synopsis of Recommendation 13.

To speed up the death penalty review process, it is recommended that a one-year statute of limitations be imposed for the filing of all post-conviction applications in capital cases. This filing deadline would compel prisoners and counsel to seek prompt review in state post-conviction forums and federal court. It would also signify to state and federal judges, as well as to the parties and the public at large, that unnecessary delay in reviewing capital convictions and sentences is not tolerated.

The one-year period would begin upon completion of the state direct review process. The deadline would be tolled during active post-conviction litigation or when the prisoner did not have qualified counsel. Once the one-year filing period has been exhausted, the petitioner’s stay of execution would automatically expire upon the conclusion of the pending habeas corpus proceedings. If such proceedings have not been instituted, any petition filed after the deadline would be dismissed unless the petitioner raises a colorable claim, not presented previously, either of factual innocence or of the petitioner’s ineligibility for the death penalty. While the recommended creation of a statute of limitations represents a significant departure from current and longstanding habeas corpus procedure, the American Bar Association believes that this step is justified to reduce delay in the review process.

Recommendation #13.

Many have complained about delay in the review of capital cases. Delay is a pejorative term, however, frequently connoting procrastination or abuse. This is not necessarily the case in capital litigation, for some fair time period is both necessary and desirable to ensure adequate and deliberate review of complex cases. When the penalty is death, that period should not be abbreviated for arbitrary or political reasons. The American Bar Association has, therefore, endeavored to recommend measures that will eliminate unnecessary delay, but which will not impair the quality of the review process.

If adopted and implemented, the Association’s recommendations concerning competent and adequately compensated counsel should alone shorten the process while at the same time enhancing its fairness. Similarly, the recommendation of a status hearing in federal court to determine the existence of unexhausted issues will significantly reduce unnecessary delay, engendered by successive petitions and abuse of the writ, in many cases. Further, the proposal for a mandatory stay of execution through the first round of federal habeas corpus review will eliminate the time-consuming and repetitive collateral litigation attendant to seeking stays at every stage of review. Adding to the above the relative increasing stability of the law in this area, little more is needed to reduce delay.

The recommendation of time requirements for filing the first federal habeas corpus petition, therefore, is not intended primarily as an efficiency mechanism to abridge the process by restricting the remedy. Rather, eliminating the current unfair, unrealistic, and cumbersome practice of signing death warrants and setting execution dates as a means to keep the case moving through the system and get it to federal court necessitates the creation of an alternative means to give prisoners and their counsel an incentive to prosecute the cases diligently. A limitations period will serve that function well. It will also serve as a means to alter existing expectations. Unlike the existent limitations periods for several states’ post-conviction remedies, the plan proposed by the Association is calculated not to produce finality through procedural default, but instead, in keeping with the overall theme of the recommendations, to allow one full and fair opportunity to litigate the merits of the case through the state and federal systems at a pace that is reasonable considering the interests of the death-sentenced inmate, counsel, the state, the criminal justice system, the public, and the victim’s family.

The American Bar Association recommends a one-year limitations period. This period will permit sufficient time for adequate investigation and preparation of post-conviction pleadings, while also recognizing that counsel will have work to do that is unrelated to the particular death penalty case. The time period would run from the completion of the direct review process, which would include review, if any, by the United States Supreme Court.

This starting point was chosen for two reasons. First, current law and dicta are placing primary importance on the direct, rather than the collateral, review process. Time limitations should not interfere with that process in any way. Second, under the counsel recommendations, new counsel normally will be appointed for the state direct appeal, rather than for state post-conviction review, and will continue representation through state and federal post-conviction challenges. Counsel who represents that petitioner on certiorari in the Supreme Court, therefore, or in the state di-
The court is considering whether to issue a mandamus order, which is a type of writ that compels a public or subjudicial officer to perform a certain act. The court is primarily concerned with the constitutional right to an speedy and efficient determination of legal proceedings, as guaranteed by the due process clause of the Fourteenth Amendment. The issue at hand is whether the state's current procedures for post-conviction relief violate this constitutional right.

The court has heard arguments from both the state and the petitioner. The state argues that its current procedures comply with the federal constitution, while the petitioner contends that they do not. The court must now weigh the evidence and decide whether to grant the petition for a writ of mandamus. If it determines that the state's procedures are unconstitutional, it may order the state to change its procedures to comply with the constitutional requirements.

The court's decision will have implications for the rights of individuals convicted of crimes in the state. It is expected to set a precedent that other states may follow, as well as influence the development of federal law on the subject of post-conviction relief proceedings.
cases, it would be unrealistic to develop a time line that would be optimal for many, or most, of the cases. There is simply no “garden variety” death penalty case. Depending on the circumstances, for example, investigation in one case may take only a matter of weeks; in other cases it may take many months.

To have a model timetable, then, would be unfair to one party or the other in the many cases that fall on either side of the line. Such an approach might therefore result in delay in the many cases in which there is now very little. While perhaps these variances could be accounted for by recommending that judges be authorized to allow departures from the timetable, the American Bar Association believes that there would then be too much time spent litigating those requested departures.

Despite the fact that the American Bar Association Task Force on Death Penalty Habeebs Corpus instead selected the idea of time limitations, for its own information the Task Force attempted to develop a model time frame. The results were astonishing: Death penalty cases that encounter no problems and that are affirmed at every stage of state, federal, and Supreme Court review are likely to take about seven years from imposition of sentence to execution.65 (In a state in which there is no intermediate appellate review of the state post-conviction proceeding, the time period should be just over six years.) If this analysis is correct, one major benefit of this Report is to point out—to Congress, to the public, and to others—that the current average of about six years and five months66 from sentence to execution is not that far off an “optimal” time line.67 Thus, any idea that these can be completed adequately in two, three, or even four years, given the current remedies that are available to the inmate, is not realistic.

65See infra note 97.

66See, e.g., Bureau of Justice Statistics, United States Department of Justice, Capital Punishment 1988, at 1, 10 (1989) (indicating that the average time elapsed from sentence to execution was 6 years and 16 months for death-sentenced inmates executed in 1988, and 7 years and 2 months for those executed in both 1986 and 1987).

Ironically, despite the length of time consumed by the process, because of the many procedural labyrinths, the quality of counsel, and the plethora of attorneys (for the petitioner and the state) involved at various stages of the proceedings, it is rare that all of the claims that are raised by a petitioner will be decided on their merits prior to his or her execution.

See also, Remarks of Chief Justice William H. Rehnquist at the American Bar Association Mid-Year Meeting (Feb. 6, 1989), at 13–14, 16.

Also, according to information submitted to the American Bar Association Task Force on Death Penalty Habeebs Corpus by Ed Carnes, Assistant Attorney General of Alabama, only one state—Utah—showed a figure of more than 13 years. The average time period for the period from the date of commission of the crime to the date of execution, rather than from the date that the sentence was imposed to the date of execution. Moreover, since Utah has had only one post-Furman involuntary execution, this “average” figure includes only the one case. The next highest average, also from the time of commission of the crime, is from Missouri (10 years and 5 months; 1 case), then Florida (10 years; 21 cases), and Georgia (9 years and 5 months; 14 cases). The shortest average time between crime and execution for involuntary executions is 5 years and 10 months, in Louisiana (1.8 cases). The average for all states in which an involuntary execution has taken place is 6 years and 2 months, see Carnes statement. When the figures are compiled for the average length of time between imposition of sentence and date of execution, obviously the period is shorter. According to the Bureau of Justice Statistics of the United States Department of Justice, that figure is 6 years and 5 months. See Bureau of Justice Statistics, United States Department of Justice, Capital Punishment 1988, at 10 (1989).


SUCCESSIVE PETITIONS (Recommendation 14)

A Synopsis of Recommendation 14.

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

is appointed at this stage. It also assumed that a date of execution would be set no earlier than 90 days after denial of certiorari or Supreme Court affirmation at the end of the first federal habeas corpus process.

The resulting time schedule assumes that there is no substitution of counsel during the post-conviction process; there are no remands to the state court for exhaustion; relief is denied at every stage; the Supreme Court does not grant certiorari at any stage; and there are no significant extensions of time granted to either side for extraordinary developments. Further, in states in which appellate review of the state post-conviction proceeding goes directly to the state’s highest court, 330 days can be eliminated. Finally, the period for United States Supreme Court review depends on the time at which the petition for certiorari is filed. If it is filed during the regular term, it is usually resolved in 90 days. If it is filed during the summer, it is usually resolved in 120 days.
no. 2. annual plan, 1989-90

The plan's objectives are to:

1. Improve public safety through
   a. Increased police resources
   b. Enhanced community services
2. Reduce crime rates through
   a. Effective law enforcement
   b. Crime prevention programs
3. Enhance the efficiency and effectiveness of the criminal justice system through
   a. streamlining operations
   b. Improved communication and cooperation among agencies

The plan includes specific strategies and initiatives to achieve these objectives.
Recommendation #14.

To the extent that there is a problem of successive petitions, it is not generally because good lawyers deliberately withhold claims. Rather, poor lawyering, mixed-petition rules, execution-date practices, new counsel at later stages of the proceedings, and changes in the law give rise to the need for most successive petitions.

Agreeing with the statement in Sanders v. United States98 that “the imaginative handling of a prisoner’s first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion,”99 the American Bar Association, in recommendations presented earlier in this report, included several proposals that should reduce the number of second or successive petitions.

Foremost among these proposals is the provision of competent and adequately compensated counsel, along with adequate state funding for investigative, expert, and other services. Quality counsel, with good support, will likely uncover more claims and present them more fully than is currently the case. Further, the proposal for a status conference in federal court, to identify unexhausted claims and have the petitioner abandon them or exhaust them in the state courts while the habeas corpus proceedings in abeyance, will both reduce piecemeal litigation and eliminate procedurally forced successive petitions. Moreover, the proposal for a mandatory stay of execution, because it is in failing to discover claims due to insufficient time for factual and legal investigation, will lead to more comprehensive and better presented initial petitions. Add to the foregoing the increased determinacy of criminal constitutional law and the American Bar Association recommendations, if adopted and implemented, should serve to greatly reduce any problem of successor petitions.

Nevertheless, some or many successive petitions may still be filed. Usually, these petitions will be dismissed. But dismissal should not be the result if the following circumstances: (1) where the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; (2) where 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) where consideration of the requested relief is necessary to prevent a miscarriage of justice.

The reason for allowing a federal court to consider these types of claims should be clear. The intent of the American Bar Association is to provide a set of recommendations that will create an orderly post-conviction process with the opportunity for fair and effective review, particularly for the first time through state and federal col-

lateral processes. Substance should not be displaced by form, however, in cases of manifest injustice, however defined—such as where the prosecutor or police suppressed material evidence; where the prisoner alleges factual innocence; or where the court, due to constitutional error, lacks confidence that absent the error the prisoner would have been either convicted of the capital crime charged or sentenced to death.

RETROACTIVITY

(Recommendation 15)

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

Recommendation #15.

The rule of Teague v. Lane,100 is that federal habeas corpus courts may not grant relief on the basis of new constitutional law and may only grant relief on the basis of settled constitutional precedent. The effect of this decision is that only the United States Supreme Court, on direct review, can interpret the Constitution; the lower federal courts are hereafter confined in habeas corpus cases to interpreting the Supreme Court’s prior interpretations of the Constitution.

The historic purpose of federal habeas corpus to review state convictions, however, has been to enhance the extremely limited direct review capacities of the Supreme Court in criminal cases with the far more extensive review capacities of the lower federal courts—more extensive due to the greater number of lower courts and to the district courts’ factfinding capabilities.101

The idea to rely on the Supreme Court’s direct review jurisdiction arguably has not worked well in other areas of federal habeas corpus review. This is especially true in the fourth amendment area, in which exclusionary rule claims are barred from federal habeas consideration unless there has not been an opportunity for full and fair litigation of the claim in the state courts. Stone v. Powell, 428 U.S. 456 (1976). Although the 5-to-4 majority carved in, Stone the view that the Supreme Court’s certiorari jurisdiction could adequately monitor state compliance with the fourth amendment, id. at 495-95, this position is open to debate. See, e.g., Trapper v. North Carolina, 451 U.S. 997, 1001 (1981) (Brennan, J., dissenting from denial of certiorari) (“[S]ince Stone v. Powell saddles this Court with the duty of providing the only federal forum for decision of Fourth Amendment claims, we are obligated to decide cases on direct review which we might otherwise deny.”). “The denial of certiorari in this case demonstrates, however, that the Court will not discharge that duty, because the petition presents a substantial issue whether the North Carolina courts properly applied the Fourth Amendment.”). See also Mincey v. Arizona, 437 U.S. 385, 404-05 (1978) (Marshall, J., concurring) (“Because of the constraints of Stone v. Powell, we will often be faced with a Hobson’s choice in cases of less than national significance that could formerly have been left to the lower federal courts: either to deny certiorari and thereby let stand divergent state and federal decisions with regard to Fourth Amendment rights; or to grant certiorari and thereby add to our calendar, which many believe is already overcrowded, cases that might better have been resolved elsewhere.”).

99 Id. at 22.
101
Conclusion

Acquittal of a federal offense after two years from the date of conviction and the acquittal of all federal offenses, as well as a federal offense under the criminal justice system, is also derived from the same constitutional process as the federal offense under the federal justice system. The acquittal of a federal offense under the criminal justice system is further supported by the principle of habeas corpus, which is applicable to federal offenses under the criminal justice system. The acquittal of a federal offense under the criminal justice system is further supported by the principle of habeas corpus, which is applicable to federal offenses under the criminal justice system.

Effective Date

Recommendation 16

Legislative Interpretation of Terrorism

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