

EFFECTIVE DEATH PENALTY ACT OF 1995

FEBRUARY 8, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. McCOLLUM, from the Committee on the Judiciary,  
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 729]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 729) to control crime by a more effective death penalty, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) **SHORT TITLE.**—This Act may be cited as the “Effective Death Penalty Act of 1995”.

(b) **TABLE OF CONTENTS.**—The table of contents is as follows:

Sec. 1. Short title; table of contents.

**TITLE I—HABEAS CORPUS REFORM**

**SUBTITLE A—POST CONVICTION PETITIONS: GENERAL HABEAS CORPUS REFORM**

Sec. 101. Period of limitation for filing writ of habeas corpus following final judgment of a State court.

Sec. 102. Authority of appellate judges to issue certificates of probable cause for appeal in habeas corpus and Federal collateral relief proceedings.

Sec. 103. Conforming amendment to the rules of appellate procedure.

Sec. 104. Effect of failure to exhaust State remedies.

Sec. 105. Period of limitation for Federal prisoners filing for collateral remedy.

**SUBTITLE B—SPECIAL PROCEDURES FOR COLLATERAL PROCEEDINGS IN CAPITAL CASES**

Sec. 111. Death penalty litigation procedures.

**SUBTITLE C—FUNDING FOR LITIGATION OF FEDERAL HABEAS CORPUS PETITIONS IN CAPITAL CASES**

Sec. 121. Funding for death penalty prosecutions.

**TITLE II—FEDERAL DEATH PENALTY PROCEDURES REFORM**

Sec 201. Federal death penalty procedures reform.

**TITLE I—EFFECTIVE DEATH PENALTY**

**Subtitle A—Post Conviction Petitions: General Habeas Corpus Reform**

**SEC. 101. PERIOD OF LIMITATION FOR FILING WRIT OF HABEAS CORPUS FOLLOWING FINAL JUDGMENT OF A STATE COURT.**

Section 2244 of title 28, United States Code, is amended by adding at the end the following:

“(d)(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

“(A) The time at which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

“(B) The time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action.

“(C) The time at which the Federal right asserted was initially recognized by the supreme court, where the right has been newly recognized by the Court and is retroactively applicable.

“(D) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.

“(2) Time that passes during the pendency of a properly filed application for State review with respect to the pertinent judgment or claim shall not be counted toward any period of limitation under this subsection.”.

**SEC. 102. AUTHORITY OF APPELLATE JUDGES TO ISSUE CERTIFICATES OF PROBABLE CAUSE FOR APPEAL IN HABEAS CORPUS AND FEDERAL COLLATERAL RELIEF PROCEEDINGS.**

Section 2253 of title 28, United States Code, is amended to read as follows:

**“§ 2253. Appeal**

“(a) In a habeas corpus proceeding or a proceeding under section 2255 of this title 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.

“(b) 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.

“(c) 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, or from the final order in a proceeding under section 2255

of this title, unless a circuit justice or judge issues a certificate of probable cause. A certificate of probable cause may only issue if the petitioner has made a substantial showing of the denial of a Federal right. The certificate of probable cause must indicate which specific issue or issues satisfy this standard.”.

**SEC. 103. CONFORMING AMENDMENT TO THE RULES OF APPELLATE PROCEDURE.**

Federal Rule of Appellate Procedure 22 is amended to read as follows:

“RULE 22

“HABEAS CORPUS AND SECTION 2255 PROCEEDINGS

“(a) APPLICATION FOR AN ORIGINAL WRIT OF HABEAS CORPUS.—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

“(b) NECESSITY OF CERTIFICATE OF PROBABLE CAUSE FOR APPEAL.—In a habeas corpus proceeding in which the detention complained of arises of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the Government or its representative, a certificate of probable cause is not required.”.

**SEC. 104. EFFECT OF FAILURE TO EXHAUST STATE REMEDIES.**

Section 2254(b) of title 28, United States Code, is amended to read as follows:

“(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 applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. A State shall not be deemed to have waived the exhaustion requirement, or be estopped from reliance upon the requirement unless through its counsel it waives the requirement expressly.”.

**SEC. 105. PERIOD OF LIMITATION FOR FEDERAL PRISONERS FILING FOR COLLATERAL REMEDY.**

Section 2255 of title 28, United States Code, is amended by striking the second paragraph and the penultimate paragraph thereof, and by adding at the end the following new paragraphs:

“A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

“(1) The time at which the judgment of conviction becomes final.

“(2) The time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action.

“(3) The time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable.

“(4) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.”.

**Subtitle B—Special Procedures for Collateral Proceedings in Capital Cases**

**SEC. 111. DEATH PENALTY LITIGATION PROCEDURES.**

(a) IN GENERAL.—Title 28, United States Code, is amended by inserting the following new chapter after chapter 153:

**“CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES**

“Sec.

“2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

“2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

“2258. Filing a habeas corpus petition; time requirements; tolling rules.

“2259. Scope of Federal review; district court adjudications.

“2260. Certificate of probable cause inapplicable.

“2261. Application to State unitary review procedures.

“2262. Limitation periods for determining petitions.

“2263. Rule of construction.

**§2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment**

“(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply on if the provisions of subsections (b) and (c) are satisfied.

“(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

“(c) Any mechanism for the appointment, compensation and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record: (1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer; (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

“(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

“(e) The ineffectiveness or incompetence of counsel during State or Federal collateral postconviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 of this chapter. This limitation shall not preclude the appointment of different counsel, on the court’s own motion or at the request of the prisoner, at any phase of State or Federal postconviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

**“§2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions**

“(a) Upon the entry in the appropriate State court of record of an order under section 2256(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application must recite that the State has invoked the postconviction review procedures of this chapter and that the scheduled execution is subject to stay.

“(b) A stay of execution granted pursuant to subsection (a) shall expire if—

“(1) a State prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2258, or fails to make a timely application for court of appeals review following the denial of such a petition by a district court;

“(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 certioraris has expired and no petition has been filed; (B) a timely petition for certioraris was filed and the Supreme Court denied the petition; or (C) a timely petition for certioraris 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 counsel and after having been advised of the consequences of his decision, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254.

“(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

“(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

“(2) 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 the 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 in time to present the claim for State or Federal postconviction review; and

“(3) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense.

“(d) Notwithstanding any other provision of law, no Federal district court or appellate judge shall have the authority to enter a stay of execution, issue injunctive relief, or grant any equitable or other relief in a capital case on any successive habeas petition unless the court first determines the petition or other action does not constitute an abuse of the writ. This determination shall be made only by the district judge or appellate panel who adjudicated the merits of the original habeas petition (or to the district judge or appellate panel to which the case may have been subsequently assigned as a result of the unavailability of the original court or judges). In the Federal courts of appeal, a stay may issue pursuant to the terms of this provision only when a majority of the original panel or majority of the active judges determines the petition does not constitute an abuse of the writ.

**“§ 2258. Filing of habeas corpus petition; time requirements; tolling rules**

“Any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within one hundred and eighty days from the filing in the appropriate State court of record of an order under section 2256(c). The time requirements established by this section shall be tolled—

“(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

“(2) during any period in which a State prisoner under capital sentence has a properly filed request for postconviction review pending before a State court of competent jurisdiction; if all State filing rules are met in a timely manner, this period shall run continuously from the date that the State prisoner initially files for postconviction review until final disposition of the case by the highest court of the State, but the time requirements established by this section are not tolled during the pendency of a petition for certiorari before the Supreme Court except as provided in paragraph (1); and

“(3) during an additional period not to exceed sixty days, if (A) a motion for an extension of time is filed in the Federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254; and (B) a showing of good cause is made for the failure to file the habeas corpus petition within the time period established by this section.

**“§ 2259. Scope of Federal review; district court adjudications**

“(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

“(1) the result of State action in violation of the Constitution or laws of the United States;

“(2) the result of the Supreme Court recognition of a new Federal right that is retroactively applicable; or

“(3) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal postconviction review.

“(b) Following review subject to the constraints set forth in subsection (a) and section 2254(d) of this title, the court shall rule on the claims properly before it.

**“§ 2260. Certificate of probable cause inapplicable**

“The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to the provisions of this chapter except when a second of successive petition is filed.

**“§ 2261. Application to State unitary review procedure**

“(a) For purposes of this section, a ‘unitary review’ procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. The provisions of this chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of a reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

“(b) A unitary review procedure, to qualify under this section, must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2256(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

“(c) Sections 2257, 2258, 2259, 2260, and 2262 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State ‘post-conviction review’ and ‘direct review’ in those sections shall be understood as referring to unitary review under the State procedure. The references in sections 2257(a) and 2258 to ‘an order under section 2256(c)’ shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the one hundred and eighty day limitation period under section 2258 shall be deferred until a transcript is made available to the prisoner or his counsel.

**“§ 2262. Limitation periods for determining petitions**

“(a)(1) A Federal district court shall determine such a petition or motion within 60 days of any argument heard on an evidentiary hearing, or where no evidentiary hearing is held, within 60 days of any final argument heard in the case.

“(2)(A) The court of appeals shall determine any appeal relating to such a petition or motion within 90 days after the filing of any reply brief or within 90 days after such reply brief would be due. For purposes of this provision, any reply brief shall be due within 14 days of the opposition brief.

“(B) The court of appeals shall decide any petition for rehearing and or request by an appropriate judge for rehearing en banc within 20 days of the filing of such a petition or request unless a responsive pleading is required in which case the court of appeals shall decide the application within 20 days of the filing of the responsive pleading. If en banc consideration is granted, the en banc court shall determine the appeal within 90 days of the decision to grant such consideration.

“(3) The time limitations contained in paragraphs (1) and (2) may be extended only once for 20 days, upon an express good cause finding by the court that the interests of justice warrant such a one-time extension. The specific grounds for the good cause finding shall be set forth in writing in any extension order of the court.

“(b) The time limitations under subsection (a) shall apply to an initial petition or motion, and to any second or successive petition or motion. The same limitations shall also apply to the re-determination of a petition or motion or related appeal following a remand by the court of appeals or the Supreme Court for further proceedings, and in such a case the limitation period shall run from the date of the remand.

“(c) The time limitations under this section shall not be construed to entitle a petitioner or movant to a stay of execution, to which the petitioner or movant would otherwise not be entitled, for the purpose of litigating any petition, motion, or appeal.

“(d) The failure of a court to meet or comply with the time limitations under this section shall not be a ground for granting relief from a judgment of conviction or sentence. The State or Government may enforce the time limitations under this section by applying to the court of appeals or the Supreme Court for a writ of mandamus.

“(e) The Administrative Office of United States Courts shall report annually to Congress on the compliance by the courts with the time limits established in this section.

“(f) The adjudication of any petition under section 2254 of this title that is subject to this chapter, and the adjudication of any motion under section 2255 of this title

by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

**“§ 2263. Rule of construction**

“This chapter shall be construed to promote the expeditious conduct and conclusion of State and Federal court review in capital cases.”.

(b) CLERICAL AMENDMENT.—The table of chapters at the beginning of part VI of title 28, United States Code, is amended by inserting after the item relating to chapter 153 the following new item:

“154. Special habeas corpus procedures in capital cases ..... 2256”.

### **Subtitle C—Funding for Litigation of Federal Habeas Corpus Petitions in Capital Cases**

**SEC. 121. FUNDING FOR DEATH PENALTY PROSECUTIONS.**

(a) IN GENERAL.—Part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended by adding at the end the following new section:

“FUNDING FOR LITIGATION OF FEDERAL HABEAS CORPUS PETITIONS IN CAPITAL CASES

“SEC. 523. Notwithstanding any other provision of this subpart, the Director shall provide grants to the States, from the funding allocated pursuant to section 511, for the purpose of supporting litigation pertaining to Federal habeas corpus petitions in capital cases. The total funding available for such grants within any fiscal year shall be equal to the funding provided to capital resource centers, pursuant to Federal appropriation, in the same fiscal year.”.

(b) CLERICAL AMENDMENT.—The table of contents at the beginning of title I of the Omnibus Crime Control and Safe Streets Act of 1968 is amended by inserting after the item relating to section 522 the following new item:

“Sec. 523. Funding for litigation of Federal habeas corpus petitions in capital cases.”.

### **TITLE II—FEDERAL DEATH PENALTY PROCEDURES REFORM**

**SEC. 201. FEDERAL DEATH PENALTY PROCEDURES REFORM.**

(a) IN GENERAL.—Subsection (e) of section 3593 of title 18, United States Code, is amended by striking “shall consider” and all that follows through the end of such subsection and inserting the following: “shall then consider whether the aggravating factor or factors found to exist outweigh any mitigating factors. The jury, or if there is no jury, the court shall recommend a sentence of death if it unanimously finds at least one aggravating factor and no mitigating factor or if it finds one or more aggravating factors which outweigh any mitigating factors. In any other case, it shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants. The jury shall be instructed that its recommendation concerning a sentence of death is to be based on the aggravating factor or factors and any mitigating factors which have been found, but that the final decision concerning the balance of aggravating and mitigating factors is a matter for the jury’s judgment.”.

(b) CONFORMING AMENDMENT.—Section 3594 of title 18, United States Code, is amended by striking “or life imprisonment without possibility of release.”

#### **PURPOSE AND SUMMARY**

H.R. 729, the “Effective Death Penalty Act of 1995” is virtually identical to Title I of H.R. 3, the “Taking Back Our Streets Act of 1995.” H.R. 729 would enact provisions to strengthen the nation’s death penalty laws. The bill is divided into two titles. Title I reforms the habeas corpus provisions which apply in federal court. Title II modifies the federal procedures that determine when juries may recommend the death penalty at trial.

Title I of the bill contains provisions designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases. This proposal is the culmination of almost 15 years of work in Congress to achieve meaningful habeas corpus reform.

Subtitle A of Title I will impose periods of limitation on the filing of federal habeas corpus petitions and motions. Motions filed with respect to federal court convictions must be filed within two years from the time when the conviction becomes final. Petitions relating to state court convictions must be filed within one year from the conclusion of direct review of the case. The subtitle also contains provisions that require prisoners to first exhaust any state court remedies available to them before they file a habeas corpus petition in federal court.

Subtitle B of Title I enacts a number of the recommendations of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases. The “Powell Committee” was formed by the Chief Justice of the United States, and chaired by retired Associate Justice Lewis Powell, for the purposes of studying and recommending changes to the habeas corpus process as it applied to State capital cases.

Subtitle B enacts procedures that states may choose to adopt as part of their post-conviction practice. These procedures require states to create a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel for indigent prisoners who bring post-conviction proceedings relating to a conviction for a capital crime. The subtitle also provides for an automatic stay of execution when a prisoner files a post-conviction petition that conforms with the requirements of the subchapter.

Subtitle B enacts the core recommendation of the “Powell Committee”—States that appoint competent counsel to represent indigent capital defendants in state collateral proceedings obtain further safeguards against delay by limiting second and successive habeas in capital cases to claims raising doubt about prisoner’s factual guilt. Under this subtitle, prisoners will have six months to file their federal habeas claim once their state habeas is completed and their execution is stayed automatically upon application to federal court. Additionally, federal courts reviewing convictions from states that have conformed their laws to this subtitle will be limited to considering only those claims raised in the state courts, unless the failure to raise the claim was the result of state action, the recognition of a new right retroactively applied by the U.S. Supreme Court, or based on facts that could not have been previously discovered.

Subtitle B also provides general time limits on federal courts for consideration of federal habeas corpus petitions and motions. A federal district court will have 60 days from final argument to determine a petition; a court of appeals will have 90 days to determine an appeal; 20 days to decide a petition for rehearing en banc.

Subchapter C requires the federal government to provide funds to the states to assist them in defending against post-conviction petitions filed by prisoners in capital cases. The amount of that fund-

ing must be equal to the federal funds appropriated to capital resource centers each year.

Title II of H.R. 729 would reform the statute that governs the recommendation of a death sentence in federal trials. Title II would require juries in capital cases to weigh the aggravated and mitigating factors found to exist. If the jury finds that the aggravating factors outweigh the mitigating factors, or that aggravating factors exist but no mitigating factors exist, then the jury is required to recommend the death penalty. In all other situations, the jury is prohibited from recommending the death penalty.

#### BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 729 has been drafted to address a number of problems that presently exist in federal court criminal litigation, and especially in death penalty litigation. The bill's reforms can be grouped into two broad classifications. First, the bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings. Second, the bill modifies existing federal death penalty provisions to reduce arbitrariness by federal juries in the imposition of capital punishment.

To help accomplish the first purpose, the bill imposes periods of limitation on federal habeas corpus petitions filed under 28 U.S.C. section 2254 or motions filed under 28 U.S.C. section 2255. The periods differ depending upon whether the convicting was obtained in federal or state court. This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner. It also preserves review when governmental action resulted in the prisoner's delay in filing, when the United States Supreme Court recognizes a new right that is retroactively applicable, or when new facts are asserted that could not have been timely discovered through the exercise of reasonable diligence.

The bill will also broaden the range of proceedings in which the certificate of probable cause requirement applies. Under current law, state prisoners seeking federal habeas corpus relief must obtain such a certificate to appeal a district court's denial of the writ. The bill creates an identical certificate requirement for appeals of denials of federal prisoners' collateral motions. Since federal prisoners, like state prisoners, generate a high volume of meritless applications for collateral relief, it is appropriate to require that appeals of habeas corpus petitions meet a threshold probable cause standard before such an appeal will be heard by an appellate panel.

The bill also strengthens the certificate of probable cause requirement by providing (in proposed 28 U.S.C. 2253(c)) that a certificate may issue only on a substantial showing of the denial of a federal right. The bill thus enacts the standard of *Barefoot v. Estelle*, 463 U.S. 880 (1983). The bill also requires that the certificate indicate which specific issue or issues satisfy this standard.

This bill also provides that an application for a writ of habeas corpus may be denied on the merits even if it might otherwise be dismissed because the applicant has failed to exhaust state remedies. This reform will help avoid the waste of state and federal re-

sources that now result when a prisoner presenting a hopeless petition to a federal court is sent back to the state courts to exhaust state remedies. It will also help avoid potentially burdensome and protracted inquiries as to whether state remedies have been exhausted, in cases in which it is easier and quicker to reach a negative determination of the merits of a petition. This amendment does not undermine the policy of comity to state courts that underlies the exhaustion requirement, since the federal habeas court would only be permitted to deny an unexhausted claim.

The bill further provides that a state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance on that requirement unless it waives the requirement expressly through counsel. This provision accords appropriate recognition to the important interests in comity that are implicated by the exhaustion requirement in cases in which relief maybe granted. This provision is designed to disapprove those decisions which have deemed states to have waived the exhaustion requirement, or barred them from relying on it, in circumstances other than where the state has expressly waived the requirement.

Subtitle B of Title I of the bill contains a version of the recommendations for capital collateral litigation that were presented in the Report of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (the "Powell Committee" proposal). While the need for reform extends to all categories of habeas cases, the defects of the current system have had the most extreme effect in capital cases. In such cases, the continuation of litigation means that the sentence cannot be carried out. Hence, capital defendants and their counsel have a unique incentive to keep litigation going by any possible means. In the later stages of review, the most useful means of doing so is repetitive federal habeas filing. The result of this system has been the virtual nullification of state death penalty laws through a nearly endless review process.

In essence, the Powell Committee proposal addresses this problem through quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants. The proposal consists of special capital litigation procedures that would be set out in a new chapter 154 of the Judicial Code. The chapter would apply to capital cases in states that undertake to appoint counsel to represent indigent capital defendants in state collateral proceedings, and to set competency standards for such counsel. This would fill the gap in representation for indigent capital defendants in state proceedings under existing law, since appointment of counsel for indigents is constitutionally required for the state trial and direct appeal.

In states that meet this condition, the filing of federal habeas petitions in capital cases would be subject to a general 180 day time limit, and the filing of a second or successive federal habeas petition would be limited to situations in which cause is shown for failing the raise a claim in earlier proceedings and the claim impugns the reliability of the petitioner's conviction of the offense of which the capital sentence was imposed.

The Committee notes that the Powell Committee procedures preserve ample opportunities of raising claims in capital cases. Beyond trial and direct review, the defendant would typically be accorded a second run through the state trial court and appellate hierarchy in state collateral proceedings—with the assistance of counsel—followed by review by the federal courts at the trial and appellate levels in federal habeas corpus proceedings, with a final opportunity to seek Supreme Court review at the end of the process. If still more review proceedings are to be made available following this process, they should be confined, as the Powell Committee proposed, to the compelling case of a defendant who raises grounds that cast serious doubt on his factual guilt.

The proposal in subtitle B of Title I of the bill preserves the essential features of the original and earlier House-passed and Senate-passed versions of the Powell Committee proposal, and incorporates some additional features that further strengthen finality and reduce the potential for litigation abuse and delay.

Subtitle C in Title I of the bill requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to any federal appropriations for capital resource centers in the same year. The federal government provides substantial assistance to defense efforts in the this area through the resource centers, but provides no support for prosecution efforts in such litigation. In many cases, a state attorney general office on a limited budget now faces a large law firm operating pro bono and a federally funded capital resource center in federal habeas litigation. The reform in this title is responsive to the imbalance in litigation resources that has resulted from one-sided federal support for defendants' efforts to overturn capital sentences and convictions.

Title II of H.R. 729 amends federal death penalty procedures to require a jury to recommend a capital sentence if the jury finds that the aggravation factors in the case outweigh any mitigating factors. This follows the approach approved by the Supreme Court in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) and *Boyde v. California*, 494 U.S. 370 (1990). The *Blystone-Boyde* rule provides the greatest degree of assurance that capital sentences will be imposed in cases in which they are warranted. It also provides the best assurance of consistency and fairness in the imposition of capital punishment by avoiding any suggestion of a standardless discretion of the jury to refrain from imposing a capital sentence, in disregard of the aggravating and mitigating factors in the case.

The amendment in this title further requires the court to instruct the jury to avoid any influence of sympathy, settlement passion, prejudice, or other arbitrary factors in its decision. This type of instruction was upheld by the Supreme Court in *Saffle v. Parks*, 494 U.S. 484 (1990) and *California v. Brown*, 479 U.S. 538 (1987). Finally, the court will be required to instruct the jury that its recommendation is to be based on the aggravating and mitigating factors in the case, but that the final decision concerning the balance of aggravating and mitigating factors is a matter for the jury's judgment.

## HEARINGS

The Committee's Subcommittee on Crime held two days of hearings on H.R. 3, the Taking Back Our Streets Act of 1995, on January 19 and 20, 1995. H.R. 729 incorporates virtually all of the provisions of Title I of H.R. 3. Testimony was received from three witnesses: Gerald H. Goldstein, Esq., President of the National Association of Criminal Defense Lawyers; Larry W. Yackle, Esq., Professor of Law, Boston University Law School; and Susan Bolelyn, Esq., Senior Assistant Attorney General, State of Georgia, with no additional material submitted.

## COMMITTEE CONSIDERATION

On February 1, 1995, the Committee met in open session and ordered reported the bill H.R. 729 without amendment by a recorded vote of 24 to 10, a quorum being present.

## VOTE OF THE COMMITTEE

The Committee then considered the following amendments with recorded votes:

1. An amendment by Mrs. Schroeder to establish a new rule affecting the nature of federal court review of state court adjudications. The Schroeder amendment was defeated by a rollcall vote of 15-18.

AYES	NAYS
Mr. Schiff	Mr. Hyde
Mr. Conyers	Mr. Moorhead
Mrs. Schroeder	Mr. Sensenbrenner
Mr. Frank	Mr. McCollum
Mr. Schumer	Mr. Gekas
Mr. Berman	Mr. Coble
Mr. Boucher	Mr. Smith (TX)
Mr. Bryant (TX)	Mr. Gallegly
Mr. Reed	Mr. Canady
Mr. Nadler	Mr. Inglis
Mr. Scott	Mr. Goodlatte
Mr. Watt	Mr. Buyer
Mr. Serrano	Mr. Bono
Mr. Lofgren	Mr. Heineman
Ms. Jackson Lee	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

2. An amendment by Mr. Watt to expand the basis for general habeas corpus appeals beyond the denial of a federal right. The Watt amendment was defeated by a rollcall vote of 14-19.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorhead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Berman	Mr. Gekas

Mr. Boucher	Mr. Coble
Mr. Bryant (TX)	Mr. Smith (TX)
Mr. Reed	Mr. Schiff
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Mr. Serrano	Mr. Goodlatte
Ms. Lofgren	Mr. Buyer
Ms. Jackson Lee	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

3. Mr. Schumer offered an amendment that established federal standards governing the provision of trial counsel by the states in capital cases. The Schumer amendment was defeated by a rollcall vote of 14–19.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mrs. Schroeder	Mr. Moorhead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Boucher	Mr. Coble
Mr. Bryant (TX)	Mr. Smith (TX)
Mr. Reed	Mr. Schiff
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Mr. Serrano	Mr. Goodlatte
Ms. Lofgren	Mr. Buyer
Ms. Jackson Lee	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

4. Final Passage. Mr. Hyde moved to report H.R. 729 favorably to the whole House. The resolution was adopted by a rollcall vote of 24–10.

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Moorhead	Mrs. Schroeder
Mr. Sensenbrenner	Mr. Frank
Mr. McCollum	Mr. Berman
Mr. Gekas	Mr. Reed
Mr. Coble	Mr. Nadler
Mr. Smith (TX)	Mr. Scott
Mr. Schiff	Mr. Watt
Mr. Gallegly	Mr. Serrano
Mr. Canady	Ms. Lofgren

Mr. Inglis  
Mr. Goodlatte  
Mr. Buyer  
Mr. Hoke  
Mr. Bono  
Mr. Heineman  
Mr. Bryant (TN)  
Mr. Chabot  
Mr. Flanagan  
Mr. Barr  
Mr. Schumer  
Mr. Boucher  
Mr. Bryant  
Ms. Jackson-Lee

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 729, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, February 7, 1995.*

Hon. HENRY J. HYDE,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 729, the Effective Death Penalty Act of 1995.

Enactment of H.R. 729 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER.

#### INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 729 will have no significantly inflationary impact on prices and costs in the national economy.

#### SECTION-BY-SECTION ANALYSIS

##### TITLE I. HABEAS CORPUS REFORM

##### *Subtitle A. post conviction petitions: general habeas reform*

##### *Section 101. Period of limitation for filing writ of habeas corpus following final judgment of a state court*

Section 101 in subtitle A of title I of the bill amends 28 U.S.C. 2244 to create a one year period of limitation for federal habeas petitions relating to state court convictions. The limitation period would begin to run upon the later of the finality of the judgment (i.e., the conclusion of direct review or the expiration of the time for seeking such review), the time at which any impediment to the filing created by state action was removed, the time at which the Supreme Court retroactively recognized a new federal right, or the time at which the factual basis for the claim could have been discovered. The running of the limitation period would be tolled during the pendency of a properly filed application for state review with respect to the pertinent judgment or claim.

##### *Section 102. Authority of appellate judges to issue certificates of probable cause for appeal in habeas corpus and federal collateral relief proceedings*

##### *Section 103. Conforming amendment to the rules of appellate procedure*

These sections amend 28 U.S.C. 2253 and make conforming changes in Rule 22 of the Federal Rules of Appellate Procedure. The amendments in these sections extend and strengthen the requirement that a certificate of probable cause be obtained in order to appeal a district court's denial of an application for federal collateral relief.

##### *Section 104. Effect of failure to exhaust State remedies.*

This section amends 28 U.S.C. 2254(b) to provide that an application for a writ of habeas corpus may be denied on the merits despite the applicant's failure to exhaust state remedies. The amendment in section 104 further provides that a state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance on that requirement unless it waives the requirement expressly through counsel.

*Section 105. Period of limitation for Federal prisoners filing for collateral remedy*

Section 105 creates a two-year period of limitation for the filing of habeas corpus motions filed by offenders convicted in federal court. The limitation period begins to run from later of the finality of the judgment (i.e., the conclusion of direct review or expiration of the time for seeking direct review), the time of which any impediment to the filing created by government action was removed, the time at which the Supreme Court retroactively recognized a new federal right, or the time at which the factual basis for the claim could have been discovered.

*Subtitle B. Special procedures for collateral proceedings in capital cases*

*Section 111. Death penalty litigation procedures*

Subtitle B of title I of the bill incorporates the recommendations for State capital collateral litigation that were presented in the Report of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (the "Powell Committee" proposal).

Proposed 28 U.S.C. 2256 sets out the basic conditions for states to "opt in" to the Powell Committee procedures, by extending appointment of counsel for indigent capital defendants to state collateral proceedings.

Proposed 28 U.S.C. 2257 generally authorizes a stay of execution through the conclusion of the litigation of an initial federal habeas petition, and provides (in subsection (c)) that no federal court shall thereafter have the authority to stay the execution or grant relief unless (1) the basis for the stay and request for relief is a claim that has not previously been presented in state or federal court, (2) cause is shown for failing to raise the claim earlier, and (3) the underlying facts of the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense.

Under proposed 28 U.S.C. 2257(c), the notion of cause for failing to raise a claim earlier is spelled out in standard fashion as connoting state action in violation of federal law or the unavailability of the legal or factual basis of the claim at the time of earlier proceedings. The restriction of the class of claims that may be raised in paragraph (3) of subsection (c) is based on the definition of "actual innocence" suggested by the Supreme Court's decision in *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992). Only claims impugning the reliability of the petitioner's conviction for the underlying offense under the specified standard could be raised.

In light of the requirement that a claim must relate to the underlying offense for which the capital sentence was imposed, proposed 28 U.S.C. 2257(c) bars raising at this stage claims that go only to the validity of the capital sentence and claims that go only to the petitioner's eligibility for a capital sentence. The rationale for this limitation is that there are ample opportunities to raise such sentence-related claims at earlier stages of state and federal review, and that any value in permitting such claims in second or later fed-

eral habeas petitions is greatly outweighed by the likelihood of routine abuse.

Proposed 28 U.S.C. 2257 also includes (in subsection (d)) a new provision that would limit the authority of both the district court and court of appeals to grant a stay or other relief on a second or later petition to the district judge and appellate panel that decided the initial petition (or to the judge or panel to which the case is reassigned due to the unavailability of the original court or judges), and to the en banc court of appeals. This provides an orderly alternative to the judge-shopping and frantic last-minute litigation over stays that now occur when the execution of a capital sentence is imminent.

Proposed 28 U.S.C. 2257(d) further provides that a stay or other relief may not be granted unless the court first determines that the petition does not constitute an abuse of the writ. The notion of “abuse of the writ” in this context means a failure to satisfy the standards set forth in proposed 28 U.S.C. 2257(c). This provision promotes timely filing which will allow the courts adequate time to decide whether a second or later filing is permitted under the applicable standard, and avoids the problem of courts issuing stays and delaying executions to determine the threshold issue of “abuse of the writ” presented by an eleventh-hour filing.

Proposed 28 U.S.C. 2257(d) states that its restrictions apply “[n]otwithstanding any other provision of law” to emphasize that it overrides other provisions, including local rules of court, which have provided inadequate or unsound standards governing these issues in the past.

Proposed 28 U.S.C. 2258 provides a 180 day time limit for federal habeas filing, subject to a possible extension of up to 60 days for good cause. In general, the limitation period would begin running with the filing of an order appointing counsel for state collateral review, would be tolled during the pendency of a petition for certiorari before the Supreme Court following state direct review and in the course of state collateral review, and would run following the conclusion of state collateral review.

Proposed 28 U.S.C. 2259 provides for review and a ruling by the district court on the claims that are properly before it. This ensures that a ruling can be obtained on all properly presented claims, without the delay entailed by sending unexhausted claims back to the state courts. The Powell Committee Report, *supra*, at 22–23, explained: “Because of the existence of state procedural default rules, exhaustion is futile in the great majority of cases. It serves the state interest of comity in theory, but in practice it results in delay and undermines the state interest in the finality of its criminal convictions. The Committee believes that the States would prefer to see post-conviction litigation go forward in capital cases, even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine.”

As specified in subsection (a) of proposed 28 U.S.C. 2259, the claims that are “properly before” the district court are (1) claims that have been raised and decided on the merits in the state courts, and (2) other claims where cause is shown for not having raised them properly in state proceedings. The district court’s review of these claims would be subject to the normal limitations on

the scope of federal habeas review, including the rules regarding deference to state court fact finding under 28 U.S.C. 2254(d).

Proposed 28 U.S.C. 2260 waives the requirement of a certificate of probable cause to appeal the denial of an initial federal habeas petition by a district court, in capital habeas cases subject to the Powell Committee procedures.

Proposed 28 U.S.C. 2261 contains provisions that make the Powell Committee procedures potentially applicable to states, such as California, which have adopted unitary review systems in capital cases that involve review of collateral claims concurrently with direct review of the judgment.

Proposed 28 U.S.C. 2262 establishes time limitation rules for concluding the litigation of capital habeas petitions, and for concluding the litigation of section 2255 motions by federal prisoners under capital sentences, in the district courts and in the courts of appeals. The section generally sets 60 and 90 day time limits for decisions by these courts following final argument or briefing. These time limitation rules will be enforceable by mandamus. They do not create any expanded right for petitioners or movants to obtain stays of execution, and a court's failure to reach a decision in the specified time would not be a ground for granting a petitioner or movant relief from a judgment or sentence.

Proposed 28 U.S.C. 2262 further provides that the adjudication of any capital habeas petition that is subject to the chapter, and of any section 2255 motion by a federal prisoner under a capital sentence, shall be given priority by the district court and the court of appeals over all noncapital matters. Given the fact that the sentence cannot be carried out in a capital case while litigation abuse and delay that have actually occurred in capital cases, it is appropriate to require district and appellate courts to place these cases "at the head of the line," and to reach decisions concerning the presented matters within the time limits specified in this section.

*Subtitle C. Funding for litigation of Federal habeas corpus petitions in capital cases*

Subtitle C in Title I of the bill requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to any federal appropriations for capital resource centers in the same year.

TITLE II. FEDERAL DEATH PENALTY PROCEDURES REFORM

Title II of the H.R. 729 (section 201) amends federal death penalty procedures to require a jury to recommend a capital sentence if the jury finds that the aggravating factors in the case outweigh any mitigating factors, or if only aggravating factors exist. The bill prohibits any recommendation of the death penalty in all other cases. The amendment in this title further requires the court to instruct the jury to avoid any influence of sympathy, settlement, passion, prejudice, or other arbitrary factors in its decision. Finally, the court must instruct the jury that its recommendation is to be based on the aggravating and mitigating factors in the case, but that the final decision concerning the balance of aggravating and mitigating factors is a matter for the jury's judgment.

## AGENCY VIEWS

The Committee received a letter from the U.S. Department of Justice providing Administration views on H.R. 3, the "Taking Back Our Streets Act of 1995." This letter addressed the issues presented in H.R. 729 in pertinent as follows:

## I. DEATH PENALTY

*A. Habeas corpus reform*

Subtitle A of title I contains reforms affecting federal habeas corpus review of state criminal judgments and collateral review in federal criminal cases.

Chapter 1 of subtitle A contains general habeas corpus reforms that are essentially the same as those passed by the Senate in S. 1763 of the 98th Congress and title XI.A of S. 1241 of the 102d Congress, except that they do not include a rule of deference to "full and fair" state adjudications. Chapter 2 of subtitle A contains a version of the "Powell Committee" recommendations for capital collateral litigation; somewhat different versions of this proposal were previously passed by the Senate in title XI.B of S. 1241 of the 102d Congress, and by the House of Representatives in H.R. 5269 of the 101st Congress. Chapter 3 in subtitle A requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to federal appropriations for capital resource centers. The same provision was passed by the Senate in §4923 of S. 1241, and by the House of Representatives in §1108 of the first version of H.R. 3371 and §208 of the conference committee version of H.R. 3371 in the 102d Congress.

We share the objectives of curbing the abuse of habeas corpus and other collateral remedies—including the particularly acute problems of delay and prolonged litigation in capital cases—and of ensuring adequate representation for defendants who face capital sentences. We believe, however, that these objectives would be better accomplished through enactment of the reforms proposed in title III of S. 1607 of the 103d Congress.

Both the proposal in H.R. 3 and the proposal of S. 1607 contain provisions designed to reduce delay and redundancy in collateral litigation, primarily by imposing time limits for federal habeas filing, and by limiting successive habeas filings following the federal courts' rejection of an initial petition. Both proposals also would correct an imbalance in current federal funding by providing that states are to be given funding for capital habeas litigation in an amount equal to the federal funding of capital resource centers. However, in S. 1607, these measures are conjoined with measures that will improve this process further, promoting both fairness and finality by ensuring competent legal representation for defendants.

For example, under the provisions of S. 1607, the creation of a time limitation rule for federal habeas filing in

non-capital cases is contingent on a state's appointment of counsel to represent defendants pursuing state collateral remedies. In contrast, the proposal of the current bill simply imposes a general one-year time limit for federal habeas filing, and does not prescribe any correlative obligation on states to go beyond current practices in providing representation for defendants.

Similarly, S. 1607 prescribes necessary minimum counsel standards for the representation of capital defendants in state proceedings; otherwise, a defendant could be put on trial for his life with limited appeal rights and with only an inexperienced, recent law school graduate to provide a defense. In contrast, H.R. 3 does not prescribe any counsel standards for the states in capital cases. H.R. 3 does provide an incentive for states to extend appointment of counsel to collateral proceedings in capital cases—and to set some type of competency standards for such counsel—by affording states which do so a stronger rule limiting successive federal habeas petitions and time limits for concluding the litigation of federal habeas petitions. However, at the end of the day, states are free to decide whether they wish to accept this “deal” at all—removing any “mandate” from the states.

Competent representation at trial and on appeal not only provides essential safeguards of fairness for defendants, but also constitutes a critical element in ensuring the integrity and finality of judgments. Effective counsel at the primary stages of litigation promotes error-free proceedings, and reduces the likelihood that reversible error will be found at later stages, potentially after years of protracted litigation. Conversely, a failure to provide effective representation for the defendant at the initial, critical stages is a false economy that complicates and undermines the proceedings, and jeopardizes the finality of any resulting judgment on review. The proposal of S. 1607 embodies a highly effective approach to minimizing the likelihood of error and resulting jeopardy to the integrity of judgments through provision of effective counsel at trial and on appeal, while the proposal in H.R. 3 does not move beyond existing law and practice in this area.

Hence, since we believe that sound reforms should effectively further all the important objectives in this area—increased finality and assurance of fairness to defendants—we recommend that the habeas reform provisions of S. 1607 be enacted in lieu of those proposed in this bill.

#### *B. Federal death penalty procedures reform*

Subtitle B of Title I amends the death penalty provisions enacted by the Violent Crime Control and Law Enforcement Act of 1994, to direct the jury to impose a capital sentence if it finds that the aggravating factors in the case outweigh any mitigating factors. As we have previously stated, we support this approach as providing “more effective safeguards against inconsistency in capital sentencing

by providing better guidance for the jury concerning the circumstances in which a capital sentence should or should not be imposed.” Letter of Attorney General Janet Reno to Honorable Joseph R. Biden, Jr., Detailed Comments at 3 (June 13, 1994).

However, the amendment in § 111(a) of subtitle B does not fully delete inconsistent language in the enacted version of 18 U.S.C. 3593(e). A technically correct formulation of this amendment would read as follows:

Subsection (e) of section 3593 of title 18, United States Code, is amended by striking “shall consider” and all that follows through the end of the subsection and inserting the following: “shall then consider whether the aggravating factor or factors found to exist outweigh any mitigating factors. The jury, or if there is no jury, the court shall recommend a sentence of death if it unanimously finds at least one aggravating factor and no mitigating factor or if it finds one or more aggravating factors which outweigh any mitigating factors. In any other case, it shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants. The jury shall be instructed that its recommendation concerning a sentence of death is to be based on the aggravating factor or factors and any mitigating factors which have been found, but that the final decision concerning the balance of aggravating and mitigating factors is a matter for the jury’s judgment.”.

Beyond the amendment in subtitle B of title I of the current bill, our communication to the conference committee on the 103d Congress crime bills recommended several additional amendments which remain relevant to the enacted death penalty provisions. Specifically, we continue to recommend that the following changes also be made to strengthen and clarify these provisions.

(1) The separate death penalty procedures under 21 U.S.C. 848 should be repealed, to make it clear that the new procedures apply uniformly to all Federal capital offenses. We note that the legislation does repeal the other existing set of separate death penalty procedures (for fatal aircraft piracy, in 49 U.S.C. 1473).

(2) Proposed 18 U.S.C. 3593 should be amended to require the defense to give notice of the mitigating factors it will rely on in capital sentencing, just as the Government is now required to give notice of aggravating factors. Defense notice is important, for example, in relation to mental status mitigating factors (such as impaired capacity

and mental or emotional disturbance), for which the Government will often need time to employ its own experts.

(3) The final sentence of proposed 18 U.S.C. 3595(c)(2) \* \* \* should be deleted, since it could be construed as limiting findings of harmless error based on non-constitutional violations to instances in which the *Chapman* harmless-beyond-a-reasonable-doubt standard is satisfied. Under general standards of appellate review, the *Chapman*, standard only applies to constitutional error, and claims of non-constitutional error are assessed under the *Kotteakos* harmless error standard.

(4) The proposed procedures contemplate a return to an earlier system in which the Federal Government does not directly carry out executions, but makes arrangements with states to carry out capital sentences in Federal cases. We recommend amendment of the legislation to perpetuate the current approach, under which the execution of capital sentences in Federal cases is carried out by Federal officials pursuant to uniform regulations issued by the Attorney General.

(5) The use-of-a-firearm aggravating factor in the Senate bill (proposed 18 U.S.C. 3592(c)(2)(A)) should be included in the final bill.

(6) [L]anguage in proposed 18 U.S.C. 3593 relating to victim impact information has been placed in the wrong subsection.

Letter of Attorney General Janet Reno to Honorable Joseph R. Biden, Jr., Detailed Comments at 3-4 (June 13, 1994).

We would be pleased to work with interested members of Congress to develop this more complete set of death penalty amendments, as discussed in our letter to the 1994 crime bill conference committee.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**TITLE 28, UNITED STATES CODE**

\* \* \* \* \*

**PART VI—PARTICULAR PROCEEDINGS**

Chap.		Sec.
<b>151.</b>	<b>Declaratory Judgments .....</b>	<b>2201</b>
<b>153.</b>	<b>Habeas Corpus .....</b>	<b>2241</b>
<b>154.</b>	<b><i>Special habeas corpus procedures in capital cases</i> .....</b>	<b>2256</b>

\* \* \* \* \*

**CHAPTER 153—HABEAS CORPUS**

\* \* \* \* \*

**§ 2244. Finality of determination**

(a) \* \* \*

\* \* \* \* \*

*(d)(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:*

*(A) The time at which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.*

*(B) The time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action.*

*(C) The time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable.*

*(D) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.*

*(2) Time that passes during the pendency of a properly filed application for State review with respect to the pertinent judgment or claim shall not be counted toward any period of limitation under this subsection.*

\* \* \* \* \*

**[§ 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.]**

**§ 2253. Appeal**

*(a) In a habeas corpus proceeding or a proceeding under section 2255 of this title 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.*

*(b) 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.*

*(c) An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention com-*

*plained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause. A certificate of probable cause may only issue if the petitioner has made a substantial showing of the denial of a Federal right. The certificate of probable cause must indicate which specific issue or issues satisfy this standard.*

**§2254. State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for 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.

[(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.]

*(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 applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. A State shall not be deemed to have waived the exhaustion requirement, or be estopped from reliance upon the requirement unless through its counsel it waives the requirement expressly.*

\* \* \* \* \*

**§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.

*A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:*

*(1) The time at which the judgment of conviction becomes final.*

*(2) The time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action.*

*(3) The time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable.*

*(4) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.*

#### **CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES**

*Sec.*

*2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.*

*2257. Mandatory stay of execution; duration.; limits on stays of execution; successive petitions.*

*2258. Filing of habeas corpus petition; time requirements; tolling rules.*

*2259. Scope of Federal review; district court adjudications.*

*2260. Certificate of probable cause inapplicable.*

*2261. Application to State unitary review procedures.*

*2262. Limitation periods for determining petitions.*

*2263. Rule of construction.*

#### **§2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment**

*(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital*

sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record; (1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer; (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal collateral postconviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 of this chapter. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal postconviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

**§2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions**

(a) Upon the entry in the appropriate State court of record of an order under section 2256(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application must recite that the State has invoked the postconviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2258, or fails to make a timely application for court of appeals review following the denial of such a petition by a district court;

(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 certiorari has expired and no

*petition has been filed; (B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or (C) a timely petition for 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 counsel and after having been advised of the consequences of his decision, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254.*

*(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—*

*(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;*

*(2) 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 the 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 in time to present the claim for State or Federal postconviction review; and*

*(3) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense.*

*(d) Notwithstanding any other provision of law, no Federal district court or appellate judge shall have the authority to enter a stay of execution, issue injunctive relief, or grant any equitable or other relief in a capital case on any successive habeas petition unless the court first determines the petition or other action does not constitute an abuse of the writ. This determination shall be made only by the district judge or appellate panel who adjudicated the merits of the original habeas petition (or to the district judge or appellate panel to which the case may have been subsequently assigned as a result of the unavailability of the original court or judges). In the Federal courts of appeal, a stay may issue pursuant to the terms of this provision only when a majority of the original panel or majority of the active judges determines the petition does not constitute an abuse of the writ.*

**§2258. Filing of habeas corpus petition; time requirements; tolling rules**

*Any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within one hundred and eighty days from the filing in the appropriate State court of record of an order under section 2256(c). The time requirements established by this section shall be tolled—*

*(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;*

(2) during any period in which a State prisoner under capital sentence has a properly filed request for postconviction review pending before a State court of competent jurisdiction; if all State filing rules are met in a timely manner, this period shall run continuously from the date that the State prisoner initially files for postconviction review until final disposition of the case by the highest court of the State, but the time requirements established by this section are not tolled during the pendency of a petition for certiorari before the Supreme Court except as provided in paragraph (1); and

(3) during an additional period not to exceed sixty days, if (A) a motion for an extension of time is filed in the Federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254; and (B) a showing of good cause is made for the failure to file the habeas corpus petition within the time period established by this section.

**§2259. Scope of Federal review; district court adjudications**

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

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

(3) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal postconviction review.

(b) Following review subject to the constraints set forth in subsection (a) and section 2254(d) of this title, the court shall rule on the claims properly before it.

**§2260. Certificate of probable cause inapplicable**

The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to the provisions of this chapter except when a second or successive petition is filed.

**§2261. Application to State unitary review procedure**

(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. The provisions of this chapter shall apply, as provided in this section in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) A unitary review procedure, to qualify under this section, must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2256(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2257, 2258, 2259, 2260, and 2262 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in those sections shall be understood as referring to unitary review under the State procedure. The references in sections 2257(a) and 2258 to "an order under section 2256(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the one hundred and eighty day limitation period under section 2258 shall be deferred until a transcript is made available to the prisoner or his counsel.

**§ 2262. Limitation periods for determining petitions**

(a)(1) A Federal district court shall determine such a petition or motion within 60 days of any argument heard on an evidentiary hearing, or where no evidentiary hearing is held, within 60 days of any final argument heard in the case.

(2)(A) The court of appeals shall determine any appeal relating to such a petition or motion within 90 days after the filing of any reply brief or within 90 days after such reply brief would be due. For purposes of this provision, any reply brief shall be due within 14 days of the opposition brief.

(B) The court of appeals shall decide any petition for rehearing and or request by an appropriate judge for rehearing en banc within 20 days of the filing of such a petition or request unless a responsive pleading is required in which case the court of appeals shall decide the application within 20 days of the filing of the responsive pleading. If en banc consideration is granted, the en banc court shall determine the appeal within 90 days of the decision to grant such consideration.

(3) The time limitations contained in paragraphs (1) and (2) may be extended only once for 20 days, upon an express good cause finding by the court that the interests of justice warrant such a one-time extension. The specific grounds for the good cause finding shall be set forth in writing in any extension order of the court.

(b) The time limitations under subsection (a) shall apply to an initial petition or motion, and to any second or successive petition or motion. The same limitations shall also apply to the re-determination of a petition or motion or related appeal following a remand by the court of appeals or the Supreme Court for further proceedings, and in such a case the limitation period shall run from the date of the remand.

(c) *The time limitations under this section shall not be construed to entitle a petitioner or movant to a stay of execution, to which the petitioner or movant would otherwise not be entitled, for the purpose of litigating any petition, motion, or appeal.*

(d) *The failure of a court to meet or comply with the time limitations under this section shall not be a ground for granting relief from a judgment of conviction or sentence. The State or Government may enforce the time limitations under this section by applying to the court of appeals or the Supreme Court for a writ of mandamus.*

(e) *The Administrative Office of United States Courts shall report annually to Congress on the compliance by the courts with the time limits established in this section.*

(f) *The adjudication of any petition under section 2254 of this title that is subject to this chapter, and the adjudication of any motion under section 2255 of this title by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.*

**§2263. Rule of construction**

*This chapter shall be construed to promote the expeditious conduct and conclusion of State and Federal court review in capital cases.*

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**FEDERAL RULE OF APPELLATE PROCEDURE 22**

**[Rule 22. Habeas Corpus Proceedings**

[(a) Application for the Original Writ. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

[(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court

of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.】

*RULE 22*

*HABEAS CORPUS AND SECTION 2255 PROCEEDINGS*

(a) *APPLICATION FOR AN ORIGINAL WRIT OF HABEAS CORPUS.*—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

(b) *NECESSITY OF CERTIFICATE OF PROBABLE CAUSE FOR APPEAL.*— In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the Government or its representative, a certificate of probable cause is not required.

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**OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968**

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**PART E—BUREAU OF JUSTICE ASSISTANCE GRANT PROGRAMS**

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*FUNDING FOR LITIGATION OF FEDERAL HABEAS CORPUS PETITIONS IN CAPITAL CASES*

*SEC. 523. Notwithstanding any other provision of this subpart, the Director shall provide grants to the States, from the funding allocated pursuant to section 511, for the purpose of supporting litigation pertaining to Federal habeas corpus petitions in capital cases. The total funding available for such grants within any fiscal year shall be equal to the funding provided to capital resource centers, pursuant to Federal appropriation, in the same fiscal year.*

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**TITLE 18, UNITED STATES CODE**

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**PART II—CRIMINAL PROCEDURE**

\* \* \* \* \*

**CHAPTER 228—DEATH SENTENCE**

\* \* \* \* \*

**§ 3593. Special hearing to determine whether a sentence of death is justified**

(a) \* \* \*

\* \* \* \* \*

(e) RETURN OF A FINDING CONCERNING A SENTENCE OF DEATH.—  
If, in the case of—

(1) an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;

(2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or

(3) an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist,

the jury, or if there is no jury, the court [shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.] *shall then consider whether the aggravating factor or*

*factors found to exist outweigh any mitigating factors. The jury, or if there is no jury, the court shall recommend a sentence of death if it unanimously finds at least one aggravating factor and no mitigating factor or if it finds one or more aggravating factors which outweigh any mitigating factors. In any other case, it shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants. The jury shall be instructed that its recommendation concerning a sentence of death is to be based on the aggravating factor or factors and any mitigating factors which have been found, but that the final decision concerning the balance of aggravating and mitigating factors is a matter for the jury's judgment.*

\* \* \* \* \*

**§ 3594. Imposition of a sentence of death**

Upon a recommendation under section 3593(e) that the defendant should be sentenced to death [or life imprisonment without possibility of release], the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

\* \* \* \* \*

## DISSENTING VIEWS

We strongly oppose this bill.

It sacrifices the last hope of the falsely accused and the wrongly convicted—the Great Writ of Habeas Corpus—to a facile expediency driven by misguided passion for “finality.”

The enthusiasm for hasty review and swift execution embodied in this bill grotesquely diminishes the historic role of the federal writ of habeas corpus in ensuring justice.

Pursuit of habeas corpus relief by the guilty may inconvenience judicial administration. It may also irritate a society vexed by the persistence of violent crime. But the federal writ’s enduring value is that over and over again it frees the falsely accused from jail, the wrongly convicted from prison, and the innocent from horribly mistaken execution.<sup>1</sup>

This federal bulwark against State injustice is priceless. Its value cannot be measured in days “saved” by rigid timetables, nor by the convenience of short cuts to execution.

The ultimate test of any proposal to reform federal habeas corpus proceedings, therefore, is not whether it will make the trains of judicial administration run on time. This bill may do that.

The true test is whether the reform advances justice. It is whether it protects innocent men and women from being imprisoned and killed by a human process that—especially in death penalty cases—is too often flawed by emotion, subverted by prejudice, and bungled by incompetence:

I, as a trial lawyer, can tell you that [death penalty cases] are the most heinous kinds of offense, the kind that outrage public indignity. They inflame jurors and they are the kinds of cases where that inflamed public passion is the most likely to permeate the jury box . . . they are the kinds of cases that we are the most likely to make a mistake on.<sup>2</sup>

This bill does not address this fundamental and pervasive problem of criminal justice. It neither advances justice nor protects the innocent. It is therefore flawed not only by what it does poorly, but by what it does not do at all.

It is upon this high ground that we stand against this bill.

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<sup>1</sup> Hearings on Habeas Corpus, Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong., 1st and 2nd Sess. (Statements of The Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, and Rubin Carter); see also, H.R. Rpt. No. 103—[Const. subcomm. report on mistaken convictions].

<sup>2</sup> Hearing on H.R. 3, Before the Subcommittee on Crime of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (January 19, 1995) (Statement of Gerald H. Goldstein, President, National Association of Criminal Defense Lawyers). See also, Hearings on Habeas Corpus, Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong., 1st and 2nd Sess.; H.R. Rpt. No. 103—[report on mistaken convictions].

## BACKGROUND

Habeas corpus had a long and distinguished history in England before it was imported to the American colonies. Both the courts at Westminster and Parliament contributed to the development of habeas as the Great Writ of Liberty—the means by which English courts could enforce the “law of the land” against governmental power. The American colonists also linked habeas corpus with due process of law. Moreover, the Constitution in 1787 assumed that habeas corpus would be available and thus provided that the privilege of the writ could not be “suspended” except in “Cases of Rebellion or Invasion.” U.S. Const., art. I, §9, cl. 2.

The Judiciary Act of 1789 initially authorized the federal courts to receive petitions from prisoners held in the custody of federal officers in violation of federal law, 1 Stat. 81–82, and one of the most significant enactments of the Reconstruction era, The Habeas Corpus Act of 1867, extended the jurisdiction to cases in which petitioners charge they are unlawfully detained by state officials. 14 Stat. 385. The provisions of the 1789 and 1867 Acts conferring basic, subject matter jurisdiction on the federal courts are codified at 28 U.S.C. §2241.

The Great Writ figured early and often in national affairs. In the wake of Reconstruction, habeas corpus was turned to the task of adjusting the relations between the Federal Government and the states. Most importantly, the writ provided the means by which the federal courts came to have ultimate authority to vindicate federal claims arising in state criminal cases. The sweeping text of the 1867 Act invited such an interpretation. No one would contend that the Reconstruction Congress “intended” that the federal courts would defer to state judgments.

Sponsors of the 1867 Act declared it would extend to the federal courts a jurisdiction in habeas “coextensive with all the powers that can be conferred upon them.” Cong. Globe, 39th Cong., 1st Sess. 4151 (1866) (statement of Rep. Lawrence in the House). The Supreme Court was equally expansive. In *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 326 (1867), the first case to arise under the new Act, the court acknowledged that Congress had brought within the federal courts’ authority “every possible case of privation of liberty contrary to the National . . . laws”—a jurisdiction it would be “impossible to widen.” Again in *Ex parte Royall*, 117 U.S. 241, 247 (1886), the Court read the Act to confer judicial power “in language as broad as could well be employed.”

In this century, it has long been settled that the federal courts’ jurisdiction in habeas corpus provides the judicial machinery by which fourteenth amendment rights are enforced in the federal judicial system. Justice Oliver Wendell Holmes put the point squarely in his celebrated opinion for the Court in *Moore v. Dempsey*, 261 U.S. 86, 91 (1923), when he declared that even “perfection in the machinery” of adjudication in state court cannot insulate an unconstitutional conviction from reconsideration by the federal courts in the exercise of their habeas corpus jurisdiction. The *form* of state court process is, accordingly, insufficient—however full and fair it might have been.

Thirty years later, in *Brown v. Allen*, 344 U.S. 443 (1953), Justice Felix Frankfurter's opinion for the Court's majority confirmed that the federal courts have the authority and the obligation under the 1867 Act to adjudicate prisoners' federal claims *de novo*. The federal courts may consider previous state court judgments on federal issues. But they cannot defer to those judgments. It is worth noting that this bill makes no attempt to alter the established principle of independent federal adjudication in federal habeas corpus; rather, it presupposes that the federal courts have, and will continue to have, the authority and the duty to exercise independent judgment on the merits of constitutional claims, provided such claims are presented to them in a timely way and in a proper procedural posture.

#### COMPETENT COUNSEL

On the face of it, this bill is largely procedural. It (1) establishes a general one-year period within which petitioners from State court judgments—capital and non-capital alike—must file for habeas corpus relief; (2) creates a special 180 day limit and accelerated procedure in death penalty cases for States that “opt in” by choosing to provide *post-conviction* counsel to persons convicted of capital offenses and sentenced to death; (3) limits all petitioners to one federal habeas corpus review—the so-called “one bite at the apple”—except under the most extraordinary of circumstances; (4) sets rigid timetables within which federal courts must act on petitions; and (5) requires the federal government to award grants to States to help them oppose petitions for federal habeas corpus.

Each of these provisions shaves, calcifies, and truncates existing law so as to tightly limit the ability of non-capital prisoners and persons sentenced to death alike to seek federal review of Constitutional questions raised by their cases.

However, in all of its 21 pages, this “reform” legislation contains not a single sentence directed toward reforming the greatest single cause of *successful* petitions for federal writs of habeas corpus—incompetent counsel at trial.<sup>3</sup> Although some States commendably have instituted systems to ensure competent counsel in death penalty cases, far too many have not.<sup>4</sup>

By stark contrast, bills reported out of this committee in past Congresses have taken care to ensure that those who face the death penalty will be guaranteed not simply counsel, but *competent* counsel.<sup>5</sup>

Proponents of this bill argue that the procedural reforms it proposes are necessary to ensure that the trial—as opposed to post-conviction appeals and proceedings—is “the main event.”<sup>6</sup> Yet this

<sup>3</sup>Hearings on Habeas Corpus, Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong., 1st and 2nd Sess. (Statement of The Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey).

<sup>4</sup>Hearing on H.R. 3, Before the Subcommittee on Crime of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (January 19, 1995) (Statement of Gerald H. Goldstein, President, National Association of Criminal Defense Lawyers). Hearings on Habeas Corpus, Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong., 1st and 2nd Sess. (Statement of Seth P. Waxman, Esq., partner, Miller, Cassidy, Larroca & Lewin).

<sup>5</sup>See, e.g., H.R. Rep. No. 103-470; 103d Cong., 2d Sess. (1994).

<sup>6</sup>Hearing on H.R. 3, Before the Subcommittee on Crime of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (January 19, 1995) (Prepared statement of The Honorable Daniel E. Lungren, Attorney General, State of California).

bill ignores the fact that “main events” flawed by shoddy counsel not only wreak injustice upon defendants, but will continue to generate grounds upon which review will be sought, judgments set aside, and justice delayed.

In fact, the senior assistant attorney general of the State of Georgia, called by the proponents of this bill, testified that competent counsel at trial actually makes her job easier:

[T]he better the attorney is in the trial court, the easier that my job is in post-conviction proceedings because everything has either been raised or it has been waived and there is very little left to litigate unless there is some undiscovered misconduct on someone’s part that someone later finds. So it makes my job much easier if trial counsel is effective.<sup>7</sup>

In short, not only does simply fairness require that capital defendants be provided good, experienced, aggressive defense counsel, smart judicial administration demands it.

A broad range of ways exist by which to repair this defect in this bill. For example, one amendment proposed and defeated in committee would have created an “opt in” provision for States similar to the proposed “opt in” provision for post-conviction counsel. Under the proposed amendment, federal habeas petitioners could not reopen questions they should have raised in state proceedings if the State has set up a counsel authority.

However, this “procedural default” defense would not be available to States that refuse to ensure competent counsel in death penalty cases. This only makes common sense—incompetent counsel are much more likely to make the kind of mistakes that are implicated in procedural default situations.

Under the proposed amendment, the counsel authority could be, at the State’s option, the highest court of the state, an independent agency, or a statewide public defender organization. The authority would oversee providing, compensating, and evaluating the competence of trial counsel in death penalty cases.

Other ways exist to achieve the same end. Some prefer requiring States to set up counsel authorities, mandating in more detail the duties of such authorities and setting Federal standards of competence.<sup>8</sup>

The point in all of these cases remains the same, however: if justice is truly to be served, we must not only execute punishment swiftly. We must also ensure that the trial itself is fair.

#### INNOCENCE

A fatal flaw in H.R. 729 that goes to the heart of due process and fundamental fairness if the failure to ensure that an innocent person should never be executed.

The McCollum bill permits habeas claims only in the difficult-to-imagine situation where there is “clear and convincing” evidence of innocence and “no reasonable juror” would find the petitioner guilty. A Democratic amendment to substitute “preponderance of

<sup>7</sup>Hearing on H.R. 3, Before the Subcommittee on Crime of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (January 19, 1995) (Statement of Susan Bolelyn, Senior Assistant Attorney General, State of Georgia).

<sup>8</sup>See e.g., Section 308, S. 1607, 103d Cong., 1st Sess. (1993).

the evidence" instead of the more restrictive standard was defeated.

Claims of "innocence" in habeas proceedings are not part of a far-fetched scenario that can never happen in this day and age. The truth is this is all too common. In fact, the Supreme Court decided a case just this January 23, 1995, that shows how easily this can occur.

The facts in *Schlup v. Delo* are that a prison inmate accused of murder argued that a videotape and interviews in the possession of prosecutors showed he could not have committed the murder but the information was not revealed to him until six years after his conviction. The Court ruled that Mr. Schlup should be allowed to raise his claims of innocence.

There is case after shocking case of similar horror stories:

James Dean Walker had served 20 years in prison when one of his co-defendants confessed that he had pulled the trigger that killed a Little Rock police officer. Walker's gun had not been fired but he had been convicted on the testimony of a witness who said she had seen him shoot the officer. The Eighth Circuit, which had denied his first habeas petition 16 years earlier, agreed in 1985 that he should be freed.

Ruben "Hurricane" Carter was convicted of murder in 1967 and served in prison for 18 years even though the witnesses whose identification led to his conviction later recanted their identifications. The conviction was reversed after a federal judge ordered prosecutors to turn over evidence, including failed polygraph tests, which showed the witnesses were lying. Carter was set free.

Robert Henry McDowell was almost executed for a crime that the victim initially told police was committed by a white man. McDowell was black. The North Carolina Supreme Court reversed a trial court order granting him a new trial but the Fourth Circuit ordered him to be released after the police reports were made public.

False identifications, witnesses recanting, death-bed confessions: these are all too familiar to those who defend Death Row inmates. Access to federal courts is vital.

The federal courts should also be available to hear claims of innocence when based on newly-discovered evidence. This bill is a sly smokescreen to cut off all claims based on innocence.

The bill may achieve the goal of speedier executions but the cause of justice will not be served. It is an admission of failure to pursue one without the other.

For all these reasons, we strongly dissent.

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