

JUSTICE DELAYED OR JUSTICE DENIED? A CONTEMPORARY REVIEW OF CAPITAL HABEAS CORPUS

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In the last year, researchers released two reports about capital cases and habeas corpus. Together, these studies offer a contemporary snapshot of postconviction review and illustrate the influence of state collateral processes on capital habeas litigation in the federal courts. This essay examines those new findings, seeking to pair the studies to understand how the processing of capital habeas petitions has changed since the last wave of national reform and to explain why the courts differ in the time and attention they give these cases. Although capital habeas-corpus petitions now take twice as long to complete in the federal courts as they did over a decade ago, the new studies report considerable geographic disparities in the processing of capital habeas petitions and also point to sources that lie in state, not federal, litigation. The federal courts must not only pick up the pieces when states fail at collateral review, but also, in occasionally taking their time to review habeas matters more thoroughly, ensure that due process means as much in practice as it does in theory.

“Death is different,” Justice Thurgood Marshall reminded us in the case of *Ford v. Wainwright* (1986, at 411). Given the stakes at issue in capital prosecutions, courts and commentators have devoted extra attention to the procedures and processes used to try, convict, and sentence defendants to death. Much of that review has been accomplished by the writ of habeas corpus, a right protected under the U.S. Constitution that permits prisoners to challenge the constitutionality of their convictions and sentences. Habeas corpus has long been a subject of controversy, as partisans have simultaneously questioned the efficiency and effectiveness of the habeas process.

In the last year, researchers released two reports about capital cases and habeas corpus. The first, by Judge Arthur Alarcón of the U.S. Court of Appeals for the Ninth Circuit, concerns the processing of capital cases in California. The second, funded largely by the National Institute of Justice and conducted by Professor Nancy King of Vanderbilt Law School and Fred Cheesman and Brian Ostrom of the National Center for State Courts, examines federal habeas-corpus processing nationwide and the handling of capital habeas cases in thirteen federal district courts. Together, these studies offer a contemporary and complementary snapshot of postconviction review and illustrate the influence of state collateral processes on capital habeas litigation in the federal courts.

The picture that emerges is unlikely to satisfy critics, for capital habeas petitions now take twice as long to complete in the federal courts as they did at the time of the last national reform in 1996. Indeed, not one of the federal courts studied has been able to complete habeas review in less than an average of 500 days, well above the

limits that prior legislation established for states that sought a fast-track option. Lest these studies generate additional proposals by Congress to limit habeas review, critics would do well to consider *why* habeas cases take as long as they do, for the new studies report considerable geographic disparities in the processing of capital habeas petitions and also point to sources that lie in state, not federal, litigation.

This essay examines those new findings, seeking to pair the studies to understand how the processing of capital habeas petitions has changed since the last wave of national reform and to explain where possible why the courts differ in the time and attention they give these cases. In doing so, the article provides a recent history of habeas reform, summarizes the recent research on capital habeas, and challenges the critics of collateral review to address the likely sources behind the problems they so casually condemn.

Readers should understand that this article is addressed to the processing of capital habeas petitions, not necessarily to their results. To be sure, who wins and why are essential questions, some of which have been taken up in the recent research. Case processing is addressed here because the critics of capital habeas corpus have focused so heavily on “delay” in collateral litigation, making an argument that at times seems to forswear even modest judicial review of capital habeas petitions. Justice delayed may be justice denied, but speed for speed’s sake threatens to weaken the very purpose of habeas corpus.

RECENT HISTORY OF HABEAS CORPUS

Since the days of ancient England, common-law judicial systems have maintained the writ of habeas corpus, granting individuals held by the state the right to assert that their custody is unconstitutional. In the United States, Article I, Section 9 of the Constitution makes clear that habeas corpus is guaranteed except, when in times of rebellion or invasion, public safety necessitates its suspension.

The last two decades have seen several changes to habeas corpus in the United States. In 1988, the Judicial Conference of the United States convened an ad hoc committee to consider existing problems in the administration of habeas corpus and to recommend changes in its operation. Popularly known as the Powell Committee in honor of the committee’s chair, Associate Justice of the Supreme Court Lewis Powell, the committee released a report a year later concluding that the system of habeas corpus was plagued by “unnecessary delay and repetition” (Ad Hoc Committee, 1989). In response, the committee recommended a series of stepped-up deadlines in capital habeas cases, provided that the states agreed to appoint competent postconviction counsel for petitioners and allocated adequate resources to investigate and litigate these cases fairly. The committee also recommended changes that would limit the number of claims and resulting litigation that the federal courts would be required to consider in favor of resolving more of these matters in the state courts where collateral review originated.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

Congress took up many of the Powell Committee's recommendations a few years later when, in 1996, it passed, and President Clinton signed, the inelegantly named Antiterrorism and Effective Death Penalty Act (AEDPA), which changed the administration of habeas corpus in the federal courts. Under AEDPA:

- State prisoners now face a one-year statute of limitations from the denial of their direct appeal in state court to the filing of their habeas-corpus petition in federal court. The statute is tolled during the pendency of the petitioner's collateral claims in state court, but in practice a defendant who has not sought collateral review of his conviction within a year of sentencing faces a time bar on habeas consideration.
- Petitioners must exhaust all state remedies before a federal court will entertain a habeas claim. This requirement has been softened subsequently by the U.S. Supreme Court's decision in *Rhines v. Weber* (2005), which permitted federal courts to stay federal habeas cases while a petitioner returns to state court to complete the litigation of some claims. Nevertheless, this right is limited to so-called mixed petitions, in which the majority of habeas claims already have been considered during state collateral review.
- Federal courts are now directed to defer to the judgment of state courts on matters related to the habeas claim. Unless the state court's decision is either "contrary to" or an "unreasonable application of" clearly established federal law, it carries precedential weight in federal habeas proceedings. For that matter, petitioners who defaulted on their cases in state court are barred from an evidentiary hearing in federal court unless the district judge determines there is "cause" and "prejudice" or the petitioner can establish his factual innocence.
- Finally, AEDPA gives the federal courts of appeal greater supervisory powers for habeas corpus. The federal courts may not hear a claimant's second or subsequent habeas petition unless a panel of the relevant court of appeals approves. Moreover, decisions of the federal district courts are final in habeas cases unless either the trial judge or a panel of the court of appeals grants a certificate of appealability.

OPT-IN PROVISIONS

Perhaps one of the most striking changes embedded in AEDPA—and a measure recommended by the Powell Committee—was the creation of new, faster deadlines for capital habeas cases in those states that agree to provide better resources for collateral review. Such states, which are said to "opt-in" to AEDPA's optional standards, must a) provide and reasonably compensate attorneys for indigent capital defendants in state postconviction proceedings, b) maintain standards of competency for appointment of these attorneys, and c) ensure that a petitioner's postconviction attorney is not also his counsel from trial or direct appeal unless both consent.

In exchange for meeting these requirements, AEDPA grants opt-in states shorter deadlines for consideration of the federal habeas cases. Petitioners must file their federal habeas claims within six months of the denial of their direct appeals in state court; federal district courts must resolve these claims within 180 days of their filing; and the federal appellate courts have 120 days to complete their consideration once the parties have filed their briefs. Under the USA Patriot Improvement and Reauthorization Act of 2005, the federal district courts' deadline has been extended from 180 to 450 days in capital habeas cases brought from opt-in states. Should the courts fail to meet these deadlines, AEDPA allows the states a writ of mandamus to the next higher federal court.

Interestingly, of the thirty-eight states that had the death penalty at the time of AEDPA, not one has been permitted to avail itself of the faster opt-in schedules. AEDPA placed authority with the federal courts to determine whether a state qualified for the opt-in rules. In *Spears v. Stewart* (2001), the Ninth Circuit concluded that Arizona had met the requirements laid out under AEDPA, but the court refused to allow Arizona to apply the expedited deadlines to the *Spears* case "because it did not comply with the timeliness requirement of its own system with respect to [the] petitioner" (at 992). No other state has successfully managed to qualify for AEDPA's opt-in deadlines.

Aware of this phenomenon, and presumably intending to qualify more states, Congress in 2005 transferred authority from the federal courts to the attorney general to decide which states qualify under AEDPA's fast-track option. In June 2007, the U.S. Department of Justice under then Attorney General Alberto Gonzalez released a draft of its proposed opt-in requirements. Under the draft proposal (Office of the Attorney General, 2007), a state would be permitted to utilize the faster deadlines if it has:

- "established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in state postconviction proceedings"
- "established a mechanism for compensation of appointed counsel in state postconviction proceedings"
- "established a mechanism for the payment of reasonable litigation expenses"
- provided "competency standards for the appointment of counsel representing indigent prisoners in capital cases in state postconviction proceedings"

The Department of Justice sought public comment for its proposal and, in fact, extended the deadline for further submissions to September 24, 2007. As of this writing, the department had not issued a final rule, in part because of the transition from Attorney General Gonzales to Attorney General Michael Mukasey. Nonetheless, as is described later in this article, an expansion of "opt-in" habeas cases will likely clog and delay the disposition of cases in the federal courts.

THE CRITICS

Notwithstanding the changes wrought by AEDPA, critics still contend that the writ of habeas corpus moves too slowly, that capital cases in particular grind their way through the courts at an unacceptable, glacial pace. There has been no greater critic of capital habeas practice than Senator John Kyl (R-Ariz.), who in 2005 introduced the Streamlined Procedures Act (SPA), which proposed to limit the federal courts' consideration of capital habeas matters, required the dismissal of claims unexhausted in state court, limited claimants' ability to amend their habeas petitions, and tightened the counting of deadlines for AEDPA's statutes of limitations, among other provisions (Congressional Research Service, 2005).

SPA came in for considerable opposition, its critics including not only the U.S. Conference of Bishops but also the federal courts themselves. Kyl eventually abandoned SPA but not before he succeeded in placing authority for opt-in decisions with the attorney general, a change ratified by the USA Patriot Improvement and Reauthorization Act of 2005. Still, even this change saw testimony in opposition from the federal judiciary. Appearing before the Senate Judiciary Committee, Senior Judge Howard McKibben (D. Nev.), chairman of the Judicial Conference Committee on Federal-State Jurisdiction, said, "There are no empirical data to indicate the courts have not properly determined opt-in requests." Indeed, he "repeatedly urged the committee to gather data to determine whether there is a systemic problem of delay in habeas review or just isolated cases in certain circuits before approving the comprehensive overhaul" advanced in SPA (Coyle, 2005).

NEW RESEARCH

Judge McKibben's testimony was prescient, for 2007 saw the publication of two important reports that provide a new look at the processing of capital habeas-corpus petitions from state prisoners in federal courts. The first report, by Judge Arthur Alarcón, concerns the processing of capital cases in California. The second, conducted by King, Cheesman, and Ostrom, examines federal habeas-corpus processing nationwide and the handling of capital habeas cases in thirteen federal district courts.

Judge Alarcón's piece is a normative and empirical inquiry, offering his explanations for the time taken to hear capital cases on both direct and collateral appeal in California, as well as providing a review of processing times for cases before the California Supreme Court and the federal courts with jurisdiction over California. By contrast, the King, Cheesman, and Ostrom report is entirely an empirical study. As the authors explain, they and their research assistants examined 2,384 randomly selected cases from among the 27,000 noncapital habeas cases filed by state prisoners in federal district court during 2003 and 2004. Simultaneously, they reviewed capital habeas cases filed in 2000, 2001, and 2002 in the thirteen federal districts with the highest volume of capital habeas filings. Researchers coded more than twenty variables on each of these cases. The courts included all four districts in Texas, as well as

the U.S. district courts in Eastern Pennsylvania, Northern and Southern Ohio, Central California, Arizona, Nevada, Northern Alabama, Middle Florida, and Western Oklahoma.

Reviewing the two studies side by side, it is immediately apparent that habeas-corpus cases now take longer to litigate than they did at the time AEDPA was passed. As King, Cheesman, and Ostrom report, capital habeas cases that terminated in federal district court lasted an average 29 months, almost twice the 15 months they took before AEDPA. But this hardly tells the full story about case-processing time, for as the authors note, one in four federal capital habeas cases filed in 2000-02 were still pending as of November 2006 and had been pending an average of 5.3 years. Taking account of pending cases, they say, the average time to disposition for federal capital habeas cases was 3.1 years, or 1,152 days (King, Cheesman, and Ostrom, 2007:7). Given the paucity of past research on habeas case-processing times, their study is a significant contribution in this respect alone. Indeed, as the authors note, the benchmark for their findings is a decade-old report on habeas corpus (Hanson and Daley, 1995), which while useful, makes it impossible to provide tabular summaries of annual case-processing times.

NEW TIME PRESSURES

A disposition time of 1,152 days quite clearly exceeds the 450-day limit slated under AEDPA for states that manage to opt-in to the shorter deadline. Interestingly, not one of the thirteen districts examined by King, Cheesman, and Ostrom concluded its hearing of capital habeas petitions in shorter than an average of 500 days, even excluding the time that petitions were stayed for state court proceedings. Put another way, should the Department of Justice issue its final regulations, and should states successfully opt-in under AEDPA, the federal courts would face a serious problem in meeting the 450-day deadline.

It is not difficult to imagine this scenario. The criteria laid out by the Justice Department in its proposed rulemaking are relatively simple for most interested states to satisfy. With the exception of requiring states to pay "reasonable litigation expenses," not one of the standards set out by the attorney general demands more than a bare-bones system of appointment. States must offer counsel to indigent defendants in postconviction proceedings, use some unspecified criteria to measure the attorneys' competency, and pay them some unspecified amount for their work. Missing in the proposed rule are standards to ensure that lawyers pass the constitutional standard for competency set in *Strickland v. Washington* (1984) and that the compensation offered by the states is sufficient for counsel to provide adequate representation.

It is difficult to say how many states would seek opt-in status after the Department of Justice finalizes its proposed rule. As of February 2008, thirty-six states had the death penalty (Death Penalty Information Center, 2008), but not all of these would immediately seek to opt-in to AEDPA's shorter deadlines. Some, like Alabama,

would not qualify because they fail to provide postconviction counsel to the indigent (Freedman, 2006). Others may be wary of the increased pressure that the opt-in provision would place on staff within their attorney general's offices, which would be called to litigate capital habeas petitions at a faster pace. Indeed, informal conversations I have had with several federal defenders suggest that as few as seventeen states may seek opt-in status once the Department of Justice releases its final rule.¹

Still, an increase of seventeen states would put a heavy burden on the federal courts to reconfigure their caseloads to accommodate a substantially shorter deadline for capital habeas petitions. In 2000 alone, the Case Management/Electronic Case Filing System (i.e., PACER) reports that more than 200 state prisoners filed habeas-corpus petitions in the federal courts challenging their death sentences, which were considered by forty-seven different district courts. Of these forty-seven districts, thirty-six courts received more than one petition. Civil cases and even some criminal matters will have to be put to the side if the federal courts are expected to devote compressed attention to the considerable litigation involved in capital habeas-corpus petitions. The federal courts, and anyone who appears before them, should be fearful of this prospect, for it likely means that some groups of cases will be delayed to accommodate the rising tide of "opt-in" habeas cases.

WHAT EXPLAINS CASE-PROCESSING TIMES?

Before requiring breakneck changes from the federal courts, Congress and the Justice Department would do well to consider what forces explain case-processing time in capital habeas petitions. King, Cheesman, and Ostrom offer several reasons. First, they say habeas caseloads affect case-processing times; holding other forces constant, the more habeas petitions a judge must consider, the longer it takes him or her to complete a habeas case. Second, a number of capital habeas cases have been stayed in federal court under *Rhines v. Weber* (2005) to permit petitioners to return to state court to litigate their unexhausted claims. In the King, Cheesman, and Ostrom sample, 17 percent of capital habeas cases had at least one stay, which averaged almost two years (2007:6). It makes intuitive sense that a stayed case would take longer to conclude than other cases. Yet stays are not uniform across the federal courts. Of the thirteen districts examined by King, Cheesman, and Ostrom, four are in Texas; these courts are among the least likely districts to issue stays, and their stays are also among the shortest in the sample. Contrast these districts with those in California, where the average stay to return to state court lasted 2.8 years (Alarcón, 2007:749). The King et al. study includes only one California district in its sample—Central California, based in Los Angeles—while excluding Northern California (San Francisco), Eastern California (Sacramento), and Southern California (San Diego).

¹ The Office of Defender Services, a branch of the Administrative Office of the U.S. Courts, has several staff members who follow developments with AEDPA.

King, Cheesman, and Ostrom do an admirable job of anticipating and testing a number of hypotheses that may explain the time it takes for federal courts to consider capital habeas petitions. They include such factors as whether the claimant filed an amended petition, how many claims were raised in the petition, and what substantive issues were claimed. Some of these factors are shown to have an influence. For example, cases take longer when a petition is amended or when the petitioner asserts a claim under *Roper v. Simmons* (2005), *Atkins v. Virginia* (2002), or *Ring v. Arizona* (2002) challenging the constitutionality of his capital conviction and sentence. But the greatest influence on case processing is the location of the court hearing the capital habeas petition. As the authors explain, “even after controlling for other factors, one of the factors with the most powerful association with processing time for both capital and non-capital cases was the identity of the circuit, district, or state in which the case was filed” (King, Cheesman, and Ostrom, 2007:9).

GEOGRAPHIC EFFECTS

It is difficult to say what forces explain these geographic differences. It cannot be regional disparities in compensation rates, as attorneys who represent indigent defendants in federal capital habeas cases are paid a common rate across the country, \$125/hour for lead counsel through 2004 and \$160/hour or more since then. A more likely factor—and one that King, Cheesman, and Ostrom did not estimate—is a state’s “capital culture.” This construct represents a state’s historical attachment to the death penalty and posits that capital habeas cases are litigated more strenuously and considered at greater length when arising from states that do not have as strong an attachment to the death penalty as do others.² For example, although both Alabama and Illinois have the death penalty, Alabama’s death-row population is significantly larger than that in Illinois (Death Penalty Information Center, 2008), especially if one controls for state population. In these circumstances, one can imagine a capital habeas petition taking longer in Chicago as judges and lawyers expend great care to scrutinize the state legal processes that sent a convicted defendant to death row than in, say, Montgomery, where capital convictions are a more common occurrence and where citizens, lawyers, and the judiciary may have grown accustomed to an “assembly-line justice” process (Bright, 2004).

The geographic differences may also reflect the varying cultures of the local legal markets and the professional backgrounds of the lawyers appointed to the federal bench there. Major cities like New York and Los Angeles are legal markets often dominated by large, commercial law firms, which create a culture in which lengthy, meticulous, and often expensive litigation is not only accepted but also at times expected. By contrast, the legal markets in smaller cities like Little Rock, Arkansas, or Cheyenne, Wyoming, may not support such painstaking litigation, in part because a

² There are several ways of modeling this construct, including the per-capita size of a state’s death-row population or the number of convicts it has executed in the modern era, again on a per-capita basis.

different client base—one with more individuals and smaller companies—may not be able to afford extravagant legal bills or tolerate the longer wait for litigation to resolve.

There are well-documented differences in “local legal culture” (Church, 1985; Gallas, 2005; Ostrom et al., 2007), in which common experiences of litigation become shared norms of “court culture.” Indeed, “the concept ‘local legal culture’ was developed from research findings that participants in the federal and state courts in the same locale had relatively consensual views of the appropriate length of time to disposition for cases, although there was considerable variation among different locales” (Wasby, 2007:131). Whether a local legal culture, which includes the expectations of judges and lawyers, or a more narrow notion of court culture, which reflects the views of judges and court administrators, better explains geographic differences in disposition times, both constructs illustrate how the lawyers who litigate habeas-corpus claims in a given jurisdiction and the judges who hear these petitions can become accustomed to an acceptable range of time and effort for the litigation.

Some might say capital habeas should be immune to such differences in local legal culture, that because so few lawyers handle these cases, and because the death penalty is an issue of national salience, the lawyers who litigate capital habeas create their own niche and subculture of litigation norms. Those norms are shared, in turn, with the federal judges who hear such matters, who may also take their cues from the small cadre of other federal judges with experience in capital habeas matters. Although the argument has merit—especially in explaining aspects of a defense culture that is led by the national Capital Defense Network—the data instead suggest that local differences are more powerful than national norms. Recall that King, Cheesman, and Ostrom examined only thirteen federal districts. Of these, the four Texas districts accounted for half of the 368 cases studied (King, Cheesman, and Ostrom, 2007:50). By contrast, a PACER search shows that in several other districts, including Southern New York, Western Missouri, Western Tennessee, and Southern Georgia, only a single state prisoner filed a capital habeas petition in each during the same time. Thus, the case data actually suggest that capital habeas-corpus petitions are an occasional or even rare occurrence for many federal district courts. When these courts are called upon to hear these cases, they may bring their own idiosyncratic perspectives—perhaps gleaned from their experience with the local legal culture—to the litigation of capital habeas petitions.

Geographic effects may, of course, have other explanations. One is ambiguous or changing precedent. King, Cheesman, and Ostrom report that the District of Arizona “had the lowest percentage of terminated [capital habeas] cases” of the thirteen federal district courts they sampled (2007:9). This finding is understandable when one considers that the sample was drawn from 2000-02, when judges in Arizona were aware that the U.S. Supreme Court had taken certiorari in *Ring v. Arizona* (2002), which threatened to—and did—change the law on the death penalty in Arizona. Observing the considerable litigation about the decision’s retroactivity that followed, a federal judge in Arizona might very well have waited on any habeas peti-

tions until the law became more settled. Of course, *Ring* had national significance, but the most likely site to litigate its implementation would have been Arizona, where the case originated.

The same period saw the federal and state courts spar over a rule of Arizona criminal procedure that barred a defendant from raising a claim of ineffective assistance of counsel in a federal habeas petition. By 2002, the U.S. Supreme Court finally ruled, having first certified a question to the Arizona Supreme Court. But in remanding the case to the Ninth Circuit (*Stewart v. Smith*, 2002), the Supreme Court may well have signaled to the Arizona federal judges that further litigation would be required to interpret and apply the Court's holding. Against this backdrop, it is understandable that the U.S. District Court in Arizona completed a smaller percentage of capital habeas petitions during the study period than did other federal courts examined.

State law and practice likely have a strong influence on the processing of federal capital habeas petitions as well. Texas, for example, has strict default rules, which require defendants to raise certain issues on direct appeal and others during a simultaneous collateral-review process. Issues not litigated in the correct proceeding are lost and may not be raised again in the Texas courts. Nor will the federal courts step in, the U.S. Supreme Court having ruled that state procedural default is a bar to federal consideration under habeas corpus unless there is a finding of cause (*Coleman v. Thompson*, 1991) or, now under AEDPA, innocence. As a result, the unfortunate defendant who is confused by the Texas appellate process may unwittingly default on an issue and lose the claim forever. Faced with fewer claims that he can raise in a federal habeas petition, the federal court in Texas may then dispose of his case more swiftly than in other jurisdictions. Indeed, as King, Cheesman, and Ostrom (2007:9) have found, "capital petitions filed in the four districts in Texas were more likely to be concluded, and concluded sooner, than cases filed in any of the other nine districts in the study."

CALIFORNIA AS A MICROCOSM

It is also important to remember that the progress of federal habeas cases depends to some extent on the quality of state court litigation that precedes them, whether on direct appeal or collateral proceedings. Judge Alarcón (2007:748) issues a stark reminder: habeas-corpus cases take an average 6.2 years in the California federal courts, he reports, largely because 75 percent of the cases must return to state court where they spend an average 2.8 years litigating the petitioners' unexhausted claims.

Judge Alarcón is too polite to say it directly, but California's system of postconviction review seems designed to have the state punt its responsibility for constitutional review to the federal courts. As he explains, "lawyers who file state habeas corpus petitions on behalf of death row inmates in California currently do not receive sufficient funds for investigation of their clients' claims" (Alarcón, 2007:748). Whether because the hourly rate for attorney compensation is too low—\$140, com-

pared to the \$287 rate permitted under the “lodestar” method in federal civil cases³—or because California caps habeas expenditures for investigators and experts at \$25,000 over three years, capital defendants are not getting a fair opportunity to challenge their convictions and sentences in the California courts. As a result, “lawyers appointed to represent death row inmates in federal habeas proceedings are forced to conduct an investigation at federal government expense to determine all the facts necessary to support exhausted federal constitutional claims and to discover facts necessary to prove unexhausted claims” (Alarcón, 2007:748).

For that matter, the California Supreme Court seems unwilling to provide a complete record that would permit the federal courts to identify—and thus give proper deference under AEDPA to—the findings made in state habeas proceedings. To be sure, the California Supreme Court receives many petitions for habeas corpus; in the years 1978-2005, the number reached as high as 689 habeas petitions. However, the court decided 632 of these cases on the petition and response alone, ordering further proceedings in just 47 matters and an evidentiary hearing only 31 times (Alarcón, 2007:741). The result is that, in many cases, the court offers a scant record to justify its rulings. In 92 percent of the 689 habeas-corpus petitions on which it has ruled, the California Supreme Court has issued nothing more than a summary report to announce its decision. Sometimes called “postcard denials,” these summary dispositions provide no explanation or details for the court’s holding, thus giving the federal courts virtually nothing to consider besides the decision itself in weighing the constitutional merit of the defendant’s later federal petition.

California chief justice Ronald George has not been shy in explaining his court’s reluctance to offer guidance for its habeas decisions. Responding to questions from Senator Dianne Feinstein (D-Cal), George said “that drafting and reviewing an order containing more information than the basic ground for denying relief consumes far more time on the part of both staff and the justices, to the detriment of the court’s performance of its responsibilities in noncapital cases” (quoted in Alarcón, 2007:742). However, as Senator Feinstein correctly notes, the California Supreme Court’s failure to spell about the reasons for its habeas decisions “often requires federal courts to essentially start each federal habeas death penalty [case] from scratch, wasting enormous time and resources” (quoted in Alarcón, 2007:743). This would seem to turn AEDPA on its head. Passed largely to speed up the consideration of postconviction claims by condemned prisoners, AEDPA requires federal courts to defer to state court decisions that are neither “contrary to” nor an “unreasonable application of” clearly established federal law. Yet without an opinion that explains the basis for its decision, one can hardly understand how the California Supreme

³ “Under the typical federal fee-shifting statute, the court will arrive at an attorney’s fee by first determining the ‘lodestar’ amount, which is calculated by ‘multiplying the attorney’s reasonable hourly rate by the number of hours reasonably expended.’” *Grant v. George Schumann Tire & Battery Company*, 1990, at 879.

Court has applied federal law in its state habeas cases. If anything, California's actions seem determined to thwart the intentions of AEDPA and shift costs to the federal government by requiring the federal courts of California to do the work that its state system should complete.

“DELAY”

The result of California's actions, Judge Alarcón concludes, is “delay.” Referring to state habeas review, he says:

the average delay between the filing of the responsive brief by the attorney general and the prisoner's reply brief was 6.5 months. The average delay between the filing of the reply brief and oral argument before the California Supreme Court was 18.5 months. The average delay between oral argument and the filing of the California Supreme Court's opinion between 1978 and January 19, 2004 was 6.2 months (Alarcón, 2007:722).

Yet Judge Alarcón's use of delay is imprecise, for the term fails to distinguish between those points in the collateral process that take *some* amount of time and those that may take *too much* time. Moreover, the word has a pejorative meaning, implying that habeas-corpus claims take too long to process when, in fact, there may be some courts that do not give these matters sufficient consideration. To be sure, many would agree with Judge Alarcón that a gap of twenty-four years between sentencing and execution, as happened in the case of Clarence Allen, is unacceptable. Whether one supports the death penalty and seeks swift administration of justice or opposes capital punishment and believes that a two-decade wait on death row constitutes cruel and unusual punishment, the state and federal courts ought to be able to complete their postconviction review within a shorter amount of time. The gap is all the more troubling when the petitioner is actually innocent, or when his sentence is disproportionately high, and he must keep time on death row until he wins eventual reprieve.

These exceptional cases do not mean, however, that every gap in litigation constitutes illegitimate delay. Indeed, at a most basic level, meritorious cases are likely to take longer to litigate than those habeas petitions that are dismissed, for as King, Cheesman, and Ostrom demonstrate, the federal courts are more likely to hold evidentiary hearings for habeas petitions they eventually grant. Hearings, and the motions and submissions that go with them, often extend the life of a habeas petition. Would Alarcón or others include such time in delay? Likely not, yet the loose use of the term when describing case processing only reinforces the notion advanced by others that collateral review in capital cases is itself an unnecessary delay. One need only consider the remarks of California governor Arnold Schwarzenegger, who “in a strongly worded statement” criticized the federal court in San Francisco for “interject[ing] itself into the details of the state's execution process” when it halted the execution of Michael Morales out of concern that the state's method of execution would

violate the Eighth Amendment (CNN, 2006). Such sentiments are understandable if they come from relatives of the victim, who in this case decried “the entire process [as] a mockery” (CNN, 2006), but those sworn to uphold the Constitution should not consider federal review of a state’s execution process to be an unacceptable delay.

Defining an appropriate length for collateral review is beyond the scope of this article, for, of course, each case is unique and warrants individual attention. Nonetheless, it is troubling that so much of the debate over capital habeas corpus has focused on how long the federal courts take rather than whether some of those courts, not to mention their state cousins, fail to give habeas petitions appropriate consideration. Why, for example, do we focus on states like California, asking, as I have heard in hushed conversations, whether anti-death penalty judges are “putting these cases in drawers”? Why not address the cases King uncovered in Texas, where habeas review takes place more quickly than anywhere in the nation? Why is it that the U.S. District Court for Southern Texas, which completed an astonishing 92 percent of the eighty-seven capital habeas petitions it received from state prisoners in 2000-01, granted only 7 percent of the petitions, whereas the Eastern District of Pennsylvania was still considering eleven of the nineteen petitions it received in the same period and had granted relief in 75 percent of the terminated cases (King, Cheesman, and Ostrom, 2007:11)? Do we explain these differences by variations in state law and practice, local legal culture, or quality of postconviction counsel, or is this evidence of “activist” judges imposing their ideology on capital habeas cases, whether for or against the death penalty? The short answer is that we do not know exactly, but the question deserves more reasoned attention than it has received so far.

LESSONS

Both the King, Cheesman, and Ostrom and Alarcón studies are excellent steps through which to bring empirical evidence and informed debate to the question of postconviction review in capital cases. Perhaps others will add to these data. As reported in the March 2007 minutes of the Judicial Conference of the United States (Proceedings, 2007:16), the Administrative Office of the U.S. Courts and the Federal Judicial Center were undertaking a “capital habeas corpus study.” At the time of this writing, there was no information available on the status or findings of that review. Were this information to be forthcoming, it presumably would add much to the body of new data that are now being generated on the processing of capital habeas corpus petitions.

Regardless of whether additional reports will be forthcoming, the studies by Alarcón and King, Cheesman, and Ostrom present three important lessons. First, not only does capital habeas corpus take longer now than it did before AEDPA, but there is also tremendous variation in the time and treatment that federal courts give to these petitions. Second, even if we account for the many variables that King, Cheesman, and Ostrom test, the strongest explanation for case processing is geography; state, circuit, and district effects overwhelm other potential explanations for

case-processing times and outcomes. Third, and perhaps most important, these geographic differences compel us to dig deeper into qualitative research and case studies to better understand why the federal courts treat similar constitutional claims differently. This essay has suggested several potential reasons, from varying local legal cultures to differences in state law and practice, to the failure of certain states to carry out their responsibilities in postconviction review.

If there is one “takeaway lesson” from this research, it is the folly of branding the federal courts scapegoats for other deficiencies in the intergovernmental system of collateral review. Habeas corpus may take longer than many of us would prefer, but this does not mean that the federal courts are dragging their heels, resistant to rule on claims that may send the losing party to the death chamber. To the contrary, not only must the federal courts pick up the pieces when states fail at collateral review, but in occasionally taking their time to review habeas matters more thoroughly, the federal courts are also ensuring that due process means as much in practice as it does in theory. **jsj**

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