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ESSAY

FEDERAL HABEAS CORPUS: THE EFFECT OF HOLDING STATE CAPITAL COLLATERAL PROCEEDINGS BEFORE A JUDGE RUNNING FOR RE-ELECTION

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I. INTRODUCTION

In a number of cases death-row inmates have found themselves challenging their convictions and death sentences in state collateral proceedings presided over by a judge running for re-election.¹ Of what significance in federal habeas corpus is the

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1. The precise frequency with which this situation arises is unknown. No reported case has discussed this situation. I am aware of five cases in which a collateral hearing was scheduled to be held during an election campaign. In one case recusal was summarily ordered by an appellate court, *State ex. rel. Messiah v. Whitley*, 588 So. 2d 91 (La. 1991), although the simultaneity of hearing and re-election campaign was only one of the issues raised in behalf of *Messiah*. Telephone Conversation with Nicholas Trenticosta, Executive Director, Loyola Death Penalty Resource Center (October 15, 1993). In another case, *State v. Lopez*, No. C 68946 (Dist. Ct. Clark Co., Nev.) (Motion for Stay of Decision Pending Election, filed June 2, 1992), the motion for stay was denied, and the case is now in appeal. Telephone conversation with Michael Pescetta, Director, Nevada Appellate and Post-Conviction Project, Inc. (October 19, 1993). In a third case, the issue was raised in a Motion for Change of Venue or, in the Alternative, Recusal, *Ex Parte Macies*, No. 41270, (168th Jud. Dist. Ct., El Paso Co., Tex., filed Sept. 6, 1988), but the motion failed. Address by Douglas Robinson before the ABA Post Conviction Death Penalty Representation Project, Washington, DC (July 14, 1993). (Eventually, the U.S. Court of Appeals affirmed a U.S. District Court judgment granting a petition for writ of habeas corpus on the ground of ineffective assistance of counsel at trial. *Martinez - Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).) In a fourth case, *State v. Coleman*, No. 84 CF 811 (Cir. Ct., Lake Co., Ill., July 2, 1993), in which I continue to act as co-counsel, the issue was not raised, and the petition for post conviction relief was denied. In a fifth case, counsel filed a motion in March 1993 to disqualify a judge before whom post-conviction proceedings were pending and who was scheduled to appear on the ballot in a retention

coincidence of re-election campaigns and the holding of the hearings?

Although procedures vary somewhat from state to state, capital collateral proceedings typically commence in a trial-level court following unsuccessful appeals to the state intermediate appellate court (where permitted) and the highest state appellate court and denial of discretionary review by the United States Supreme Court. State collateral proceedings are analogous to federal habeas corpus but must precede federal habeas corpus because of the need to exhaust state remedies before an incarcerated person is permitted to seek federal habeas corpus.

At least three related issues arise in federal habeas corpus.² First, does the simultaneity of state court election and the conduct of state collateral proceedings deprive the defendant of an opportunity for full and fair litigation of Fourth Amendment (i.e., search and seizure) issues? If so, the defendant is not automatically denied habeas relief when arguing a violation of Fourth

election in November 1993. *Wise v. State*, No. 627 655 (21st Jud. Cir., St. Louis Co., Mo., filed March 30, 1993).

Undoubtedly, this situation has arisen in other unreported cases, especially in jurisdictions in which judges' terms are very short (for example 4 years). Telephone Conversations with Brent Newton, Texas Resource Center (October 19, 1993).

The problem is potentially great. In thirty of the thirty-six states that have capital punishment, trial judges are either elected in contested elections (partisan or non-partisan) or must run in retention elections (in which the voters are asked whether a particular judge should be retained in office). ALA. CONST. amend. 328, § 6.13; ARIZ. CONST. art. 6, § 12; ARK. CONST. art. 7, § 17; CAL. CONST. art. 6, § 16; COLO. CONST. art. 6, § 25; FLA. CONST. art. 5, § 10 (b); GA. CONST. art. 6 § 7; IDAHO CONST. art. 5, § 11; ILL. CONST. art. 6, § 12; IND. CONST. art. 2, § 14; KY. CONST. § 117; LA. CONST. art. 5, § 22; MD. CONST. art. IV, § 5; MISS. CONST. art. 6, § 153; MO. CONST. art. 5, §§ 25(a)-25(c)(1); MONT. CONST. art. VII, § 8; NEB. CONST. art. V, § 21; NEV. CONST. art. 6, § 5; N.M. CONST. art. VI, § 33; N.C. CONST. art. IV, § 9; OR. CONST. art. 7, § 1; PA. CONST. art. 5, § 13; S.D. CONST. art. V, § 7; TENN. CONST. art. 6, § 4; TEX. CONST. art. 5, § 7; UTAH CONST. art. 8, § 9; WASH. CONST. art. 4, § 5; WYO. CONST. art. 5, § 4.

There is, of course, some ambiguity in the phrase "running for re-election." Nevertheless, it would certainly include, for example, the time between the date when a judge is required to file a declaration of candidacy to succeed herself or himself and the date of the election. *See, e.g.*, ILL. CONST. art. 6, § 12 (d).

Analogous cases have also arisen. For example, the presiding judge may be running for re-election at trial, *Sheppard v. Maxwell*, 346 F.2d 707 (6th Cir. 1965), *rev'd on other grounds*, 384 U.S. 333 (1966), or at sentencing, *State v. Kynard*, No. CC-88-35 (Cir. Ct., Perry Co., Ala., Sept. 12, 1990) (sentencing continued on motion of defendant).

2. *See generally* 1 JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (1988 & Supp. 1992); 3 WAYNE R. LA FAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* (1984 & Supp. 1993).

Amendment rights. (Under *Stone v. Powell*,³ an applicant who has been provided with such an opportunity is not entitled to federal habeas relief.)

Second, does this coincidence prevent a federal district court from denying an evidentiary hearing under *Townsend v. Sain*?⁴ In *Townsend* the United States Supreme Court listed six circumstances under which a federal district court, after finding that the applicant had alleged facts entitling the applicant to relief, was obligated to hold a hearing. Among them were the following: "(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing . . . (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."⁵

Third, does the simultaneousness of re-election campaign and hearing deprive state court findings of fact of a presumption of correctness which they would otherwise enjoy under 28 U.S.C. § 2254 (d)? Under this section, the presumption of correctness is lost, *inter alia*, if "a fact finding procedure employed by the state was not adequate to afford a full and fair hearing" or "if the applicant did not receive a full, fair, and adequate hearing in State court proceeding."⁶

Although these contexts are different — one involving a possible total denial of relief, a second involving the necessity of a hearing, and the third involving the possibly presumptive correctness of state court findings of fact — the language used in the statute and cases is thus very similar. One can imagine that the meaning of "full and fair" could vary with the context;⁷ nevertheless, if a state collateral fact-finding hearing is actually held

3. 428 U.S. 465 (1976).

4. 372 U.S. 293 (1963).

5. *Id.* at 313.

6. For a discussion of the relationship between *Townsend v. Sain* and 28 U.S.C. § 2254 (d), see LIEBMAN, *supra* note 2, § 20.2.

7. For example, *Stone v. Powell* refers to an "opportunity," which, in essence, can be waived through a failure to raise the issue in state court. This "procedural default" bars federal habeas relief unless the applicant can show cause and prejudice for the failure to raise a claim in a timely fashion, or a miscarriage of justice. *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992) (failure to develop facts in state collateral proceedings); *Coleman v. Thompson*, 111 S. Ct. 2546 (1991) (failure to file timely notice of appeal from judgment in collateral proceedings); *Murray v. Carrier*, 477 U.S. 478 (1988) (failure to include claim of error on appeal); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (failure to raise *Miranda* issue at trial); *Francis v. Henderson*, 425 U.S. 536 (1976) (failure to object prior to trial to grand jury's composition). Thus, one who fails to raise an issue in state court may still be said to have had "an opportunity for full and fair litigation." By contrast, *Townsend v. Sain* and 28 U.S.C. § 2954 (d) presuppose an absence of procedural default.

and if there is no procedural default on the part of the applicant (i.e., if appropriate objections and claims are timely made), the meaning of this phrase is likely to be the same regardless of context. Indeed, in *Stone v. Powell*, dealing with a Fourth Amendment issue, the Court cited *Townsend v. Sain*, dealing with the need to hold an evidentiary hearing.⁸

This article focuses narrowly on two stages of review of capital cases: (1) the first capital collateral proceeding in state court and (2) the subsequent review of those proceedings by a federal district court following the filing of a petition for federal habeas corpus. These two stages provide a defendant with his or her only opportunity to supplement, through the introduction of evidence, an inadequate trial record. Since findings of fact made at the trial level are seldom rejected by appellate courts, and since most cases are won or lost on the facts, one cannot overemphasize the importance of these two stages in general and, in particular, of the federal district court's treatment of state court findings of fact.

II. DEFINITION OF "OPPORTUNITY FOR FULL AND FAIR LITIGATION"

Few federal cases have dealt with structural bars to a full and fair hearing. That is, although one finds a number of federal cases interpreting the phrases "opportunity for full and fair litigation" and "full and fair hearing,"⁹ there are few cases that outline what circumstances beyond the control of the judge would constitute a lack of full and fair hearing. Obviously, the need of a particular judge to run for re-election at a particular time is a circumstance beyond his or her control.

One case which arguably deals with a structural bar is *Rose v. Mitchell*.¹⁰ In *Rose*, the applicants alleged that the trial judge had selected the foreman of the grand jury on a racially discriminatory basis, in violation of the equal protection clause of the Fourteenth Amendment. One of the preliminary issues that the Supreme Court had to address was whether the ruling in *Stone v.*

8. *Stone v. Powell*, 428 U.S. 465, 495 n.36 (1976).

9. Compare, e.g., *Agee v. White*, 809 F.2d 1487, 1490 (11th Cir. 1987) (failure of state appellate court to deal with "fruit of the poisonous tree" argument constituted absence of "opportunity" under *Stone*) with *Caldwell v. Cupp*, 781 F.2d 714, 715 (9th Cir. 1986) (since petitioner was "given, and took advantage of every opportunity to present evidence, to cross examine witnesses, and argue the law," he had an "opportunity" under *Stone* even though the state judge "did not articulate which facts, if any, supported the judge's legal conclusions").

10. 443 U.S. 545 (1979).

Powell would be applied in this context. In rejecting the application of *Stone*, the Court said, in part:

In the first place, claims such as those pressed by respondents in this case concerned allegations that the trial court itself violated the Fourteenth Amendment in the operation of the grand jury system. In most such cases, as in this one, the same trial court will be the court that initially must decide the merits of such a claim, finding facts and applying the law to those facts. This leads us to doubt that claims that the operation of the grand jury system violates the Fourteenth Amendment in general will receive the type of full and fair hearing deemed essential to the holding of *Stone*.¹¹

In *Rose*, the trial judge was indeed the first judge to rule on the applicant's claim, even though he was, in effect, the chief witness in the case.¹²

Two other reported cases come close to raising the issue that is the subject of this article. One, *Sheppard v. Maxwell*,¹³ is famous for the Supreme Court's holding that a denial of due process resulted from the trial judge's failure to deal appropriately with "the massive, pervasive and prejudicial publicity that attended [the defendant's] prosecution."¹⁴ The Supreme Court noted in passing that the trial began two weeks before an election in which the trial judge was to stand for re-election. The court of appeals, however, had previously rejected Sheppard's claim of a denial of due process, based on the timing of the re-election in relation to the commencement of the trial:

11. *Id.* at 561.

12. *Cf. In re Murchison*, 349 U.S. 133, 137-39 (1955) (a judge acting as "one-man grand jury" violated due process by publicly trying defendant for contempt after citing defendant for contempt in secret; result followed from judge's not being "wholly disinterested" in the outcome and from the denial of defendant's right to cross-examine the judge, who was a material witness).

Presumably the judge in *Rose* also violated the MODEL CODE OF JUDICIAL CONDUCT Canon 3 (C) (1972), which provides in pertinent part:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
 (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding."

The pertinent part of the MODEL CODE OF JUDICIAL CONDUCT Canon 3 (E) (1990) is identical, as is the pertinent provision of the Tennessee Code on judicial conduct. Tenn. Sup. Ct. R. 10.

13. 384 U.S. 333 (1966).

14. *Id.* at 335.

Much has been made of the fact that the Sheppard trial began on the eve of a judicial election at which the trial judge and one of the prosecution staff were candidates. We must assume that this is emphasized to imply that desire for victory may have led the judge to conduct prejudicial to Dr. Sheppard's rights. We would have to entertain a low estimate of the integrity of our fellow judicial officers to join in any such inference. In most of the states of the Union it is traditional that those who occupy judicial office be required from time to time to account for their stewardship by submitting to election. If it is suggested that we presume that an elective judiciary can preserve constitutional rights only at some undefined distance in time from election day, we reject such suggestion out of hand. As realists we know that those who seek re-election to judicial office hope that their conduct will find public approval, but we do not think that judicial *misconduct* would be more attractive to the electorate than conduct marked by the integrity which we as judges like to believe is possessed by elected judges as well as those who have the security of tenure during "good behavior." Nor are we prepared to presume that any judge is so far enamored of his position as to betray its responsibilities, no matter what he thinks would most please the electorate. Additionally, it is not inappropriate to note that much of the publicity complained of, and the actual taking of testimony at Dr. Sheppard's trial, occurred *after* the election had been held. For like reasons, we must reject Dr. Sheppard's repetition in this Court of his broadside charge "that the elective judges of Ohio were so biased and prejudiced against him that he could not expect fair adjudication of his case in state courts."¹⁵

It should be noted that the issue as presented to the court of appeals involved an allegation of a violation of due process at a trial conducted before a jury; the precise issue raised in this article, however, is whether a judge (without the aid of a jury) can be said to provide a full and fair hearing in a capital collateral proceeding. (When a jury is present, it decides most issues of fact; thus, there is less opportunity for the judge to affect the outcome of the case.)

In *Brown v. Doe*¹⁶ a federal habeas applicant complained in a non-capital murder case of the trial judge's references to applicant's trial in the judge's re-election campaign that occurred

15. Sheppard v. Maxwell, 346 F.2d 707, 729-30 (6th Cir. 1965).

16. 2 F.3d 1236 (2d Cir. 1993).

shortly after applicant's sentencing. In rejecting applicant's claims, the court of appeals said, in part:

Brown claims that a causal relationship between the trial judge's electioneering and his earlier trial rulings can be inferred here because of the strict security at trial, unspecified trial rulings, and the imposition of a maximum sentence. None of these circumstances evidences partiality. There is ample record support for the security measures and the sentence, and overwhelming evidence of Brown's guilt. On oral argument, Brown's attorney conceded that, to reverse Brown's conviction, this Court would have to rule in effect that no judge who is elected may preside in sensational cases. We reject such a rule as incompatible with federalism. We refuse to assume, as Brown asks us to do, that all elected judges will invariably disregard their oath and subvert justice in cases like his.¹⁷

Like *Sheppard*, this case is distinguishable from the situation discussed in this article: *Brown* involves allegations of judicial bias during a jury trial. In addition, and unlike *Sheppard*, *Brown* is a non-capital case.

III. GIVING CONTENT TO "OPPORTUNITY FOR FULL AND FAIR LITIGATION"

In the absence of a precedent dealing specifically with a situation in which a judge is running for re-election at the time that he or she conducts capital collateral proceedings, one must resort to analogy. To do this we must consider the practical consequences of a judge's ruling for the inmate in a death penalty case while the judge is trying to convince the electorate that she or he should be returned to office in a partisan election, non-partisan election, or retention election (in which the voters are

17. *Id.* at 1249. In previously denying relief in this case, the district court had said, in part:

Use of a trial in a judicial election contest occurring after the trial cannot directly establish any right of petitioner to release. Nor is it possible in this instance to infer retrospectively that the trial judge conducted the trial with an eye to future benefit. On the other hand, in the future, overt use of a trial to enhance the electability of the jurist presiding at the trial can in a clear enough case become a ground for considering *habeas corpus* relief. Flagrant disregard of such a prospective rule — especially if called to the attention of the jurist involved during or at the outset of the trial where counsel believes such a conflict of interest may exist — would add to the strength of a possible backward-looking inference that electoral considerations had outweighed judicial ones during the trial.

803 F. Supp. 932, 946 (S.D.N.Y. 1992).

asked whether a particular judge should be retained in office). These practical consequences cannot be assessed without reference to public attitudes towards the death penalty. For example, from 1936 until 1991 (the last year in which Gallup surveyed attitudes towards the death penalty), during only one year, 1966, was the percentage of the electorate in favor of the death penalty below fifty percent. (In 1966 the percentage in favor was forty-two percent.)¹⁸ The percentage in favor of the death penalty in June, 1991, was seventy-six percent;¹⁹ this is only slightly less than the percentage of seventy-nine percent in 1988,²⁰ the highest in any of the Gallup surveys.

It is not simply that there is considerable public support for the death penalty; one must also consider the intensity of feelings surrounding the death penalty. To evaluate this, one need only look at the retention election involving three justices of the California Supreme Court in 1986. In that election, in which the electorate was asked merely whether a particular justice should be retained,²¹ Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin were rejected at the polls.²² In Rose Bird's case, the margin of defeat was approximately two to one.²³ Commentators have disagreed over the extent to which factors other than the death penalty played a part in the rejection of

18. The Gallup Poll 129 (1991) (selected national trend).

19. *Id.* at 128.

20. *Id.* at 129. A review of national polls conducted since the beginning of 1990 has revealed strong support for the death penalty. Search of LEXIS, Market library, Rpoll file (Oct. 29, 1993) (data provided by Roper Center at University of Connecticut): Survey by National Opinion Research Center, from February 5, 1993, to April 26, 1993 (72%); Survey by Peter Hart and Breglio Research Companies for NBC News and Wall Street Journal, from May 15, 1992, to May 19, 1992 (69%); Survey by ABC News and Washington Post, from April 22, 1992, to April 26, 1992 (75%); Survey by Gallup Organization, from November 7, 1991, to November 10, 1991 (73%); Survey by Gallup Organization, from June 13, 1991, to June 16, 1991 (76%); Survey by Hart and Teeter Research Companies for NBC News and Wall Street Journal, from May 10, 1991, to May 14, 1991 (71%); Survey by National Opinion Research Center from February 1991 to April 1991 (72%); Survey by CBS News and New York Times, from August 16, 1990, to August 19, 1990 (76%); Survey by Hart and Teeter Research Companies for NBC News and Wall Street Journal, from July 6, 1990, to July 10, 1990 (71%); Survey by CBS News and New York Times, from March 30, 1990, to April 2, 1990 (72%); Survey by National Opinion Research Center, from February 1990 to April 1990 (75%).

21. CAL. CONST. art. VI, § 16(d).

22. John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

23. *Id.* at 351.

these three justices.²⁴ One of the commentators who argued that factors other than the death penalty were involved nevertheless described the campaign in part as follows:

The emotional appeal of the opponents connected two, not necessarily related, situations. First, it emphasized the undisputed proposition that despite the number of years since the California Constitution had been amended to expressly authorize the death penalty, there had been no executions in the state. Then, in a constantly repeated series of television spots, many times spotlighting relatives of murder victims, it graphically depicted the circumstances of the crime, concluding with the statement that the death penalty imposed upon the defendant had been reversed.²⁵

Other commentators have described the role of the death penalty issue as follows: "Of apparent primary concern was the three jurists' perceived opposition to the death penalty; of secondary concern, the justices' perceived leniency towards criminal defendants generally."²⁶

Yet another commentator observed: "The election reflected frustration on one issue — the death penalty. Thirty second television spots urged voters to cast three votes for the death penalty: 'No on Bird,' 'No on Grodin,' 'No on Reynoso.'"²⁷

The importance of the death penalty issue was not lost on Joseph Grodin, one of the three defeated justices. In writing about the election, he noted:

There is no doubt whatsoever what the voters thought the issue was; exit polls showed that of the voters who voted against the chief justice, only 11 per cent gave as a reason that she was not qualified, and only 18 per cent that she was too liberal; 66 per cent said that it was because she opposed the death penalty, and clearly that was their view regarding Justice Reynoso and myself as well.²⁸

24. Compare Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2036 (1988) (cataloguing reasons why various parts of the electorate were potentially hostile to Chief Justice Bird and two of her colleagues) with John L. Hill, Jr., *Comments on Thompson and Observations Concerning Impartiality*, 61 S. CAL. L. REV. 2065 (1988) and Gerald F. Uelman, *Commentary: Are we Reprising a Final or an Overture?*, 61 S. CAL. L. REV. 2069 (1988).

25. Thompson, *supra* note 24, at 2038-39.

26. Wold & Culver, *supra* note 22, at 353.

27. Uelman, *supra* note 24, at 2070.

28. Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 367 (1987). Former Justice Grodin also stated:

Of equal importance for our purposes is the fact that the rejection of the three California Supreme Court Justices received considerable national publicity,²⁹ none the least of which was the coverage in the American Bar Association Journal, in which it was acknowledged that the election was "dominated by hysteria about the death penalty."³⁰ Given this publicity, it seems unlikely that any sitting judge who is up for re-election can be unaware of the potentially disastrous consequences of appearing to oppose the death penalty by ruling in favor of a death-row inmate.

Accordingly, the closest analogy is the situation in which a judge has a pecuniary interest in the outcome of a case. The United States Supreme Court has made it clear in a series of cases that it is a denial of due process for a litigant to be faced with a judge who has a pecuniary interest in the outcome of the case.³¹ The interest that suffices to disqualify under the due process clause has certainly been held to be less than the loss of one's total salary. (And certainly a judge who was rejected at the polls because of perceived opposition to the death penalty would suffer a total loss of salary for as long as it took to obtain new employment.) In *Aetna Life Insurance Company v. La Voie*,³² for example, the Supreme Court ruled that an Alabama Supreme Court Justice was disqualified constitutionally because he eventually profited to the extent of \$30,000.00. This \$30,000.00 in December 1984 was less than his salary for one year,³³ not to mention his salary for succeeding years. In *Ward v. Village of*

Justice Otto Kaus, after he left the bench, acknowledged the possibility that a key vote of his, during the 1982 campaign when he was on the ballot, may have been affected by the pendency of that election — at a subconscious level — he could not say. There is profound truth, as well as great candor, in that acknowledgement.

Id. at 368.

29. See, e.g., Ira P. Robbins, *Towards a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 60-61 n.130 (1990); Aric Press et al., *A Vote on the Quality of Mercy*, NEWSWEEK, Nov. 3, 1986, at 63.

30. Paul Reidinger, *The Politics of Judging*, A.B.A. J., April 1987, at 52.

31. *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813 (1986); *Connally v. Georgia*, 429 U.S. 245 (1977); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

This due process line of cases needs to be distinguished from cases interpreting the federal statutory provision dealing with judicial disqualification. See generally *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (interpreting 28 U.S.C. § 455).

32. 475 U.S. 813 (1986).

33. The annual salary was approximately \$58,000 in 1984. Telephone Conversation with Hazel Johnson, Reference Librarian, University of Alabama School of Law (Nov. 2, 1993).

Monroeville,³⁴ the Supreme Court declared the judge disqualified constitutionally even though the financial interest was not a personal one. Instead, he had a financial interest that was of an institutional sort; he was responsible for administering the affairs of the city, and his decision to impose fines resulted in monies' going into the city coffers.

If due process precludes a judge from sitting, one would have to conclude that any hearing held by such a judge did not afford an applicant an opportunity for full and fair litigation of issues in the case.³⁵

As the preceding discussion indicates, it would be possible to argue that a judge who is running for re-election should be *constitutionally* disqualified for collateral proceedings involving a death-row inmate at the time the judge is running for re-election.³⁶ Indeed, one could make a broader argument — namely, that due process is violated whenever a judge subject to re-election (or a retention election) sits in a case in which one of the parties is either wildly popular or unpopular.³⁷ Such an argu-

34. 409 U.S. 57 (1972).

35. Logically, a violation of due process must deprive a hearing of the capacity to provide "an opportunity for full and fair litigation" or a "full and fair hearing." After all, the Constitution provides minimum protections; non-constitutional standards must provide *greater* protections if they are different from constitutional protections. This conclusion is supported by a consideration and comparison of subsections (6) and (7) of 28 U.S.C. § 2254 (d) (6)-(d) (7):

- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding.

The use of "otherwise" in subsection (7) indicates that the subsection refers to violations of due process different from those already set forth in subsection (6); the implication, of course, is that subsection (6) describes a violation of due process that is narrower than the more inclusive category of subsection (7).

See *supra* notes 11-12 and accompanying text and *infra* note 37 and accompanying text.

36. Such an argument was made, and rejected, in regard to the trial judge in *Sheppard v. Maxwell*, 346 F.2d 707 (6th Cir. 1965), *rev'd on other grounds*, 384 U.S. 333 (1966).

37. Such an argument would be especially compelling where the judge stands for re-election frequently, e.g., every four years, as in Texas, TEX. CONST. art. V, § 7; and Georgia, GA. CONST. art. VI, § 7, ¶ 1.

Even though the U.S. Supreme Court indicated in dictum in *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 822-24 (1986), that few claims of bias beyond those arising from pecuniary interest could be sustained under a due process analysis, the Court in that very case equated financial interest with the interest of the judge in *In re Murchison*, 349 U.S. 133 (1955), in vindicating his own prior charge of contempt against the defendant; the Court referred to the judge as having been "a judge in his own case." 475 U.S. at 822. The Judge's

ment would find support in a number of policy considerations: that the nature of the judicial function encompasses a need to preserve the proper balance between majority rule and minority rights³⁸ and a need to provide for competent, representative judges,³⁹ neither of which can be satisfied through popular election of the judiciary. This argument would also be supported by the following facts: collateral proceedings often extend over a period of years, and judicial decisions taken substantially before an election can affect the conduct of a hearing during an election campaign. Certainly judges conducting capital collateral proceedings are aware of these facts.

Although one could thus make a good faith argument that the due process clause precludes having elected judges sit in controversial cases, it is not necessary to make such an argument in order to reach the conclusion that, for purposes of *habeas corpus*, a hearing conducted by a judge who is running for re-election cannot be deemed a full and fair hearing when the applicant is a death-row inmate because of the judge's warranted fear that decisions favorable to such an inmate will result in the judge's defeat in the pending election. After all, the U.S. Supreme Court has said that death is "different,"⁴⁰ and has sometimes required procedures in capital cases that are not required in other cases.⁴¹

bias in *Murchison* was thus not pecuniary but nevertheless constitutionally disqualifying.

38. See generally Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 421 (1981).

39. I have argued that a broadly representative judiciary is required by analogy to the jury, and that competent and representative judges can be selected, first, by providing for a broadly representative nominating commission consisting of perhaps twelve members (e.g., two lawyers elected by lawyers, two judges elected by judges, two academicians elected by academicians, and six members elected by the public through proportional representation) who can nominate twelve candidates, and, second, by providing for final selection by lot from among the twelve nominees. *Id.* at 432-51.

40. "In [*Furman v. Georgia*, 408 U.S. 238 (1972)], members of the Court acknowledged what cannot fairly be denied — that death is a punishment different from all other sanctions in kind rather than degree." Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion).

41. See, e.g., *Gardner v. Florida*, 430 U.S. 349 (1977) (defendant's due process rights were violated when judge at sentencing relied on pre-sentence report that was not disclosed to defense counsel) (plurality opinion).

Sometimes the Court has refused to provide special procedures for death penalty cases. See, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989) (death-row inmates not always entitled to appointed counsel in collateral proceedings).

IV. CONCLUSION

I have argued that, in light of the extent and emotional intensity of the public's support for the death penalty, no capital collateral hearing before a judge running for re-election (or retention) should be regarded as having provided an "opportunity for full and fair litigation" or a "full and fair hearing" for purposes of *Stone v. Powell*, *Townsend v. Sain*, and 28 U.S.C. § 2254(d). The importance of federal *habeas corpus* review of state impositions of the death penalty cannot be overemphasized. Direct review, even in the United States Supreme Court, cannot be counted on to correct trial errors; indeed, that is not the purpose of review by the Supreme Court.⁴² Moreover, even if that Court were inclined to correct trial error, one could not ignore the practical difficulty of getting one's case before the U.S. Supreme Court: although there have been over five thousand applications to the Supreme Court each year (recently), the Court has decided only about three percent of these cases on the merits.⁴³ This is to be contrasted, of course, with the situation in federal *habeas corpus*, in which each litigant can receive an adjudication by a federal judge.⁴⁴ Thus I would disagree with the view that "the argument for freedom from electoral accountability to afford protection of minority rights is weaker in the case of state judges than it is in the case of federal judges simply because the article III judges exist to protect these rights."⁴⁵ This statement can be true only if there is the practical possibility of review of decisions of the state court judges in the federal system. This review cannot be effective if the holding of a state collateral hearing unreasonably limits the ability of a United States district court to render relief.⁴⁶ Thus, if the view expressed in the quota-

42. See SUP. CT. R. 10.

43. In the 1991 term of the U.S. Supreme Court, ending in June 1992, the Court disposed of 5825 cases, but only 194 of these were decided on the merits. Of the 194, only 114 were cases in which opinions (either signed or per curiam) were written. Perhaps the most telling statistic is the percentage of cases on the miscellaneous docket (in forma pauperis) in which review was granted: 0.5%. *The Supreme Court, 1991 Term*, 106 HARV. L. REV. 19, 378, 382 (1992).

44. This statement must be qualified, of course, by the acknowledgment that under *Stone v. Powell*, 428 U.S. 465 (1976), federal habeas review is not possible if there has been "an opportunity for full and fair litigation" of Fourth Amendment issues; similarly an applicant may be precluded from obtaining relief by procedural default. See *supra* note 7.

45. Thompson, *supra* note 24, at 2055.

46. See *supra* note 40. For a discussion of the ominous trends in the Supreme Court's habeas jurisprudence, see James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM.

tion immediately above is to have any validity at all, it is essential that federal fact-finding hearings be available in any death penalty case in which the state fact-finding hearing is held before a judge who is running for re-election.

Admittedly this conclusion runs contrary to the view of federalism apparently held by a majority of the present members of the United States Supreme Court.⁴⁷ Federalism, however, is not necessarily the ultimate value in our constitutional scheme. Indeed, the protection of individual rights through amendments to the Constitution was a matter discussed during the ratifying conventions in a number of key states prior to ratification of the original Constitution; concern over this issue prompted Congress during its first session to propose the Bill of Rights.⁴⁸ And it is not obvious that the states have been more responsible for the protection of individual rights than the federal government has

L. REV. 1997 (1992). Professor Liebman's fears were partly realized in *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714, 1722 (1993) (abandonment in federal habeas corpus of *Chapman* harmless error rule in favor of rule placing upon applicant the burden of showing that the prosecution's unconstitutional use of applicant's post-*Miranda* silence "had substantial and injurious effect or influence in determining the jury's verdict.").

47. In *Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991), for example, Justice O'Connor began her opinion for the Court by saying, "This is a case about federalism." Only in the second paragraph did she acknowledge that petitioner's life was at stake. Apart from rhetoric, the majority in *Coleman*, consisting of Justices O'Connor, White, Scalia, Kennedy, and Souter, and Chief Justice Rehnquist, concluded, in essence, that it was more important to enforce the state's rule requiring timely filing of a notice of appeal from a decision of the state circuit court in a capital collateral proceeding than to permit a death-row inmate to secure federal review of his conviction and death sentence. The majority never satisfactorily explained how the state would be prejudiced by allowing such review. (This was not a case of something improperly done or omitted at trial, for example — a mistake that might have prevented the trial court from taking corrective action at the only time it could have been effective.) In essence, the Court enforced a rule of agency with a vengeance — or, to put it somewhat differently, a rule providing for the killing of the client because the attorney blundered. Following *Coleman*, Justice Marshall, a dissenter in *Coleman*, was replaced by Justice Thomas, and Justice White was replaced by Justice Ginsberg. The majority position in *Coleman* does not appear threatened by this change.

More recently, Justice Scalia has expressed the view that no claim of a violation of a state defendant's federal constitutional rights should be reviewed in federal habeas corpus if the state has provided that defendant with an "opportunity for full and fair litigation" of defendant's claim unless the claim "goes to the fairness of the trial process or to the accuracy of the ultimate result." *Withrow v. Williams*, 113 S. Ct. 1745, 1768 (1993) (Scalia, J., concurring in part and dissenting in part).

48. See, e.g., Robert P. Davidow, *George Mason on the Tension Between Minority Rule and Minority Rights*, 10 GEO. MASON U. L. REV. 1, 16-17 nn.61-63 and accompanying text (1987).

been. One could make the contrary argument by noting some other historical facts: it was the federal government that ended slavery;⁴⁹ it was the federal government that sought to put an end to desegregation;⁵⁰ it was the federal government that gave women and minorities the right to vote;⁵¹ it was the federal government that took the lead in the 1960s in trying to ensure that the constitutional rights of defendants in criminal cases were protected.⁵² It may be that in recent years state courts — or at least some of them — have done a better job than they did previously of protecting the constitutional rights of such defendants.⁵³ It is also true, of course, that providing a hearing before a judge with life tenure is no guarantee that constitutional rights will be respected.⁵⁴ Nevertheless, the rates of reversal in federal courts of state court convictions and sentences in capital cases⁵⁵ do not

49. U.S. CONST. amend. XIII.

50. *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.

51. U.S. CONST. amends. XIX and XV.

52. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in serious criminal cases); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule applied to the states).

53. *See, e.g.*, *People v. Griminger*, 524 N.E.2d 409 (N.Y. 1988) (rejecting the Supreme Court's relaxed standard of probable cause enunciated in *Illinois v. Gates*, 462 U.S. 213 (1983)); *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976) (rejecting Supreme Court's holding concerning the breadth of state power to inventory the contents of automobiles without probable cause).

54. *See, e.g.*, *Burger v. Kemp*, 483 U.S. 776 (1987) (finding of no ineffective assistance of counsel despite failure of counsel at sentencing to introduce evidence of defendant's abusive childhood, and finding of no conflict of interest on appeal even though same attorney on appeal represented co-defendants each of whom was trying to show that the other one was primarily culpable).

55. "The success rate of non-capital habeas petitions is low, with estimates ranging from 0.25% to 3.2% to 7%. The success rate in capital habeas is much higher, however: 60-75% as of 1982, 70% as of 1983, and 60% as of 1986." Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520-21 (1988) (footnotes omitted).

The activities of "hanging judges" in Texas, for example, are concrete evidence of the need for federal habeas review. *See* Brent E. Newton, *The Death Penalty in Texas, 1973-93*, at 76-80 (unpublished manuscript, on file with author). An empirical study comparing state court and federal court decisions has concluded that "there is simply no widespread disregard for the vindication of federal rights in state appellate courts." Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 252 (1983). As the quote indicates, however, this study does not deal either generally with state trial court findings of fact or specifically with federal habeas review of state capital collateral proceedings. A study of enforcement of Fourth Amendment rights in Alabama, Arizona, Georgia, Idaho, Illinois, Louisiana, Oklahoma, South Carolina, and Utah has concluded that many of these states are conscientiously enforcing the Fourth Amendment; nevertheless, "*Georgia plainly, and possibly*

provide a basis for concluding that all state courts are yet able to correct the potentially fatal errors of counsel and state trial judges. The possibility of correction in federal *habeas corpus* must be preserved if the administration of the death penalty in the United States is to come remotely close to the ideal of non-arbitrariness proclaimed in the Supreme Court's death penalty decisions.⁵⁶

South Carolina and Arizona, are not enforcing the fourth amendment." Craig M. Bradley, *Are States Enforcing the Fourth Amendment? A Preliminary Study*, 77 GEO. L.J. 251, 286 (1988) (emphasis added). This study also did not focus on the death penalty.

56. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).