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Stack:	Row:	Section:	Shelf:	Position:
G	26	19	5	7

5/13/89

To: Grace Mastalli
From: David Karp

(1) Excerpts from habeas corpus report containing statistics and horror stories

(2) Additional statistical info on habeas reform (one page)

(3) Excerpt from exclusionary rule report ~~on~~ containing anecdotes

(4) Exclusionary rule and drug enforcement statement (one page)

(5) Three-page statement on importance of exclusionary rule and habeas reform to drug enforcement -- has good exclusionary rule statistics in it

(6) Excerpts from Cassell testimony on obstruction of death penalty by habeas corpus

(7) A Department letter to Kastenmeier containing information on bail and pre-trial detention

Item (1)

Item (1)

Habeas corpus statistics: pp. 32-38

Habeas corpus "horror stories": pp. 76-90

Hillery case: pp. 76-83

Aiken case: pp. 83-88

Witt case: pp. 88-90

Report to the Attorney General on Federal Habeas Corpus Review of State Judgments

Truth in Criminal Justice
Report No. 7

Office of Legal Policy
May 27, 1988

Congress (1985-86) they were not brought to a vote in the Senate because of filibustering by opponents of the legislation at Senate Judiciary Committee mark-ups.[60] In the House of Representatives they have been introduced with broad sponsorship in various bills,[61] which have invariably been buried at the subcommittee level in the House Judiciary Committee. No significant action has occurred in the House because of opposition by the House leadership.

In the current (100th) Congress, the reform proposals have recently been transmitted to Congress again by the President as title II of the proposed Criminal Justice Reform Act (H.R. 3777 and S. 1970).

II. THE CURRENT JURISDICTION

Justice Robert Jackson, in his separate opinion in *Brown v. Allen*, complained that judicial expansions of the federal habeas corpus jurisdiction were resulting in "floods of stale, frivolous and repetitious petitions [which] inundate the docket of the lower courts and swell our own" (344 U.S. at 536). The "flood" to which Justice Jackson referred consisted of 541 petitions in the preceding year (1952). In comparison, 9,542 federal habeas corpus petitions were filed by state prisoners in the most recent reporting year (ending June 30, 1987). As these figures indicate, habeas corpus applications were a relatively rare occurrence prior to the creation of a quasi-appellate federal habeas corpus jurisdiction by judicial decisions of the 1950's and 1960's, but now constitute a major category of federal litigation. More detailed statistical and quantitative information is set out in the first part of this section.

While the volume of habeas corpus litigation has grown in recent years, the marked tendency of the Supreme Court's decisions since the start of the 1970's has been to draw back from the heady expansion of inferior federal court review of state judgments that characterized the Court's habeas corpus jurisprudence of the 1960's. The most significant

Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 16-17, 32-41, 160-65 (1983), the proposals were voted out by the Senate Judiciary Committee as a separate bill (S. 1763), *see* S. Rep. No. 226, 98th Cong., 1st Sess. (1983), and passed by the Senate, *see* 130 Cong. Rec. 1854-72 (1984).

[60] There was an additional hearing in the 99th Congress. *See Habeas Corpus Reform*: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985).

[61] *E.g.*, H.R. 5594 of the 98th Congress.

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decisions of the current period are described briefly in the second part of this section.

A. Empirical Findings

Information concerning the volume of habeas corpus applications and other federal litigation is available in the Annual Reports of the Director of the Administrative Office of the U.S. Courts. As noted above, these figures show that large-scale habeas corpus litigation by state prisoners is a recent phenomenon in historical terms. In 1941 there were 127 petitions. In 1961 there were 1,020. The number of applications thereafter increased astronomically in the course of the 1960's, reaching 9,063 in 1970; subsided in the early 1970's, reaching a low of 6,866 in 1977; and has since increased fairly steadily. The figures for habeas corpus petitions filed by state prisoners in the federal district courts over the past ten years are as follows:[62]

1978	1979	1980	1981	1982	1983
7,033	7,123	7,031	7,790	8,059	8,532

1984	1985	1986	1987
8,349	8,534	9,045	9,542

More detailed statistical information is available from a study of habeas corpus litigation that was funded by the Justice Department and

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[62] The figures in the text are drawn from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. The aggregate figures for state prisoner habeas corpus petitions include, in addition to normal petitions in which jurisdiction is predicated on claimed violations of federal rights ("federal question" petitions), a small number of petitions by prisoners in United States territories where the federal courts have jurisdiction over local criminal matters ("local jurisdiction" petitions). For example, the 1987 figure of 9,542 comprised 9,524 "federal question" petitions and 18 "local jurisdiction" petitions, and the 1986 figure of 9,045 comprised 9,040 "federal question" petitions and 5 "local jurisdiction" petitions. In addition to reporting 9,542 habeas corpus petitions by state prisoners, the most recent report (1987) noted 1,808 habeas corpus petitions and 1,664 "motions to vacate sentence" by federal prisoners (Table C2).

A tabular summary of the volume of prisoner litigation between 1961 and 1982 appears in S. Rep. No. 226, 98th Cong., 1st Sess. 4 n.11 (1983). A more comprehensive summary of statistical data relating to habeas corpus litigation appears in Special Report of the Bureau of Justice Statistics, *Federal Review of State Prisoner Petitions : Habeas Corpus* (March 1984) [hereafter cited as "Statistical Report"].

completed in 1979. The study, carried out by Professor Paul Robinson, examined a sample containing 1,899 petitions filed between 1975 and 1977, which comprised about one-eighth of all habeas corpus applications filed in the country in the relevant period.[63] The general picture of habeas corpus litigation that emerges from the available empirical data and other factual information is as follows:

1. Workload and Results

The work involved in processing habeas corpus cases constitutes a substantial burden on state officials and the court system. In connection with a typical petition, the state is required to transmit records and to respond to the legal and factual contentions raised by the petitioner. The district court must review the record to the extent necessary and redetermine each claim that is properly presented, working from the evidentiary basis set out in the record together with the submissions and arguments of the parties. Frequently the district court's decision is appealed, resulting in additional work for judges, state officials and defense counsel at the level of the federal courts of appeals.[64] Since a prisoner is required to exhaust state remedies before seeking federal habeas corpus, the lure of an additional level of review in the federal courts -- in which claims rejected at the state level are open to relitigation -- results in increased recourse to state remedies. The availability of federal habeas corpus accordingly increases the workload of the state courts as well as the federal courts.[65]

Despite the substantial expenditure of prosecutorial and judicial resources entailed in habeas corpus litigation, the normal outcome is dismissal of the petition or affirmance of the state judgment. In the 1979 study, only 3.2% of petitions resulted in any form of relief and only 1.7%

[63] The findings of the study were initially reported in P. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* (Federal Justice Research Program 1979). The data gathered in the study was later independently analyzed in Allen, Schachtman, & Wilson, *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 Rutgers L. Rev. 675 (1982). A concise summary of the main findings of these reports appears in Statistical Report, *supra* note 62, at 5-7.

[64] *See* P. Robinson, *supra* note 63, at 21-23; *The Habeas Corpus Reform Act of 1982*: Hearing on S.2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 42-44 (1982); *Comprehensive Crime Control Act of 1983*: Hearings on S.829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 41 (1983).

[65] *See generally* Friendly, *supra* note 41, at 144 n. 10.

resulted in an order directing release from custody.[66] Even these low figures cannot be taken as reliable indications of the "benefits" of habeas corpus review, since there is no reason to believe that the federal court determination in such cases is generally "better" than the contrary state judgment it supersedes. In purely descriptive terms, a successful petition normally means only that a federal trial judge disagreed with a number of state trial and appellate judges.[67] The judgmental or subjective nature of the determinations required is suggested by the large differences observed in the 1979 study between the granting rates for different federal judges -- a small number of judges accounted for a large proportion of successful petitions.[68] As Judge Friendly has observed:

> In the vast majority of cases we agree with the state courts .... In the few where we disagree, I feel no assurance that the federal determination is superior .... [W]e do not know how many of these [successful habeas] cases represented prisoners ... whom society has grievously wronged ... or how many were black with guilt. The assumption that many of them fall in the former category is wholly unsupported.[69]

In considering the low incidence of successful petitions, an analysis of the study data concluded that "[i]f one considers only the statistically measurable benefits of habeas review, they appear to be outweighed by the costs of expansive habeas review." [70]

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[66] *See* P. Robinson, *supra* note 63, at 4(c), 14.

[67] Even where an appellate panel affirms the granting of a writ, the issue remains one of disagreement among federal and state judges who are equally bound to uphold the Constitution and federal law. *See generally* pp. 42-49 *infra*.

[68] *See* P. Robinson, *supra* note 63, at 53 (out of 51 judges who handled state habeas petitions, three judges accounted for 29.9% of all petitions granted and twelve judges accounted for over two-thirds of all petitions granted).

[69] Friendly, *supra* note 41, at 165 n. 125, 148 & n. 25; *see Brown v. Allen*, 344 U.S. 443, 540 (1953) (opinion of Jackson, J.) ("Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal ... is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.").

[70] Allan, Schachtman, & Wilson, *supra* note 63, at 683. *But cf. id.* at 683-90 (noting non-quantitative costs and benefits alleged for habeas corpus review). These non-quantitative considerations are examined at pp. 40-53 *infra*.

2. Character of Petitioners and Prior Proceedings

The 1979 study indicated that habeas corpus petitioners constitute a highly atypical class of prisoners. Most petitioners had been convicted of serious, violent offenses. Over 80% had been convicted after trial, and practically the same proportion had had, or were having, direct appellate review of their cases in the state system. Moreover, about 45% of petitioners had pursued collateral remedies in the state courts, including over 20% who had filed two or more previous state petitions. Over 30% of petitioners had filed at least one previous federal petition.[71]

In contrast, the vast majority of state defendants plead guilty and have no trial or appeal. Thus, habeas corpus typically operates as a mechanism for providing additional review to prisoners whose cases have already received an abundance of judicial process in comparison with the average criminal case.

3. Delay in Filing

Another finding of the 1979 study is that there are frequently enormous delays between the conclusion of the normal adjudicatory process in the state courts and the filing of a habeas corpus petition. About 40% of the petitions in the study were filed more than five years after conviction and nearly a third were filed more than ten years after conviction. Still longer delays were noted in some cases in the study, up to more than fifty years from the time of conviction.[72]

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[71] *See* P. Robinson, *supra* note 63, at 4(a), 7, 15. Even where a petitioner has not had prior state court review of his claims, this does not imply that means for raising such claims are unavailable in the state courts. Prisoners frequently by-pass state remedies and file procedurally defective habeas corpus petitions. *See id.* at 13.

[72] *See* Allen, Schachtman, & Wilson, *supra* note 63, at 703-04. The cited report's characterization of this data as showing that "lengthy delay . . . rarely occurs," *see id.*, is idiosyncratic.

Legitimate post-conviction delays in filing of up to a few years can result from the exhaustion requirement, but this cannot account with any frequency for time intervals exceeding a decade, which the study found to be common. The average time prisoners took to exhaust state remedies was 2.8 years from conviction. *See id.* at 705. This average figure would actually exaggerate the time necessary to complete the state review process, since it would be inflated by cases in which prisoners failed to pursue certain claims at trial or on direct review and then delayed a number of years before presenting them on collateral attack in the state system.

Delays of the length and frequency noted in the report also cannot be explained on the

The tolerance shown in habeas corpus proceedings for lengthy delays in seeking review is particularly striking in comparison with other procedures for seeking review or re-opening of criminal judgments in the federal courts, which are subject to definite time limits. Federal defendants, for example, generally must decide whether to appeal within ten days (Fed. R. App. P. 4(b)); state convicts seeking direct review of their convictions in the Supreme Court generally must apply within sixty days (Sup. Ct. R. 20); and even a federal prisoner who claims to have new evidence of his innocence discovered after trial is subject to a two-year time limit on seeking a new trial under Fed. R. Crim. P. 33.

The problem of delay has been particularly acute in capital cases. In such cases, the continuation of litigation prevents the sentence from being carried out. While thirty-seven states currently authorize capital punishment, and about 2,000 prisoners are currently under sentence of death, the typical capital case is characterized by interminable litigation and re-litigation, and fewer than a hundred executions have been carried out in the past twenty years.[73] The federal habeas corpus jurisdiction provides an avenue for obstruction and delay in these cases which the states are powerless to address. Attorney General William French Smith has observed:

> [T]he inefficiency of current court procedures has resulted in a de facto nullification of the decisions of most state legislatures to impose capital punishment for some crimes. The "public interest" organizations that routinely involve themselves in the litigation carried on in capital cases have fully exploited the system's potential for obstruction. Delay is maximized by deferring collateral attack until the eve of execution. Once a

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basis of petitions challenging events that occurred some time after conviction, such as parole denial or revocation. Petitions of this sort were a small part of all petitions in the study; nearly a third of all petitions were filed more than ten years after conviction, but the average time intervals for petitions challenging post-conviction events were far less than that; and the average delay in the various districts covered by the study was not correlated with the incidence of such petitions. *See id.* at 703-04 n. 103, 706 & nn. 109-10.

[73] NAACP Legal Defense and Educational Fund, *Death Row, U.S.A.* (Nov. 1, 1987). A general analysis of the problem of dilatory habeas corpus litigation in capital cases appears in Statement of Associate Deputy Attorney General Paul Cassell concerning Habeas Corpus and Capital Punishment Litigation before the Subcomm. on Government Information, Justice, and Agriculture of the House Comm. on Government Operations (Feb. 26, 1988) (hearing held in Madison, Florida).

> stay of execution has been obtained, the possibility of carrying out the sentence is foreclosed for additional years as the case works its way through the multiple layers of appeal and review in the state and federal courts.
>
> The solution to this problem lies in part in the reform of state court procedures . . . . The efficacy of state reforms is severely limited, however, by the availability of federal habeas corpus, which cannot be limited by the state legislatures . . . . It . . . prevents correction of the practical nullification of all capital punishment legislation that has resulted from litigational delay and obstruction.[74]

Overall, the available data provides a more definite empirical content to Justice Jackson's characterization of habeas corpus petitions as "stale, frivolous and repetitious." The delays involved in habeas corpus litigation greatly exceed those allowed under any other appellate mechanism, the prospect of success is slight, and the review that is provided generally amounts to another round on claims that have already been thoroughly worked over in the state courts.

B. Recent Judicial Decisions

The Supreme Court, in its current habeas corpus jurisprudence, has given weight to considerations of finality and federalism that were ignored or shrugged off in the expansive decisions of the 1960's. While the Court's ability to make changes in this area is constrained by precedent and existing statutory provisions, some noteworthy limitations have emerged in recent decisions. The most important decisions include the following:

First, the decisions in *McMann v. Richardson*, 397 U.S. 759 (1970), and *Tollett v. Henderson*, 411 U.S. 258 (1973), generally limit a defendant

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[74] Smith, *Proposals for Habeas Corpus Reform*, in P. McGuigan & R. Rader, eds., *Criminal Justice Reform: A Blueprint* 137, 145-46 (1983).

Executions have resumed on a significant basis within the past few years, though the number carried out remains a minute fraction of the number of prisoners under capital sentence. The causes of this development presumably include the Supreme Court's resolution of various issues in its capital punishment caselaw whose uncertainty had previously impeded executions, and a toughening of the Court's stance toward delay in capital cases through habeas corpus litigation. *See generally Barefoot v. Estelle*, 463 U.S. 880 (1983).

Appendix: Habeas Corpus Cases

As noted at the start of this report, the contemporary system of federal habeas corpus review of state judgments can convert "the process of review in criminal cases into a kind of interminable game, an open-ended hunt for official error. In this attenuated process the question is not whether an innocent defendant, mistakenly convicted, may enlist the aid of an appellate court in correcting a miscarriage of justice. Rather, it is whether a persistent defendant, however guilty, may eventually get lucky and persuade some judge or court to find error, given unlimited opportunities to do so." [134] This appendix describes some particular cases that illustrate the costs of a system which permits the indefinite continuation of litigation in criminal cases.

1. The Hillery Case. On the night of March 21, 1962, fifteen-year-old Marlene Miller was at home alone, sewing a dress that she expected to wear on her sixteenth birthday. Marlene never got to wear the dress. On the following morning, her body was found in an irrigation ditch near her house. She had been subjected to an attempted rape, and the sewing scissors she had been using, monogrammed with her name, were embedded up to the handles in her throat.

Booker Hillery, who was out on parole from an earlier rape conviction, was arrested for the crime, convicted, and sentenced to death. Hillery's conviction marked the start of sixteen years of litigation in the state courts.

The conviction and sentence were initially upheld by the Supreme Court of California on appeal in 1963 (386 P.2d 477). In 1965, that court upheld Hillery's conviction again on re-hearing, finding all his claims to be without merit or non-prejudicial, and characterizing the evidence of guilt as "overwhelming" (401 P.2d 382, 395). [135] However, the jury that sentenced Hillery to death had been given instructions relating to the possibility of release on parole if a life term was imposed and the possibility of reduction of the sentence that were inconsistent with a California Supreme Court decision which followed Hillery's trial and

[134] Remarks of Assistant Attorney General Stephen J. Markman at a Seminar on the Administration of Justice sponsored by the Brookings Institution, Annapolis, Maryland, at 1-2 (Mar. 8, 1986).

[135] Hillery applied for review of this decision by the United States Supreme Court. The Court denied certiorari (386 U.S. 938).

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[137] Friendly, *sup*

initial appeal. The case was accordingly remanded for a new penalty trial (401 P.2d 384-85, 395).

At the second penalty trial, Hillery was again sentenced to death, and the sentence was upheld by the California Supreme Court on appeal in 1967 (423 P.2d 208). Hillery subsequently filed a petition for state habeas corpus in the California Supreme Court, presenting a new challenge to the result of the second penalty trial. A potential juror had been excused at that trial after she stated that she thought that she could not sentence anyone to death in any case or follow state law relating to capital punishment. The California Supreme Court believed that the trial judge's questioning on this point and the juror's responses were inadequate under the standard of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and overturned Hillery's capital sentence again (457 P.2d 565).

This decision in 1969 was followed by a third penalty trial, at which Hillery was sentenced to death for the third time. He appealed to the California Supreme Court, raising various claims attacking his conviction and sentence. In 1974, that court affirmed the conviction again, but the sentence was changed to life imprisonment on the basis of a 1972 California Supreme Court decision holding capital punishment to be inconsistent with the state constitution. That decision had been promptly overturned through amendment of the state constitution by initiative, but this change was deemed too late to affect Hillery's case (519 P.2d 572). In 1978, Hillery engaged in a final round of state habeas corpus litigation which terminated with the denial of his petition by the California Supreme Court.[136]

The conclusion of sixteen years of state court litigation in Hillery's case was, to borrow Judge Friendly's phrase, only "the end of the beginning."[137] Later in 1978, he filed a petition for habeas corpus in federal district court, alleging that blacks had been intentionally excluded from the grand jury that indicted him in 1962. This issue had been raised, prior to Hillery's initial trial, before the state superior court judge responsible for grand jury selection (Judge Wingrove). There had been no blacks on the seven grand juries selected by that judge, though blacks constituted about 5% of the county's population in the relevant period, and blacks had served on trial juries. In ruling on a motion to quash the

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[136] *See Vasquez v. Hillery*, 474 U.S. 254, 256 & n.2, 279 n.10 (1986); *id.*, Brief for Petitioner at 5-6 and Brief for Respondent at 3.

[137] Friendly, *supra* note 41, at 142.

indictment, Judge Wingrove denied that the absence of blacks on the grand juries he had selected was the result of discrimination, and stated that he had made unsuccessful efforts to identify qualified blacks for grand jury service. In particular, he had previously asked Hillery's lawyer (who was black) to identify such persons, and had considered selecting a particular black resident of the county for grand jury service, but declined to do so after determining that it would interfere with the prospective juror's regular employment. Judge Wingrove's rejection of this discrimination claim was affirmed by the California Supreme Court on appeal. The discrimination claim was later rejected again in state habeas corpus proceedings.[138]

Hillery's federal habeas corpus petition re-presenting this claim was litigated over a period of five years before the district court (496 F. Supp. 632; 533 F. Supp. 1189; 563 F. Supp. 1228). In 1983, the district court finally reached the merits of the claim and granted the writ. The evidence before the court included the records of state proceedings; testimony given in the federal proceedings by Hillery's former lawyer in support of the claim that he had unsuccessfully litigated in the state courts twenty years earlier; and a statistical analysis of grand jury selection in Kings County up to the time of Hillery's case. Judge Wingrove was not available to testify in response to the charge that he had engaged in intentional discrimination on the basis of race, having died many years before the federal proceedings.

In granting the writ, the district court identified as supporting evidence the absence of blacks on grand juries although blacks constituted about 4.6% of the adult population in the county,[139] Judge Wingrove's knowledge that his standards for grand jury service did not result in any blacks being selected,[140] the subjective nature of the

[138] *See* 386 P.2d at 486-87; 401 P.2d at 392-93; and sources cited in note 136 *supra*.

[139] Much of the district court's opinion was devoted to a statistical analysis supporting the conclusion that the absence of blacks on grand juries "was unlikely to be due solely to chance or accident," assuming random selection from the general adult population (563 F. Supp. 1241-46). This point, however, was of slight relevance to the ultimate issue in the case, since the grand jury selection process was not random. The question presented was whether the statistical disparity resulted from non-racial conditions on service in an obviously non-random selection process, as opposed to the deliberate exclusion of potential grand jurors on the basis of race.

[140] The district court made the stronger assertion that Judge Wingrove continued to select only persons meeting his standards "with full knowledge that such action would mean

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selection process,[141] and the fact that Judge Wingrove did select a black person to serve on a grand jury in the year following Hillery's indictment.[142] The court refused to credit Judge Wingrove's explanation of his actions in the state record and also discounted the state's explanation that the county's black residents were largely engaged in itinerant farmwork and would have suffered economic hardship from grand jury service.[143] The district court's decision was affirmed by the Ninth Circuit on appeal in 1984 (733 F.2d 644).

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that no blacks would serve" (563 F. Supp. 1247). However, the basis for this assertion was not explained, and Judge Wingrove did select a black grand juror in the following year (563 F. Supp. 1248).

[141] The district court dismissed as irrelevant Judge Wingrove's explanation in the state record that grand juries in Kings County rarely considered criminal matters, and primarily performed a watchdog function with respect to the operations of county government (563 F. Supp. 1233, 1250). However, this point was relevant as support for a non-discriminatory purpose behind a practice of using certain judgmental standards in selecting grand jurors. In relation to a body whose essential function was oversight of county government, it was not unreasonable to want to choose "people who are interested in the community, civic minded, the better type of our citizens" and "someone who has some substance, some interest in government, some interest in community activities, civil activities, people that take an interest that way." 563 F. Supp. 1232 (quoting Judge Wingrove's explanation of selection standards). *See generally* JA-33 and Brief for Petitioner at 38-40, *Vasquez v. Hillery*, 474 U.S. 254 (1986) (description of grand jury functions and statutory conditions on service).

[142] Judge Wingrove's selection of a black grand juror was cited by the district court as evidence that he had intentionally excluded blacks from grand juries on the ground that it evidenced a change from prior practice after the discrimination issue was raised in Hillery's case (563 F. Supp. 1248-49). One wonders what would have happened if Judge Wingrove had *not* subsequently selected any black grand jurors. Presumably that would also have been cited as additional evidence supporting the discrimination claim.

[143] *Cf. Los Angeles Times*, Jan. 20, 1986 ("Raymond Niday, 63, a Lemoore insurance man who was foreman of the grand jury that indicted Hillery . . . said . . . that economics, not race, was the governing factor in selecting grand jury members: 'Three classes of people served on the grand juries, a businessman able to sustain his family whether he worked on a day-to-day basis or not, a retired person or a housewife. Farm laborers, wage earners, blue collar people could not afford to serve on grand juries. You would have created a hell of an imposition on any person in those categories. They had to be out earning their living. . . . Blacks at that time in this county were at the lower end of the economic scale, just as many whites were. If a person had the ability to [participate], he or she would never have been excluded. . . . The evidence was totally overwhelming against Hillery. We had no other alternative but to indict him. . . . The court's decision [overturning Hillery's conviction] is a travesty, transposing an incident that happened nearly a quarter of a century ago into the present day. . . . The futility of it all upsets me.'").

The state applied for certiorari to the Supreme Court, and the Court granted review (474 U.S. 254). The Court upheld the granting of the writ, emphasizing that a finding of racial discrimination in grand jury selection has traditionally been grounds for reversing a conviction, and rejecting the idea of creating a limitation on the raising of such claims on review in light of prejudice to the state's ability to re-try the petitioner. Justice Powell, joined in dissent by Justice Rehnquist and Chief Justice Burger, stated:

> Respondent, a black man, was indicted by a grand jury having no black members for the stabbing murder of a 15-year-old girl. A petit jury found respondent guilty of that charge beyond a reasonable doubt, in a trial the fairness of which is unchallenged here. Twenty-three years later, we are asked to grant respondent's petition for a writ of habeas corpus -- and thereby require a new trial if that is still feasible -- on the ground that blacks were purposefully excluded from the grand jury that indicted him. It is undisputed that race discrimination has long since disappeared from the grand jury selection process in Kings County, California. It is undisputed that a grand jury that perfectly represented Kings County's population at the time of respondent's indictment would have contained only one black member. Yet the Court holds that respondent's petition must be granted, and that respondent must be freed unless the State is able to reconvict, more than two decades after the murder that led to his incarceration.
>
> It is difficult to reconcile this result with a rational system of justice.

The dissent went on to argue that the establishment of Hillery's guilt by proof beyond a reasonable doubt at a fair trial demonstrated that he had not been prejudiced in any legally relevant sense by discrimination in the selection of the grand jury, and that permitting such a non-guilt-related claim to be litigated indefinitely -- despite substantial prejudice to the possibility of re-trial -- goes beyond what is reasonably warranted for deterring discriminatory practices.[144]

[144] *Cf.* Fed. R. Crim. P. 12(b) and Advisory Committee Note (challenges to grand jury selection waived if not raised before trial); Remarks of Assistant Attorney General Stephen J. Markman at a Seminar on the Administration of Justice sponsored by the Brookings Institution, Annapolis, Maryland, at 4 (Mar. 8, 1986) ("[I]n *Vasquez v.*

The Supreme Court's decision entailed that the state would either have to release Hillery or give him a new trial, although there was no reason to doubt the accuracy of his conviction in 1963 for murdering Marlene Miller. The impact of the Court's decision on the victim's community and family were described as follows in a *Time Magazine* article entitled "Seeing Justice Never Done":

> Hanford, California, is a farm community, the kind of place where people know each other by name and trust each other by nature. "You can go downtown without a dime in your pocket, do your shopping and come back to pay later," says City Councilman J. Brent Madill. . . . In any town, the brutal killing of a teenage girl leaves a deep mark, but in Hanford the wound remains, 24 years after the crime. And now the U.S. Supreme Court has rubbed the wound open again all these years later. . . .
>
> "Where's the justice?" asks Councilman Madill. "Is there any justice?" Most of Hanford believes little attention was given to deterring the larger evil. . . .
>
> Neighbors say that Marlene's parents, now in their 70's, dread the possible reopening of the case. They still reside in Hanford, though the house they lived in at the time of their daughter's death has long since been torn down. The memories have been harder to demolish. "The sad thing is that it keeps coming back," says Marlene's brother Walter Jr. "We have not been allowed the time to heal." And the end is still not in sight.[145]

Hillery. . . the conviction of the defendant for murdering a fifteen-year-old girl was reversed after twenty-three years of . . . litigation on grounds of discrimination in the selection of the grand jury . . . despite the absence of any unfairness in the defendant's trial. . . . As the dissenting Justices noted, '[i]t is difficult to reconcile this result with a rational system of justice.' No purpose of affording justice to the individual defendant can explain it, since there is no reason to believe that his conviction was anything other than accurate and just. Nor can it be explained in terms of providing a systemic deterrent to the specific evil for which relief was granted. Allowing defendants to challenge the grand jury selection process for some reasonable time would suffice to deter such wrongs. Allowing them to do so forever is irrational and absurd.").

[145] *Time Magazine*, Feb. 17, 1986; *see Los Angeles Times*, Nov. 17, 1986 ("A trial that takes place so many years after the original crime only 'causes the victims more suffering,' said Bernard Miller, the uncle of the slain girl. The family spent a lifetime trying to forget a tragedy, he said, and now they are forced to remember. . . . 'My

The state authorities resolved to re-try Hillery, though doing so presented extraordinary difficulties after the lapse of a quarter of a century. Six thousand pages of transcripts from earlier proceedings had to be reviewed. A number of key witnesses from the original trial were dead; locating surviving witnesses and other persons with relevant knowledge involved tracking down about 115 people throughout the country. At the original trial, Hillery was discredited through the admission of false alibi statements that he made to the police following his arrest; these statements were ruled inadmissible at the re-trial because the police had not observed restrictions on custodial questioning which emerged in subsequent judicial decisions.[146] Hillery's testimony from the 1963 trial was also excluded.[147] However, physical evidence had been retained from the original trial on account of Hillery's reputation as a persistent litigator, and additional evidence was generated from this material through the use of contemporary forensic technology. The loss of witnesses was partially offset in some instances by having proxies read transcripts of their testimony from earlier proceedings at the second trial.

On December 18, 1986, Hillery was again convicted of murdering Marlene Miller in 1962, and sentenced to life imprisonment. Re-trying

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brother and his wife were terribly traumatized,' he said. 'They've tried to live with it and get on with their lives. But how can they when the courts keep tossing it back at them? They're going to have to go back in that courtroom and relive the thing all over again.'").

[146] In *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964), the Supreme Court held that statements obtained from a suspect in custodial interrogation could not be used at trial if the suspect had requested and been denied counsel and had not been told that he had a right to remain silent. The Supreme Court of California, in addressing one of Hillery's appeals in 1965, had held that the questioning of Hillery violated *Escobedo* and a related state decision because the police had not told Hillery that he had a right to counsel and a right to remain silent (401 P.2d 382, 384, 394). Of course no such requirement existed when Hillery was questioned in 1962, *see* Office of Legal Policy, *Report on the Law of Pre-Trial Interrogation* 25-32, 38-39, 55-56 (Feb. 12, 1986) (Truth in Criminal Justice Report No. 1), and the California Supreme Court found in its 1965 decision that the admission of Hillery's pre-trial statements at his trial was harmless error "in light of the other overwhelming evidence of guilt" (401 P.2d 394-95). However, the 1965 finding that the admission of Hillery's statements was improper was deemed to be "the law of the case" and sufficient to require their exclusion at his second trial in 1986.

[147] Hillery's testimony at the original trial included a reiteration of his pre-trial alibi story -- which was shown to be false by other evidence -- and also brought out the fact that he had a prior rape conviction (386 P.2d 481-82; 401 P.2d 395). These facts were concealed from the jury at the re-trial in 1986.

Hillery had cost the county over $250,000. Within hours of the conviction, a notice of appeal was filed with the California Court of Appeal; Hillery's appeal is now pending before that court. And the end is still not in sight.[148]

2. The Aiken Case. Arthur Aiken and Antonio Wheat robbed gas stations and killed the attendants. Following their third robbery and murder within a single month in 1965, they were apprehended by the police.

Aiken was advised of his rights after being taken into custody. He was initially unwilling to talk to the police when questioned, and stated repeatedly during a brief portion of the interrogation that he wanted a lawyer and did not want to say anything. However, after Aiken was confronted with his accomplice Wheat's refusal to retract statements which imputed primary responsibility for one of the killings to Aiken, he became eager to give his version of the crimes, and provided detailed confessions which inculpated him in two of the murders. At trial, Aiken was convicted of three counts of murder and sentenced to death (434 P.2d 10, 14-15, 27-29).

The conviction was appealed to the Supreme Court of Washington, which remanded the case for additional fact-finding concerning the propriety of admitting Aiken's confessions. The trial court concluded that the confessions had been properly admitted, and the state supreme court, agreeing, upheld the judgment.[149]

In reaching this result, the court noted that continued questioning following a request for counsel or an expression of unwillingness to talk is inconsistent with the restrictions on custodial questioning created by *Miranda v. Arizona*, 384 U.S. 436 (1966). However, in light of *Johnson v. New Jersey*, 384 U.S. 719 (1966), *Miranda* did not apply retroactively to cases, like Aiken's, in which the trial preceded the *Miranda* decision (434 P.2d 21-22).

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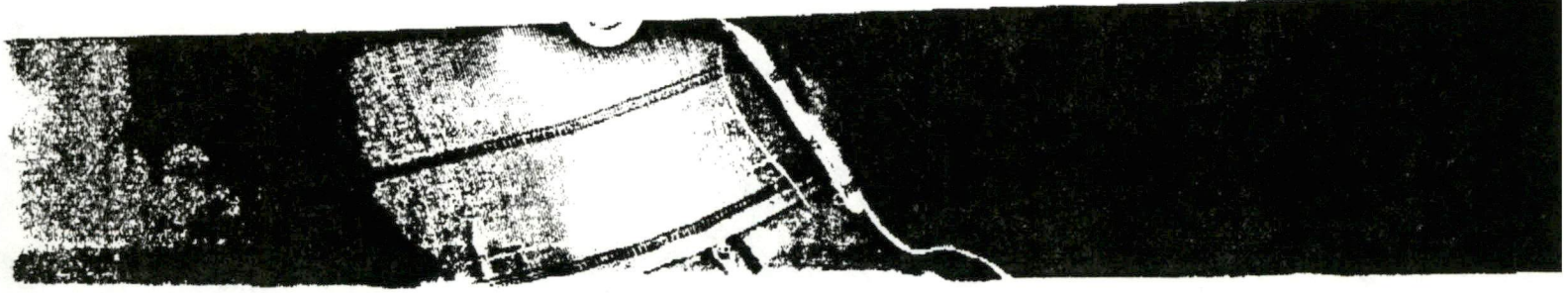
[148] *See Los Angeles Times*, Dec. 19, Dec. 3, Nov. 25, and Nov. 17, 1986. Additional information concerning the re-trial and subsequent proceedings was provided by Robert Maline, the Kings County District Attorney who prosecuted the re-trial, Ronald Fahey, who served as special prosecutor in connection with the re-trial, and the Kings County Auditor's office.

[149] The court also rejected various other claims raised by Aiken, including claims relating to pre-trial publicity, denial of severance, admission of evidence, and jury instructions (434 P.2d 35-40).



The court also rejected arguments (434 P.2d 22-24, 31-34) that Aiken's confession was involuntary or inconsistent with the more limited restrictions on interrogation announced by the Supreme Court in the decision of *Escobedo v. Illinois*, 378 U.S. 478 (1964). The trial court had found that Aiken did not confess because of overreaching by the police, but out of a desire to rebut his accomplice's statements portraying Aiken as the main actor in one of the killings. The trial court also found that the officers conducting the interrogation -- which was taperecorded -- did not hear Aiken's remarks about wanting a lawyer or being unwilling to talk. The grounds for this conclusion included the denial of all officers involved that they had heard such statements; the fact that Aiken "held his head down . . . spoke softly, slurred his words, and . . . let his voice trail off"; interference by numerous noises from outside with audibility in the interview room; the distance of the interviewing officers from Aiken; and the great difficulty of hearing on the tape many of Aiken's answers -- including the disputed statements -- as a result of which the trial court did "not believe that the interrogating officers heard, nor could possibly . . . have heard, any request for an attorney or desire to remain silent" (434 P.2d 27-33).

Following the affirmance of Aiken's conviction by the Washington Supreme Court in 1967, he applied to the United States Supreme Court for review. The Court granted certiorari (392 U.S. 652), vacated the judgment, and remanded the case to the state courts for reconsideration in light of the decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), regarding exclusion of potential jurors who oppose the death penalty, and the decision in *Bruton v. United States*, 391 U.S. 123 (1968), regarding the admission in a joint trial of a co-defendant's confession which implicates the defendant.

On remand, the Washington Supreme Court reaffirmed the conviction and sentence in 1969, finding that the state procedures followed in Aiken's trial had been consistent with the new constitutional rules that were subsequently announced in *Witherspoon* and *Bruton* (452 P.2d 232). The United States Supreme Court disagreed on the *Witherspoon* issue, and overturned Aiken's death sentence in 1971 (403 U.S. 946). On remand, Aiken was re-sentenced to three consecutive life terms.

Aiken's case was then quiet for eight years. In 1979, however, he filed a petition for habeas corpus in federal district court. The district court dismissed the petition on grounds of delay in filing under Rule 9(a) of the habeas corpus procedural rules. A panel of the Ninth Circuit

Court of Appeals reversed the dismissal and remanded the case for findings on the issue of whether the state had been prejudiced by Aiken's delay. The district court found prejudice to the possibility of re-trying Aiken and dismissed the petition a second time under Rule 9(a). The court of appeals, in 1982, then reversed the second dismissal, holding that prejudice to the possibility of re-trial can never be grounds for a Rule 9(a) dismissal (684 F.2d 632; pp. 69-71 *supra*).

The state applied to the Supreme Court for review, and the Court denied certiorari in 1983. In a statement concerning the denial of certiorari, Chief Justice Burger observed (460 U.S. 1093):

> The time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing stale claims that were fully ventilated in state courts. . . . The astonishing facts underlying this petition are illustrative and instructive.
>
> On October 14, 1965, a jury . . . found Arthur Aiken and his codefendant guilty of murder in the first degree for the robbery and slayings of three gas station attendants . . . . On direct appeal, Aiken advanced numerous challenges to his conviction. Following a remand to the trial court, the Washington Supreme Court affirmed the conviction and the sentence. . . . On petition for certiorari to this court, the conviction was vacated and the case remanded for reconsideration. . . . After a second petition for certiorari, the conviction was again vacated and remanded. . . . The state trial court then resentenced Aiken to three consecutive life prison terms.
>
> On July 26, 1979, *fourteen years* after his original conviction and *eight years* after his resentencing, Aiken filed this [habeas corpus] petition. . . . He raised claims concerning pretrial publicity, the voluntariness of his confession, and the trial court's failure to grant severance -- all claims that had been raised and decided . . . in his first appeal to the Washington Supreme Court. . . .
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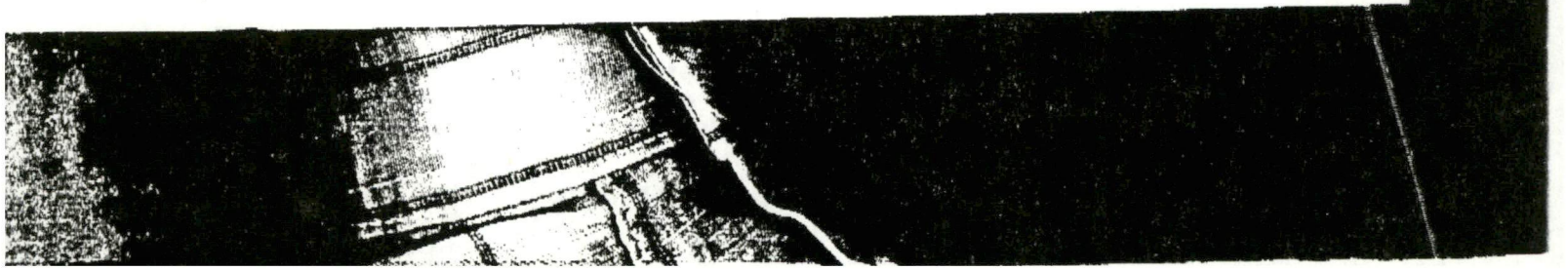
> On February 22, 1980, the District Court denied the habeas petition . . . [under] . . . Habeas Corpus Rule 9(a). The Court of Appeals for the Ninth Circuit reversed, holding that prejudice may not be presumed. On remand, the state



> presented evidence that it could locate only 30 of the 87 witnesses who testified at trial and that 136 of the State's 138 exhibits were lost or destroyed. Finding that the evidence demonstrated that it would be difficult to retry Aiken . . . the District Court again dismissed the petition. . . . The Court of Appeals for the Ninth Circuit again reversed, reasoning that Rule 9(a) allows consideration only of the State's difficulty in "respond[ing] to the [habeas] petition," and not consideration of the difficulty in retrying the petitioner.

Following the Supreme Court's denial of certiorari in 1983, the case was returned to the district court, which reached a decision on Aiken's petition in 1985. That court observed:

> Aiken's conviction, which will soon reach its twentieth anniversary, has been before the [state] trial court twice, the Supreme Court of Washington four times, the Supreme Court of the United States three times, the United States Court of Appeals twice, and is before this court for the third time.[150]

The district court rejected all of Aiken's claims on the merits including the claim that admission of his confessions violated his rights under the Sixth, Fifth, and Fourteenth Amendments.

On the Sixth Amendment issue, the district court deferred to the state trial court's determination that the interviewing officers had not heard Aiken's requests for counsel, finding it to be fairly supported by the record. While the result reached on this claim was correct, the district court's reliance on the state court's findings and rationale was unnecessary. The Sixth Amendment right to counsel cannot attach before a defendant is formally charged with a crime or initially brought into court. *See Moran v. Burbine*, 475 U.S. 412, 428-32 (1986). Since these events had not occurred at the time of Aiken's interrogation (434 P.2d 14-15, 27-29, 54), his rights under the Sixth Amendment were not violated even if the officers did hear his requests for counsel.[151]

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[150] The opinion generated in the district court was a magistrate's report that was approved and adopted by the court. *Aiken v. Spalding*, Report and Recommendation in Case No. C79-892R (W.D. Wash., June 14, 1985); Judgment of District Court in Case No. C79-892R (W.D. Wash., Sept. 5, 1985). References to the statements and reasoning of the "district court" refer to the magistrate's report.

[151] The principal case establishing that the Sixth Amendment right to counsel cannot

On the question of the voluntariness of Aiken's confession (the Fifth and Fourteenth Amendment issue), the district court found -- like the state courts almost twenty years earlier -- that Aiken had not confessed because of police coercion, but in order to respond to his accomplice Wheat's effort to shift most of the blame to Aiken. The district court also found the case to be indistinguishable from *Frazier v. Cupp*, 394 U.S. 731 (1969) -- another case involving a post-*Escobedo* but pre-*Miranda* interrogation -- in which the Supreme Court upheld the admission of a confession obtained through continued questioning after the defendant had expressed a desire to talk to a lawyer.

Aiken appealed the district court's denial of the writ to the Ninth Circuit Court of Appeals. A panel of the Ninth Circuit, in 1988, then dismissed the petition for failure to exhaust state remedies, although Aiken had previously litigated all of his claims in state court and the state had conceded before the district court that state remedies were exhausted.[152] In the district court proceedings, Aiken had presented new evidence in support of his confession claim -- specifically, a sound expert's enhancement and analysis of the taperecording -- which had not been presented to the state courts. The panel believed that this evidence "substantially improves the evidentiary basis for Aiken's right-to-counsel and voluntariness arguments," and accordingly should be considered in the first instance in the state courts.[153]

Thus, nine years of federal habeas corpus litigation -- following six years of state and federal litigation on direct review and eight years of

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attach prior to formal accusation, *Moran v. Burbine*, 475 U.S. 412 (1986), came after the district court's decision. The Supreme Court had previously taken the same position in different factual settings in *United States v. Gouveia*, 467 U.S. 180 (1984), and the plurality opinion in *Kirby v. Illinois*, 406 U.S. 682 (1972).

[152] *Aiken v. Spalding*, 841 F.2d 881 (9th Cir. 1988).

[153] For reasons suggested in the textual discussion of the district court's decision (pp. 86-87 *supra*), this conclusion was unwarranted. Even if the "new evidence" did establish that the officers heard Aiken's requests for counsel, there could be no Sixth Amendment violation, since adversarial judicial proceedings had not commenced at the time of his interrogation. Both the district court and the state courts also made determinations that rebutted Aiken's involuntariness claim and that were independent of the question whether the officers had heard his statements (specifically, the finding that Aiken's confession resulted from a desire to refute his accomplice's accusation rather than from any misconduct by the police). Prior assessment of the "new evidence" by the state courts is unnecessary because -- even taken for all it might be worth -- it would not entitle Aiken to relief on his confession claim.

pure delay – failed to produce a federal court resolution of the merits of the claims raised in Aiken's petition. If his claims are again presented to and rejected by the state courts, he will then be free to commence another round of habeas corpus litigation in the lower federal courts.

3. The Witt Case. On October 28, 1973, Johnny Witt was out bow and arrow hunting with a younger friend, Gary Tillman. The two men had spoken on other occasions about killing a human, and had stalked persons like animal prey. On that day, they waylaid 11 year old Jonathan Kushner as he rode his bicycle along a path through a wooded area. Tillman struck Jonathan on the head with a star bit from a drill. Witt and Tillman then wrestled the struggling boy to the ground, bound and gagged him, and placed him in the trunk of Witt's car. They drove to a deserted grove and discovered when they opened the trunk that the victim had died by suffocating from the gag. They then "dug a grave for the Kushner boy and ... slit his stomach so it would not bloat. Before burying the victim, Witt and Tillman performed various acts of sexual perversion and violence to Kushner's body." [154]

Witt was turned in to the sheriff's department by his wife, and gave a detailed confession to the crime following his arrest. At trial, he was convicted of murder and sentenced to death. The Supreme Court of Florida upheld the conviction and sentence on appeal in 1977 (342 So.2d 497). The United States Supreme Court denied certiorari (434 U.S. 935; 434 U.S. 1026).

Witt then applied for post-conviction relief in the state trial court. The application was denied, and the Florida Supreme court affirmed the denial in 1980. The court noted that "Witt raises essentially six issues, all of which he admits either were raised in the direct appeal from his conviction and sentence, or could have been raised at that time." The court went on to find that alleged changes in caselaw subsequent to Witt's initial appeal were insufficient to justify the relitigation or belated raising of these claims (387 So.2d 922). The United States Supreme Court again denied certiorari (449 U.S. 1067).

In 1980, Witt applied for habeas corpus in federal district court. The district court denied the writ. On appeal, a panel of the Eleventh Circuit Court of Appeals upheld the rejection of most of Witt's claims,

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[154] *Witt v. Wainwright*, 714 F.2d 1069, 1071 (11th Cir. 1983); *Wainwright v. Witt*, 469 U.S. 412, 414 (1985); *Witt v. State*, 342 So.2d 497, 499 (Fla. 1977).

but concluded that the writ should be granted on the basis of improper exclusion of a potential juror.

The specific claim was that three prospective jurors who opposed capital punishment had been excused on inadequate grounds. The defense had raised no objection to excusing these individuals during jury selection in 1974, and the same type of claim had been rejected by the Supreme Court of Florida in Witt's initial appeal. Nevertheless, the Eleventh Circuit focused on one prospective juror who was excused after she indicated that she was opposed to capital punishment and that her death penalty beliefs would interfere with her sitting as a juror and judging the guilt or innocence of the defendant. This was deemed improper under the standards of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and resulted in the overturning of Witt's sentence by the federal appellate panel in 1983 (714 F.2d 1069).

The Supreme Court granted certiorari and reversed the granting of the writ in 1985 (469 U.S. 412). The Court held that excusing a potential juror is proper if his views on capital punishment would substantially impair the performance of his duties as a juror, and that a state court determination that a potential juror is so biased is entitled to a presumption of correctness under the standards of 28 U.S.C. § 2254(d).

The Supreme Court's decision on January 21, 1985, reinstating Witt's capital sentence was followed by the usual last-minute flurry of applications seeking to prevent or delay the execution of the sentence. Witt unsuccessfully applied for post-conviction relief in the state trial court, alleging ineffective assistance of trial counsel and re-presenting on a different theory his earlier objection to the exclusion of certain prospective jurors who opposed capital punishment. The Supreme Court of Florida affirmed the denial of relief (465 So.2d 510). The court found that the belated raising of the ineffective assistance of counsel claim was an abuse of procedure in light of the decision of Witt's attorney not to raise such a claim in the first state post-conviction proceeding, and also rejected the claim on the merits. The court similarly found that the belated raising of the revised juror-exclusion claim was unjustified and also noted that the theory underlying the claim had been rejected in earlier decisions.

Witt applied for habeas corpus and a stay of execution in federal district court, presenting the same ineffectiveness of counsel and juror-exclusion claims. The district court dismissed the petition as an abuse of

the writ and denied a certificate of probable cause for appeal on March 1, 1985. The Eleventh Circuit Court of Appeals affirmed the denial of a stay and a certificate of probable cause on March 4, 1985, agreeing that the petition was an abuse of the writ and finding that it presented no substantial ground upon which relief might be granted (755 F.2d 1396). The Supreme Court denied an application for a stay of execution, denied certiorari, and denied a petition for rehearing of the denial of certiorari and a stay of execution on March 5, 1985 (470 U.S. 1039, 1046).

On March 6, 1985, after eleven years of litigation, Witt's death sentence for murdering Jonathan Kushner was finally carried out.

• U.S. GOVERNMENT PRINTING OFFICE: 1988-202-046/82220

Item(3)
Exclusionary rule anecdotes: pp. 71-74

REPORT TO THE ATTORNEY GENERAL

ON

THE SEARCH AND SEIZURE EXCLUSIONARY RULE

Truth in Criminal Justice

Report No. 2

Office of Legal Policy

February 26, 1986

Appendix A-2 - Selected Exclusionary Rule Cases

The exclusionary rule has been criticized for causing the release of individuals who were clearly guilty but whose convictions were based on evidence obtained in a manner that was later held to violate Fourth Amendment search and seizure standards. Collected here are cases where appellate courts reversed or vacated and remanded convictions on the grounds that evidence used to convict in the trial court should have been suppressed.

1. *United States v. Gillespie*, 650 F.2d 127 (7th Cir. 1981), *cert. denied*, 458 U.S. 1111 (1982).

FBI and local police arrived at the home of Gillespie armed with arrest warrants for fugitives believed to be inside. Gillespie admitted the officers and accompanied them on a room-by-room search. No fugitives were found, but contraband (heroin) was discovered. More heroin was seized during two subsequent searches, Gillespie freely consenting to both. Notwithstanding these facts, the Seventh Circuit reversed Gillespie's conviction. The appeals court said that because the FBI and local police officers were armed with shotguns and revolvers when they appeared at Gillespie's door, "Gillespie could only have felt he had no choice but to let in the officers." The court held that the first search was illegal, and that the second and third searches, although freely consented to, were "entirely the product of the first unconstitutional search." Accordingly, all of the drugs seized were inadmissible.

2. *United States v. Sanchez-Jaramillo*, 637 F.2d 1094 (7th Cir.), *cert. denied*, 449 U.S. 862 (1980).

INS agents, acting with probable cause, arrested Sanchez on a charge of counterfeiting alien registration cards. After being arrested, Sanchez consented to a search of his apartment. During the search the agents found Cruz in a bedroom, read him his Miranda rights, and told him to sit in the living room with Mr. and Mrs. Sanchez while they continued to search. Two locked suitcases were then found in the bedroom where Cruz had been sleeping. Cruz told the agents they belonged to him. At the agents' direction Cruz opened the suitcases. Cash and materials used to counterfeit alien registration cards were found inside. Cruz was then arrested. He was later convicted. The Seventh Circuit overturned the conviction. The court held that the agents lacked probable cause to detain Cruz, and that any "consent" Cruz gave

for the search of the suitcases was ineffective, as it could not be sufficiently voluntary to purge the "taint" of the illegal detention. The court held that both the evidence in the suitcases and the statements made by Cruz subsequent to the search should have been suppressed.

3. *United States v. Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979).

An informer who had previously supplied the DEA with reliable information 20 out of 25 times tipped them that a specific car was being used to smuggle narcotics from Mexico into the United States. Border Patrol agents subsequently stopped the car and detained the driver, Perez-Esparza, for two and one-half hours until DEA agents arrived. Perez-Esparza was then read his *Miranda* warnings, told that he was being detained on suspicion that his car was transporting narcotics, and further told that agents were obtaining a warrant for a search of the car. Perez-Esparza then gave both oral and written consent to a search of the car. The search uncovered cocaine. After again being warned of his rights, Perez-Esparza confessed.

The Ninth Circuit overturned the conviction. The court reasoned that while the informer's tip provided a sufficient basis for officers to stop the car and question its driver, it did not support probable cause for an arrest. Thus, the two and one-half hour wait for DEA agents to arrive was an illegal "arrest", rendering the suspect's consent to the search of his car ineffective, even though the court agreed the consent was fully "voluntary". All evidence stemming from the defective consent to the search was therefore suppressed.

4. *United States v. Lockett*, 674 F.2d 843 (11th Cir. 1982)

Federal agents acting pursuant to a search warrant found 85 sticks of dynamite stored on the premises of Lockett, who was subsequently convicted. The conviction was reversed by the Eleventh Circuit, which found that the affidavit supporting the warrant did not allege sufficient facts for a magistrate to conclude that explosives were stored on the specific property searched. This despite the fact that the affidavit did aver (1) that Lockett had purchased a case of dynamite on a specific date, (2) that Lockett had made several threats against his former employers and had mentioned explosives in such threats, and (3) that a bomb made of the same type of dynamite as that purchased by Lockett had been discovered at a facility of his former employer 60 miles from Lockett's home.

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5. *People v. Trudeau*, 385 Mich. 276, 187 N.W.2d 890 (1971), *cert. denied*, 405 U.S. 965 (1972).

A night watchman was killed by crowbar blows to the head during the attempted burglary of a Michigan synagogue. A heel print at the scene was one of the few leads. Approximately two weeks later Trudeau was arrested in a United States Post Office where he had attempted to break and enter a vault. Because of the similarity of the crimes a detective assigned to the murder case went to the preliminary hearing on the Post Office case in order to view the defendant's shoes. Later the same day at the jail, Trudeau refused to turn over his shoes to the police. Acting without a warrant, officers removed the shoes and gave them to the detective. Trudeau was convicted at trial in part due to expert testimony comparing the seized shoes with the print. The Michigan Supreme Court reversed and remanded for a new trial on the grounds that there was no probable cause and no warrant for the seizure, and that the shoes were therefore taken in violation of the Fourth Amendment, and should not have been allowed in evidence.

* * *

The following case involves evidence thrown out at the preliminary hearing phase. *People v. Padilla & Corona*, Cal. Municipal Ct., Dec. 29, 1970.

California narcotics detectives arrested a couple for possession of narcotics. The suspects had a nine-month-old baby with them, in whose diapers the detectives found heroin. At a preliminary hearing in the case a judge threw out the evidence because "A baby has the rights of a person, and must therefore be afforded the protection of the Constitution." The judge said that since a nine-month-old was too young to consent to a search, the evidence must be suppressed and the case dismissed.

Appendix A-3 - A Brief Note on *Mapp v. Ohio*

Dollree Mapp was convicted for possession of obscene materials, found in her home during a search by Cleveland police. The police were interested in obtaining information relating to an extortionist bombing. Dollree Mapp was believed to be the girlfriend of one of the men associated with the crime. She had earlier been arrested in another county and had given police a statement on the involvement of several men in the extortion scheme. However, she subsequently pled the Fifth Amendment and refused to testify in court against the men she had named.

When the police went to Mapp's home they believed the bomber might be hiding inside. Upon arrival, the police knocked and demanded entrance. After telephoning an attorney, Mapp refused to admit them without a search warrant. The officers advised their headquarters of the problem and set up watch outside the house. In the meantime an affidavit was prepared but the police were unable to locate a judge and get a warrant.

About three hours after the initial try at entry, more officers arrived at the house, armed with the affidavit but no warrant. Police then forced their way into the house and showed Mapp the affidavit, which she took from them and placed "in her bosom". A struggle ensued, and the police recovered the affidavit. They then searched the house, finding not the bombing suspect but the obscene materials.[107]

In her appeal to the Supreme Court Mapp did not urge that *Wolf v. Colorado* be overruled. Indeed, the Supreme Court in its opinion chose not to address any of the issues Mapp raised. Instead, the Court observed in a footnote that this exclusionary rule issue had been raised only by an *amicus curiae* in the case. But the Court disposed of the case entirely on the exclusionary rule ground, stating that the issues actually raised by Mapp "need not be decided."[108]

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[107] The facts described in the preceding paragraphs have been gleaned from the *Mapp* opinion, 367 U.S. 643 (1961), and the transcript of an interview between Eugene H. Methvin, now a senior editor at *Reader's Digest*, and John Corrigan, Cleveland District Attorney at the time of *Mapp*, conducted in 1966. A copy of this transcript is in possession of the Office of Legal Policy.

[108] *Mapp*, 367 U.S. at 646 n.3.

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Item (4)

Exclusionary Rule Reform and Drug Enforcement

- This amendment would admit reliable physical evidence -- such as narcotics seized from a drug trafficker -- where the responsible officers acted with an objectively reasonable (so-called "good faith") belief that their conduct was lawful.

- The Senate has already passed legislation providing for such an exception to the exclusionary rule as S. 1764 in 1984. The House of Representatives has also done so in H.R. 5484 in 1986, and in the pending drug bill.

- The impact of the exclusionary rule is overwhelmingly focused on drug cases. For example, a 1982 study by the National Institute of Justice found that over 70% of all felony cases rejected for prosecution in California because of potential exclusionary rule problems were drug cases. The same study found that almost 3,000 felony drug arrests were not prosecuted in California during the four year period from 1976 through 1979 because of such problems.

- In order to prosecute drug crime effectively, we must limit the application of the exclusionary rule to cases where it may actually have some value in preventing search and seizure violations. It does not have such value in cases covered by the amendment. As the Supreme Court observed in United States v. Leon, 468 U.S. 897, 919-20 (1984): "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'"

- The Supreme Court has already applied the standard of this amendment to searches under warrants through its decision in United States v. Leon, 468 U.S. 897 (1987). The Fifth and Eleventh circuits, following the decision in United States v. Williams, 622 F.2d 830 (5th Cir. 1980), have recognized a general "reasonable good faith" exception to the exclusionary rule for several years, in both warrant and non-warrant cases, with no untoward consequences. The "reasonableness" standard is also routinely applied in civil suits in determining an officer's personal liability based on search-and-seizure violations. See Anderson v. Creighton, 55 U.S.L.W. 5092 (1987).

Item (5)

The Importance of Exclusionary Rule and Habeas Corpus Reform to Drug Crime Enforcement

Enactment of the exclusionary rule and habeas corpus reforms of the proposed Criminal Justice Reform Act (S. 1970 and H.R. 3777) is of critical importance to effective efforts against drug crime.

The relationship of exclusionary rule reform to drug enforcement is straightforward: The impact of the exclusionary rule is particularly acute in drug cases. For example, a 1982 National Institute of Justice study, The Effects of the Exclusionary Rule: A Study in California, reported (pp. 12-13, 18):

> Although the exclusionary rule may in theory be relevant to any kind of case in which evidence is collected, its actual impact, in fact, is much narrower. The study data show that the exclusionary rule's impact is concentrated on drug cases.
>
> Both the county and statewide data show that the vast majority of cases rejected because of search and seizure problems involve defendants charged with drug offenses. In San Diego, for example, 74 percent of defendants released in 1980 for the primary reason of a search and seizure problem were charged with at least one felony narcotic or drug crime. A profile of the most serious felony charge filed in all statewide cases rejected for prosecution because of search and seizure problems in the years 1976-1979 reveals that 71.5 percent were drug offenses . . . .
>
> In both of the Los Angeles offices surveyed, almost one-third of all felony drug cases submitted to the district attorney for prosecution were rejected because of a search and seizure problem. In the Pomona survey, of a total 1,131 felony cases reviewed by the District Attorney in 1981, 58 (5.1 percent) were rejected because of search and seizure problems. However, of the 114 felony drug and narcotic cases submitted for review, 37 (32.5 percent) were rejected for search and seizure reasons. In the Central Operations office there were similar findings. Of the 1,330 sampled 1981 cases

> screened for prosecution, 63 cases (4.7 percent) were rejected for search and seizure problems. Of the 145 drug cases reviewed, the proportion rejected for search and seizure was much higher: 29 percent, or 42 cases . . . .
>
> [T]he findings demonstrate conclusively that the effects of the exclusionary rule are most evident in drug cases and are felt in a significant portion of drug arrests. Over 70 percent of all the felony cases rejected because of search and seizure problems in California and in San Diego were drug cases. During the four-year period 1976 through 1979, almost 3,000 felony drug arrests in California were not prosecuted because of search and seizure problems. Analysis of drug arrest screenings at two local prosecutors' offices reveals that 30 percent of all felony drug arrests were rejected for prosecution because of search and seizure problems.

A number of other empirical studies have also identified drug crimes as an area in which enforcement efforts are particularly affected by the exclusionary rule. The earlier studies are cited and summarized on pp. 5-7 of the NIJ study (copy attached).

Habeas corpus reform also has an important relationship to drug crime enforcement. The Senate has recently passed legislation authorizing capital punishment for certain drug-related killings, and passed broader capital punishment legislation as S. 1765 in the 98th Congress. The House of Representatives similarly passed legislation authorizing a federal death penalty for certain drug-related homicides as part of H.R. 5484 in the 99th Congress. There is little point in having a death penalty on paper, however, if the execution of capital sentences can be delayed and obstructed indefinitely through interminable collateral proceedings. In the absence of remedial legislation, the abuse of habeas corpus and the corresponding collateral remedy for federal prisoners (§ 2255 motions) will continue to impair the effectiveness of both state and federal capital punishment laws against the rampant violence associated with drug trafficking.

Testimony on this point by the Department of Justice, given at a House hearing in February, is attached. The basic problem of obstruction of capital punishment through abuse of habeas corpus is discussed at pp. 1-2, 15-17. The value of the legislative habeas corpus reform proposals in curbing this

problem is analyzed at pp. 26-34. The desirability of enacting these reforms in conjunction with the restoration of an enforceable federal death penalty -- to "guard against efforts to obstruct the execution of federal death sentences through dilatory § 2255 litigation" -- is noted specifically on pp. 33-34.

Attachments

Item (6)

Department of Justice

STATEMENT

OF

PAUL CASSELL

ASSOCIATE DEPUTY ATTORNEY GENERAL

CONCERNING HABEAS CORPUS

AND CAPITAL PUNISHMENT LITIGATION

BEFORE

THE SUBCOMMITTEE ON GOVERNMENT

INFORMATION, JUSTICE, AND ARGRICULTURE

OF THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

February 26, 1988

Held in Madison, Florida

Mr. Chairman, I am pleased to appear before this committee to present the views of the Department of Justice on the need for reform of federal habeas corpus, and on the particularly acute problems of obstruction and delay that have arisen from the abuse of habeas corpus in capital cases. Before turning to a specific discussion of these issues, let me direct your attention briefly to two general assessments. The first is an observation of Justice Lewis F. Powell, delivered at an American Bar Association meeting in 1982. In commenting on the major contemporary problems of the federal judicial system, Justice Powell observed:

> Another cause of overload of the federal system is [28 U.S.C.] § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy. 1/

The second observation I wish to bring to your attention was made by Attorney General William French Smith in 1983. In the course of a general critique of the current federal habeas corpus jurisdiction, Attorney General Smith stated:

1/ Address of Justice Lewis F. Powell before the American Bar Association Division of Judicial Administration, Aug. 9, 1982.

> A . . . final criticism is that the present system of habeas corpus review creates particularly acute problems in capital cases . . . . The "public interest" organizations that routinely involve themselves . . . in capital cases have fully exploited the system's potential for obstruction. Delay is maximized by deferring collateral attack until the eve of execution. Once a stay of execution has been obtained, the possibility of carrying out the sentence is foreclosed for additional years as the case works its way through the multiple layers of appeal and review in the state and federal courts.
>
> The solution to this problem lies in part in the reform of state court procedures . . . . The efficacy of state reforms is severely limited, however, by the availability of federal habeas corpus, which cannot be limited by the state legislatures . . . . It . . . prevents correction of the practical nullification of all capital punishment legislation that has resulted from litigational delay and obstruction. 2/

In my testimony today, I will discuss how we have come to have a system that "assures no end to the litigation of a criminal conviction" -- a system that is "viewed with disbelief by lawyers and judges in other countries," and that results in the "practical nullification" of the judgment of the vast majority of Americans that capital punishment is the appropriate penalty for the most egregious crimes. I will also discuss the means of correcting these anomalies.

2/ Proposals for Habeas Corpus Reform in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 145-46 (1983) [hereafter cited as "Proposals for Habeas Corpus Reform"].

ended review system reflects is in conflict with the corrective and deterrent functions of the criminal justice system. 18/

The difficulty of dealing with these cases is increased by the absence of any definite time limit on habeas corpus applications, which can result in the need to reconstruct events after a lapse of years or decades. Data collected in an extensive study conducted for the Department of Justice showed that about 40 percent of habeas corpus petitions were filed more than five years after the state conviction, and nearly one-third were filed more than a decade after the state conviction. Still longer delays were noted in some cases in the study, up to more than fifty years from the time of conviction. 19/

There is no need for me to inform the members of this committee that the problem of delay is particularly acute in capital cases. 20/ In such cases, the continuation of litigation prevents the sentence from being carried out. Thirty-seven states now authorize capital punishment, and about 2,000

18/ See Bator, supra note 7, at 452; Mackey v. United States, 401 U.S. 667, 690-91 (1971) (separate opinion of Harlan, J.); Friendly, supra note 10, at 146; Spalding v. Aiken, 460 U.S. 1093, 1096-97 (1983) (statement of Burger, C.J.).

19/ See Allen, Schachtman & Wilson, Federal Habeas Corpus and its Reform: An Empirical Analysis, 13 Rutgers L. J. 675, 703-04 (1982).

20/ See, e.g., Address of Justice Lewis F. Powell before the Eleventh Circuit Conference, Savannah, Georgia, May 8-10, 1983, at 9-14; Bureau of Justice Statistics, Capital Punishment, 1986 (Dept. of Justice, Sept. 1987).

prisoners are currently under sentence of death, but the typical capital case is characterized by interminable litigation and re-litigation, and fewer than a hundred executions have been carried out in the past twenty years. 21/ While the constitutionality of capital punishment under appropriate standards and procedures has now been settled for many years, and the popular and legislative judgment overwhelmingly supports the death penalty for the most serious crimes, the open-ended system of review has largely nullified this judgment as a practical matter. The federal habeas corpus jurisdiction, in particular, provides an avenue for obstruction and delay in these cases which the states are powerless to address. 22/ The general problem was cogently described by Justice Lewis F. Powell in an address in 1983 before the Eleventh Circuit Conference:

> As capital cases accumulate, they add a new dimension to the problem of repetitive litigation. . . . Gregg v. Georgia decided that capital punishment is constitutional. Some 37 states have authorized it. Murders continue, many of incredible cruelty and barbarity, as mindless killings increase in much of the world. We now have more than 1,000 convicted persons on death row, an intolerable situation.
>
> Many of these persons were convicted five and six years ago. Their cases of repetitive review move sluggishly through our dual system. We have found no effective way

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21/ NAACP Legal Defense and Educational Fund, Death Row, U.S.A. (Nov. 1, 1987).

22/ See Proposals for Habeas Corpus Reform, supra note 2, at 145-46.

> to assure careful and fair and yet expeditious and final review.
>
> So far this Term, we have granted and heard arguments in four capital cases, and have agreed to hear a fifth next Term. We have received 28 applications for stays of execution, about half of which have come at the eleventh hour . . . .
>
> Perhaps counsel should not be criticized for taking every advantage of a system that irrationally permits the now familiar abuse of process. The primary fault lies with our permissive system, that both Congress and the courts tolerate . . . . [There is] need for legislation that would inhibit unlimited [habeas corpus] filings 23/

In the few years since Justice Powell's remarks, the "intolerable" figure of 1,000 prisoners awaiting execution has roughly doubled, and the need for remedial legislation remains unmet.

III. Legislative Restrictions of Habeas Corpus

The Supreme Court, in its current habeas corpus jurisprudence, has given weight to considerations of finality and federalism that were ignored or shrugged off in the expansive decisions of the 1960's. A number of the Justices have been openly critical of excessive habeas corpus review, and recent decisions have effected several limitations on its scope and

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23/ Citation in note 20 supra.

~~broader compromise relating to the formulation of title II of the Omnibus Crime Control and Safe Streets Act. 36/~~

IV. Pending Reform Legislation

Up to this point I have been discussing the historical expansion of the federal habeas corpus jurisdiction and past efforts by congress to curb its excesses. The final portion of my testimony will focus on the most promising vehicle for dealing with its contemporary problems.

The President has recently transmitted to Congress the proposed Criminal Justice Reform Act (H.R. 3777 and S. 1970). In brief, the main provisions of the proposed Act are as follows:

Title I of the legislation would provide for the admission in federal judicial proceedings of evidence obtained under circumstances justifying an objectively reasonable belief that the search or seizure by which it was obtained was in conformity with the Fourth Amendment. Very similar exclusionary rule reform legislation was passed by the Senate as S. 1764 in the 98th Congress and by the House of Representatives as section 673 of H.R. 5484 in the 99th Congress. 37/

36/ See generally Office of Legal Policy, Report on the Law of Pre-Trial Interrogation 62-63 (Feb. 12, 1986).

37/ See generally S. Rep. No. 350, 98th Cong., 2d Sess. (1984) (Senate Judiciary Committee Report on S. 1764).

Title II would effect a variety of reforms in federal habeas corpus for state prisoners and the corresponding collateral remedy for federal prisoners. Very similar habeas corpus reform legislation was passed by the Senate as S. 1763 in the 98th Congress by a vote of 67 to 9. Substantially the same proposals have also been introduced with broad sponsorship in various bills in the House of Representatives (e.g., H.R. 5594 of the 98th Congress). 38/

Title III of the bill would restore an enforceable federal death penalty for the most egregious federal crimes of murder, treason, and espionage. Very similar death penalty legislation was passed by the Senate as S. 1765 in the 98th Congress. In the 99th Congress, the House of Representatives passed as part of H.R. 5484 legislation authorizing capital punishment under similar standards and procedures for killings in the course of a continuing drug enterprise offense. 39/

38/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. (1983) (Senate Judiciary Committee Report on S. 1763); Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 14-59 (1985) (most recent testimony of Department of Justice in support of habeas corpus reform legislation).

39/ See generally S. Rep. No. 251, 98th Cong., 1st Sess. (1983); S. Rep. No. 282, 99th Cong., 2d Sess. (1986) (Senate Judiciary Committee Reports on capital punishment proposals).

The habeas corpus reform proposals of title II of the proposed Criminal Justice Reform Act are obviously most germane to the subject of this hearing. These proposals have the support of the Conference of (State) Chief Justices, the National Association of Attorneys General, the National District Attorneys Association, and the National Governors Association. 40/ As noted above, they have already been passed by the Senate.

Title II comprises a moderate and balanced set of proposed reforms in habeas corpus standards and procedures. It does not go as far as the legislation that was twice passed by the House of Representatives in the 1950's or the legislation approved by the Senate Judiciary Committee in 1968 -- which would have virtually abolished federal habeas corpus for state prisoners -- but it does provide effective responses to the clearest problems of the current system. While it would not foreclose all possibilities of abuse and delay in capital punishment litigation, it would bring about basic improvements in that context, as well as in non-capital cases. The specific reforms proposed in title II are as follows:

40/ See Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 226-27, 235-36, 287-88, 309-11, 1111-12 (1983). The formal resolution of the National Governors Association, id. at 235-36, related to an earlier but generally similar set of reform proposals.

First, there is currently no time limit on habeas corpus applications. This reflects a failure of the procedures associated with federal habeas corpus to keep pace with its expanding scope. By way of comparison, other remedies for reviewing or re-opening judgments in the federal courts are subject to definite time limitations. Federal defendants, for example, generally must decide whether to appeal within ten days (Fed. R. App. P. 4(b)); state convicts seeking direct review of their convictions in the Supreme Court generally must apply within 60 days (Sup. Ct. R. 20); and even a federal prisoner who claims to have new evidence of his innocence discovered after trial is subject to a two-year time limit under Fed. R. Crim. P. 33.

The specific corrective proposed in title II is a one-year limitation period for habeas corpus applications, normally running from exhaustion of state remedies. 41/ State remedies would be exhausted with respect to a claim, and the time limit would begin to run, if the claim had once been taken up to the

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41/ The legislation provides for deferral of the start of the time limitation period in certain extraordinary situations involving claims which could not have been discovered at an earlier point through the exercise of reasonable diligence, retroactively applicable new rights which are subsequently recognized by the Supreme Court, or unlawful state interference with filing. However, these qualifications are narrowly and specifically defined in the legislation and the related legislative materials, and would not undermine the value of the time rule as a safeguard against unjustifiable delay. See generally S. Rep. No. 226, 98th Cong., 1st Sess. 8-10, 16-18 (1983).

highest court of the state on review. State remedies would also be exhausted with respect to a claim in the relevant sense if the direct review process were completed and state law barred raising such a claim in state collateral proceedings, or if the time provided by state law for raising such a claim in state collateral proceedings had expired. 42/ This would provide state convicts with a reasonable period within which to seek federal habeas corpus review, but would provide protection against the delays of years or decades beyond the normal conclusion of state proceedings that now frequently occur in habeas corpus litigation.

A time limitation is obviously of particular importance in capital cases. The incentives of the current system favor dilatory tactics by capital punishment litigants in habeas corpus proceedings. There is generally no particular disadvantage in filing a petition later rather than earlier, and delaying until the last moment makes it more likely that the continuation of litigation will prevent an execution from being

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42/ See id. at 17, 20. Since state rules generally bar raising on collateral attack claims that were raised or that could have been raised on direct review, the time limitation period would begin to run with respect to most types of claims -- i.e., those not allowed on collateral attack -- when direct review of the case was completed or the time for seeking direct review expired. If a state replaced the traditional bifurcated system of direct review and collateral attack with a unitary review system, the completion of unitary review or the expiration of the time for seeking such review would similarly start the running of the time limitation period. See id. at 17 n. 63.

carried out. In contrast, the proposed time rule would provide capital litigants with an incentive to seek federal habeas corpus review promptly, and to present all available claims in initial habeas corpus applications. 43/ A failure to do so would risk having delayed or omitted claims dismissed as time-barred if presented at a later point.

The second major reform proposed in the legislation is a general narrowing and simplification of the standard of review in federal habeas corpus proceedings. Under the current system, state court fact-finding is presumed to be correct if a number of poorly-defined conditions set out in 28 U.S.C. § 2254(d) are satisfied, but the federal habeas court is required to make an independent determination of questions of law and to apply the law independently to the facts. This can result in the overturning of a state judgment -- following the passage of years and affirmance by the appellate courts of the states -- on grounds which the habeas court recognizes as close or unsettled questions on which courts may reasonably differ, and on which the lower federal courts themselves may disagree. The legislation would substitute a relatively simple and uniform standard under which the federal habeas court would generally defer to the state determination of a claim if it was reasonable in its resolution

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43/ Once a claim has been presented in a federal petition and rejected on the merits, it may be dismissed if it is presented again in a subsequent petition. See Habeas Corpus Rule 9(b).

of legal and factual issues and was arrived at by procedures consistent with due process. 44/

Like the other reforms of the legislation, this change in the standard of review would reduce the dilatory potential of habeas corpus litigation in capital cases, as well as curbing excessive review in non-capital habeas cases. A capital sentence predicated on a clear violation of the defendant's federal rights would remain subject to correction on habeas corpus. But the invalidation of a capital sentence would no longer be required or permitted simply because the state courts reasonably resolved a close or unsettled question in a manner different from a lower federal court in the same geographic area.

A third reform in the legislation is a codification of the caselaw standards governing the consideration in federal habeas corpus proceedings of claims that were not properly raised before the state courts (the standard for excusing "procedural defaults"). This would bring greater definiteness and clarity to the law in this area and would help ensure that lower courts consistently resolve this issue in conformity with the properly restrictive standards that have been articulated by the Supreme Court. 45/

44/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. 6-7, 22-28 (1983).

45/ See generally id. at 7-8, 12-16; Murray v. Carrier, 106 S. Ct. 2639, 2644-50 (1986).

A fourth reform is providing that a federal habeas court can deny a petition on the merits, even if state remedies have not been exhausted. In capital cases, as in other cases, this would enable district judges to deny frivolous claims promptly, without the delay and waste of resources involved in sending the petitioner back to state court to pursue state remedies. 46/

A fifth reform proposed in the legislation would vest the authority to issue certificates of probable cause for appeal in habeas corpus proceedings exclusively in the judges of the courts of appeals. This would correct inefficient and wasteful features of current procedure under which a petitioner is given repetitive opportunities to attempt to persuade first a district judge and then a circuit judge to authorize an appeal, and under which a court of appeals is required to hear an appeal on a district judge's certification, though it believes that the certificate was improvidently granted. 47/

Finally, title II of the Criminal Justice Reform Act would institute comparable reforms relating to time limitation, excuse of procedural defaults, and certification of probable

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46/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. 10, 21-22 (1983).

47/ See generally id. at 10, 18-19.

cause for appeal in relation to the collateral remedy for federal prisoners under 28 U.S.C. § 2255. Collateral litigation by federal prisoners, like habeas corpus litigation by state prisoners, frequently involves frivolous and repetitive applications; the enactment of these reforms in the § 2255 remedy would be of comparable value in limiting this abuse. 48/ In conjunction with the proposed restoration of an enforceable federal death penalty by title III of the Criminal Justice Reform Act, it would also guard against efforts to obstruct the execution of federal death sentences through dilatory § 2255 litigation.

CONCLUSION

In closing, I hope that my remarks today have been of use to the committee in its consideration of this important national problem. It is intolerable that the cumbersomeness and redundancy of the process of review have largely thwarted the constitutionally valid judgments of most state legislatures to impose capital punishment for the most atrocious crimes.

Needless to say, no one would countenance a "rush to judgment" in capital cases, or in criminal cases generally. But there is a fundamental difference between reasonable review processes which ensure that a sentence is justly imposed, and

48/ See generally id. at 19, 30-31.

Item (7)

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 19 1988

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties, and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your request for information from the Department of Justice concerning bail practices in Federal criminal cases. Your letter of December 18, 1987 posed six questions raised by the General Accounting Office's recent report, Criminal Bail: How Bail Reform Is Working in Selected District Courts GAO/GGD-88-6, October 1987, (hereinafter "GAO report").*/ The answers below provide the most complete information currently available.

(1) What steps, if any, does the Department plan to take with respect to the promulgation of criteria to be used by prosecutors with respect to the use of the statutory presumption of dangerousness?

After careful consideration, the Department has concluded that additional criteria for employing the statutory presumption of dangerousness would be inappropriate. Assessing dangerousness in a particular case is an inherently difficult decision. It requires that the attorneys most familiar with the case and local circumstances be permitted to exercise discretion and good judgment in making a decision on whether to request pretrial detention. The Department has directed government attorneys to make judicious use of all of the provisions of the Bail Reform Act and has provided them with policy guidance on implementing them. We believe that government attorneys are conscientious in applying these provisions.

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*/ We assume that your questions were directed to this report, although your letter refers to report number GGD-87-110.

The statutory presumptions provide fairly specific guidance on the circumstances that may qualify for pretrial detention. In addition, all U.S. Attorneys Offices received copies of the Department's Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress. Chapter One of this publication is devoted to implementation of the Bail Reform Act. Moreover, the Department is revising the U.S. Attorneys' Manual, and the new sections on pretrial detention will provide government prosecutors with current information.

The courts have resolved questions concerning the constitutionality of the presumptions and of detention based on dangerousness in general. The Supreme Court upheld the constitutionality of the Bail Reform Act's provision for detention based on dangerousness in United States v. Salerno, 107 S.Ct. 2095 (1987). The Court held that protecting community safety by detaining persons presumed to be dangerous prior to trial is a "legitimate and compelling" regulatory goal (107 S.Ct. 2102). The Court stated that, in certain circumstances, the government has well-established authority to restrain an individual's liberty prior to or absent a criminal trial or conviction. The Court also found that the Act contains sufficient procedural safeguards to protect the rights of the accused person. The courts of appeal have construed the presumptions as placing a burden of production, but not of ultimate persuasion, on the defendant (e.g., United States v. Jessup, 757 F.2d 378 (1st Cir. 1985) and United States v. Portes, 786 F.2d 758 (7th Cir. 1985)). On this basis, the constitutionality of the presumptions has been uniformly upheld.

(2) What steps, if any, does the Department plan to take -- with the Administrative Office of United States Courts -- to improve the collection of statistical information on bail practices?

Recently, the Administrative Office of United States Courts (AOUSC) agreed to provide the Criminal Division and the Bureau of Justice Statistics with quarterly reports from AOUSC's data collection system. These reports will replace the Division's system for collecting data from U.S. Attorneys' Offices. They should provide a full picture of how pretrial detention is being implemented in federal courts. Based on data from Pretrial Services, AOUSC reports will include, among many other things:

- Hearing information: the number of pretrial detention hearings held, the initiator of detention motions, the outcome of detention hearings, and the basis for a decision to detain;

- Detention information: whether the defendant was detained due to inability to pay bail, conditions imposed upon those released, the total number of days of detention and the related cost, and defendants' bail violations and changes in bail status;

- Case information: arrest information (e.g., type of charge) and case disposition; and

- Demographic information: defendant's criminal history, alien status, sex, age, race, and citizenship.

We received the first report, covering calendar year 1987, in April 1988.

(3) What amendments, if any, to the bail law are necessary? Specifically, should the Congress clarify the law with respect to the use of money bail?

Amendments to the Bail Reform Act of 1984 are unnecessary at this time. Under current law, the defendant has ample opportunity to challenge a money bond that he believes the judicial officer has imposed improperly.

The GAO report found varying opinions among judicial officers on whether high money bonds may be used for flight risk defendants. (GAO report pp. 24-25) While the statute itself is not completely clear, the Department's interpretation is consistent with case law and the legislative history. It is our view that the Act does not preclude a high money bond if that is the only means that the judicial officer believes will ensure the defendant's appearance and the amount is reasonable for the defendant. If the defendant chooses not to pay the bond or does not challenge the amount's reasonableness, then he can be detained for non-payment. High money bonds may not, however, be used as a sub rosa means of detaining dangerous persons.

This interpretation follows the legislative history of the Act (S. Rept. No. 98-225, 98th Cong., 1st Sess. (1983) at 16), and has been endorsed uniformly in the reported decisions of the courts.*/ We believe any lingering uncertainty surrounding this issue will be resolved as more judges and other officials become aware of these court decisions.

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*/ United States v. Szott, 768 F.2d 159 (7th Cir. 1985), United States v. Gotay, 609 F. Supp. 156 (S.D.N.Y. 1985), United States v. Westbrook, 780 F.2d 1185 (5th Cir. 1986). See also, United States v. Wong-Alvarez, 779 F.2d 583 (11th Cir. 1985), and United States v. Jessup, 757 F.2d 378 (1st Cir. 1985).

(4) From internal Department surveys or statistics:

(a) What is the Government's success rate in pre-trial detention cases?

During FY 1986, the Criminal Division collected information from U.S. Attorneys' offices on pretrial detention hearings, including the number of motions the government made for pretrial detention, the number of motions granted and denied, the number of appeals taken, and success on appeal. Although pretrial detention activity was underreported, these data were internally consistent and useful for describing the pretrial detention process. These data indicated that 82% of government attorneys' motions requesting pretrial detention were granted originally. Slightly over 14% of FY 1986 release and detention orders were appealed. The government filed most of the appeals and was successful on about 86% of them. Overall, 88% of the detentions requested by the government were granted.

The Criminal Division received fewer reports during FY 1987 on this type of information and it did not analyze the incomplete data. However, AOUSC statistics indicate that, during calendar year 1987, pretrial detention was ordered in 73% of the cases in which a detention hearing was held.

(b) For what types of crimes is pretrial detention generally sought?

In July 1987, the Criminal Division, Office of Policy and Management Analysis, surveyed 15 U.S. Attorney Offices regarding their pretrial detention practices. The sample included five large, five medium, and five small offices across the nation. The survey results provided the Department with an overview of how pretrial detention issues are being handled by its attorneys.

This survey asked respondents to list the five offenses for which they most frequently request pretrial detention. The responses indicate that the largest number of requests are made for major drug violations, bank robberies, weapons offenses, and alien offenses (usually alien smuggling). Every office listed drug violations as one of the offenses for which pretrial detention is most often requested, and drugs made up the overwhelming majority of responses (12) for the offense most frequently involving a pretrial detention request. Most offices also listed other offenses that were related to local law enforcement priorities (e.g., currency violations in offices located in common ports of entry). The Department will continue to monitor this aspect of pretrial detention through the new AOUSC reports.

(c) What rule or regulation, if any, exists within the various U.S. Attorneys' Offices with respect to supervisory approval for a detention application or the use of the statutory presumption?

As part of their general management responsibilities, U.S. Attorneys may set their office policies on internal approval procedures and on the recommended use of statutory provisions. These policies may vary, depending upon such factors as the size of the office, the local judicial climate, and the nature and extent of crime in the district. Among other things, the responses to our 15-office survey showed that different offices rely on various factors to decide which cases warrant a pretrial detention motion.

Our 15-office survey showed that U.S. Attorneys have communicated to their staffs the need for judicious use of the Bail Reform Act's provisions. While most do not have formal written guidelines, they emphasized that they employ the factors set forth in the statute. One office even commented that the statute is specific enough in this regard to make additional guidelines unnecessary. Several offices responded that each case must be evaluated for potential pretrial detention in light of the totality of information available. In other words, prosecutors examine each defendant's situation and the case as a whole when considering whether to request pretrial detention. Another office has conducted special training on the subject of pretrial detention. Some offices require special approval for high profile cases, and two offices require higher levels of approval for motions based on the defendant's dangerousness.

(5) What work, if any, is the Bureau of Justice Statistics or the National Institute of Justice doing on the implementation of the bail provisions of the Comprehensive Crime Control Act? Please provide details if any such work is underway.

The Bureau of Justice Statistics (BJS) released a Special Report, Pretrial Release and Detention: The Bail Reform Act of 1984, on February 14, 1988. The report compared detention and release before and after the Act. BJS found that the percent of federal defendants held for the entire time prior to trial, either on pretrial detention or for failure to pay bail, increased from 24% before the Act to 29% after. Both before and after the Act, however, about half (54%) of all defendants were released without financial conditions. The study also showed that the likelihood of being detained prior to trial after the Act was 63% higher for those accused of causing injuries, 21% higher for those charged with violent offenses involving firearms, 20% higher for persons accused of serious narcotics violations, and 17% higher for those persons

classified as dangerous during pretrial interviews. The report is part of the continuing series of BJS reports prepared under the Federal justice statistics program. A copy of the report is attached for your information.

The National Institute of Justice has carried out a number of studies relevant to the pretrial and bail area in recent years; however, none specifically addresses the implementation of the bail provisions of the federal Comprehensive Crime Control Act. Although NIJ has funded research projects addressing the Federal criminal justice system, it focuses its efforts primarily on the state and local levels.

Nonetheless, the following related projects have been and are being carried out by NIJ: drug testing of arrestees to aid pretrial decision-making and to forecast drug use in the arrestee populations; the development and implementation of bail guidelines; a comparative analysis of state laws on public danger as a factor in pretrial release; an experiment on the use of electronic monitors on pretrial releasees; and a study of bail bondsmen. Summaries of projects on bail guidelines and public danger as a factor in pretrial release are attached for your information.

(6) What Department costs (based on previously submitted budget or appropriation requests) are associated with the implementation of preventive detention? Please be specific as to:

(a) the U.S. Marshals Service;
(b) the U.S. Attorneys; and
(c) the Federal Bureau of Prisons.

With respect to the original costs attributable to the pretrial detention provisions of the Bail Reform Act, I regret that we cannot provide precise statistical information. Our agencies do not account for costs on this basis. We do know that our total attorney time spent on pretrial hearings generally has increased and that the number of persons being detained prior to trial has risen slightly from 24% to 29% of federal defendants, according to the BJS Special Report noted above with respect to Question 5. While the new provisions of the Bail Reform Act are certainly a contributing factor, other factors are also adding to the net increase in pretrial workload, such as changes in the composition of the arrested population.

The BJS Special Report contains some information on the potential increase in resources to address pretrial detention. The study indicated that, after the Bail Reform Act's implementation, the average length of time that defendants were held increased by 5%. Since the overall percentage of

defendants held also increased, BJS concluded that, assuming no change in the number or characteristics of defendants or the offense distribution, there may be an increase in the demand for detention resources. Moreover, we believe that many variable factors affect the number of persons detained.

The U.S. Marshals Service (USMS) believes that it has experienced both direct and indirect impacts on its workload since passage of the Bail Reform Act. For example, the Marshals Service has seen an increased number of prisoner productions required for pretrial detention hearings. Also, the increase in the percentage of persons detained and in length of time they were held has had an impact on USMS resources for handling prisoners.

I hope this letter is sufficiently responsive to your inquiries. Please let me know if you require any additional information.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General
Office of Legislative Affairs

Enclosures

Enclosures to Kastenmeier Letter included:

- BJS Special Report, Pretrial Release & Detention: The Bail Reform Act of 1984
- (2) National Institute of Justice Research Reports:
  - Public Danger as a Factor in Pretrial Release: A Comparative Analysis of State Laws
  - The Development and Implementation of Bail Guidelines: Highlights & Issues

WINNERS

MAKING A DIFFERENCE IN THE DRUG WAR

To our readers,

Today USA TODAY presents a special report, which recognizes those fighting on the front lines of the drug war. More than 450 readers made nominations. The three top winners received $1,000 each, and a full-page report on more heroes is on page 6A. We're proud to present their stories.

Peter S. Prichard
Editor

DRUG BUSTERS '89

By Eileen Blass, USA TODAY

UNDER HIS WING: Darryl Webster helps Washington, D.C., kids stay off streets, find self-esteem. With him, from left: Jordathan Jones, 12; Trayawn Brown, 10, and Antonio Lucas, 12.

By Acey Harper

RISKY RAIDS: Miami FBI agent John Thompson is often the first one through the door on drug busts.

By Robert Hanashiro, USA TODAY

GOOD NEIGHBOR: Brenda Adams organized Monrovia, Calif., neighbors to fight drugs on their street.

Vatic...
wants N...

"We wa... back," said spokesm... Fitzwater. "We went in for that purpose and that purpose remains the same."

"A lot of what we're seeing is crocodile tears," said Gregory Treverton of the Council on Foreign Relations, a Washington-based think tank.

"My guess is the administration would be happy to see him go somewhere else."

The Justice Department today asks six European countries to freeze $10 million in drug assets Noriega moved out of Panama. Tuesday:

▶ Lt. Col. Luis del Cid, a close Noriega ally, pleaded not ...ficking charges. He was arrested Monday in Panama.

▶ Pentagon spokesman Pete Williams said Noriega, when seeking refuge Sunday, was "so exhausted from the chase that he could barely speak."

Williams added Noriega did not direct rebel forces "because he was too busy trying to save his own skin."

▶ The presidents of Colombia and Bolivia said they still would go to a drug summit with Bush Feb. 15 in Colombia. Peru will boycott the summit.

▶ Inside Panama, 4A

Hawaii most taxing; N. Hampshire least

By Pat Walkup
USA TODAY

Hawaii may be paradise to live in, but it's hell to pay taxes there, according to *Money*'s January issue.

The magazine ranks states by their tax burden for a hypothetical family of four with $61,372 in earned income — its readers' average — and $3,747 from investments.

In The Aloha State, that family would have paid $4,463 in state income, sales and gas taxes in 1988.

That's almost 34 times the $132 taken by New Hampshire, *Money*'s top tax haven. Others:

▶ Florida ($164), Alaska ($196), Texas ($213), Nevada ($231), Washington ($250), Connecticut ($300), Wyoming ($316), South Dakota ($410) and Tennessee ($627).

▶ Rounding out the top 10 tax hells: Oregon ($4,095), the District of Columbia ($4,036), Maryland ($3,782), Idaho ($3,744), Utah ($3,717), New York ($3,690), Wisconsin ($3,605), Minnesota ($3,548) and Maine ($3,498).

If you live in a high-tax state, strategies to save money, short of moving, include investing in municipal bonds issued in your state. The interest usually is exempt from state and local, as well as federal, taxes.

The rankings don't reflect:

▶ Local property taxes, which depend on "billions of variables," says *Money* senior editor Joe Coyle, including what neighborhood you live in.

▶ The growing swarm of state and local "user fees" such as hotel and restaurant surcharges and recreation fees. Governments are turning to such fees to avoid raising high-profile income and sales taxes.

'Gangbuster' bargains still to be found

By Patricia Gallagher
USA TODAY

The holiday gift-buying frenzy may be over, but stores will still be packed this week — and not just for returns.

"The public has been waiting for after-Christmas sales," says Paul Lablang, senior vice president at Saks Fifth Avenue.

Holiday shoppers swamped stores until the last minute:

▶ "Friday, Saturday and Sunday were gangbusters," says Richard Unger of Prange's department stores.

▶ Sears had its biggest day of the season Saturday.

▶ Marshall Field & Co. beat expectations Friday, Saturday.

▶ Hess's Department Stores set a one-day record Saturday.

More could join that list this week as clearance sales lure shoppers and fill the tills.

Retailers can see "tremendous swings" in revenue the week after Christmas, says Jim Fowler of Jacobson Stores Inc.

▶ Retail profit picture, 3B

COVER STORY

Three 'keep pressure up' against drugs

People join fight from all corners; more heroes, full-page report, **6A**

By Denise Kalette and Lee Michael Katz
USA TODAY

Fighting the drug war can be a lonely, uphill battle. But in the nation's cities and towns, unsung heroes are winning important victories.

More than 450 people wrote to USA TODAY to nominate heroes in the drug war for its DrugBusters '89 program. Today, USA TODAY announces the three winners, who have been presented the awards by drug czar William Bennett.

"We're keeping the pressure up," Bennett told the winners. "Your story is a story of honor." USA TODAY winners:

▶ Brenda Adams, 40, of Monrovia, Calif., who watched crack pushers move into her street and pushed back by organizing her neighbors and forcing several dealers out.

▶ Darryl Webster, 25, of Washington, D.C., who has taken

Please see COVER STORY next page ▶

Resolutions: Think small

By Nanci Hellmich
USA TODAY

If you're tired of making — then breaking — New Year's resolutions, you should give up.

Psychologist Ronald G. Nathan, co-author of *The Doctors' Guide to Instant Stress Relief*, advises setting one goal and working toward small but lasting changes. If your goal is to exercise, take walks instead of coffee breaks.

Psychologist John C. Norcross, of University of Scranton (Pa.), says you'll have more luck if you realize a lapse is not a relapse. If you're trying to quit smoking, but take a few puffs, it doesn't mean you should give up.

He suggests being ready for situations that could cause a slip. Two major causes are emotional distress and social pressure.

Surveys show half of adults make resolutions, 70 percent health-related.

Norcross and a team surveyed 213 adults in Pennsylvania who made resolutions for two years:

▶ 77 percent kept their resolutions for one week.

▶ 55 percent a month.

▶ 40 percent six months.

▶ 19 percent two years.

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...that wasn't true."
...ing the 1988 presidential campaign, ...ch said "Jews and other supporters of Israel would be crazy to vote for Jesse Jackson, the same way that blacks would be crazy to vote for George Bush."

Says Koch: "That's a terrific sentence." He says he spoke out not just to draw attention or applause, but because "there was no one to respond. I did it because I think

2 tiny liver patients ma

Doctors say Alyssa Smith, the USA's first liver transplant recipient from a living donor, will be able to leave the hospital by Jan. 1 if her progress continues.

Alyssa, 22 months, of Schertz, Texas, got a Christmas doll from Frank Sinatra and a "day pass" to visit with family outside her

Chicago ... graded ... Sarina ... Tenn., ... "critical ... to remov... have bili...

COVER STORY

'Getting hurt' a risk

Continued from 1A

35 children under his wing, steering them away from drugs.

▶ Miami FBI agent John Thompson, 42 — known as "Big John" — who doggedly tracks dealers, often at the risk of his own life, and seizes millions of dollars in property.

But these are not the only heroes in the drug war. In every corner of the country, thousands of people are taking up the challenge. Teachers spend extra time with at-risk children, and show how drugs can ruin their bodies. Nurses care for crack-addicted babies. Radio stations raise money for the children no one wants to claim. Former drug abusers thread their way to "Just Say No" programs in the nation's auditoriums, warning of the price for saying yes. Ordinary people are striking blows at an extraordinary enemy, often spending thousands of dollars out of pocket and hundreds of hours out of busy lives.

Drug dealing is a $120 billion-a-year business. The FBI reports 1.2 million drug arrests in 1988, and officials link drug use to thousands of murders. Those enormous costs will draw President Bush to a summit on drug production and the violence it spawns, scheduled for Feb. 15 in Colombia.

At home, dealers are invading small towns like Monrovia, Calif. (pop. 35,000), a community near Los Angeles with a picturesque square and neighborly pace. Decked in Christmas lights, Walnut Street shows no hint of the drive-up crack trade, the Uzis and the cruising Jaguars of six months ago.

That's when Brenda Adams peered out a window to see teenagers pointing a gun at passers-by, and decided enough was enough. She organized her neighbors, briefly called in the Guardian Angels, endured death threats and dodged thrown bottles. For 60 nights, she shepherded patrols that saved her street from becoming a drug wasteland. "I was afraid, but I was so mad I didn't care anymore," she says.

"Children no longer played outside. We were becoming prisoners in our homes," says Monica Lord of Walnut Street.

On a recent night, Roy Lee Smith, 26, joins the patrolling group as cars cruise slowly past. Three young men in gang dress step from the darkened street, eyeing the marchers. "I come down to make sure the women folks are OK," says Smith.

On his own street, only minutes away, he has seen evidence of what happens when a neighborhood doesn't fight back. Smith has seen gunshot victims on the sidewalk; one staggered to his door for help.

Five dealers have moved from Walnut Street since July, and gang members no longer threaten children, says Adams, co-owner with husband Cory of a recreational-vehicle repair shop. She was unable to attend the awards ceremony because of her mother's sudden illness. Lord accepted in her place.

In Washington, D.C., Darryl Webster, a former college basketball star, does his part against drugs through Youth Entrepreneurial Services, Y.E.S., a group he started to keep youths off the street. He helps them obtain odd jobs — shoveling snow, raking leaves — and find tutoring. He provides a mattress when they have no place to stay, he works with them on his personal computer. He exposes them to a different world, and offers a safe haven.

In their world, he says, "Self-esteem is so low that if you step on my shoes, I have to prove I'm a man by shooting you. The key is to expose these kids to a different way of thinking."

Webster was a high school underachiever who never met his father. Raised by grandparents, he was nearly overpowered by street life. He was stabbed and nearly strangled.

But basketball got him into George Washington University, where "He was terrified of getting up in front of people," says Sheila Hoben, his former academic adviser. He overcame. Last fall, Webster was emcee at an awards ceremoney at the school. Now he's working on a master's degree in sociology.

His youth program seems to help. "I used to be the baddest kid in school," says Tony Lucas, 12, who watched a relative deal drugs and has seen users die violently on capital sidewalks. "I want to be like Darryl. Since I've been with Darryl, I haven't been fighting."

Webster's kids are not out "dabbling in the drug world," says agent B.T. Neal of the Drug Enforcement Agency. "He has made tremendous strides in improving his lot and those of people around him."

In Miami, another DrugBuster, Special Agent Thompson, is often first through the door on drug raids. And, at 6 feet 3 inches, 220 pounds, he's a big target. His four years of detective work helped crack a case against corrupt Customs agents who warned drug smugglers of radar failures and Coast Guard schedules.

Thompson tracked one corruption case from Florida to the Netherlands — leading to seizure of $10 million in property.

Thompson's ability to work an informant is legendary. "He's such an honest and trustworthy person," says agent Nancy Savage, "even the bad guys end up liking John." And helping the FBI.

On a recent morning, Thompson surveys the Gulf of Mexico from a twin-engine Piper Navajo seized from dealers. Along a finger of land near the Bimini airstrip are ruins of several drug-ferrying planes. Drug runners "can't call the FAA" for help, he says.

Runners line a plane's shell with tarp so drugs can be hastily tossed overboard. "They'd rather get caught with an empty plane," says Thompson.

FBI agent Mike Wald describes Thompson this way: "When we're short of manpower for an operation, he's the first guy we always go to, because John almost never says no. He just digs in his desk, takes out his gun and says, 'I'm ready to go.'"

Divorced, with an adult daughter he raised alone from age 11, Thompson explains: "If somebody gets hurt, I don't have a big family. I always wanted a big family. The FBI is my family."

A NATION WRESTLES

Romanians protest n

By Rob Taggart, Reuters

SYMBOL OF CHANGE: A man waves a Romanian flag — with the Communist symbol cut out — as he stands on the balcony of Communist Party headquarters on Bucharest's Republic Square.

EASTERN EUROPE
at a glance

▶ **ROMANIA:** The reformist National Salvation Front named an interim government with Ion Iliescu president until April elections. Tensions are rising between new factions and Communists who remain in government. Sporadic fighting continues in Timisoara and elsewhere. The United States is sending Romania $500,000 in humanitarian aid.

▶ **SOVIET UNION:** Mikhail Gorbachev refused to recognize a decision by Lithuanian Communists to break with Moscow and says he'll fly there to try to hold together the Communist Party.

▶ **CZECHOSLOVAKIA:** Unrest spread to at least five Czechoslovak prisons as inmates pressed for better conditions and amnesty. Vaclav Havel is set to be sworn in as president Friday.

▶ **YUGOSLAVIA:** The first stock exchange in communist Yugoslavia was set up in Ljubljana. It will list Yugoslav and foreign companies and publish the Yugoslav Index of average closing prices of selected stocks.

▶ **BULGARIA:** Bulgaria's Communist leaders promised talks with the opposition early in 1990; 5,000 demonstrated for reforms in Sofia.

DEATH IN BUCHAR... day a family membe...

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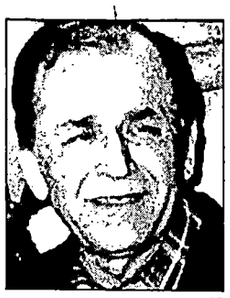


AP

ILIESCU: 'He's a Communist in the mold of Gorbachev'

By Andrea Stone
USA TODAY

Ion Iliescu's ties to Soviet leader Mikhail Gorbachev may have saved him from the wrath of Romania's old hardline regime — but they're unlikely to keep him in power for long.

Ion Iliescu (yahn ill-ee-YES-koo), a veteran Communist Party member who last week announced the arrest of dictator Nicolae Ceausescu, was named president Tuesday. But he may keep that post only until April elections.

"He's a transition figure,"

Fifty-state roll of honor

Nominations for USA TODAY's DrugBuster awards show the scope of anti-drug work. Here, a look at some outstanding nominations state-by-state.

ALA.: Chris Ruttan, 34, Birmingham; directs Aletheia House, 36-bed residential drug treatment program housed in former school. Just begun: home for pregnant addicts.

ALASKA: Lynda Adams, 45, Ketchikan; founded Alaskans for a Drug-Free Youth, volunteers 12-14 hours a day.

ARIZ.: Jim Butler, 58, Tucson; football coach who saw promising team hurt by drugs. Began school-district wide anti-drug movement; started 24-hour treatment center.

ARK.: Buster Lackey, 19, and Casey King, 18, started SOBER at Central Arkansas Christian School, North Little Rock.

CALIF.: Sharon Rose, 51, Davis; founder national Red Ribbon (education) Campaign. Works 12-14 hours a day.

COLO.: Casey Clark, 37, Aurora, friend died of LSD overdose. Began lecturing. Starter poster campaign and essay contest.

CONN.: Donald McConnell, 59, West Hartford; director of Connecticut Alcohol and Drug Abuse Commission, four treatment sites.

DEL: Martin Golden, 63, Smyrna; with state's Office of Narcotics and Dangerous Drugs. Offers treatment to medical professionals with substance abuse problems.

D.C.: Brig Owens, 46, was with NFL Players' Assoc., started anti-drug Students United with Pros Encouraging Responsibility Teams (SUPER TEAMS).

FLA.: Christina Martin, 7, of Davie; 1989 poster child for Kids Against Driving Under the Influence, does public speaking.

GA.: Patsy Carpenter, 43, Gainesville; teacher. Started Courage and Strength (drug prevention) Program for kids in 1984.

HAWAII: David Benson, 47, Honolulu; police officer. Son's suicide led to campaign for residential center for addicted youths.

IDAHO: Jerry Lister, 40, Boise; police officer. Began Parents and Youth Against Drug Abuse to educate parents about drugs.

ILL.: Vera Wesley, 57, Champaign; despite health problems organized community to squeeze out local drug activity.

IND.: Judy Wahl, 52, Hammond; alcoholism in her family led her to start Just Say No club for youngsters.

IOWA: Patrick Jackson, 35, Burlington; moved back to hometown and found drug problem. Has pursued, prosecuted drug cases.

KAN.: Dr. Eric Voth, 34, Topeka; saw effect of drugs on fellow highschoolers, became a doctor and national anti-drug speaker.

KY.: Herb Mays, 53, Louisville; radio show host; ; wrote anti-drug rap song; started youth job-training.

LA.: Rebecca Boone, 38, of Many; founded summer Camp Challenge to teach life skills.

MAINE: Rebecca Miller, 40, Houlton; uses puppets to show children dangers of drugs.

MD.: Harry Finke Jr, 41, Baltimore, pharmacist; set up state Pharmacist Rehabilitation Committee to help addicted pharmacists.

MASS.: Richard Goodman, 29, North Andover; available 24-hours to counsel teens. "We get kids to feel good about themselves."

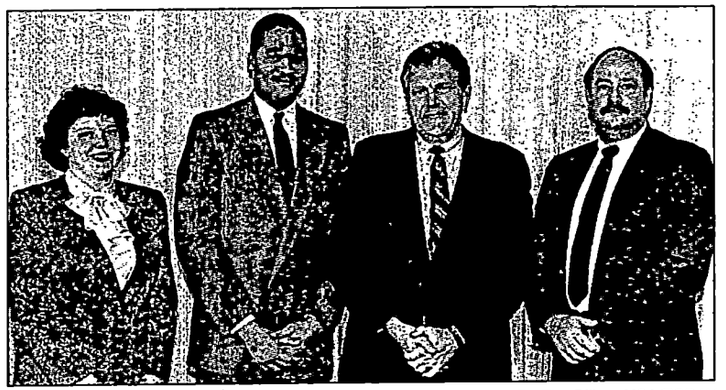
MICH.: Emma Kogo, 46, and Jennifer Miracle, 31, Detroit, formed Just The Neighbors. Led to seizure of main crack house as first in city under a

The heroes

Fighters in drug war honored

USA TODAY's three DrugBuster '89 winners were awarded medals by the nation's drug czar William Bennett at USA TODAY in Arlington, Va. Their stories begin on page 1-A.

Other reader nominations told compelling tales of service and sacrifice. This page honors nominees who treat the victims, educate the children and punish the offenders.



By Tim Dillon, USA TODAY

WINNERS: From left: Monica Lord (who accepted the award for Brenda Adams), Darryl Webster, drug czar William Bennett and John Thompson.

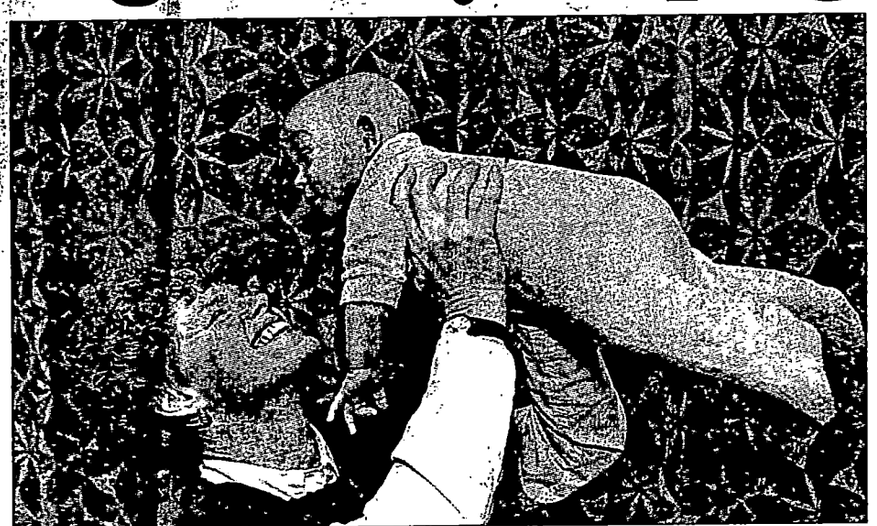
Treating: Many helping hands

By Denise Kalette
USA TODAY

Shattering realities of the nationwide drug abuse dilemma are testing the skills and compassion of health professionals.

Care-givers like public health nurse Jo Ann Dourdis of Poughkeepsie, N.Y., are called on to deal with drug poisoning in babies born addicted to crack. Dallas physician Robert Gehring treats medical colleagues hooked on cocaine and women dependent on the anti-anxiety drug Xanax. In Columbus, Ohio, former teacher Bob Sweet's program attempts to rehabilitate hundreds of abusers, and to prevent addiction among teen-agers.

These are among the many drug treatment specialists nominated for recognition in USA TODAY's DrugBusters '89 program.



By Robert Niles, USA TODAY

LOVING HANDS: Jo Ann Dourdis, a Dutchess County, N.Y., nurse plays with a baby born addicted to crack. The girl's single mother is trying to get off public assistance.

They could not look into their mothers' eyes. She

she says, "if you're going to limit the potential ... of children."

Bob Sweet has put his life on the line. In the '70s, while setting up a methadone pro-

By Doug Martin

SWEET: Runs Youth-to-Youth and Teenage Institute

Free Youth, herself a Drug-Buster nominee.

Ex-obstetrician Gehring, once a drug abuser himself, calls the "yuppie" cocaine addicts he sees "a different breed of cat. They are elitist. They don't identify with other people with drug dependency problems."

Two addicted physicians

macist Rehabilitation Committee to help addicted pharmacists.

MASS.: Richard Goodman, 29, North Andover; available 24-hours to counsel teens. "We get kids to feel good about themselves."

By Bill Anderson

DETROITER: Jennifer Miracle helped save her street.

MICH.: Emma Kogo, 46, and Jennifer Miracle, 31, Detroit, formed Just The Neighbors. Led to seizure of main crack house as first in city under a new forfeiture law.

MINN.: Barbara Yates, 37, St. Paul; manager of Federal Drug Abuse Prevention for the state education department.

MISS.: Eddie Spencer, 27, Jackson; hooked on sniffing gasoline at age 7, went on to pills, now lectures; on call for Jackson Schools.

MO.: Lucy Webb, 62, Kansas City; runs Reach Out America, high-tech, mobile classroom teaches effects of drugs.

MONT.: Marko Lucich, 37, Butte, probation office; moved by deaths of two teenagers in alcohol-related car accident now volunteers 25-30 hours a week at anti-drug Butte Cares Inc.

NEB.: Police Sgt. Bobby Polk, 36, Omaha; night shift supervisor of gang unit. On call 24 hours. Assignment has turned into a full-time preoccupation: "It kind of follows you."

NEV.: Margaret Corbett, 35, Sparks; provided information to police this fall that led to two major drug busts in Washoe County.

N.H.: State Police Sgt. James Garvin, 40, Washington; brought DARE (Drug Abuse Resistance Education) to his state this year.

N.J.: L.A. Waimon, 41, Parsippany; tells kids of his triple tragedy: His grandmother and father were killed by drunken drivers; he was injured by a drunken driver, is on disability.

N.M.: Glenn Wieringa, 39, Santa Fe; set up 24-hour crisis intervention center and hot line after four high school buddies were killed in alcohol-related accident.

N.Y.: Tim Arrance, 48, Randolph; son recovering from drug problem. Works one-on-one with youths, parents.

N.C.: District Attorney Michael Easley, 39, Southport; pushed for laws to catch drug dealers. Warns rights should not be violated in zeal to stamp out drugs.

N.D.: Beth Stroup-Menge, 33, Mandan; inspired by tragedy of teen friends on drugs is now president of the National Adolescent Treatment Consortium.

OHIO: Mary Miles, 40, Lorain; with Lorain Network for the Prevention of Drug and Alcohol Abuse, trains teachers, parents to detect drug use among kids.

OKLA.: Sandie Bailey, 47, Tulsa; began state's Red Ribbon (education) Campaign; "People want to do something... just don't know what to do."

ORE.: Irine Tate, 50, Portland; waged war by spray painting "No Drugs Here" on garage doors, calling police every time she saw drug transaction. "Our nice, quiet neighborhood was turning into New York." Result: "It's a nice, quiet neighborhood again."

abusers, and to prevent addiction among teen-agers.

These are among the many drug treatment specialists nominated for recognition in USA TODAY's DrugBusters '89 program. The care-givers are pressed to keep up with the need.

Two years ago, Dourdis' program in Dutchess County, N.Y., had 15 babies. Now there are 55.

In 1987 she first encountered infants who cried nonstop. Their tiny bodies shook: They could not look into their mothers' eyes. She called experts in Chicago and New York, then set up clinics with pediatricians and physical therapists.

These babies will have long-term speech, behavior and learning problems. "You can see the impact that it's going to have on society," she says, "if you're going to limit the potential ... of children."

Med student Maureen Finnegan, 25, says her mother, Philadelphia physician Loretta Finnegan, has worked with heroin-addicted mothers "for as long as I can remember. She has literally spent seven days a week."

Bob Sweet has put his life on the line. In the '70s, while setting up a methadone program, he was shot at several times. "His motivations are to raise a generation of drug-free youth and his ego never gets in the way of the ultimate goal," says Sharon Rose of the National Federation of Parents For Drug

By Robert Niles, USA TODAY

LOVING HANDS: Jo Ann Dourdis, a Dutchess County, N.Y., nurse plays with a baby born addicted to crack. The girl's single mother is trying to get off public assistance.

Teaching: Creative voices

By Anita Manning
USA TODAY

People are willing to try almost anything to keep kids off drugs. Dozens of creative programs are going on in schools, many funded and powered by a single, dedicated soul. Among them:

▶ **Little No No.** Ron La Magdelaine, 56, of Holyoke, Mass., created a costumed character to tell preschool to third grade youngsters it's OK to say no and feel good about it. He hopes to set the stage for more comprehensive drug-abuse prevention in later grades.

▶ **Talking car.** In Camden County, Ga., the sheriff's department converted a 1984 Pontiac Trans Am seized in a drug bust into the R.O.A.D. (Reach Out Against Drugs) Runner, with computerized voice, lights and sirens.

By Tony Miller

RAUCH: Warns pupils against steroids.

▶ **Drug-fighting robot.** Punchy "The Million Dollar Machine," financed by the Edward J. DeBartolo Corp., a mall development and management company, tells jokes, plays music and talks to kids about self-esteem and good health. His message: "Yo! I'm not the Million Dollar Machine. *You* are!"

By Jim Brown

DON'T FOLLOW ME: Chaplain Cleveland Houser with students Deanna Day, left, Daniel Ellis and Shawanda Maxwell.

▶ **Weightlifter.** Bodybuilder Norman "Rocky" Rauch of Lake Geneva, Wis., tells teens he believes the cancer he's fought since 1983 is from steroids. "If I were more educated" about side effects, "I wouldn't have the problem I have," says Rauch. His non-Hodgkins lymphoma is in remission.

Policing: Rewards are often personal

By Anita Manning
USA TODAY

Drug lords drive BMWs. Cops drive Chevys.

Despite the daily danger, long hours, and low pay, law enforcers — from police officers to Coast Guardsmen — keep performing their duties. Those in law enforcement "are the front line defense," says Detective Sgt. Albert Dowdell III, of Belle Glade

Kids told drugs not short cut

By Denise Kalette
USA TODAY

High schoolers who think the Mercedes, gold chains and fast cash of drug dealers mark the route to the good life better think again.

That's the message of the Nashville group "Don't Follow Me." They should know. Members of the 15-man group once earned up to $120,000 a year dealing drugs. Now, they spend their days in prison.

Their cash was frittered on habits that cost $2,000 a day, and on lawyers.

"One guy spent $75,000 (in legal fees) to get out of a cocaine bust," says Chaplain Cleveland Houser, 45. He accompanies the minimum-security inmates of the Nashville Community Service Center to schools, churches, and recreation centers.

They've spoken to 15,000 young people this year, and received 1,000 letters from students and principals.

The 15 range in age from 22 to 53. Their crimes vary from murder to bank fraud. All used or dealt drugs. And their credentials for discussing the impact of drugs are impeccable.

"When they came to pris-

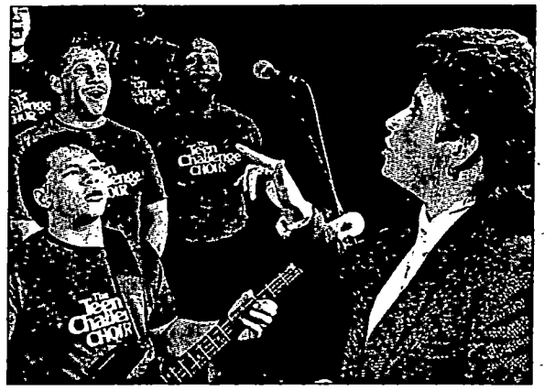
calls the "yuppie" cocaine addicts he sees "a different breed of cat. They are elitist. They don't identify with other people with drug dependency problems."

Two addicted physicians are staying in his 90-day program right through the Christmas holidays, but they'll soon have company. People don't like to spend Christmas drying out, says Gehring, but "come Jan. 2, we're going to be deluged."

OHIO: Mary Miles, 40, Lorain; with Lorain Network for the Prevention of Drug and Alcohol Abuse, trains teachers, parents to detect drug use among kids.

OKLA.: Sandie Bailey, 47, Tulsa; began state's Red Ribbon (education) Campaign; "People want to do something . . . just don't know what to do."

ORE.: Irine Tate, 50, Portland; waged war by spray painting "No Drugs Here" on garage doors, calling police every time she saw drug transaction. "Our nice, quiet neighborhood was turning into New York." Result: "It's a nice, quiet neighborhood again."



By J. Charles Garner

SINGING OUT: Cathy Gillott with Teen Challenge Choir

PA.: Cathy and Bernie Gillott of Rehrersburg, spend six months on the road every year with their Teen Challenge Choir — recovering addicts — singing about the perils of drug addiction.

R.I.: Bob Houghtaling, 35, Warwick; substance abuse specialist. Started program for junior high kids; Students Opposing Drug Abuse (SODA) for senior high in East Greenwich.

S.C.: William McCord, 57, Columbia; state director Commission on Alcohol/Drug Abuse worked 30 years to develop prevention, early intervention and treatment programs.

S.D.: Pam Teaney Thomas, 36, Rapid City; helped one student with drug problem in 1979. Led to formation of community task force. She still gets calls from that first student.

TENN.: Dorothy Hudson, 53, Jackson; both sons used drugs at age 12. She started local programs, led to Tennessee Families in Action.

TEXAS: Imam Yahya Abdullah, 34, and Khaleef Hassan, 45, Dallas. Formed African-American Men Against Narcotics to encourage citizens in the drug-ridden neighborhoods not to fear drug dealers.

UTAH: Jan Bullock, 49, Bountiful; inspired by drug-related death of 16-year-old, works with Utah Federation for Drug-Free Youth.

VT.: Bob Bick, 43, Shelburne, director of Champlain Drug & Alcohol Service, administers training for school anti-drug curriculum.

VA.: Bud Mayo, 44, Fairfax County; assistant principal Cooper Intermediate has held 75-100 workshops. "It's easier to prevent drug abuse than to cure it."

WASH.: Danetta Rutten, 42, Port Angeles; Crime research steered her to work with drugs and kids. Helped develop community-wide programs to keep kids drug-free.

W.VA: Stephanie Reid, 37, Charleston, special education teacher, Roosevelt Junior High; coordinated drug education program that won first place nationally among junior highs.

WISC.: Virginia Peterson, 43, Nekoosa; Alcohol and Drug Director for the Nekoosa Public Schools; helped start Reaching Others on Alcohol and Drugs).

WYO.: Kip Crofts, 47, Cheyenne; chairs the governor's Drug Policy Board; opened treatment facility for youth in Casper.

OK to say no and feel good about it. He hopes to set the stage for more comprehensive drug-abuse prevention in later grades.

▶ **Talking car.** In Camden County, Ga., the sheriff's department converted a 1984 Pontiac Trans Am seized in a drug bust into the R.O.A.D. (Reach Out Against Drugs) Runner, with computerized voice, lights and sirens.

RAUCH: warns pupils against steroids.

▶ **Drug-fighting robot.** Punchy "The Million Dollar Machine," financed by the Edward J. DeBartolo Corp., a mall development and management company, tells jokes, plays music and talks to kids about self-esteem and good health. His message: "Yo! I'm not the Million Dollar Machine. *You* are!"

By Jim Brown

DON'T FOLLOW ME: Chaplain Cleveland Houser with students Deanna Day, left, Daniel Ellis and Shawanda Maxwell.

▶ **Weightlifter.** Bodybuilder Norman "Rocky" Rauch of Lake Geneva, Wis., tells teens he believes the cancer he's fought since 1983 is from steroids. "If I were more educated" about side effects, "I wouldn't have the problem I have," says Rauch. His non-Hodgkins lymphoma is in remission.

Policing: Rewards are often personal

By Anita Manning
USA TODAY

Drug lords drive BMWs. Cops drive Chevys.

Despite the daily danger, long hours, and low pay, law enforcers — from police officers to Coast Guardsmen — keep performing their duties, often heroically.

"Every one of us believes in what we're doing," says Lt. Mark Sikorski, 33, commander of the Coast Guard cutter Cushing based in Mobile, Ala. "Even if we don't catch anybody . . . if we deter people, we're successful."

Sikorski and his crew of 15 made the biggest cocaine bust in maritime history on Oct. 2 when they arrested nine Colombian crew members on the Panamanian ship Zedom Sea. Seized: 12,208 pounds of cocaine, "as much as the Coast Guard seized all of last year," Sikorski says. "That hurts the cocaine cartel. Every seizure after this is going to hit them hard."

By Alan Whitman

SIKORSKI: Made largest maritime bust

Those in law enforcement "are the front line defense," says Detective Sgt. Albert Dowdell III, of Belle Glade, Fla. But the low salaries hurt. "It's really offensive when the only reward is the feeling you get inside knowing you're doing something that's needed." Still, he knows, "If we don't do an adequate job, we're going to lose this country to drugs."

Life isn't much like TV, says Officer David Stroud, 41, of the Washington, D.C., police department, "When Don Johnson and Philip Michael Thomas make a mistake, they get to try again. A lot of times we don't."

By Tony Aruzza

FLORIDA DETECTIVE: Albert Dowdell III helped in 187 drug arrests in 22 months.

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"When they came to prison they were so far strung out, either it was prison or the graveyard," says Houser.

"Cocaine just messes your brain cells all up." One man cannot remember the full names of this three children.

People who deal or use drugs think they're not going to get caught, Houser says. "But they find out it's just a matter of time before they will get caught. The people who make it in life are those people who go to school, who make an honest living. There are no short cuts."

How you can help locally

How can you be a DrugBuster in your neighborhood?

Thousands of people across the country want to work against drug abuse. Many just don't know where to start.

In a recent USA TODAY poll, three-fourths of respondents said they would work one hour or more a week to help stop drug abuse. Fourteen percent said they'd work 10 hours a week.

To find out how to volunteer at a local anti-drug program, call the National Clearinghouse for Alcohol and Drug Information, 301-468-2600, or write Dept. DB, P.O. Box 2345, Rockville, Md. 20852 . Also:

▶ Urge schools and local police to join the Drug Abuse Resistance Education program. DARE officers are trained to teach a 17-week course on drugs, the importance of self-esteem and resisting peer pressure. Information: 1-800-223-DARE.

▶ Get the facts on the harmful effects of drugs and educate your family and friends.

▶ Sponsor, publicize and supervise community drug-free activities for kids.

Special report staff

Contributing to this report: Writers Denise Kalette, Lee Michael Katz and Anita Manning.

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