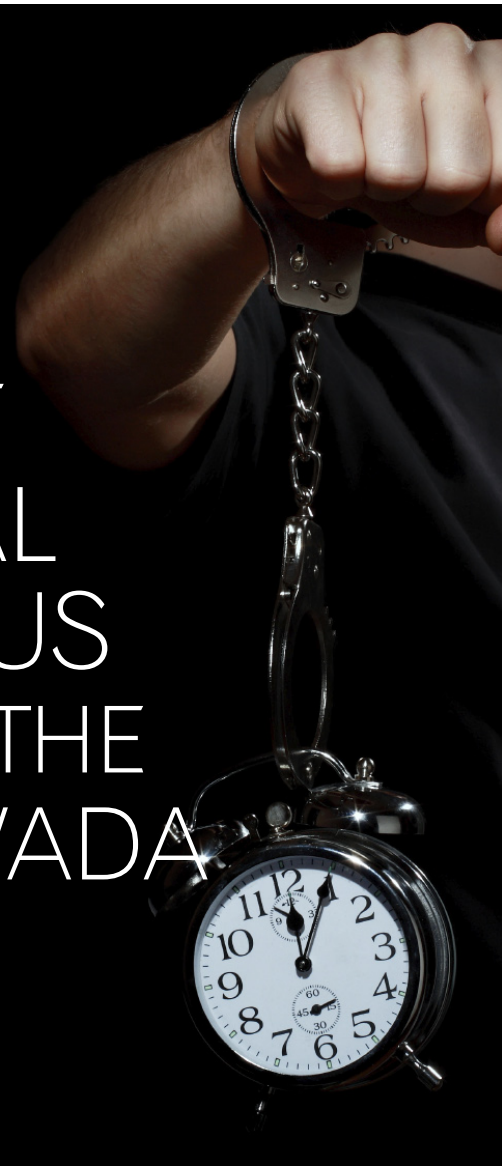

OBSERVATIONS OF CAPITAL FEDERAL HABEAS CORPUS IN PRACTICE IN THE STATE OF NEVADA

BY THOM GOVER, ESQ.

Undue delay in the execution of a capital sentence is a dominant concern of both proponents and detractors of the death penalty. "Justice delayed is justice denied," is often heard in the context of death penalty litigation. Bills are presented in the state's Legislature seeking moratoriums to study the efficiency of the death penalty. Yet, some time is obviously required to vet a capital sentence. While a capital conviction can be obtained relatively quickly, the appeals process is often misunderstood and can be viewed as a source of delay. This article will focus on capital federal habeas corpus practice as a necessary mechanism in the review of a capital sentence and the effect it may have in creating undue delay.

Appeals of Capital Cases in the State of Nevada:

The modern era of capital punishment in the state of Nevada began on July 1, 1973, upon the post-*Furman* re-enactment of the death penalty.[1] Since the re-enactment of the death penalty, 12 inmates have been executed by the state of Nevada.[2] For the last few years, the number of capital inmates in the custody of the Nevada Department of Corrections has hovered around 80, all entitled to appeal their conviction and sentence at both the state level and the federal level.[3]

At the state level, Nevada law provides an automatic direct appeal of a capital sentence to the Nevada Supreme Court.[4] If that appeal is denied, the capital inmate can petition the United States Supreme Court for discretionary review via a writ of certiorari. In almost all cases, certiorari is denied and the capital inmate may then file a post-conviction petition for writ of habeas corpus in the state district court in which he was convicted.[5] An appeal is available

to the Nevada Supreme Court if the post-conviction petition is unsuccessful, as well as discretionary review via a writ of certiorari with the United States Supreme Court. The state-level appeals are litigated by the prosecuting attorney's office where the capital case originated. Counseled representation of the capital defendant is provided as a matter of the Nevada Supreme Court Rules.[6] Of course, the above process can take years and is only summarized above for context, as it is beyond the scope of the instant article.

Practice in the Federal Courts:

The federal court has jurisdiction to consider habeas corpus petitions filed by state

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prisoners, including prisoners sentenced to death, if the petitioner alleges his or her custody is in violation of the Constitution or laws or treaties of the United States.[7] A capital federal habeas corpus case is initiated by a petition filed with the United States District Court of the District of Nevada, with appeals available to the United States Court of Appeals for the Ninth Circuit and to the United States Supreme Court.

The federal courts have long recognized the potential for undue delay in capital habeas corpus proceedings. "Though, generally, a prisoner's 'principal interest … is in obtaining speedy federal relief on his claims,' not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."[8]

Congress has attempted to reduce the "dilatory conduct" of any such likeminded petitioners with the passing of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, creating a highly deferential standard of review by federal courts of state court decisions.[9] Additionally, AEDPA created a one-year period of limitations for a person in custody pursuant to a judgment of a state court to apply for a federal writ of habeas corpus.[10] Nevertheless, opportunities for "dilatory conduct" abound and are regularly utilized.

Because of the highly deferential standard of review, a capital petitioner wishing to engage in dilatory tactics is best served by refusing to present a federal petition ripe for review in the federal courts. A capital petitioner alerts the federal court of his desire to seek the federal remedy of habeas corpus by filing a pro se petition, at which point he is appointed counsel. Newly appointed counsel necessarily requires time to review the capital petitioner's pro se filing, the voluminous state court record of the trial and all post-conviction proceedings, and file an amended petition. In the amended petition, the capital petitioner is required

to raise all claims, both exhausted and unexhausted, resulting in what is called a "mixed petition."[11] Upon a showing of good cause, "potential" merit and a lack of "intentionally dilatory litigation tactics," the capital petitioner can be awarded a stay of the federal habeas proceedings to return to state district court to present a second or successive petition for post-conviction relief and usually an appeal to the Nevada Supreme Court. It is not unheard of for a capital petitioner to be granted more than one stay and return trip to the state court to exhaust state remedies.

Discovery practice is an additional area ripe with potential for a capital petitioner to engage in "dilatory tactics." Once a fully exhausted petition is finally filed with the federal district court, a capital petitioner may seek leave to conduct discovery. Discovery is only allowed upon a showing of "good cause."[12] It is further limited by the AEDPA mandate that a court not hold an evidentiary hearing unless a capital petitioner can show that he was denied the opportunity to develop a factual predicate in state court, or that his claim is based upon a new rule of constitutional law.[13] However, the ability to make such an objective showing does not guarantee that the relevant claim is not a subjectively frivolous claim. As a result, a dilatory capital litigant can obtain leave to conduct discovery to develop a claim that only he knows is without merit. It is almost impossible to identify for the federal district court, absent an objection from the capital petitioner himself of the frivolous nature of a claim, why a claim is subjectively frivolous and therefore not meriting leave for discovery.[14]

The practice of defending the state's capital sentences is centralized with the Nevada Office of the Attorney General. Strategies are constantly being developed to better identify "dilatory tactics" and persuasively oppose delaying motions. This writer's observation is that the federal courts are diligent in managing the capital cases on their docket, and the defense bar is appropriately zealous in the representation of their clients. But quite frankly, "[f]ederal habeas corpus happens to be one of the most complex areas of American law."[15] Obviously, the expenditure of a significant amount of time is therefore merited to ensure that an injustice is not done in haste. ■

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1 *Furman v. Georgia*, 408 U.S. 238 (1972), struck the death penalty under an Eighth Amendment theory that the sentencer, whether a jury or judge, lacked any guidance in exercising the discretion to sentence a defendant to capital punishment, resulting in "arbitrary and capricious" results. Senate Bill No. 545 (1973) amended Nevada's capital punishment provisions to address the *Furman* concerns, essentially requiring the consideration of aggravating and mitigating circumstances, and thus reinstated the death penalty in the State of Nevada.
2 Of the death penalty states within the jurisdiction of the Ninth Circuit Court of Appeals, the State of Nevada is first in its rate of execution on a per capita basis at a rate of 0.046 persons executed per 10,000 people; ahead of Arizona at 0.035, Idaho at 0.007, Washington at 0.006, California at 0.004 and Oregon at 0.003. State Execution Rates, Death Penalty Information Center, (2007).
3 It should be noted that the right to state- and federal-level appeals is also extended to inmates convicted of non-capital offenses.
4 *See* Nevada Revised Statutes 177.055.
5 *See* Nevada Revised Statutes 34.720 et al.
6 Nevada Supreme Court Rule, 250.
7 *See* 28 U.S.C. § 2254(a).
8 *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005)(quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).
9 Prior to 1996 the standard of review was *de novo*.
10 *See* 28 U.S.C. §§ 2244(d) and 2254(b) (statutory provisions relating to the AEDPA limitations period and standard of review, respectively).
11 "Exhaustion" of state remedies is a bedrock principal of federal habeas corpus litigation requiring that the federal courts not usurp the power of the state courts to have the first opportunity to resolve issues claiming violations of the U.S. Constitution and federal law. Quite simply, a claim that has previously been presented to the Nevada Supreme Court is exhausted, one that has not is unexhausted. For a complete treatment of "exhaustion" consult *Rose v. Lundy.*
12 Rules Governing Habeas Corpus Cases Under Section 2254, Rule 6.
13 *See* 28 U.S.C. § 2254(e)(2).
14 The conflicts that arise between capital petitioners and their appointed counsel in litigating claims that would unduly delay a federal court's consideration of the merits of a federal habeas petition is beyond the scope of this article, but increasingly observed. Subjectively frivolous claims do not further a capital inmate's interest in justice if he believes his other claims have potential merit.
15 *Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007).