

OPINIONS OF INDIVIDUAL JUSTICES
IN CHAMBERS

AUTRY *v.* ESTELLE, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS

ON APPLICATION FOR STAY

No. A-242. Decided October 5, 1983

An application to stay applicant's execution under a sentence imposed by the courts of Texas is granted pending the final disposition by the United States Court of Appeals for the Fifth Circuit of applicant's appeal from the District Court's denial of a writ of habeas corpus, or until a further order by this Court or by the Circuit Justice. One of the grounds on which applicant sought relief, not raised in his earlier habeas corpus petition, was the Texas Court of Criminal Appeals' failure to determine whether his death sentence is disproportionate to the punishment imposed on others. The issue of whether the Federal Court of Appeals properly concluded that the Texas death-penalty system, as a whole, satisfies any constitutional requirement with respect to proportionality cannot be said to lack substance, since this Court has granted certiorari in another case to review a holding of the Court of Appeals for the Ninth Circuit that a California death sentence cannot be carried out until the State Supreme Court conducts a comparative proportionality review.

JUSTICE WHITE, Circuit Justice.

Applicant is under a sentence of death imposed by the courts of Texas. His execution is scheduled to be carried out after midnight of October 4, c. d. t. He has once unsuccessfully sought a writ of habeas corpus from the United States District Court; denial of the writ was affirmed by the Court of Appeals for the Fifth Circuit, 706 F. 2d 1394 (1983), and on October 3, 1983, we denied a stay pending the filing of a petition for certiorari. *Ante*, p. 1. Applicant then filed a second petition for habeas corpus, raising grounds not presented in his first petition and hence not before us when we so recently denied a stay of execution. After a hearing, the Dis-

trict Court denied both the writ and a certificate of probable cause, which, under 28 U. S. C. § 2253, is a prerequisite to an appeal. The Court of Appeals then held a hearing, denied the certificate of probable cause, and denied the stay. Applicant has now applied to me for a stay.

One of the three grounds on which applicant sought relief in his second habeas corpus petition is the failure of the Texas Court of Criminal Appeals to compare his case with other cases in order to determine whether his death sentence is disproportionate to the punishment imposed on others. That ground as I have said was not presented in his first petition. Although it appears that no such review was in fact carried out in this case, the Court of Appeals held that the Texas death-penalty system, as a whole, satisfies any constitutional requirement with respect to proportionality.

I am compelled to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253, and to enter a stay pending the final disposition of the appeal by the Court of Appeals. On March 21, we granted certiorari in No. 82-1095, *Pulley v. Harris*. 460 U. S. 1036. In that case, the Court of Appeals for the Ninth Circuit held that a death sentence cannot be carried out by the State of California until and unless the State Supreme Court conducts a comparative proportionality review, which, the court held, was constitutionally required. 692 F. 2d 1189 (1982). We shall hear argument in that case in November, and if we affirm the Court of Appeals for the Ninth Circuit, there will be a substantial question whether the views of the Court of Appeals for the Fifth Circuit with respect to the proportionality issue were correct. Of course I do not know how the Court will rule on this question, but in view of the judgment of the Court of Appeals for the Ninth Circuit and in view of our decision to give the case plenary consideration, I cannot say that the issue lacks substance. Accordingly, I hereby issue a certificate of probable cause and stay petitioner's execution pending the final disposition of the appeal by the Court of Appeals, or until the Court's or my further order.

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Opinion in Chambers

In my view, it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus. Except in unusual circumstances, successive writs would be summarily denied. But historically, *res judicata* has been inapplicable to habeas corpus proceedings, *Sanders v. United States*, 373 U. S. 1, 7-8 (1963), and 28 U. S. C. § 2244(a) and 28 U. S. C. § 2254 Rule 9 implicitly recognize the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated.