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STREAMLINED PROCEDURES ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

H.R. 3035

NOVEMBER 10, 2005

Serial No. 109–82

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STREAMLINED PROCEDURES ACT OF 2005

THURSDAY, NOVEMBER 10, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. I want to welcome you all to the important legislative hearing on habeas corpus procedures for review of State death penalty convictions. This is the second hearing on this legislation. And for the benefit of all involved, I need to let you know we need to vacate this room on or before 12. We are having our PATRIOT Act conference in this room. So we have to set up for that. So keep that in mind. We need to hit the road at 12.

I have stated on numerous occasions that I support the death penalty for the most heinous crime. But I've also made clear that the death penalty must be clear, fair and must be accurate with appropriate balance between victims and analyst litigation and appropriate consideration of crimes of error and legitimate claims of actual innocence.

I am a strong supporter of the Justice For All Act, a far-reaching measure which provides additional safeguards in our death penalty system for post-conviction DNA testing of evidence and improvements in our capital counsel system.

Today, we are reexamining representative Lungren's proposal, H.R. 3035, the "Streamlined Procedures Act of 2005," which reforms Federal habeas corpus review of State court convictions.

Mr. COBLE. The Subcommittee in the judicial security hearing and in examining child crimes and even last Congress during consideration of the Justice For All Act has gathered a substantial amount of evidence showing that the Federal Court, that the Federal Court habeas review, particularly in the death penalty area, has suffered from extraordinary delays, some as long as 15 years for pending habeas petition to be resolved by a single Federal judge and misguided application of precedent to frustrate the ends of justice.

State provides significant habeas review. And applicants are now using the Federal review in some instances to frustrate justice which at once calls for reform aimed at ensuring that justice delayed does not turn into justice denied.

Currently, many Federal habeas corpus cases require 10, 15, even 20 years to complete. These delays burden the courts and deny justice to defendants with meritorious claims. They are also deeply unfair to victims of serious violent crimes. A parent whose child has been murdered or someone who has been a victim of a violent assault cannot be expected to move on with their lives without knowing how the case against the attacker has been resolved.

Endless litigation and the uncertainty that it brings is unnecessarily cruel to these victims and their families. As President Clinton noted of the 1996 habeas corpus reforms, "It should not take 8 or 9 years and three trips to the Supreme Court to finalize when a person, in fact, was properly convicted or not." For the sake of all parties, we should minimize these delays.

The 1996 habeas corpus reforms were supposed to prevent delays in Federal collateral review. Unfortunately, as the Justice Department noted in testimony before the House Crime Subcommittee in March 2003, there still are significant gaps in the habeas corpus statutes which can result in highly protracted litigation, and some of the reforms that Congress did adopt in 1996 have been substantially undermined in judicial application.

In a recent letter sent by the Judicial Conference, they provided data which demonstrates that delay is increasing and that some steps are needed to address the problem.

The median time for disposing of habeas petitions for State capital convictions has nearly doubled from 1998 to 2004, from 13 months to 25.3 months.

The number of habeas petitions pending for over 3 years doubled from 1998 to 2004, from 20 percent to 46 percent.

Similarly, the percent of habeas petitions pending in the Federal Court of Appeals increased sevenfold from 1998 to 2004, from 5 percent to 36 percent.

I want to commend representative Lungren for his work in this area and look forward to working with him on this important issue.

I am now pleased to recognize the distinguish gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman, for holding this hearing on H.R. 3035, the "Streamlined Procedures Act of 2005." And Mr. Chairman, I want to thank you for your excellent representation of the Sixth District of North Carolina, the State of North Carolina and the Nation. You're one of the most respected leaders of the House. It is an honor to serve on this Committee with you. And I think the entire House could benefit from the kind of leadership that you provide.

We have a lot of disagreement on issues, but you're one that can disagree without being disagreeable. And we would have a much better House if we had more Members like you. So thank you for your service and leadership.

Mr. COBLE. If the gentleman will suspend, I will give the gentleman from Virginia all the time he wants.

I thank you for that, Bobby. I appreciate that.

Mr. SCOTT. Well, the next thing I was going to say is because of your admonition that time was of the essence—but the title of the bill, Mr. Chairman, suggests that it would streamline the processing of habeas cases. In fact, it would actually strip the courts

of jurisdiction to determine many Federal issues and undercut the Supreme Court's efforts to clean up uncertainties regarding reforms that Congress enacted in 1996 with the Anti-terrorism and Effective Death Penalty Act.

The bill would virtually eliminate the ability of Federal courts to determine Federal constitutional issues in cases involving prisoners either facing the death sentence or serving prison terms. In short, the bill would greatly increase the prospects of an innocent person being put to death or languishing in prison with no help of correcting an unconstitutional conviction.

In general, the bill will overturn a series of Supreme Court decisions adopted since 1996, increase the number of habeas corpus petitions filed, complicate and delay litigation in this area, disregard traditional principles of federalism and invite constitutional challenge on the theory that it impairs the independence of Federal courts.

Ironically, many of the supporters of this bill are the same people who in the Terry Schiavo case advocated for the elimination for that case of the very kinds of hurdles that this bill promotes.

Federal habeas corpus is a modern day reflection of the great writ which was the foundation for much of our criminal law principles. A right without a remedy is no right at all. What good is it to have a constitutional right that cannot be enforced? This bill would eliminate the Federal court's role as courts of last resort for citizens of this country. It would restrict citizens to State courts where prosecutors seeking to protect their convictions—it would restrict them to courts where prosecutors are seeking to protect their convictions when the State prosecutors were the cause of the problem to begin with.

Those prosecutors are the only ones who have anything to gain from having innocent people languish in prison or even put to death because they were unable to get the proper relief from the courts.

Crime victims and their families will face even greater delays and frustration as courts struggle to resolve constitutional challenges to a new law, and they nor the society in general will benefit from having people locked up or put to death while the true perpetrators remain free to prey on others. And there are other examples of innocent people being released in recent years who could not have been released if this bill had been law.

I would like to offer for the record, Mr. Chairman, two of these cases, one involving release from death row, the other will be identified. And we are going to add other cases as well as an article, recent article in my hometown newspaper which indicates that several people were released from prison after they had served a substantial portion of their time for crimes that they did not commit.

Mr. COBLE. Without objection, it will be received.

[The information referred to follows in the Appendix]

Mr. SCOTT. Thank you, Mr. Chairman. A host of organizations and individuals, including prosecutors and judges, liberals and conservatives, have expressed concerns about the bill becoming law; 49 of 50 chief justices have asked Congress to carefully study the need for and impact of this legislation before any new law is passed. And I would like to offer their resolutions at this point for the record.

Mr. COBLE. Without objection.

[The information referred to follows in the Appendix]

Mr. SCOTT. I also have read letters of letters and resolutions from the Federal Judicial Conference, Federal public prosecutors, Federal public defenders, a prosecutor in California expressing concern about the legislation, and I would like to offer these for the record as well.

Mr. COBLE. Without objection, they will be received.

[The information referred to follows in the Appendix]

Mr. SCOTT. In this latter submission is a memo developed by a former prosecutor and a letter from a current chief justice of the California Supreme Court which explains why most of the time period necessary to complete habeas petitions occurs at the State level, not at the Federal level.

So, Mr. Chairman, in some way, while there are not—where there are, no doubt, instances in which non meritorious prisoner claims get more attention than they deserve, it is not a heavy price to pay to ensure that we don't execute an innocent person or have innocent people languishing in prison with no hope. We already have streamlined the habeas process in 1996. Now, only those who have, quote, clear and convincing evidence of actual innocence even get a hearing under the traditional habeas process.

Those who can establish that they are only probably innocent, that is, 51 percent chance that they are innocent but more probably innocent than not, they don't even get a hearing under the present restrictions.

Apparently, Mr. Chairman, under the Anti-terrorism and Effective Death Penalty Act, having the courts clogged up with all these people who are probably innocent is contrary to the goals of an effective death penalty.

So, Mr. Chairman, in the context of where it is clear that innocent people have been released in recent years who could not have been released under the provisions of the bill, we should not further jeopardize the prospects of cases like that by proceeding with this bill.

Again, it benefits no one, that Congress should assist in having innocent people languishing in prison or executed while real perpetrators roam free. A single case of that happening is a tragedy, and we shouldn't create a situation where more of that might occur. Thank you.

Mr. COBLE. Thank you, I thank the gentleman from Virginia. Normally we restrict opening statements to the Chairman and the Ranking Member, but the distinguished gentleman from Massachusetts asked to be heard.

Mr. DELAHUNT. Yes, thank you, Mr. Chairman, let me echo the kudos of the Ranking Member for you and your leadership.

Mr. COBLE. I thank you for that, sir.

Mr. DELAHUNT. I think you have heard me say that before. It is sincere, and it is an honest sentiment. And we are definitely fortunate to have you.

Mr. COBLE. I appreciate very much the generous comments from Mr. Scott and you. I hope you are not lulling me into a sense of false security this morning.

Mr. DELAHUNT. Let me proceed. And I probably will have to leave the hearing for another hearing. So that will eliminate some of the questions I would ask. But I think it is—I wanted to be here because I was one of the authors of the Justice For All Act.

You know, the core of our justice system is a search for the truth. That is the purpose of the criminal justice system in this country. And in that system, we should take every opportunity to maximize our capacity in our efforts to secure the truth because often it is illusive. Often it is not available to those accused of crimes. It is a system that is fallible and fragile and susceptible to error.

I served as the chief prosecutor—the elected prosecutor—in the Metropolitan Boston area for almost 22 years. I know mistakes. I have been there. I have made them. One of my constant concerns was making a mistake that resulted in the conviction of someone that was innocent. I almost did that twice.

This bill is about maximizing the power of the State to limit our search for the truth.

There have been many cases where information was developed decades after the conviction that clearly exonerated innocent individuals that served on death row. The Ranking Member has referenced some of them. I could stay here and recite two or three cases where individuals were convicted and the truth did not surface for 30 years.

I want to recognize someone who is in the hearing room today. Her name is Gloria Killian, she won't be testifying, obviously, but I think her case is reflective of what I just said. She was a former law student who had no criminal record. She is sitting in the front row. She has the gray hair.

She had no criminal record when she was convicted in 1986 of being the mastermind of a 1981 burglary, robbery and murder of an elderly couple in California. She was sentenced to 32 years in prison. Her conviction was based on the testimony of one of the actual killers who had been convicted for the crime and sentenced to life without parole. And any prosecutor knows that informant testimony, testimony that is subject to a deal, really needs to be scrutinized.

Despite the fact that his codefendant testified at his own trial that he had never met Ms. Killian, shortly after his conviction, Gary Masse wrote to the Sheriff's Department offering to lie for the Government in exchange for a sentence reduction.

Mr. Masse testified at Killion's trial that he made no deal with the prosecution. Shortly after Killion's trial, Masse further wrote to the prosecutor again admitting that he had lied. The prosecution failed to disclose this letter and two others, both of which made clear that Masse was offered and expected benefits in return for his testimony.

Gloria Killion's appeal was denied. And her State petition was rejected without an evidentiary hearing. If I could have just 2 additional minutes, Mr. Chairman.

Mr. COBLE. Without objection.

Mr. DELAHUNT. She petitioned for habeas corpus relief in Federal Court. A hearing was held in which evidence of Masse's perjury finally came to light in part because his codefendant's attorneys—his codefendant's attorneys—discovered the letters Masse had written

and brought the information to Killian. The Federal district Court nonetheless denied her petition.

On appeal, however, the Ninth Circuit found clear error in the District Court's decision and vacated the conviction. The Circuit Court concluded that there is a reasonable probability that, without all the perjury, the result of the proceeding would have been different.

It also held the cumulative effect of Masse's perjury, the prosecution's failure to disclose impeachment evidence and prosecutorial conduct at trial were sufficient to justify relief, even if each claim individually was not.

She was released in 2002 after spending 16 years in prison. She founded and became executive director of the Action Committee for Women in Prison.

The bottom line is that had this proposal been in effect, Gloria Killian would never have had the opportunity to prove her innocence. And she sits here today.

This proposal, with all due respect to my good friend and another individual for whom I have great respect, Mr. Lungren, this proposal erodes the integrity of that effort to search for the truth that is incorporated in our jurisprudence. Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman. We have been joined by the distinguished gentlemen from California, Ohio and Arizona; Mr. Lungren, Mr. Chabot and Mr. Flake.

Mr. Lungren, did you want to be heard? This is your bill and very briefly for an opening statement and then——

Mr. LUNGREN. Thank you, Mr. Chairman. Mr. Chairman, I am sorry I was late. I had one of my periodic flare-ups with my back so it was a little while getting here.

I appreciate the opportunity once again and consider the proper role of the Federal collateral review in the context of the larger criminal justice system, along with the hearings which have taken place in the other body and time for opportunity for additional input we are better able to craft legislation to address abuses of the habeas corpus process in light of the Federal courts.

I welcome all the witnesses here this morning. We have heard from many who have criticized our original proposal. We have made changes in the proposal that we are now considering. We will consider others.

I would just like to mention, however, the gentleman referred to the pursuit of truth. That is what the jury system is supposed to be all about.

As the late Chief Justice Rehnquist said at a time when he was on the bench but not chief justice, our system is predicated on the assumption that the main event is that jury trial. And the habeas corpus collateral review is the most distant from the jury trial. And one should not mistake the two.

On habeas corpus, you don't have the opportunity to eyeball the witnesses. You don't have a chance to see their demeanor. You do not have a chance to judge what juries have to judge.

And while there certainly is a place for habeas corpus—remember, we are not talking about the great writ, despite what some editorialists have said. We are talking about a statutory writ which the Congress has every right to expand or contract or eliminate al-

together. Although I wouldn't suggest that we eliminate it altogether in any event. But let's just remember what it is we are talking about.

The pursuit of truth is not just given to those who happen to be Federal judges looking at it long after the events have taken place. The pursuit of truth begins with the jury trial.

I would like to acknowledge the participation of Mary Ann Hughes. It was because of the comments made to me by crime victims and their families that I agreed to introduce this bill in the first instance.

I noted in the prepared statements of one of the witnesses the suggestion was that even those for whom this was intended to benefit, the State judges do not support this bill.

I never introduced this for the purpose of helping the State judges. I did this in response to victims' family members who came to me and said, how can you justify, 25 years after a crime is committed, the Federal Court is still trying to question what the truth is? A case in my home State of California where a convicted murderer sitting at Folsom State Prison under a sentence of life without possibility of parole, directs murders against two of the witnesses who had testified in his original trial. The Supreme Court finally turned down the latest collateral appeal on that case 25 years after the second set of murders. The fellow sitting on death row is 75 years of age. All his victims never had a chance to reach anywhere close to that time.

So the responsibility of Congress to monitor the operation of the statutory habeas procedures, a fundamental access of this responsibility is to ensure that those who have been victimized by crime are not then again victimized by the criminal justice system itself.

It is for that reason and that reason alone I introduced this legislation. And I will work to refine it and to see that it is ultimately passed and signed into law. I thank you again and look forward to hearing from our distinguished panel.

Mr. COBLE. I thank the gentleman from California. For the benefit of those who came in late, I want to reiterate, we must vacate this room by 12 because the PATRIOT Act conference will be conducted in this room subsequently.

For the benefit of the panelists, it is the practice of the Subcommittee to swear in all witnesses appearing before it. So if you all would please stand and raise your right hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show that each of the witnesses answered in the affirmative. You may be seated.

We have a distinguished panel before us today, I say to the Members of the Subcommittee. Our first witness is Mr. Tom—Tom, help me with that surname—Dolgenos, chief of the Federal Litigation Unit at the Philadelphia District Attorney's Office. Mr. Dolgenos previously worked as an associate in the Deckert firm in Philadelphia. Following law school, he clerked for the Honorable Rya Zobel of the U.S. District Court of the District of Massachusetts and the Honorable Walter Stapleton of the U.S. Court of Appeals for the Third Circuit. Mr. Dolgenos was awarded his undergraduate degree from Brown University and his law degree from the Yale School of Law.

Our second witness today is Mr. Ken Cattani—is that right, Ken—chief counsel of the Capital Litigation Section in the Arizona Attorney General's Office. Mr. Cattani currently serves on the Attorney General's DNA Task Force, the Attorney General Citizen Advisory Committee and is a member of the National Association of Government Attorneys in Capital Litigation Board of Directors. Mr. Cattani received his JD degree from the University of California at Berkeley.

Our third witness today is Mrs. Mary Ann Hughes who was previously recognized by Mr. Lungren. In 1983, Mrs. Hughes' 11-year-old son, Christopher, was brutally murdered at the hands of an escaped convict. The escaped convict not only bludgeoned Christopher to death but brutally murdered three others and severely wounded a fourth. Although extensive evidence, including DNA, pointed to Kevin Cooper as an assailant, he has eluded justice after committing those heinous crimes nearly 23 years. We look forward to hearing Mrs. Hughes' compelling testimony as well.

Our final witness is Mrs. Ruth Friedman, a solo practitioner under contract with the Office of Defender Services of the Administrative Office of the United States Courts. She has devoted her entire career to representing poor people sentenced to death and has more than 17 years of litigation in State and Federal courts. Previously, Mrs. Friedman was senior counsel at the Equal Justice Initiative in Montgomery, Alabama, where she worked at all levels of civil litigation. Mrs. Friedman is a graduate of Harvard University and received her law degree from the Yale School of Law.

We are indeed pleased to have you all with us today.

Now folks, we operate under the 5-minute rule. Your written testimony has been examined and will be re-examined. But when you see the red light on the panel before you, that is your warning that the ice upon which you are skating has became very thin.

We, Mr. Scott and I, will not haul you into custody at that point, but we would ask you to wrap up on or before that red light illuminates.

Mr. Dolgenos, we will start with you sir.

TESTIMONY OF TOM DOLGENOS, CHIEF, FEDERAL LITIGATION UNIT, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA

Mr. DOLGENOS. Thank you, Mr. Chairman, and Members of the Committee. I am an assistant district attorney in Philadelphia. It is my job and the job of the other lawyers in my unit to respond to hundreds of habeas corpus petitions each year. We are on the front lines. And I believe there are some real problems in the habeas system that have recently grown worse, not merely in death penalty cases—and I want to emphasis this—but across the board in all types of habeas cases, despite the enactment of habeas reforms in 1996.

I also believe, however, that the proposed Streamlined Procedures Act contains some commonsense solutions to some of the worst abuses that we face. Now, it is important to emphasize that the stakes here are very high, not merely for those convicted of the crimes but for the stability and reliability of the criminal justice system itself.

Every time a convicted prisoner files a habeas petition, he invites the Federal court to overturn a State court judgment. Most of the time, that means throwing out a unanimous jury verdict. It means subjecting victims and their families to more pain. It means reversing the considered judgment of State court appellate judges despite their good faith attempts to apply the very same Constitution that the Federal judges apply. And it also means that State and local governments, if they want to keep this person in jail, must allocate the resources to do it all over again.

Now, in most legal contexts, this kind of Federal interference with State government would be unthinkable. But criminal cases are different. And we all agree that they are so important that we have got to do everything we can to avoid mistakes.

That is why it is so important to ensure that every criminal defendant has adequate representation up front and the funds to present the best possible defense at trial.

But at some point, more review by yet another different set of judges no longer makes the process more fair or trustworthy. And the SPA aims to strike an appropriate balance.

Perhaps the most familiar problem in habeas litigation is that it robs the system of finality. This is no abstract issue for the victims who are dragged along in an endless process or for local governments that must pay for prosecutions that never really end. To take a small example, in the past 5 years, the number of attorneys in my office who are assigned as full-time habeas attorneys has increased by 400 percent.

I want to emphasize one other point. The truth itself is a casualty of delay. As years pass, memories fade. Evidence is lost. Witnesses who were once sure can't remember everything. Other witnesses disappear.

Some witnesses who never wanted to get involved in the first place are extremely reluctant to testify again years later. In fact, the longer the process goes on, the more opportunities exist for witness tampering and intimidation. After all, police and judges can't protect witnesses forever. And too often, a recantation or other new evidence is simply the product of coercion or foul play.

One recent example from our office makes the point. The prisoner had repeatedly molested and raped a girl when she was only 5 and 6 years old. About 15 years later, he presented to Federal court with the victim's alleged recantation, but it was ambiguously worded. When we investigated, the victim, now a young woman, told us the defense investigator had misled her. The investigator had not clearly identified herself as a member of the defense team. She had urged the victim to sign the statement while assuring her that the assailant would remain in prison, and the statement, which was written by the defense, had been worded just ambiguously enough to make it sound as if her attacker had not committed rape when, in fact, he had.

Now the victim was mortified when we told her that she had signed a defense-prepared affidavit that was designed to get this man out of prison. The prisoner's strategy had been to make evidence to convince the Federal court that he was innocent. That way he believed he could sweep away all of the bars and the rules that

should prevent him from raising new claims many years later. As of now, this matter is still ongoing.

The point is, the passage of time, repetitive hearings and relitigation of guilt do not increase reliability. They can discourage witnesses from coming forward in the first place. And they can punish those who do. And because Federal habeas courts are so far removed in space and in time from the crime, from the subtleties and the rules of State proceedings and from the victims, it is all too easy to create claims as the years pass.

The only way to restore balance is by Federal statute, a statute that makes deadlines meaningful and prevents the litigation of new claims except in extraordinary situations. And that is why I support the reforms contained in this Streamlined Procedures Act. Thank you, Mr. Chairman.

[The prepared statement of Mr. Dolgenos follows:]

PREPARED STATEMENT OF THOMAS DOLGENOS

UNITED STATES CONGRESS
HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Hon. Howard Coble, Chairman

Legislative Hearing on H.R. 3035
"The Streamlined Procedures Act of 2005"

November 10, 2005

Testimony of Thomas Dolgenos
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I am an assistant district attorney in Philadelphia. Since January 2000, I have been Chief of the Federal Litigation Unit; the lawyers in this Unit, myself included, respond to hundreds of habeas petitions each year. We are on the front lines, and I believe there are some real problems in the habeas system that have recently grown worse, despite the enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in 1996. I also believe, however, that the proposed Streamlined Procedures Act contains carefully crafted, common sense responses to some of the worst abuses we commonly face.

At the outset, I want to emphasize the importance of the issue. There is a great deal at stake – for victims and their families, for state and local governments, for state prisoners, and for the public as a whole. From my perspective, the continuing growth of habeas litigation is a problem in itself; as it expands, local prosecutors are forced to divert scarce resources from other areas of law enforcement, and victims and families are compelled to remain involved in legal proceedings that never seem to end. This can be very frustrating, because endless litigation and repetitive hearings do not bring us closer to the truth. Finally, expansive habeas review shifts the ultimate responsibility for criminal matters from state to federal courts, which both offends any reasonable notion of state sovereignty, and strips state judges of a sense of final responsibility – that is, some other (federal) judge always gets the last word. Simply put, there is a real cost to this litigation, in human, financial, and constitutional terms. While it is important to maintain federal habeas review, this review should be limited so as to minimize unnecessary disruption of state criminal convictions.

I also want to emphasize that these problems are not limited to death penalty cases. On the contrary, they apply across the board, to all of the convictions that reach the federal habeas stage – murder, rape, robberies, and other violent crimes. Only a small percentage of these cases involve the death penalty. The SPA would help protect the rights of victims, and encourage the fair and effective use of the criminal justice system, in all of these cases.

Before I describe in more detail the kinds of problems we currently face in habeas litigation, and how the SPA addresses those problems, I would like to briefly rebut a few of the key points commonly raised by opponents of the SPA.

1. Litigating innocence. SPA opponents argue that the proposed legislation would endanger the ability of prisoners to prove their innocence. On the contrary, as I explain below, the SPA carefully preserves avenues of relief for prisoners who have convincing new proof of their innocence. It is true that the bar for such claims is set high – that is, evidence of innocence must truly be convincing – but that is by necessity. Almost every habeas petitioner claims that he is innocent. If the "innocence" standard is set too low, then the federal courts will be deluged with dubious claims from prisoners who want to re-try their cases, and no criminal verdict would ever be final.

2. The danger of new litigation. I have heard SPA opponents say that now is the wrong time to change the habeas statute – that the uncertainties of AEDPA have finally subsided somewhat, and a new round of reforms would simply start the litigation process all over again. Frankly, I don't understand this argument. First of all, AEDPA litigation has not lately decreased. While some of the major litigation questions are settled, many remain open; in any event, it is clear that many of AEDPA's provisions

missed their mark, do not work, or are being misinterpreted. These problems are a continuing source of litigation. Just to take one example: the AEDPA time limit is now subject to constant erosion by an almost endless array of "equitable tolling" arguments. The only way to fix these problems is through legislation.

3. The death penalty provisions. Some SPA opponents have complained that the SPA's restrictions on death penalty cases go too far. It is important to remember, however, that Section 9 of the SPA – the provision that applies only to capital cases – does not apply retroactively. Rather, states must first *qualify* for this section by guaranteeing experienced and reasonably paid lawyers for all defendants who face the death penalty. These lawyers must also have reasonable funds at their disposal to present their case. Once these guarantees are in place, then Section 9 applies. In other words, this provision aims to prevent errors before they happen.

4. The "procedural default" provisions. Some SPA opponents believe that the proposed law is too strict because prisoners who violate a state procedural rule, and as a result have "defaulted" their claim before they get to federal court, must make a convincing showing of innocence before they can raise the claim in habeas. But I think default jurisprudence is in special need of reform: AEDPA did not address the standard for defaults, and as a result this is now a major loophole in the statute. Prisoners currently have the incentive to withhold claims from the state courts, or to present them half-heartedly; once in federal court, they can argue that any state procedural bars were "uncertain" or "unpredictable." If the federal court agrees – and the "uncertainty" standard is a very slippery one, which does not seem to require much of a showing – then the federal court can address the issue *de novo*, free from AEDPA's deferential standard

of review. The SPA restores some balance here, and re-emphasizes the importance of exhausting each and every claim in state court.

I. PROBLEMS IN CURRENT HABEAS LITIGATION

What follows is a short description of the kinds of abuses that now infect the habeas system; afterwards, I will briefly describe how these problems are addressed by various sections of the SPA.

DELAY

This is a familiar problem, but it is something we see every day. Criminals who were convicted five, ten, or twenty years ago continue to complain about their trials and raise new claims. The facts are endlessly re-litigated. The process goes on and on.

There are many costs associated with delay: The victims pay a heavy emotional cost, of course, because they and their families must relive the crimes again and again, without any closure or sense of justice. But they have no choice but to remain involved – otherwise, the criminal is left alone to make his arguments, and pose as the victim of an unfair system, without any effective rebuttal. The states also bear the cost of delay, because we have to pay for prosecutions that never really end. To take a small example – in the past five years, the number of attorneys in my office who are assigned as full-time habeas attorneys has increased by 400%. The public, too, bears the cost of delay, both because it is expensive to support drawn-out litigation, and because time dilutes the effectiveness of the criminal justice system. Deterrence works best when punishment is

swift and sure; when the process is open-ended, and nothing ever seems final, the system breaks down.

I want to emphasize one other important point: The truth is a casualty of delay. As years pass, memories fade. Evidence is lost. Witnesses who were once sure cannot remember everything. Other witnesses disappear. Some witnesses, who never wanted to get involved in the first place, are extremely reluctant to testify again years later. In fact, the longer the process goes on, the more opportunities exist for witness tampering and intimidation. After all, police and judges cannot protect witnesses forever, and too often a "recantation" (or other new evidence) is simply the product of coercion. The point is, repetitive hearings and re-litigation of guilt do not increase reliability, and they can discourage witnesses from coming forward in the first place.

Causes of delay – unenforced deadlines and "equitable tolling"

In 1996, Congress and President Clinton tried to end unnecessary delays by creating a one-year deadline for habeas cases. Delays still happen, though, because the deadline is not strictly enforced. Sometimes the courts invoke "equitable tolling" and refuse to enforce the deadline simply because its application might be "unfair" to the criminal, which is an unpredictable standard.

The deadlines are often suspended on "equitable" grounds, often in absurd situations. One Philadelphia defendant named Robert Graham, who pled guilty to rape and a series of armed robberies in 1977, filed a habeas petition twenty-four years later. His "excuse" for his late filing was that he had no lawyer, couldn't understand legal

documents, and wasn't able to sufficiently "trust" anyone to help him with the preparation of a federal habeas petition. We pointed out that he had filed other legal petitions in state and federal court over the years, as well as many written prison grievances, and "trust" had never been a problem before. But the court held a hearing, and appointed counsel and a psychological expert for Graham. We were forced to hire our own expert, at a cost of many thousands of dollars. Our expert testified that Graham had been fully capable of filing on time. But the district court held that Graham's "difficulty in trusting and seeking the assistance of others" deserved "equitable tolling" and he could go forward with his case. Graham v. Kyler, 2002 U.S. Dist. LEXIS 26639, *30 (E.D. Pa. 2002).

Or there is Mark Garrick, who robbed and murdered a man in 1975. Garrick said he couldn't file on time (more than twenty years later) because he didn't have enough money for the federal filing fee and he didn't have the right forms to file without it. We found out, however, that the prison *did* have the right forms, and anyway a few days before the filing Garrick had plenty of money in his account – but he spent most of it at the prison commissary on junk food. We eventually won that case in the district court, but only after many briefs and a hearing; even after all that, the Third Circuit somehow concluded this was a close case, and allowed Garrick (with his appointed counsel) to appeal. As a result, this case is still ongoing.

Needless to say, it is frustrating to see these cases, and others like them, continue to drag on. The "equitable tolling" standard is slippery and needs fixing.

Slow litigation in the federal courts

Part of the problem is that federal courts often take too long to decide cases. We have seen some habeas matters sit in the district and circuit courts for years with no action. And there is almost nothing we can do about it.

My colleague, Ronald Eisenberg, testified before this subcommittee about several cases which have languished for years in federal court without any decision at all. As Mr. Eisenberg testified, "Federal habeas courts have great power, simply because they are last in line. But they have little responsibility, because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently, to give credit to the judgment of their brethren in state courts, or to consider the needs of crime victims. The only way that balance can be restored is by congressional statute."

Evading the statute of limitations by "staying" mixed habeas petitions

One common way in which prisoners and district courts defeat the one-year habeas deadline is through "stay and abey" orders. What happens is this: Prisoners file habeas petitions that contain some claims that have already been rejected by the state courts, and one or more new claims. The district court then "stays" the petition, and places it in suspense, while the petitioner tries to exhaust the new claim(s) in state court, in effect starting the process over again.

It hardly needs mention that this practice makes the one-year deadline meaningless. It converts habeas into a jurisdictional foot-in-the-door, where prisoners can park their claims without worrying about deadlines. Plus, the stay-and-abey practice

effectively rewards prisoners who have failed to timely raise their claims in state courts in the first place.

The Supreme Court has recently partially restricted this kind of stay, in Rhines v. Weber, 125 S. Ct. 1528 (2005), but under Rhines a petitioner will still be able to get such a stay upon a showing of "good cause." This vague standard promises to create a wealth of new litigation. In the meantime, we continue to see many such stay orders issued by federal district courts, ensuring years of new delays.

RELITIGATION OF OLD CLAIMS

State criminal convictions are entitled to respect. When the jury (or the judge) weighs the evidence and makes a decision, that is a significant event. Each state has its own rules and procedure for ensuring that their trials are fair, and if there are complaints, each state provides its own review procedure. State judges are just as duty-bound as their federal counterparts to uphold the Constitution. If a prisoner has a federal claim to make, he must make it first in state court. If he does not properly present it to the state courts, the federal courts should not reach it, either. If the state court rejects the claim on the merits, *only then* can he go to federal court – and the federal court must defer to the state court's decision if it was reasonable.

That is the law. It is relatively simple, and it makes sense. If federal courts were free to re-weigh the evidence or litigate new claims, the process would truly be endless, unworkable and unconstitutional. State trials would merely be a prelude to the "main event" in federal court. States would be stripped of the power to enforce their own criminal laws.

Too often, however, federal courts do re-weigh the evidence, or entertain claims that have not been decided by the state courts. There are a number of ways that federal courts can do this; each method allows the court to evade both the exhaustion requirement, and the AEDPA deference standard.

Ignoring "inconsistently applied" state rules

When a state court rejects a claim because it is improper under the state's own rules – for example, it may be waived or raised too late – a later federal habeas court is obligated to defer to the state court's application of its own rules, and must also decline to entertain the claim. Otherwise, a prisoner could violate any state procedural rule, knowing that later the federal court will hear all of his claims anyway. But under the "inadequacy" doctrine, a federal court may decide that the state rule is "inconsistent" and hear the claim anyway, even though the state courts have held that its rules have been violated.

In practice, this means that federal courts can ignore all of what happened in state court, and entertain defaulted claims as if they were fresh and properly preserved, simply by finding that a particular state rule is, in the opinion of the federal court, inconsistent. This is a powerful way around AEDPA's various restrictions. For example, the Third Circuit recently held that Pennsylvania's own time-limit on state collateral review was inconsistently applied in death penalty cases for the first few years after its enactment in 1996 – despite the fact that the deadline has always been strictly and uniformly applied exactly as it was written. See Bronshtein v. Horn, 404 F.3d 700, 707-710 (3d Cir. 2005). For the Third Circuit, the mere possibility that death penalty defendants could imagine an

exception to the deadline in capital cases – an exception that is nowhere in the statute, and which was never applied to the time-bar by Pennsylvania courts – rendered the state deadline somehow unpredictable and inadequate, until the state supreme court explicitly rejected it. As a result, there is now apparently no such thing as default in Pennsylvania capital cases pending in the late 1990's, which is virtually all of the death penalty cases now pending in habeas. Criminals in these cases are presumably able to raise entirely new claims and introduce new evidence, without any showing of innocence. The burden on the State to relitigate these cases is huge; the emotional burden on the victims' families is incalculable.

The loose application of "inadequacy" creates a perverse incentive for states to adopt rules with absolutely no exceptions and no room for judicial discretion. This is not a desirable result, for prisoners or anyone else.

The "ends of justice" exception

Another way around procedural default is through use of the "independence" requirement – that is, a state procedural rule must be "independent" of federal law, or the federal courts can overlook it. The rationale is, if the state rule is intertwined with, or dependent on, federal law, then the application of the rule amounts to a decision on the merits of the federal claim. But sometimes, the "independence" requirement is applied in peculiar ways. For example, many states have an "ends of justice" exception to their rules and deadlines. Some federal courts have held that if the "ends of justice" exception involves a cursory review of the merits of the claim – however fleeting – then the application of the rule is "dependent" on federal law and there is no default. See, e.g.,

Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990) (no default under Washington State rule because it includes "ends of justice" exception).

In addition to providing yet another mechanism for evading AEDPA's deference requirements, as well as the rule of exhaustion, this creates another perverse incentive for states to create absolute rules with zero exceptions, whether it serves justice or not.

The "actual innocence" standard

A showing of "actual innocence" allows petitioners to go forward with their habeas case, despite the existence of various bars. This obviously serves the interest of justice – no one wants to see the innocent wrongly punished. But the bar must be set high for these claims, and it is easy to see why. Claims of innocence are routinely made. They are the rule, not the exception. For the most part, however, claims of "innocence" are simply dressed-up attempts to argue the evidence all over again. If the mere allegation of innocence is enough to re-open otherwise barred claims, then nothing would ever be final. An incrementally higher standard – say, requiring the petitioner to make a "colorable" claim of innocence – would ultimately be no better. Many (if not most) defendants who go to trial have a "colorable" claim of innocence. But in the end, the jury may conclude that guilt has nevertheless been proven beyond a reasonable doubt – after all, "beyond a reasonable doubt" does not mean "beyond *all* possible doubt."

The only workable solution is to set the bar very high for claims of "actual innocence." The presumption of guilt, which attaches when a defendant is convicted, should not be pierced unless there is new evidence that the jury did not hear. Nor is this enough by itself, because it is always possible to find (or create) unpersuasive new

evidence. The new evidence must be convincing enough to mean that no reasonable juror would have voted to convict. This is the standard of Schlup v. Delo, 513 U.S. 298, 329 (1995), and it is the standard used at various points in the Streamlined Procedures Act. It is the only bar-overcoming "innocence" standard that makes sense. In her concurring opinion in Herrera v. Collins, 506 U.S. 390, 419-20, 426-27 (1993), Justice O'Connor, with Justice Kennedy concurring, stressed this point: If the "actual innocence" standard is too easy to meet, "the federal courts will be deluged with frivolous claims of actual innocence" by prisoners "who, refusing to accept the jury's verdict, demand[] a hearing in which to have [their] culpability determined once again." To avoid such a result, "[I]f the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case."

A couple of examples from my recent experience will, I hope, make the point more clear. First, there is a man named Raymond Smolsky who repeatedly molested and raped a five-year-old girl in Philadelphia about seventeen years ago. He filed a habeas petition in 2000, raising some claims that he had not properly presented to the state courts; but, he claimed, he was "innocent" and the victim had recanted, so he contended that everything was subject to more review. But the recantation was ambiguously worded; when we investigated, the victim – now a young woman – told us that the defense investigator had misled her. This investigator had not clearly identified herself as a member of the defense team; she had urged the victim to sign the statement while assuring her that Smolsky would remain in prison; and the statement (written by the defense) had been worded just ambiguously enough to make it sound as if Smolsky had not committed rape, when in fact he had. The victim was mortified when we told her that

she had signed a defense-prepared affidavit that was designed to get Smolsky out of prison.

Smolsky's strategy had been to manufacture evidence to qualify under the "actual evidence" standard; otherwise, his claims were barred. We were able to convince the court that this new "evidence" should be examined first by the state court, and the habeas petition is now stayed pending state court proceedings. In the meantime, the victim has been dragged back into the case. An easy-to-meet, defendant-friendly standard will encourage more of this kind of abuse.

Aaron Jones is another criminal who has tried to take advantage of the "actual innocence" standard to relitigate his case. Jones was the head of a notorious and violent Philadelphia drug gang, which was finally brought to justice after extensive federal and state investigations. Part of the problem was that this gang had a pattern of murdering witnesses (including other gang members) who would dare cooperate with authorities. Jones was finally, after much effort, convicted of murder and sentenced to death. After years of state court appeals and review, Jones filed a federal habeas petition with many completely new claims, and a request for wide-ranging discovery into state and federal files, including information about witnesses who are still in the witness protection program. We pointed out that many of his claims were unreviewable because they had not been properly presented to the state courts, and the discovery was thus unjustified. But Jones argued that he had made a claim of "actual innocence" which put everything back on the table. His evidence of innocence, however, was simply a re-hash of his earlier argument that the prosecution's witnesses were lying to curry favor with the

government. He simply hoped to obtain more discovery because he might discover something helpful that he hadn't found before.

As of this date, both state and federal authorities have provided yet more discovery in the Jones case. The district court recently stayed the case and sent Jones back to state court. If the state holds any of Jones' claims to be procedurally barred – for example, if they are late or waived – presumably Jones will trot out the same claims of innocence when he returns to federal court and seeks more review.

While it is important to protect the innocent, an "actual innocence" exception to various bars and deadlines is a potentially major loophole. It provides a continuing incentive to re-argue old facts, manufacture new evidence, and intimidate victims and witnesses. The "innocence" exception must be strict, and it must be guarded carefully.

Evading rules through allegations of "ineffective" counsel.

Perhaps the most common way of reviving waived claims, in both state and federal court, is through an allegation that defense counsel provided such incompetent representation as to violate the constitutional guarantee of effective counsel. Usually, the petitioner complains that his lawyer should have made an objection of some kind, but did not. Such claims turn on three inquiries: (1) How meritorious was the claim that wasn't raised? (2) Did the defense counsel have an understandable reason for not making the argument? And (3) Did the "omission" change the outcome of the trial? In federal habeas cases, these claims too often focus on the first prong (the merits of the waived

claim) without any consideration of the second or third (counsel's possible reasoning, and the prejudice to the defendant). In practice, that means that the waived claim gets reviewed as if it were properly preserved. Even more disturbingly, these allegations often involve issues of state law that the defense lawyer didn't raise – for example, an evidentiary objection, or a state rule of procedure – and the federal court simply converts itself into an arbiter of state law as it decides whether the foregone objection was meritorious.

Sometimes, the issue is even further confused by misapplication of the exhaustion rules. Some federal judges have held that where a prisoner has raised a claim of ineffectiveness in state court, this not only serves to exhaust the ineffectiveness claim, but the underlying issue as well, which can be freely reviewed on the merits by the federal court, as if the defense lawyer had actually made the objection. For example, see Veal v. Myers, 326 F.Supp.2d 612, 617 (E.D. Pa. 2004).

The only way to justify federal court adjudication of ineffectiveness claims, is to focus on counsel's conduct rather than the underlying allegation of error, and to recognize that exhaustion of an ineffectiveness claim is very different from proper preservation and exhaustion of the underlying claim. Otherwise, the federal court will routinely decide waived claims, and resolve state law issues, without a proper focus on the lawyer's conduct.

II. SECTION-BY-SECTION ANALYSIS OF HOW THE STREAMLINED PROCEDURES ACT WILL ADDRESS THESE PROBLEMS

SECTION 2: MIXED PETITIONS

This section sets out a new procedure for dealing with habeas petitions that contain both exhausted and unexhausted claims. The exhausted claims will be considered; the unexhausted claims will be dismissed with prejudice, meaning that they cannot be raised again in federal court absent extraordinary circumstances.

Under this provision, prisoners will no longer be able to obtain a stay to exhaust their claims that were never presented to the state courts, as I described in the previous section. They must, rather, abide by the statute of limitations. Further, this provision creates clear, negative consequences for prisoners who do not exhaust their claims before coming to federal court – thus ensuring that they will attempt to raise every claim in state court at the first opportunity, which is, after all, the goal of the exhaustion requirement.

This section also clarifies requirements for pleading exhaustion of state remedies. Under the new 2254(b)(1)(A)(i), the prisoner must clearly present the federal claim to state courts, and he must identify the stage of the state proceedings where he did so, in order to proceed on the claim in federal habeas. This will ensure that states actually have the chance to decide each and every federal claim the petitioner later presents to federal court – instead of having to guess what the prisoner might mean by vague references to "due process" or the like.

Finally, this provision sets out a standard of review for unexhausted claims that, nevertheless, ultimately qualify for federal review. These claims must be denied unless "the denial of relief is contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See Section 2254(b)(1)(B)(ii). This is the familiar AEDPA standard that elsewhere governs review of claims that have been decided by the state courts. (In several other sections of

the SPA, the same familiar standard is applied to other claims that qualify for federal review but were not decided by the state courts, either because they were never submitted, or were not submitted in accordance with state rules.) Applying this standard across the board ensures that petitioners who do not properly submit their claims to the state courts are not in a better position, with a more claimant-friendly standard of review, than prisoners who *do* properly submit their claims to the state courts. This standard also codifies a presumption of constitutionality: If reasonable minds can disagree over whether there was any error, then in deference to the states, the conviction will remain undisturbed.

SECTION 3: AMENDMENTS TO PETITIONS

This section of the Act provides a straightforward remedy to a common problem: Sometimes, petitioners who file timely habeas petitions later try to add more claims, after the one-year deadline has passed. Under this subsection, a petition may be amended once as a matter of course before the State files its response, and the one-year deadline passes. After that, no more amendments will be allowed, unless the prisoner meets the "actual innocence" standard. This is one more way to combat delay, and to require that the petitioner make all of his claims up front, in a timely manner.

SECTION 4: PROCEDURALLY DEFAULTED CLAIMS

This section addresses the various ways described above by which the federal courts can ignore state procedural defaults. It sets out one clear standard: If a claim has

been procedurally defaulted in state court, it will be barred from consideration in federal habeas unless it implicates meaningful evidence of actual innocence.

The enactment of this section would address the various evasions of default in several ways. First, the "inconsistent application" method of avoiding state procedural defaults would no longer be available. Federal courts would no longer be in a position to "grade" state procedural rules governing state convictions – the only way to overcome a default would be through a convincing showing of innocence. Second, states would be free to incorporate exceptions to their rules for miscarriages of justice, without running the risk that the federal court would find that the rule is no longer predictable or "independent" of federal law. Third, this section bars ineffectiveness-of-counsel claims that are derivative of defaulted claims, in order to prevent prisoners from avoiding the consequences of a state default by recasting the claim in ineffectiveness terms.

The message is clear – all federal claims must be properly exhausted in the state courts, in accordance with state rules, or the federal court will not hear it without a meaningful showing of innocence. Enactment of this provision will give back to the states the power to make and enforce their own procedural rules without undue federal interference.

SECTION 5: TOLLING OF LIMITATION PERIOD

These important provisions relate to the one-year habeas deadline enacted in 1996. Under the current § 2244(d)(2), that deadline is tolled while the prisoner pursues state collateral relief – specifically, the habeas clock stops while a "properly filed" state collateral petition is "pending." The proposed language clarifies several key points.

First, the habeas deadline is tolled only where the petitioner seeks review of federal claims that may later form the basis of a habeas petition; litigation of unrelated state claims do not extend the federal deadline. Second, this provision clearly limits tolling to the period where the claims are actually pending before a state court. If the prisoner's state petition is rejected by one court, and he waits awhile before appealing or otherwise challenging the decision, the time in-between is not "pending" and has no tolling effect. This would eliminate the phantom, make-believe period of "pendingness," when nothing is actually pending, that Judge Easterbrook criticized in Fernandez v. Sternes, 227 F.3d 977, 980 (7th Cir. 2000).

The third change is, I think, the most important. The new § 2254(d)(4) would limit the grounds for allowing tolling of the one-year habeas deadline to those grounds actually identified in the statute. This would curtail the enormous explosion of "equitable tolling" litigation. If the prisoner has new evidence, or relies on a new rule of law, or has been prevented from filing by government officials, or is properly pursuing state collateral review, the deadline is postponed or tolled. Otherwise, it is not tolled. This would prevent results like that in the Robert Graham case described above, where a costly battle of experts, and Graham's supposed inability to "trust" others to do his legal work, was enough for the prisoner to evade the deadline for years. It is also common sense, because presumably AEDPA means what it says, and if a ground for tolling does not appear in the statute then it should not be applied.

SECTION 6: HARMLESS ERROR IN SENTENCING

This provision is aimed at the particular problems arising from claims of state sentencing errors. This type of complaint can easily devolve into fact-intensive second-guessing about whether the alleged sentencing mistake made any difference. As the law currently stands, it is confusing – federal courts ask whether a state court's finding that the error could not reasonably have affected the sentencing was itself reasonable. In addition to creating a tangled, two-layered reasonableness review, this standard inevitably involves a subjective re-weighing of the facts.

The proposed new language replaces the fact-intensive inquiry with a legal inquiry: Rather than asking about the likely impact of the weight of the evidence on local juries, the new standard asks whether the error itself rises to the level of "structural" error. The Supreme Court has identified several kinds of "structural" errors that merit reversal without a harmlessness analysis. If the alleged sentencing error fits into this category, then relief may issue. If not, then a sentencing error that was determined by the state courts to have been harmless may not be second-guessed.

It is worth emphasizing that this section only applies to sentencing claims. Also, no one who asserts innocence of the underlying offense will see his options limited by this section. This section merely precludes a repeat of the state review process in federal court for sentencing errors that are not related to guilt of the underlying offense.

SECTION 7: UNIFIED REVIEW STANDARD

In 1997, the Supreme Court held that many of AEDPA's reforms would only apply to petitions filed after April 24, 1996. Lindh v. Murphy, 521 U.S. 320 (1997).

Even now, because sometimes habeas litigation is so drawn out, there are pending habeas petitions to which AEDPA does not fully apply. This section would eliminate the need to apply the pre-1996 regime to any claims still pending today.

SECTION 8: APPEALS

This section addresses the delays that often afflict habeas appeals, as described by my colleague Ronald Eisenberg in his testimony before the House subcommittee (a copy of which is attached). Subsection 8(a) sets clear, generous but firm deadlines. A court of appeals will be required to decide habeas appeals within 300 days of the completion of the briefing. The court of appeals must also decide whether to grant a petition for rehearing or rehearing *en banc* within 90 days. If a three-judge panel grants rehearing, it must decide the case within 120 days after the grant of rehearing. If the full court grants rehearing, it must decide the case within 180 days.

This section accomplishes two other things as well. Subsection 8(l)(1) provides that the State is automatically entitled to a stay of the judgment while it appeals the district court's grant of relief, which is sometimes the subject of unnecessary litigation. Subsection 8(b) bars courts of appeals from rehearing successive petition applications on their own motion. Current law bars petitioners from seeking rehearing of denials of such petitions, but some courts have concluded that they have the power to rehear these applications *sua sponte*. This provision closes the loophole.

SECTION 9: CAPITAL CASES

The AEDPA habeas reforms included a set of comprehensive provisions governing capital cases. See Chapter 154, Title 28. These provisions included special time requirements, tolling rules, and strict standards of review. The section also required the States to meet certain requirements, regarding standards for defense counsel, as a prerequisite to qualify for these special rules. The problem is, as of now the court that decides whether a State is eligible for Chapter 154 is the same court that would be subject to its various limits; not surprisingly, these courts have been reluctant to grant such eligibility.

The proposed subsection fixes this problem by placing the eligibility decision in the hands of the U.S. Attorney General, with review of his decision in the D.C. Circuit. In addition, the new provision grants district courts more time to review these capital petitions (15 months, instead of 6 months), and limits relief to claims implicating meaningful evidence of actual innocence.

SECTION 10: CLEMENCY AND PARDON DECISIONS

State clemency proceedings are an important "fail-safe" for catching fundamental errors and protecting the innocent. Formalized clemency procedures ensure that prisoners have better access to these mechanisms. Nevertheless, some prisoners have brought challenges to state clemency procedures in federal court, once again creating a perverse incentive for states to have any formal procedure at all. No one benefits from this result. This section bars lower federal courts from entertaining these challenges, and

ensures that states will not be discouraged by the threat of litigation from formalizing and codifying their clemency procedures.

SECTION 11: EX PARTE FUNDING REQUESTS

Current law allows capital prisoners to request funds for their habeas litigation *ex parte* – that is, without the presence of the prosecution. This practice can create bias in the judge who hears the request (who does not hear the prosecution's side of the story) and sometimes results in funding for claims that have been waived or defaulted – because if the prosecution is not present, these objections cannot be made. This section bars *ex parte* requests, except to the extent necessary to protect attorney-client privilege. It also requires that the judge who hears the funding request not be the same judge who ultimately hears the petition.

SECTION 12: CRIME VICTIMS' RIGHTS

Because federal habeas petitions are often so far removed in space and time from the state proceedings – let alone the crime itself – the rights of victims are undervalued, and their views are too often disregarded. This section extends to crime victims in habeas proceedings for state convictions the same rights made available last year to victims in federal prosecutions under the Crime Victims' Rights Act of 2004. These rights include the right to be present at court proceedings and the right to be notified of developments in a case.

SECTION 13: TECHNICAL CORRECTIONS

Subsection (a) of section 13 fixes a drafting error in the 1996 Act, concerning who has the authority to issue a certificate of appealability when a habeas petition is denied by the district courts. Section 2253 currently states that these certificates can be issues by a "circuit justice or judge," and the new language would replace this with "district or circuit judge." This change will not work a substantive change in the law, because the courts have been applying the law as if the new language were already included.

Subsection (b) designates the various paragraphs of section 2255, governing postconviction review for Federal prisoners, as subsections, thus making this rather long provision easier to navigate and cite.

SECTION 14: APPLICATION TO PENDING CASES

This section makes the changes of the Streamlined Procedures Act applicable to defendants who already have initiated federal habeas petitions. Although habeas corpus is a civil proceeding, and any changes to civil proceedings generally apply to pending cases, this is not the result reached by the Supreme Court when AEDPA was enacted. See Lindh v. Murphy, 521 U.S. 320 (1997) (AEDPA reforms do not apply to cases pending at time of enactment). This section would prevent a similar result here, and ensure that the normal rules of construction would apply. The section also provides that if any deadline imposed by the proposed legislation would run from an event that preceded the Act's enactment, the deadline will be shifted to run instead from the date of enactment.

CONCLUSION

The various sections of the Streamlined Procedures Act address some real problems in the current practice of federal habeas corpus. I urge the Committee to give it careful consideration and to support its reforms. Thank you.

Mr. COBLE. Thank you, sir.

Mr. Cattani, you are recognized for 5 minutes.

TESTIMONY OF KENT CATTANI, CHIEF COUNSEL, CAPITAL LITIGATION SECTION, ARIZONA ATTORNEY GENERAL'S OFFICE, PHOENIX, AZ

Mr. CATTANI. Thank you.

Thank you, Mr. Chairman, Members of the Committee.

The AEDPA has not solved the problem of excessive delay in Federal habeas proceedings, particularly in capital cases in Arizona. We have had 9 years under the AEDPA. Delay in capital cases has increased rather than decreased. The chart that is attached to my written statement shows how long Arizona's capital cases have been pending in Federal Court; 63 Arizona capital cases have been filed and remain pending since the effective date of the AEDPA. Of those cases, only one has advanced to the Ninth Circuit where it has remained pending for the past 9.5 years. The case that moved on to the Ninth Circuit was filed in 1996. Ten cases were filed in 1997. They were all awaiting rulings in District Court. 16 more were filed in 1998, and all of them have yet to be resolved.

Some of our pre-AEDPA cases have remained pending for over 19 years in Federal Court. We have one case that is still pending in the Ninth Circuit in which the defendant, Robert Comer requested over 5 years ago that his Federal appeal be withdrawn. Comer, who committed murder and rape in 1987, has acknowledged responsibility for his crimes and has repeatedly indicated a desire to waive his Ninth Circuit appeal.

The Ninth Circuit ordered an evidentiary hearing at which Comer's habeas attorneys argued, over Comer's objection, that he was incompetent. Additional counsel, a highly respected defense attorney in Phoenix, was appointed to represent Comer's interests. After an evidentiary hearing in District Court, Comer was found to be competent. The appeal of the District Court ruling that Comer is competent nevertheless remains pending in the Ninth Circuit. Again, it has been more than 5 years since Comer's initial request that he be permitted to withdraw his appeal.

The delay that we encounter in Arizona capital cases is particularly frustrating given the system that we have set up in Arizona to protect the rights of criminal defendants. We have no interest in executing or even incarcerating an innocent person. We take very seriously our role as prosecutors, and we have created a system that provides multiple opportunities to establish claims of innocence.

In capital cases, since 1993, we appoint two highly qualified attorneys to represent the defendant at the trial stage. We appoint yet another highly qualified attorney to represent the defendant on appeal. We appoint another qualified attorney to represent the defendant at the post-conviction stage. The State appellate process includes an automatic appeal to the Arizona Supreme Court with the option to appeal that ruling to the United States Supreme Court. The post-conviction relief process similarly provides an opportunity to appeal to the Arizona supreme court as well as the United States Supreme Court.

Additionally, a defendant can pursue successive post-conviction proceedings to raise claims that the law has changed or that there is newly discovered evidence that would have affected his trial or sentence. State funds are made available for DNA testing whenever it is warranted, including for retesting when DNA technology improves.

We even have a free-standing actual innocence provision in our post-conviction rules. That is rule 32.1(h) of the Arizona rules of criminal procedure which authorizes a successive post-conviction proceeding to raise claims of actual innocence even if the claim could have been raised earlier if the defendant had been diligent.

The fact that there is a free-standing actual innocence provision for Arizona defendants in State courts is particularly significant in my view because its availability shows that the Federal habeas process involving Arizona cases is about something other than guilt or innocence. Federal habeas review may serve a purpose, but that purpose is not to provide a forum for asserting claims of actual innocence for Arizona defendants.

One of the key provisions of the AEDPA is what is known as the opt-in provision. That provision was designed to accelerate Federal habeas review in capital cases on the condition that a State establish a mechanism to provide for the appointment of competent counsel at the post-conviction stage. We anticipated that if those provisions were applied in Arizona, the Federal process would be shortened to approximately 3 years. The theory underlying the opt-in provisions was that if you ensure competent representation in State courts, there is less of a need for lengthy Federal habeas proceedings.

Arizona responded to the AEDPA by enacting new standards for the appointment of counsel in post-conviction proceedings. Attorneys have to meet specific criteria to be eligible to be on a list of qualified counsel that is maintained by the Arizona Supreme Court. In 21 cases in which counsel have been appointed from the list maintained by the Arizona Supreme Court, the State has thus far expended over $1 million to represent these defendants in capital post-conviction proceedings. In some cases, the State has paid in excess of $100,000 in attorney's fees and costs for these post-conviction proceedings.

Nevertheless, we have not been able to opt-in. And there are no States who have opted in under the AEDPA. Why haven't we opted in? We attempted to do that in the Anthony Spears case several years ago. The Ninth Circuit ruled that the standards that we have adopted for the qualification levels for attorneys who handle post-conviction proceedings are satisfactory. The court refused to allow us to opt-in however because there had been a 20-month delay in appointing counsel to represent Spears in the post-conviction proceeding. The delay was caused primarily because defense lawyers initially boycotted the process.

We argued in Federal Court that the 20-month delay did not prejudice Mr. Spears, and in fact, in the State proceeding, Mr. Spears' counsel never asserted that the delay had created any kind of impediment to raising claims in that proceeding. In our view, Spears received the benefit of the opt-in provisions, but the State was denied the corresponding benefit.

We do not claim to have a perfect system in Arizona. I see my time is up. I just have maybe 1 minute. We do not claim to have a perfect system in Arizona. We have, in fact, had two DNA exonerations in Arizona. Significantly, however, those exonerations were a result of State court proceedings. Neither of the defendants who were exonerated had ever set foot in Federal Court. Our frustration with the Federal habeas process is that it does not recognize the improvements that have been made to the criminal justice system.

The people in Arizona and particularly the victims of violent murders deserve a better Federal review process. The current review process is not working. I urge your careful consideration of the proposed amendments to the habeas statute. Thank you.

[The prepared statement of Mr. Cattani follows:]

PREPARED STATEMENT OF KENT E. CATTANI

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which was intended to restrict the scope of federal habeas review and limit delay in federal habeas proceedings. After 9 years under the AEDPA, it is clear that the Act did not reduce the problem of delay. As evidenced by Attachment A, a chart of Arizona capital cases currently pending in federal court, 63 Arizona capital cases have been filed and remain pending since the effective date of the AEDPA. Of those cases, only one has advanced to the Ninth Circuit, where it has remained pending for the past 5½ years. Thirteen pre-AEDPA cases remain pending in federal court; five of those cases have been in federal court longer than 15 years; the others range in time from 9.33 years to 14.08 years.

The AEDPA contained provisions intended to restrict federal court consideration of claims not properly raised in state court. Additionally, the AEDPA included a provision—specific to capital cases—designed to accelerate the federal habeas process on the condition that states opt-in by enacting procedures to ensure effective representation of indigent defendants in state post-conviction relief (PCR) proceedings. Under the opt-in provision, the federal habeas process would be reduced to approximately three years by virtue of accelerated briefing schedules and a requirement that the federal courts rule on the claims raised within specified periods of time. The rationale underlying the opt-in provisions is that when more experienced attorneys represent death row inmates throughout the state court process, there is less need for a lengthy federal review.

After the AEDPA was enacted, the Arizona Legislature and the Arizona Supreme Court amended Arizona's system for appointing and compensating PCR counsel to meet the opt-in requirements. Arizona previously provided PCR counsel to all indigent capital defendants, and under the amended system, that provision remains and requires the appointment of an attorney who did not represent the defendant at trial or sentencing. Arizona enacted mandatory competency standards for attorneys who apply to be placed on a list of available counsel for capital PCR proceedings. There is an objective measure relating to bar status, continuing legal education, and years of experience as a lawyer and in practicing in the area of criminal appeals or post-conviction proceedings. There is also a subjective requirement that the attorney have "demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases."

In addition to provisions to ensure qualified counsel for PCR proceedings, Arizona already had in place a system to try to ensure qualified counsel at the trial stage. Since 1993, Arizona has required the appointment of two highly qualified attorneys in every case in which the State notices its intent to seek the death penalty. The requirements for lead trial counsel include practice in the area of state criminal litigation for 5 years immediately preceding the appointment, having been lead counsel in at least 9 felony jury trials tried to completion; and having been lead counsel or co-counsel in at least one capital-murder jury trial. There are additional legal education requirements and the same subjective requirement mandated for PCR counsel—that counsel shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital case. Additionally, Arizona provides extensive funding for mitigation specialists and expert witnesses at both the trial and post-conviction stages. Multiple expert witnesses and intensive mitigation investigation are routinely utilized in capital cases throughout the state.

Since 2002, Arizona has spent more than 1 million dollars for PCR representation in 21 cases. Many of those cases are in the early stages of the post-conviction process, and will result in significantly higher expenditures by the state and local government. Of the cases that have completed the post-conviction process, the expenditures have ranged between $25,000 and $138,000 for each case, with the median figure of approximately $64,000.

Prior to the clarification regarding compensation, there were only 6 attorneys on the list of qualified PCR counsel and a backlog formed of about 15 capital defendants who were ready to pursue PCR proceedings and were awaiting appointment of qualified counsel. In those cases, it took between one to two years to appoint counsel. More attorneys eventually applied for the list, and there are currently 4 Arizona cases pending at the PCR stage where the attorney was appointed without delay.

The first case that went through the state post-conviction process with an attorney appointed under the opt-in provision requirements was that of Anthony Spears, who was sentenced to death in 1992. In *Spears v. Stewart,* the district court denied Arizona's request that the case be treated as an opt-in case, and certified the opt-in issue to the Ninth Circuit for an interlocutory appeal. The Ninth Circuit held that Arizona's mechanism for appointment of counsel for indigent capital defendants in post-conviction proceedings meets the requirements of the AEDPA and qualifies for opt-in status. 283 F.3d 992 (9th Cir. 2002). However, the court held that the opt-in procedures could not be invoked in *Spears* because there had been a 20-month delay before counsel had been appointed in the state post-conviction proceeding. *Id.*

The ruling that the opt-in mechanism will not be applied in the *Spears* case or in any other case in which there has been a delay in appointing post-conviction counsel is frustrating. The delay in appointing counsel did not prejudice Spears. His post-conviction counsel never argued that the 20-month delay in appointment affected his ability to pursue the claims Spears raised in his post-conviction proceeding. Although Spears was given every advantage contemplated under the AEDPA opt-in provisions, the State has been denied the corresponding benefits to which it is entitled.

The holding in *Spears* places undue emphasis on what is essentially an arbitrary date. There is no set time line for any criminal case. Sometimes there is a delay between the date of the crime and the date of the arrest. Sometimes there is delay prior to trial, or delay during the trial or state appellate process. If, for example, there had been a delay in preparing transcripts for the appeal, or if the Arizona Supreme Court had taken additional time to resolve Spears' direct appeal, the PCR proceeding might have commenced on or about the same date even without delay in appointing counsel. Again, there was no suggestion that the delay in appointment of counsel prejudiced Spears' case. In my view, Arizona should have been deemed to have opted in to the accelerated provisions for capital cases.

That fact that Arizona has attempted to opt-in to the accelerated provisions of the AEDPA for capital cases does not signify an intent to foreclose a defendant's efforts to establish innocence. We have no interest in executing or even incarcerating an innocent person. We believe, however, that our state court system provides the necessary means to address claims of innocence, and that the federal habeas process does not measurably increase the likelihood that innocent persons will be vindicated.

The Arizona Rules of Criminal Procedure place no limitation on a defendant's ability to raise claims relating to newly discovered evidence or retroactive application of new substantive rules, and we permit DNA testing and retesting (as technology improves) at state expense any time there is evidence that may establish innocence. We have a specific rule of criminal procedure that exempts from the rules of preclusion any evidence that would establish that the defendant did not commit the crime or should not have been subjected to the death penalty. Thus, it is hard to fathom a claim of innocence for which an Arizona defendant would not be granted relief in state court, but which would entitle the defendant to federal habeas relief.

The best way to improve our criminal justice system is to ensure that quality representation and adequate resources are made available for the main event—the trial and sentencing proceedings. We are trying to do that in Arizona, and we have a system that provides defendants in capital cases with two highly qualified attorneys at trial, another highly qualified attorney to handle a direct appeal, and yet another highly qualified attorney to handle state post-conviction proceedings. The direct appeal process includes review by the Arizona Supreme Court (whose members are appointed through a merit selection process) and the United States Supreme Court, and the post-conviction process permits review not only by the original trial court, but again by the Arizona Supreme Court and the United States Supreme Court. That same type of review is also available for successive post-conviction relief pro-

ceedings, where a defendant seeks to raise claims of newly-discovered evidence, change in the law, or freestanding claims of innocence.

Providing this level of review at the state court level should decrease the number of meritorious claims that are presented in federal court (since federal habeas review permits only claims that have first been presented in state court). Nevertheless, during the past 10 years, we have seen an *increase* in the number of claims that are being raised in federal court and an increase in delay in federal court. That delay has prejudiced the state's and crime victims' interest in fairness and the finality of state court judgments, and has decreased public confidence in the criminal justice system.

An Arizona capital case, *Smith v. Stewart,* 241 F.3d 1191 (2001), provides an example of why habeas reform is needed. In *Smith,* the state courts rejected a claim of ineffective assistance of sentencing counsel (raised in Smith's third post-conviction proceeding) on the basis of a state procedural bar. The federal district court rejected the claim on the basis of procedural default, but the Ninth Circuit reversed, holding that the state procedural default ruling was intertwined with a merits ruling. The Ninth Circuit reasoned that, because a Comment to Arizona's procedural rules noted that for some issues of significant constitutional magnitude, the state must show a knowing, voluntary, and intelligent waiver by the defendant, Arizona's procedural default rule necessarily required a merits ruling on every defaulted claim. Arizona argued that the comment suggested only the need for an on-the-record waiver of certain types of claims, including the right to counsel or the right to a jury trial. The Ninth Circuit rejected the State's argument, as well as its request that the court certify a question to the Arizona Supreme Court to clarify whether a procedural default ruling necessarily encompassed a merits ruling. Arizona filed a certiorari petition in the United States Supreme Court, which reversed the Ninth Circuit's ruling.

Although the State ultimately prevailed in the United States Supreme Court, the victory simply returned the parties to where they were two years earlier. In the meantime, every other case involving a procedural bar imposed by an Arizona court was similarly delayed pending resolution of *Smith* in the United States Supreme Court.

Smith's federal habeas proceeding has been pending since 1994. The district court denied relief in 1996, and the case has been in the Ninth Circuit since then. Most recently, the Ninth Circuit ordered a stay to allow Smith to pursue a jury trial in state court on the issue of mental retardation, even though Smith had never raised a claim of mental retardation in state court or in the federal district court. Arizona filed a certiorari petition in the United States Supreme Court challenging that ruling. In October of this year, the United States Supreme Court again reversed the Ninth Circuit. In the meantime, proceedings had been initiated in state court to assess whether Smith is mentally retarded, and a court-appointed psychologist administered an IQ test on which Smith scored in the average range, which precludes a finding of mental retardation. The case, involving a 1982 conviction of first-degree murder, kidnapping, and sexual assault, remains pending in the Ninth Circuit.

In *Cassett v. Stewart,* 406 F.3d 614 (9th Cir. 2005) (a non-capital case), the federal courts recently added another impediment to resolution of procedurally defaulted claims. Cassett never raised the claim at issue in state court (an alleged due process violation unrelated to guilt or innocence), and the district court found the claim to be precluded in a federal habeas proceeding. The Ninth Circuit reversed, however, ruling that because there has not been a ruling of preclusion by a state court, the case should not be dismissed and Cassett should be given an opportunity to return to state court to raise the claim. If the rule in *Cassett* is applied in capital cases, an already delayed process will be delayed even further to allow defendants to return to state court to try to litigate procedurally defaulted claims never raised in state court. As with the *Smith* case, Arizona is seeking further review of *Cassett* by the United States Supreme Court.

In addition to *Smith,* there are several other examples of capital cases that demonstrate extensive delay in the federal habeas process:

Joseph Lambright

Lambright was Smith's co-defendant, and was similarly convicted and sentenced to death in state court in 1982. In 2004, the Ninth Circuit ordered an evidentiary hearing on a procedurally defaulted claim that Lambright's counsel had failed to investigate as possible mitigation the possibility that Lambright suffered from post-traumatic stress disorder based on his combat experiences in Viet Nam.

At the evidentiary hearing held last year in federal district court, the State established that Lambright was never in combat in Viet Nam; he was a mechanic who was never involved in a combat situation. The friend who Lambright claimed to

have held in his arms after the friend was sawed in half by enemy fire, is in fact alive and well in Florida. The case remains pending in the Ninth Circuit; the only issue now before it is the propriety of the district court's ruling that Lambright did not establish that his counsel was ineffective for failing to assert post-traumatic stress disorder as a mitigating circumstance.

Michael Corrrell

Correll was convicted in 1984 of first degree murder in a triple homicide case. The trial court sentenced Correll to death after finding four aggravating factors beyond a reasonable doubt: that Correll committed the offense in expectation of pecuniary gain, that the murders were committed in an especially cruel, heinous or depraved manner and multiple homicides. Correll's federal habeas proceeding has been pending since 1987. The district court denied habeas relief in 1995. However, the Ninth Circuit ordered an evidentiary hearing regarding whether counsel was ineffective at sentencing.

At the evidentiary hearing held in 2003, Correll called fourteen witnesses during the hearing including the original trial attorney, a mitigation specialist, a neuropsychologist, a psychiatrist and addictionologist, a toxicologist, and several of Correll's family members and friends. The State responded that if Correll had provided this alleged mitigation evidence to the trial court, it would have opened the door for the State to present powerful rebuttal evidence, including evidence of Correll's rape of a female psychiatric patient while he was undergoing treatment for his antisocial personality disorder, Correll's repeated sexual assaults against his sister while living at home, Correll's numerous escape attempts from mental health facilities, and Correll's participation in a number of armed robberies with this thirteen year old brother and fifteen year old girlfriend.

In March 2003, the district court denied Correll his requested relief, finding that Correll did not suffer any prejudice as a result of his counsel's deficient performance. The district court held that, "after all of the evidence that [trial counsel] could have obtained and presented has been reviewed, it is clear that the rebuttal and non-mitigating aspects of such evidence overwhelms any slight mitigation evidence."

Correll immediately appealed that ruling to the Ninth Circuit, and the case has remained pending in that court since then. Thus, the case has been pending in federal court for 18 years.

Jasper McMurtrey

The federal district court ordered an evidentiary hearing regarding whether the state trial court should have conducted a competency evaluation of capital defendant McMurtrey. The state court held an evidentiary hearing in 1994, after which the trial judge, who had presided over McMurtrey's trial, found that McMurtrey had been competent during trial. The district court nevertheless granted federal habeas relief, finding that there was not enough evidence from which the trial judge could reach the conclusion that McMurtrey was competent during trial, even though the evidence included the trial judge's own recollection of what happened. Arizona is seeking further review of that ruling.

The common thread in these cases is not only excessive delay in federal court, but an absence of any allegation of factual innocence. The federal habeas process is not accomplishing its intended purpose in these and many other cases and is in fact undermining public respect for the criminal justice system.

Length of Time Arizona Capital Cases Have Been Pending in Federal Courts

(As of 11/10/2005 10:08 AM)

Defendant's Name	Current Case #	Date Filed in District Court	Date Filed in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Total Time in District Court	Total Time in 9th Circuit	Total Years Spent in Federal Court
Summerlin, W.W. *	Circuit No. 98-99002	4/11/1986	3/18/1998					11 y 11 m	7 y 8 m	19.58
Smith, Rbt. D. **	Circuit No. 96-99026	4/14/1987	12/31/1996					9 y 8 m	8 y 11 m	18.58
Lambright, J.L.	Circuit No. 04-99010	4/14/1987	10/9/1996	5/25/2001	12/1/2004			13 y 1 m	5 y 6 m	18.58
Correll, M.E.	Circuit No. 03-99006	9/15/1987	7/7/1993	6/1/1998	5/20/2003			10 y 9 m	7 y 5 m	18.17
McMurtrey, J.N.	Circuit No. 0-99002	12/19/1988	3/26/2003					14 y 3 m	2 y 8 m	16.92
Moormann, R.H.	Circuit No. 00-99015	7/11/1991	10/30/2000					9 y 3 m	5 y 1 m	14.33
Beaty, D.E.	Circuit No. 00-99007	11/6/1992	4/6/2000	12/8/2002	11/2/2005			10 y 4 m	2 y 8 m	13.00
Comer, R.C.	Circuit No. 98-99003	7/19/1994	3/18/1998	6/9/2000	6/24/2002			5 y 8 m	5 y 8 m	11.33
Williams, R.T.	Circuit No. 01-99015	8/15/1995	8/21/2001					6 y 0 m	4 y 3 m	10.25
Washington, T.	CV-95-246-PHX-JAT	11/9/1995						10 y 0 m	N/A	10.00
Salazar, A.R.	CV-96-085-TUC-FRZ	2/5/1996						9 y 9 m	N/A	9.75
Robinson, F.L.	CV-96-669-PHX-JAT	3/14/1996						9 y 8 m	N/A	9.67
Rossi, R.M.	Circuit No. 01-99010	4/23/1996	7/13/2001					5 y 3 m	4 y 4 m	9.58
Landrigan, J.T.	Circuit No. 00-99011	10/16/1996	5/8/2000					3 y 7 m	5 y 6 m	9.08
Cook, D.W.	CV-97-146-PHX-SMM	1/24/1997						8 y 10 m	N/A	8.83
Schurz, E.M.	CV-97-580-PHX-EHC	3/20/1997						8 y 8 m	N/A	8.67
Lopez, G.M.	CV-97-244-TUC-WDB	3/17/1997						8 y 8 m	N/A	8.67
Nash, V.L.	CV-97-1104-PHX-RGS	5/19/1997						8 y 6 m	N/A	8.50
Ramirez, D.M.	CV-97-1331-PHX-JAT	6/26/1997						8 y 5 m	N/A	8.42
Apelt, R.	CV-97-1249-PHX-ROS	6/12/1997						8 y 5 m	N/A	8.42
Williams, A.	CV-97-1239-PHX-PGR	6/10/1997						8 y 5 m	N/A	8.42
Scott, R.M.	CV-97-1554-PHX-PGR	7/25/1997						8 y 4 m	N/A	8.33
Libberton, L.K.	CV-97-1881-PHX-EHC	9/9/1997						8 y 2 m	N/A	8.17
Schad, E.H.	CV-97-2577-PHX-ROS	12/16/1997						7 y 11 m	N/A	7.92
Greenway, R.M.	CV-98-0025-TUC-WDB	1/14/1998						7 y 10 m	N/A	7.83
Spencer, C.L.	CV-98-0068-PHX-SRB	1/13/1998						7 y 10 m	N/A	7.83
Lopez, S.V.	CV-98-0072-PHX-SMM	1/13/1998						7 y 10 m	N/A	7.83
Milke, D.J.	CV-98-0060-PHX-RCB	1/12/1998						7 y 10 m	N/A	7.83
Wood, J.	CV-98-053-TUC-JMR	2/3/1998						7 y 9 m	N/A	7.75
Atwood, F.J.	CV-98-116-TUC-JCC	3/12/1998						7 y 8 m	N/A	7.67
Stanley, M.	CV-98-0430-PHX-MHM	3/9/1998						7 y 8 m	N/A	7.67
Apelt, M.	CV-98-0882-PHX-ROS	5/14/1998						7 y 6 m	N/A	7.50
West, T.P.	CV-98-218-TUC-FRZ	5/6/1998						7 y 6 m	N/A	7.50

ATTACHMENT

Length of Time Arizona Capital Cases Have Been Pending in Federal Courts

(As of 11/10/2005 10:08 AM)

Defendant's Name	Current Case #	Date Filed in District Court	Date Filed in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Total Time in District Court	Total Time in 9th Circuit	Total Years Spent in Federal Court
King, E.J.	CV-98-1277-PHX-RCB	7/14/1998						7 y 4 m	N/A	7.33
Stokley, R.D.	CV-98-332-TUC-FRZ	7/14/1998						7 y 4 m	N/A	7.33
Runningeagle, S.B.	CV-98-1903-PHX-PGR	10/21/1998						7 y 1 m	N/A	7.08
Bible, R.L.	CV-98-1859-PHX-PGR	10/15/1998						7 y 1 m	N/A	7.08
Gulbrandson, D.	CV-98-2024-PHX-SMM	11/6/1998						7 y 0 m	N/A	7.00
Styers, J.L.	CV-98-2244-PHX-EHC	12/16/1998						6 y 11 m	N/A	6.92
Hooper, M.	CV-98-002164-SMM	12/1/1998						6 y 11 m	N/A	6.92
Hinchey, J.A.	CV-99-0798-PHX-ROS	4/30/1999						6 y 7 m	N/A	6.58
Murray, Robert	CV-99-1812-PHX-DGC	10/8/1999						6 y 1 m	N/A	6.08
Gonzales, E.V.	CV-99-2016-PHX-SMM	11/15/1999						6 y 0 m	N/A	6.00
Walden, R.L.	CV-99-00559-TUC-RCC	11/10/1999						6 y 0 m	N/A	6.00
Medrano, A.M.	CV-9900-603-TUC-JMR	12/14/1999						5 y 11 m	N/A	5.92
Kemp, T.	CV-00-00050-TUC-FRZ	1/21/2000						5 y 10 m	N/A	5.83
Hurles, R.D.	CV-00-0118-PHX-SMM	1/21/2000						5 y 10 m	N/A	5.83
James, S.C.	CV-00-1118-PHX-SMM	6/9/2000						5 y 5 m	N/A	5.42
Spears, A.M.	CV-00-1051-PHX-SMM	6/1/2000						5 y 5 m	N/A	5.42
Rogovich, P.C.	CV-00-1896-PHX-ROS	10/5/2000						5 y 1 m	N/A	5.08
Jones, D.L.	CV-01-0384-PHX-SRB	2/28/2001						4 y 9 m	N/A	4.75
Dickens, G.	CV-01-757-PHX-SMM	4/27/2001						4 y 7 m	N/A	4.58
Gallegos, M.S.	CV-01-1909-PHX-ROS	10/5/2001						4 y 1 m	N/A	4.08
Lee, C.A. (D)	CV-01-2178-PHX-EHC	11/6/2001						4 y 0 m	N/A	4.00
Lee, C.A. (R & L)	CV-01-2179-PHX-EHC	11/6/2001						4 y 0 m	N/A	4.00
Jones, B.L.	CV-01-00592-TUC-FRZ	11/6/2001						4 y 0 m	N/A	4.00
Miles, K.	CV-01-00645-TUC-RCC	12/11/2001						3 y 11 m	N/A	3.92
Hedlund, C.	CV-02-0110-PHX-SMM	1/18/2002						3 y 10 m	N/A	3.83
Djerf, R.K.	CV-02-0358-PHX-JAT	2/27/2002						3 y 9 m	N/A	3.75
Spreitz, C.J.	CV-02-00121-TUC-CKJ	3/8/2002						3 y 8 m	N/A	3.67
Henry, G.S.	CV-02-0656-PHX-SRB	4/10/2002						3 y 7 m	N/A	3.58
Doerr, E.	CV-02-0582-PHX-SMM	4/3/2002						3 y 7 m	N/A	3.58
Towery, R.C.	CV-03-00826-PHX-MHM	4/30/2003						2 y 7 m	N/A	2.58
Detrich, D.S.	CV-03-00229-TUC-DCB	4/29/2003						2 y 7 m	N/A	2.58
McKinney, J.	CV-03-00774-PHX-DGC	4/24/2003						2 y 7 m	N/A	2.58
Murray, Roger	CV-03-775-PHX-DGC	4/24/2003						2 y 7 m	N/A	2.58

Length of Time Arizona Capital Cases Have Been Pending in Federal Courts

(As of 11/10/2005 10:08 AM)

Defendant's Name	Current Case #	Date Filed in District Court	Date Filed in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Date Remanded to DC	Date Refiled in 9th Circuit	Total Time in District Court	Total Time in 9th Circuit	Total Years Spent in Federal Court
Mann, E.O.	CIV-03-00213-TUC-CKJ	4/23/2003						2 y 7 m	N/A	2.58
Schackart, R.	CV-03-00287-TUC-DCB	5/30/2003						2 y 6 m	N/A	2.50
Rienhardt, C.B.	CV-03-00290-PHX-DCB	5/30/2003						2 y 6 m	N/A	2.50
Jones, R.G.	CV-03-00478-TUC-DCB	9/18/2003						2 y 2 m	N/A	2.17
Smith, T.	CIV 03-1810-PHX-SRB	9/17/2003						2 y 2 m	N/A	2.17
Clabourne, S.D.	CV-03-00542-TUC-RCC	10/29/2003						2 y 1 m	N/A	2.08
Greene, B.J.	CV-03-00605-TUC-FRZ	12/5/2003						1 y 11 m	N/A	1.92
Lee, D	CV-04-00039-PHX-MHM	1/9/2004						1 y 10 m	N/A	1.83
Poyson, R.A.	CV-04-00534-PHX-NVW	3/17/2004						1 y 8 m	N/A	1.67
Van Adams, J	CV-04-01359-PHX-MHM	7/1/2004						1 y 4 m	N/A	1.33
Martinez, E.S.	CV-05-015615-PHX-EHC	5/25/2005						0 y 6 m	N/A	0.50

* The time includes appeal to the United States Supreme Court to correct Ninth Circuit decision. *See Schriro v. Summerlin*, 542 U.S. 348 (2003)

** The time includes appeal to the United States Supreme Court to correct Ninth Circuit decision. *See Stewart v. Smith*, 536 U.S. 856 (2002)

Mr. COBLE. I thank you, Mr. Cattani.

Ms. Killian, even though you are not a witness, the Subcommittee is pleased to welcome you at this hearing. It is good to have you here.

Ms. Hughes you are recognized for 5 minutes.

TESTIMONY OF MARY ANN HUGHES, CHINO HILLS, CA

Ms. HUGHES. Thank you, Mr. Chairman and Members of the Subcommittee.

I have come here today to talk to you about the tragedy that my family has gone through for the last 22 years. The last time that I saw my son Christopher, he had asked permission to spend the night at a friend's house, and he and Josh Ryen were on their bikes riding up the road turning around waving, laughing. I'll forever blame myself for sending my son to that house. The next time I saw him was an autopsy picture at a 16-week preliminary hearing.

The next day, when Chris didn't come home in time for church, I sent my husband out to the horror that he has to live with the rest of his life, the nightmares that he has to have. He found Doug and Peg Ryen dead in their bedroom, 10-year-old Jessica dead in the hallway with multiple stabs and hack marks. The killer had actually pulled up her nightgown and carved on her chest after she was dead. He found 8-year-old Josh in his parents' bedroom, his throat slit from ear to ear, his fingers at his throat to keep himself from bleeding to death, and he had laid there for over 12 hours staring at the naked dead body of his mother.

Last of all, he found our son Christopher only 11 years old, our oldest child, dead on the floor in the master bedroom by a door, obviously trying to get out, away from the killer. He had more than 25 wounds made by a hatchet and a knife. Many of them were defensive wounds to his hands. He had tried to fight off his killer but to no avail.

The person arrested for these crimes was a man who had escaped from the Chino prison under the name of David Trautman. It was found afterwards that they had mishandled the outstanding warrants and who they actually had there was someone wanted back east by the name of Kevin Cooper for a robbery and for a rape.

He raped a young girl who happened to interrupt him when he was robbing a house, someone who was at the wrong place at the wrong time. He raped her with a screw driver to her throat. He was caught in the Channel Islands near off Santa Barbara raping a woman on a boat. Two years later, we had a guilty verdict, and we had a death penalty.

We waited for the system of justice to work for us, our son and for the Ryen family. Mostly, we were silent as almost every year it came up in the papers, on the TV, on the radio, that it always seemed that these would coincide with special dates, Christmas, my son's birthday in December, Father's Day, Mother's Day.

Finally, in 2004, we were told that an execution date had been set, February 10, ironically another date, my birthday.

We were naive to think at that time that the system was finally going to work for us and for our son and for the Ryens.

It didn't really matter that Kevin Cooper was guilty. The defense saw fit to weave another fantasy. We were now going to blame the police and the district attorneys. They planted all the evidence. Kevin Cooper wasn't guilty. He was just framed.

He became the poster child for a group of celebrities, religious leaders, political—politicians. The object was to stop the death penalty in California. Where was someone speaking out for our son and for the Ryens? We had no celebrity, no politician, no religious leader. No one was there for us, and we quickly realized that if Christopher was going to have a voice, it was going to have to be us.

We proceeded to talk to any newspaper, radio, television program, anyone who would hear us cry out for justice for our son. This, evidently, was unusual. Evidently, victims don't fight. Evidently, we are quiet. We are beat down, and we don't speak up for ourselves. We went up to San Quentin on the day before the execution was supposed to take place. A three-judge panel from the Ninth Circuit Court that was totally familiar with the case had sent the case forward for execution. However, this wasn't good enough for them. Instead, they called an 11-judge en banc panel who had no knowledge of the case, who, to my knowledge, had never even read the transcript of the case. The defense weaved their fairytale fantasy, and the court bought into it. Four hours from the execution, they stopped it.

The Ninth Circuit said a few simple, definitive tests needed to be done to prove that Kevin Cooper was really guilty. Well, almost 2 years later, we had been through the courts in San Diego once again. Kevin Cooper is still guilty. There has been no new evidence presented whatsoever. And now we are appealing again.

Recently, the defense has put forward to the Ninth Circuit Court an appeal that I am told is 6,000 pages long, 6,000 pages after 22 years.

My family's story is probably just one of many in this country whose victims need help from you people.

My son's death affected a lot of people. Maybe they weren't the politicians or the celebrities or the religious leaders. Maybe they weren't the people in the news. But we had hundreds of thousands of calls from the everyday people, the type of people that put you in the positions that you are in now, the voters in this country who were appalled by what the justice system was doing and the time that it was taking.

We had calls from classmates of Christopher, calls from mothers who, at night, go in and look at their children, who are afraid to let them spend the night, other people who have nightmares.

You have a chance to help fix a system that is broken. I have listened to your statements in spite of what you have—frankly, if you haven't been there, you don't have a clue what it is like to be a victim and to have a child, of all people, murdered. They say no parent should have to bury a child. You are right. No child should have to die in the type of horror that my son knew.

The Federal system is totally being abused and mishandled. And you have got a chance with this Streamlined Procedures Act to do something positive to make this system work for other parents and to finally let us have justice for our son and for the Ryen family

and maybe bring peace to Josh Ryen, the young boy that was only 8 years old when his throat was slit and who is now 30 years old and lives in horror. I urge you to seriously pass this bill. Thank you very much.

[The prepared statement of Ms. Hughes follows:]

PREPARED STATEMENT OF MARY ANN HUGHES

My husband and I are the parents of Christopher Hughes. Chris was senselessly and brutally murdered at the age of 11 by Kevin Cooper, an escaped convict with a lengthy criminal record. The legal proceedings against Cooper have now taken twice as long as the time our young son was alive. Before I talk about how the Streamline Procedures Act would have affected this case, I want to share with you who our son was and how he died at the hands of Cooper. I want you to be able to understand what the delays in this case have meant to us. It is our hope that our story will serve to bring about changes so that other families will not have to endure what we have been through.

Christopher was a beautiful little boy. He had just completed the fifth grade at a local Catholic school. His classmates later planted a tree in his memory at the school. Chris swam on the swim team and dreamed of swimming for the University of Southern California and being in the Olympics. He loved his younger brother, and in typical brotherly fashion would tease him one minute and be his best friend the next. Chris' younger brother is now 28 years-old. He has missed Chris every day since he was murdered. Our younger son was not yet born when Chris was murdered. I was pregnant during part of Cooper's trial with our third son. When he was born we gave him the middle name Christopher after the brother he never knew. Both boys have only in the last few years been able to face what happened to their brother. As the years have passed, we are reminded that Chris never got to finish grammar school, go to a prom, marry, have children of his own, or pursue his dreams.

On Saturday, June 4, 1983, Chris asked me for permission to spend the night at the home of his friend, Josh Ryen. We lived in what was then a very rural neighborhood. Josh was the only boy nearby who was really close to Chris' age and so they formed a bond. We were good friends with Josh's parents, Doug and Peggy Ryen. The Ryens lived just up the road from our home with their 10-year-old daughter Jessica and eight-year-old Josh. The last time I saw Chris alive he and Josh were riding off on their bicycles toward Josh's house. They were excitedly waving because they were so happy I had given Chris permission to spend that night with Josh. The only thing Chris had to remember was to be home Sunday in time for church. The next time I saw Chris was in a photograph on an autopsy table during Cooper's preliminary hearing.

Unbeknownst to anyone, Cooper had been hiding in a house in Chino Hills just 126 yards from the Ryen's home. He had escaped two days earlier from a minimum security facility at a nearby prison. When Cooper was arrested for burglary in Los Angeles he used a false identity. His identity and criminal past should have caught up with him before he was wrongly assigned to the minimum security portion of the prison. The prison, however, mishandled the processing of an outstanding warrant for Cooper for escape from custody in Pennsylvania. He was being held pending trial for the kidnap and rape of a teenage girl who interrupted him while he was burglarizing a home. While staying at the hide-out house near the Ryens, Cooper had been calling former girlfriends, trying to get them to help him get out of the area. A manhunt was under way for Cooper, but the rural community surrounding the prison was never notified of the escape.

The failure of the California prison-system to protect the surrounding community from a dangerous felon marked the beginning of our family and community's being let down by our government. Within a few hours of Cooper's escape, prison officials realized who Cooper was and how dangerous he was. Nevertheless, they still failed to alert the community that he was at large. Our frustration and disappointment with our government's failings has only grown since that time as Cooper's case continues to wind its way down a seemingly endless path through our judicial system.

The morning following the murders, I remember being mad at Chris because he had not arrived home on time as promised so we could attend church. Then my anger turned to worry. I sent my husband Bill up to the Ryen home. He saw that the horses had not been fed, and that the Ryen station wagon was gone. Uncharacteristically, the kitchen door was locked, so my husband walked around the house. He looked inside the sliding glass door of the Ryen's master bedroom. He saw blood everywhere. Peggy and Chris were lying on the ground and Josh was

lying next to them, showing signs of life but unable to move. My husband could not open the sliding glass door, so he ran and kicked open the kitchen door. As he went into the master bedroom, he found 10-year-old Jessica lying on the floor in fetal position in the doorway, dead. He saw Doug and Peggy nude, bloodied, and lifeless. When he went to our son Chris, he was cold to the touch. Bill then knew that Christopher was dead.

My husband then forced himself to have enough presence of mind to get help for Josh, who miraculously survived despite having his throat slit from ear to ear. Josh, only eight years-old, lay next to his dead, naked mother throughout the night, knowing from the silence and from the smell of blood that everyone else was dead. He placed his fingers into his throat, which kept him from bleeding to death during the 12 hours before my husband rescued him.

Everyone inside the home had been repeatedly struck by a hatchet and attacked with a knife. Christopher had 25 identifiable wounds made by a hatchet and a knife. Many of them were on his hands, which he must have put against his head to protect himself from Kevin Cooper's blows. Some were made after he was already dead. No one should know this kind of horror. That it happened to a child makes it even worse.

The killer had lifted Jessica's nightgown and carved on her chest after she died. The killer also helped himself to a beer from the Ryen's refrigerator. We wondered what kind of monster would attack a father, mother, and three children with a hatchet, and then go have a beer. That question has long since been answered, but 22 years later we are still waiting for justice.

One way that things could have been different in our case under the Streamlined Procedures Act is that victims would have the same rights in federal habeas proceedings as victims have in criminal cases in the federal courts. In other words, victims or their surviving family members would be heard from by the federal courts. There was no indication that the en banc Ninth Circuit majority ever gave even a moment's consideration to the impact upon the victims and their families when they granted yet another stay in the case in 2004. In this way, the bill would have made a difference. It would have prevented federal courts from making decisions in federal habeas litigation that affect people without ever knowing or thinking about them. Judge Huff recently afforded us an opportunity to address her at the end of 14 months of proceedings in her courtroom. My husband and I spoke to the court, as did Josh, who is now 30 years old.

While I know that Cooper is the one who murdered my son, I will always bear the guilt of having given Chris permission to spend the night at the Ryen's house. I will always feel responsible for sending my husband to find the bodies of our son and the Ryen family. It is a guilt similar to the guilt that Josh feels to this day because he had begged me to let Chris spend the night. He thinks that Chris would still be alive if he had not spent the night. Of course, Cooper is responsible for all the pain and suffering that he inflicted that night and the continued pain that has followed, but it does not help stop the pain and guilt. Kevin Cooper is still here over 22 years later—still proclaiming his innocence and complaining about our judicial system.

As Josh explained when he finally got a chance to speak to the Judge about how he has been affected by Cooper's crimes: Cooper never shuts up. We continually get to hear more bogus claims and more comments from Cooper and his attorneys. Over the years I have learned to know when something has happened in Cooper's never-ending legal case: the calls from the media start up again, or, at times, the media trucks just park in front of our house. We have no opportunity to put this behind us—to heal or to try to find peace—because everything is about Cooper. Our system is so grotesquely skewed to Cooper's benefit and seemingly incapable of letting California carry out its judgment against him.

It is important to understand how obvious it has been for over two decades that Cooper committed these horrible, senseless, and brutal crimes. This has never been a "who done it" case by any stretch of the imagination, despite all the publicity and antics by Cooper and his attorneys. The California Supreme Court understandably characterized the volume and consistency of evidence proving Cooper guilty as "overwhelming."

The Ryen family and Chris returned to the Ryen home from a neighbor's barbecue about 9:30 that Saturday night. None except for Josh were ever seen alive again. Cooper could observe the Ryen home from the hideout house next door. He knew it was a home and a family lived there because he had been watching the Ryen home for the two days since his escape. Cooper also had a motive for the crimes. The phone records from the hideout house, combined with statements Cooper's former girlfriends gave to police, showed Cooper was trying to get help to get out of the area. Cooper found out just before the Ryens and Chris returned to the Ryen

home that night that no money and no help was coming his way, despite his numerous phone calls to former girlfriends. Forensic evidence established Cooper's presence in the hideout house (footprints, fingerprints, and semen). The murder weapons came from the hideout house, and other evidence showed that the killer returned to the hideout house after the murders to wash up.

Cooper told the jury that he simply walked out of the hideout house the same night as the murders. He said he never went inside the Ryen home, a mere 126 yards away. He claimed he was never inside the Ryen station wagon that was stolen the night of the murders. Not surprisingly, the jury did not believe him. Cooper was asking the jury to believe that some hypothetical killer entered Cooper's hideout house within a short period of time of his vacating it, selected a hatchet and other weapons, went and attacked an innocent family 126 yards away, returned to the hideout house to wash up, and then stole the Ryen family car and drove it in the same direction that Cooper admittedly traveled to Mexico.

A single drop of blood inconsistent with the victims' blood was found inside the Ryen home on the hallway wall immediately adjacent to the entrance to the master bedroom. Cooper's own expert excluded anyone other than an African-American as the source of the drop of blood. (The Ryens were white.) A serology analysis showed that the drop of blood was a rare type and Cooper had that same rare blood type. The distinctive prison-issued tobacco that Cooper admitted having when he escaped from prison was found in the hideout house and in the Ryen station wagon. A butt from a hand-rolled cigarette found in the station wagon with the distinctive prison-issued tobacco had saliva from a non-secretor. Only 20 percent of the population, including Cooper, are non-secretors. Another cigarette butt found in the car was a manufactured cigarette matching the brand of cigarettes taken from the hideout house; it also had saliva from a non-secretor. A pubic hair consistent with Cooper's hair was found in the Ryen station wagon. Plant burrs found in the station wagon were from vegetation that grew between the hideout house and the Ryen home. The burrs were also found in the hideout house and underneath Jessica's Ryen's nightgown. Jessica's killer had pulled up her nightgown to carve on her chest after she died and then lowered her nightgown. A button similar to those on the prison-issued jacket Cooper was wearing when he escaped was found with blood on it on the floor of the hideout house. A shoe print made by a particular make and model of shoe that was issued by the prison to Cooper, and that he admitted at trial to wearing at the time of his escape, made a partial print in blood on a sheet on the floor of the Ryen master bedroom, and another print on the cover to the spa outside the sliding glass door leading into the Ryen master bedroom, and a third shoe print inside the hideout house.

In other words, Cooper's defense has always asked that we believe the utterly ridiculous scenario that a hypothetical killer coincidently entered the same house where an escaped convict had just been hiding shortly after the convict departed, selected a hatchet and other weapons, committed a brutal murder of a family, returned to clean up before stealing their car, **and** that the hypothetical killer was African-American and had Cooper's rare blood type, wore a prison-issued jacket and the same make and model of prison-issued shoes that Cooper wore, had the same shoe size as Cooper, had hair like Cooper's, and was a smoker and a non-secretor like Cooper, used distinctive prison-issued tobacco, and fled in the Ryen station wagon in the same direction that Cooper traveled.

In 2001, after years of Cooper contending that he was innocent and his highly publicized demand for DNA testing, the State agreed to post-conviction testing. The evidence to be tested was identified by Cooper's own nationally recognized expert as the most significant pieces of evidence in the case in terms of determining guilt or innocence. The results confirmed Cooper's guilt. The single drop of blood that had been identified through serology analysis at the time of trial as belonging to a person of African-American ancestry with the same rare blood type as Cooper was consistent with Cooper's DNA profile; the probability of a random match with the population was a staggering **one in 310 billion.** The saliva on the cigarette butts in the Ryen station wagon also matched Cooper's DNA; the odds of a random match with the general population was **one in 19 billion** for the hand rolled cigarette and one in 110 million for the manufactured cigarette butt. At trial, Cooper claimed that a t-shirt that had been recovered from along side the road nearby the Canyon Corral Bar belonged to the "real killer." The post-conviction DNA testing confirmed that the T-shirt had smears of blood belonging to the victims as well as Cooper's blood. The probability of a match in the general population to Cooper's DNA profile on the t-shirt is one in 110 million, and the random occurrence within the general population of a match to the victim's blood would be one in 1.3 trillion. The t-shirt, which was never used against Cooper at trial, was new damning evidence of his guilt: his blood was present on the same item of clothing as the victims' blood.

The fact that the overwhelming evidence of Cooper's guilt presented at trial was now bolstered by undeniable scientific evidence evoked a predictably absurd response from Cooper. Cooper now claimed that his blood had been planted on the shirt by police and the drop of blood found at the crime scene had been tampered with. Of course, Cooper could not explain how or why police would plant a minute amount of blood on the t-shirt only to never use it as evidence against him at trial. Moreover, this evidence had been in police custody since 1984. Apparently, these supposed rogue police officers also anticipated the development of the Nobel Prize-winning science that would enable Cooper to have the blood tested for DNA. Cooper also could not explain how the police could have planted his blood at the crime scene within a few hours of discovering the bodies, while he was still at large.

The fact that Cooper's claims were patently absurd, however, did not prevent him from receiving yet another round of appeals from the federal courts. In February 2004, the Ninth Circuit authorized Cooper file another full round of habeas corpus appeals on the ground that he showed "clear and convincing" evidence that he could be "actually innocent." I simply do not see how the judges could have reached such a conclusion.

Our story is one of a judicial system so out of balance in favor of the convicted that it literally enables them to victimize their victims and their families all over again through the federal judicial system. We understood the rights of an accused and that Cooper's rights took precedence over ours as he stood trial. His trial was moved to another County because of the publicity surrounding the horrendous crimes. I had to drive a long distance to another County to watch the trial as it could not take place in our County. Cooper's defense attorney spent an entire year preparing to defend Cooper at trial. Everything was about Cooper's rights and none of our sensibilities or concerns could be dignified because Cooper had to have a fair trial. We understood and we waited for justice. In California, Cooper's appeal was automatic because he had received the death penalty for his crimes. The appeal took six years to conclude. We understood the need for a thorough appeal and we waited for justice.

By 1991, Cooper had received a fair trial and his appeal had been concluded. The California Supreme Court aptly observed that the evidence against Cooper, both in volume and consistency, was "overwhelming". Since then, we have waited and watched as the United States Supreme Court has denied Cooper's eight petitions for writ of certiorari and two petitions for writ of habeas corpus, and the California Supreme Court has denied Cooper's seven habeas corpus petitions and three motions to reopen Cooper's appeal. The Ninth Circuit affirmed the denial of Cooper's first federal habeas petition, and denied him permission to file a successive petition in 2001, and again in 2003. But then, on Friday night, February 6, 2004, Cooper's attorneys filed an application with the Ninth Circuit requesting permission to file a successive habeas petition.

A three-judge panel of the Ninth Circuit denied Cooper's application to file a successive petition on Sunday February 8, 2004. Cooper was scheduled to be executed at one minute after midnight on Tuesday February 10, 2004. On Monday February 9, 2004, my husband and I made the trip to Northern California from our home in Southern California. Relatives of the extended Ryen family flew in from all over the Country. Josh Ryen, now 30, left for dead at the age of eight, his entire immediate family murdered, drove hundreds of miles to reach the prison to witness the execution of Cooper. We all expected that finally, this case would be brought to a close.

Since the murder of Chris, holidays and special days are never totally joyful. They serve as a painful reminder that Chris is not with us, and of how he was taken from us. Otherwise happy occasions with our surviving children often are overshadowed by what Chris should have been able to experience in his life but for Cooper's choices and actions. When I learned from the prosecutor that Cooper's execution was going to be set for February 10, 2004, I asked to have it changed because February 10th is my birthday. The prosecutor explained that it was not possible to accommodate my request because the date had been chosen in order to coordinate the staffing of the hundreds of people who must be on duty when an execution is scheduled to be carried out, *i.e.* the personnel at the prison, at the appropriate state and federal courts, and at the California Attorney General's Office. With that explanation, I at least hoped the date would be one that would be remembered for justice being served at long last. Sadly, that date is now identified with yet another example of a judicial system gone wrong.

If the Streamlined Procedures Act had been law in February 2004, Cooper would have been executed as scheduled. My birthday would not forever be a reminder of how it felt to believe that this case would finally end—only to have it begin again, 21 years after it first began. Today, my family and Josh Ryen are left to wonder if there will ever be justice for my son and the Ryens.

The reason that Cooper would have been executed as scheduled under the SPA was because a three-judge panel that was familiar with his crimes and the lengthy procedural history of his case already had rejected Cooper's request to pursue yet another habeas petition in the federal District Court. Unfortunately, since the Streamline Procedures Act was not the law, the Ninth Circuit was left free to decide that Congress' prior habeas reforms, which provided that a three-judge panel has the final word on whether a successive federal habeas petition will be allowed, did not really mean what they said. While Congress specified that there would be no petitioning for rehearing of the three-judge panel's decision, the Ninth Circuit decided that what Congress really meant was that a rehearing would be just fine if it was the appellate court's idea to have a rehearing as opposed to one of the parties.

Of course, the problem with the Ninth Circuit's logic is that it resulted in judges who had absolutely no familiarity with Kevin Cooper's crimes or the history of his case making a last-minute decision about it. Only hours before Cooper's scheduled execution, these judges would decide whether he would get yet another round of federal habeas review. Not surprisingly, having the decision made by the en banc panel that did not include a single judge with any familiarity with Cooper's case did not improve the quality of justice. Cooper's application for a successive petition and supporting exhibits was deliberately presented late in the process and was over 1,000 pages long. It contained nothing meritorious or worthy of review. The outcome was a gross miscarriage of justice.

The Ninth Circuit's authorization for the filing of a successive habeas petition resulted in

further proceedings in the federal District Court which served to reveal exactly how wrong it was to give Cooper yet another round of federal review. After 14 months of proceedings in the District Court, we now know that the entire premise of the Ninth Circuit's decision to grant Cooper the opportunity to file yet another federal habeas petition was predicated on false assumptions and mistaken impressions. The en banc majority of the Ninth Circuit decided in a matter of a few hours that two "quick and definitive scientific" tests could be conducted with respect to Cooper's continuing claim of actual innocence. The subsequent proceedings in the District Court showed the tests were anything but quick. After considerable time and expense, both tests were conducted and neither supported Cooper's claim of innocence. So here we are, 17 months after this case should have been put behind us, and law enforcement, prosecution and judicial resources continue to be wasted on a guilty man whose crimes were committed over 22 years ago. The same judge who decided Cooper's first federal habeas petition just issued a 160 page decision explaining in detail why he is not innocent and why he is not entitled to relief on any of the claims that the Ninth Circuit allowed him to file. Cooper is now asking for his numerous baseless federal habeas claims to be certified for appeal to the Ninth Circuit. His attorneys apparently envision many more years of appeals.

The claim that the majority of the en banc panel identified as satisfying the "actual innocence" test enacted by Congress in 1996 that enabled Cooper to return for yet another round of federal habeas review was his claim that the prosecution withheld exculpatory evidence relating to the shoe prints in the Ryen house. Cooper left a partial print in blood on the Ryen's bedsheet, a print in dust on the spa cover outside the sliding glass door leading into the Ryen masterbedroom, and another shoe print in the hideout house. The shoe that Cooper wore when he left the damning shoe print evidence was a make and model that was issued to him by the prison. He also admitted at trial that he was wearing these shoes at the time of his escape from the prison, just days before he murdered our son and the Ryens. The fact that Cooper admitted to wearing the particular make and model of shoe did not prevent the en banc majority of the Ninth Circuit from deciding that "information" from the former Warden, if believed by the jury, would mean the jury "would have known that Cooper was almost certainly not wearing" the same brand and model of shoe responsible for the distinctive shoe prints inculpating him in the brutal murders. Of course, nothing in Cooper's papers supported that conclusion. Not even Cooper's attorneys argued that the former Warden's "information" would have meant the shoes could not have been issued by the prison, yet this is the conclusion that caused the en banc majority of the Ninth Circuit to let Cooper file yet another habeas petition in the District Court.

Cooper's attorneys' contention was, of course, completely false but, the Ninth Circuit en banc panel, unfamiliar with the details of the case, managed to buy into the version of events conjured up by Cooper's counsel. The Ninth Circuit could not have gotten everything so wrong had they not undertaken to decide such an important matter over a span of just a few hours, rather than leaving matters to the three-judge panel that was actually familiar with Cooper's case.

What Cooper's attorneys actually argued in their eleventh hour filing was that the murder shoes had been purchased by the prison at Sears and were readily available to the public in retail stores. They based this allegation on the former Warden's "personal inquiry," which she supposedly had conducted and conveyed to the San Bernardino County Sheriff's Department before trial. Of course, as the former Warden testified later in front of Judge Huff, she did not conduct a "personal inquiry." Instead, she just asked someone and they told her information that was inaccurate. The corporate records and prison purchase records introduced at trial clearly showed the prison bought the shoes directly from the manufacturer, and the sales records of the corporation showed sales only to state and federal institutions such as the military, forestry service, and prisons such as that from which Cooper had escaped before the murders.

A greater familiarity with the evidence in the case would have enabled the judges on the en banc panel to understand that Cooper admitted to having been issued the make and model of shoe that left the incriminating foot prints, and he admitted to wearing the shoes when he escaped only days before the murders. Those facts, combined with the fact that the prints were consistent with Cooper's shoe size, along with all the other evidence incriminating him, is what made the shoe prints damning—not whether the prison bought the shoes at Sears or whether anyone else could buy the shoes at Sears. As if missing this point were not infuriating enough, it also turns out that everything the former Warden said to Cooper's attorneys is absolutely wrong, and that the defense as well as the trial jury knew all along where the prison had purchased the shoes and who else had purchased those kinds of shoes. Imagine this scenario: everything is stopped just hours before an execution, after two decades of litigation, because of inaccurate hearsay offered by the same warden who put a violent offender in the minimum security portion of the prison, allowing Cooper to escape and commit the murders in the first place.

Not only was the entire claim misunderstood and false, the Ninth Circuit also was misled as to how long the defense knew about the "facts" supporting the claim. The time frame in which the defense learns something is a critical fact to be considered when something is asserted at the last minute after years of litigation. The importance of when something is discovered in the context of an application to file a successive petition is evident from the decision of the en banc majority, which expressly states when it believed Cooper's defense learned of the "new" information. The decision expressly noted that a sworn declaration by Cooper's counsel showed that the Cooper defense did not become aware of former Warden Carroll's "information" until the date on her declaration, which was January 30, 2004. If we were not already completely disgusted with our judicial system, we certainly were when we sat in Judge Huff's courtroom while a Cooper defense investigator testified that he had discovered Warden Carroll's "information" years earlier, and that Cooper's attorneys had had that information for years and knew that it was worthless because, as everyone had known since trial, the shoes had not been purchased from Sears and were not readily available in retail stores. In other words, the whole appeal was based on a lie. It was based on worthless evidence that Cooper's lawyers held back until the last minute, so that they trick the en banc Ninth Circuit into grant a second-appeal application that it never should have been considering in the first place.

The decision of the en banc majority also shows a lack of understanding of the evidence against Cooper in other ways as well. The hastily crafted opinion noted: "[t]here was, of course, evidence pointing to Cooper's guilt at trial." The opinion then references a spot of blood on the hallway wall of the Ryen house, **the bloody T-shirt,** and hand-rolled cigarettes from the Ryen car." But the so-called bloody T-shirt was **never** used as evidence against Cooper at trial. Instead, it was Cooper's defense attorney who had waived it around and argued that it belonged to the "real killer" as he tried unsuccessfully to cast suspicion on three unknown patrons who visited a local bar on the night of the murders. Remarkably, the en banc panel that decided to grant Cooper more appeals thought the T-shirt was used as evidence against him at trial. Hours before Cooper's execution, the Ninth Circuit en banc panel majority wanted a "quick and definitive scientific" test conducted to determine whether Cooper's blood was planted on evidence that was **never used against him at trial.** This error was magnified when the test turned out to be neither quick, definitive, or even scientific—or helpful to the defense.

The other scientific test that the en banc Ninth Circuit panel ordered for Cooper was mitochondrial DNA testing of hair that Jessica supposedly was "clutching" in her hand at the time she died. Cooper argued it could identify the real killer. It came as no surprise, after spending $2,500 per hair, that the victims could not be eliminated as the donors of the hairs selected by Cooper's own expert. Common sense suggests that when a person is attacked with a hatchet and multiple blows are struck to the head, clumps of cut hair will adhere to the victims' bloodied hands.

Cooper's expert from trial and post-conviction testing himself explained that the theory that young Jessica clutched her killer's hair in her hands was absurd because a dead person cannot clutch anything. Also, how would a little girl, attacked in the dark by a hatchet-wielding assailant, ever manage to pluck hairs from her assailant's head? The whole argument that Jessica was "clutching" her killer's hair is absurd. The only thing that it accomplishes is to force her family and my family to once again focus on the horrific manner in which the Ryens and my son died.

The Streamlined Procedures Act also would have changed the course of Cooper's case by limiting the amendments that he filed to his first federal habeas petition. Cooper first asked the federal court for a stay of execution in March of 1992. In August of 1994, he finally filed his first habeas petition. He was allowed to amend his petition in April of 1996. Then Cooper was again allowed to amend his petition in June of 1997. The Streamlined Procedures Act would allow one amendment as a matter of right before the answer is filed, and any amendment after that would have to present meaningful evidence that the petitioner did not commit the crime. Obviously, under these standards, Cooper would not have been allowed to amend his petition twice over a three year period. Years of delay could have been avoided.

The Streamlined Procedures Act also would not have permitted Cooper's appeal from the denial of his first federal habeas petition to take as long as it did. Cooper's appeal of the 1997 denial of his first federal habeas petition was not completed until 2001—over three and a half years. The SPA would have required that the matter be resolved within 300 days of the completion of briefing by the parties, and would require a rehearing decision to be made within 90 days, a rehearing by a three-judge panel to be completed within 120 days, and a rehearing en banc to be completed within 180 days. Years of delay in Cooper' appeal in the federal court could have been avoided.

Every state and federal court has repeatedly and consistently upheld the judgment against Kevin Cooper, yet 22 years later he still has not answered for his horrific crimes. My husband and I urge you to reform the federal habeas system so the profound abuses and manipulations that have allowed the murderer of our son to evade justice for over 22 years will finally be brought to an end.

Mr. CHABOT. Thank you Mrs. Hughes.

Ms. Friedman.

TESTIMONY OF RUTH FRIEDMAN, SOLO PRACTITIONER, WASHINGTON, DC

Ms. FRIEDMAN. First of all, I would like to thank you, Mr. Chairman, for holding this hearing.

Punishment of crime, particularly in death penalty cases, is a highly charged subject. Confronting the minutia of the laws and actual practice can be very challenging. Some people tell me sometimes boring.

Habeas corpus is a very, very complicated subject and has become even more so over the last decade with the procedural rules and technical requirements often referred to as Byzantine. But we should make no mistake about it. This is a very radical bill. It proposes to gut years of Supreme Court case law, most of it by the Rehnquist court. In many places, it would amount to a virtual repeal of the writ of habeas corpus.

Hearings like this one, a careful examination of the actual effects of this bill across the country, are critical. My understanding, Mr. Chairman, is that some of the most drastic provisions of this bill are being attached piecemeal to other legislation without the debate undertaken today and without even the consideration by the Subcommittee.

I hope these issues are not resolved in that way.

Hearings such as this one, where there can be open and public debate on the merits of the legislation, are essential. I thank you for the privilege of submitting my remarks and appearing before you today.

I say that this bill is radical not only because it would fundamentally change the time-honored American remedy of habeas corpus in an unprecedented fashion, it would also destroy the last and often the only chance of fairness for thousands of State prisoners. For many, particularly those on death row, Federal Court is the first place one has access to a paid and competent lawyer, any resources to prove the case and an unbiased decision maker not facing re-election pressure in the community where a terrible crime occurred.

Where I practice in Alabama, almost three-quarters of the current death row population was represented at trial by an attorney who got paid $1,000 for all the work he or she did, out of court, preparing the case.

There is no public defender system in Alabama, no institution comparable to district attorneys or attorneys general who gain expertise in handling capital litigation. There is no right of access to forensics or DNA labs or even investigators who could prove the accused's defense or even his innocence, trials where first guilt and then life is at stake. That is two trials, and sometimes jury selection as well have been known to last less than 3 days in Alabama. The situation of State post-conviction, which if this bill were to become law would be the last place to look for justice, is worse.

Alabama death row inmates are not entitled to an attorney at all until after they file their petition for relief. This is after their Federal statute of limitations may even have run out. The State of Alabama does nothing to provide these inmates with counsel at this juncture, though this is when the prisoner must file a pleading that will withstand all of the procedural defenses that the State lawyer immediately and always asserts. Indeed, the Alabama Attorney General has watched the statute of limitations clock run out on an unrepresented death row inmate and then contacted them to let them know they would be seeking an execution date because the deadline was missed. If a prisoner does manage to get a lawyer, that attorney will lose money doing the case. He or she will be paid a total of $1,000 for however long it takes to prepare, research, litigate, defend and present the case.

The State typically will oppose every attempt made for discovery, for experts or even for investigative help. The case will usually be decided by the same elected judge who imposed the death sentence originally. Even often over the express wishes of the jury, even though that jury was comprised of people in favor of the death penalty, even when they determined that the defendant's life should be spared, Alabama law permits judicial override. And about a quarter of the people currently on the row got there even after jury verdicts of life without parole.

As it stands now, the habeas law is completely unforgiving of any mistakes that post-conviction lawyers, unpaid, coming in late, without help, without access to discovery, any mistakes that he or she made or any claim he or she neglected to raise. There is no constitutional right to post-conviction attorneys, much less to competent or paid lawyers. Thus when lawyers miss their clients' deadlines, under the habeas law as it stands today, those clients will die without Federal habeas review. This has already happened a

number of times. Under the AEDPA, it is likely to happen more times more.

As I noted more extensively in my written remarks, it is important to recognize and consider just how strict habeas law has already become. All habeas petitioners are now subject to a statute of limitations. There is no right anymore to a Federal evidentiary hearing. Claims subject to legitimate State procedural defaults are barred forever from Federal review. There is only one shot at a habeas petition. Federal judges must generally defer to all State court fact findings, and relief cannot be granted, even if a State court decision maker got it wrong, unless he or she also got it unreasonably wrong. To put it mildly, it is not easy for a petitioner to get past the hurdles erected by the AEDPA. But it is still possible.

For example, the prosecution at Bo Cochran's Alabama trial intentionally removed nearly every qualified black juror from that case. The State courts found the claim defaulted. The Federal Court said the State courts didn't apply it fairly. Bo Cochran was acquitted at his retrial.

I see my time is up. I will end quickly. At the Delma Banks' Texas trial, the State lied throughout about what it did to its witnesses. It paid them. It coached them. It lied throughout. When the case was taken by the U.S. Supreme Court, the main defense by the State was that defense didn't catch the lie soon enough. The Supreme Court overturned the case.

Had this bill been law, Delma Banks would have been executed. As I mentioned in my remarks, Arkansas' death row inmate Ledell Lee was represented by a drunk lawyer. In post-conviction, the State judge, the State lawyer knew that, but the State courts approved it anyway. Under this law, he would have gotten no relief.

I could go on and on. I will not. Let me just add, the Senate has looked at this bill several times. It has held hearings. It has met and conferred. I have spoken with staff members on both sides of the aisle. It has changed that bill twice, offered two new substitutes. It has eliminated section 6 altogether, gotten rid of the appeal effects of section 9, changed the tolling revisions and done other things. I urge this Committee to please do the same.

[The prepared statement of Ms. Friedman follows:]

Statement of Ruth E. Friedman

Thank you for this opportunity to address the Subcommittee on H.R. 3035. I have spent the better part of the last seventeen years representing prisoners in state and federal post-conviction proceedings. My practice has consisted primarily of capital cases in the Deep South, most notably Alabama, where lawyers both willing and able to take on such cases are in short supply. I have also worked in an advisory capacity for the Office of Defender Services of the Administrative Office of the United States Courts, assisting in efforts to improve the quality of habeas resources in a number of southern states. I have counseled, consulted with, or trained lawyers handling habeas corpus cases in every death penalty jurisdiction in the country.

Over these last two decades, I have seen the availability of the "Great Writ" to address real constitutional error shrink considerably. If a lawyer neglects to raise an issue properly in state court, it will be procedurally defaulted, and thus forever barred from federal review. If the Supreme Court decides that a practice violates the Constitution, but does so after my client has completed his state appeal, federal habeas relief as to that claim will be permanently unavailable to him. Prisoners are now executed without any habeas review if their attorneys miss the statute of limitations filing deadline by a single day. These changes, both statutory and judge-made, have seriously restricted the ability of habeas petitioners even to get inside the federal courthouse door.

But no change that either Congress or the courts have made in the history of the writ comes close to what H.R. 3035 – the "Streamlined Procedures Act" – is contemplating. This bill represents an unprecedented assault on the role of the federal courts in vindicating our constitutional rights. Unlike any prior reform or revision, this legislation would strip the federal judiciary of jurisdiction to consider claims of serious constitutional error arising from state court convictions. In so doing, it would dismantle years of Supreme Court jurisprudence and, in ways I will describe in more detail below, wreak havoc on the administration of criminal justice. And H.R. 3035 would deal this crippling blow to habeas corpus without any evidence of a need for such extreme measures.

I believe that this proposed bill, which would in some respects effectively repeal the writ of habeas corpus, is based on several flawed assumptions. One of these is that habeas is a remedy that is now widely available and easily subject to abuse. I would thus like to take a brief look at the history of the writ and the current state of habeas jurisprudence before turning to the effects of this radical bill's provisions.

A brief history of habeas corpus

Petitioning for a writ of habeas corpus is one of the most ancient and fundamental rights guaranteed by our Constitution. It has been a steadfast presence in the law both in England from the seventeenth and eighteenth centuries and in this country from its very beginnings. The habeas writ provides a vehicle for the vindication of core rights and liberties. For any constitutional right -- the right to free speech, for example, or to assemble, to a fair trial and due process, to freedom from unjust or cruel punishment -- would be worthless without a procedural mechanism through which to vindicate it. In the words of Justice Oliver Wendell Holmes, "Habeas corpus cuts through all forms and goest to the very tissue of the structure. It comes in from the outside, not insubordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[1]

Thus, for centuries, the writ of habeas corpus provided a federal forum in which citizens could challenge their imprisonment if serious mistakes were alleged. Through their habeas jurisdiction, the federal courts have had the opportunity to step in and remedy egregious trespasses of key fundamental rights.[2]

Up through the 1970's, the implementation of the habeas remedy generally focused on whether federal constitutional error had deprived the petitioner of a fair trial or reliable verdict. Federal courts were free to conduct evidentiary hearings where they believed a more complete factual record would enhance the quality of their rulings;[3] they could hear claims not previously presented to the state courts unless the prisoner had deliberately withheld them;[4] they were charged with determining, *de novo*, whether the facts proved a violation of the Constitution;[5] and they could entertain more than one petition from the same prisoner so long that the petitioner's conduct did not "abuse" the writ.[6]

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1 *Frank v. Magnum*, 237 U.S. 309, 346-47 (1915) (Holmes, J., dissenting).

2 *See e.g., Moore v. Dempsey*, 261 U.S. 86 (1923) (due process violation where trial dominated by mob and state corrective process inadequate); *Rogers v. Richmond*, 365 U.S. 534, 540 (1961) (coerced confessions "offend an underlying principle in the enforcement of our criminal law" and violate due process).

3 *Townsend v. Sain,* 372 U.S. 293 (1963).

4 *Fay v. Noia*, 372 U.S. 391 (1963).

5 *Miller v. Fenton*, 474 U.S. 104 (1985).

6 *Sanders v. United States,* 373 U.S. 1 (1963).

But, beginning with its opinion in *Stone v. Powell*[7] in 1976, and accelerating in the mid-1980's, our Supreme Court began to reshape the habeas landscape. The Court issued a series of opinions overhauling its writ jurisprudence and significantly tightening access to habeas review. This jurisprudential reform was intended to advance the principle of federalism and the goal of finality. Its effect was to significantly restrict habeas relief for state prisoners.

Stone v. Powell held that Fourth Amendment claims -- allegations that a person was illegally arrested or a car improperly searched -- were not cognizable in federal habeas corpus proceedings if there had been a full and fair opportunity to litigate the claim in state court. The Court concluded that a state-court conviction founded on evidence derived from an unconstitutional search would nonetheless be upheld if the state court process was sufficient. Thus began a doctrinal shift from an inquiry into the substantive merits of a legal issue to a review of the procedure that produced the result.

Next, in a series of cases beginning with *Waimwright v. Sykes*,[8] the Court abandoned the rule that a prisoner had to have deliberately bypassed the state process before a claim could be found procedurally barred. Instead, it ruled that any claim not raised in state proceedings could not be heard in federal habeas unless the petitioner could show "cause" for his failure to comply -- usually that his trial counsel's performance was so inadequate as to constitute a violation of the Sixth Amendment right to counsel, or that state officials interfered with the timely assertion of the claim – plus actual "prejudice" – i.e., that the error substantially affected his verdict. Many prisoners, including those on death row, have permanently lost federal review of potentially meritorious constitutional claims due to state-imposed procedural bars.

In another bow to finality, the Court made changes to the "exhaustion" requirement, whereby petitioners must first "exhaust" their state remedies before seeking federal relief. It promulgated a firm rule that petitions that contained both exhausted and unexhausted claims must be dismissed.[9] In practice, this meant that a federal court could not address a meritorious constitutional claim if the habeas petition contained an unrelated, unexhausted claim. While this rule arguably strengthened the core reason for the exhaustion doctrine, it also significantly increased the burden on petitioners as well as the procedural complexity of the federal habeas proceeding.

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[7] 428 U.S. 465 (1976)

[8] 433 U.S. 72 (1977); *see also Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 477 U.S. 527 (1986)

[9] *Rose v. Lundy*, 455 U.S. 309 (1982)

Also in the 1980's, the Court significantly altered the rules governing which decisions would be available to habeas petitioners when challenging their convictions and sentences in habeas. In *Teague v. Lane,* 10 the Court reversed the approach that most of its decisions would be fully applicable in habeas, holding instead that nearly all favorable rulings announced after a petitioner's conviction becomes final cannot benefit him in habeas proceedings. (Rulings *contrary* to the petitioner's interest *are* applied retroactively.) A federal court must therefore make a retroactivity assessment before even addressing the merits of a habeas claim and summarily deny any claim that seeks a "new rule" of law or is based on a "new rule" promulgated since that case was on direct review. The effect of *Teague* has been a significant restriction on the ability of petitioners to obtain habeas relief and a further move away from the merits of a constitutional claim of error toward a complex procedural inquiry.

In the early 1990's, the Court turned to restricting the availability of evidentiary hearings in federal habeas proceedings. While previous law allowed and often required a federal hearing under a variety of circumstances,11 the Court now announced that if the prisoner had had a full and fair opportunity to develop the facts in state court, no hearing could be held in federal court unless the inmate could show "cause" and "prejudice" for the failure.[12] Such a restriction was particularly harsh when applied against indigent petitioners who had no lawyer or plainly deficient legal assistance in state court

In addition, the Court decided that the traditional "harmless error" rule – that once constitutional error is shown, the state has the burden to establish, beyond a reasonable doubt, it was not harmful[13] – would no longer apply in habeas proceedings. The Court held that habeas relief could be granted only if the constitutional violation could be shown to have *substantially* influenced the jury verdict.[14]

The Supreme Court also significantly restricted second or successor habeas petitions in the 1990's, abandoning the approach that permitted the filing of such

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10 *Teague v. Lane*, 489 U.S. 202 (1989)

11 *Townsend v. Sain,* 372 U.S. 293 (1963).

12 *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992)

13 *Chapman v. California*, 386 U.S. 18 (1967).

14 *Brecht v. Abrahamson*, 307 U. S. 619 (1993).

applications. The Court allowed second petitions, regardless of the merits of the new or repeated claim, to be reviewed only in extremely limited circumstances.[15]

Collectively, the Supreme Court's efforts to reform habeas corpus law from the late 1970's to the mid-1990's transformed the Great Writ. Essentially, prisoners now had one shot at federal review. They had to avoid state-court default and present fully exhausted petitions. They faced substantial but not insurmountable burdens to secure merits review of claims or evidence not properly presented to the state courts. Relief was available only if the error played a significant role in the judgment and was not based upon a "new rule" of constitutional interpretation. Before this reform, "the focus of the federal courts was on the familiar and often easy task of determining the merits of constitutional claims."[16] Subsequently, relief became much more difficult to obtain and, in addition, both the federal courts and the litigants had to wade "through a morass of new, complicated, and ever-changing procedural rules."[17]

Thus, when Congress passed the 1996 Anti-terrorism and Effective Death Penalty Act ("AEDPA") in the wake of the Oklahoma City bombing, the Great Writ -- "the most celebrated writ in the English law"[18] -- had already been significantly diminished in scope and effect.

The profound changes brought by the AEDPA further reduced the opportunities for prisoners to petition the federal judiciary for freedom from unjust confinement. For the first time in the history of the writ, the AEDPA erected a one-year statute of limitation for all habeas applications.[19] No Congress had previously imposed any such limitation.[20] For capital cases, the AEDPA contained a separate chapter – commonly known as the "opt-in" provision – that promulgated a six month statute of limitations and complete federal review within designated time periods for qualifying states. In order to qualify, states had to

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[15] *McCleskey v. Zant*, 499 U.S. 467 (1991); *Sawyer v. Whitley*, 505 U.S. 333 (1992).

[16] Friedman, Barry, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 Calif. L. Rev. 485, 541 (1995).

[17] *Id.*

[18] 3 W. Blackstone, Commentaries, 129.

[19] 28 U.S.C. § 2244(d)(1).

[20] Previously, petitioners had been subject to a flexible and equitable doctrine disfavoring delay under Rule 9 of the Rules Governing Section 2254 Cases.

implement an independent, meaningful system for appointing and funding qualified counsel during the state post-conviction process. Despite the incentive, few states have elected to enhance their post-conviction review process sufficiently to "opt-in." [21]

The general one-year statute of limitation has certainly succeeded in inducing petitioners to expeditiously file their petitions. It has also meant that numerous prisoners, by failing to comply with this provision, have been barred from federal review of the lawfulness of their incarceration. Further, courts have found cause to toll the limitations period only upon a showing of extremely extenuating circumstances. Thus, death row inmates have been executed under the AEDPA without any federal review of the constitutionality of their convictions or sentences because their lawyers missed the filing deadline.[22]

In addition to accelerating habeas filings, the AEDPA implemented a review process requiring significant deference to state court findings of fact and conclusions of law. With regard to facts, it abandoned an earlier statutory requirement that the state court fact finding process be adequate, and declared that *any* state fact finding be presumed correct unless it is shown to be erroneous by clear and convincing evidence.[23] The statute now also prohibits a federal evidentiary hearing in any case unless the petitioner can show he was prevented from developing the facts in state court, or that, despite diligent effort, the facts were not available, and, by clear and convincing evidence, he is innocent.[24] These

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21 Many never attempted, and some made a half-hearted attempt with inadequate systems that were then never reformed. *See, e.g., Leavitt v. Arave*, 927 F. Supp. 394 (D. Idaho 1996)(Idaho); *Williams v. Cain*, 942 F. Supp. 1088 (W.D. La. 1996) (Louisiana); *Sexton v. French*, 163 F.3d 874, 876, n. 1 (4th Cir. 1998) (North Carolina). One state, Arizona, has met the standards but did not receive expedited review in the case under review because the petitioner himself had not received the benefits of the enhanced counsel system. *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001). In the next case in which it has implemented its own procedures, Arizona will get the benefit of the opt-in system.

22 *See, e.g., Ex Parte Rojas*, 2003 WL 1825617 (Tex. Crim. App.)(federal habeas petition time-barred where lawyer serving third probated suspension for failure to competently represent clients did not take any action to preserve petitioner's federal habeas review and failed to notify petitioner state court denied relief); *Lookingbill v. Cockrell*, 293 F.3d 256 (5th Cir. 2002); *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000); *Cantzu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998).

23 28 U.S.C. § 2244(e)(1).

24 28 U.S.C. § 2244(e)(2).

provisions sharply constrain the federal habeas courts, and allow factual development only in narrow circumstances.

With regard to state court legal determinations, the AEDPA amendments took the extraordinary step of removing the traditional power of the federal court to review a legal determination *de novo*. They imposed the rule that no legal determination can be disturbed unless it is contrary to a directly controlling Supreme Court decision, or amounts to an unreasonable application of such authority.[25] This constituted a landmark shift in habeas jurisprudence. Supreme Court construction of this provision has made clear that state court legal determinations cannot be disturbed even when they are clearly wrong: They may be disturbed only when they are *unreasonably* wrong.[26]

Thus, the AEDPA amendments enacted sweeping changes to habeas, each of which was designed to further protect state finality interests and speed up the review process. Taken with the Supreme Court's earlier comprehensive pruning of habeas, the Writ that exists today is a vastly scaled back remedy. It reaches only a subset of the cases where egregious harmful constitutional error deprived the petitioner of a minimally fair trial.

The "Streamlined Procedures Act"

Yet this is the habeas writ that the "Streamlined Procedures Act" seeks to roll back: One that is already highly deferential to state interests and unforgiving of prisoner mistakes. The fundamental changes the Subcommittee considers today would deprive the federal courts of any real ability to address constitutional error. In section after section, this legislation would promote the withholding of evidence by state actors; eviscerate federal review of death sentences; and minimize incentives for states to improve their counsel systems. It would also undoubtedly result in the prolonged incarceration and execution of the innocent.

Nearly every provision in H.R. 3035 is troubling. Some will at a minimum spawn years of the kind of interpretive confusion only now being settled a decade after the AEDPA's enactment. Others appear to be based on faulty assumptions unsupported by data, and still others are likely to have effects surely unintended by the bill's drafters. As the problems are too many and too varied to all be addressed in this setting, I would like to focus here on some of the most glaring pitfalls in the bill's major provisions.

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[25] 28 U.S.C. § 2254(d).

[26] *Williams v. Taylor*, 529 U.S. 420 (2000).

Exhaustion of State Remedies (Section 2)

As I noted earlier, state prisoners are required to exhaust state court avenues for litigating their federal claims before petitioning the federal courts for a writ of habeas corpus. This allows state courts the first opportunity to correct their own errors and is a sensible administrative rule that guarantees federal adjudication at the proper *time*. Because the new statute of limitations was to some extent in conflict with *Rose v. Lundy*'s rule of exhaustion, the Supreme Court just last term decided a case that reconciled these two timing rules. It held in *Rhines v. Weber* that a federal petition can be stayed while a petitioner returns to state court, but only if there is "good cause" for the failure to exhaust, the claim is "potentially meritorious," there is no indication that the petitioner intentionally engaged in dilatory tactics, and the court places a reasonable time limit on the petitioner's return for federal adjudication.27

Section 2 of H.R. 3035 would scrap both *Rose v. Lundy* and *Rhines v. Weber*. It would require dismissal of any unexhausted claim "*with prejudice*," that is, without the possibility of federal court review at a later time. A failure to exhaust would no longer be excused even if no state remedy was even available for the inmate.28 Thus, if the state court simply refused to act on a claim,29 there would be nothing the petitioner could do about it. If a state remedy did appear to be available, the petitioner could still not return to state court to present the issue even if there was "good cause" for failing to exhaust a "potentially meritorious" claim.

One problem in Section 2 that is seen throughout this bill is that it would punish petitioners for circumstances beyond their control. Reasons for the failure to exhaust include the prosecution's concealment of evidence during state proceedings;30 trial or appellate counsel's constitutionally defective

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27 *See Rhines v. Weber*, 125 S. Ct. 1528, 1533-35 (2005).

28 Under current law, a failure to exhaust may be excused if there are no "remedies available in the courts of the State," there is "an absence of available State court corrective process," or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

29 *E.g.*, *Turner v. Bagley*, 401 F.3d 718 (6th Cir. 2005) (excusing failure to exhaust where state court failed to adjudicate petitioner's appeal for eight years); *Story v. Kindt*, 26 F.3d 402 (3d Cir. 1994) (excusing failure to exhaust where state courts delayed review of post-conviction petition for nine years).

30 *E.g.*, *Banks v. Dretke*, 540 U. S. 668 (2004).

representation;31 or the state court's arbitrary refusal to consider the claim or admit the evidence.32 Most prisoners have no lawyer at all in state post-conviction; some have been given incompetent or even impaired counsel. If H.R. 3035 had been the law, for example, Ledell Lee, an Arkansas death row inmate, would not have had his case sent back to state court for proper proceedings even though his post-conviction lawyer was drunk during his hearing.33

Section 2 would thus advance principles of neither comity nor fairness. It proceeds from the erroneous premise that prisoners *want* to delay federal adjudication of their claims. Ninety-nine percent of state prisoners are serving prison sentences they hope to cut short by winning federal habeas corpus relief. For the 1% under sentence of death, *Rhines* has already addressed concerns about unwarranted delay.

Amendments (Section 3)

Any legitimate problems meant to be served by Section 3 also have been resolved by recent Supreme Court action. Under current law, a federal habeas petitioner must generally request and receive permission to amend his petition after the state has answered. Under the Court's decision last term in *Mayle v. Felix*, an amendment to a petition submitted after the statute of limitations has run does not "relate back" to the date the original petition was filed under Fed. R. Civ. P. 15(c)(2) unless the petition and the amendment "are tied to a common core of operative facts."34 *Felix* obviates any possible concern about petitioners extending the one-year limitations period by amending their petitions.

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31 *E.g., Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001).

32 *E.g., Soffar v. Dretke*, 368 F.3d 441, 478-79 (5th Cir. 2004).

33 *Lee v. Norris*, 354 F.3d 846 (8th Cir. 2004) (post-conviction lawyer was "impaired to the point of unavailability").

34 *Mayle v. Felix*, 125 S. Ct. 2562, 2574 (2005).

Yet Section 3 would permit a petitioner to amend his petition only once and not after the earlier of the state's filing of an answer or the running of the one-year limitations period. Thus, it would eliminate the relation-back doctrine even when the amendment *is* closely tied to the original claims. This is unnecessary, since the state is on notice of and is not prejudiced by amendments tied to the same core of operative facts already before it. This provision once again encourages the withholding of evidence: If a prisoner learned during federal proceedings that the state had violated *Brady v. Maryland*, for example, by concealing critical information, he could not seek redress.

Procedural Default (Section 4)

The provision on procedural bars is among the most problematic in the bill. Section 4 would nullify decades-old doctrines of comity and federalism designed to respect state court procedural rules while maintaining the federal courts' constitutional duty to remedy unlawful incarcerations and sentences. Current law strives to preserve that balance: It precludes federal habeas review of the merits of a claim if the petitioner failed to comply with a state procedural rule that is "independent and adequate" to bar all federal review. A state rule is considered adequate and independent if the petitioner actually violated a state rule that was

independent of federal law and that was "clear," "firmly established," and "regularly followed" at the time the alleged procedural default occurred.

That rule may appear to some too obvious to quarrel with. Yet prisoners have seen their claims defeated by states that imposed a rule *after* it was allegedly violated;35 or insisted on a default even though the prisoner had complied with all that was demanded of him;36 or rewarded the prosecutor for successfully hiding the evidence until it was too late for the inmate to press the claim.37 Nevertheless, proposed Section 4, in new § 2254(h)(1), would strip the federal courts of jurisdiction to consider any federal constitutional claims that were "found by the State court to be procedurally barred." Thus, state courts would be free to "find" transgression of rules that did not exist at the time, could not have been complied with, or served no conceivable state interest.38 The federal courts would be required to simply take the state court's word that the claim was procedurally barred.

Section 4 has other deeply troubling aspects. The provision would strip the federal courts of jurisdiction over any allegation of ineffective assistance of counsel related to the procedural bar. Thus, if a court-appointed attorney were sleeping during the trial and failed to object to blatantly unconstitutional conduct, his client would nonetheless be deprived of a federal forum in which to establish such injustice. While current law requires a state to make plain whether it is invoking a default, H.R. 3035 would place the burden of disentangling ambiguous rulings on the federal court. In some instances, even where the state court ruled fully and clearly on the merits of a petitioner's federal constitutional claim, the habeas court would be deprived of jurisdiction to assess even the unreasonableness of that decision.

It is far from clear what the purpose of this amendment might be. As noted earlier, it is already very difficult for a petitioner to prevail if a state court has imposed a procedural bar. One likely effect of Section 4, however, would be to encourage the withholding of the evidence needed to assert the claim in state court; another would be for state actors, who in many jurisdictions write the findings of fact and law for post-conviction judges, to create new defaults for the

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35 *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

36 *Lee v. Kemna*, 534 U.S. 362 (2002).

37 *Banks v. Dretke*, 540 U.S. 668 (2004).

38 *Lee v. Kemna*, 534 U.S. 362 (2002).

unwary or even unrepresented inmate. Section 4 would serve little purpose other than to insulate such misconduct.

Tolling (Section 5)

H.R. 3035's tolling section is one example of a provision that could not have been intended to act as drafted. It would clearly create chaos in the courts. For one, Section 5 would allow tolling of the AEDPA's one-year statute of limitations only when an application for review of a "claim" was pending, as opposed to an application for review of the "judgment or claim" as the law stands now. Many states do not allow a claim asserted on direct appeal to be raised again in state post-conviction, and in any state, claims that require investigation of facts outside the trial record (such as prosecutorial withholding of exculpatory evidence, jury misconduct, or ineffective assistance of counsel) can be raised only in post-conviction. Under Section 5, a petitioner would have statutes of limitations running at different times on different claims, and would theoretically have to file one habeas petition for his direct appeal issues and another for his post-conviction claims. But as the law already prohibits the filing of more than one habeas application, this would not be possible, and he would be forced to lose one set of claims or the other.

Section 5 would also preclude the tolling of any time between courts during the post-conviction process. Thus a prisoner whose federal clock was running would be encouraged not to use the time the state gave him to properly prepare his brief on appeal lest he use up the time he needed to get into federal court. The state could effectively thwart the right to habeas by holding up the compiling of the record for appeal, for example, until the federal clock had run out. A capital petitioner whose lawyer dropped the case after the trial level in post-conviction could see his federal statute of limitations expire while he sought new counsel. This provision promotes neither fairness to the petitioner nor respect for state court process.

Section 5 would also prohibit equitable tolling, an infrequently used but important failsafe generally available where statutes of limitations are imposed. It has been invoked to date in the habeas context in rare instances to correct injustice when a prisoner who has been pursuing his rights diligently was unable to comply with the statute of limitations because an extraordinary circumstance stood in his way. For example, if not for equitable tolling, Curtis Brinson of Pennsylvania would have been shut out of federal review. Mr. Brinson learned in federal court of evidence supporting his claim of intentional racial discrimination in the selection of his jury. Over his objections, the state convinced the district court judge to require him to return to state court to exhaust this new evidence. The state then urged the state court to rule that the state petition was untimely because

the 60-day period for raising a claim based on newly discovered evidence had passed, even though it had in fact passed before the state moved to send the case back for exhaustion. Thus, when Mr. Brinson returned to federal court, he could not get statutory tolling as the district court had assumed he would. The district court found that this was fundamentally unfair and ordered equitable tolling of the otherwise time-barred claims. The Court of Appeals for the Third Circuit affirmed the tolling decision and granted habeas relief in an opinion authored by Judge Alito.39 None of this would have been possible had H.R. 3035 been law.

Finally, Section 5, like nearly every other provision in this bill, would be fully *retroactive* to cases already in the pipeline. It would thus retroactively strip petitioners now properly attempting to exhaust their claims in the state forum of any chance at habeas review by "untolling" the statute of limitations. Section 5 would be especially harsh for the overwhelming majority of habeas petitioners who are not represented by counsel and must navigate this maze alone.

Harmless Error in Sentencing (Section 6)

Section 6 is a virtual repeal of habeas corpus for sentencing claims. This provision would strip the federal courts of jurisdiction to remedy unconstitutional sentences of death if the state court found the constitutional violation to be "harmless" or "not prejudicial," no matter how unreasonable or unlawful that determination. Section 6 would have the odd effect of withdrawing habeas jurisdiction where an error was deemed harmless, but sustaining jurisdiction where the state court found no error at all. Because in many jurisdictions, the prosecution writes the findings of fact for the state post-conviction judge, this provision would serve to encourage "harmlessness" determinations in the state courts.

It is not at all clear what purpose this section could sensibly serve. Many accused of capital crimes are still defended by lawyers who do not investigate their cases and present no evidence to save their lives. In many jurisdictions, the trial court judge is asked to rule on the validity of the sentence she herself imposed, and must face the political reality of defending any grant of relief when running for reelection. Section 6 would most likely lead to the execution of individuals with serious constitutional error that the state court deemed non-prejudicial. In the *Banks* case, for example, the state withheld key evidence about the witness whose testimony provided the only basis for the finding that Mr. Banks could be a future danger. Findings of harmlessness could shield such

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39 *See Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), *cert. denied, DiGuglielmo v. Brinson*, __ S. Ct. __, 2005 WL 2494217 (Oct. 11, 2005).

misconduct from review. Similarly, under Section 6, Texan Ernest Willis would have been executed, although his prosecutors withheld their expert's report stating that he did not pose a future danger, without which he would have been ineligible for the death penalty under Texas law40. Mr. Willis was subsequently determined to be innocent of any crime. Pennsylvanian Fred Jermyn would have been executed, although his lawyer did no investigation for the penalty phase and thus did not present the overwhelming mitigating evidence the State now agrees warrants a sentence of life.41

"Opt-In" Procedures (Section 9)

Section 9 of this bill would indeed amount to a repeal of the Great Writ in any state that satisfied its requirements for capital cases. If a state provided competent, independent and fairly compensated post-conviction counsel – something we would hope all states would do where human life is at stake, although resources and political capital are often lacking – then there would be *no* jurisdiction over any aspect of the case in federal court. This is a simply stunning proposal.

The problems with this provision are numerous. First, it would strip the federal courts of jurisdiction to review *any* claim arising in an opt-in state, whether it was properly raised in state court or not raised in state court through no fault of the prisoner. This is habeas repeal, pure and simple. Second, it would take the decision as to whether and when a state was qualified from a neutral Article III court and place it in the hands of the Attorney General, an Executive Branch official who routinely files *amicus* briefs supporting states and opposing petitioners in habeas cases, with virtually unreviewable discretion. This would create at least the appearance of biased decision-making, and runs the risk of violating separation of powers doctrine. Third, Section 9 would permit retroactive certification. It would allow states to appoint counsel past the deadline under 28 U.S.C. § 2263, obtain certification with an "effective date" on or before the date counsel was appointed, and then obtain a ruling that the petition is time-barred

The driving force behind section 9 may have been a misconception that the states have tried in good faith to opt in under the special provisions for capital cases currently in place, but that the federal courts have unfairly prevented them from doing so. There is no evidence that this is in fact the case. The more likely explanation is that states have chosen not to opt in because they receive substantial benefits under the normal provisions of the AEDPA without having to provide

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40 *Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004)

41 *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001).

competent post-conviction counsel. Pennsylvania is one example. Soon after the AEDPA's enactment, Pennsylvania death row inmates, not having been able to discover what set of deadlines they needed to comply with, filed a class action lawsuit asking the federal court to order the State to declare whether or not it was an opt-in jurisdiction. The State declared that it did not meet the statutory requirements, and the Third Circuit agreed.42 Pennsylvania has never claimed since then that it has met the opt-in requirements.

More disturbing, a few states have sought to take advantage of the short deadlines and special deference reserved for opt-in states without having complied with their obligations under the statute. In *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001), the Ninth Circuit found that Arizona had a facially qualifying mechanism. A necessary basis for that conclusion was that Arizona had a rule requiring appointment of counsel within 15 days of the Arizona Supreme Court's issuance of notice of the mandate after denial of certiorari by the United States Supreme Court. Arizona did not follow its 15-day rule in *Spears*, instead appointing counsel *twenty months* after the Supreme Court denied certiorari. Although Mr. Spears's lawyer was not even appointed until well past the opt-in filing deadline, Arizona sought to have the habeas petition that the lawyer filed, after he was appointed, time barred under that deadline. The Ninth Circuit appropriately found that Arizona had utterly failed to appoint counsel in a timely manner. In any case in which counsel is timely appointed, however, Arizona will get the benefit of the opt-in provision.

The effects of proposed section 9 would be unprecedented in habeas jurisprudence. Rather than recognizing that the states have failed to provide a system for and actual appointment of competent counsel and attempting to stimulate improvement, this provision would reward them – mightily -- for not having done so.

Other Concerns and Misconceptions

There are many other serious flaws in this bill. For example, it would needlessly strip the federal courts of jurisdiction over clemency determinations, including claims of racial bias or witness intimidation, although such challenges are already exceedingly rare. It would change the way requests for funding are handled in a manner that will immediately implicate due process and equal protection guarantees. In an effort to be more mindful of the concerns of victims, it incorporates wholesale a recently-enacted victims' rights statute designed for trial proceedings into a process guided primarily by questions of law. That the

42 *Death Row Prisoners of Pennsylvania*, 106 F.3d 35 (3d Cir. 1997).

provisions of H.R. 3035 are meant to be applied retroactively to cases already pending is alone a recipe for chaos in the administration of habeas review.

Time does not permit me to address all of the problematic aspects of this bill. There are two points though that I would like to mention before I close. The first is the misconception some may harbor about the continuing need for federal habeas corpus review. It would be a mistake to believe that we no longer need careful oversight of state deprivations of life or liberty, that government need no longer "be accountable."43 We continue to hear regularly of prisoners released after decades of unjust incarceration or exonerated on the eve of execution.44 Where I practice, people are still imprisoned or sent to their deaths without ever having received proper representation or the tools with which to mount a defense. Over 70% of Alabama's death row prisoners were represented by lawyers whose combined investigative, research and preparation efforts were capped at a payment of $1000. Unfortunately, Alabama makes no provision whatsoever to give condemned inmates any sort of legal assistance in preparing and presenting post-appeal petitions.[45] Moreover, death-row prisoners in Alabama who can get a petition timely filed within the statute of limitations cannot typically obtain independent judicial fact finding or decision making without the assiduous efforts of competent and dedicated counsel, all of whom must work essentially for free.46

For many death-row prisoners across the country, federal habeas corpus review under current AEDPA standards represents the first opportunity to obtain independent judicial reviews of the adequacy and constitutionality of the state process. Texas inmate Joe Lee Guy, for example, was represented at trial and appeal by a lawyer who had been disciplined repeatedly by the State Bar for neglecting his (non-capital) clients. He also suffered from drug and alcohol addiction. His defense was mounted by an investigator who developed a relationship with the surviving victim in the case, a woman who ultimately left

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43 *Fay v. Noia*, 372 U.S. 391, 401-402 (1963).

44 One particularly chilling example is that of Anthony Porter of Illinois. He received a last-minute stay of execution to pursue a claim of mental retardation. While that stay was in effect, a journalism class reinvestigated his case and established his innocence of the crime.

[45] ALA. CODE § 15-12-23 (1975) (as amended by Act 99-427 (1999)).

46 Counsel need only be appointed in post-conviction cases in Alabama *after* a petition is filed. Some would-be petitioners have located counsel only after their statutes of limitations have expired. When counsel is appointed, her total compensation for all time spent on the case, in and out of court, is limited to $1000. It *costs* lawyers money to represent capital petitioners in post-conviction in Alabama.

him her estate in her will. Mr. Guy's post-conviction lawyer filed a 9-page petition that raised none of this, nor challenged the fact that Mr. Guy, the outside "lookout" in a robbery, was on death row while the men who killed the victim had their lives spared. Although the Texas Court of Criminal Appeals had evidence in its own file that cast serious doubt on the fairness and reliability of the trial results, the Texas appellate court did not question the competence of state habeas counsel or call for further inquiry, instead denying relief and leaving Mr. Guy to bear the grave consequences of his lawyer's incompetence. It was only in federal court that he was able to gain appropriate review and relief.47

For others, the very absence of qualified counsel in state post-conviction closes the door forever to habeas review. Another Texas inmate, Leonard Rojas, was given a state habeas lawyer who had been disciplined twice and received two 48-month probated suspensions from the practice of law by the State Bar before the Texas Court of Criminal Appeals assigned him to this case. The lawyer was still on probation at the time of his appointment and was so continuously throughout his representation of Mr. Rojas. Fourteen days after the Texas court appointed him to the Rojas case, the State Bar disciplined him a *third time*. Despite these violations, counsel was deemed "qualified" for this capital case. He filed a thirteen-page petition raising thirteen claims for relief, twelve of which were not cognizable in state habeas. When the post-conviction appeal was denied, he failed to file the motion required under state law for appointment of federal habeas counsel or to inform his client that the appeal was denied and the federal clock was ticking. Leonard Rojas therefore missed his statute of limitations deadline under the AEDPA, and was executed in 2002 without any habeas review of his conviction or sentence of death.48

We should not be under any misconceptions about the continuing need for habeas corpus. There continue to be many, many instances in which the state courts are unable or unwilling to fully safeguard federal constitutional guarantees.

The second point is about innocence. Some of the bill's proponents have argued that the "innocence" exceptions to these radical provisions will protect those truly "deserving" of federal review. Never in the history of the Great Writ – not through decades of the Rehnquist Court's pruning nor during passage of the AEDPA – has it been understood as a tool for the innocent. Habeas corpus has existed throughout our history as one means of protecting cherished American

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47 Tex. Defender Serv., "Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals" (2002), *available at* http://http://www.texasdefender.org//publications.htm

48 *Id.*

rights and values. Indeed, one of our core values is that we cannot determine who is guilty or deserving of punishment absent a fair proceeding in which everyone plays by the rules.

But the Members of the Subcommittee also should not be misled into believing that H.R. 3035's "exceptions" to Sections 2, 3, 4 and 9 will identify the innocent. In order to gain federal jurisdiction of a claim that would be barred under these provisions, a petitioner would have to show (1) that the facts underlying the claim "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty," *and* (2) that the claim rests on a factual predicate that "could not have been previously discovered through the exercise of due diligence," *and* (under sections 2, 4 and 9) (3) that a denial of relief would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[49]

This exception is effectively impossible to meet. For one thing, contrary to the bill's requirement, innocent prisoners often gain relief on a constitutional claim that did not depend on their lack of guilt. For example, the factual bases for Ernest Willis's claims were that the State of Texas had administered antipsychotic drugs to him without his consent, had withheld a psychologist's report stating that he did not meet the future dangerousness requirement for the death penalty. Neither of these would have led a fact finder to believe he was not guilty of the offense, but the District Attorney has since dismissed all charges against Mr. Willis, declared him to be actually innocent, and apologized to him and his family on behalf of the State of Texas.

Moreover, when state misconduct or incompetent counsel interferes with a prisoner's ability to litigate his claims, he will usually arrive in federal court either without sufficient evidence to meet the innocence standard, or with evidence that could have been or was discovered previously, but that defense counsel simply failed to investigate or use. Thus, John Tennison, who was freed after a federal judge granted relief, the State of California stipulated that he was factually innocent, and a California judge declared him to be officially factually innocent, could not have met the innocence exception upon arrival in federal court, because the state withheld the exculpatory evidence, including evidence about the real killer; that evidence was developed only after the federal court ordered discovery

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49 The exception for a new rule of constitutional law made retroactive to cases on collateral review would almost never apply, and could not apply under Sections 2, 4 or 9 in any event unless the claim also "would qualify for consideration" under the clear and convincing evidence of innocence standard.

in the case.50 Nor does H.R. 3035 contemplate the provision of discovery or resources in federal court so that a previously unrepresented or continuously incarcerated prisoner could have the tools to demonstrate his innocence. Paradoxically, where a prisoner *already* developed the evidence of innocence in state court but it was ignored, it is doubtful that he could meet the bill's requirement that the facts not have been "previously undiscoverable." Thus Ricardo Aldape Guerra, who was convicted of shooting a police officer and sentenced to death in Texas, would likely have been denied relief *because* his lawyers exercised due diligence in state court in uncovering repeated examples of police and prosecutorial misconduct, including witness intimidation, the suppression of exculpatory evidence, and the intentional use of highly suggestive and misleading techniques to taint witness testimony, on the basis of which the habeas writ was granted, and without which the state conceded it had no case.51 These are not the only problems with the "innocence" exceptions: among others, establishing innocence alone would not be enough, as the petitioner would then have to show that the denial of relief on his constitutional claim was itself "contrary to law" or "unreasonable," something many unjustly incarcerated prisoners have been unable to do since the AEDPA's enactment.

Thus, many people who we now know are innocent, or who may be innocent but have not yet had a fair and reliable trial, could not possibly meet the innocence exception simply *because* the state hid the evidence, their lawyers failed to investigate or present it, or their lawyers did investigate and present it but the

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50 *See Tennison v. Henry*, 2000 WL 1844301 (9th Cir. 2000); *Tennison v. Henry*, 203 F.R.D. 435 (N.D. Cal. 2001); *Tennison v. Henry*, 98-3842 (N.D. Cal. 8-26-2003), (Unpublished) Order Granting Amended Petition for Writ of Habeas Corpus and Denying Motion for Evidentiary Hearing as Moot; *Tennison v. City & County of San Francisco*, 226 F.R.D. 615 (N.D. Cal. 2005); *Tennison v. California Victim Compensation Board*, Case. No. __ (Superior Court of California in and for the County of San Francisco) (Petition for Statutorily Authorized Writ of Mandate to Review Decision of the California Victim Compensation and Government Claims Board, filed April 27, 2005); Seth Rosenfeld, *Witness: DA, cops coached me to lie; Sanders, partner accused in tainted murder testimony*, San Francisco Chronicle, June 19, 2003, at A1, *Conviction tossed in case tied to Sanders; Judge rules evidence wrongly withheld*, San Francisco Chronicle, Aug. 27, 2003, at A1; *D.A. vows to probe wrongful conviction; After 13 years in jail, S.F. man goes free without new trial*, San Francisco Chronicle, Aug. 30, 2003, at A1; *Hard sell for lost years; Second man freed in 1989 gang killing*, San Francisco Chronicle, Sept. 4, 2003, at A17; *Wrongly imprisoned man must prove case again for state to pay*, San Francisco Chronicle, Aug. 29, 2004, at B1; *2 men jailed 14 years fail to convince compensation panel*, San Francisco Chronicle, Dec. 18, 2004, at B3; Nina Martin, *Innocence Lost*, San Francisco Magazine, Nov. 2004.

51 *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff'd*, *Guerra v. Johnson*, 90 F.3d 1075, 1080 (5th Cir. 1996).

state court ignored it or refused to admit it. There is no failsafe "innocence" exception to the removal of federal jurisdiction here.

Conclusion

I am hardly alone in urging this Subcommittee to reject this unwise and unnecessary legislation. Individuals and groups from across the political spectrum have loudly voiced their opposition to this unparalleled attack on the venerable writ of habeas corpus. Perhaps most notable among these is the resolution signed by 49 of the 50 state Chief Justices asking Congress not to pass this bill. If H.R. 3035 is not supported by those who would presumably benefit from its passage – the state courts – it should not be adopted here today.

Thank you.

Mr. COBLE. Thank you Ms. Friedman. We impose the 5-minute rule against ourselves as well so we will commence the examination now.

Mr.—pronounce your surname for me again, please.

Mr. DOLGENOS. Dolgenos, Mr. Chairman.

Mr. COBLE. Mr. Dolgenos, one issue which surrounds this subject matter is the cost of relitigating. Comment on that, for me, if you will.

Mr. DOLGENOS. Well, Mr. Chairman, as I said in my remarks earlier, in my little office in Philadelphia—it is not that little, but it is small compared to some of the agencies we see around this city. We have had to increase the number of lawyers who work full time on habeas by 400 percent. And the reason that is, as far as I can see, is that when a prisoner files a habeas petition, it doesn't, despite the existence of a statute of limitations, despite the existence of various default provisions, it does not go away easily, even if it is patently frivolous.

The fact is, we have far more evidentiary hearings now than we ever did before, evidentiary hearings about whether the time bar should be applied in a particular case, evidentiary hearings about whether the State court proceedings were fair, far more evidentiary hearings than we used to have before the passage of AEDPA. In fact, last year, I think we had something like 20 Third Circuit appeals in my unit. Before AEDPA was passed, before the last 5 years, we had hardly any. And I think it is not because AEDPA is so complicated. I think it is because there are so many judicial exceptions, judicially carved exceptions to each and every bar in AEDPA, that litigation snowballs every time habeas petition is filed.

And that means that those of us in State and local governments have to take money away from the investigation of crime, away from the prosecution of crime, and put it into the habeas unit where, frankly, I think it's better spent elsewhere.

Mr. COBLE. Thank you, sir.

Mr. Cattani, in the 1996 act, Congress created a special expedited habeas corpus procedure into which States can opt-in by creating a mechanism for providing high-quality counsel to defendant's own State post-conviction matters.

Tell us what your State has done to that end.

Mr. CATTANI. After the AEDPA was enacted, we enacted heightened standards for attorneys who would represent defendants in post-conviction proceedings. The standards require extensive experience to be qualified to act as lead counsel in a post-conviction proceeding.

We've ensured that there is adequate funding for defense attorneys to handle these post-conviction proceedings, as I indicated. In some cases, more than $100,000 has been spent for post-conviction proceedings; and in those post-conviction proceedings, what we generally see—the post-conviction proceeding is the primary opportunity to raise claims such as ineffective assistance of counsel. And the claim that we routinely see is counsel should have developed additional mitigation.

So notwithstanding the fact that the initial—our trial attorneys are well-funded and conduct a mitigation investigation at trial, we

repeat the mitigation investigation during the post-conviction proceedings. Notwithstanding the fact that we've then had that type of a hearing in post-conviction proceedings, we move to Federal court, and we still get claims of ineffective assistance of counsel for not developing additional mitigation.

But the point—going to the question that you raise, we have implemented a system that provides highly qualified attorneys to represent defendants in post-conviction proceedings, but we haven't been able to take advantage of the opt-in requirements.

Mr. COBLE. Ms. Hughes, you've mentioned in your testimony that you're not—you're not alone in this situation. Do you know other families that have experienced similar difficulties in finalizing the problems that plague them?

Ms. HUGHES. All I can say to answer that is, I live in a State where the death penalty is seldom ever carried out. If you're the family of a victim and the murderer of your family member is on death row and he's been there for a long time, they're in the same boat that I am.

We've seen recently in California—and it was tragic that the parents, Doug and Peg, were killed, but I'm coming here as a mother, I'm talking about someone who kills a child.

We've had a lot of very high-profile child murders in California. We've got cases that have been tried, are waiting to be tried; and I know that these parents—and I see some of them when they've had the verdict and they go, "Thank God it's all over," and I go, "You'd better pray because you're just—you're just beginning to see what the system is like and how it's not going to work for you." Twenty-two years is too long.

Mr. COBLE. Well, I see my red light has appeared.

My aunt, Ms. Hughes, recently lost a child, natural death, but she said to me, as you have told us, that the saddest day in a parent's life is burying a child because it's supposed to be the reverse.

The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Dolgenos, I assume it's your position that most of these petitions are without merit; is that true?

Mr. DOLGENOS. I would say so, yes.

Mr. SCOTT. And some have merit?

Mr. DOLGENOS. That's correct.

Mr. SCOTT. Is it important to have finality if you're dealing with someone that happens to be innocent?

Mr. DOLGENOS. I think it's legally untenable to imprison or execute someone who's innocent; it's important not to punish the innocent.

Mr. SCOTT. Okay. Well, exactly what happens now if you have someone who's probably innocent?

Mr. DOLGENOS. Well, what we have, sir, are claims of innocence that reasonable people can disagree about; and the question is whether or not we need to channel that to a jury or——

Mr. SCOTT. The jury has found them guilty. Now you've got evidence that shows they're probably innocent.

Mr. DOLGENOS. If I believed, sir, that someone——

Mr. SCOTT. What is their right, not what you believe. They can convince you—because you've already prosecuted them. Do they

have an independent shot at a judge to show they're probably innocent?

Mr. DOLGENOS. Yes, they do. It depends——

Mr. SCOTT. Well, now you have to show clear and convincing evidence that they're guilty. That's a higher standard than probability; is that not right?

Mr. DOLGENOS. That's correct, sir.

Mr. SCOTT. Ms. Friedman, what happens if you've got somebody that's probably innocent?

Ms. FRIEDMAN. Through this bill?

Mr. SCOTT. Yes.

Ms. FRIEDMAN. They would not be able to make it through under this bill. These innocence provisions are not fail-safes for the innocent by any measure for many reasons. One of them is that there is no provision here for even presenting any evidence. The court wouldn't even have jurisdiction under this bill; it's a jurisdiction-stripping bill.

Mr. SCOTT. Well, suppose a lawyer prematurely files an unexhausted claim on page 3, lines 1 through 3 of the bill. If you file an unexhausted claim that is, for procedural reasons, thrown out, what does "dismissed with prejudice" mean?

Ms. FRIEDMAN. That claim is gone forever, you can never litigate that.

Mr. SCOTT. So if it's prematurely filed and you get yourself together and you have a valid claim, but you messed up and prematurely filed it, it's dismissed with prejudice so that when you get it together it can't be brought back?

Ms. FRIEDMAN. That's absolutely right, unless you can prove not only innocence to a clear and convincing—there's many things wrong with that standard. It's got to be tied to the claim. It's innocence-plus. It's not even enough if you're innocent.

Mr. SCOTT. Clear and convincing is a higher standard than probability, so if all you've got to show is that you're probably innocent, the court doesn't have jurisdiction to hear the case?

Ms. FRIEDMAN. That's correct. And it's even beyond that. You have to show that that evidence wasn't available before, so that if you had a bad lawyer, who never put it on, you're out of luck as well.

Mr. SCOTT. On page 7, line 10, it shows that, unless determination that the error is not structural is contrary to clearly established Federal law.

Mr. Cattani, what's the difference between clearly established Federal law and Federal law?

Mr. CATTANI. Clearly established Federal law is law as determined by the United States Supreme Court. There has to be a decision from the United States Supreme Court.

Mr. SCOTT. What do the words "clearly established" do? I mean, if it's contrary to Federal law, what does "clearly established" do to that sentence?

Mr. CATTANI. It suggests that there's no reasonable dispute among jurists.

Mr. SCOTT. So if the court decides that it's contrary to Federal law, it's not clearly established, then you can't be heard; is that the deal?

Mr. CATTANI. I'm not familiar with the specific provision that you're looking at.

Mr. SCOTT. Page 7, line 10.

Mr. CATTANI. I guess—the important point, I guess, for me is that——

Mr. SCOTT. Those words aren't in there by accident. What do they mean?

Mr. CATTANI. This is collateral review, and as Representative Lungren pointed out, if, for example, you commit a Federal crime, you have a trial, an appeal, a post-conviction proceeding.

We have those same provisions in State court, and then this is another layer of review on top of that. And I think it's appropriate to have a higher standard—greater requirements to pursue your appeal in that setting in a Federal collateral review——

Mr. SCOTT. So if a State court has decided, then the Federal court doesn't second-guess the State court; is that the deal?

Mr. CATTANI. That is correct.

Mr. SCOTT. Okay. Is a guilty person entitled to a fair trial?

Mr. CATTANI. Yes.

Mr. SCOTT. Suppose everybody agrees you didn't have a fair trial, but you're not claiming innocence?

Mr. CATTANI. I guess I have more confidence in our State court system——

Mr. SCOTT. So a guilty person is not entitled to a fair trial. If everybody up there agrees that the trial was not fair, but the person was guilty, is a guilty person entitled to a fair trial?

Mr. CATTANI. Certainly a guilty person is entitled to a fair trial.

Mr. SCOTT. And what is his remedy if it's no fair trial?

Mr. CATTANI. If it's not a fair trial, he certainly has all of these avenues of appeal that I've outlined.

Mr. SCOTT. How do you get in if you're not claiming innocence?

Mr. CATTANI. Well, you get in by raising your Federal constitutional claims in State court, and then you get to raise those claims again in Federal court.

Mr. SCOTT. Without a claim of innocence?

Mr. CATTANI. Even without a claim of innocence, yes.

Mr. SCOTT. Ms. Friedman, can you get into Federal court under these without a claim of innocence?

Ms. FRIEDMAN. Not for any claim that has been in any way defaulted, unexhausted, unamended. So if you didn't have proper counsel or if the State withheld evidence—and that's one of the problems with this bill, it does nothing if the State lies, it withholds evidence and denies access to discovery, it's going to be too late when you get to Federal court to raise that claim.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Ms. Friedman, in your testimony on page 2 you talk about the Federal forum being available for habeas petitions for centuries, and that after the 1970's the implementation of the habeas remedy generally focused on whether the petitioner had been deprived of a fair trial. Yet the Supreme Court, in *Felker v. Turpin* doesn't seem to agree with you.

The Supreme Court said that, in these words, the first Congress made the writ of habeas corpus available only to prisoners confined under the authority of the United States, not under State authority. Again, the Supreme Court said it was not until 1867 that Congress made the writ generally available in all cases where any person may be restrained of his or her liberty in violation of Federal law.

The Supreme Court goes on to say, and it was not until well into this century—that is, the 1900's—that this court interpreted that provision to allow a final judgment of conviction to be collaterally attacked on habeas.

I view that as suggesting there's a great distinction between the great writ and the statutory writ that we are talking about here today.

Do you still stand by your statement that the right to litigate in a Federal forum a habeas petition has existed for centuries?

Ms. FRIEDMAN. Yes, Congressman Lungren.

Mr. LUNGREN. Okay, that's fine. You can disagree with the Supreme Court here. Many of us do, as well.

Talking about the "actual innocence" test, people have to understand under this bill, procedural default, if the claim goes to the innocence, the Federal court can still consider, under the "safe harbor," the claim even if not exhausted. If it doesn't relate to innocence, then the claim would be dismissed.

Again, that goes to Mr. Cattani's suggestion that there ought to be a higher standard in this subsequent, subsequent, subsequent review by the Federal courts.

Ms. Friedman, you state in your testimony on page 18 that we should not be misled into believing that the bill's exceptions to sections 2, 3, 4 and 9 will identify the innocent. The exception that these sections illustrate is that codified in 28 U.S.C. 2254E2, which requires that the evidence of innocence be new or previously undiscoverable, and that the evidence clearly shows innocence.

This standard was enacted in 1996, the same standard to limit the right of habeas petitioners to file a second or successive habeas petition, as was also enacted in 1996. Both of these standards have now been around for 9 years and have been used to bar hundreds if not thousands of claims from going forward.

Can you give me one actual case, not a hypothetical case or a case that you think would have been affected had this section applied—can you name one actual case where either 2254E2 or 2244E2 was applied to the actual case out of the many cases where the sections have been applied and where this test has denied relief to a prisoner who reasonable people would agree was actually innocent?

Ms. FRIEDMAN. I'm glad you brought up those sections.

Those sections were a part of a bill, and they apply in the AEDPA in two places. One is to limit repetitive filings, and the other is to limit evidentiary hearings when the petitioner is not at fault. So those are both standards that are very different from what's in this bill. This bill would limit—would use those same standards to limit any ability to get into Federal court at all. So it's a very, very different situation.

Mr. LUNGREN. The standard is the same, but it's applied in a different manner?

Ms. FRIEDMAN. It's applied in a wholly different manner. These are applied in the ability ever to get Federal habeas review of a claim. Those were used to limit repetitive filings, and have halted repetitive filings of habeas petitions for all intents and purposes; or to limit Federal evidentiary hearings when the petitioner himself was at fault for not presenting the evidence. Those are not what this is about here.

Mr. LUNGREN. Let me ask you this: Do you think there is any need to reform habeas petitions at all, given, in fact, that we have these instances, such as Mrs. Hughes' case, of what appear to be interminable delays?

Ms. FRIEDMAN. My heart, of course, goes out to Mrs. Hughes——

Mr. LUNGREN. That's not the question I asked.

Ms. FRIEDMAN. But I would like to say that, thank you.

Yes. If cases are going on and on, that is a problem. And there are lots of problems that I think should be looked at in this bill and not just those. But it seems to me, that is about timing and the length of time something takes in Federal court, not the ability to go to Federal court at all, which is what this bill says.

Mr. LUNGREN. Okay. Well, let me ask you that, then.

In one specific part of the bill we allow expeditious review if a State—if a State follows the outline that we've established actually in the 1996 bill, which would improve the kind of representation that those defendants would get. Would you support that?

Ms. FRIEDMAN. I think having incentives for States to improve their counsel is a terrific idea.

What happened in 1996 is that it was put into the bill and very few States attempted to meet it. Some did, without changing their systems at all, and then gave up; some said they didn't need it at all.

Mr. LUNGREN. Which States have been approved by the Federal courts thus far?

Ms. FRIEDMAN. Arizona will meet it. It did not meet it——

Mr. LUNGREN. No, no. I asked which have thus far, since 1996?

Ms. FRIEDMAN. None have.

Mr. LUNGREN. By the action of the Federal courts?

Ms. FRIEDMAN. No, by their own actions, they have not improved their systems, and this bill rewards them for not improving their systems.

Mr. LUNGREN. Well, since my office wrote the 1996 law, and we wrote it to pattern after the practice in California, it seems rather strange that the very law that we wrote that was patterned after what we had done to improve the situation in California has not been deigned by the Ninth Circuit to meet those standards.

And what I would ask you is, why can't we have some authority that has no interest in this whatsoever; that is, the Attorney General of the United States—these are State cases—he has no real interest in it; there's no conflict there in the Circuit for the District of Columbia to do that rather than have what we have now, which—where there is a conflict? Because what you're asking the courts to do is to say, Okay, you'll have expedited procedure, we'll have less chance to look at this, as we have imposed upon you in

the past. So really there's no incentive for us to actually say that your State qualifies.

Ms. FRIEDMAN. Three quick answers to that. One is that the Attorney General——

Mr. COBLE. Ms. Friedman, if you will answer tersely because——

Ms. FRIEDMAN. Okay. The Attorney General is not——

Mr. COBLE. But it is Mr. Lungren's bill, so we'll be generous with him. Go ahead.

Ms. FRIEDMAN. Thank you.

The Attorney General of the United States comes in on the side of States in habeas cases against petitioners often; it has never, to my knowledge, come in on the side of a petitioner.

I think what this bill also does is, it doesn't just speed up the process, which is what the original AEDPA contemplated; it repeals jurisdiction entirely for any State that meets the opt-in, and I think that is an enormous problem.

Mr. LUNGREN. I will just mention, the Attorney General does at times sue States in the Union, prosecutes officials of States when they find that they violate civil rights acts—civil rights laws, for instance, so they're not always on the side of the States.

Ms. FRIEDMAN. I don't believe they have ever come in on the side of a habeas petitioner.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I thought we had a very informative exchange between my friend from California and Ms. Friedman. If Mr. Lungren—and I can see he's in discomfort with his back, but if he would wish to continue the dialogue that you're having with Ms. Friedman——

Mr. LUNGREN. Well, I thank the gentleman for yielding. I appreciate it.

Mr. DELAHUNT. I yield whatever time you might have. I find this very informative.

Mr. COBLE. Mr. Delahunt controls the time and Mr. Lungren is recognized.

Mr. LUNGREN. This is the confusing thing that I find in the whole process, the way it works now, and we have it in California with the Ninth Circuit. We have a situation where the procedural default exceptions that the State courts impose on themselves to serve the interest of justice, where they find that if they actually impose their procedural default rule in a particular case, they find that it would be inappropriate, that there is a case of innocence there that ought to be looked at.

So the courts impose this on themselves; the California State court would do that in, as what we call it, the interest of justice. And then, subsequently, the Federal courts don't recognize our procedural default rules because they say they're inconsistently applied.

Now, that seems strange to me. You have procedural default rules that you believe make good sense. In a very, very few cases you make an exception in the interest of justice at the State level. Then that very exception that you utilize is used against your whole State system by the Ninth Circuit that says, because you don't apply it in every single case, we won't apply these rules now.

Does that make sense?

Ms. FRIEDMAN. I think it's a very different situation when you have a couple of times where the court may say, we're going beyond our rule for some reason.

Mr. LUNGREN. That's what I'm saying.

Ms. FRIEDMAN. What this bill does is, it goes way beyond that, it gets rid of any defense whatsoever to a default. So it would encourage and it would allow any State that makes up a default after the fact, as in *Ford v. Georgia,* about objecting to striking black people from juries——

Mr. LUNGREN. You don't recognize any safe harbor that we have in here for actual innocence?

Ms. FRIEDMAN. The actual innocence exceptions to this bill are impossible to meet.

Mr. LUNGREN. Impossible to meet?

Ms. FRIEDMAN. I think they are. But in terms of procedural default, it not only deals with inconsistent application, but with defaults that don't serve legitimate purpose, that are announced after any time for applying the default has already passed, that are based on a State's withholding of evidence, like in Delma Banks' case.

Mr. LUNGREN. Well, all I know is that the standard that we use in our bill, as you suggest, is used in other circumstances right now for successive petitions; and unfortunately, I would have to advise Ms. Hughes that that standard was used by the Ninth Circuit to allow successive petition to the convicted murderer in the case involving her child.

So to suggest that that would never happen, when we had it in, I think, outrageous circumstances, at least undercuts your argument that it could never happen and that we provide no safe harbor whatsoever.

Ms. FRIEDMAN. You know, I think one very big problem with this bill is, most of it has been based on anecdote and not on data. And I think it would be very important to know what, exactly, the data is around the country, and not just in one or two jurisdictions in the country, about how the AEDPA is being applied.

Mr. LUNGREN. Well, you can call it anecdotal, I spent 8 years with the Ninth Circuit. My office wrote the law that was adopted by the Congress in 1996, expecting to see some change, and we actually see even greater delay.

And the argument we hear from some of the judges now is—and you suggest in your final comments of your written statement that, even the presumed beneficiaries of this, the State courts, oppose it. And again, I would just say to you, my presumed beneficiaries were not the State courts, but they were people like Mrs. Hughes.

But if you read what they have said, they are worried that if we put new law in there, the Federal courts will once again take so much time to interpret it, we will have uncertainty, which is sort of like a war of attrition. If the Ninth Circuit is obstinate in its effort to try and avoid the direction it was given by the Congress, by statute, we therefore can't go back and try and change that statutorily because we're told it will give us more uncertainty, because they will just do the same thing, times X, in the future.

And you say it's anecdotal. I spent 8 years dealing with it, dealt with people like Mrs. Hughes and many others who have seen that.

If you examine the case involving Mr. Cooper, you will see that they have raised claims based on DNA. You will see that Mr. Cooper stated that if the forensic experts would conduct new DNA tests, he would drop his appeals. So they had the DNA tests, the DNA of Doug and Peggy Ryen, on a T-shirt, never presented at trial.

The DNA tests firmly placed Cooper in the Ryen home, where he said he had never been; in the Ryen car, which he said he had never driven. But rather than drop appeal, they concocted another story that he was framed. And now his lawyers demanded a new test for a preservative on the T-shirt, never presented at trial, that would show that Cooper's blood was planted, as well as hairs that police already knew were not Cooper's, so the question of Cooper's innocence could be answered once and for all.

So they did the new test and found no extra preservative on the T-shirt blood. The district court judge ruled the tested hairs presented no proof of another assailant. And now they're off on another journey to see if they can do it again.

That may be anecdotal, but it's actually what was presented to the court. And it's that kind of thing that I think is indefensible.

Ms. FRIEDMAN. I think——

Mr. COBLE. The gentleman's time again has expired.

Folks, I think we will probably have time for another round. I appreciate your yielding, Mr. Delahunt.

The gentleman from Arizona.

Mr. FLAKE. I thank the Chairman, and I appreciate this hearing. And I appreciate the gentleman from California for bringing up this bill.

I would like to thank Mr. Cattani, in particular, for coming in from Arizona. This is an issue that obviously Arizona has been involved with for a long time, trying to get at a place where we can actually take advantage of law passed by the Federal Government in 1996.

Mr. Cattani, is it true there are over 100 prisoners in Arizona on death row that have exhausted all State habeas claims?

Mr. CATTANI. There are 106; I think some of them—those have not all exhausted. The chart that I have attached to my written statement details all of the defendants who are in Federal court.

And the evidence regarding delay in Arizona is not anecdotal. You can look at the chart and it's there, and it's there notwithstanding the fact that the provisions that we have in Arizona for establishing innocence are more generous than anything that has been proposed in the Federal process. And again, what I want to reiterate, that suggests to me that what's happening in Federal court in Arizona cases is not about innocence.

And we have this delay—and you can look at the chart—there have been cases that have been there for 19.58 years; we've had 61 cases since the enactment of the AEDPA that are still pending, none of them have moved on past—we've only had one that's even made it to the Ninth Circuit.

Mr. FLAKE. I believe you mentioned in your written testimony you spend an average of $64,000 per case in order to comply with the provisions of the '96 law?

Mr. CATTANI. I'm not sure of the exact average, but certainly funds are made available, and we haven't had any examples where defendants have said, I don't have enough money to pursue my claims and post-conviction relief. Funds are made available, funds are made available for defense counsel, for highly qualified defense counsel; funds are made available for investigators, for mitigation specialists and for expert witnesses. And notwithstanding that, we still haven't been able to opt-in.

Mr. FLAKE. The assumption with this legislation that—as proffered by Mr. Lungren, is that the Ninth Circuit has conflict of interest here, since they're the ones that will be hearing these appeals and they're involved in the process.

Is that your feeling as well? Do we need a third party, a U.S. Attorney General or something else to look at it?

Mr. CATTANI. I'm not sure it's necessarily a conflict. All I know is that it seems to me we have made a good-faith effort to opt-in, and we haven't been able to opt-in, and it seems to me the mechanism should be changed.

Mr. FLAKE. And, Ms. Friedman, your contention is that Arizona has not made a good-faith effort or hasn't fully completed it. Where has Arizona gone wrong here?

Ms. FRIEDMAN. That's actually not my contention. My understanding is, it was just in the case that was before it, they didn't appoint—didn't follow their own rules is my understanding in appointing Mr. Spears a lawyer in a timely fashion.

My understanding is that Arizona will be deemed to be opted in when they have done that in the next case in front of them.

I also think it's an example of the problem of doing something that's so sweeping in the nature of a bill to cover the entire country, when the circumstances are so different in different places. I think some of these are regional issues we're talking about, and a lot of the anecdotes, et cetera, are about the Ninth Circuit. My practice is very, very different.

Mr. FLAKE. Mr. Dolgenos, what is your feeling with regard to the need for an outside party or group to certify?

Mr. DOLGENOS. I think that particular problem is uniform across the country because every circuit—the decision that every circuit has to make is whether to limit their own power, and I think that is inherently a conflict. And I think it's best placed in a third party, with meaningful review by the 3rd Circuit.

Mr. FLAKE. Thank you.

I thank the Chairman.

Mr. COBLE. I thank the gentleman.

The distinguished lady from Texas. The gentlelady is recognized for 5 minutes.

Ms. JACKSON LEE. I thank the distinguished gentleman for yielding, and for the Ranking Member.

I think, Mr. Chairman, I'm going to do something that is sort of the talent of the early ages of our origins, when we were just 13 colonies, and a few Representatives were able to pontificate and stand in the well or to be able to talk at length about this, if you

will, emerging country and what its principles should be and not be.

Isn't it interesting that the habeas corpus was grounded in some of the early thoughts of the Founding Fathers? I don't pretend to document all of the citations, but I'm reminded that Georgia was founded by released prisoners, as our history will tell us. And there was a great sensitivity, I believe, in the Founding Fathers; and might I just suggest that I obviously was not a whole person at that time, obviously being represented by my slave ancestors, but there was a great sensitivity to being detained or incarcerated with no relief because, as we know, the early courts or the court systems in our European neighbors were the kind of systems to a certain extent that would have those penalties for the impoverished or the debtor, if you will, the debtor prisons. So we were without the relief that this habeas corpus procedure was to allow.

So the idea of a concept of streamlining and habeas, to me, is incongruous and just completely against the grain, because what they suggest—and I know the underpinnings of this—the underpinnings, of course, is to be tough on criminals and to be empathetic to victims, and none of us want to be victims and none of us want to take advantage of victims. But frankly, I think that when you begin to tamper with a system that allows a great deal of democracy or justice to be rendered, then you are trampling on the very values of the Founding Fathers and their dedicated commitment to the Bill of Rights, the fifth amendment, the due process concept.

And as a trained lawyer and someone who has encountered a number of more conspicuous death penalty cases in the State of Texas, that has the highest number of death penalty cases and death row cases, knowing that I have seen where courts without a habeas corpus would have simply, if you will, moved against a prisoner; and then in the backdrop of the last decade, the '90's and the early 21st century, we have found a number of innocents out of the Innocence Project, and a number of other cases, a number of other efforts, to suggest that how many were sitting on death row and were ultimately found, because of the new DNA, that did not exist in 1990 or 1989 to be used as it has been used, and they are innocent.

So we know that victims have, in many instances, been stressed and strained. And it may be quite conflicted to suggest that you are someone who is very sensitive to victims' rights. I have supported a number of victim-support legislation and believe that victims should have their day in court, believe that victim's testimony is particularly important in the sentencing process.

But, Ms. Friedman, let me ask you this: What good comes out of streamlining habeas corpus? And of course the backdrop to your answer should be, people are there 8, 9 years before they are, if you will, ultimately finalized in the judgment and then sentenced, if you will, or they're sentenced and therefore it is finalized. What good does this kind of legislation bring to a system, a criminal justice—a judicial system that is so far exceeding the importance of a habeas that was defined and designed by our early Founding Fathers?

Ms. FRIEDMAN. I don't think this bill, as written, brings any good. I think it is a very, very radical proposal.

It's really not about streamlining, it's not about moving cases forward to resolution; it's about cutting out the jurisdiction of the Federal court to ensure that fundamental rights are ensured. So there are some people who—there are many people, I think, who, had this law been in effect, would never have seen—been exonerated, they would never have had that opportunity because they would have lost out under one or another of these provisions. And I think it is a very dangerous bill in its effect.

Some of the effect I think was even unintended. There were provisions that may have been drafted somewhat hastily, such as the tolling provision. It's also not about the comity that is supposed to exist between State and Federal courts.

For example, just quickly, the tolling provision, as it's written in here, doesn't allow for the Federal clock to stop in between parts of the State post-conviction process——

Mr. COBLE. The gentlelady's time has expired. I think we're going to have time for another round.

Sheila, we have to be out of here by 12 o'clock for the conference.

Ms. JACKSON LEE. You will finish later. Thank you, Mr. Chairman.

Mr. COBLE. You're welcome.

I want to put one question to Mr. Dolgenos or Mr. Cattani, and then I want to yield the balance of my time to Mr. Delahunt, so if you all could give me a terse response, gentlemen——

One way the Congress sought to limit endless delays of habeas litigation under the 1996 act was by limiting so-called "successive petitions." The '96 Act sets a limit standard—a limited standard for filing successive petitions and requires a petitioner to first apply to a three-judge panel and persuade the panel that he meets the standard. If the panel rejects the application to file a successive petition, the '96 Act bars the petitioner from seeking rehearing in the court of appeals.

Have the courts of appeal undermined this bar; and if so, what would this bill do to address that problem?

Mr. DOLGENOS. I think this has been sort of a Ninth Circuit problem.

Mr. CATTANI. The problem in Arizona has not been so much successive petitions, but rather consideration of procedurally defaulted claims. And I think—there really isn't very much of a difference between a procedurally defaulted claim and a successive petition.

Generally, a procedurally defaulted claim means it was not raised in State court, and if it's not raised in State court, you're not supposed to be able to raise it in Federal court; and that's the same thing that would happen if you decide you want to file a successive petition. And we've been unsuccessful in enforcing procedural bars in the initial petition where a claim was not raised, was not presented in State court, yet the Federal courts allow evidentiary hearings on that issue. And I think that's what would happen in a successive petition.

Again, we're not seeing that many successive petitions, but they make an end run around having to file a successive petition by simply filing procedurally defaulted claims with the first petition.

Mr. COBLE. Thank you, sir.

I have 3 minutes remaining, and I will yield to Mr. Delahunt.

Mr. DELAHUNT. I thank my friend. And this has, I think, been a very good panel.

I think it was Thomas Paine who made that quote about, you know, "It's the patriot that protects the citizen from the Government."

Now, you're both prosecutors. How many cases have you run across where you never—have you both tried cases? I mean, I know your duty now obviously is at the appellate level, but you, I presume, have had extensive trial experience?

Mr. CATTANI. Mine is primarily appellate.

Mr. DOLGENOS. Mine, as well, sir.

Mr. DELAHUNT. Okay. Well, I've got to tell you, all right, there are a lot of mistakes being made every day in the criminal justice system. It's replete. Any prosecutor who's in the trenches, who's trying cases, hopefully will catch a significant proportion of them. Informant testimony, newly discovered evidence, evidence that is withheld. You know, as I listen to this, we keep coming back to the Ninth Circuit. Maybe we should have a bill just for the Ninth Circuit.

You know, I have to concur with Ms. Friedman. I mean, I would like to see some data, I would like to see a questionnaire that was done that was a survey of really the magnitude of the problem.

Now, we have legislation and bills before this Committee dealing with the Ninth Circuit all the time. I'm not that familiar myself with the Ninth Circuit; but it seems maybe to have a particular bent, at least it's perceived that way by some. But we constantly come back here and deal with issues that are provoked by some action of the Ninth Circuit. I mean, we can't have just those kind of policies.

Ms. Friedman, let me give you what's left of my time to liberate yourself of some concerns or observations you want to make.

Ms. FRIEDMAN. I just want to make a point about—there is a concern here about the Ninth Circuit's inconsistent application of rules, somehow not being fair to the Ninth Circuit. I just wanted to read a short quote:

"If inconsistently applied procedural rules suffice adequate grounds of decisions, they could provide a convenient pretext for State courts to scuttle Federal claims without Federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called 'rules,' directions of general operability rather than by prejudice against a claim or claimant." That was written by Judge Leo on the 3rd circuit.

These are serious rules that have be taken seriously.

I disagree entirely that a successive petition is the same thing as a procedurally defaulted rule. Claims come into Federal court. They don't come—people aren't able to bring these claims into Federal court most often because they had inadequate counsel or because the State withheld the basis for the claim. And again, I point you——

Mr. DELAHUNT. Mr. Cattani, I think you mentioned, Arizona changed its system in what, 2003?

Mr. CATTANI. I think it was '90—I believe it was 1993.

Mr. DELAHUNT. I mean, I would like to think that, you know——

Mr. CATTANI. It wasn't a drastic change, though; it was simply to make certain that the attorneys handling the post-conviction proceedings——

Mr. DELAHUNT. Would you agree with me that it's a system that has an abundance of imperfections to it, and it, in essence, is to secure the truth?

We're talking about people who are incarcerated by the way; you know, they're not out wreaking havoc and violence in the community.

Mr. CATTANI. I would agree with that. But when you consider the fact that when we have this actual innocence exception that is more generous than anything that's ever been proposed as part of Federal legislation, and yet we still have no finality with these cases, I think there is a frustration that is justified.

I think the resources should be put in up front at the trial and at the post-conviction stage. And having done that, there should be some finality in Federal court.

Mr. DELAHUNT. I applaud that idea of investing in—and I'm impressed with what you're saying about the qualifications and two attorneys in capital cases, plus investigative resources; that's all good.

Mr. COBLE. I will reclaim my time.

Folks, keep in mind we have got to vacate this ship at 12 o'clock.

The gentlelady from California is recognized for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman.

I don't know if this question has been raised or this discussion has been had here, but you know, I am very much concerned about the death penalty. And I, too, believe that we must make sure that people who are imprisoned and who have been sentenced to death have the opportunity to go before the court with emerging evidence.

It is noted that recently—in at least eight recent cases, the Federal courts have ordered new trials, after which defendants have been exonerated; and in each case, the exonerated defendant would have been executed if the bills before us now had—if this bill had been law.

I would like to know if there is anyone who would disagree with the statement, or this observation or this assessment: Does this bill trivialize a person's right to life and liberty?

Mr. DOLGENOS. If I may, ma'am, I don't think it does. I think the key to remember is that by the time someone gets to the Federal courts, if the system is working right and if defense counsel are funded, they've had a jury look at their claims, they've had a State court look at their legal claims, they've had time and they've had resources.

That is not to say that Federal review is unnecessary; it's a good thing. But the question is, if we are 15, 20 years after the crime relitigating guilt again, I believe that doesn't lead to reliability; I believe that leads away from reliability. And I think it asks too much of habeas corpus and ultimately undermines the system of justice when assessments of guilt and innocence are made regularly so long after the crime.

Ms. WATERS. Anyone else feel differently?

Mr. CATTANI. I would just like to point out—I'm not certain of the specifics.

I believe—I have seen the list of eight cases, I think, that was proffered in the Senate; and the fundamental premise is wrong in some of those cases. The premise is that if this had been an opt-in case, these defendants would not have been entitled to relief in Federal court.

Well, the point of this was, those were not opt-in cases; the States did not provide that level of post-conviction review. So it really doesn't make sense to say that these defendants would not have obtained relief in Federal court. Well, presumably, if we had established a good system to address these claims in State court at the post-conviction stage, there wouldn't be a need for Federal relief.

So I don't think it's fair to say that if these cases had been opt-in cases we wouldn't get relief, because it's based on an incorrect premise—if it's a situation where a State does not provide an attorney or only pays $1,000 for an attorney to handle the trial or the post-conviction process, then it's not an opt-in case.

Ms. WATERS. Any other opinions?

Ms. FRIEDMAN. I thought the whole purpose of the bill in trying to move it to the Attorney General was to ensure that some States would get the opt-in status much more easily. And so I think—yeah, there's a problem looking back at a case, but people are going to be in exactly the same situation.

I think beyond opt-in, you've got people who have procedurally barred claims, procedurally barred claims that are barred because of a State committed misconduct. Nowhere in this bill is there a safe harbor for people in that situation. And I think this bill encourages that; it encourages States to withhold evidence, it encourages States to make harmlessness findings to avoid Federal review, it encourages default findings. And there is no way around that the way this bill is written.

Ms. WATERS. Thank you very much. I will yield back the balance of my time.

Mr. COBLE. I thank the gentlelady.

The distinguished gentleman from California.

Mr. LUNGREN. How could you discover it using due diligence if the State were hiding it?

Ms. FRIEDMAN. I think that's right in terms of getting past the due diligence part of it. There is a problem, of course, for people who come with their claims already—the claims of innocence, for example.

I assume you're talking about the innocence provision, Congressman.

Mr. LUNGREN. Right.

Because you keep talking about the fact that the State would hide this evidence. If they had the evidence, obviously you couldn't have found it by due diligence. And it goes to innocence——

Ms. FRIEDMAN. That's only one part of the innocence provision. The innocence provision also requires that the evidence of innocence be tied to the claim itself and that a person doesn't seek relief on a different claim, which has happened many times and inno-

cence is proved. It requires that there be absolutely no connection to the offense whatsoever.

It requires due diligence such that in cases where there are examples—it happened in the State of Texas where people put their evidence on in front of the State court. So you can't say in Federal court that they couldn't have found it by the exercise of due diligence and the State court rejected it. Under this bill, I don't know how you would——

Mr. LUNGREN. But if it's hidden by the State, if they intentionally hide it, you think a Federal court is going to have difficulty making a finding that due diligence wouldn't have revealed it?

Ms. FRIEDMAN. There is no way—absolutely, there is no way in this bill that people who have defaulted claims, who come in and want to say, I need to even find out if I can get evidence of innocence in front of this court, there is no way they're going to be get past this. A case like Banks is a very good example of that.

They are not raised in State court because the State withholds the evidence in State court. What happened in Banks is that basically the State got up and said—and it may have been Justice O'Connor——

Mr. LUNGREN. If they successfully hide it in State court, you're not going to be successful in hiding it in Federal court? I mean, I appreciate your work, and I understand your sincerity, but I have not found all wisdom and objectivity in the Federal courts as opposed to the State courts.

We had a situation in which we had a district court judge, Federal district court judge in California who was named to be the chief justice of the California Supreme Court, so he took off the Federal robe and put on the State robe. Now is the assumption that he is less dedicated to the Constitution because he's the chief justice of the California Supreme Court than he was when he was the district court judge on the Federal bench?

I just—I find difficulty with that.

Let me ask, Ms. Hughes—you've been very good to be sitting there and listening to this, but I can't let a comment go by without asking your response to it. And I wish Mr. Delahunt was still here. But almost as an aside to one of the questions he asked of the two prosecutors there, he said, "Remember, these people are in custody," and I'm sure you've heard that before.

Why should you be so concerned about the fact that the murderer of your son is having a few more years to go through the courts because he's not going to get out, he's still being punished? It's like life without possibility of parole. Why would you be concerned?

Ms. HUGHES. I almost jumped out of my seat when that statement was made.

Mr. LUNGREN. We need to hear that.

Ms. HUGHES. This is a constant emotional upheaval for my family.

And you say he's not going to get out. Last week a death penalty inmate walked out in Texas. Granted, he wasn't on death row at that time, but what's to stop Kevin Cooper from having some kind of medical problem, be transferred to some hospital and escape? He's an escape artist.

The truth of the fact is, all right, so he's incarcerated, he's still living and breathing. He has a TV, he has a radio, he has his own Web site, he has his own little bit of groupees.

My child was 11 years old, 11 years old in the fifth grade. He never got to go to high school, to go to a prom, to graduate, to fall in love, to have a family of his own. He would be 33 years old today, and Kevin Cooper robbed him of all this. And I am horrified that Kevin Cooper still exists on the face of this Earth.

The California Supreme Court said the evidence against Kevin Cooper was overwhelming, that was in 1991; this is 2005 and we are still at it. And I don't know when the end is going to ever take place. Are we going to still be alive when the person who murdered my son is finally put to death?

That's how I feel.

Mr. COBLE. The gentleman's time has expired.

We have time for one more questioning, and the gentleman from Virginia will do the honors.

Mr. SCOTT. Thank you, Mr. Chairman.

You know, the problem with these kinds of cases is that the guilty and innocent are being stuck with the same process. If we know the person is guilty, then there is no problem with the streamlined stuff. If we knew the person was innocent, then we could have a more complicated process; but unfortunately, we don't know. And so we have the same process; whatever we do for the guilty we've got to do for the innocent.

Now the gentleman from California went to great lengths to show how a person who got evidence, who was able to subpoena evidence, in fact, wasted the court's time because he was guilty. What if the evidence had come back that he was, in fact, innocent? The question, I guess, is, should he have had the right to get the evidence?

Ms. Friedman, if you present evidence of clear and convincing evidence of innocence, do you have a right to discovery, to subpoena?

Ms. FRIEDMAN. There is nothing in this bill that suggests that one does. And I have actually seen this in a case recently in Alabama where somebody missed the statute of limitations and attempted to make an innocence argument, a compelling innocence argument, the person who had seen the person leaving the scene of the crime had described somebody looking very different from the person on death row. And he tried to meet the same kind of standard, and the district court said, no, you don't get any discovery to do that. So there is no provision here.

Mr. SCOTT. So you have to have your clear and convincing evidence all lined up going in. You cannot make—under this bill, you can't even make the case where if I can get the evidence, I can show that by clear and convincing evidence, DNA—you don't have a right to the DNA test, is that right, unless you're coming in with clear and convincing evidence already?

Ms. FRIEDMAN. You don't have a right to anything. This is a jurisdiction-stripping bill. You don't have a right to get into court.

Mr. SCOTT. So unless you have evidence already lined up, you can't even get into court?

Ms. FRIEDMAN. I think that's right.

Mr. SCOTT. Okay. Now——

Mr. LUNGREN. Would the gentleman yield?

Mr. SCOTT. So if your allegation is that if I can get the DNA evidence, I can prove my innocence by clear and convincing evidence, and first Ms. Friedman is saying I can't even get to court to subpoena the evidence. I will yield.

Mr. LUNGREN. Is the gentleman suggesting that there ought to be a broad scale allowance of any individual post-conviction, that they could make any claim whatsoever without any evidence, because they have an opportunity at a fourth bite at the apple?

Mr. SCOTT. Well, that's a hard question. I would say to the gentleman, that's a hard question. Suppose somebody is innocent, and if I can just subpoena the evidence, I can show I'm innocent. What do you say to that?

Mr. LUNGREN. We have an actual innocence exception in this.

Mr. SCOTT. Wait a minute. I don't have any evidence, I need to get the evidence. I'm alleging I'm innocent, and if I can get the evidence, I can show it.

Mr. LUNGREN. In other words, I know I'm innocent, but I have nothing other than my statement that I'm innocent after being found guilty by a jury of my peers and after going through an appeal to my State Supreme Court, a collateral appeal to my State court——

Mr. SCOTT. But if you give me subpoena power——

Mr. LUNGREN.—and directly to the U.S. Supreme Court.

Mr. SCOTT. If you give me subpoena power, I can show that I'm actually innocent.

Do I have subpoena power to show it?

Mr. LUNGREN. I don't believe you do under this or any other procedure.

Mr. SCOTT. Well, that's a problem. And see—you know, unfortunately the innocent and the guilty are stuck with the same process. And so somebody saying they're innocent that's actually guilty, well, they shouldn't have it; but if they are innocent, well——

Mr. LUNGREN. We don't change that part of the law the way it is already.

Mr. SCOTT. How do you—you can't get into court to get a subpoena unless you've already got the evidence lined up, which—suppose you have seen—you've got a catch-22. If I can get the DNA evidence, I can show I'm innocent. I don't have subpoena power until I get in court.

And you show up in court, Your Honor, well, I don't have any evidence now, but so what? You get thrown out and you never get an opportunity to show.

Let me ask another question, Mr. Dolgenos. Tell me what happens if you—considering everything that's before you, you conclude that somebody's probably innocent?

Mr. DOLGENOS. Well, sir, first of all, presumably the prosecutors who have gone before me have had the same choice, and it often happens in State court that we take steps. If it comes to me and if I have evidence in front of me that I believe someone is probably innocent——

Mr. SCOTT. Are you talking about as a judge or as a prosecutor?

Mr. DOLGENOS. As a prosecutor. Is that the question you're asking me? If I believe someone is probably innocent——

Mr. SCOTT. Actually, I'm asking what right does a defendant have in an adversary process? After all is said and done, you look at the case, and an independent trier of fact would conclude—not what the advocates say, but an independent trier of fact would conclude that the defendant is probably innocent.

Mr. DOLGENOS. Well, if he's in court, in State court or Federal court, the judge can find——

Mr. SCOTT. How do you get into Federal court without clear and convincing? Just kind of probable——

Mr. DOLGENOS. If you've exhausted your claims in State court, you're in court in Federal court under this bill. It's only when you haven't brought our State claims——

Mr. SCOTT. After all is said and done, you've got all these defaulted claims and everything, and you're trying to get in, and it requires clear and convincing evidence of innocence, you don't have it, all you have is probably innocent, should the person be put to death or not under those circumstances?

Mr. DOLGENOS. And there is all default, they haven't done anything in State court?

Mr. SCOTT. No, no. They've gone through and they've had a fair trial; they've had all their endless—their eternal appeals and all of what people are complaining about——

Mr. DOLGENOS. And the judges have disagreed about the innocence claim?

Mr. SCOTT. And you are now in a situation where, after you have discovered evidence and the totality of the circumstances, the conclusion that an objective trier of fact is that the person is probably innocent, should they be put to death or not?

Mr. DOLGENOS. I think what this bill says is that the hunch of one judge as opposed to a system of State court judges is not enough.

Mr. SCOTT. So if the person in the totality of circumstances can show that they're probably innocent, the effectiveness of the death penalty is in jeopardy? We've got to put him to death?

Mr. DOLGENOS. If everyone agrees that he's probably innocent, that would lead to a different result.

But I think——

Mr. SCOTT. You can't get into court.

Mr. DOLGENOS. Well, if it was in court in State court——

Mr. SCOTT. This is after all the discovered evidence and everything else he can show that he's probably innocent.

Mr. DOLGENOS. And he didn't show that to anyone else?

Mr. SCOTT. That's right, that's right. He finally put his little case together after this thing had been thrown out procedurally with prejudice on page 3, line 3——

Mr. DOLGENOS. After 15 years, he put it together and he didn't do anything in State court, he never put this evidence together before?

Mr. SCOTT. That's right.

Mr. DOLGENOS. Well, I think that's going to be a case that won't ever happen. I can't imagine why someone wouldn't put together his evidence.

Mr. SCOTT. Could Ms. Friedman——

Mr. COBLE. Ms. Friedman, the noon hour is upon us. Ms. Sheila Jackson Lee wants 2 minutes, but Ms. Friedman, can you wrap it up in a minute or less?

Ms. FRIEDMAN. In less. It can absolutely happen. There is no right to counsel in post-conviction. You might not get counsel in time. There is no right to expert services; there is no right to investigation. And it may be that the State was withholding that evidence for a long time.

Mr. COBLE. The gentleman's time is up.

The gentlelady from Texas is recognized for 2 minutes.

Ms. JACKSON LEE. I thank you very much, Mr. Chairman.

And I want to say to the victim's mother, coming from Texas, there was absolutely no excuse for that ridiculous incident that occurred in Harris County. All of the local officials need to be held accountable. And it's those kinds of episodes, unfortunately, that do further harm to those that have been victimized.

And I want to build on what Congressman Scott did, that unfortunately there is a mix between the innocent and the guilty and, of course, the taking advantage—when you're talking about 10 and 20 years on death row, and the procedures are used frivolously. And, of course, we have to make that determination.

But, Ms. Friedman, you were finishing, but let me get to this point and see how we can fix this problem. "Streamline," to me, does not equal justice, but it does seem that we need to find a way to move the so-called "delaying" in Federal review of death penalty cases, habeas cases, in a much more responsible way.

What would be your suggestion, as you sit alongside of Ms. Hughes, as to how we balance that so that there is, in fact, the real justice that we want to have.

Ms. FRIEDMAN. I think in talking about California, which is very different from where I practice, I think you can talk about moving things under time lines in the Federal courts. That's what moving things quickly is about, timing, it's not about repealing one's ability ever to get a case heard.

I think for other States outside of California, I think it would be very good to have real incentives for people to have decent, adequate counsel and adequate access to resources so that the State process really is a process that can be supported and would allow things to move more quickly in Federal court.

Ms. JACKSON LEE. Mr. Chairman, I think Ms. Friedman, in her brief answer to my brief question, has given us the real type of fix. Because if we take a problem in California and make it the general product of the Nation, we're doing great disservice to those early musings of the Founding Fathers about what justice, what the habeas means, what due process means. And I don't think that is worthy of our Committee, and I yield back.

Mr. COBLE. I thank the gentlelady,

Folks, this has been a very good hearing. I appreciate that.

And Ms. Hughes, in particular, your courageous effort here is very much appreciated, as is the case with the others. We thank you for your testimony, and this Subcommittee is very much appreciative to you.

In order to ensure a full record and adequate consideration of this very important issue, the record will remain open for additional submissions for 7 days. Any written questions that a Member wants to submit should be submitted within that same 7-day period.

Mr. COBLE. This concludes the legislative hearing of H.R. 3035, the "Streamlined Procedures Act of 2005." Thank you for your cooperation, and the Subcommittee stands adjourned.

[Whereupon, at 12:07 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman, for holding this hearing on H.R. 3035, the "Streamline Procedures Act of 2005". The title of this bill suggests that it would streamline the processing of habeas corpus cases. In fact, it would strip federal courts of jurisdiction to determine many federal issues and undercut the Supreme Court's efforts to clear up uncertainties regarding the reforms Congress enacted in 1996 (Antiterrorism and Effective Death Penalty Act, AEDPA).

The bill would virtually eliminate the ability of federal courts to determine federal constitutional issues in cases involving prisoners either facing death sentences or serving prison terms. In short, this bill would greatly increase the prospects of an innocent person being put to death, or languishing in prison with no hope of correcting an unconstitutional conviction. In general, the bill would overturn a whole series of Supreme Court decisions adopted since AEDPA, increase the number of habeas corpus petitions filed, complicate and delay litigation in this area, disregard traditional principles of federalism, and invite constitutional challenge on the theory that it impairs the independence of the federal courts. Ironically, supporters of this bill are some of the same folks who, in the Teri Schiavo case, advocated for elimination, for that case, of the very kinds of hurdles this bill promotes.

Federal Habeas Corpus is the modern day reflection of the "Great Writ" which was the foundation for much of our criminal law principals. A right without a remedy is not a meaningful right, and is worse than no right at all. What good is it to have constitutional rights that cannot be enforced?

Ths bill will eliminate the federal courts role as a courts of last resort for the citizens of this country, and relegate citizens to "Jim Crow-like" state's rights where prosecutors seeking to protect their wins wield all the power. They are the only people who have anything to gain from having innocent people languish in prison, or even be put to death, because they are unable to seek meaningful relief from unconstitutional convictions. Crime victims and their families will face even greater delays and frustration as the courts struggle to resolve constitutional challenges to a new law, and they, nor society in general, will not benefit from having innocent people locked up or put to death as the true perpetrators remain free to prey on others. And there are a number examples of innocent people being released in recent years who could not have been released if this bill had been law. I would like to offer these 2 for the record, Mr. Chairman, one involving a release from death row, and more will be identified and added before the record closes.

A host of organizations and individuals, including prosecutors and judges, liberals and conservatives, have expressed concerns about this bill becoming law. Forty nine of the 50 Chief justices have asked the Congress to carefully study the need for, and impact of, this legislation, and I would like to offer their resolutions on the point for the record. I also have letters and a resolution from the federal Judicial Conference, the federal public defenders, and a former prosecutor in the California system expressing their concern about the legislation, and I would like to offer these for the record, as well. In this later submission is a memo developed by the former prosecutor, and letter from the current Chief Justice of the California Supreme Court, which explains why most of the time period necessary to complete habeas petitions occurs at the state court level.

In summary, Mr. Chairman, while there are, not doubt, instances in which non meritorious prisoner claims get more attention than they deserve, that is not a heavy price to pay to ensure that we don't execute an innocent person, or have innocent people languishing in prison with no hope. We already greatly streamlined ha-

beas claims in AEDPA. Now, only those who have "clear and convincing evidence of actual innocence even get a hearing under traditional habeas processes. Those who can establish that they are innocent only by a preponderance of the evidence, that is by 51% or more, or that they are only probably innocent, that is that it is more likely than not that they are innocent—they don't even get a hearing under current habeas procedures pursuant to AEDPA restrictions. So, Mr. Chairman, in a context where it is clear that innocent people who have been released in recent years could not be released under the provisions of this bill, we should not proceed with further jeopardizing the prospects for like cases. Again, it benefits no one that Congress should assist to have an innocent person languishing in prison or executed while the real perpetrators roam free. A single case of that happening is a tragedy worth all we are doing now, and more, to avoid. Thank you.

KRISTEN GELINEAU, "OLD DNA CLEARS TWO MORE MEN, INCLUDING ONE IN NORFOLK CASE," ASSOCIATED PRESS, (DECEMBER 14, 2005)

Old DNA clears two more men, including one in Norfolk case

By KRISTEN GELINEAU, Associated Press
© December 14, 2005
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After spending years in prison, two more men have been exonerated by DNA testing of a random sample of old cases at the state lab, state officials announced Wednesday.

The men – one convicted of a Norfolk rape in 1981, the other of a rape in Alexandria in 1985 have already served their time and been released. They have asked Gov. Mark R. Warner for pardons and have supporting letters from the commonwealth's attorneys in both cities. Warner has asked that the review of their cases be expedited.

The exonerations came after Warner's September 2004 order that the lab test 10 percent of old case files that contained biological evidence. A total of 81 cases were reviewed. In all, five men in Virginia have now been cleared through DNA testing of old evidence.

As a result, Warner has ordered the state lab to review all remaining old case files that contain evidence

previously untested for DNA and to test them "where appropriate."

"The powerful crime-fighting tool of DNA has helped add certainty to our justice system for many years now," Warner said in a press release. "I believe a look back at these retained case files is the only morally acceptable course, and what truth they can bring only bolsters confidence in our system."

The lab holds 660 boxes containing about 165,000 such files from 1974 to 1988. Lab director Paul Ferrara said they could produce more than 300 cases for review.

Willie Davidson is the exonerated man from Norfolk. Newspaper archives show that Davidson was charged with raping a 66-year-old widow in her home on Thanksgiving Day in 1980. The woman identified him as her attacker. Davidson was on parole from a robbery conviction when he was accused of the rape.

Davidson pleaded not guilty and testified that he was at home at the time of the crime. A judge convicted him of rape, statutory robbery, and two counts of sodomy after a bench trial and sentenced him to four 20-year terms, with the time running concurrently.

James Broccoletti, a criminal defense lawyer who now represents Davidson, said his client was released in 1992 after serving almost 13 years in prison.

"He's gratified that the system has finally worked," Broccoletti said. "But he's still very bitter." Through Broccoletti, Davidson declined to be interviewed.

Commonwealth's Attorney John R. Doyle III said the victim in the case is dead and prosecutors were unable to locate any members of her family. Doyle said there is no new suspect in the case

In the Alexandria case, the testing produced a "cold hit" -- a match to another person's DNA in the state's data bank.

"We are aggressively pursuing it as a pending criminal investigation," said S. Randolph Sengel, the Alexandria commonwealth's attorney.

Sengel has met with the exonerated man, whom he declined to identify because the man wants to remain anonymous.

"He was thankful his innocence has been established," Sengel said.

The string of exonerations began in 2001, with the discovery of biological evidence in Marvin L. Anderson's file at the state lab. Anderson had been convicted of a Hanover County rape in 1982. He asked for DNA testing of evidence in his case after the state eased laws that had restricted inmates' ability to submit such evidence to prove their innocence.

After pulling Anderson's file for review, Ferrara discovered that Mary Jane Burton, a lab worker who tested blood and other biological evidence from 1974 to 1988, had saved pieces of the samples by taping them to hand-made charts. Those preserved samples were tested for DNA.

Evidence from Burton's files cleared Anderson and later exonerated two other Norfolk men of rape -- Julius Earl Ruffin and Arthur Lee Whitfield.

Anderson had served 15 years in prison, and Ruffin and Whitfield had each served more than 20 years before they were cleared. Warner pardoned Anderson and Ruffin.

The state Supreme Court ruled earlier this year that Whitfield could not seek a petition for writ of actual innocence because he has already been released from prison. Whitfield's lawyer has said he also will seek a pardon.

It was after Whitfield's exoneration last year that Warner ordered the lab to test the random sample of old cases.

Also this year, an outside audit found serious mistakes in how the state lab handled evidence in the case of Earl Washington Jr., who had been convicted of the 1982 rape and murder of a Culpeper woman. DNA tests later showed that Washington did not commit the crimes and he was pardoned by the governor. The lab conducted a review of more than 100 cases involving small amounts of DNA after that audit. That review found one incorrect interpretation of DNA evidence, but no errors that substantially affected the test results.

In the continuing testing, evidence will be sent to a private lab, the Bode Technology Group in Springfield, in batches of 10 to 15 cases at a time. The results will be returned to the Department of Forensic Science for review. The testing should begin to return results in about four months.

Ferrara was not in his office Wednesday afternoon and could not be reached. He was quoted in a statement from the governor's office.

"Any math we do to try to calculate the possible impact of this new full-scale review is simply guesswork," Ferrara said. "That being said, as many as 300 or more cases may meet the testing

criteria. One could apply the same ratio of exonerations — two out of 31 — but again, that is unlikely to be statistically valid."

The co-director of a non-profit group working to identify and free wrongfully convicted people applauded Warner's call for additional testing.

"There can be no doubt that every other governor in the nation has an obligation to investigate how many other innocent people are in prison and could be exonerated if the state looked into their cases," Peter Neufeld of the New York-based Innocence Project said in an e-mailed statement. Neufeld also represented Marvin Anderson.

Last year, the Virginia Trial Lawyers Association requested that the lab take the very step that Warner has now ordered — a review of all the old case files.

"The only regret I would have is that the call for this over a year ago had not been heeded sooner," said Andrew Sacks, a Norfolk lawyer who is the vice president for the criminal law section of the association. "We already had solid evidence in light of the repeated exonerations of falsely accused persons that a crisis existed."

Willie Davidson has lost job and housing opportunities because of his conviction, in addition to 13 years of his life, Broccoletti said. He missed seeing his nieces and nephews grow and lost time with his mother, who is now sick and elderly.

Like Sacks, Broccoletti wondered how many more people would be cleared by the continued testing.

"Out of a 10 percent sample, they have two exonerations," he said. "They have 90 percent more to go. What does that tell you?"

News researcher Ann Kinken Johnson contributed to this report.

Reach Michelle Washington at (757) 446-2357 or michelle.washington@pilotonline.com.

LETTER SUBMITTED BY LEONIDAS MECHAM, SECRETARY, JUDICIAL CONFERENCE OF THE UNITED STATES, TO THE HONORABLE F. JAMES SENSENBRENNER, JR., CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY (JULY 22, 2005)

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

July 22, 2005

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-4905

Dear Mr. Chairman:

As the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security begins consideration of H.R. 3035, the "Streamlined Procedures Act of 2005," I wanted to provide you with the views of the Judicial Conference of the United States on this habeas corpus legislation. As explained more fully below, the Judicial Conference opposes particular provisions within sections 8, 9, and 11 of H.R. 3035, based on positions previously adopted by the Conference.

The judiciary is still assessing the bill and may provide additional comments in the near future. In this regard, I have asked the Judicial Conference Committee on Federal-State Jurisdiction, chaired by Judge Howard McKibben, U.S. District Court for the District of Nevada, in consultation with certain other committees of the Conference, to undertake an analysis of the proposed legislation to determine its implications for the federal courts and the administration of justice. We hope to continue to be of assistance to the Judiciary Committee in its consideration of H.R. 3035.

The judiciary's existing positions in this matter are based principally on its consideration of the 1989 Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Powell Committee Report), a report of the committee chaired by then-retired Justice Lewis F. Powell, Jr. The Powell Committee studied habeas procedure and then proposed statutory reforms that sought to enhance the competency of counsel and expedite review in capital cases. The Conference approved those proposals in 1990 with

two modifications.[1] *See Report of the Proceedings of the Judicial Conference of the United States* (*Proceedings*), March 1990, pp. 8-9. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which in part responded to the recommendations in the Powell Committee Report.[2]

The Conference has also drawn on other prior positions it has adopted in formulating the specific comments below.

Section 8

Section 8(a) of H.R. 3035 would amend 28 U.S.C. § 2254 to limit the time in which courts of appeals could hear and determine appeals from district court decisions regarding habeas corpus petitions. The bill would require appellate courts to decide a habeas appeal within 300 days after the appellee's brief is filed, rule on a petition for rehearing of an appellate court decision within 90 days, and decide cases on rehearing within 120 days if the appeal is before the same appellate panel or 180 days if the rehearing is before the court en banc.

The Judicial Conference is mindful of the concerns raised by the sponsors of the legislation as to the length of time it has taken to complete action on some habeas cases. The Conference, however, has consistently expressed its strong opposition to the statutory imposition of priority, expediting, and time limitation rules for designated categories of litigation, beyond those specified in 28 U.S.C. § 1657. The Conference has also specifically opposed provisions relating to judicial case management of habeas corpus actions in capital cases. *See, e.g.*, *Proceedings*, September 1990, p. 80. Section 1657 already requires courts, both trial and appellate, to "expedite the consideration of any action brought under chapter 153 [of title 28, United States Code]," which includes habeas corpus proceedings. This expediting requirement is in addition to many other expediting mandates that are already placed on the federal courts, including the specific time deadlines for criminal cases under the Speedy Trial Act of 1974.

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[1]One modification relevant to H.R. 3035 established standards for the appointment and compensation of counsel (*see infra* at page 3). The other modification related to a federal court's consideration of a second or successive petition.

[2]Chapter 154 of title 28 codified a special set of federal habeas corpus procedures to govern capital cases that would apply only to petitions brought by prisoners in states that have chosen to adopt specified procedures to ensure competent counsel in state post-conviction proceedings.

Specific time limits require that scarce judicial resources be diverted from other matters pending before the court, disrupting the orderly processing of cases. Inflexible time limits also fail to accommodate developments that warrant a delay in the interests of justice or efficient court administration, such as a stay pending a Supreme Court decision in a related or similar case or a remand to the state courts for the resolution of state-law questions. Because H.R. 3035 would impose specific deadlines on judicial actions, the Judicial Conference opposes Section 8(a).

Section 9(c) & (d)

Section 9 of H.R. 3035 would amend chapter 154 of title 28, United States Code (now codified in 28 U.S.C. §§ 2261-2266), which establishes special habeas corpus procedures in capital cases arising in states that have adopted specified procedures to ensure competent counsel in state post-conviction proceedings. Section 9(c) would authorize the Attorney General of the United States to determine that a state has "opted-in" to chapter 154 by certifying that the state has established by statute, by rule of its court of last resort, or by another agency authorized by state law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings. Section 9(d) provides that the decision of the Attorney General to certify a state for this purpose would be subject to judicial review exclusively in the U.S. Court of Appeals for the District of Columbia Circuit. The certification decision of the Attorney General would be conclusive "unless manifestly contrary to the law and an abuse of discretion," which is a very deferential standard of review.

The provisions included in 9(c) and (d) are inconsistent with Judicial Conference policy. In adopting the Powell Committee recommendations in 1990, the Conference made clear that it supports a role for the federal courts in determining whether a state has met the requirements for expediting capital habeas corpus proceedings. The Conference determined that there should be specific mandatory federal standards similar to those set forth in the Anti-Drug Abuse Act of 1988 (codified at 21 U.S.C. § 848(q)) for the appointment and compensation of counsel in capital cases. The Conference also stressed the need for counsel at "all stages of the state and federal capital punishment litigation." *Proceedings*, March 1990, p. 8.

A core concept behind the Conference's action was that the federal courts would assume a critical and continuing role in determining the adequacy of state mechanisms for

providing counsel and whether the state has complied with the requirements of 28 U.S.C. § 2261(b) and (c). This is reflected in the following excerpt from the Powell Committee Report (at page 11):

> The final judgment as to the *adequacy* of any system for the appointment of counsel under subsection (b), however, rests ultimately with the federal judiciary. If prisoners under capital sentence in a particular State doubt that a State's mechanism for appointing counsel comports with subsection (b), the adequacy of the system – as opposed to the competency of particular counsel – can be settled through litigation.

Section 9(c) would shift the responsibility for determining whether a state has established a "qualifying mechanism" to the Attorney General, thereby divesting district and appellate courts of their current jurisdiction. The Conference recognizes that section 9(d) would provide for judicial review of the Attorney General's decision in the U.S. Court of Appeals for the District of Columbia Circuit. However, the Conference has traditionally opposed consolidating review of certain categories of cases in a single Article III court, preferring instead to disperse actions to the geographic Article III courts to preserve their generalist nature. *See, e.g., Proceedings*, September 1982, pp. 64-65. Moreover, some district and appellate courts already have experience with the issues relevant to certification decisions.

Section 11

The federal courts are responsible for administering the appointment of counsel in federal criminal and related proceedings, including capital habeas corpus cases. 18 U.S.C. § 3006A (Criminal Justice Act); 21 U.S.C. § 848(q) (Anti-Drug Abuse Act). The appointment of counsel in both federal capital prosecutions and federal capital habeas corpus proceedings involving either federal or state prisoners is specifically addressed in § 848(q). Judicial Conference policy in this area is set forth in the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume 7, *Guide to Judiciary Policies and Procedures* (Guidelines).

Section 11 of H.R. 3035 would substantially amend the language in 21 U.S.C. § 848(q)(9) that provides for an *ex parte* application for expert or other services as long as "a proper showing is made concerning the need for confidentiality." The proposed amendment would permit an *ex parte* proceeding in habeas corpus cases only if necessary

to protect any confidential-communications privilege between the petitioner and post-conviction counsel. Further, the bill would require that the government's attorney be notified of any application to proceed *ex parte* and given an opportunity "to answer the application." Finally, it would require immediate public disclosure of any amounts paid for expert and other services.

The current statutory scheme and Judicial Conference policy strike an appropriate balance between protecting the public fisc and preserving the due process protections constitutionally guaranteed in our adversary system. Guidelines Paragraph 3.03 explains that *ex parte* proceedings preserve the adversarial principle in non-capital criminal cases: "[m]aintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense." Although 21 U.S.C. § 848(q)(9) was amended by the AEDPA to limit the use of *ex parte* proceedings in capital cases, the statute and regulations (Guidelines, Paragraph 6.03) have preserved a core principle of the adversarial system by permitting *ex parte* consideration upon a showing of need for confidentiality. Giving prosecutors the right to intervene in this administrative process would alter the balance of the adversarial system and introduce complexity and delay. Moreover, it would create a disparity in the rights afforded defendants based on financial status: petitioners with enough money to hire their own experts would have the unfettered right to do so, while those who do not would, in most circumstances, have to reveal to the prosecution confidential strategy decisions, investigative avenues, and work product in order to obtain services necessary to a constitutionally adequate defense.

Section 11 also would add to 21 U.S.C. § 848(q)(9) a requirement that any amounts authorized to be paid for expert and other services be disclosed to the public immediately. Section 848(q) generally, and section 848(q)(9) in particular, apply equally to federal capital prosecutions and federal capital habeas corpus cases. As drafted, the immediate disclosure mandate proposed in section 11, unlike the other proposed changes to section 848(q)(9), would apply to both federal capital prosecutions and federal capital habeas corpus cases involving federal and state prisoners. The same interests that require confidentiality in the funding application process also support the present statutory language and Judicial Conference policies, which provide for disclosure of payments made in capital habeas cases "after the disposition of the petition." *Id.* § 848(q)(10)(C). The Guidelines cite this language in subparagraph 5.01B and state that the timing of

disclosure should be consistent with the principles stated in subparagraph 5.01A, which provides in part:

> Generally, such information which is not otherwise routinely available to the public should be made available unless it is judicially placed under seal, or could reasonably be expected to unduly intrude upon the privacy of attorneys or defendants; compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources; or otherwise adversely affect the defendant's right to the effective assistance of counsel, a fair trial, or an impartial adjudication. (See 5 U.S.C. § 552(b).)
>
> Upon request, or upon the court's own motion, documents pertaining to activities under the CJA and related statutes maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings, including appeals, in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such order.

Guidelines Paragraph 5.01A. Thus, the existing policies favor disclosure of expenditures for the costs of representation while appropriately committing to the discretion of the court the determination as to whether a delay in the release of such information is warranted in a particular case.

For these reasons, the Judicial Conference opposes the provisions in section 11 that would (1) limit *ex parte* applications for expert services, (2) give prosecutors the right to intervene in the funding application process, and (3) require immediate public disclosure of payment information.

Other sections

As mentioned previously, H.R. 3035 contains several provisions that the Judicial Conference has not yet had the opportunity to study fully. Given the importance of these issues, the judiciary would like to examine them more closely. For example, the bill proposes new standards applicable to all habeas corpus proceedings, both non-capital and capital. Three sections of the bill would address the ability of federal courts to

review habeas petitions brought by state prisoners: section 2 relates to mixed petitions (exhausted and unexhausted claims), section 4 relates to procedurally defaulted claims, and section 6 relates to federal review of claims where the state finds there was harmless error in sentencing. Section 10 would limit federal court review of state clemency and pardon procedures. Other sections would bar the courts of appeals from rehearing successive petitions *sua sponte* (section 8), prohibit the federal courts from extending the one-year period for filing a habeas petition on equitable grounds (section 5), and require federal judges hearing a habeas petition to transfer requests for investigative services to another judge (section 11).

In addition, a potential concern for the Conference is related to section 9(a). That subsection would replace existing section 2264 (establishing the scope of federal district court review) with a new version that would permit a federal court to review a state prisoner's habeas petition in very limited circumstances. Under current law, for capital cases qualifying for the special procedures under chapter 154, a federal court is required to consider claims that have been raised and decided on the merits in state court and to apply to those claims the same standards that govern habeas cases generally under section 2254. If the petitioner raises a new claim not previously heard by state courts, section 2264 imposes restrictions on the availability of review.

Section 9(a) would bar federal jurisdiction unless the petitioner shows that the claim relies on a new rule of constitutional law that the Supreme Court has made retroactively available to cases on post-conviction review, or that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. In addition, the petitioner must show that denial of relief would be contrary to, or involve an unreasonable application of, clearly established federal law as determined by the Supreme Court. This restriction of habeas review may be contrary to the standard of review endorsed by the Conference when it adopted the recommendations of the Powell Committee. Implicit in that standard of review, although limited, was the notion that the federal courts would retain a role in safeguarding the constitutional rights available to defendants in these cases.[3]

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[3]In September 1991, the Conference opposed legislation containing language that would preclude habeas review by the federal courts in all cases in which there was "full and fair adjudication" at the state level. *See Proceedings*, September 1991, p. 59.

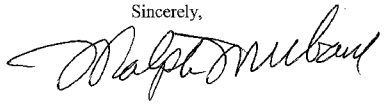
During the past decade, a body of case law has been carefully developed to implement the objectives of the AEDPA to streamline the procedures for federal habeas review. The proposed legislation may complicate the task of resolving many federal habeas cases by creating additional procedural issues that will undoubtedly be litigated in the federal courts. Such a development might lead to more, rather than less, litigation. The Conference believes that it is important to provide some continuity in the interpretation of current law and notes that the legislation would unsettle several carefully crafted Supreme Court decisions, including *Wainwright v. Sykes*, 433 U.S. 72 (1977) (per Rehnquist, J.) (tightening the standard for the review of procedurally defaulted claims), and *Rhines v. Weber*, 125 S.Ct. 1528 (2005) (per O'Connor, J.) (integrating the AEDPA time limits into the treatment of mixed petitions).

Conclusion

At this point, the Judicial Conference would like to communicate its opposition to provisions in sections 8, 9, and 11, based on existing positions. As its review of the legislation continues, the federal judiciary will likely consider whether the legislation would afford defendants a meaningful opportunity to adjudicate their constitutional rights in the state and federal courts, and at the same time provide for expeditious consideration and disposition of the issues presented in their habeas petitions.

Thank you for your consideration of these views, which we may supplement in the near future. We would be pleased to offer any assistance you deem appropriate as you consider this important issue. Please feel free to contact me at 202-273-3000, or, if you prefer, you may have your staff contact Karen Kremer, Counsel in the Office of Legislative Affairs, at 202-502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Democrat, Committee on the Judiciary
Honorable Daniel E. Lungren
Members of the Committee on the Judiciary

LETTER SUBMITTED BY LEONIDAS MECHAM, SECRETARY, JUDICIAL CONFERENCE OF THE UNITED STATES, TO THE HONORABLE F. JAMES SENSENBRENNER, JR., CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY (SEPTEMBER 26, 2005)

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 26, 2005

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Mr. Chairman:

I write to transmit the views recently adopted by the Judicial Conference of the United States regarding H.R. 3035, the "Streamlined Procedures Act of 2005" (109th Cong.). Some of these views are applicable to S. 1088, as amended by the Senate Judiciary Committee on July 28, 2005. This letter supplements the information provided to you in my letter dated July 22, 2005, in which we explained the Conference's opposition (based on previously adopted positions) to particular provisions within sections 8, 9, and 11 of H.R. 3035.

On September 20, 2005, the Judicial Conference determined to:

a. Express support for the elimination of any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts;

b. Urge that, before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners and, if so, the causes for such delay;

c. Express opposition to legislation regarding federal habeas corpus petitions filed by state prisoners that has the potential to:
(1) undermine the traditional role of the federal courts to hear and

decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation, including the following sections of the proposed "Streamlined Procedures Act of 2005" in the 109th Congress (H.R. 3035 as introduced and S. 1088 as amended in July 2005):

Section 2 of H.R. 3035 and S. 1088 (mixed petitions);
Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims);
Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period);
Section 6 of H.R. 3035 (harmless errors in sentencing); and
Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code);

d. Express opposition to section 3 (amendments to petitions) of H.R. 3035 and S. 1088 that would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law;

e. Express opposition to section 7 of H.R. 3035 and section 6 of S. 1088 that would make the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applicable to cases pending prior to its enactment, and section 14 of H.R. 3035 and S. 1088 that would make the proposed Streamlined Procedures Act applicable to pending cases; and

f. Express opposition to the provision in section 11 of H.R. 3035 and section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding.

These views, which are explained in the attachment, reflect the judiciary's long-standing concern with the fair and efficient consideration of the constitutional issues that

arise in federal habeas corpus litigation. In general, the existing jurisdictional framework establishes a role for the federal courts in reviewing the constitutionality of state court criminal processes. The Conference has consistently supported providing competent counsel to habeas petitioners at all stages of post-conviction review in capital cases, and it has opposed legislation that would deprive the federal courts of their traditional role in reviewing federal constitutional claims arising originally in state criminal or post-conviction proceedings. The goal should be, as the Powell Committee Report[1] noted, to secure a meaningful presentation of the issues to the state and federal courts and then to avoid further repetitive litigation.

Over the past ten years the federal judiciary has addressed and resolved issues related to the implementation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That body of law, though not entirely settled, now provides guidance to the courts in resolving habeas corpus claims and attempts to strike an appropriate balance between providing a forum in which the rights of individuals with meritorious claims can be heard and the need to ensure that the criminal justice system can function without unreasonable delay in bringing finality to the process.

Proponents of the Streamlined Procedures Act have referred to particular habeas corpus capital cases initiated by state prisoners that were pending in federal courts for a lengthy period. The Judicial Conference Committee on Federal-State Jurisdiction has conducted a preliminary review of statistical data related to the handling of non-capital and capital cases in the federal courts, which is outlined in the attachment. The Conference does not believe that the data as a whole supports the need for a comprehensive overhaul of federal habeas jurisprudence. The Conference would urge Congress to undertake further analysis to evaluate whether there is any unwarranted delay and if so, the causes for such delay. The Judicial Conference is available to work with the Congress to attempt to gather such information to be used in a methodical review of the handling of such cases. The Judicial Conference remains supportive of efforts to eliminate any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts.

Much of the law related to habeas corpus (including the exhaustion and procedural default rules) seeks to ensure that the state courts will have an opportunity to consider all the federal claims in the first instance. Only after state avenues have been exhausted do the federal courts consider the federal claim, and only when the state courts have

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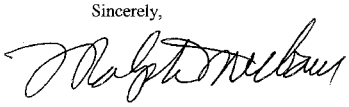
[1] 1989 Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Powell Committee Report).

committed errors in the application of federal law, or made an unreasonable determination of the facts in light of the evidence, will any relief be granted.

The proposed Streamlined Procedures Act would take a substantially different approach to federal habeas review. It attempts to expedite the processing of habeas corpus petitions by creating a stringent system of forfeitures for federal constitutional claims. Not only could it create unreasonable obstacles to resolution of such claims, but it has the potential for complicating and protracting litigation in both state and federal courts. Furthermore, because there is no federal right to counsel in state post-conviction proceedings, except for capital cases under chapter 154, these procedural requirements may prove very difficult for applicants to meet.

The judiciary's review of H.R. 3035 and S. 1088 has centered around an examination of whether the legislation would afford defendants a meaningful opportunity to adjudicate their constitutional rights in the state and federal courts, and, at the same time, provide for expeditious consideration and disposition of the issues presented in their habeas petitions. The Conference has expressed opposition to provisions it believes would interfere with those goals. Thank you for your consideration of the Judicial Conference's position regarding the Streamlined Procedures Act of 2005. If you have any questions, please feel free to contact me at 202-273-3000, or, if you prefer, you may have your staff contact Karen Kremer in the Office of Legislative Affairs at 202-502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

Attachment: Explanation of Views

cc: Honorable John Conyers, Jr.,
Ranking Democrat, Committee on the Judiciary
Honorable Dan Lungren
Members of the Committee on the Judiciary

EXPLANATION OF VIEWS

Positions Adopted by the Judicial Conference of the United States[1]
on September 20, 2005, Regarding
the "Streamlined Procedures Act of 2005"
(S. 1088, as amended by a Substitute Amendment on July 28, 2005,
and H.R. 3035)

a. **The Judicial Conference expresses support for the elimination of any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts.**

b. **The Judicial Conference urges that, before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners and, if so, the causes for such delay.**

The federal judiciary supports the goal of expediting review of habeas corpus cases in the federal courts and believes that handling cases efficiently and effectively benefits litigants, victims of crime, the public, and the judicial system. It has consistently encouraged Congress to provide for procedures that will facilitate a fair resolution of claims brought by state prisoners in federal court. Such fair resolution encompasses the notion that petitioners will be provided a meaningful opportunity to adjudicate their constitutional rights in the state, as well as federal courts.

To examine recent assertions that there are widespread delays in the processing of habeas corpus petitions in the federal courts, the judiciary reviewed information compiled by the Statistics Division of the Administrative Office of the U.S. Courts (AO). In fiscal year 2004,[2] there were 18,432 non-capital habeas corpus petitions filed by state prisoners in U.S. district courts, and 6,774 in the U.S. courts of appeals. The total number of terminations for 2004 revealed that the federal courts are terminating nearly as many non-capital habeas corpus petitions from state prisoners as are filed annually.

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[1]On July 13, 2005, the Judicial Conference sent a letter to members of the Senate Judiciary Committee stating its opposition to certain provisions in sections 8, 9, and 11 of S. 1088, as introduced, based on previously adopted Conference positions. On July 22, 2005, the Judicial Conference sent a similar letter to members of the House Judiciary Committee on H.R. 3035.

[2]Statistical records of the Administrative Office of the U.S. Courts are based on a fiscal year ending September 30 of each year.

The median time from filing to disposition for state non-capital habeas corpus cases in the district courts has remained relatively constant since 1998, and in 2004 was six months. In the courts of appeals, the median time from filing of notice of the appeal to disposition of state non-capital habeas corpus appeals also remained relatively stable between 1998 to 2004, ranging from 10 to 12 months. Thus, the statistics appear to indicate that the district and appellate courts are handling non-capital habeas corpus petitions originating from state prisoners expeditiously.

With respect to capital habeas corpus petitions originating from state prisoners, the statistics indicate that the number of these cases pending in the federal district courts has been growing. From 1998 to 2002, more state capital habeas corpus cases were filed in the district courts than were concluded. As a result, the number of state capital habeas corpus cases pending increased from 466 at the end of 1998 to 721 at the end of 2002. In 2003 and 2004, the number of state capital habeas corpus cases terminated by district courts nearly equaled the number of cases filed, so the growth in the pending caseload has slowed and was 732 at the end of 2004.

In addition to increases in the number of pending state capital habeas corpus cases in the district courts, the pending and disposition times for these cases have increased. The percentage of state capital habeas corpus cases pending more than three years rose from 20.2 percent at the end of 1998 to 46.2 percent at the end of 2004. The median time from filing to disposition for state capital habeas corpus cases was 13 months in 1998, rose to 24.5 months in 2001, fell to 20 months in 2003, and rose again in 2004 to 25.3 months.

Looking at the entire civil docket, 12.6 percent of all civil cases in 2004 were pending in the federal district courts three years or more. Even though state prisoner habeas corpus proceedings comprised 6.6 percent of all civil cases filed in 2004, they amounted to only approximately 3 percent of civil cases pending for three years or more. Capital habeas corpus cases filed by state prisoners comprised slightly less than one percent (0.97) of civil cases pending three years or more.

In the courts of appeals, the number of terminations of state capital habeas corpus cases generally kept pace with the number of filings of these cases between 1998 and 2000. Beginning in 2001, however, the number of state capital habeas corpus cases terminated in the courts of appeals was generally lower than the number filed, resulting in increases in the number of these cases that are pending. From the end of 1998 to the end of 2004, pending state capital habeas corpus cases rose from 185 to 284.

The median time from filing of notice of the appeal to disposition for state capital habeas corpus appeals ranged from 10 to 13 months between 1998 and 2000. The median time from filing of notice to disposition for these cases increased to 15.5 months in 2001, dropped to 13 months in 2003, and rose in 2004 to 15 months. In addition, state capital habeas corpus appeals that were pending in the courts of appeals three years or more increased from 5 (2.7 percent of all pending state capital habeas corpus cases) at the end of 1998 to 36 (12.7 percent of all pending state capital habeas corpus cases) at the end of 2004.

The statistical information currently available from the AO does not support a finding of undue delay overall with respect to the processing of non-capital cases. With respect to capital cases, the statistics indicate that the median time from filing to disposition has increased in both the federal trial and appellate courts, and that the number of capital cases pending for three years or more has also increased. However, without further information, the judiciary is unable to draw a definitive conclusion as to the causes for these increases or to reach the conclusion that these time frames are unreasonable in light of the complexity of capital federal habeas corpus jurisprudence.

Additional study on this point should be undertaken before legislation is pursued that would further alter habeas corpus practice and procedure. The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) at their joint annual meeting held July 30-August 3, 2005, adopted a resolution similarly urging that additional study and analysis be undertaken to evaluate the impact of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to date and the causes of unwarranted delay, if any. The CCJ and COSCA also supported delaying further action on amending AEDPA or otherwise changing the existing statutes affecting the filing and processing of habeas corpus petitions in the federal courts as contemplated in H.R. 3035 and S. 1088.

Thus, before Congress moves forward, analysis should first be conducted regarding the impact of AEDPA on the handling of habeas corpus cases, particularly capital habeas corpus cases, and the factors that may affect the length of time required to process a habeas corpus case in the federal courts. Such analysis could be undertaken by Congress, the federal judiciary, or a combination thereof. Should systemic problems be identified, the judiciary would be willing to work with Congress in seeking solutions to ensure the effective and expeditious administration of justice.

c. **The Judicial Conference expresses opposition to legislation regarding federal habeas corpus petitions filed by state prisoners that has the potential to: (1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation, including the following sections of the proposed "Streamlined Procedures Act of 2005" in the 109th Congress (H.R. 3035 as introduced and S. 1088 as amended in July 2005):**

Section 2 of H.R. 3035 and S. 1088 (mixed petitions);
Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims);
Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period);
Section 6 of H.R. 3035 (harmless errors in sentencing); and
Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code).
[*Note: each section is discussed infra.*]

Section 2 of H.R. 3035 and S. 1088 (mixed petitions)
Current Law

Under current law, a petitioner is required to exhaust specific federal claims in the state courts, either on direct review or in the state post-conviction proceedings.[3] A failure to comply with this requirement generally would preclude federal review of the claim. Failure to exhaust a claim in state court may be excused, however, in cases where the state offers no corrective process or where that process would not provide an effective remedy for the petitioner's claim. *See* 28 U.S.C. § 2254(b)(1)(B)(i) and (ii).[4]

In addition, current law provides a procedure for judicial consideration of mixed petitions, meaning petitions that include claims that have been fully presented to the state courts (exhausted claims) and those that have not (unexhausted claims). The mixed-petition issue first arose before AEDPA was enacted, when the Supreme Court adopted

[3] *See* Baldwin v. Reese, 541 U.S. 27 (2004) (requiring the habeas corpus petitioner to specifically identify the federal law underpinning a claim of ineffective assistance of appellate counsel).

[4] *See also* Lynce v. Mathis, 519 U.S. 433, 436 n.4 (1997) (excusing the failure to exhaust an *ex post facto* claim, noting that the state supreme court had previously rejected such claims and there was no reason for the petitioner to expect that the court would decide petitioner's claim differently).

the complete-exhaustion rule of *Rose v. Lundy*, 455 U.S. 509 (1982). Under that rule, federal courts dismissed mixed petitions without prejudice. The decision assumed that, following dismissal, the state prisoner would return to state court to exhaust available state remedies and then refile his or her federal habeas corpus petition containing only exhausted claims.

AEDPA amended the federal habeas corpus process in significant ways, notably by imposing a statute of limitations for all habeas corpus petitioners. Under AEDPA, state prisoners are given one year to file their federal habeas corpus petitions following the completion of direct review. *See* 28 U.S.C. § 2244(d). This period is tolled once the petition for state post-conviction relief is properly filed and while it remains pending. *See* 28 U.S.C. § 2244(d)(2).

The adoption of the time limits in AEDPA and the complete-exhaustion rule of *Rose v. Lundy* interacted to present a problem for habeas corpus petitioners. If the federal courts dismissed a mixed petition, as required by *Rose*, then the state prisoner could exhaust claims by submitting them to state court. But the dismissal meant that the federal habeas corpus prisoner could no longer rely upon his earlier federal habeas corpus filing date to satisfy the one-year limitation period. Instead, the federal petitioner would have to refile in federal court following exhaustion, which in some cases could present a timeliness issue for petitioners.

The lower federal courts developed a variety of approaches to the resulting problems of potential unfairness, prompting the Supreme Court to resolve the issue as recently as the last term. In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), the Court ruled that the district court may, in appropriate cases, stay proceedings on a mixed petition in order to preserve the petitioner's filing date. Such a stay would enable the petitioner to exhaust state remedies in state court and return, if necessary, to federal court to pursue the now fully exhausted petition. But while it recognized the importance of a stay option, the Court also required some scrutiny of the unexhausted claims. Only where the petitioner could show good cause for the failure to exhaust, where the unexhausted claims met a standard of "potentially meritorious," and where the petitioner had not engaged in any intentionally dilatory litigation tactics would the Court permit the stay to issue. *See id.* at 1535.

Proposed Changes

Section 2 of H.R. 3035 and S. 1088 would amend 28 U.S.C. § 2254 in three respects. First, it would require petitioners to fairly present and argue the specific basis for each claim in state court and describe in the federal habeas corpus petition how each claim was exhausted in state court.

Second, it would require the dismissal with prejudice of any unexhausted claim, unless that claim would qualify for consideration on the grounds set forth in existing provisions of 28 U.S.C. § 2254(e)(2). That provision establishes standards that limit the authority of federal courts to hold evidentiary hearings on claims the petitioner failed to develop factually in state court. Thus, section 2254(e)(2) now applies to a narrow subset of habeas claims. The Streamlined Procedures Act would apply these standards to a much broader range of habeas claims. The apparent goal of the Streamlined Procedures Act is to enable the district court to determine the merits of the petition consisting of exhausted claims immediately, without the possibility of a stay during which the petitioner could return to state court to litigate unexhausted claims.

The standards set forth in section 2254(e)(2) are as follows:

- As to legal claims, section 2254(e)(2) requires the petitioner to show that the constitutional right at issue is a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. This defines a very small universe of possible legal claims. The Supreme Court has only rarely concluded that new rules of substantive constitutional law apply retroactively to habeas corpus petitioners (such as the Court's decision barring the execution of juvenile offenders), and it is extremely unlikely to make any procedural rule retroactively applicable to habeas corpus petitioners. By adopting the standard of "new rules" made retroactively applicable, the Streamlined Procedures Act would eliminate review of virtually all unexhausted legal claims.

- As to factual claims, section 2254(e)(2) requires the petitioner to show that he or she could not have discovered the predicate for the factual claim in the exercise of reasonable diligence, and show, by clear and convincing evidence, that no reasonable fact finder would have found the petitioner guilty of the underlying offense, before he could secure review of unexhausted claims. Absent DNA evidence, this standard will likely foreclose many unexhausted claims.

The Streamlined Procedures Act adds an additional requirement as to both legal and factual claims that the denial of relief in the habeas corpus proceeding would be contrary to or involve an unreasonable application of clearly established federal law as determined by the Supreme Court.

Third, section 2 of both bills makes a significant change in the legal standard for exhaustion of state remedies by deleting the language in current law that excuses a failure to exhaust in circumstances where the state offers no corrective process or where that process would not actually provide an effective remedy for the petitioner's claims.

Commentary

Because the Supreme Court has recently addressed this issue, section 2 of the Streamlined Procedures Act is unnecessary. Instead of facilitating submission of unexhausted claims for consideration by the state courts, section 2 would severely restrict federal review of such claims. This approach differs significantly from that adopted by the Supreme Court in *Rhines*, which would permit a court to stay a mixed petition if the petitioner shows good cause for the failure to exhaust, where the unexhausted claim is potentially meritorious, and where the petitioner has not engaged in any dilatory tactics. The legislation would undermine a system that currently respects state court processes by permitting the states to correct any errors, while at the same time preserving a federal forum for the review of meritorious constitutional claims. The federal courts may also be prevented from providing relief even in situations where the state offers no corrective process.

If the legislation were enacted, petitioners would run the risk of forfeiture if they failed to assert claims that had little prospect of success in state court but had not yet been considered in federal court. Apart from the risk of forfeiture, this more demanding exhaustion standard would likely broaden the range of claims presented to state courts, and make the process more difficult for petitioners, particularly those without counsel, as they attempt to comply with the rigorous pleading requirements.

Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims)

Current Law

In general, procedural defaults occur when the state prisoner or his or her lawyer fail to raise and properly argue defenses to the imposition of criminal liability. When defaults occur, the state will argue that the petitioner has procedurally defaulted the claim (including any federal constitutional claim) and that the state court should, therefore, decline to review the claim.

State courts take a variety of approaches to the problem of procedural defaults, depending on the importance of the procedural rule and the nature and strength of the federal claim. In some cases, state courts may require strict adherence to the procedural rule and foreclose consideration of a federal claim. In other cases, where the state perceives the procedural rule to be of somewhat less significance and where the federal claim may have some merit, the state court may couple its consideration of the procedural issue with some consideration of the federal claim. States might, for example, enforce a default and then consider the federal claim only for the purpose of preventing a miscarriage of justice or to address potentially serious constitutional claims. In some cases, the state might forgive the default altogether.

Under current law, a federal court cannot reach the merits of a claim if the petitioner failed to comply with a state procedural rule that is "adequate and independent,"[5] unless the petitioner can show "cause and prejudice" for the default, or make a showing of actual innocence. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *see also Murray v. Carrier*, 477 U.S. 478 (1986). Under the cause-and-prejudice standard, a petitioner must show a valid reason for the failure to comply with the state rule, and must show that the resulting prejudice was substantial. Thus, the exceptions that would permit federal courts to review a claim that was procedurally defaulted at the state level are already very narrow.

The Supreme Court has treated ineffective assistance of counsel as "cause" for relief from the default of claims at an earlier stage of the process. State defendants have a right under the Sixth Amendment to constitutionally effective lawyers at trial and on direct review; if the state fails to provide such lawyers, it has violated the defendant's constitutional rights. Such failures, in turn, relieve the state prisoner from the procedural defaults that the ineffective lawyer may have committed during the course of the proceeding. Ineffective assistance of counsel claims frequently appear in federal habeas corpus petitions because they provide a basis for reopening any procedural defaults that may have occurred at earlier stages.[6]

Proposed Changes

Section 4 of H.R. 3035 and S. 1088 would amend 28 U.S.C. § 2254 to add a new subsection 2254(h)(1)-(5) to:

- Prohibit federal courts from considering a claim that a state court previously refused to consider on the basis of some procedural error committed by the prisoner or his lawyer in state court, unless the defaulted claim would qualify for

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[5]In order for a procedural default in state court to bar federal court review, that state rule must be "adequate," meaning that it is sufficient to uphold the judgment of the state court, and it must be "independent,"which means that the rule must not depend on the court's view of the merits of the federal claim.

[6]The Supreme Court has long held that the right to counsel attaches at trial and to the first appeal as of right. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (trial); Murray v. Giarratano, 492 U.S. 1, 7 (1989) (first appeal of right in state court). While the Court has not extended the right to counsel to state post-conviction proceedings, *see* Coleman v. Thompson, 501 U.S. 722 (1991), it has specifically reserved the question whether counsel may be required in circumstances where state post-conviction proceedings provide the first realistic opportunity to challenge a conviction. *Id.* at 755. The most clear-cut example of such a first-opportunity claim would be in a case involving a claim that counsel at trial and on direct appeal were constitutionally ineffective.

consideration under section 2254(e)(2).[7] This is the same standard that would govern federal court review of unexhausted claims under the Streamlined Procedures Act.

- Prohibit federal courts from considering a claim when the state court both reached the merits of the claim and treated it as barred under a procedural rule, unless the claim would qualify for consideration under section 2254(e)(2). Today, such alternative grounds of decision may not necessarily bar federal review of the merits because the state court did not actually treat the default as a bar to review.[8]

- Prohibit federal courts from considering a claim when the state court found a procedural default but also reviewed the merits of the claim for plain or fundamental error, unless the claim meets the standards of 2254(e)(2). S. 1088 substitutes the term "miscarriage of justice" for "plain error." Today, federal courts might treat the determination of the merits as forgiving the procedural default, and might themselves reach the merits.

In addition, a federal court would not be permitted to grant relief unless it also found that denial of relief would be contrary to, or would involve an unreasonable application of, clearly established federal law as determined by the Supreme Court. Section 4 of H.R. 3035 would also prohibit federal court review of ineffective assistance of counsel claims related to the procedurally defaulted claims, unless the ineffective assistance of counsel claim also met the standards of section 2254(e)(2). S. 1088 does not include similar language.[9]

Section 4 of H.R. 3035 and S. 1088 would also amend subsection 2244(d)(2), which provides that the one-year filing period shall be tolled during the time a state post-

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[7]Section 4 would also permit federal courts to hear a procedurally defaulted claim if the state, through counsel, expressly waives the provisions of proposed new subsection 2254(h)(1).

[8]In the Ninth Circuit, for example, if the alternative state and federal grounds are "interwoven" in the state-court ruling, the federal court may reach the merits. *See* Siripongs v. Calderon, 35 F.3d 1308, 1317 (9th Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). If, on the other hand, the state and federal grounds are clearly independent and represent alternative bases for the ruling, the federal court is barred from reaching the merits. *See* Loveland v. Hatcher, 231 F.3d 640, 643-44 (9th Cir. 2000).

[9]S. 1088 as introduced was identical to H.R. 3035 in this respect. The Substitute Amendment deleted the language "or any claim of ineffective assistance of counsel related to such claim," from proposed new subsections 2254(h)(1) and 2254(h)(2)(A).

conviction petition is "properly filed."[10] Section 4 would add language to this subsection providing that an application that was otherwise improperly filed in state court shall not be deemed to have been properly filed because the state court exercised discretion in applying a rule or recognized exceptions to that rule. Although the full effect of this provision is unclear, concerns have been raised that this section would tighten the standard under which a federal court could consider a state petition as having been properly filed for purposes of tolling the one-year period.

Commentary

Section 4 of both H.R. 3035 and S. 1088 would substitute a new-rule-of-constitutional-law or actual-innocence standard for the carefully crafted standard of cause and prejudice established by the Supreme Court in *Wainwright*, the standard which currently serves as an effective gatekeeper to limit federal court review of constitutional claims that were treated by the state courts as procedurally defaulted. Federal courts would even be precluded from reviewing claims that the state court itself had reviewed on the merits for plain error (H.R. 3035) or a miscarriage of justice (S. 1088), though such claims could have been barred by state procedural rules. H.R. 3035 goes even further, prohibiting the federal courts from considering ineffective-assistance-of-counsel claims arising in connection with the procedurally defaulted claim, unless they also met the new-rule or actual-innocence standards. The current version of S. 1088 would not preclude a petitioner from raising an ineffective assistance of counsel claim in the federal habeas corpus petition that is related to a constitutional claim that has itself been procedurally defaulted. Nevertheless, the provisions of section 4 in both bills may undermine the ability of the federal courts to consider meritorious constitutional claims.

Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period)

Current Law

Current law (28 U.S.C. § 2244) tolls the one-year period for filing a federal habeas corpus petition while a properly filed application for state post-conviction relief is pending (the one-year period does not begin to run until the conclusion of direct review). Today, petitioners often present some federal claims to state courts on direct review and a different set of federal claims on state post-conviction review. Both sets of claims will be viewed as exhausted and as ripe for presentation to a federal habeas corpus court when state post-conviction review ends, and the limitation period for filing the federal habeas

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[10] *See* Artuz v. Bennett, 531 U.S. 4 (2000) (treating state petition, even one that contained some procedurally defaulted claims, as properly filed for tolling purposes if directed to the right court at the right time) *see also* Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005) (ruling that an untimely state post-conviction petition did not qualify as properly filed for purposes of tolling the federal limitations period).

corpus petition would be satisfied as to all federal claims, including both those that were exhausted on direct review and those that were exhausted in state collateral proceedings.

The Supreme Court in *Carey v. Saffold*, 536 U.S. 214 (2002), held that tolling should apply to the entire time the petitioner pursues state-court post-conviction relief, from the date of the initial filing in a trial court to the date of the final disposition by the final appellate body. If there are any gaps in the time that a petition is pending before a state court, those gaps are not counted against the one-year period, as long as the petitioner meets the state filing deadlines. Thus, if the state prisoner waits 30 days between the dismissal of his claims at trial and the submission of his timely state appeal, that period would not be counted against the prisoner's one-year deadline for filing a federal habeas claim.

In addition, 28 U.S.C. § 2244(d)(2) provides for the tolling of the limitation period during the pendency of state post-conviction proceedings that seek review of the "pertinent judgment or claim." In *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001), the Ninth Circuit ruled that this language entitled a federal habeas corpus petitioner to the benefit of the tolling provision by filing state post-conviction claims that challenged the state court's judgment of conviction. Such tolling was made available even where the petitioner did not present any federal claims to the state post-conviction court. The Ninth Circuit reasoned that an attack on the state "judgment" of conviction was sufficient to trigger the tolling provision, even though no federal claims were presented to the state post-conviction court. Thus, a prisoner who has already challenged his conviction as part of direct review, thereby exhausting this claim, does not run the risk that the one-year period will expire while he submits additional claims as part of the state post-conviction proceeding. Since *Tillema*, all the federal circuits that have addressed this issue have expressed agreement with its interpretation.[11]

Finally, current statutory law provides for the reopening of the limitation period to take account of a narrow range of changes in circumstances that might require habeas corpus review. *See* 28 U.S.C. § 2244(d)(1)(C), (D). Such an example might be if the petitioner discovers new evidence that would entitle him to relief or gains the benefit of a newly recognized constitutional right that the Supreme Court has made retroactively applicable to prisoners in the petitioner's situation. Current law also reopens the limitation period upon the removal of any unconstitutional impediment to the petitioner's ability to file a federal habeas corpus petition. *See* 28 U.S.C. § 2244(d)(1)(B). In

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[11] *See* Cowherd v. Million, 380 F.3d 909 (6th Cir. 2004) (collecting cases).

addition, the courts have developed a range of non-statutory bases for tolling the one-year limit based on general equitable principles.[12]

Proposed Changes

Section 5 of H.R. 3035 and S. 1088 would tighten the existing time limits for filing in three respects. First, it would charge the petitioner with any time that runs when no proceeding is actually pending in state court. Second, it would strike the words "judgment or" from section 2244(d)(2) so that tolling would apply only on a claim-by-claim basis to the claims actually presented in the state post-conviction proceeding. Third, section 5 would bar the federal courts from developing alternative bases for the equitable tolling of the one-year limitation period.

Commentary

Section 5 in both bills would overturn *Saffold* by charging the petitioner with any time that runs when no proceeding is actually pending in state court.[13] The provision striking the reference to "judgment" in section 2244(d)(2) apparently seeks to prevent a habeas corpus petitioner from gaining the benefit of tolling in cases where no federal claims have been presented to the state post-conviction court. Yet the amendment could have a much more far-reaching impact on the process of state and federal post-conviction review. Following the change in law that would occur if section 5 were enacted, tolling would no longer be available except as to "claims" that were actually presented to the state post-conviction court. This would result in significant collateral litigation on whether the claims had been properly raised, and the section would have the effect of barring claims from federal review that were not raised in the state post-conviction proceeding.

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[12] *See* Calderon v. U.S. District Court, 163 F.3d 530 (9th Cir. 1998) (tolling the limitation period on the ground that mental incapacity may have prevented the petitioner from participating in the preparation of a habeas corpus petition); *see generally* Randy Hertz & James S. Liebman, Vol. I *Federal Habeas Corpus Practice and Procedure* 239-46 (4th ed. 2001) (collecting cases in which the federal courts have expressed willingness to consider equitable tolling in cases involving judicial delay, government interference, omissions by prisoner's counsel, mental incompetence, a lack of notice of filing deadlines, and in cases of actual innocence). *Cf.* Pace v. DiGugliemo, 125 S. Ct. 1807, 1814 n.8 (2005) (leaving open the question of whether equitable exceptions apply under AEDPA).

[13] As was explained in *Saffold*, there are differences among the post-conviction procedures in various states. For example, in most states, a petitioner unsuccessful in a lower state court appeals to a higher state appellate court, while in California, an unsuccessful state petitioner files a new petition in a higher state court. It is not completely clear from the language of section 5 exactly which state systems would be affected and what the effects would be. In this respect, section 5 would add uncertainty to the functioning of the AEDPA statute of limitations.

Some petitioners might be prohibited from raising substantial claims, previously exhausted on direct review, as a result of the change of the tolling rules. Others might seek to avoid the time bar by submitting all of their federal habeas claims to the state post-conviction court, even though many such claims would have been previously (and quite recently) presented to and rejected by the state court on direct review.[14] State courts might justifiably be concerned that the alteration of federal timeliness rules would have the effect of requiring petitioners to file a series of duplicative federal claims in state court, thereby overburdening the state post-conviction review systems. Moreover, if states have strict rules as to the form and substance of post-conviction petitions, prisoners may be forced to eliminate valid claims in order to comply with these rules. For example, some states place strict page limitations on petitions filed in the state post-conviction proceeding.

Finally, by abrogating all equitable tolling by the federal courts, section 5 would limit tolling to the narrow list of considerations that appears in AEDPA. As discussed earlier, the statute reopens the limitation period only for a narrow range of cases, including a change in circumstances or where the state took action to create an impediment to the timely filing of the claim but only if it rose to the level of a constitutional violation. Although the apparent goal of this change is to encourage petitioners to act promptly in presenting their claims, petitioners may not have counsel or may suffer from mental or physical disabilities and face other constraints that make timely filing impossible. Equitable tolling now provides a framework for determining issues of fundamental fairness that avoids unnecessary and time-consuming constitutional litigation. As narrowly tailored in recent decisions of the Supreme Court, the doctrine protects the process from strategic behavior and dilatory tactics. *See, e.g., Pace v. DiGugliemo*, 125 S. Ct. 1807 (2005) (even if applicable, the doctrine of equitable tolling would apply only where petitioner diligently pursued claims).

The strict tolling rules in section 5 could result in a forfeiture of constitutional claims. Section 5 would also burden and complicate state post-conviction proceedings. Moreover, the proposed amendment could prompt petitioners to file federal petitions while still pursuing state habeas corpus appeals in order to avoid the one-year limitations period. It could also increase the number of federal petitions and require the federal court

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[14]One might argue that federal habeas corpus petitioners could avoid the temporal problems caused by the proposed change by splitting their habeas corpus cause of action in order to present their previously exhausted direct review claims to a federal court while they pursue their other federal claims in a state post-conviction proceeding. But such splitting will not work under current law, which bars the submission of a second or successive petition except in exceptional circumstances. *See* 28 U.S.C. § 2244(b)(2).

either to rule without the benefit of the decision of the highest state court or to dismiss the petition because the petitioner had not fully exhausted state remedies.

Section 6 of H.R. 3035 (harmless errors in sentencing)

Current Law

At present, federal courts in habeas corpus cases conduct harmless error analysis under the guidance of the Supreme Court's decision in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which requires the federal court to examine the trial of the case and determine whether the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." This harmless error inquiry comes after the federal court has found a constitutional error was committed and assesses whether that error affected the decision at trial. AEDPA did not include any provisions dealing with harmless error, thereby apparently leaving the *Brecht* standard in place as the measure of harmless error.

The Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991), distinguished structural errors from "trial type" errors. Under *Fulminante*, a structural error was defined as one "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. As to structural errors, no harmless error analysis is required. The Supreme Court has recognized the following errors as structural: deprivation of the right to counsel at trial; a judge who was not impartial; unlawful exclusion of members of the defendant's race from a grand jury; the right to self-representation at trial; and the right to a public trial.[15] The Supreme Court has also determined that denial of the right to a jury verdict of guilt beyond a reasonable doubt is a structural error. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Proposed Changes

Section 6 of H.R. 3035 would add a new subsection (k) to 28 U.S.C. § 2254 that would prohibit a federal court from considering an application with respect to an error related to the applicant's sentence or sentencing that was found to be harmless or not prejudicial in the state-court proceedings. The federal court could grant relief only if the error were "structural," as determined by the Supreme Court. Although S. 1088, as introduced, included an identical section, the Substitute Amendment deleted this section.

Under current law, federal courts must weigh errors in the sentencing phase of a state capital proceeding to determine whether the error had a substantial injurious impact on the decision of the judge or jury. Wrongful admission of prejudicial evidence or argument by the prosecutor may raise such impact issues, as may the failure of defense

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[15] *See* Arizona v. Fulminante, 499 U.S. at 310. *See also* Campbell v. Rice, 408 F.3d 1166 (9th Cir. 2005).

counsel to introduce mitigating evidence. Under the new standard proposed in section 6, a state-court determination of the harmlessness of such an error would foreclose federal judicial review entirely.

Commentary

While AEDPA put in place a structure that provides deference to state-court processes by requiring claims to be exhausted and giving deference to state factual and legal determinations, the federal courts nonetheless retain jurisdiction in the habeas corpus proceeding to ensure that federal constitutional rights are protected. Section 6 of H.R. 3035 would effectively eliminate federal jurisdiction to examine many non-structural claims directed toward the constitutionality of a sentence, when the state court finds harmless error. If the state court determines that the constitutional sentencing error appeared "harmless" or "not prejudicial," the federal courts could not review the sentence, even to examine whether or not the conclusion reached by the state was manifestly incorrect. The only exception would be for errors deemed "structural" by the Supreme Court. It is important for the federal courts to be available to review possible errors in sentencing, particularly in capital cases where sentencing errors take on greater significance.

Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code)

Current Law

Chapter 154 of title 28, United States Code, establishes special expedited habeas corpus procedures for capital cases (sections 2261-2266). This chapter was added by AEDPA, and in part, is based on the recommendations of the 1989 *Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases* (Powell Committee Report). States may "opt-in" and take advantage of certain features of AEDPA by establishing a system for providing competent counsel to indigent defendants in capital cases in state post-conviction proceedings. Those special procedures would: (1) require a federal court to issue a final judgment on a habeas corpus petition not later than 180 days after the date on which the application is filed; (2) limit federal review of claims in such cases; (3) prohibit amendments to an application for habeas corpus relief after the filing of an answer to the application unless the amendment meets the grounds for claims under section 2244(b), which provides standards for the filing of a second or successive petition; and (4) provide certain tolling rules. Under current law, federal courts have the responsibility for determining whether a state has established a qualifying system for

providing competent counsel in state post-conviction proceedings, thereby permitting that state to "opt-in" to the special procedures.

With respect to federal court review of claims in capital cases qualifying for the special procedures under chapter 154, a federal court may consider only a claim or claims that have been raised and decided on the merits in the state court and must apply to those claims the same standards that govern habeas corpus cases generally under section 2254. If the petitioner raises a new claim not previously heard by the state court, section 2264 imposes restrictions on the availability of review. A federal court may review such a claim only if the failure to raise the claim was the result of state action in violation of the Constitution, the result of the Supreme Court's recognition of a new federal right that is made retroactively applicable, or based on a factual predicate that could not have been discovered by due diligence in time to raise the claim in state or federal post-conviction review. The provisions thus offer states an opportunity to streamline the habeas corpus review process if the quality of legal representation is improved at the state post-conviction stage of the process.

Proposed Changes

Section 9 of H.R. 3035 would shift the authority for determining whether a state has established a qualifying mechanism for providing competent counsel to the U.S. Attorney General, with limited review of the Attorney General's determination in the U.S. Court of Appeals for the District of Columbia Circuit.[16] In addition, it would replace existing section 2264 (related to the scope of federal review of such capital cases) with a new standard of review. Subsection (a) would prohibit federal courts from reviewing claims in capital cases falling within chapter 154 unless the petitioner shows that the claim relies on a new rule of constitutional law that the Supreme Court has made retroactively available to cases on collateral review, or a claim of factual innocence that would clearly convince a reasonable fact finder that the prisoner was not guilty of the underlying offense. It would also require a federal court to find that denial of relief would be contrary to, or involve an unreasonable application of, clearly established federal law as determined by the Supreme Court.

Section 8(a) of S. 1088, as amended, provides that any claim brought under section 2264 must meet the standards relating to such actions under chapter 153 of title 28.

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[16]Section 9 of H.R. 3035, as well as section 8 of S. 1088, would amend 28 U.S.C. § 2266(b)(1)(A) added by AEDPA to extend the time for a federal district court to decide a capital case under chapter 154, discussed *supra*, from the existing requirement of 180 days (6 months) after the application is filed to a requirement of 450 days (15 months) after filing, or 60 days after the date on which the case is submitted for decision, whichever is earlier. The reference to 60 days from submission may limit the actual decision time available to district court judges.

These include the standards relating to deference to state court legal and factual determinations, the review of unexhausted or procedurally defaulted claims, the holding of evidentiary hearings, and the ordering of DNA testing (as provided in section 13 of S. 1088 adding a new subsection 2254(e)(3) related to DNA testing). S. 1088 also includes the requirement that relief may not be granted unless the denial of such relief would be contrary to, or result in an unreasonable application of, clearly established federal law as determined by the Supreme Court.

Commentary

In contrast to current law, H.R. 3035 would make no provision for the regular review of the constitutional claims that the petitioner presented to a qualifying state court system in a capital case. Rather, it would deprive the federal courts of jurisdiction to pass on any such claim, so long as the state system had been certified as one that provides competent counsel. The only exception would be for claims that would qualify for consideration under a very demanding actual-innocence standard or claims that rely on a new rule of constitutional law made retroactively applicable by the Supreme Court. Thus, even if the petitioner fully exhausts the claim at the state level and the claim is not procedurally barred, a federal court could not ordinarily consider the claim. Section 9(a) of H.R. 3035 goes well beyond current law in narrowing the availability of habeas corpus review in capital cases under chapter 154, thereby causing a severe restriction on federal court review of claims in capital cases.

S. 1088 would provide for federal court review of capital cases under chapter 154 in accordance with the standards of chapter 153. It should be noted, however, that other provisions of S. 1088 would substantially amend those chapter 153 standards. Because the Conference has already commented on those proposed amendments to chapter 153, it did not take a position on section 8(a) of S. 1088.

d. The Judicial Conference expresses opposition to section 3 (amendments to petitions) of H.R. 3035 and S. 1088 that would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law.

Current Law

In *Mayle v. Felix*, 125 S. Ct. 2562 (2005), the Supreme Court determined that in habeas corpus proceedings timeliness rules require a more particularized conception of what constitutes an "occurrence" for purposes of permitting new or modified claims to "relate back" to the date of the original pleading in order to comply with the one-year time deadline. In *Mayle*, the habeas corpus petitioner in a timely filed petition set forth a claim (under the Confrontation Clause of the Sixth Amendment) relating to the admission

of videotaped statements of witnesses against him. After the one-year time limit expired and after the district court appointed counsel to represent the petitioner, the petitioner sought to amend the complaint to raise an additional challenge (under the Fifth Amendment's rule against self-incrimination) to the admission of his own pre-trial statements. The petitioner argued that the new claim (self-incrimination) related back under Federal Rule of Civil Procedure 15(c) to the timely filing date of the old claim (confrontation).

The Court rejected the argument, adopting a fairly narrow construction of when a habeas claim will be viewed as arising from the same transaction or occurrence within the meaning of Rule 15(c) for relation-back purposes. The Court ruled that the relevant transaction or occurrence was the specific confrontation-clause claim that appeared in the initial petition. Only where the additional claim arose from that specific occurrence would relation-back be appropriate. New claims, such as the petitioner's self-incrimination claim, that rest upon facts that differ "both in time and type" from the initial claim, would not be entitled to relation-back treatment. The Court's decision in *Mayle* requires petitioners to state all of their claims in their initial habeas corpus petition; new claims added by amendment after the one-year period would be barred unless they meet the same "time and type" test for relation back.

Proposed Changes

Section 3 of H.R. 3035 and S. 1088 would extend this rule of timeliness by further narrowing the right of habeas corpus petitioners to amend their petitions. It would amend 28 U.S.C. § 2244 to add a new subsection (e) to permit an applicant to amend a habeas corpus petition "once as a matter of course" before the state files a responsive pleading to the petition or the one-year statute of limitations expires, whichever is earlier.[17] After that time, the Streamlined Procedures Act would treat new claims or modifications to existing claims added by way of amendment as second or successive claims, and would allow the amendment only if it met the more demanding standard that applies to such claims. The standards for second or successive petitions are essentially the same standards as those set forth in section 2254(e)(2).[18]

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[17]Section 3 would also amend 28 U.S.C. § 2242 to delete the language "in the rules of procedure applicable to civil actions," substituting the procedure outlined in proposed new subsection 2244(e).

[18]28 U.S.C. § 2244(b) provides that a claim presented in a second or successive petition that was not presented in a prior application must be dismissed unless the applicant shows that the claim (1) relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, or (2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error,

Commentary

The Streamlined Procedures Act thus raises the hurdle for amending habeas corpus claims. Under *Mayle*, petitioners can still argue that their new claims meet the "time and type" test and qualify for relation-back. Such arguments, however, would be foreclosed by the broad prohibition against amendment specified in section 3. Section 3 would bar both amendments that present additional claims and amendments that propose to "modify existing claims." Section 3's bar to modification would appear to prevent any reformulation or extension of the claims set forth in the initial petition from qualifying as timely under the relation-back rules. It would thus establish a rule of pleading specificity distinct from the general practice in the federal courts, and it would apply that rule of specificity to claims asserted by habeas corpus petitioners who often appear pro se. It is also worth noting that by filing an early response to the petition, the state could control whether or not the petitioner would have the benefit of the full one-year period in which to amend the habeas corpus petition.

Thus, the Conference opposes section 3 to the extent it would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law. Because claims often evolve during the course of litigation, it would be particularly unfair to prevent a petitioner from modifying an existing claim unless that claim met the higher standards required by section 3. Similar restrictions on adding new claims to the petition could also foreclose meritorious claims in circumstances that might warrant federal court review.

e. **The Judicial Conference expresses opposition to section 7 of H.R. 3035 and section 6 of S. 1088 that would make the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applicable to cases pending prior to its enactment, and section 14 of H.R. 3035 and S. 1088 that would make the proposed Streamlined Procedures Act applicable to pending cases.**

Current Law

In general, the Supreme Court has adopted a presumption that new legislation should apply prospectively and thus attempts to construe legislation so as to avoid retrospective changes in the legal rules. In 1997, the Supreme Court held that the amendments to chapter 153 enacted as part of AEDPA's reforms would only apply to

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no reasonable fact finder would have found the applicant guilty of the underlying offense. AEDPA established a similar requirement for amendments in cases involving indigent prisoners under sentence of death, but only in cases from states that provided indigent prisoners competent counsel in state post-conviction proceedings.

petitions filed after the effective date of the Act, April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

Proposed Changes

Section 7 of H.R. 3035 and section 6 of S. 1088 would amend section 107(c) of AEDPA by striking the reference to "Chapter 154 of title 28, United States Code (as amended by subsection (a))" and inserting "This title and the amendment made by this title". These sections appear to be intended to apply all of the provisions of AEDPA to pending habeas corpus cases, even cases that were pending prior to the passage of ADEPA in April of 1996.

Section 14 of H.R. 3035 would make the changes included in the Streamlined Procedures Act applicable to federal habeas corpus petitions already pending in the federal courts. The section would also provide that if any time limit established by the Act would run from an event that preceded the Act's enactment, the time limit would begin to run from the date of enactment.

Section 14 of S. 1088 would also make the provisions of the Streamlined Procedures Act applicable to cases pending on and after the date of enactment, *except as otherwise provided in the Act*. Section 2 of S. 1088, relating to mixed petitions, provides that the changes made by that section would apply only to *claims* filed after the date of enactment. Section 3, relating to amendments to petitions, provides that changes made by that section would apply only to *amendments* filed after the date of enactment. Section 4, relating to procedurally defaulted claims, provides that the changes made by that section would not apply to *claims on which relief was granted by a district court* prior to the date of enactment. Finally, section 5, relating to the tolling of the limitation period, provides that the changes made by that section would apply only to *applications* filed after the date of enactment. (The Senate bill also includes language similar to that included in H.R. 3035 defining the beginning date of the time limits imposed by the bill.)

Commentary

Both the House and Senate bills would appear to make the provisions of AEDPA applicable to habeas corpus petitions predating AEDPA's passage. Although this has been described as a relatively small universe of cases, retroactively applying AEDPA to cases that have been in the court system since before 1996 may generate additional legal challenges in these cases, thereby delaying, instead of expediting, their consideration.

In addition, section 14 of H.R. 3035 would make the provisions of the Streamlined Procedures Act applicable to pending habeas corpus petitions. This would include all of the limitations on federal court review of claims and the tolling provisions. As noted

above, section 14 of S. 1088 appears to make some of its provisions prospective only. However, because these sections would impose consequences on the petitioner for actions or omissions in cases currently pending in state court, as well as affect the rights of petitioners who have already filed a habeas corpus petition in federal court, the Senate bill still raises concerns about the application of its provisions to pending cases.

The Act's sections providing for the retroactive application of AEDPA and the provisions of the Streamlined Procedures Act to pending cases raise questions of fairness and judicial administration, and they threaten to undermine the stated goal of the legislation, which is to streamline the processing of federal habeas corpus petitions. At the end of 2004, there were 16,952 habeas corpus petitions, capital and non-capital, pending in the federal district courts. Applying the provisions of the Act to these habeas corpus petitions as proposed by H.R. 3035 and S. 1088 will only add to the burden of processing these cases through the federal courts.[19]

f. The Judicial Conference expresses opposition to the provision in section 11 of H.R. 3035 and section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding.

Current Law

Under 21 U.S.C.§ 848(q)(9), upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, "the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality." Pursuant to this provision, the judge presiding over the merits of the case may also consider the authorization of and payment for these services. The Guidelines approved by the Judicial Conference of the U.S. implementing this section indicate that these are duties of the presiding judicial officer. *See* paragraph 6.03A of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume 7, *Guide to Judiciary Policies and Procedures*.

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[19]Section 14 provides that, for time limits "establish[ed]" in the law, the relevant period shall run from the date of enactment. That prevents new time limits from applying retroactively. But the legislation's restrictions on the tolling of existing limitation periods establish no new time limits and would seemingly apply retroactively.

Proposed Changes

Section 11 of H.R. 3035 and section 10 of S. 1088 would amend section 408(q)(9) of the Controlled Substances Act, 21 U.S.C. § 848(q)(9), to require that an application for services other than counsel in a capital habeas corpus case be heard by a judge other than the judge presiding over the habeas corpus litigation.

Commentary

Although this provision may be intended, in part, to respond to concerns of government attorneys who believe that permitting defense attorneys to submit *ex parte* applications for investigative or other services potentially gives the defense an unfair advantage, it does not appear that requiring transfer of these decisions to another judge would serve the interest of sound case management. Such a requirement may prolong resolution of the case and may impede the ability of the presiding judge to move the case forward. This would be particularly true in those districts with a small number of district judges and in districts where judges are separated geographically. Thus, the provision unnecessarily restricts the discretion of the federal judge to manage his or her case, and is an unwarranted intrusion into case-management decisions of the federal courts.

Comments on Section 12 of H.R. 3035 and Section 11 of S. 1088

Although the Judicial Conference did not take a position with respect to section 12 of H.R. 3035 and section 11 of S. 1088, relating to the rights of crime victims, the following comments may be helpful as Members of Congress undertake further consideration of the legislation.

Section 12 of H.R. 3035 and section 11 of S. 1088 would amend 18 U.S.C. § 3771 to extend to crime victims in federal habeas proceedings certain rights made available to victims in federal prosecutions. H.R. 3035 does not specify which rights set forth in the current statute would apply to crime victims in federal habeas proceedings. S. 1088, however, provides that the following rights would be afforded to victims in a federal habeas proceeding: the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceedings; the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; the right to proceedings free from unreasonable delay; and the right to be treated with fairness and with respect for the victim's dignity and privacy.

While the judiciary strongly supports the goal of providing victims of crime certain rights to participate in the criminal justice process, the current provisions of the

legislation, without further clarification, could create administrative problems. Neither S. 1088 or H.R. 3035 indicate which entity would be responsible for finding and notifying the victim of the underlying crime that federal habeas corpus proceedings will be undertaken.

The Department of Justice is currently required to make its best efforts to ensure that crime victims in federal cases are notified of, and afforded, certain rights. But the Department of Justice would not be a party to habeas proceedings involving state prisoners. (In fact, S. 1088 specifically provides that the legislation does not give rise to any obligation or requirement applicable to personnel of any agency of the executive branch of the federal government.) In addition, implementation of the provisions of this section may be complicated by the requirement to notify victims of state crimes that may have been committed years ago. It should also be noted that often in a federal habeas proceeding, there is no formal hearing before a judge; the judge may decide the case after a review of the record.

For further information, contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700

LETTER SUBMITTED BY RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA, SUPREME COURT OF CALIFORNIA TO CHIEF JUDGE MARY M. SCHROEDER

Supreme Court of California
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102

(415) 865-7060

RONALD M. GEORGE
CHIEF JUSTICE OF CALIFORNIA

October 29, 2003

Chief Judge Mary M. Schroeder
United States Court of Appeals for the Ninth Circuit
U.S. Courthouse, Suite 610
401 W. Washington Street, SPC 54
Phoenix, AZ 86003-2156

Dear Chief Judge Schroeder: Mary

On several occasions over the past six years, as reflected in my memoranda of March 17, 1998, November 2, 1999, and March 20, 2000, to members of the California State-Federal Judicial Council, we have discussed requests by some of the members of the federal bench that the California Supreme Court consider issuing expanded orders for capital habeas corpus petitions, in which this court might go beyond announcing its disposition in order to set out its reasons in support.

In each of the memoranda referred to above, I detailed problems with the various suggestions that this court issue expanded orders for capital habeas corpus petitions. In essence, I expressed a belief that this court would not be able to produce such orders without substantially impairing its ability to discharge properly its other important work, including producing opinions in granted matters and in capital appeals.

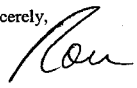
Nevertheless, as I mentioned informally at least twice during the past two years at meetings of the California State-Federal Judicial Council, in a spirit of comity and cooperation, this court has undertaken an internal experiment in order to determine whether, in fact, this court's preparation of expanded orders for capital habeas corpus petitions would unduly impair its other important work. Accordingly, in November 2001 we began a project to assess the expected costs and benefits by preparing — but not actually issuing — such orders under the most realistic circumstances practicable. We brought this project to an end in October 2003.

Over the two-year period of our internal experiment, we prepared expanded orders for 26 capital habeas corpus petitions. For a number of those petitions, the internal memoranda filled well over 200 pages, consumed more than five months of judicial and staff time, and diverted resources that otherwise would have produced perhaps two — and possibly as many as four — opinions in civil or non-capital criminal matters. Similar petitions, in the period prior to the experiment, yielded internal memoranda of between 70 and 90 pages, and drew on substantially less judicial and staff time.

After reviewing our internal experiment with expanded orders for capital habeas corpus petitions, we have concluded that the costs of issuing such orders would substantially outweigh any benefits and hence preclude our departing from our historical, and current, practice of issuing orders that announce the disposition (invoking, of course, as appropriate both the merits and any procedural bars).

Despite the result of our internal experiment, I am fully confident that in the sphere of capital habeas corpus petitions, as in all other spheres, we will be able to continue to cooperate in order to further relations between our courts with the goal of promoting the fair and efficient administration of justice for all of the residents of California in the various matters that come before us.

Sincerely,



RONALD M. GEORGE

cc: Members of the California State-Federal Judicial Council
Chief Judges — Northern, Eastern, Central, and Southern Districts of California
Judge Stephen M. McNamee
Judge Barry Ted Moskowitz
Judge Patti B. Saris

bcc: Associate Justices, Supreme Court
Justices' Staff
Frederick K. Ohlrich
Dennis Maio
Hal Cohen
Beth Jay
Jake Dear
Ingrid Haubrich
Mary Jameson
Lynne Coffin, State Public Defender
Dane Gillette, Senior Assistant Attorney General
Michael Laurence, Executive Director, Habeas Corpus Resource Center
Michael Millman, Director, California Appellate Project
Joshua Weinstein, Attorney, California Administrative Office of the Courts
Jay Kim, Legal Affairs Staff Attorney, Ninth Circuit

JOINT RESOLUTION OF THE CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS

Resolution 16

In Support of Gathering Further Information Concerning the Effects of the Anti-Terrorism and Effective Death Penalty Act of 1996 to Determine Whether Amendments Are Needed

WHEREAS, state courts have an interest in the finality of their judgments and an interest in ensuring that such judgments are fairly and effectively rendered; and

WHEREAS, federal habeas corpus review of both capital and non-capital convictions is an established part of the legal structure of our nation and a considerable body of law concerning this process has developed in the United States Supreme Court, the lower federal courts, and the state courts; and

WHEREAS, in 1996 the United States Congress adopted the Federal Antiterrorism and Effective Death Penalty Act (AEDPA) in order to improve the fair and timely review of state court judgments by the federal courts; and

WHEREAS, the interpretation and effect of AEDPA only recently has begun to be settled after years of legal challenges and litigation; and

WHEREAS, affording those claiming to be wrongfully convicted an opportunity to obtain reasonable and timely review of their convictions and providing victims and their families with the fair and timely resolution of charges and punishment of those found to have violated their rights are integral to our system of justice; and

WHEREAS, Congress presently is considering far-reaching changes to AEDPA and the traditional right to seek habeas corpus in the federal courts in S. 1088 and H.R.3035; and

WHEREAS, the changes contemplated in these measures may preclude state defendants in both capital and non-capital matters from seeking habeas corpus relief in the federal courts, and may deprive the federal courts of jurisdiction in the vast majority of these matters, all with unknown consequences for the state courts and for the administration of justice;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Courts Administrators support delaying further action on amending the AEDPA or otherwise changing the existing statutes affecting the filing and processing of habeas corpus petitions in the federal courts, as contemplated in H.R. 3035 and S. 1088, presently pending before the United States Congress; and

BE IT FURTHER RESOLVED that the Conferences urge that additional study and analysis be undertaken to evaluate the impact of AEDPA to date and the causes of unwarranted delay, if any, including the availability and allocation of resources, and to consider appropriate targeted measures that will ameliorate the documented problems and avoid depriving the federal courts of their traditional jurisdiction without more supporting evidence; and

BE IT FURTHER RESOLVED that the Conferences are interested in working cooperatively with Congress and the federal courts to identify problems related to the AEDPA and stand ready to assist in the development and implementation of strategies to address those identified problems.

Approved by the CCJ/COSCA Conferences on August 3, 2005.

JOINT RESOLUTION OF THE CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS

Resolution 18

In Support of Increasing Public Confidence in the Criminal Justice System by Reducing the Risk of Wrongful Convictions

WHEREAS, a part of the mission of the Conference of Chief Justices is to improve the administration of justice in the states, commonwealths and territories of the United States; and

WHEREAS, part of the mission embraces the development and advancement of policies in support of the common interests and shared values of state judicial systems regarding criminal justice; and

WHEREAS, the power of the state to restrict the freedom of persons through the criminal justice system should be respectfully exercised with the utmost care and caution; and

WHEREAS, protecting the innocent and convicting the guilty are two key goals of our constitutional criminal justice system; and

WHEREAS, the faithful search for new methods and practices by which we can increase reliability and accountability, and thereby public confidence, in the criminal justice system is prudent and reasonable, and

WHEREAS, the people of the United States rightly look to and expect the judiciary to safeguard and promote fairness and reliability in the criminal justice system; and

WHEREAS, advancements in science and technology and the work of innocence projects and commissions identify and demonstrate methods of improving reliability and accountability - and thereby building public confidence - in the criminal justice system; and

WHEREAS, the wrongful conviction of an innocent person leaves the actual perpetrator free and undermines public trust and confidence in our criminal justice system; and

WHEREAS, DNA evidence and recent exonerations of wrongfully convicted persons have raised public concern regarding the reliability of some criminal convictions;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports state judicial officers and appropriate public entities in their efforts to prevent the conviction of persons charged with criminal acts they did not commit; and

BE IT FURTHER RESOLVED, that the Conference of Chief Justices also supports the continuation and improvement of appropriate procedures for hearing and considering post-conviction claims of innocence.

*Approved by the CCJ/COSCA Conferences on August 3, 2005.

"SAMPLE LIST OF INNOCENT PEOPLE ON DEATH ROW GRANTED RELIEF IN FEDERAL COURT WHO WOULD HAVE BEEN EXECUTED HAD THE STREAMLINED PROCEDURES ACT OF 2005 BEEN IN EFFECT," EXCERPTED FROM THE TESTIMONY OF BARRY SCHECK, CO-FOUNDER OF THE INNOCENCE PROJECT AT CARDOZO LAW SCHOOL IN NEW YORK TO THE SENATE JUDICIARY COMMITTEE

SAMPLE LIST OF INNOCENT PEOPLE ON DEATH ROW GRANTED RELIEF IN FEDERAL COURT WHO WOULD HAVE BEEN EXECUTED HAD THE STREAMLINED PROCEDURES ACT OF 2005 BEEN IN EFFECT*

1. Ernest Willis -- Texas

Ernest Willis spent 17 years on death row for a crime he did not commit. He was sentenced to death in 1987 for killing two young women in a house fire. He was released last year after a different district attorney than the one who had originally prosecuted him dismissed the charges. The new district attorney assigned two highly-qualified arson experts to re-examine the case after the federal district court ordered a new trial. The experts concluded that the fire was accidental and not the result of arson.

Under either the Kyl version of the SPA or the Specter Amendment, the federal courts would have been denied the power to review Mr. Willis's case. Section 4 of the SPA would have barred the federal courts from reviewing a claim that the State forcibly administered a daily dose of powerful anti-psychotic drugs to Mr. Willis – even though he had no history or symptoms of mental illness. The Texas Court of Criminal Appeals denied relief on this claim, concluding that trial counsel had failed to preserve the claim with a timely objection to the medication. Under Section 4, a federal court cannot consider a claim that has been denied in state court based on a state procedural requirement. Mr. Willis would have been unable to meet the narrow exceptions to Section 4, because he could not have shown by clear and convincing evidence that no reasonable juror would have found him guilty if the juror had known he had been forcibly medicated. Nor could he have shown that the factual basis of the claim could not have been previously discovered through the exercise of due diligence; his lawyers noticed the effect of the medication on him, but did nothing to investigate what caused it.

Section 6 of the Kyl version of the SPA would have prevented the federal courts from considering Mr. Willis's claim that the prosecution hid a psychologist's favorable report about his lack of future dangerousness. The Texas Court of Criminal Appeals concluded that the psychologist's report was not favorable and that Mr. Willis had failed to show the harm necessary to prevail on a claim of suppressed evidence. Section 6 deprives federal courts of the power to consider any claim related to a prisoner's sentencing that the state courts hold is not harmful. Consequently, even though the state court judgment was both contrary to, and an unreasonable application of, clearly established Federal law as determined by the Supreme Court, it would have stripped the federal court of jurisdiction to consider the prosecution's suppression of evidence bearing directly on the central question before Mr. Willis's jury during the sentencing phase.

Finally, Section 9 of the Kyl version of the SPA would have stripped the federal courts of jurisdiction to review the case. Mr. Willis could not have met Section 9's narrow exceptions, because his claims did not rest on new, retroactive rules of law, nor did they rely on previously

* This document was excerpted from the testimony of Barry Scheck, Co-Founder of the Innocence Project at Cardozo Law School in New York, and was submitted to the Senate Judiciary Committee on July 13, 2005.

undiscoverable evidence. If the SPA had been in effect, Texas would have executed an innocent man.

Fortunately, under current law, the federal courts had the authority to review Mr. Willis's claims. The federal district court found that the state court had unreasonably erred in denying relief. In 2004, the federal judge ordered a new trial because (1) the State violated Mr. Willis's due process rights by forcibly medicating him; (2) Mr. Willis received ineffective assistance of counsel at both the guilt-innocence stage and at sentencing; and (3) the prosecution suppressed favorable, material evidence at sentencing.

2. Ronald Keith Williamson -- Oklahoma

Mr. Williamson spent 11 years on death row for a crime he did not commit. He was sentenced to death in 1988 for the rape and murder of a young woman. After the federal courts ordered a new trial, Mr. Williamson was exonerated by DNA testing. The charges against him were dismissed, and his primary accuser -- who turned out to be the real killer -- was convicted of the crime.

Under Section 4 of both the Kyl version of the SPA and the Specter Amendment, the federal courts would not have had the power to review Mr. Williamson's claims, because his claims failed to meet specific state law procedural requirements. Mr. Williamson would not have been able to satisfy the exceptions to this provision, because the facts in support of his claims could have been discovered previously through the exercise of due diligence. The critical facts were not discovered, however, precisely because the State provided him with constitutionally ineffective trial counsel.

For similar reasons, Mr. Williamson would not have been entitled to federal review under Section 9 of the Kyl version of the SPA. Section 9 prohibits the federal courts from reviewing "any claim" unless the factual basis of the claim could not have been previously discovered or the claim relies on a new, retroactive rule of constitutional law. Mr. Williamson would have been unable to meet either exception. The facts in support of his claims could have been uncovered with diligent investigation. Moreover, his claims did not rely on new, retroactive rules. Under the SPA, no competent investigation of his innocence would ever have taken place, and he would have been executed.

Fortunately, federal review of Mr. Williamson's claims was available. The federal courts ordered a new trial based on trial counsel's ineffectiveness in failing to seek a mental competency hearing. The federal courts held that the state procedural rule on which the Oklahoma courts had relied to deny relief was not a proper basis for prohibiting federal consideration of the merits of the claim. In addition, the U.S. Court of Appeals found that trial counsel had been ineffective for failing to investigate leads that Mr. Williamson was actually innocent and that his primary accuser may have committed the crime. This, indeed, turned out to be the case, as later DNA testing proved.

3. <u>Nicholas Yarris</u> -- Pennsylvania

Nicholas Yarris spent 21 years on death for a crime he did not commit. He was sentenced to death in 1982 for murder, kidnapping, and rape. While the merits of his case were pending in federal court, he obtained DNA testing of biological material in the possession of the State and was exonerated.

The federal courts would have been unable to review the merits of Mr. Yarris's claims under either the Kyl or Specter versions of the SPA. Section 2 of the SPA would have required the federal courts to deny Mr. Yarris's claims that were not presented and exhausted earlier in state court. Furthermore, because the claims contained in Mr. Yarris's first federal habeas petition could have been presented in state court initially, he would have been unable to meet Section 2's exception for claims relying on facts that could not have been discovered previously with the exercise of due diligence.

Section 4 of the SPA would also have tied the federal court's hands, because the Pennsylvania Supreme Court relied on a state procedural timeliness requirement to deny the petition. Section 4 deprives the federal courts of jurisdiction to entertain claims that are denied in state court in this manner. With an exception identical to the one found in Section 2, Mr. Yarris would have been unable to show that the facts underlying his claims could not have been discovered in state court with the exercise of diligence.

For similar reasons, Section 9 of the Kyl version of the SPA would have stripped the federal courts of jurisdiction to consider any of Mr. Yarris's claims. He could not have shown that the claims were based on a new, retroactive rule of constitutional law, or that the factual predicate of his claims could not have been discovered previously with the exercise of diligence. Mr. Yarris would have been executed without the benefit and safeguard that federal habeas review provides.

Fortunately, the federal district court did have jurisdiction to review his claims. The federal court held that the time bar imposed by the Pennsylvania Supreme Court was not an adequate and independent state procedural rule that prohibited federal merits review. While the federal district court was considering the merits of his claims, Mr. Yarris obtained DNA testing that exonerated him.

4. <u>Eric Clemmons</u> -- Missouri

Eric Clemmons spent 13 years on death row before he received a new trial and was acquitted in less than three hours. He was originally sentenced to death in 1987 for murdering a fellow inmate while serving a life sentence. In state court proceedings after his conviction, he discovered an eyewitness memo that the prosecution had suppressed at trial. The memo described an interview with a witness who stated that a different person had stabbed the victim. The state courts denied relief without discussing the claim or considering it on appeal.

If either the Kyl version of the SPA or the Specter Amendment had been the law when the Missouri courts rejected Mr. Clemmons's claims, he would have never received a new trial in federal court, and he would have been executed. Because Mr. Clemmons's appellate counsel failed to abide by state procedural requirements to preserve his claims, Section 4 would have stripped the federal courts of jurisdiction to hear such "procedurally defaulted" claims. Mr. Clemmons would have been unable to take advantage of the narrow exceptions to procedural default set out in Section 4: Neither claim relied on a new, retroactive rule of constitutional law, and neither claim relied on facts that could not have been previously discovered through the exercise of diligence.

Similarly, if Section 9 of the Kyl version of the SPA had been in effect at the time Mr. Clemmons completed state habeas corpus review, the federal courts would have had no jurisdiction whatsoever to consider his claims. After the state proceedings ended, he discovered no new evidence and developed no new facts. Consequently, Mr. Clemmons would have been unable to demonstrate that the facts in support of the claims were previously unavailable or that his claim rested on a new, retroactive rule of law. The SPA would have presented an absolute bar to federal review, and Mr. Clemmons would have been executed.

Fortunately, the SPA was not the law when Mr. Clemmons entered federal court. The U.S. Court of Appeals eventually concluded that Mr. Clemmons's state appellate counsel had been ineffective in preserving the eyewitness memo claim and a Confrontation Clause claim. The Court found that counsel's ineffectiveness provided a reason for the federal courts to excuse the failure to follow the state procedural requirements for preserving the claim. Based on its review of the merits, the Court of Appeals granted Mr. Clemmons a new trial.

5. <u>Ricardo Aldape Guerra</u> -- Texas

Ricardo Aldape Guerra spent 15 years on death row for a crime he did not commit. The State dismissed the charges against him in 1997, after the federal courts ordered a new trial. Mr. Aldape Guerra was sentenced to death in 1982 for the murder of a police officer. Although overwhelming physical evidence pointed to Roberto Carrasco Flores as the killer, the State prosecuted Mr. Aldape Guerra, because Carrasco had been killed in a shoot-out with the police. In federal habeas proceedings, the district court found repeated instances of police and prosecutorial misconduct, including witness intimidation, the suppression of exculpatory evidence, and the intentional use of highly suggestive and misleading techniques to taint witness testimony.

Had Section 9 of the Kyl version of the SPA been in effect, Mr. Aldape Guerra would have been executed without any federal review of his claims. Because Mr. Aldape Guerra's lawyers uncovered in state court the factual bases supporting the claims of prosecutorial misconduct, and the claims did not rely on a new, retroactive rule of law, the claims would not have met the narrow exceptions to Section 9's absolute bar to federal habeas review. Mr. Aldape Guerra would have been executed without any federal consideration of his compelling constitutional claims.

Fortunately, the federal courts did have the ability to address the merits of his claims. The federal courts found that the numerous instances of prosecutorial misconduct violated Mr. Aldape Guerra's due process rights and entitled him to a new trial.

6. Curtis Kyles -- Louisiana

Curtis Kyles spent 14 years on death row before the U.S. Supreme Court ordered him to be retried. He was released in 1998 after the State dismissed the charges against him. Mr. Kyles was sentenced to death for robbing and killing a woman in a grocery store parking lot. An informant named "Beanie" led the police to focus on Mr. Kyles. Beanie was driving the victim's car, knew that Mr. Kyles's trash would contain items stolen during the murder, and was linked to other crimes committed at the same grocery store and another murder with similar facts. Beanie also gave numerous conflicting statements to the police and prosecutors, none of which were turned over to the defense. Nonetheless, the police never considered him a suspect.

Had Section 9 of the Kyl version of the SPA been in effect, the federal courts would have lacked jurisdiction to consider Mr. Kyles's claims. Mr. Kyles would have been unable to meet Section 9's exceptions. His claims did not rely on a new, retroactive rule of constitutional law. Moreover, the facts in support of his claims were previously discovered and presented in the state court proceedings. Mr. Kyles would have been executed instead of released.

Because the federal courts did have the power to review Mr. Kyles's claims on the merits, the U.S. Supreme Court eventually granted habeas relief. The Supreme Court held that the numerous items of evidence suppressed by the State raised a reasonable probability that the outcome of the trial would have been different if the favorable evidence had been revealed to the defense. In 1998, after three unsuccessful attempts to convict Mr. Kyles, the State dropped the charges and Mr. Kyles was released.

7. Federico Martinez-Macias -- Texas

Federico Martinez-Macias spent 9 years on death row before he was released. After the federal courts ordered a new trial, a grand jury refused to re-indict him and the State dismissed the charges. Mr. Martinez-Macias was sentenced to death in 1984 for a murder committed during a robbery. His lawyers failed to put on available evidence of an alibi defense and evidence that undermined the testimony of a key state witness, and also failed to present mitigating evidence about his good character. His trial lawyers were paid at the rate of $11.84 an hour. As the U.S. Court of Appeals for the Fifth Circuit stated, "[T]he justice system got only what it paid for." *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

Had Mr. Martinez-Macias's case been subject to Section 9 of the Kyl version of the SPA, the federal courts would have lacked jurisdiction to consider his claims. His claims were not based on a new, retroactive constitutional rule, and the facts in support of his claims were

available and presented to the state courts. Instead of being exonerated and released, Mr. Martinez-Macias would have been executed.

Because the federal courts did have the power to review his claims, Mr. Martinez-Macias avoided execution. The federal district court ordered the state to hold a new trial based on the abysmal performance of Mr. Martinez-Macias's counsel during the guilt-innocence and penalty phases of his trial, and the U.S. Court of Appeals affirmed the decision.

SAMPLE LIST OF WRONGFULLY CONVICTED AND FACTUALLY INNOCENT PERSONS WHO WOULD NOT HAVE BEEN EXONERATED UNDER THE STREAMLINED PROCEDURES ACT (SPA)*

1. Timothy Brown – Florida

Timothy Brown, who has an IQ of 56, spent nearly 12 years in prison for a crime he did not commit. Brown was convicted of murdering a police officer when he was 14 years old. He was sentenced to life in prison without possibility of parole on the basis of a statement by a purported codefendant and by a statement of his own, despite the fact that even the police had said that he acted "like clay" in the hand of interrogators during a prior interview. The codefendant later recanted his accusation. Many years after Brown's conviction was affirmed, it was discovered that the murder case had been reopened as a result of inculpatory statements made by an unrelated third party to undercover police officers, as well as to a police informant. Brown ultimately received habeas relief in federal court on a claim that his own statement had been admitted at trial in violation of the Constitution. A Miami Herald investigation discovered that at least 37 other false or questionable confessions to murder, all obtained by the same sheriff's department that interrogated Brown, have been thrown out since 1990.

The claim on which Brown won in federal court would have been barred by multiple provisions of SPA, either as originally proposed by Senator Kyl or Congressman Lungren, or with Senator Specter's amendments. The claim for relief on which Brown prevailed had been procedurally defaulted due to his failure to raise it in state court. Current law allows a defaulted constitutional claim to be heard in federal court if, among other things, the prisoner presents evidence of innocence showing that it is more likely than not that the prisoner would not have been convicted had the newly discovered evidence been presented at trial. Brown met the current standard with his evidence of detailed and consistent admissions by the third party.

Under both proposed bills, a showing of innocence is the only way by which a prisoner can have a procedurally defaulted claim heard in federal court. Further, a court's consideration of innocence evidence is limited to "facts underlying the claim" upon which the petitioner seeks relief, and the prisoner must also show that those facts could not have been discovered earlier. A heightened burden of proof -- clear and convincing evidence that no reasonable juror would have found him guilty – is also imposed. Applying these provisions to Brown, he would have been required to meet a higher burden of proof, and do so without the benefit of the strongest evidence of his innocence because the third party confession evidence was not directly related to his constitutional claim. He would not have prevailed and would instead remain incarcerated for a crime he did not commit.

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* This document (with the exception of the California cases) was submitted on September 7, 2005 to Senate Judiciary Chairman Arlen Specter and Senate Judiciary Ranking Member Patrick Leahy by Talbot 'Sandy' D'Alemberte, the American Bar Association President 1991-1992.

2. <u>Rodney Bragg</u> - Arkansas

Rodney Bragg spent approximately six years in prison after being convicted of distributing crack cocaine, a crime he did not commit. At his trial, the prosecution relied almost entirely on the testimony of Agent Keith Ray, an undercover officer for the Arkansas South Central Drug Task Force. Bragg was sentenced to life imprisonment. After his trial, Bragg discovered evidence that Agent Ray had fabricated key portions of his testimony, in clear violation of the United States Constitution. A federal district court granted habeas relief to Bragg. The State did not appeal, and Bragg was immediately released.

Had either the Kyl/Lungren or Specter bill been the law, Bragg would likely remain incarcerated today based on the testimony of a police officer who ultimately admitted to perjuring himself and who resigned in disgrace. This is because Bragg's winning claims were found to be procedurally defaulted in federal court due to Bragg's failure to raise them in state court. Federal habeas corpus relief was nevertheless granted to Bragg under current law because he was able to convince the district court that it is was more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt had Agent Ray's lies been exposed at trial. In contrast, under the Specter and Kyl bills, in order to overcome the procedural default, Bragg would be required to present facts "sufficient to establish **by clear and convincing evidence** that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B) (emphasis added). It is doubtful that Bragg could have met this exceedingly high standard.

Further, even if Bragg had presented clear and convincing evidence of his innocence, SPA would probably still bar relief. When a claim has been procedurally barred in state court, the Kyl and Specter bills require not only compelling proof of innocence, but also a showing that the underlying evidence could not have been discovered earlier "through the exercise of due diligence." Here, the evidence of Agent Ray's perjury *was*, in fact, discovered before Bragg's state-court remedies had expired. He failed to assert the claims in state court because he was, like most prisoners, proceeding without the benefit of counsel.

3. <u>Algie Crivens</u> – Illinois

Algie Crivens spent approximately eight years in prison for a murder he did not commit. Mr. Crivens was found guilty despite proffered testimony that another man had confessed to the crime. The key evidence against Crivens was the testimony of an eyewitness. Six years after his trial, Crivens discovered that the prosecution had failed to disclose its star witness's criminal record, which demonstrated his propensity to lie to police officers, prosecutors, and even judges. After receiving habeas relief from the federal courts, the prosecutor elected to retry Crivens. At the close of the State's evidence, the judge took the highly unusual step of granting Mr. Crivens' motion for a directed verdict of not guilty. The Illinois Governor thereafter granted Crivens a pardon based on innocence, entitling him to automatic compensation for the many years he unjustly spent in prison.

Under SPA, the federal courts would have lacked jurisdiction even to hear Crivens's claim of constitutional error and he still would be in prison despite his innocence. Crivens's winning claim was added by amendment to the federal petition after the suppressed evidence was finally discovered. Because it was never presented to the state court, his claim was procedurally defaulted. Under current law, however, the default was excused. Both the Kyl and Specter bills, in contrast, would preclude a federal court from considering Crivens's claim unless the stringent requirements of section 2254(e)(2) are satisfied. Crivens would have failed this standard because his claim was not one "that could not have been previously discovered through the exercise of due diligence." As noted by the federal court, Crivens' trial counsel could have, but did not, cross-examine the prosecution witness about his criminal history at trial. Moreover, the "facts underlying the claim" likely could not constitute "clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty," because the suppressed evidence impeached the witness rather than directly exculpated Crivens. Crivens's claim also would have been barred by provisions of the two bills which substantially limit the ability of prisoners to amend their petitions. For persons in Crivens's position, they would have to satisfy section 2244(b)(2), which is substantially identical to section 2254(e)(2). Thus, amendment would have been precluded for the reasons discussed above.

4. **Ellen Reasonover - Missouri**

Ellen Reasonover spent sixteen years in prison for a robbery-murder she did not commit. The case against her was based on the testimony of two jail inmates who claimed Reasonover confessed while in the jail. After the jury fell one vote short of imposing a death sentence, Reasonover was sentenced to life in prison. Throughout state post-conviction and federal habeas corpus proceedings, Reasonover sought but was denied access to prosecution files and audio-tapes of her conversations which had been referenced in reports, but never produced to the defense. After Ms. Reasonover's first federal habeas corpus petition was denied and all appeals expired, a tape surfaced which corroborated her claim of innocence. Additional evidence was discovered showing that one of the informants likely received an undisclosed deal in exchange for her testimony against Reasonover, and that the other informant had lied. Based on this new evidence, a federal judge ruled that the murder trial of Ellen Reasonover was "fundamentally unfair," and that she was factually innocent. *Reasonover v. Washington*, 60 F. Supp. 2d 937 (E.D. Mo. 1999). The State of Missouri did not appeal that judgment, nor did it attempt to retry Reasonover, as there was no evidence whatsoever suggesting any involvement in the crime

Had either the Kyl or Specter bill been the law at the time Reasonover was in federal court, she would likely remain in prison today. Because the state courts had relied on procedural default in rejecting Reasonover's claim that the prosecution suppressed exculpatory evidence, SPA would have precluded federal court jurisdiction under SPA Sec. 4. This provision would place on Reasonover the burden to show *both* due diligence *and*, by "clear and convincing" evidence, that no reasonable juror would find her guilty. Because Reasonover did not even attempt to invoke the state court post-conviction procedure, she could not satisfy the "due

diligence" prong of the innocence exception Thus, SPA would preclude relief for Reasonover in spite of her innocence.

5. **Glen "Buddy" Nickerson - California ****

Glenn "Buddy" Nickerson was sentenced to life imprisonment for two murders based on a key eyewitness's testimony. Three other men were also convicted of the crimes and at various times, all have acknowledged that Nickerson had nothing to do with the killings. After Nickerson's trial, the key eyewitness recanted his testimony. The mistaken identification of Nickerson as one of the killers resulted from the State's misconduct in influencing the key eyewitness. This misconduct resulted in the granting of *habeas* relief to Nickerson by a federal district court.

Had SPA or the Specter Amendment been the law, Nickerson would likely have been denied relief because his misconduct claim was found to be procedurally defaulted by the state court. The federal district court reviewed his claim because it found that Nickerson had met the innocence exception to the procedural default doctrine as it exists under current law. The Kyl and Specter bills strip the federal courts of jurisdiction to hear procedurally defaulted claims unless the petitioner meets an even more stringent actual innocence exception. Because Nickerson was unable to fully develop the facts supporting his assertion of innocence in state court, the misconduct claim would likely have been denied by the federal court without any opportunity for Nickerson to establish that he met the exception to the procedural default provision. Further, it is questionable whether Nickerson could meet the heightened innocence test in the two bills given that much of his evidence of innocence was not directly related to his claim of misconduct. Both SPA and the Specter Amendment require a prisoner to show that the facts underlying the defaulted claim themselves establish by clear and convincing evidence that no reasonable factfinder would have found the prisoner guilty.

6. **Thomas Goldstein – California**

An uncertain eyewitness identification, coupled with testimony from a notorious jailhouse informant, led to the wrongful conviction of Vietnam veteran Thomas Goldstein, who spent decades confined for a murder he did not commit. He received *habeas* relief from a federal district court after he established that his trial attorney was ineffective in failing to interview the only eyewitness to the crime, and that the State both suppressed evidence that could have exonerated him and utilized testimony it knew to be false.

If SPA or the Specter Amendment had been the law when Goldstein requested relief from the federal courts, he would likely be in prison today. Goldstein was able to win his freedom

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** The California sample cases were submitted to Senate Judiciary Committee Chairman Arlen Specter and Senate Judiciary Committee Member Dianne Feinstein by the California and Hawaii Innocence Projects based at the California Western School of Law in San Diego on July 27, 2005.

only because the district court appointed counsel to represent him and granted him leave to return to state court to pursue newly developed claims for relief. SPA and Specter make it virtually impossible for a prisoner to develop new claims or to return to state court to present them as required by the exhaustion rule.

LETTER SUBMITTED BY THOMAS W. HILLIER, II, FEDERAL PUBLIC DEFENDER, WESTERN DISTRICT OF WASHINGTON TO THE SUBCOMMITTEE

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

October 19, 2005

Honorable F. James Sensenbrenner
Chairman
House Judiciary Committee
Washington, D.C. 20510-6275

Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
Washington, D.C. 20510-6275

Re: Streamlined Procedures Act of 2005 (H.R. 3035)

Dear Chairman Sensenbrenner and Representative Conyers:

I write on behalf of the Federal Public and Community Defenders to strongly oppose the Streamlined Procedures Act of 2005 (H.R. 3035).[1] By letter dated July 8, 2005, I wrote to the House Judiciary Committee to convey our grave concerns about this legislation. Since then, we have further analyzed the bill. Attached to this letter is an analysis of each section of the bill (Exhibit A), and examples of cases illustrating the disastrous impact it would have, including execution and life imprisonment of the innocent (Exhibit B). We appreciate the invitation to provide this information.

H.R. 3035 would increase what we *know*, thanks to the 162 DNA exonerations to date, to be the unacceptable risk of execution and incarceration of the innocent, while the true perpetrators remain free to commit further crimes. It would fail to remedy even the most egregious violations of constitutional rights. In the process, it would encourage and reward the very causes of unreliability and injustice in criminal cases that undermine public confidence in the results of individual cases and the system as a whole. And it would affirmatively undercut incentives for states to improve the quality of representation in their courts.

[1] The Federal Public and Community Defenders have the single largest concentration of federal habeas attorneys in the nation, with fourteen Capital Habeas Units dedicated solely to representing state prisoners in federal habeas proceedings, which represented approximately half the people on state death rows in 2005. In addition, all of our offices are appointed by the federal district courts and courts of appeal in a variety of capital and non-capital habeas matters. Defenders argued five habeas corpus cases decided by the Supreme Court last year. See Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005); Rompilla v. Beard, 125 S. Ct. 2456 (2005); Dodd v. United States, 125 S. Ct. 2478 (2005); Mayle v. Felix, 125 S. Ct. 2562 (2005); Gonzalez v. Crosby, 125 S. Ct. 2641 (2005).

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H.R. 3035 reflects a fundamental misunderstanding of the real problems in many state criminal justice systems. Sections 2 through 5 would strip federal courts of jurisdiction to consider claims that were unexhausted or found by a state court to be procedurally barred, applications filed outside the one-year limitations period (with severely curtailed tolling for exhaustion of state remedies), and amendments filed past the earlier of the one-year limitations period or an answer filed by the State. Such extreme measures appear to reflect the view that state prisoners routinely engage in dilatory tactics to avoid presentation of their federal claims in state court. This is far from the truth. The vast majority of state prisoners have every incentive *not* to delay: 99% of state prisoner habeas corpus applications are filed by inmates serving *non-capital* sentences.[2] Delays in obtaining federal habeas corpus review may result in these prisoners fully serving a sentence pursuant to an unconstitutional conviction. And delay is harmful to the innocent in both capital and non-capital cases, since without speedy review, they may serve their full sentences, or worse, be executed.

In fact, the reasons for failure to raise or develop claims are usually beyond the prisoner's control. A primary cause is incompetent counsel at trial, on direct appeal, or in state post-conviction, or counsel who have overwhelming caseloads and cannot adequately attend to each client. Another is lack of counsel in state post-conviction proceedings. Still another is official misconduct, such as concealing exculpatory evidence. And, the state courts, at times, fail to resolve prisoners' claims on the merits in a responsible and timely way. In case after case in the examples attached to this letter, state prisoners pursued their claims before the state courts as diligently as they could. Only when federal courts appointed counsel, ordered discovery, and held evidentiary hearings were they able to raise and develop the claims that resulted in relief, and in many cases, exoneration.

Current statutes and caselaw already contain stringent requirements in each of the areas covered by sections 2-5, providing strong incentives to raise and develop every claim as soon as possible. Only when a petitioner has been prevented from doing so by a circumstance not of his making -- such as official concealment of evidence, ineffective assistance of counsel, or a state court's arbitrary ruling -- does he have the opportunity to argue that the barrier to federal review should be lifted. As demonstrated in the attached examples, H.R. 3035 would flatly prohibit federal courts from reviewing meritorious claims even under those circumstances. The innocence exceptions would be impossible to meet under those same circumstances. When a petitioner's diligent efforts have been thwarted by state misconduct, incompetent counsel or an arbitrary state court ruling, he will arrive in federal court either without sufficient evidence to meet the innocence standard, or with evidence that could have been or was discovered previously, but defense counsel simply failed to investigate or use it. The chief effect would be to

[2] See Administrative Office of the United States Courts, Judicial Facts and Figures, Table 2.9, available at http://www.uscourts.gov/judicialfactsfigures/table2.09.pdf.

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penalize state prisoners, encourage wrongful and negligent state action, and discourage improvement by the states.

Section 6 would strip federal courts of jurisdiction to review an unconstitutional sentence, including an unconstitutional death sentence, based on a state court's finding that the error was "harmless" or "not prejudicial." Section 6 would permit executions to go forward when the death sentence was obtained through egregious state misconduct or grossly ineffective assistance of counsel. For example, Ernest Willis, who is innocent, would have been executed, although his prosecutors intentionally withheld their expert's report stating that he did not pose a future danger, without which he would have been ineligible for the death penalty under Texas law. Fred Jermyn would have been executed, although his lawyer, less than two years out of law school, failed to take the most basic step of investigating his childhood. Had he done so, he would have discovered that Mr. Jermyn suffered unspeakable abuse at the hands of his father, including being whipped with a cat-o'-nine-tails, beaten with a steel crutch, and being forced to eat from a dog food bowl while chained with a dog collar and leash -- evidence the State now agrees warrants a sentence of life.[3] Under current law, the federal courts may intervene only when state courts make the most unreasonable findings of harmless error, as they did in these cases. Section 6 would require such errors to go uncorrected and, like sections 2-5, would create perverse incentives and encourage injustice.

Section 9 would strip the federal courts of jurisdiction to review *any* claim arising from a state deemed to have had a qualifying mechanism for the appointment of competent post-conviction counsel. It would take the decision as to whether and when a state was qualified from a neutral Article III court and place it in the hands of the Attorney General, an Executive Branch official who routinely files briefs supporting states and opposing petitioners in habeas cases, creating the appearance of and potential for biased decision-making, and violating separation of powers. Section 9 would specifically authorize the Attorney General to retroactively certify that a state had a qualifying mechanism. This would allow a state to appoint counsel past the short filing deadline reserved for opt-in states, then obtain certification with an "effective date" on or before the date counsel was appointed, then obtain a ruling that the petition is time-barred. The neutral federal courts have rejected arguments by some states, including Arizona, Virginia and South Carolina, that they should benefit from the short filing deadline or the special deference reserved for opt-in states even though they failed to appoint counsel until after the filing deadline had passed, or had no qualifying mechanism until after state post-conviction proceedings were at an end, or appointed counsel who was admittedly unqualified under the state's own standards. Rather than

[3] We understand that the House of Representatives, by floor amendment and without a hearing, has already passed Sec. 303(a) of H.R. 3132, the "Children's Safety Act of 2005," which includes a provision identical to Sec. 6 of H.R. 3035, and a provision that would strip the federal courts of jurisdiction to review sentencing claims found by a State court to be procedurally barred. Under both provisions, executions would proceed with no federal review of egregious state misconduct and grossly ineffective assistance of counsel.

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recognizing that the states have failed to provide a system for and actual appointment of competent counsel and attempting to stimulate improvement, H.R. 3035 would reward the states for not doing so.

Section 10 would preclude lower federal court review of any claim relating to state clemency or pardon proceedings. Currently, such claims are cognizable only in the rarest of circumstances. We question why the sponsors would wish to close off even this limited avenue for the vindication of minimal due process rights at what is many times the final review before execution, and the last fail safe against execution of the innocent.

Section 11 would deny equal justice and effective assistance of counsel to indigent federal capital trial defendants and indigent state and federal capital habeas petitioners by hindering their ability to obtain funds to develop and prepare their defenses and claims, authorizing prosecutors to scrutinize attorney work product in a manner that is unprecedented, prejudicial, and certainly unfair, and requiring immediate publication in the midst of litigation of the amount of funds authorized. This provision is almost surely unconstitutional, would create judicial inefficiency, and is wholly unjustified.

Section 12 would purport to give the same rights to crime victims in state prisoner habeas cases that crime victims have at federal trials, enforceable through a federal cause of action on an expedited basis. Most, if not all, of these rights are incapable of being applied in habeas cases. For example, victim impact statements are not relevant to any issue under review in a habeas case, restitution is not granted in habeas cases, and there is no "attorney for the Government" with whom victims could confer. This section would create unmet expectations for victims, invite satellite litigation of matters off the record, add to the burdens of judges trying to adjudicate the issues before them, and complicate, not streamline, federal habeas corpus proceedings.[4]

As we and many other commentators have already noted, most of the difficult questions of interpretation of the AEDPA have only recently been settled after nine years of litigation. H.R. 3035 would cast this aside and begin a new decade of litigation and uncertainty. Many of its provisions are exceedingly complex and poorly drafted. The tolling provisions of Sec. 5, and the retroactivity provisions of Secs. 7 and 14, would create chaos in the state and federal courts. This legislation would make it still more difficult for *pro se* prisoners, lawyers and judges to comply with state and federal requirements. It would not advance its stated purpose, but instead would complicate and delay the process, and subvert the true purpose of the constitutional right to habeas corpus review.

No need for this radical legislation has been demonstrated. Instead, it is justified by slim anecdotal evidence of "delay." Most post-conviction delays, however, occur in

[4] We understand that the House of Representatives has already passed this provision as Sec. 303(b) of H.R. 3132, the "Children's Safety Act of 2005."

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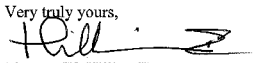
the state systems.[5] Examples of delay offered in support of H.R. 3035 support this point. Cases beginning in California have been repeatedly criticized. California has a unique set of systemic issues that lengthen the time between judgment and final resolution in the state courts and that impede federal review. The resulting delay is entirely state-created and not the result of federal court review or statutes, and would remain unaffected by this bill.[6] Moreover, simply by operation of these state procedures and H.R. 3035, California prisoners would suffer uniquely severe consequences. Under Sec. 5, much of the time between judgment and final resolution by the California courts would no longer toll the federal statute of limitations, and under Sec. 2, the prisoner could no longer file a protective petition in federal court. As a result, no matter how diligent, the prisoner could not obtain federal review.

It is telling that the Conference of Chief Justices, whose decisions this legislation would shield from federal review, has warned Congress that depriving federal courts of jurisdiction in this manner would have unknown and potentially harmful consequences for the state courts and the administration of justice, and has urged Congress to undertake careful study and to consider targeted solutions to documented problems.

H.R. 3035 is not the product of a careful study designed to address documented problems in post-conviction litigation. It is unbalanced, unwise and beyond repair in the amendment process. It would further rather than remedy the known causes of injustice and unreliability in the state courts. We urge the Committee to scrap this proposal in favor of a true study of issues associated with federal court review of state convictions and sentences with the ultimate goal of producing legislation that addresses the very real problems that produce unjust and unreliable results in some cases.

Thank you for the opportunity to present our thoughts on this important proposal. We are available to provide further information, assistance or testimony for your Committee and would welcome a call for that help.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender
Chair, Legislative Expert Panel

cc: Members of the House Judiciary Committee

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[5] Eric M. Freeman, Innocence, Federalism, and the Capital Jury, 18 N.Y.U. Rev. Law & Soc. Change 315 (1990-91).

[6] See Letter and Memorandum of Paul Renne to Senators Specter, Leahy and Feinstein, July 20, 2005.

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EXHIBIT A

Section by Section Analysis of "Streamlined Procedures Act of 2005" (HR 3035)

Jurisdiction Stripping Provisions: Secs. 2, 3, 4, 5, 6, 9

Sec. 2. Exhaustion

Under current law, a state prisoner must exhaust the remedies available in state court, unless there is an absence of available state corrective process, or circumstances that render such process ineffective to protect the prisoner's federal constitutional rights.[1] The purpose of the exhaustion requirement is to give the state courts the first opportunity to correct a constitutional violation. To exhaust a federal claim, the applicant must present its legal basis and underlying facts in state court. The reason for failure to exhaust is frequently inadequate counsel or lack of counsel, the State's withholding of supporting evidence, or the state court's failure to act on a state post-conviction petition.

A federal court confronted with a petition raising unexhausted claims may find that there is an absence of effective state court process, for example, if the state court simply failed to act on the claim, or that it would be futile to attempt to exhaust because, for example, the claim would be procedurally barred (which may or may not be excused under the strict "cause and prejudice" or "miscarriage of justice" standards, see discussion of Sec. 4, infra). Otherwise, the petitioner may return to state court to exhaust his state remedies,[2] and the federal court has discretion to stay and abey the federal petition in the interim, so long as there is good cause for the failure to exhaust, the claims are potentially meritorious, there is no indication that the petitioner intentionally engaged in dilatory tactics, and the court places a reasonable time limit on the petitioner's trip to state court and back. See Rhines v. Weber, 125 S. Ct. 1528, 1533-35 (2005); Pace v. DiGuglielmo, 125 S. Ct. 1807, 1813 (2005). This procedure permits the state courts to rule in the first instance and at the same time prevents petitioners from losing their opportunity for any federal review due to the running of AEDPA's one-year statute of limitations.

Sec. 2 would mandate dismissal with prejudice and preclude exhaustion no matter the circumstances. It would preclude federal review of unexhausted claims if the prosecution concealed the supporting evidence and lied about it, as it did for years in Banks v. Dretke, 540 U.S. 668 (2004), thus permitting the State to prevent review by any court, state or federal, through its own misconduct. It would preclude federal review of unexhausted claims where a petitioner could not obtain a ruling from the state courts despite his diligent efforts. See, e.g., Turner v. Bagley, 401 F.3d 718 (6th Cir. 2005) (excusing failure to exhaust where state court failed to adjudicate petitioner's appeal for eight years); Story v. Kindt, 26 F.3d 402 (3d Cir. 1994) (excusing failure to exhaust where state courts delayed review of post-conviction petition for nine years).

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[1] 28 U.S.C. § 2254(b)(1).

[2] Rose v. Lundy, 455 U.S. 509, 518-19 (1982).

If Sec. 2 had been the law, Nicholas Yarris, though now proved to be innocent by DNA testing, would have been executed. Rodney Bragg, Timothy Brown, Algie Crivens, Antoine Goff, Thomas Goldstein, John Tennison, and James Tilemma, all innocent, would be incarcerated for decades to life. Fred Jermyn would have been executed rather than serving a life sentence based on evidence of the savage abuse and torture he endured as a child but which his lawyer failed to introduce at trial. Max Soffar would have been executed, instead of having a chance to prove his innocence to a new jury with reliable evidence and competent counsel. Delma Banks would have been executed, instead of having a chance to present exculpatory evidence the prosecution hid and lied about for years. Thomas Miller-El and Eddie Lee Miller would have been executed, rather than having the chance for a trial free of intentional race discrimination. Ledell Lee, whose lawyer was so intoxicated that he was "unavailable" at trial, would never have a chance to be represented by competent counsel. See Examples of Cases in Which Federal Review Would Be Precluded by H.R. 3035 at 10-11, 11-19, 22-25, 26-27, 30-34, 37-38 (Exhibit B).

Sec. 3 - Amendments to Petitions

Under current law, a federal habeas petitioner must generally request and receive permission to amend the petition after the state has answered. Under recent Supreme Court law, an amendment to a petition submitted after the statute of limitations has run does not "relate back" to the date the original petition was filed under Fed. R. Civ. P. 15(c)(2) unless the petition and the amendment "are tied to a common core of operative facts."[3] This is a very difficult standard to meet. As with exhaustion, the reason amendment is necessary is usually inadequate counsel or that the State withheld the basis for the claim, and the basis is not discovered and presented until counsel is appointed by the federal court.

Sec. 3 would permit a petitioner to amend his petition only once and not after the earliest of the State filing an answer or the running of the one-year limitations period. Thus, it would eliminate the relation-back doctrine even when the amendment *is* closely tied to the original claims. This is unnecessary, since the State is on notice of and is not prejudiced by amendments tied to the same core of operative facts. It also would create an unfair advantage for the State. For example, if the original petition alleged that the State withheld exculpatory evidence in violation of Brady of Maryland, 373 U.S. 83 (1963), the State could defeat an amendment alleging that it failed to disclose a particular exculpatory document by simply hurrying to file an answer. The Supreme Court recently ordered further review of a Brady claim, the basis of which had been intentionally concealed and was not disclosed until the federal petition had been pending for more than a year. See Banks v. Dretke, supra. Sec. 3 would bar review of such claims and reward purposeful state misconduct.

[3] Mayle v. Felix, 125 S. Ct. 2562, 2574 (2005).

If Sec. 3 were the law, Rodney Bragg, Thomas Goldstein, John Tennison and his innocent co-defendant Antoine Goff, though innocent, would remain incarcerated for life. Delma Banks would have been executed rather than having a chance for federal review of his claim that the State concealed and lied about exculpatory evidence throughout trial and state post-conviction proceedings. See Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035 at 11-14, 17-19, 22-25, 26-27 (Exhibit B).

Sec. 4(a) -- Procedural Default

Sec. 4(a) would nullify decades-old doctrines of comity and federalism designed to respect state court procedural rules while maintaining the federal courts' constitutional duty to remedy unlawful incarcerations and sentences. Current law precludes federal habeas review of the merits of a claim if the petitioner failed to comply with a state procedural rule that is "adequate and independent" of federal law, unless the petitioner can show either (1) both "cause" for the failure to comply with the state procedural rule and actual "prejudice," or (2) a "fundamental miscarriage of justice," a showing generally involving clear proof of innocence.[4] A state rule is adequate and independent if the petitioner actually violated a state rule that was independent of federal law and was "clear," "firmly established," and "regularly followed" at the time the alleged procedural default occurred.[5] To show cause, the petitioner must establish state action that interfered with presentation of the claim (such as withholding evidence[6]) or ineffective assistance of counsel at trial or on direct appeal (which is not available to challenge action or inaction by state post-conviction counsel). Showings of cause and prejudice, or alternatively of a fundamental miscarriage of justice, are difficult to establish.

Sec. 4(a) would add § 2254(h)(1), which would explicitly strip federal courts of jurisdiction to consider federal constitutional claims that were "found by the State court to be procedurally barred, or any claim of ineffective assistance of counsel related to such claim." Thus, state courts would be free to "find" that the petitioner had failed to comply with a court rule though no such rule had ever been announced at the time of the alleged default, as in Ford v. Georgia, 498 U.S. 411 (1991), or a statutory rule that was not enacted at the time of the alleged default, as in Yarris v. Horn, 230 F. Supp.2d 577, 588-89 (E.D. Pa. 2002), or a requirement that was not invoked when the petitioner allegedly violated it, served no conceivable state interest, was impossible to comply with, and the violation of which was caused by the state, as in Lee v. Kemna, 534 U.S. 362 (2002). The federal courts would be required to simply take the state court's word that the claim was barred. The Senate Judiciary Committee heard testimony on July 13, 2005 that in Alabama and Texas, two states with huge death row populations and frequent executions,

[4] Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986).

[5] Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

[6] Strickler v. Greene, 527 U.S. 263, 285-86 (1999).

state court judges *almost always* adopt "rulings" in post-conviction proceedings that were prepared by the State Attorney General's office, with no independent judicial fact finding or legal analysis.[7] New subsection (h)(1) would only encourage state prosecutors to "find" procedural default, and federal courts would have to take them at their word.

Further, an alleged default could not be excused even though it was caused by egregious state misconduct or grossly ineffective assistance of counsel, and any related ineffective assistance of counsel claim would be precluded.

Additionally, Sec. 4(a) would strip federal courts of jurisdiction even when the state court did *not* clearly rely on a state procedural bar, and would transfer the burden of identifying such a bar from the state courts and state prosecutors -- where it clearly belongs under principles of comity and federalism -- to the federal courts. Under the law in effect for over twenty years, if the state court's decision appears to rest primarily on federal law or is interwoven with federal law, it is presumed to rest on federal law, and federal habeas review may proceed; the presumption can be avoided by a plain statement that the decision also rests on an independent and adequate state procedural bar.[8] Thus, a state court can deny relief based on a procedural bar and in the alternative on the merits so long as it plainly states that its decision rests in the alternative on a state procedural bar. Where the state court's decision appears to rest primarily on or is interwoven with federal law, the "plain statement" rule advances comity, federalism and efficiency by reflecting the fact that the state courts have an interest in and are in the best position to recognize and apply a state procedural bar, while a rule that would force federal courts to examine the state court record to resolve ambiguity would be a waste of federal judicial resources and an intrusion on state court proceedings.[9] Furthermore, it is appropriately up to the state prosecutor to point out a potential state procedural bar to the federal court, rather than the federal court having to look for such a bar in every case.

Sec. 4(a) would undo this body of law in several ways, and in the process would significantly interfere with state court proceedings, and require federal courts to sift through the state court record, divining and applying and correcting the state courts' own applications of their own rules. First, it would add § 2254(h)(2)(A), which would strip federal courts of jurisdiction to review a claim if the state court denied it on the merits and on a procedural ground, even if the denial appeared to rest primarily on federal law or was interwoven with federal law and the state court failed to plainly state that it also rested on a procedural bar. And, as in subsection (h)(1), it would preclude federal review

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[7] Statement of Bryan Stevenson Before the Senate Judiciary Committee (July 13, 2005).

[8] See Coleman v. Thompson, 501 U.S. 722, 734-35 (1991); Harris v. Reed, 489 U.S. 255, 263 (1989); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985); Michigan v. Long, 463 U.S. 1032, 1041 (1983). Or, a later state court may, without explanation, leave in effect a prior judgment making such a statement. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

[9] Coleman, 501 U.S. at 732-33, 736; Harris, 489 U.S. at 264-65.

of the defaulted claim and a related ineffective assistance of counsel claim even if the procedural default was caused by ineffective assistance of counsel. Second, it would add § 2254(h)(2)(B), which would strip federal courts of jurisdiction when the state's *own* rules required its courts to review otherwise-defaulted claims on the federal merits under plain error, fundamental error or other heightened standard of review. Third, it would add § 2254(h)(3), which would illogically and impractically place the burden on the federal court to identify a procedurally barred claim in the first instance by relieving the State of the duty to answer "any claim described in paragraph (1) or (2) unless the court first determines" that the claim would qualify under the innocence exception. Finally, it would add § 2254(h)(4), which would require the federal court to examine "the full record" in the state court if the state court's order was ambiguous as to which claims were procedurally barred, thus creating a new and onerous duty on the federal court to review the entire state court record merely because the state court was sloppy in its ruling.

Under Sec. 4(a), Eric Clemmons, Ronald Williamson, Ernest Willis, and Nicholas Yarris, though innocent, would have been executed. Though innocent, Rodney Bragg, Timothy Brown, Dennis Fritz, Glen Nickerson and Ellen Reasonover would be serving life sentences. Algie Crivens, though innocent, would be serving twenty years. Arnold Holloway would stand convicted of first degree murder and would have been executed, rather than third degree murder and serving 10-20 years. Kenneth Richey would stand convicted of aggravated felony murder, even though the state did not present and did not have any evidence of the required specific intent element, and would have been executed rather than have a chance for a new trial. Alan Pursell and Fred Jermyn, though the State has now agreed that life is the appropriate sentence based on evidence their lawyers utterly failed to investigate or present, would have been executed. Sidney Scott, Ernest Simmons and Steven Slutzker would have been executed rather than have the chance for a new trial with exculpatory evidence the state deliberately withheld. Marcus Cargle and Maxwell Hoffman would have been executed and never have a chance to be represented by competent counsel. Zachary Wilson would have been executed rather than have a chance for a new trial free of race discrimination. Delma Banks would have been executed, instead of having a chance to present strong exculpatory evidence the prosecution hid and lied about for years. See Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035 at 1-2, 6-9, 10-11, 11-17, 19-22, 26-27, 28-29, 30-32, 35-37, 39-40 (Exhibit B).

The House of Representatives, by floor amendment and without a hearing, has already passed Sec. 303(a) of H.R. 3132, the "Children's Safety Act of 2005," which would strip the federal courts of jurisdiction to review any sentencing claim in any case that was found by a State court to be procedurally barred. Under this provision, Delma Banks, Alan Pursell, Fred Jermyn, Marcus Cargle, and Maxwell Hoffman, whose offenses had nothing to do with children, would have been executed. See Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035 at 26-27, 28, 29, 30-32, 35 (Exhibit B).

Sec. 4(b) -- Time Bars

Sec. 4(b) would amend 28 U.S.C. § 2244(d), which currently states that the "time during which a properly filed" state post-conviction petition is "pending" shall not be counted toward the federal one-year statute of limitations, to add: "An application that was otherwise improperly filed in State court shall not be deemed to have been properly filed because the State court exercises jurisdiction in applying a rule or recognizes exceptions to that rule."

It is not at all clear what this means. In Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005), the Supreme Court held that a state petition filed past a state statute of limitations was a condition to proper filing, and thus the federal statute of limitations could not be tolled between filing such a petition and the state court's ultimate decision that the petition was time-barred. Id. at 1810-11. Pace followed Artuz v. Bennett, 531 U.S. 4 (2000), where the Supreme Court held that a state application is "properly filed" under § 2244(d) if it is delivered and accepted in the prescribed form, and at the prescribed place and time, even if it may be subject to some procedural bar, id. at 8-9, and left open the question whether the existence of exceptions to a timely filing requirement can prevent a late application from being considered improperly filed. Id.at 8 n.2. The Pace Court did *not* hold that a petitioner is not entitled to tolling even when the state court finds that he *did* meet an exception to a state timing rule, because Pace did not allege or prove to the state court that he met one of the statutory exceptions. Id. at 1811. But Sec. 4(b) apparently would prohibit tolling even when the state court "recognizes" an exception to a timing rule in the particular case. This would hold the petitioner to stricter requirements than the state court did, would ignore state court rulings, and thus would be unfair, contrary to principles of comity and federalism, and make no sense.

A very serious problem is Sec. 4(b)'s interaction with Sec. 2. A petitioner trying in good faith to exhaust state court remedies may litigate in state court for years only to be told that he is time-barred when it is too late to file a federal petition. In Pace, the petitioner argued that for that reason, deeming a petition a state court ultimately determined to be time-barred as having not been "properly filed" in the first place was unfair. See 125 S. Ct. at 1813. The Court said that its recent decision in Rhines obviated the potential unfairness: Under Rhines, a petitioner may file a "protective petition" in federal court and ask the court to stay and abey the proceedings while he exhausts state remedies, citing reasonable confusion regarding state timing requirements as good cause. Id. But Sec. 2 would overrule Rhines by requiring dismissal with prejudice of any unexhausted claims. The Supreme Court has already recognized that this would be unfair.

Further, Sec. 4(b) could be read to extend Pace in the sense of permitting state procedural rules of all kinds, not just timing requirements, to be asserted as resulting in an "improper" filing such that the state application would not toll the federal statute of limitations, and thus potentially render the federal petition untimely and preclude all state and federal court review.

Sec. 5 - Tolling of Limitations Period

Under current law, AEDPA's one-year statute of limitations begins to run from the date the judgment became final on direct appeal (i.e., when certiorari was denied or, if no petition for certiorari was filed, when the time for filing a petition for certiorari expired), and is tolled during the time a properly filed application for state post-conviction or other collateral review of the pertinent "judgment or claim" is pending. See 28 U.S.C. § 2244(d)(2). The state application is "pending" from the time it is properly filed and while moving from one court to the next until all state process is denied. Carey v. Saffold, 536 U.S. 214 (2002). This encourages petitioners to first raise all of their claims in state court, complying with state deadlines, in order to give the state courts the first opportunity to resolve them. Id. at 220.

Sec. 5 would overrule Carey and in doing so would create chaos in state and federal courts, be impossible to comply with, and contradict principles of comity and federalism, all for no reason.

First, Sec. 5 would allow tolling only when an application for review of a particular "claim" was pending. In most states, a claim raised on direct appeal cannot be raised in state post-conviction. In any state, claims that require investigation of facts outside the trial record -- which include prosecutorial withholding of exculpatory evidence, bad faith destruction of evidence, knowing presentation of false testimony, jury misconduct, and ineffective assistance of counsel -- cannot be raised on direct appeal but only in post-conviction. This presents no problem under current law because a state application for review of the "judgment" tolls the statute of limitations. Under Sec. 5, an application for review of a "claim" raised on direct appeal would not be pending while the petitioner was litigating other claims in state post-conviction, the statute of limitations therefore would not be tolled as to the claims raised on direct appeal, and they would likely become untimely while the other claims were being litigated in post-conviction. It would not be possible for petitioners to resolve this by filing one federal habeas petition for the direct appeal claims and another for the state post-conviction claims, because successive petitions are forbidden (absent a narrow innocence exception). Thus, petitioners would have to decide to either pursue only the direct appeal claims, or only the state post-conviction claims (before they were developed), but not both.

This would be unfair, and would create endless confusion and complexity. The majority in Pace justified treating a state timing rule that applied on a claim by claim basis as a condition to "properly filing" an application in state court because § 2244(d)(2) applies to a "properly filed application . . . *with respect to the pertinent judgment or claim.*'" Pace, 125 S. Ct. at 1813 (emphasis in original). Under Sec. 5, the majority's justification would disappear, and would explicitly create the "incoherent results" of which the dissent warned. Id. at 1818 (dissenting opinion).

Second, the application would be deemed pending only between filing of the application and the ruling on that application by the "same State court," and "not pending" during any period between a state court's ruling and the date on which "the application or a related application" is presented for rehearing to the same state court, or to a higher state court. Thus, any period *provided by state law* between a decision and appeal of that decision would be counted against the federal statute of limitations. This would force petitioners to file undeveloped, hastily-prepared pleadings, possibly without even having a transcript, and before they were even due under state law, thus hobbling the state courts' ability to intelligently resolve federal claims. It takes time even for experienced counsel to present these issues well, and many states do not provide counsel at all in post-conviction.

The primary effect would be to prevent review of meritorious claims of diligent petitioners. As one example, Glen Nickerson, an innocent man serving a life sentence in California with no conceivable motive to delay, filed his federal petition a few weeks early, but it would have been late under this provision, and he would remain in prison for life. John Tennision, another innocent man serving a life sentence in California, filed his federal petition on the day it was due, but would have been late under this provision. See Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035 at 19-20, 22-25 (Exhibit B).

Third, Sec. 5 would prohibit equitable tolling altogether, which now is available only in the narrowest circumstances: when the petitioner can establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace, 125 S. Ct. at 1814. Equitable tolling is an important failsafe to correct extreme injustices where the petitioner was *unable* to comply with the statute of limitations because of extraordinary circumstances not of his making, such as Henry Wallace's mental incapacity and inability to read, and his lawyer's failure to provide him with his files despite a written request by inmate law clerks and a court order, or the federal district court's own mistake in Curtis Brinson's case. See Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035 at 27-28, 38-39 (Exhibit B). There is no justification for precluding equitable tolling.

Sec. 6 – Harmless Error in Sentencing

Current law requires federal courts to defer to state court findings of fact, unless unreasonable in light of the evidence presented, and to state court legal conclusions, unless contrary to or an unreasonable application of Supreme Court law. Thus, most state court denials of relief based on a finding that a constitutional error was "harmless" or "not prejudicial" are upheld in federal court. It is only truly egregious, unreasonable state court decisions that are reversed.

Sec. 6 would strip the federal courts of jurisdiction to remedy unconstitutional sentences, including death sentences, if the state court found the constitutional violation to be "harmless" or "not prejudicial," no matter how unreasonable or unlawful that

determination. The only exception would be if it would be contrary to clearly established Supreme Court law to determine that the constitutional error was "structural." Structural errors are never harmless, but are limited to deprivation of the right to a public trial, the right to trial counsel, the right to self-representation, the right to an impartial judge, the right to a verdict beyond a reasonable doubt, and the right against unlawful exclusion of members of the defendant's race from the grand jury.[10]

Under Sec. 6, Ernest Willis, who is innocent, would have been executed, although his prosecutors withheld their expert's report stating that he did not pose a future danger, without which he would have been ineligible for the death penalty under Texas law. Delma Banks would have been executed, although the witness whose testimony the State presented in support of the Texas future dangerousness issue testified falsely, which the State steadfastly hid and affirmatively denied. Fred Jermyn would have been executed, although his lawyer did no investigation for the penalty phase and thus did not present the evidence the State now agrees warrants a sentence of life: Mr. Jermyn's father savagely tortured him, by, among other things, hanging him by his heels and whipping him; beating him with a steel crutch; whipping him with a cat-o'-nine-tails; and keeping him in an attic room, chained with a dog collar and leash and forced to eat from a dog food bowl. Ronald Rompilla would have been executed, though his lawyers failed to present the evidence that he was raised by alcoholics, was beaten with fists, leather straps, and sticks, was locked in a dog pen filled with excrement, and had organic brain damage caused by fetal alcohol syndrome and an IQ in the mentally retarded range. Terry Williams would have been executed, though his lawyers failed to prepare for sentencing and thus did not present the evidence of his "nightmarish childhood" of brutal physical abuse, his mental retardation, and the opinions of the State's own experts and prison authorities that he was unlikely to act violently and did not pose a future danger in prison. See Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035 at 7-9, 26-27, 30-32, 35-36, 39 (Exhibit B). The identical provision in Sec. 303(a) of H.R. 3132, the "Children's Safety Act of 2005," already passed by the House, would have the same effect.

Sec. 9. Capital Cases in Opt-in States

Under the AEDPA, in return for meeting the requirements of 28 U.S.C. § 2261 or § 2265, a state is entitled to substantial advantages in a capital habeas case: (1) the petition must be filed within 180 days of the conviction and sentence becoming final on direct review, subject to tolling for certiorari and state post-conviction, 28 U.S.C. § 2263, (2) the district court must render a final determination on the petition within 180 days of filing, 28 U.S.C. § 2266(b)(1)(A), (3) the court of appeals must render a determination on any appeal of the district court's determination within 120 days of the last responsive brief, 28 U.S.C. § 2266(c)(1)(A), and (4) the federal courts may review claims not raised and decided on the merits by the state courts only if the failure to properly raise the claim is the result of unconstitutional or unlawful state action, the result of the Supreme Court's

[10] See Sullivan v. Louisiana, 508 U.S. 275 (1993); Arizona v. Fulminante, 499 U.S. 279 (1991).

recognition of a new federal right made retroactive, or is based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present it for state or federal post-conviction review, 28 U.S.C. § 2264(a).

The AEDPA "establishes a quid-pro-quo relationship: A state seeking greater federal deference to its habeas decisions in capital cases must, by appointing competent counsel to represent indigent petitioners, further ensure that its own habeas proceedings are meaningful." Bennet v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996).

Sec. 9 would strip federal courts of jurisdiction to review *any* claim arising from an opt-in state, whether it was properly raised in state court or not raised in state court through no fault of the petitioner. Perversely, petitioners who are actually innocent would receive no federal court review because they *did* properly raise their claims in state court. See "Exceptions to Jurisdiction Stripping," supra. At the same time, Sec. 9 would ease the way for states to benefit from this jurisdiction-stripping provision without doing anything in return by taking the decision whether to certify from the neutral Article III courts, placing it in the hands of the Attorney General of the United States, explicitly providing for retroactive certification, and making that decision virtually unreviewable.

There is no justification for this drastic change, it is unfair and dangerous on its face, and the available facts counsel strongly against it.

No state has yet complied with the existing statute. In some cases soon after AEDPA, the states did not have or claim to have the required mechanism, and apparently have made no subsequent attempts.[11] What is most disturbing is that some states have sought to benefit from the short deadlines and special deference reserved for opt-in states without having complied with their obligations under the statute.[12] For example, in

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[11] High v. Head, 209 F.3d 1257, 1262 n.4 (11th Cir. 2000) (Georgia), cert. denied, 121 S. Ct. 1237 (2001); Leavitt v. Arave, 927 F. Supp. 394 (D. Idaho 1996) (Idaho); Thomas v. Gramley, 951 F. Supp. 1338 (N.D. Ill. 1996) (Illinois), aff'd, 144 F.3d 513 (7th Cir. 1998), cert. denied, 525 U.S. 1123 (1999); Williams v. Cain, 942 F. Supp. 1088 (W.D. La. 1996) (Louisiana), rev'd on other grounds, 125 F.3d 269 (5th Cir. 1997), cert. denied, 525 U.S. 859 (1998); Lockett v. Puckett, 980 F. Supp. 201, 210 n.11 (S.D. Miss. 1997) (Mississippi), amended, 988 F. Supp. 1019 (S.D. Miss. 1997), aff'd, Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000); Kreutzer v. Bowersox, 231 F.3d 460, 462 (8th Cir. 200) (Missouri); Langford v. Day, 110 F.3d 1380, 1386 n.2 (9th Cir. 1996) (Montana); Sexton v. French, 163 F.3d 874, 876 n.1 (4th Cir. 1998) (North Carolina), cert. denied, 120 S. Ct. 139 (1999); Moore v. Gibson, 195 F.3d 1152, 161 n.1 (10th Cir. 1999) (Oklahoma), cert. denied, 120 S. Ct. 2206 (2000); Death Row Prisoners of Pennsylvania v. Ridge, 106 F.3d 35 (3rd Cir. 1997) (Pennsylvania); Perillo v. Johnson, 205 F.3d 775, 793-94 (5th Cir. 2000) (Texas); Tillman v. Cook, 25 F. Supp. 2d 1245, 1253 (D. Utah 1998) (Utah), aff'd, 215 F.3d 1116 (10th Cir.), cert. denied, 121 S. Ct. 664 (2000).

[12] See Spears v. Stewart, 283 F.3d 992 (9th Cir. 2001) (Arizona); Ashmus v. Woodford, 202 F.3d 1160 (9th Cir.) (California), cert. denied, 121 U.S. 274 (2000); Hill v. Butterworth, 941 F. Supp. 1129 (N.D. Fla. 1996) (Florida), rev'd for lack of a case or controversy, 147 F.3d 1333 (11th Cir. 1998); Baker v. Corcoran, 220 F.3d 276 (4th Cir. 2000) (Maryland), cert. denied, 121 S. Ct. 1194

Spears v. Stewart, 283 F.3d 992 (9th Cir. 2001), Arizona appointed counsel *after* the short filing deadline had passed, then argued that the petition should be time-barred under that deadline. In Tucker v. Catoe, 221 F.3d 600 (4th Cir. 2000), South Carolina appointed counsel whom the State admitted was not qualified under its own standards, then argued that the petition should be time-barred under the opt-in provisions. In Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996), Virginia argued that the special deference reserved for opt-in states should be applied to the state court's decision on the petitioner's state post-conviction petition, even though Virginia had no system for competent post-conviction counsel in place until *after* the state court's decision was made and post-conviction proceedings were at an end. The neutral federal courts rejected those arguments.

Rather than recognizing that the states have failed to provide a system for and actual appointment of competent counsel and attempting to stimulate improvement, Sec. 9 would reward the states for not doing so by explicitly permitting retroactive certification. Under Sec. 9(c), in what would be 28 U.S.C. § 2261(b)(3), the order for counsel must be "entered on or after the effective date of the Attorney General's certification." Under Sec. 9(d), in what would be 28 U.S.C. § 2267(a), upon request by a State, the Attorney General "shall" determine whether the State "has established" a qualifying mechanism and standards, "and, if so, the date on which the mechanism was established. The date the mechanism was established shall be the effective date of the certification." Thus, H.R. 3035 would allow states to appoint counsel past the deadline under 28 U.S.C. § 2263, obtain certification with an "effective date" on or before the date counsel was appointed, then obtain a ruling that the petition is time-barred.

Sec. 9 would allow such a travesty of justice and the danger of this occurring is not speculative. In Spears v. Stewart, supra, the Ninth Circuit found that Arizona had a qualifying mechanism but that it had failed to timely appoint counsel. A necessary basis for the court's conclusion that Arizona had a qualifying mechanism was that it had a rule requiring appointment of counsel within 15 days of the state court's issuance of a notice of post-conviction relief, though the rule was later repealed, and Arizona now has no requirement that counsel be appointed at any time. Id. at 1016-18. Arizona did not follow its 15-day rule when it was in effect, instead appointing counsel 20 months after the Supreme Court denied certiorari. Although the lawyer was not even appointed until well past the federal filing deadline, Arizona sought to have the habeas petition time barred under that deadline. Id. at 1019.

Sec. 9(c) would take the decision as to whether and when a State has successfully opted in from the neutral Article III court with jurisdiction over the state, and place it in the hands of the Attorney General, an Executive Branch official who routinely submits

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(2001); Scott v. Anderson, 958 F. Supp. 330 (N.D. Ohio 1997) (Ohio); Tucker v. Catoe, 221 F.3d 600 (4th Cir.) (South Carolina), cert. denied, 121 S. Ct. 661 (2000); Austin v. Bell, 126 F.3d 843, 846 n.3 (6th Cir. 1997) (Tennessee), cert. denied, 523 U.S. 1079 (1998); Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996) (Virginia).

amicus briefs supporting the states – against habeas petitioners -- in habeas corpus proceedings, thus creating the potential and appearance of bias. The decision as to whether states are providing competent post-conviction counsel is quintessentially judicial in nature. This provision is subject to challenge as a violation of separation of powers.

Under Sec. 9(d), in what would be 28 U.S.C. § 2267, the Attorney General's determination would be "conclusive unless manifestly contrary to the law and an abuse of discretion," a standard so forgiving that it is no standard at all, and that otherwise applies only to the Attorney General's decision whether to grant asylum,[13] but is completely inappropriate in a matter involving the enforcement of federal constitutional rights. Judicial review would be "exclusively as provided under chapter 158." If that were so, venue would be where the party challenging the order resides, and jurisdiction would be where venue lies,[14] but Sec. 9(d) would place venue and "exclusive jurisdiction" in the D.C. Court of Appeals, where the Attorney General but no party resides. The only judicial review of the Attorney General's decision would be by a court without a stake in or understanding of the administration of justice in the state. Petitioners aggrieved by the Attorney General's decisions would have to file lawsuits in the D.C. Court of Appeals,[15] rather than litigate the issue in their own cases, further lessening the likelihood that unjustified decisions to certify could be challenged.

At the Attorney General's virtually unreviewable discretion, the states could all too easily obtain certification even though they did not appoint counsel in a timely manner, had no qualifying mechanism in place, offered insufficient compensation to attract competent counsel, or appointed counsel who was in fact incompetent. Eric Clemmons, Ricardo Aldape Guerra, Curtis Kyles, Federico Martinez-Macias, Ernest Willis and Nicholas Yarris, all innocent, would have been executed if Sec. 9 were the law and their states had been certified. See Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035 at 1-5, 7-11 (Exhibit B).

Exceptions to Jurisdiction Stripping: Secs. 2, 3, 4, 9

The stated exceptions to the jurisdiction stripping provisions would not prevent the wrongful incarceration and execution of the innocent.

The only exception for unexhausted claims, procedurally barred claims, untimely amendments or claims arising from capital cases in states certified by the Attorney General would be if the claim "would qualify for consideration on the grounds that" the "facts underlying the claim" would "be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found

[13] 8 U.S.C. § 1252.
[14] 28 U.S.C. §§ 2343, 2344.

[15] 28 U.S.C. § 2344.

the applicant guilty of the underlying offense," *and* that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."[16] This would have the perverse effect in opt-in states of barring claims of innocence that were raised, presented and fully developed in state court. The exception for a new rule of constitutional law made retroactive to cases on collateral review would almost never apply, and could not apply under Sections 2, 4 or 9 in any event unless the claim also "would qualify for consideration" under the clear and convincing evidence of innocence standard. Even if the petitioner could clear these hurdles, jurisdiction over unexhausted or procedurally barred claims, and all claims arising from an opt-in state, could not be exercised unless, in addition, denial of the claim would be "contrary to, or would entail an unreasonable application of, clearly established" Supreme Court law. See Secs. 2(a), 4(a), 9(a). It would not be enough if the state court decision was "based on an unreasonable determination of the facts." Compare 28 U.S.C. § 2254(d). There would be no exception for late-filed applications or sentencing errors found to be harmless.

As demonstrated in the case examples in Exhibit B, evidence of innocence usually only emerges after years of diligent effort by effective counsel. If flaws in state proceedings such as ineffective assistance of counsel and official misconduct with respect to evidence are not able to be developed in federal court because of various bars, or because a state court made clearly erroneous factfindings, evidence of innocence will never emerge.

Under current law, federal claims that are procedurally barred, or that are filed outside the limitations period may be considered if a "constitutional violation has probably resulted in the conviction of one who is actually innocent." To open this gateway, the petitioner "must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[17] Schlup v. Delo, 513 U.S. 298, 327 (1995). This determination is made "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial." Id. at 328.

The Supreme Court noted that this is a very "substantial showing," id. at 330, but "less exacting" than the standard for innocence of the death penalty under Sawyer v. Whitley, 505 U.S. 333 (1992). The Sawyer standard requires "clear and convincing

[16] Sections 2, 4 and 9 refer to this standard as set forth in 28 U.S.C. § 2254(e)(2). Section 3 refers to it as stated in 28 U.S.C. § 2244(b)(2). These provisions were crafted for particular situations under the AEDPA, but they are entirely inappropriate in the context of lack of exhaustion, procedural default, and amendments of petitions, much less *all* claims arising from an opt-in state.

[17] Schlup was a capital case, but the Supreme Court has applied its standard in the non-capital context as well. See Bousley v. United States, 523 U.S. 614, 623 (1998).

evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" guilty. Id. at 301, 325. That standard, the Court held, was *insufficient to protect against the conviction of an innocent person.* Id. at 324-28. Likewise, the same "clear and convincing" innocence exception under this legislation is insufficient to protect against conviction of the innocent.

Another aspect of H.R. 3035's innocence exception that makes it more difficult to meet than the Schlup standard is that the evidence a petitioner may use is limited to "the facts underlying the claim." Furthermore, it is very often the case that the factual predicate for the claim *could* have been discovered previously, but state court counsel failed to do so. Even a DNA test conclusively clearing a petitioner could not open the gateway if it *could* have been done before. In the exceedingly rare case that DNA testing *was* done before, it could not be used to show innocence unless it comprised part of the "facts underlying the claim."

None of the seventeen factually innocent people in the list of examples in Exhibit B could have met this standard. In many cases, the evidence of innocence did not emerge until years after the state court proceedings had come to an end. In others, it *was* discovered but the state court ignored it, or it *could* have been discovered but counsel failed to do so, or it was *known* to counsel but counsel did nothing about it.

Retroactive Application to Pending Cases -- Secs. 7, 14

Under Secs. 7 and 14, the legislation would apply in its entirety to cases pending not only on the date of enactment of H.R. 3035, but on the date of enactment of the AEDPA. These provisions are unfair both because they fail to give notice and because they are complex, poorly drafted, and difficult to understand. This would complicate and prolong the proceedings, not streamline them.

Sec. 7 would amend "Section 107(c) of the [AEDPA] of 1996 (28 U.S.C. § 2261 note)," i.e., a note to the opt-in section for capital cases, which currently reads: "Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act [Apr. 24, 1996]." Sec. 7 would change this to read: "This title and the amendments made by this title shall apply to cases pending on or after the date of enactment of this Act." Or, as it actually appears in the note: "This title and the amendments made by this title shall apply to cases pending on or after the date of enactment of this Act [Apr. 24, 1996]." "This title" and "this Act" must be two different things, but it is not clear what either of them is -- H.R. 3035, the AEDPA, or Title 28.

In Lindh v. Murphy, 521 U.S. 320 (1997), the Supreme Court held that the non-opt-in portions of the AEDPA (Chapter 153) could not be retroactively applied to pending cases: "We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those

cases had been filed after the date of the Act." Id. at 327. Sec. 7 would at least overrule Lindh, and seems to go even further, making the AEDPA as amended by H.R. 3035 applicable to all cases under Chapter 153 or 154 pending on or after enactment of the AEDPA on April 24, 1996. Whatever it is intended to mean, this would generate complex litigation over whether Congress meant to impose new legal consequences on past actions, and if so, what they are, and whether such retroactive change is constitutional.

Sec. 14 states that "[t]his Act and the amendments made by this Act shall apply to cases pending on or after the date of enactment of this Act," but that, for pending cases, if the "amendments made by this Act establish a time limit for taking a certain action the period of which began on the date of an event that occurred prior to the date of enactment of this Act, the period of such time limit shall instead begin on the date of enactment of this Act." How this would be interpreted to interact with Sec. 7 and other sections of the statute is not clear and would be the subject of litigation for years.

Appeals -- Sec. 8

Sec. 8 would impose a complex set of rigid timing requirements on the Courts of Appeal. Current law contains timetables for appeals but only in capital cases from states that have opted in and thus made an effort to ensure that their own procedures were meaningful. See 28 U.S.C. § 2266(c). By imposing timing requirements in all cases, Sec. 8 would discourage states from creating or improving competent counsel systems.

Sec. 8 represents an inappropriate intrusion into the docket management and decisionmaking of the federal judiciary. It would force the Courts of Appeal to either push their other cases aside in order to comply with its rigid timing requirements, or give short shrift to prisoner habeas corpus appeals.

Again, this is unjustified. Of the 56,000 appeals resolved in 2004, only 102 cases *of any kind* were pending for more than 12 months following submission.[18] The Courts of Appeal terminated 73% of all state prisoner habeas corpus appeals on procedural grounds; exactly half of those were terminated with the denial of a certificate of appealability, a provision added by the AEDPA.[19]

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[18] See Administrative Office of the United States Courts, Judicial Business of the United States Courts, Statistical Table, Table B and Table S-5, available http://www.uscourts.gov/judbus2004/appendices/b.pdf and http://www.uscourts.gov/judbus2004/tables/s5.pdf.

[19] See Administrative Office of the United States Courts, Judicial Business of the United States Courts, Statistical Table, Table B-5A, available at http://www.uscourts.gov/judbus2004/appendices/b5a.pdf.

Clemency and Pardon Decisions -- Sec. 10

Sec. 10 would strip federal courts of jurisdiction to hear any claim relating to the exercise of a State's clemency or pardon power, "or the process or procedures used under such power," except for the Supreme Court's jurisdiction to review a decision of the State's highest court. Again, we wonder what the justification for this could possibly be.

Clemency proceedings take place after nearly all court remedies are exhausted and a firm execution date has been set. As explained below, challenges are brought in exceedingly rare cases involving the deprivation of the most minimal requirements of due process. In such a case under Sec. 10, the only way to get federal review would be to file an action in state court, and appeal the state's highest court's denial to the Supreme Court. It would be extremely difficult to obtain a stay of execution from the Supreme Court while the prisoner litigated the case in state court. A prisoner may well be executed before he could get any federal court review.

As Chief Justice Rehnquist observed in Herrera v. Collins, 506 U.S. 390 (1993): "Executive clemency has provided the 'fail safe' in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." Id. at 415.

We question why the sponsors would want to close off such a limited avenue for the vindication of minimal due process rights at what is the final review before execution. The Due Process Clause provides that no State may "deprive any person of life, liberty, or property, without due process of law," and a prisoner under sentence of death "remains a living person and consequently has an interest in his life." Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 289 (1998) (O'Connor, J., joined by Souter, Ginsburg, and Breyer, JJ., concurring in part and concurring in the judgment). Thus, a State's clemency and pardon procedures must comply with "some *minimal* procedural safeguards." Id. at 289 (emphasis in original); id. at 290 (Stevens, J., concurring in part and dissenting in part). Accordingly, while the Governor's discretion is virtually unlimited in ordinary circumstances, a federal court may intervene in the rare case, where, for example, clemency is denied on the basis of race, religion, or political affiliation, the process itself is arbitrary (as in the flip of a coin), a prisoner is arbitrarily denied access to the clemency process, id. at 289, 292, or the State deliberately interferes with the proper functioning of the State's clemency procedure.

In Young v. Hayes, 218 F.3d 850 (8th Cir. 2000), a death row prisoner turned to the federal courts on the very eve of his execution. The Circuit Attorney for the City of St. Louis had threatened to fire a lawyer under her supervision if she informed the

Governor in connection with clemency proceedings about the inadequate representation Mr. Young received in his capital trial, and the practice of the Circuit Attorney's Office at the time of uniformly and without exception exercising peremptory challenges to remove black jurors. Id. at 854. The Eighth Circuit found that the Circuit Attorney had engaged in witness tampering, that it was fundamentally unfair, and that it unconscionably interfered with the State's own clemency procedure, and thus violated the minimal due process required in such proceedings. Id. at 853. Though such misconduct may be rare, Sec. 10 would only encourage it by making it nearly impossible to remedy.

Funding Requests -- Sec. 11

Sec. 11 is likely unconstitutional. It is clearly designed to thwart the ability of indigent federal capital defendants and indigent state and federal capital habeas petitioners to develop and prepare their defenses or claims like all other litigants, and to authorize prosecutors to scrutinize attorney work product in a manner that is unprecedented, prejudicial, and certainly unfair. Moreover, it would create judicial inefficiency, and is wholly unjustified.

Under Sec. 11, in any habeas proceeding seeking to vacate or set aside a state or federal death sentence, a judge could not consider an *ex parte* application for funds for basic expert and investigative services "except to the extent necessary to protect any confidential-communications privilege between the defendant and post-conviction counsel," and could not grant "an application for an *ex parte* proceeding, communication, or request unless the application has been served upon the respondent and the court has allowed the respondent a reasonable opportunity to answer the application." This would seem to (1) permit consideration of an *ex parte* application only to protect attorney-client privileged communications, (2) require petitioners to submit a request for an *ex parte* application to counsel for the State or government, apparently explaining why an *ex parte* application is necessary to protect attorney-client privileged communications, which would be impossible to do without violating the privilege, and (3) to preclude any *ex parte* proceeding, communication, or request to protect against disclosure of attorney work product.

Under current law, the petitioner must make a showing "concerning the need for confidentiality," which includes attorney work product, so that he can prepare his case without being scrutinized by his adversary like any other litigant. The confidentiality showing is itself, of course, made *ex parte*. E.g., United States v. Abreu, 202 F.3d 386, 388 (1st Cir. 2000).

To make the required showing for the funds, counsel must of necessity reveal both attorney work product and information obtained in attorney-client interviews. Under Sec. 11, indigent petitioners would have to choose between foregoing necessary investigative and expert services in developing and exploring the facts, or prematurely revealing attorney work product to the government. The government certainly has no right to a wealthy litigant's work product, whether in post-conviction proceedings or not,

or any say in whether a litigant may explore and develop the facts of his own case. Nor, of course, does any litigant have a right to the government's attorney work product.

We believe that Sec. 11 would violate the Equal Protection Clause and the Due Process Clause. In Ake v. Oklahoma, 470 U.S. 68 (1985), the Supreme Court said that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake," and held that the defendant was entitled to funds for a psychiatric expert after making "an *ex parte* threshold showing." Id. at 76, 82-83. See also Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

We have found no case in which a court refused to follow 21 U.S.C. § 848(q)'s requirement of considering an application for funds *ex parte*. In cases involving courts refusing to hear *ex parte* applications for funds under 18 U.S.C. § 3006A and for subpoenas under Fed. R. Crim. P. 17, the Courts of Appeal have reversed on Equal Protection (and other) grounds. As the Fifth Circuit said long ago, "When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised, and it appears that a major reason for the amendment [to Rule 17] was to avoid such questions." United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973). See also United States v. Holden, 393 F.2d 276, 278 (1st Cir. 1968) (allowing the government to attend hearing on the need for a subpoena under Rule 17(c) "discriminated against [the defendant] because of [his] indigency."); Abreu, 202 F.3d at 392 (refusing to allow *ex parte* application for funds for psychiatrist violated the principle of "fair treatment of indigents;" to require indigents to reveal to the government the grounds for seeking funds "would penalize them for their poverty.").

Sec. 11 would also require "[a]ny amounts authorized to be paid under this paragraph [to] be disclosed to the public *immediately*" (emphasis supplied). This sentence appears to apply both to capital habeas petitions (state and federal) and federal capital trials. Presently, all CJA vouchers are available, upon request, at the end of a litigation and after appointed counsel has been notified and given an opportunity to move to have the materials sealed if appropriate. Thus, the purpose of this must be to place pressure on judges not to authorize funds in federal capital trials and capital habeas proceedings, to prejudice capital defendants and petitioners, and to ensure that their defenses and claims are not fully developed. Certainly, no litigant with means is required to have the cost of his or her representation disclosed to the public *at all*, much less in the midst of litigation and with no opportunity to have the materials sealed. To do so in these cases would discriminate on the basis of indigence in violation of the Equal Protection Clause, would violate the Sixth Amendment right to effective assistance of counsel at trial, and would "disrupt, not enhance, the functioning of the process." In re Boston Herald, 321 F.3d 174, 188 (1st Cir. 2003).

Sec. 11 would also require, in any capital habeas case, that a judge other than the presiding judge decide an application for funds. A new judge would have to be educated

about the relevant legal claims and facts, and the need for services in relation to those claims and facts. The only effect would be to create more work for judges, petitioners and their counsel.

Crime Victims' Rights -- Sec. 12

Sec. 12 would purport to give state crime victims or their family members or representatives the same rights in state prisoner habeas corpus proceedings as those accorded victims in federal trials under 18 U.S.C. § 3771(a).[20] If a victim felt she was not being accorded such rights, she could bring an action in the district court where the crime occurred, which would have to be decided "forthwith," then appeal for a writ of mandamus, which the court of appeals would have to decide within 72 hours.

The Crime Victims Rights Act was designed for trials and sentencings, not habeas corpus. Thus, most if not all of these rights are incapable of being applied in habeas cases. For example, victim impact statements are not relevant to any issue under review in a habeas case; there is no public proceeding involving release, plea, sentencing or parole; restitution is not granted in habeas cases; and there is no "attorney for the Government" with whom victims could confer.

This section would create unmet expectations for victims, invite satellite litigation of matters off the record, add to the burdens of judges trying to adjudicate the issues before them, and complicate, not streamline, federal habeas corpus proceedings.

In sum, H.R. 3035 would not address the existing problems in the criminal justice system. Instead, through a variety of means, it would encourage unreliability and unfairness, and would result in delay. This would have widespread implications, beyond federal habeas corpus proceedings, for the administration of justice in the state courts. There is no evidence to justify this radical legislation.

[20] The House has already passed this provision as Sec. 303(b) of H.R. 3132, the "Children's Safety Act of 2005."

EXHIBIT B

Examples of Cases in Which Federal Review Would Be Precluded By H.R. 3035

I. Innocent Prisoners Released as a Result of Federal Habeas Corpus Proceedings

A. Capital Cases

Eric Clemmons – Missouri

After a federal court granted habeas relief, Eric Clemmons was acquitted within three hours at his retrial.

Mr. Clemmons was convicted of murdering a fellow inmate while serving a life sentence, and sentenced to death. His case was affirmed on direct appeal by the Missouri Supreme Court. State v. Clemmons, 753 S.W.2d 901 (Mo.) (en banc), cert. denied, 488 U.S. 948 (1988). In state post-conviction proceedings, he discovered a memorandum, withheld by the prosecution, describing an interview with an eyewitness who stated that a different person had fatally stabbed the victim. The state post-conviction trial court denied relief without discussing the claim. Mr. Clemmons' post-conviction lawyer refused to include the claim on appeal from the denial of state post-conviction relief. Mr. Clemmons attempted to raise the issue in a *pro se* supplemental brief, but the Missouri Supreme Court refused to consider it. The Missouri Supreme Court affirmed the lower court's denial of relief. Clemmons v. State, 785 S.W.2d 524 (Mo.) (en banc), cert. denied, 498 U.S. 882 (1990).

Mr. Clemmons sought federal habeas relief on his Brady claim and on a Confrontation Clause claim. The district court denied relief, finding that Mr. Clemmons had procedurally defaulted both claims. The district court further held that Mr. Clemmons could not overcome the procedural default by showing cause-and-prejudice based on his post-conviction counsel's errors. Clemmons v. Delo, 1995 WL 691864 (W.D. Mo. Nov. 20, 1995). The Eighth Circuit affirmed the district court's denial of habeas relief, rejecting the Brady claim on the merits and the Confrontation Clause claim as procedurally barred. Clemmons v. Delo, 100 F.3d 1394 (8th Cir. 1996). On rehearing, the Eighth Circuit found that direct appeal counsel's ineffectiveness constituted cause-and-prejudice for the procedural default of the Confrontation Clause claim. The Eighth Circuit addressed that claim and the Brady claim on the merits and held that both claims entitled Mr. Clemmons to a new trial. Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997).

At the retrial, the jury heard the previously withheld evidence and acquitted Mr. Clemmons in less than three hours.

Under Sec. 4, Mr. Clemmons would never have received a new trial and he would have been executed, because his Brady and Confrontation Clause claims were procedurally defaulted in state court. The narrow exception would not have applied because his claims relied on a factual predicate that *was* previously discovered and presented in state court. Consequently, the Eighth Circuit would never have had the chance to conclude that Mr. Clemmons had properly

presented the Brady claim to the state courts and that he had demonstrated cause-and-prejudice excusing the procedural default of his Confrontation Clause claim. Mr. Clemmons would have been executed without any federal review of the claims that led to his acquittal.

Under Sec. 9, the federal courts would have had no jurisdiction to review his case. After the state habeas proceedings ended, he discovered no new evidence and developed no new facts. Consequently, Mr. Clemmons would have been unable to demonstrate that the factual predicate was previously unavailable. In addition, because Mr. Clemmons' claims were not founded on a "retroactive new rule," the federal courts would not have had jurisdiction to consider the claims under Sec. 9's other exception. HR 3035 would have terminated Mr. Clemmons's case at the state post-conviction level, and he would have been executed without any federal review of the claims that eventually led to his exoneration.

Ricardo Aldape Guerra – Texas

Ricardo Aldape Guerra was released after the federal courts found that the State had engaged in bad faith, intentional misconduct "designed and calculated to obtain a conviction . . . despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra," and the State conceded that it lacked a sufficient basis to re-try him.

Mr. Aldape Guerra was sentenced to death for the 1982 shooting death of a police officer. A bystander, who was nearby in an automobile, was also killed. Although all the physical evidence pointed to Roberto Carrasco Flores, the State prosecuted Mr. Aldape Guerra as the actual shooter because Carrasco had been killed in a shoot-out with the police. Carrasco was found in possession of the murder weapon, ammunition for the murder weapon, and the police officer's gun. Near the spot where Mr. Aldape Guerra was arrested, the police recovered a gun that was a different caliber from the one used to shoot the officer and the bystander. At trial, the State presented witnesses who testified that Mr. Aldape Guerra was the shooter. In closing, the prosecution advanced the theory that, after shooting the police officer and the bystander, Mr. Aldape Guerra must have exchanged weapons with Carrasco. A jury found Mr. Aldape Guerra guilty and sentenced him to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence on direct appeal. Guerra v. State, 771 S.W.2d 453 (Tex. Crim. App. 1988), cert. denied, 492 U.S. 925 (1989).

In state post-conviction proceedings, *pro bono* counsel filed a petition seeking relief based on numerous instances of police and prosecutorial misconduct. The trial court, without holding a hearing or making findings of fact, recommended denying the petition. The Texas Court of Criminal Appeals accepted the trial court's recommendation and denied relief.

The federal district court, after conducting an extensive evidentiary hearing, vacated Mr. Aldape Guerra's conviction in an opinion cataloguing repeated examples of police and prosecutorial misconduct, including witness intimidation, the suppression of exculpatory evidence, and the intentional use of highly suggestive and misleading techniques to taint witness testimony. The federal court was highly critical of the State:

> The police officers' and the prosecutors' actions described in these findings were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. It is these type [of] flag-festooned police and law-and-order prosecutors who bring cases of this nature, giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed. Their misconduct was designed and calculated to obtain a conviction and another "notch in their guns" despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.

Guerra v. Collins, 916 F.Supp. 620, 637 (S.D. Tex. 1995). The Court of Appeals affirmed the district court's decision in an opinion that examined only a fraction of the State's misconduct, finding the "examples of non-disclosure, without more, are sufficient, on the facts of this case, to support a due process violation mandating habeas relief." Guerra v. Johnson, 90 F.3d 1075, 1080 (5th Cir. 1996).

Mr. Aldape Guerra would have been executed if his case had been subject to H.R. 3035 at the time the Texas courts denied relief in state post-conviction proceedings. Because Mr. Aldape Guerra's lawyers exercised due diligence in state court in uncovering the factual bases supporting the numerous instances of prosecutorial misconduct, the federal courts would have been without jurisdiction to consider those claims under Sec. 9's second exception. Furthermore, because these claims did not rely on a "retroactive new rule," the federal courts could not have reviewed the claims under Sec. 9's first exception. Mr. Aldape Guerra's case would have ended without any federal court review of his compelling constitutional claims.

Curtis Kyles – Louisiana

Curtis Kyles was exonerated only after the United States Supreme Court, when reviewing his federal habeas proceedings, recognized the exculpatory impact of evidence withheld by the prosecution.

In 1984, Mr. Kyles was convicted of first degree murder and sentenced to death for the shooting death of Dolores Dye in the parking lot of a grocery store. He appealed, claiming that the state knew of evidence favorable to him before and during trial that it failed to disclose. The Louisiana Supreme Court remanded the case for an evidentiary hearing on his claims of newly discovered evidence.

The State's investigation of the case was guided by an informant named "Beanie" who led police to focus on Mr. Kyles. Beanie first contacted law enforcement two days after the murder and subsequently gave numerous conflicting statements to police and prosecutors, none of which were turned over to the defense. Although Beanie was driving the victim's car, had prior knowledge of when Mr. Kyles' trash would contain items stolen during the murder, was linked to two other crimes committed at the same grocery store and another murder with

substantially similar facts, and gave numerous conflicting statements, the police oddly never considered Beanie a suspect. Instead, they focused exclusively on making a case against Mr. Kyles. Police showed witnesses photo line-ups with Mr. Kyles' photo – but not Beanie's – and several picked Mr. Kyles and subsequently provided detailed and damning testimony for the State.

Although Mr. Kyles' trial counsel had asked the State to disclose any exculpatory information, the prosecution responded that there was "no exculpatory evidence of any nature," despite the government's knowledge of the following evidentiary items: (1) six contemporaneous eyewitness statements taken by police following the murder; (2) records of Beanie's initial call to the police; (3) a tape recording of the initial conversation between Beanie and Officers Eaton and Miller; (4) a typed and signed statement given by Beanie on the following day; (5) a computer print-out of license numbers of cars parked at the grocery store on the night of the murder, which did not list the number of Kyles' car; (6) an internal police memorandum calling for the seizure of Mr. Kyles' trash after Beanie had suggested that the victim's purse might be found there; and (7) evidence linking Beanie to other crimes at the grocery store and to the unrelated murder of Patricia Leidenheimer, committed before the Dye murder. Kyles v. Whitley, 514 U.S. 419, 429-30 (1995). Additionally, the contemporaneous statements given by the prosecution's two star eye-witnesses on the day of the crime – but withheld from Mr. Kyles' trial counsel – grossly contradicted their trial testimony, and the description of the murderer initially given by the State's self-described best witness more closely resembled Beanie. Id. at 441-45.

The trial court, after reviewing the suppressed evidence, denied relief, finding "no prejudice" from the prosecution's suppression of evidence. After the Louisiana Supreme Court denied Mr. Kyles' application for discretionary review, he filed a petition for a writ of habeas corpus in the federal district court, which was denied. The United States Court of Appeals for the Fifth Circuit affirmed by a divided vote.

The United States Supreme Court granted certiorari and reversed. The Court held that the net effect of the evidence withheld by the state in this case raised a reasonable probability that its disclosure would have produced a different result. Id. at 454. In 1998, after three unsuccessful attempts to convict him, prosecutors dropped the charges and Mr. Kyles was released.

Had Sec. 9 been in place – and had Louisiana been deemed to have established a mechanism qualifying under § 2261 – the federal courts would have lacked jurisdiction to consider Mr. Kyles' case unless he could have demonstrated that either his claim was based on a new, retroactive rule of constitutional law or that the factual predicate for his claim could not have been discovered previously through the exercise of due diligence. The newly discovered evidence was discovered and aired in Mr. Kyles' state court proceedings. Kyles, at 422. Thus, Mr. Kyles could not have met the exception to Sec. 9's repeal of habeas jurisdiction and he would have been executed instead of released.

Federico Martinez-Macias – Texas

The charges against Federico Martinez-Macias were dismissed only after the federal courts stopped Texas's attempt to execute him after state post-conviction review that the state court abdicated to the district attorney, and a Texas grand jury refused to indict him.

Mr. Martinez-Macias was sentenced to death in 1984 for murder during a robbery, in a case in which federal court found that "unlike the typical death penalty case, [Mr. Martinez-Macias]'s guilt is in doubt." Martinez-Macias v. Collins, 810 F.Supp. 782, 791 (W.D. Tex. 1991). Mr. Martinez-Macias' attorneys were paid $11.84 an hour for their representation. Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992) ("The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for.").

Mr. Martinez-Macias' lawyer raised two claims on direct appeal, both of which were denied by the Texas Court of Criminal Appeals. Macias v. State, 733 S.W.2d 192 (Tex. Crim. App. 1987). Following the denial of the direct appeal, the State of Texas scheduled Mr. Martinez-Macias for execution on February 12, 1988. The United States Supreme Court stayed the execution but ultimately denied Mr. Martinez-Macias' petition for writ of certiorari. Martinez- Macias, 810 F.Supp. at 788.

Texas again scheduled Mr. Martinez-Macias for execution even though he was without a lawyer. A *pro bono* attorney filed his first and only state application for habeas relief on September 6, 1988 along with a Motion for Stay of Execution. Approximately one month later, on October 6, 1988, the trial court denied the request for an evidentiary hearing and entered an order, prepared by an assistant district attorney, denying habeas relief. Id. at 788-89.

The federal court granted a stay of execution and – after an evidentiary hearing – habeas corpus relief based on the ineffective assistance provided by his trial lawyer at both the guilt/innocence and penalty phases of Mr. Martinez-Macias's trial. Specifically, the lawyers failed to put on available evidence of an alibi defense, failed to put on evidence that undermined the testimony of a key state witness, and failed to investigate and present available mitigating evidence including good character testimony from family and friends. The charges against Mr. Martinez-Macias were dismissed after a grand jury refused to indict him.

The State of Texas scheduled Mr. Martinez-Macias for execution at least twice before he reached the federal courts. Responsibility for state post-conviction review, which lasted one month, was abdicated to the district attorney. Nonetheless, had the case been subject to Sec. 9, the federal court would have lacked jurisdiction to hear the case. Mr. Martinez-Macias' claims were not predicated on a new, retroactive constitutional rule, and the factual predicate for the claims was available in – and presented to – the state courts. Thus, instead of being exonerated and released, Mr. Martinez-Macias would have been executed.

Ronald Keith Williamson, Dennis Fritz – Oklahoma

After a federal court granted habeas relief, Ronald Keith Williamson was exonerated by DNA testing and all charges against him and his innocent co-defendant were dismissed.

Mr. Williamson was convicted and sentenced to death for the rape and murder of a young woman in Ada, Oklahoma. He had such serious psychiatric problems that he was originally found incompetent by a state court and spent months in a state psychiatric hospital. Williamson v. Ward, 110 F. 3d 1508, 1511 (10th Cir. 1997). After being returned to jail, he allegedly described a dream in which he committed the murder. Id. at 1512. Another man (Simmons) confessed to the killing in a videotaped confession. Id. Mr. Williamson's defense lawyer failed both to investigate and present evidence about Williamson's mental illness and to do anything with the other confession.

Following direct appeal, Mr. Williamson filed a petition for state post-conviction relief. The trial court denied the petition and the Oklahoma Court of Criminal Appeals affirmed, finding that all of his claims were procedurally barred. Williamson v. State, 852 P.2d 167, 168 (Okla. App. 1993) ("We have reviewed each and every claim of error and find that all of these claims are barred.")

The district court granted guilt and penalty relief on a variety of grounds, including trial counsel's ineffective performance in not seeking a competency hearing, the trial court's failure to afford a competency hearing, trial counsel's failure to investigate and present to the jury Simmons' confession, and trial counsel's failure to investigate Glen Gore, the chief witness against Mr. Williamson, as a possible suspect. Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okla. 1995), aff'd, 110 F.3d 1508 (10th Cir. 1997). The district court held that the state bar regarding the competency claim was not "independent" of the federal question and therefore the federal court could reach the merits of this claim. Id. at 1547.

The Court of Appeals affirmed the district court and held that counsel was constitutionally inadequate in failing to fully investigate Mr. Williamson's history of mental illness, failing to seek a competency determination, failing to challenge the credibility of his client's confession, and failing to investigate and present to the jury the fact that another man had confessed to the crime. Williamson, 110 F. 3d at 1523.

After the case was remanded for retrial, Mr. Williamson, now with the assistance of competent counsel, proved with DNA testing that he was innocent and Gore was guilty. The charges against him and his co-defendant, Dennis Fritz (who was serving a life sentence), were dismissed.

If H.R. 3035 were the law, Mr. Williamson's federal petition would have been dismissed, and he would have been executed. Under Sec. 4, the federal courts could not have adjudicated Mr. Williamson's competency claim because it "was found by the state to be procedurally barred." The federal courts in this case held – in accordance with governing United

States Supreme Court precedent dealing with exactly this sort of ruling by the Oklahoma Court of Criminal Appeals, see Ake v. Oklahoma, 470 U.S. 68, 75 (1985) – that the procedural bar on which the state had relied was legally insufficient to preclude federal review. Under H.R. 3035, that would not matter. Mr. Williamson could not have surmounted the first hurdle necessary to overcome this absolute bar because the factual predicate for the claim was precisely that it *could* have been discovered previously through the exercise of due diligence but was not because the State provided him with constitutionally ineffective counsel.

Ernest Willis – Texas

After a federal court granted habeas relief, the State dismissed the charges against Mr. Willis, certified that Mr. Willis was actually innocent, and publicly apologized to Mr. Willis and his family.

Mr. Willis went to Texas's Death Row in 1987. He was convicted of murder for causing the deaths of two young women, who died in a fire in a private home. Like the victims, Mr. Willis was a guest in the home at the time of the fire, and narrowly escaped death himself. He was more than forty years old and had never been charged with, much less convicted of, a violent crime.

Investigators made a series of assumptions to conclude that the fire had been intentionally set, and that Mr. Willis must have set it. He was charged with capital murder. Mr. Willis had left the state by the time the charges were filed, but he returned voluntarily to face them, insisting on his innocence.

While Mr. Willis awaited trial in jail, he was administered medication by jail authorities for lingering back ailments from injuries he sustained working in the oil fields. Unbeknownst to him, a few months before trial his pain medication was discontinued. In its place, jail authorities began to administer a daily combination of powerful anti-psychotic drugs although Mr. Willis had no history or symptoms of mental illness. These powerful medications flattened Mr. Willis's demeanor before the jury. Mr. Willis' trial attorneys noticed the change in his demeanor but did nothing to investigate why their client had suddenly turned into a zombie.

At trial, the State presented a circumstantial case, using poorly trained and largely unqualified fire investigators to portray the blaze as having been arson, based on their interpretation of the physical evidence. Mr. Willis' guilt was largely inferred from his presence at the scene. Prosecutors emphasized Mr. Willis' impassive, remote, and indifferent demeanor – induced by the drugs given to him by his jailers – as proof of his guilt, describing him as an animal and a "satanic demon," to which defense counsel did not object. The jury agreed, convicting Mr. Willis of capital murder and sentencing him to death.

After Mr. Willis was convicted, the lead prosecutor boasted to the press: "We are just tickled pink. We didn't have any eyewitnesses. We didn't know what type of flammable material was used. It was all circumstantial material."

Represented by new volunteer attorneys, Mr. Willis sought a new trial in state post-conviction proceedings. The same judge who had presided over Mr. Willis's original trial heard new evidence in hearings that lasted several days. At the conclusion of those hearings, in June of 2000, the judge entered findings of fact detailing the ways in which Mr. Willis's right to a fair trial had been violated. Ultimately, the original trial judge recommended that Mr. Willis should receive a new trial as a result of prosecutorial misconduct (drugging Mr. Willis during trial, and hiding a psychologist's favorable report about his non-dangerousness) and his trial attorneys' ineffective performance. However, the Court of Criminal Appeals reversed. Its order was six pages long, unpublished, and was rendered without the benefit of substantive briefing or oral argument.

Mr. Willis turned to the federal courts. Federal District Judge Royal Furgeson of San Antonio spent months scrutinizing the record, but no new evidence was taken. He found that the original trial judge's findings were correct, that Mr. Willis's rights had been grossly violated, and that the Court of Criminal Appeals had unreasonably refused to remedy those violations. In 2004, Judge Furgeson issued an order granting Mr. Willis a new trial because: 1) Willis's due process rights were violated by the State's administration of medically inappropriate antipsychotic drugs without Willis's consent; and 2) Willis received ineffective assistance of counsel at the guilt-innocence phase. Judge Furgeson also granted relief based on errors in imposition of the death sentence: 1) The State withheld evidence favorable and material to the sentencing determination; and 2) Willis received ineffective assistance of counsel at the sentencing phase. See Willis v. Cockrell, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004). The State of Texas, represented by the Attorney General, made the extraordinarily rare choice to not appeal Judge Furgeson's order.

The local prosecutor – not the same District Attorney who originally prosecuted Mr. Willis – was troubled by the thin evidence in the case, and decided to have it re-examined before deciding whether to pursue the arson charges against Mr. Willis in a new trial. This time, the job was assigned to two extensively qualified arson experts. They concluded that the fire was accidental. They explained that the original verdict of arson was based on misunderstandings about the significance of physical evidence; advances in fire science in the 1990's made clear that the original investigators had mistaken certain features as indicating an intentionally set fire.

Based on their report, the District Attorney dismissed all charges against Mr. Willis on October 5, 2004. A little over a month later, he signed a "Certification of Actual Innocence" stating that "the record shows the actual innocence of Mr. Willis." It concluded, "In behalf of the State of Texas, I extend my apologies to Mr. Willis and best wishes to Mr. Willis and his family." However, Mr. Willis had never succeeded in persuading any post-conviction or habeas judge that he was actually innocent.

Mr. Willis would have been executed in 2000, after the Texas Court of Criminal Appeals denied relief, had his case been subject to H.R. 3035.

Under Sec. 9, if Texas had been deemed to have a qualifying mechanism under § 2261, Judge Furgeson would have had no jurisdiction to review the case or to correct the extraordinary injustice originally identified by the state trial judge but swept aside by the Court of Criminal Appeals. Mr. Willis could not have satisfied any exception to Sec. 9's complete repeal of federal habeas jurisdiction: His claims did not rest on new rules, the factual predicate of the claims was previously discovered and presented in state court, and the facts underlying the claims did not establish innocence. An innocent man would have been executed instead of released with a "Certification of Actual Innocence" and an apology from the State of Texas.

If Texas were not deemed to have a qualifying mechanism under § 2261, Sec. 4 would have deprived Judge Furgeson of jurisdiction to review Mr. Willis's forced medication claim. The Texas Court of Criminal Appeals denied that claim – despite a recommendation from the trial judge who held a lengthy evidentiary hearing and recommended granting relief – based on its belief that an objection to the medication was required in order to render it involuntary, but none was made. Id. at * 14. The federal court ruled that this procedural bar was not independent of federal law and was an unreasonable application of Supreme Court law. Id. at *16-17. Sec. 4 would have stripped the federal court of jurisdiction simply because the Court of Criminal Appeals found a procedural bar. Mr. Willis could not have shown by clear and convincing evidence that no reasonable juror would have found him guilty if it had known he had been medicated without his consent.

Judge Fergeson would have had no jurisdiction to review Mr. Willis's unconstitutional death sentence based on his claim that the State withheld evidence favorable to him at the sentencing phase. In every Texas capital prosecution, the State must prove beyond a reasonable doubt – and the jury must unanimously find – that there is a reasonable probability that the defendant will pose a continuing threat to society. Prior to trial, the prosecution retained a forensic psychologist, Dr. Jarvis Wright, and asked him to determine, inter alia, whether Mr. Willis would pose a continuing threat to society. Dr. Wright informed the prosecutor that "he 'didn't think this was a good death penalty case,' as he found no evidence to support a conclusion of future dangerousness for the purposes of the Texas capital sentencing statute." Id. at *7. Dr. Wright subsequently sent the prosecutor a written report, which the prosecution never revealed to the defense.

The Texas trial court found that the prosecution's unconstitutional suppression of evidence warranted habeas relief. The Court of Criminal Appeals, however, determined that Mr. Willis had failed to show prejudice from the State's suppression of the Wright report. Id. at *19. Thus, pursuant to Sec. 6, the Court of Criminal Appeals' judgment that the prosecutor's conduct was not prejudicial – even though both contrary to, and an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States, id. at *21, *22 – would have stripped the federal court of jurisdiction to consider the prosecution's suppression of evidence bearing directly on the central question before Mr. Willis' jury during the sentencing phase.

Nicholas Yarris – Pennsylvania

Nicholas Yarris was exonerated by DNA evidence after twenty-one years on death row. This was four years after he filed his federal habeas corpus petition, which would have been dismissed at the outset under H.R. 3035.

Mr. Yarris was convicted of the murder, kidnapping and rape of Linda Craig, in Delaware County, Pennsylvania. His convictions were affirmed on direct appeal, after which he attempted to file for state post-conviction relief. His motion for a new trial was treated as a habeas petition and denied, a decision upheld by the Pennsylvania Supreme Court on December 29, 1995. Commonwealth v. Yarris, 731 A.2d 581, 585 (Pa. 1999). On December 16, 1996, Mr. Yarris filed a habeas application in the federal district court. Yarris v. Horn, 230 F. Supp.2d 577, 581 (E.D. Pa. 2002). Mr. Yarris filed a second state post-conviction petition the following month in January of 1997. Id. In June of 1997, the federal district court dismissed, without prejudice, Mr. Yarris's federal application to allow him to exhaust state remedies.

On May 21, 1999, the Pennsylvania Supreme Court held that Mr. Yarris's second state habeas application was time-barred by retroactively applying a state statute of limitations enacted during the interim between Mr. Yarris's two state habeas applications. Commonwealth v. Yarris, 731 A.2d at 592-93. Thus, the state court refused to consider the merits of Mr. Yarris's claims. Id.

Mr. Yarris filed for federal habeas corpus relief a second time in October of 1999. Yarris, 230 F. Supp.2d at 582. The district attorney's office stipulated that all of the claims contained in Mr. Yarris's second federal habeas petition were raised in his second state post-conviction petition, id. at 582 n.2, but argued that the claims were procedurally defaulted because the Pennsylvania Supreme Court refused to consider the merits of the claims. Id. at 582. The federal district court ruled that the retroactive time bar imposed by the Pennsylvania Supreme Court "was not an adequate state rule at the time of Mr. Yarris' alleged default," and thus did not bar merits review of his claims in federal court. Id. at 588-89.

In 2003, while his case was pending in federal district court, Mr. Yarris obtained DNA testing of a small amount of highly-degraded biological material retained by the prosecution. The testing exonerated Mr. Yarris of the offense. The District Court directed the prosecution to move for a new trial in the state courts. Mr. Yarris was freed on January 16, 2004, after spending 21 years on death row for a crime he did not commit.

H.R. 3035 would have barred Mr. Yarris's federal habeas litigation for at least three independent reasons, and Mr. Yarris would have been executed.

Sec.2 would have required the federal court to dismiss with prejudice any unexhausted claim unless it satisfied the extremely narrow exception found in 28 U.S.C. § 2254(e)(2). Because the claims in Mr. Yarris's first federal habeas petition could have been presented to the state courts by the time the federal court dismissed the petition for lack of exhaustion (indeed,

the claims were already pending in the second state court habeas proceedings), he would have been unable to satisfy § 2254(e)(2)(A)(ii). Instead of dismissing Mr. Yarris's first petition without prejudice in June of 1997, the district court would have been constrained to summarily deny it with prejudice. Thus, Mr. Yarris would have been executed in 1997, years before the DNA testing that exonerated him.

Sec. 4 would have tied the federal court's hands with respect to Mr. Yarris's second, fully exhausted petition. Currently, the retroactive application of a state time-bar not in existence at the time of the alleged waiver is not "adequate" to bar federal review. Section 4 would have stripped the federal court of jurisdiction to entertain Mr. Yarris's second petition because Mr. Yarris violated an alleged state court rule, though it was not firmly established until after his alleged violation, unless Mr. Yarris could have satisfied the requirements of § 2254(e)(2). Again, because the factual predicate of his claims had been presented to the state court, he could not meet § 2254(e)(2)'s demanding standard.

If Sec. 9 had been in place and the Attorney General certified that Pennsylvania established a qualifying mechanism, the federal court would have lacked jurisdiction altogether to hear Mr. Yarris' claims. The claims in his second petition were fully presented to the state court. Thus, Mr. Yarris could not have demonstrated that the claims were based on a previously unavailable, new rule of constitutional law, or that the factual predicate of his claims could not have been discovered previously through the exercise of due diligence. Sec. 9 would have barred Mr. Yarris, like every petitioner who fully presents his claims to the state courts, from ever seeking federal habeas review.

Thus, H.R. 3035 would have resulted in Mr. Yarris's execution in 1999, years before he was exonerated by DNA evidence.

B. Non-Capital Cases

Rodney Bragg – Arkansas

A federal court ordered Rodney Bragg's immediate release after an evidentiary hearing at which Mr. Bragg proved that the undercover officer who testified against him had fabricated his testimony and that he was actually innocent.

When Mr. Bragg was arrested in July 1994 for selling crack cocaine, he had no criminal record, and had been working in the same job as a fairly successful car salesman for several years. On January 18, 1996, Mr. Bragg was convicted of distributing 1.44 grams of crack cocaine and sentenced to life imprisonment in Arkansas. He was convicted solely on the basis of the testimony of Agent Keith Ray, an undercover officer for the Arkansas South Central Drug Task Force. Ray testified that (1) he purchased crack from someone on March 26, 1993 at the home of and in the presence of John Nolen, (2) an informant who was with him told him the dealer may be Rodney Mitchel but Ray excluded Mitchel based on a photograph on file in the Sheriff's Office, (3) he and his confidential informant, Steve Krite, bought crack from the same

individual on March 1, 1994, in the individual's car, and he immediately ran the license plate number and matched it to Rodney Bragg, and (4) also on March 1, 1994, he asked the Sheriff's Department if Rodney Bragg had ever been arrested, they said he had, and showed him a photograph from which he was able to positively identify Rodney Bragg as the man who sold him crack on both occasions.

The Arkansas Supreme Court denied Mr. Bragg's direct appeal on May 27, 1997. Mr. Bragg then filed a *pro se* petition for post conviction relief in state court, alleging that his counsel was ineffective, which was denied without a hearing on September 16, 1997. He filed a timely notice of appeal on September 24, 1997. Under an Arkansas Supreme Court rule, the record on appeal had to be lodged by December 23, 1997. Mr. Bragg designated the entire record, and filed a motion for a certified copy of the record, which was granted. On December 2, 1997, he wrote a letter to the clerk, asking that if the record had not been lodged, to provide him with a date on which it would be lodged. On December 15, 1997, he wrote to the judge, again inquiring about the record. On December 15, 1997, he also filed a motion for extension of time to lodge the record with the Arkansas Supreme Court. The court never acted on the motion and the clerk lodged the record a month late. On May 21, 1998, the Arkansas Supreme Court dismissed Mr. Bragg's appeal, finding that it was his responsibility to see that the record was lodged and that he had procedurally defaulted.

On December 4, 1998, Mr. Bragg filed a *pro se* habeas petition in federal court, claiming ineffective assistance of counsel, and failure of the State to disclose exculpatory evidence. On October 19, 1999, the federal district court appointed counsel for Mr. Braggs. On March 6, 2000, counsel filed an amended petition, claiming that (1) the prosecution relied on the false and perjured testimony of Agent Ray in violation of Napue v. Illinois, 360 U.S. 264 (1959); (2) the State failed to disclose exculpatory evidence, including Agent Ray's reports, in violation of Brady v. Maryland, 373 U.S. 83 (1963); and (3) trial counsel was ineffective in failing to investigate any of the information Mr. Bragg provided him before trial, including that (a) he did not own the car on March 1, 2004, (b) he was never arrested until June 21, 2004 so there could not have been a photograph of him on file until then, (c) Nolen would testify he did not know Mr. Bragg and that he witnessed no drug deal on March 26, 1993, and (d) Krite would testify he never bought drugs from Mr. Bragg. With his petition, Mr. Bragg submitted affidavits from Nolen and Krite, the bill of sale and title registry for the car, and a letter from the Sheriff's Office stating that there was no photograph of Rodney Mitchel on file. The State responded that Mr. Bragg had procedurally defaulted the Napue and Brady claims by not raising them in state court, and procedurally defaulted the ineffective assistance claim by not perfecting the record in his post conviction appeal.

The federal district court ordered discovery and an evidentiary hearing. Based on the testimony of fifteen witnesses and forty-eight exhibits, Mr. Bragg proved that Agent Ray had fabricated his testimony. First, Nolen testified that Mr. Bragg was not involved in any drug sale at his home on March 26, 1993 (the offense with which Mr. Bragg was charged and convicted). Second, the Sheriff's Office never had any photographs of Mitchel, and Ray ultimately admitted that he never saw any such photographs and that he knew at the time that his testimony was

false. Third, official records and the testimony of the car's former owner established Mr. Bragg did not own the car, and could not have been in the car, until three weeks after the alleged March 1, 1994 drug sale. Fourth, the County Prosecuting Attorney from the county where the alleged March 1, 2004 sale took place testified that he learned that Ray's report stating that the car involved in that transaction belonged to Mr. Bragg could not be correct because Mr. Bragg did not own the car on that date, that Ray could give him no credible explanation, and that this ultimately resulted in Ray's resignation.[1] Fifth, a witness from the Sheriff's Office testified that it had no photograph of Mr. Bragg on file until June 21, 1994, and that it would have been impossible for Ray to have seen such a photograph before then. Sixth, Ray admitted that he had destroyed his original police reports, that he materially changed the facts in the "replacement" reports that he gave to the prosecutors, and that the new reports were incorrect. Seventh, two prosecutors testified that they would have dismissed the case had they become aware of this information before trial.

On December 8, 2000, the district court granted relief, holding that the State had presented testimony that Ray himself knew was perjured and that the prosecutor should have known was perjured, and that the prosecution and police had withheld exculpatory evidence. The court was able to reach the merits of the claims, despite Mr. Bragg's procedural default because of the "actual innocence" exception of Schlup v. Delo, 513 U.S. 298 (1995). The court found that "it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt" in light of Agent Ray's demonstrated fabrication. The district court ordered the State to immediately release Mr. Bragg. The State did not appeal.

Under H.R. 3035, the district court would have had to dismiss Mr. Bragg's winning Napue and Brady claims on three independent grounds. He failed to exhaust them in state court, so they would have been dismissed with prejudice under Sec. 2. He procedurally defaulted on both claims so they would be barred under Sec. 4. He would not have been able to amend his federal petition fifteen months after the initial petition was filed under Sec. 3.

Without an evidentiary hearing, Mr. Bragg would not have been able to present "facts underlying" his claims "sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found [him] guilty of the underlying offense." When Mr. Bragg filed his federal habeas petition, he submitted affidavits from Nolen and Krite, and the bill of sale and title registry for the car. After counsel was appointed, he obtained and submitted the letter stating that there was no photograph of Mitchel on file in the Sheriff's Office. The district court said that these documents "suggested" that Mr. Bragg's claims had merit, but that it was through the "tireless investigation by Mr. Bragg and his appointed counsel" that the evidence presented at trial was proved to be fabricated.

Even if Mr. Bragg had presented clear and convincing evidence of his innocence upon arrival in federal court, H.R. 3035 would still bar relief. That is because much of this evidence

[1] It also resulted in a charge based on that alleged sale being *nolle prossed*.

could have been discovered through the exercise of due diligence. In fact, much of it *was* known to Mr. Bragg and conveyed to his counsel, but his counsel failed to do anything about it.[2]

Under H.R. 3035, Mr. Bragg would remain convicted and incarcerated for life on the testimony of a police officer who perjured himself and resigned in disgrace.

Timothy Brown – Florida

All charges were dropped against Timothy Brown after federal habeas corpus relief was granted.

Mr. Brown was a 14-year-old boy with an IQ of 56 who was convicted of first-degree murder and sentenced to life in prison without possibility of parole. The victim was a uniformed Sheriff's Deputy who was sitting in his patrol car doing paperwork when he was shot in the head. The police initially focused on Mr. Brown based on a tip by a person who shortly admitted he had totally fabricated the tip in the hopes of receiving reward money. No physical evidence, eyewitness testimony, or motive linked Mr. Brown to the crime. The only evidence against him at trial was the statement of his 18 year-old co-defendant, which contradicted Mr. Brown's own statement. The Florida courts denied Mr. Brown's appeal in an unsigned order without written opinion. Not long after Mr. Brown's conviction, his co-defendant recanted his statement, explaining that police had beaten him, threatened him with the electric chair, and put words in his mouth. See Brown v. Singletary, 229 F. Supp.2d 1345, 1350-51 (S. D. Fla. 2002).

Less than a year after denial of his direct appeal, Mr. Brown filed a *pro se* habeas petition in federal court. The court appointed counsel, and over three years later Brown amended his petition to add claims that his statement was inadmissible and that trial counsel was ineffective. This petition was "mixed," containing both exhausted and unexhausted claims.

While his petition was pending, Mr. Brown discovered stunning new evidence pointing to his innocence. Through a media leak, Mr. Brown learned that the Sheriff's Office had reopened the investigation when a former employee of the Sheriff's Office, Andrew Johnson, admitted to undercover officers and a confidential informant in taped conversations that he had shot the Deputy. Id. at 1352-56.

Notwithstanding compelling new evidence of wrongful conviction that the Sheriff's Office itself had developed, the State nonetheless continued to resist Mr. Brown's petition for a new trial. Id. at 1366. Following an evidentiary hearing, the federal court held that his evidence of innocence was sufficient under Shlup v. Delo to open the gateway to the claims he failed to assert in state court, id. at 1366-67, and the judge, a Bush appointee, granted habeas relief based

[2] See Bragg v. Norris, 128 F. Supp.2d 587 (E.D. Ark. 2000); Bragg v. Norris, No. 5:98cv00540 (Post Hearing Brief, filed December 1, 2000); Bragg v. State, 1998 WL 262598 (Ark. May 21, 1998); Bragg v. State, 328 Ark. 613 (1997).

on the unconstitutional admission at trial of his statement to police. Brown v. Crosby, 249 F. Supp. 2d 1285, 1288-89, 1325 (S.D. Fla. 2003).

The federal district court judge summarized the import of the evidence implicating Andrew Johnson as the real culprit as follows:

> Essentially, the Court was presented with two people, who, over a ten month period of time, tell virtually identical stories about a murder that occurred eleven years earlier. Johnson and [his wife's] stories are too consistent to be complete fabrications. In addition, the Court has been presented with a man [Johnson] who knows virtually every detail about the crime. Details he has repeated to several different people. Finally, the Court has been presented with a man who has a motive for murder. Johnson hated the man he intended to kill.

Brown, 229 F. Supp.2d at 1364.

Mr. Brown was ultimately released when the federal court found that his "confession" was obtained in violation of Miranda.[3] A Miami Herald investigation discovered that at least 37 other false or questionable confessions to murder, all obtained by the same sheriff's department, had been thrown out since 1990.[4] After nearly 12 years in prison, Mr. Brown was released at age 26, and prosecutors dropped all charges against him.

Mr. Brown would still be in prison if H.R. 3035 had been in effect. His original habeas petition – prepared as a 15 year-old boy with an IQ of 56 and no lawyer – raised only a single claim: that the evidence of his guilt was insufficient. Even after the full story of the case emerged, the same federal judge who granted relief on other grounds concluded he could not grant this claim. Brown's alleged confession was sufficient to establish the elements of the crime; under the sufficiency of the evidence test, the court could not inquire whether the statement was true or whether the jury would have convicted had it been presented with the evidence regarding Johnson. Brown, 249 F.Supp.2d at 1318.

It was only three years later, after Mr. Brown had been appointed counsel and after the State resisted turning over key documents, that Mr. Brown was able to file an amended habeas petition. This petition added claims that had not been presented in state court because they would have been procedurally barred. All of these new claims would be barred by Sections 2 and 4, unless Mr. Brown could establish entitlement to relief under the §§ 2254(e)(2) and 2244(b)(2) standard.

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[3] "Murder Charge Finally Dropped Against Tim Brown," Inclusion Daily Express, June 5, 2003, available at http://www.inclusiondaily.com/news/laws/timbrown.htm#060503.

[4] See "Zealous Grilling by Police Tainted 38 Murder Cases," Miami Herald, p. 1A, 2002 WLNR 4596768 (Dec. 22, 2002).

Under H.R. 3035, all of the evidence regarding Johnson's confession would be absolutely barred from consideration in federal court. Section 2254(e)(2) (and identical language in § 2244(b)(2)) limits a court's consideration of innocence evidence to "facts underlying the claim," and the petitioner must show that "the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence." This standard would represent a radical departure from existing law. Existing law allowed the court to consider evidence of innocence that did not constitute "facts underlying" his constitutional claims. See 229 F. Supp.2d at 1361. None of the evidence relating to Mr. Johnson's guilt was tied to Mr. Brown's habeas claims of the unconstitutionality of his confession and the ineffective assistance of his counsel. Thus, H.R. 3035 would have barred the court from considering that evidence in determining whether to open the gateway to Mr. Brown's claims. The district court, relying on the Johnson evidence, concluded that it was more likely than not that no reasonable juror would have found Mr. Brown guilty. Under H.R. 3035, he would have had to meet a much more stringent test – clear and convincing evidence that no reasonable juror would have found him guilty – *without the benefit of the strongest evidence of his innocence* -- the fruits of the Johnson investigation. Mr. Brown could not have done so, and his habeas petition would have been dismissed.

Mr. Brown's case vividly illustrates the dangers of such a rush to judgment. The evidence exonerating Mr. Brown only began to emerge over five years after he filed his habeas petition. Thereafter, the Sheriff's department spent the ensuing ten months investigating this lead, requiring over 6,000 officer man-hours and at least a quarter million dollars. Brown, 229 F.Supp.2d at 1366. Only then did Mr. Brown learn anything about Johnson, his confessions, or the investigation, and that was not because the police disclosed it, but because it was leaked to a newspaper reporter who immediately published an account. Even after the story, the State fought to keep Mr. Brown from gaining access to the investigation file. Under H.R. 3035, federal relief would have been denied long before the Johnson evidence came to light, and he would be in prison for life.

Algie Crivens – Illinois

After eight years in prison, Algie Crivens was granted federal habeas relief, found not guilty at his retrial, and pardoned by the Governor based on innocence.

In January 1992, Mr. Crivens, at age 18 and just out high school, was convicted of first-degree murder for the shooting of Cornelius Lyons and sentenced to twenty years imprisonment. The key evidence against Mr. Crivens was the testimony of eyewitness Julius Childs. Prior to trial, Mr. Crivens requested the criminal records of the State's witnesses, but the prosecution denied that any such records existed. Mr. Crivens attempted to introduce testimony that another man, Williams, had confessed to the crime, but the judge excluded it. After trial, Mr. Crivens moved for a new trial based on a newly discovered witness, who testified at a hearing that he saw Williams shoot Lyons. The judge denied the motion for new trial.

Mr. Crivens exhausted his state remedies and filed a habeas petition in federal court in 1994. Six years after his trial and four years after he filed his federal petition, he discovered that the prosecution had failed to disclose Julius Childs' criminal record. Childs had been convicted of possessing crack cocaine with intent to deliver and criminal trespass to a vehicle. At each arrest, Mr. Childs gave police a false name.

Mr. Crivens amended his federal habeas petition to allege that the prosecution's failure to disclose this impeachment evidence violated his due process rights under Brady v. Maryland, 373 U.S. 83 (1963). The State argued that Mr. Crivens' claim was procedurally barred, but the Seventh Circuit declined to honor the bar because the default resulted from the State's misconduct. The Seventh Circuit found that the failure to disclose Childs' convictions was prejudicial because his use of aliases "demonstrated a propensity to lie to police officers, prosecutors, and even judges," and "[i]f Childs' credibility had been damaged, the State's case would have been severely damaged."

The prosecution elected to retry Mr. Crivens in 2000, and he was found not guilty. The Republican governor thereafter granted Mr. Crivens a pardon based on innocence.[5]

Under Secs. 2 and 4, the federal court would have lacked jurisdiction to consider Mr. Crivens's Brady claim. The Seventh Circuit excused Mr. Crivens' failure to exhaust and procedural default of his Brady claim because it was caused by the State: "We will not penalize Crivens for presenting an issue to us that he was unable to present to the state courts because of the state's misconduct." That would not matter under H.R. 3035. He would not have met the "actual innocence" standard because the "facts underlying the claim" would not constitute "clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found [him] guilty," because the suppressed evidence impeached Mr. Childs but did not directly exculpate Mr. Crivens.

Thomas Goldstein - California

Thomas Goldstein was released after serving twenty-five years in prison for a murder he did not commit, and the State announced it would not retry him. This case demonstrates that it can take decades to develop evidence of innocence, despite the most diligent efforts.

Thomas Goldstein, a Vietnam veteran, was accused of shooting a jogger in Long Beach, California in 1979. At the time, he had never been convicted of a crime, and was attending Long Beach City College and working. He was convicted in 1980 of first-degree murder, based on the

[5] Crivens v. Roth, 172 F.3d 991 (7th Cir. 1999); Brian J. Rogal, Seeing daylight: ex-offenders finally make political headway against Illinois' longtime support for tough-on-crime measures, Chicago Reporter, November 1, 2004, at 913; Liliana Ibara, Righting a wrong: after spending 20 years in prison a wrongful conviction, Algie Crivens III wants to do more than clear his name, Chicago Reporter, March 1, 2005, at 4.

equivocal eyewitness testimony of Loran Campbell, and the testimony of Edward Fink, who claimed that Goldstein had confessed to him while in jail awaiting trial and that he had received no benefit for his testimony. (Other witnesses described the assailant as Black or Mexican, with an afro, and 160-170 pounds; Goldstein is white, had straight shoulder-length hair, and weighed 135 pounds.) The prosecution presented no weapon, motive, or physical evidence, and established no connection between Mr. Goldstein and the jogger. Mr. Goldstein was sentenced to twenty-seven years to life.

By 1986, the California courts had affirmed Mr. Goldstein's conviction on appeal, and denied, without an evidentiary hearing, two state habeas corpus petitions.

In 1987, Mr. Goldstein filed a *pro se* federal habeas petition, claiming that his trial counsel was ineffective in failing adequately to attack Fink's credibility. The petition was denied without an evidentiary hearing in 1987, and the denial was affirmed by the Ninth Circuit in 1990.

In 1990, Mr. Goldstein learned by reading an order by a federal district judge in another case that Fink was a notoriously unreliable jailhouse informant and drug addict who had testified in other trials in return for benefits. He filed two more habeas petitions in state court, which were denied in 1996 and 1997.

In 1997, Mr. Goldstein filed a second *pro se* federal petition, which was allowed by the Ninth Circuit. In 1998, the same district judge who had denied the first petition appointed the Federal Defender Office to represent Mr. Goldstein. Counsel investigated the case, and uncovered evidence of Goldstein's innocence, in particular, that Mr. Campbell recanted his eyewitness testimony, and that Fink received benefits for his testimony.

Counsel then sought permission to file an amended petition. The federal district court stayed and abeyed the federal habeas petition while Mr. Goldstein raised his unexhausted claims in state court, which the California Supreme Court summarily denied in 1998. The federal district court then allowed Mr. Goldstein to amend his petition with the now exhausted claims, and held an evidentiary hearing.

At the evidentiary hearing, Mr. Goldstein's counsel presented documentation and testimony proving that Fink indeed received a reduced sentence in one case and had a charge dismissed in another in return for his testimony. Mr. Campbell testified that when he was shown photographic arrays by the police, he said he could not recognize anyone, but then they pointed to Mr. Goldstein's photograph, said he was the suspect, asked Mr. Campbell if that was who he saw, and he said "possibly." Mr. Campbell was embarrassed and afraid to admit this at trial because the officers were sitting right in front of him in the courtroom. He would have told defense counsel if he had interviewed him outside of their presence, but defense counsel did not contact him. The officers also told him that another witness had identified Mr. Goldstein and that Mr. Goldstein had failed a polygraph test, both of which were false, and that they were confident Mr. Goldstein was guilty. He actually did not recognize Mr. Goldstein at trial, but

could tell who he was by where he was sitting. After his testimony, he recalled that Mr. Goldstein had once helped him carry a carpet (which he had forgotten when questioned on the witness stand), but when he raised this with the police, they indicated that it was not important for him to retake the stand. None of this was ever disclosed to the defense.

The district court granted habeas relief, holding that Mr. Goldstein's due process rights had been violated by the prosecution's failure to disclose the evidence that could have exonerated him – the deal with Fink, Fink's perjured testimony, and the suggestive manner in which Mr. Campbell's identification testimony was obtained, and that trial counsel's failure to interview Mr. Campbell was prejudicial ineffective assistance. The Ninth Circuit affirmed the grant of relief on December 4, 2003.

On April 2, 2004, a Long Beach judge ordered Mr. Goldstein's release after the Los Angeles County District Attorney's Office announced it would not retry him.[6]

Under Sec. 2 of H.R. 3035, Mr. Goldstein would not have been allowed to return to state court to exhaust his claims. Under Sec. 3, he would not have been allowed to amend his petition. He would not have been able to prove by clear and convincing evidence that no reasonable juror would convict him, because, despite his diligent struggle to be heard by the state courts for eighteen years, he was not able to develop his evidence of innocence until his evidentiary hearing during federal habeas corpus proceedings. Thus, his second petition would have been dismissed upon arrival in federal court, and he would still be serving a sentence of twenty-seven years to life.

Glen Nickerson – California

Glen Nickerson was released after serving almost twenty years of a life sentence, based on evidence of innocence developed during federal habeas corpus proceedings.

Mr. Nickerson was convicted and sentenced to life in prison for two murders and an attempted murder that occurred in San Jose at about 1:00 a.m. on September 15, 1984. Nickerson was asleep in his van at the time of the shootings. Witnesses described three men of average build fleeing the scene of the shootings. Nickerson weighed 425 pounds. Despite this startling discrepancy, detectives focused their investigation on Nickerson based on the belief that the killings were in retaliation for an attack on Nickerson's brother a month earlier. Three other

[6] See Goldstein v. Bennel, 1990 WL 47446 (9th Cir. Apr. 16, 1990); Goldstein v. Harris, CV-98-5035-DT, Report and Recommendation of United States Magistrate Judge (C.D. Cal. Nov. 6, 2002); Goldstein v. Harris, CV-98-5035-DT, Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge (C.D. Cal. Dec. 27, 2002); Goldstein v. Harris, 2003 WL 22883652 (9th Cir. Dec. 4, 2003); Wendy Thomas Russell, 1979 L.B. Murder Case Refiled; Crime; Thomas Goldstein, Ordered Freed After 24 Years in Prison, to Face New Charges, Long Beach Press-Telegram A1, February 3, 2004; Tracy Manzer, Goldstein Files Claim vs. L.B., County; Courts; Man Says Police Made Up Evidence That Convicted Him, Long Beach Press-Telegram A4 (April 22, 2004).

men were also convicted of the killings. They all repeatedly acknowledged that Nickerson had nothing to do with the killings. After Nickerson's direct appeal was rejected, the trial judge in the separate trial of one of the other men found that the investigating officers destroyed evidence, manufactured evidence, and committed perjury, and declared a mistrial. In the retrial that followed, the key eyewitness who had testified against Nickerson recanted his identification of Nickerson. Nonetheless, the trial court, Court of Appeal and California Supreme Court all declined to hear evidence of Nickerson's innocence, dismissing his habeas petitions as untimely. Nickerson v. Roe, 260 F.Supp.2d 875, 888 (N.D. Cal. 2003).

Nickerson then sought relief in federal court raising claims of misconduct by police and prosecutors, and ineffective assistance of counsel. The judge determined that the petition could be dismissed based on the state courts' procedural bar. Id. at 893. Nonetheless, the judge reached the claims based on her conclusion, under the Schlup actual innocence standard, that it was more likely than not that no reasonable juror would have found Nickerson guilty beyond a reasonable doubt. Id. at 893-908. She concluded that the police investigators' "misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 918. The judge ordered the State to either free Nickerson or reinstitute criminal proceedings within 60 days, id. at 918, which it declined to do.

Sec. 4 of H.R. 3035 would deny jurisdiction to federal courts to hear "any claim that was found by the State court to be procedurally barred." Since Nickerson was not permitted to develop the facts demonstrating his innocence in state post-conviction, he could not do so until an evidentiary hearing in federal court. Id. at 889. Thus, he would not have been able to establish that the facts underlying his claims established by clear and convincing evidence that no reasonable juror would have convicted him but for the constitutional error. Nickerson would have been denied federal review, and would not have been able to develop the mountain of evidence that demonstrated his innocence. Nickerson would still be in prison for a crime he did not commit.[7]

Nickerson would also be barred under Sec. 5. The statute was tolled during the full 20 months in which three California courts deemed his petition untimely, and an additional thirty days by operation of California law. Under current federal law, Nickerson filed his federal petition about three weeks early. Id. at 888-890. Under Sec. 5, he would have been too late.

Ellen Reasonover - Missouri

Ellen Reasonover was freed after serving sixteen years of a life sentence based on evidence of factual innocence developed at an evidentiary hearing in federal district court.

On December 2, 1983, Ellen Reasonover, an African American single mother, was convicted of murdering a 19-year-old white gas station attendant, James Buckley, at a Vickers station in Dellwood, Missouri. A St. Louis County jury found her guilty of the fatal shooting

[7] See also Nina Martin, Innocence Lost, San Francisco Magazine, Nov. 2004.

eleven months later, but fell one vote short of imposing the death sentence, and a judge sentenced her to life in prison with the possibility of parole after 50 years. After an evidentiary hearing in federal court, the district court judge ruled that the murder trial of Ellen Reasonover was "fundamentally unfair," and ordered her release from prison.

On the night of the murder, Ms. Reasonover was doing her laundry at a nearby Laundromat. She went to the Vicker's station looking for change for the washing machines, but the clerk never came to the window. She saw a man poke his head out of the back room, then a few moments later saw him drive away in a white car. She went elsewhere looking for change, not realizing there had been a crime until she saw news of the murder on television the next morning. When she realized she may have seen the culprit, she called the police and volunteered to look at police mug books. In spite of police pressure to select certain suspects, she failed to make a positive identification. The police became suspicious and arrested her. The police then built a case against her based on the testimony of jailed felons who claimed she confessed to them in the jail.

The State tried Ms. Reasonover in early 1983 based on the testimony of two jailhouse witnesses, Mary Lyner and Rose Jolliff, each of whom had been placed in a cell with Ms. Reasonover at different times. They both claimed that Ms. Reasonover had confessed her involvement in the murder.

Throughout federal habeas corpus proceedings beginning in 1988, Ms. Reasonover sought but was denied access to prosecution files and audio-tapes of her conversations which had been referenced in reports, but never produced to the defense. The prosecution claimed that the tapes were immaterial or had been misplaced, and that they contained no exculpatory information. In 1996, well after Ms. Reasonover's first federal habeas corpus petition was denied and all appeals expired, one of the tapes surfaced. The exculpatory value of that tape caused a pro bono law firm to become interested in the case and re-open an investigation, which revealed that: (1) A year before Ms. Reasonover's trial, the first jailhouse informant, Ms. Lyner, had been arrested by St. Louis police. Following her testimony against Ms. Reasonover, all charges against her were mysteriously dismissed. (2) On the day of her arrest, Ms. Reasonover's boyfriend was put in a separate cell next to her in the Dellwood jail; the police secretly recorded their conversation to see whether they would say something incriminating in what they thought was a private conversation; the conversation was remarkably candid, completely consistent with what she had told police, and included bewilderment at her arrest, and expressions of disgust about the crime and sympathy for the victim. (3) An undercover police officer was put in a cell with Ms. Reasonover for the purpose of obtaining admissions of guilt; the officer wrote a report reflecting that Ms. Reasonover maintained her innocence of the crime.

Based on this and other evidence, a second habeas corpus petition was filed re-asserting Ms. Reasonover's Brady claim relating to the tape and the impeachment evidence of the State's witnesses. A federal district court judge granted a hearing on the petition. During the hearing, another tape surfaced, which had been in the prosecutor's file for sixteen years. That tape was a recording of a telephone conversation between the second jailhouse informant, Ms. Jolliff, and

Ms. Reasonover. It revealed Ms. Jollif's testimony alleging that Ms. Reasonover had confessed to be false.

In a lengthy order granting habeas relief, the district court found that the State knowingly concealed exculpatory evidence that would have changed the outcome of the trial. The State of Missouri did not appeal that judgment, nor did it attempt to retry Ms. Reasonover, as there was no evidence suggesting her involvement in the crime.

Though Ms. Reasonover's Brady claim was procedurally barred, the court found that she had easily met the Schlup innocence standard, i.e., that it was "more likely than not" that no reasonable juror would have found her guilty beyond a reasonable doubt. Sec. 4 of H.R. 3035 would have precluded federal court jurisdiction. Ms. Reasonover would have to show both due diligence and, by "clear and convincing" evidence, that no reasonable juror would find her guilty. There is some question as to whether she could have satisfied that heavy burden if required to meet it as a threshold matter; the most compelling evidence of her innocence, the audio-tape of the Jolliff phone call, was discovered in the middle of an evidentiary hearing ordered by the federal court. In any event, the district court's findings make it clear that because Ms. Reasonover did not even attempt to invoke the state court post-conviction procedure, she could not satisfy the "due diligence" prong of the innocence exception. The judge wrote that all grounds she raised "suffer from the same unexcused procedural default as a result of Petitioner's failure to file a Rule 27.26 motion in state court." Thus, H.R. 3035 would have precluded relief for Ms. Reasonover.[8]

John Tennison, Antoine Goff - California

After a federal court granted habeas relief based on evidence of innocence developed in federal district court, the State stipulated that he was factually innocent, and a California judge declared him to be factually innocent. In this case, the state courts had an opportunity to consider evidence of innocence, but refused to do so. H.R. 3035 would set up a labyrinthe of barriers that would make it impossible for a federal court to do so.

On October 3, 1990, John Tennison and Antoine Goff were convicted of murder and conspiracy and sentenced to 25 years to life in prison for the August 19, 1989, shooting death of Roderick Shannon in San Francisco, largely on the basis of purported eyewitness testimony by two twelve-year-old girls. The shooting was apparently connected to a dispute between youth gangs in the Sunnydale and Hunters Point neighborhoods. Mr. Tennison, who was 17 years of age, was arrested in December 1989 and tried as an adult.

Unbeknownst to Mr. Tennison, Chante Smith had told San Francisco police in an interview before trial that she heard that Lovinsky Ricard had murdered Shannon and that the police had the wrong people. Mr. Tennison did not learn about this until July 1992. Also unbeknownst to Mr. Tennision, on November 7, 1990, while Mr. Tennison's motion for new trial

[8] Reasonover v. Washington, 60 F. Supp. 2d 937 (E.D. Mo. 1999).

was still pending before the trial judge, the police took a videotaped, Mirandized statement from Ricard confessing to the killing and stating that Tennsion and Goff were neither present nor involved. Mr. Tennsion did not receive a copy of the tape until May 21, 1991, the second to last day of the hearing on the motion for new trial. The state trial court judge ruled that the tape was inadmissible, and denied the motion for new trial. In 1993, both Mr. Tennison and Ms. Smith took polygraph tests showing that their statements that Mr. Tennison was not present or involved were truthful.

The California Court of Appeal affirmed the conviction in 1992 and denied a petition for a writ of habeas corpus claiming innocence in 1997. The California Supreme Court denied habeas corpus relief in 1998.

On October 5, 1998, Mr. Tennison filed a *pro se* petition for habeas corpus in federal court, claiming that his due process rights were violated by the State courts' and prosecutors' refusal to allow him a new trial based on Ricard's confession and the polygraph results, and that his trial counsel was ineffective in "overriding" his wish to testify. The federal district judge initially dismissed Mr. Tennison's federal habeas petition as untimely, but was reversed by the Ninth Circuit because the district court had erroneously failed to count the time between decisions and subsequent filings in state court in tolling the federal statute of limitations (exactly what Sec. 5 of H.R. 3035 would require). The Ninth Circuit found that when the tolling period was properly calculated, Mr. Tennison had filed his petition on the very day the statute of limitations would have expired, and remanded for review of the merits.

On March 29, 2001, the district court judge appointed counsel to represent Mr. Tennison. On May 25, 2001, counsel filed a motion to stay and abey his federal habeas petition while he returned to State court to exhaust two additional claims: (1) that his due process rights under Brady were violated by the prosecution's failure to disclose information about the real killer, and (2) that his Sixth Amendment right to effective assistance of counsel was violated by his trial lawyer's failure to have Ricard's confession admitted in the proceedings on the motion for new trial.

On September 21, 2001, the federal district court stayed and abeyed the petition so that Mr. Tennison could exhaust his new claims in state court, which included the ultimately winning claim, and granted Mr. Tennison the right to depose various police officers and witnesses, because they "could" provide evidence relevant to his exhausted and unexhausted claims.

Extensive evidence of innocence and police misconduct was revealed during the federal habeas proceedings, including that: (1) one of the purported eyewitnesses (Fauolo) received reward money, (2) the other (Maluina) failed a polygraph before trial after repeatedly recanting a prior statement, and told the police that she did not see the shooting but was pressured by Fauolo to lie, (3) a man who was present at the homicide gave a videotaped interview before trial describing the events leading up to the homicide in a manner wholly inconsistent with the testimony the state then went ahead and presented at trial, and wholly consistent with the statements of Ricard and Smith, (4) Maluina declared to the federal court under penalty of

perjury that she did not witness the shooting, was coerced by Fauolo to testify falsely against Tennison, and that she withdrew her pretrial statement to police about being coerced into perjury by Fauolo due to pressure exerted on her by police.

On August 26, 2003, the federal district court judge granted the writ based on the withholding of material, exculpatory evidence. Given the lack of credibility of the two purported eyewitnesses, she had little confidence in the outcome of the trial.

The federal district court ordered Mr. Tennison released unless criminal proceedings were reinstituted. The San Francisco District Attorney declined to retry Mr. Tennison or to appeal, and agreed to his immediate release three days after the district court's order. The headline on the front page of the next day's San Francisco Chronicle read: "D.A. vows to probe wrongful conviction/After 13 years in jail, S.F. man goes free without new trial."

On Oct. 27, 2003, Mr. Tennson moved for a finding of factual innocence pursuant to California Penal Code § 851.8. The State of California stipulated in writing that Mr. Tennison is factually innocent the same day. San Francisco Superior Court Judge Tsenin stated in his Order for Declaration of Factual Innocence that "all evidence in this case . . . shows that Tennison is innocent of all charges related to the murder of Roderick Shannon and that he should not have been tried for Shannon's murder."

Antoine Goff, was freed by the state trial court as a result of the federal court's grant of Mr. Tennison's habeas petition the week after Mr. Tennison was released.[9]

Under H.R. 3035, Mr. Tennision's petition would have been dismissed for several independent reasons. First, under Sec. 5, the time between the state courts' decisions and subsequent filings would *not* have tolled the federal statute of limitations, and thus his *pro se*

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9 See Tennison v. Henry, 2000 WL 1844301 (9th Cir. 2000); Tennison v. Henry, 203 F.R.D. 435 (N.D. Cal. 2001); Tennison v. Henry, 98-3842 (N.D. Cal. 8-26-2003), (Unpublished) Order Granting Amended Petition for Writ of Habeas Corpus and Denying Motion for Evidentiary Hearing as Moot; Tennison v. City & County of San Francisco, 226 F.R.D. 615 (N.D. Cal. 2005); Tennison v. California Victim Compensation Board, Case. No. __ (Superior Court of California in and for the County of San Francisco) (Petition for Statutorily Authorized Writ of Mandate to Review Decision of the California Victim Compensation and Government Claims Board, filed April 27, 2005); Seth Rosenfeld, Witness: DA, cops coached me to lie; Sanders, partner accused in tainted murder testimony, San Francisco Chronicle, June 19, 2003, at A1, Conviction tossed in case tied to Sanders; Judge rules evidence wrongly withheld, San Francisco Chronicle, Aug. 27, 2003, at A1; D.A. vows to probe wrongful conviction; After 13 years in jail, S.F. man goes free without new trial, San Francisco Chronicle, Aug. 30, 2003, at A1; Hard sell for lost years; Second man freed in 1989 gang killing, San Francisco Chronicle, Sept. 4, 2003, at A17; Wrongly imprisoned man must prove case again for state to pay, San Francisco Chronicle, Aug. 29, 2004, at B1; 2 men jailed 14 years fail to convince compensation panel, San Francisco Chronicle, Dec. 18, 2004, at B3; Nina Martin, Innocence Lost, San Francisco Magazine, Nov. 2004.

petition would have been dismissed. Second, under Sec. 2, the claim of innocence Mr. Tennision attempted to raise in his *pro se* petition would have been dismissed because, even assuming that a freestanding innocence claim is a cognizable federal claim, he did not articulate any "specific Federal basis" for the claim. Third, under Sec. 2, Mr. Tennison would not have been allowed to return to state court to exhaust the two additional claims added by appointed counsel that *did* have a "specific Federal basis." Fourth, under Sec. 3, he could not have amended his petition with the winning claim anyway; he filed the federal petition on the exact date it was due under the federal statute of limitations; counsel was not appointed until two and a half years later, and only then was the winning Brady claim added.

Except for Ricard's videotaped confession, all of the "facts underlying" the winning Brady claim were developed pursuant to the federal district court's discovery order. Ricard's confession alone would not have been enough to satisfy the exacting actual innocence standard of Secs. 2 and 3. Moreover, Ricard's confession *was* discovered and presented to the state courts, but they ruled it was inadmissible. Sec. 5 admits of no exception and would have been dispositive whether or not Mr. Tennison could meet the actual innocence requirements of Secs. 2 and 3.

Under the proposed legislation, Mr. Tennison would still be serving a sentence of 25 years to life.

James Tillema – Nevada

After a federal court granted habeas corpus relief, James Tillema was retried, acquitted of the charges carrying a life sentence, and sentenced to time served.

In 1993, Mr. Tillema was allowed to represent himself at trial on burglary charges without being properly advised of his right to a lawyer and the risks of representing himself. He was sentenced to life in prison for breaking into two unlocked cars and theft of a combination padlock worth $4.99. He filed several state court challenges to his conviction and sentence before filing a federal habeas petition. The federal court found that there was one unexhausted claim and dismissed the petition without prejudice. When Mr. Tillema returned to federal court, the state argued that his refiled petition (the first one was timely) was time barred because the state court petition did not raise a federal claim. The Ninth Circuit rejected that argument, because the state petition challenged Tillema's conviction and sentence, and also granted equitable tolling because the federal court originally failed to tell Tillema he could dismiss his one unexhausted claim and proceed on the other claims. Tillema v. Long, 253 F.3d 494 (9th Cir. 2001). Mr. Tillema received a new trial, at which he was acquitted of the more serious charges and sentenced to time served. Secs. 2 and 5 would have foreclosed federal review, and Mr. Tillema would be serving a life sentence for crimes of which he has now been acquitted.

II. Egregious Official Misconduct, Grossly Ineffective Assistance of Counsel, and Arbitrary State Court Rulings that Prevented Fair and Reliable Determinations of Guilt or of the Appropriate Sentence

We present these cases to illustrate that without a fair trial and sentencing hearing, guilt or innocence and the proper sentence *cannot be reliably determined*. Solely due to federal habeas corpus proceedings, some of these prisoners are not guilty of the most serious charges of which they were convicted. Others have been re-sentenced to life or a term of years, thus avoiding wrongful execution. Others only now will be able to receive a fair and reliable trial or sentencing hearing.

We also present these cases to illustrate that H.R. 3035 would reward the State and punish the prisoner for egregious state misconduct, gross ineffective assistance of counsel, and state court rulings that are arbitrary or just wrong.

Seifullah Abdul-Salaam – Pennsylvania

The prosecution failed to disclose statements from a witness who indicated that the defendant was not one of the two men the witness overheard planning the robbery. The state court refused to consider Mr. Abdul-Salaam's claim, because he did not raise it before the prosecution disclosed the evidence, and because when he did raise it he violated a pleading rule that was not in effect when the state court said he should have followed it. The federal district court ruled that the procedural bar was inadequate to foreclose review. See Abdul-Salaam v. Beard, 02-2124, slip opinion (M.D. Pa. July 26, 2004). The case is now being considered on its merits; under Sec. 4, the state court's arbitrary bar ruling would preclude federal review.

Delma Banks - Texas

This case demonstrates that H.R. 3035 would preclude federal review when the prosecution hides evidence and lies about it.

Prior to the capital murder trial of Delma Banks, the prosecution assured defense counsel that there was no need to litigate discovery issues because the State would provide all discovery materials. Instead, the prosecution withheld evidence that Farr, one of its two key witnesses, was a paid police informant in the case, and a 70-page transcript showing that it had intensively coached Cook, its other key witness, as to what his testimony should be. See Banks v. Dretke, 540 U.S. 668 (2004).

Cook testified at trial that Mr. Banks confessed the killing to him, gave him the murder weapon, and drove the victim's car. Farr testified at trial and at the sentencing phase that he and Mr. Banks had planned future robberies, and that Mr. Banks had promised to "take care of it" if any problems arose; the State relied on that testimony to support the future dangerousness "special issue" under the Texas capital murder statute, without which a death sentence could not be imposed. Cook falsely testified that his testimony was entirely unrehearsed; Farr falsely

testified that he did not take money from the police, was not promised anything by the police, did not speak with the police until a few days before trial, and did not set up Mr. Banks' arrest. The prosecution left these perjured statements uncorrected and argued that Cook's and Farr's testimony was absolutely truthful.

Following Mr. Banks' conviction and death sentence, the Texas Court of Criminal Appeals denied his direct appeal. In state post-conviction, Mr. Banks raised a Brady claim that the State had failed to turn over exculpatory evidence, but throughout those proceedings, the State asserted that Cook had received no deal in exchange for his testimony, denied that Farr was a paid informant and had set up Mr. Banks' arrest, and stated that no evidence had been withheld. Mr. Banks' post-conviction petitions were denied. Mr. Banks was not able to uncover the withheld evidence until he was granted discovery and an evidentiary hearing in federal court. The Supreme Court ruled that the State's concealment of exculpatory evidence relating to Farr invalidated the death sentence, and that the lower courts should decide whether the Cook Brady claim required a new trial.

Under Secs. 2, 3, 4 and 6, Delma Banks would have been executed, and the exculpatory evidence hidden by the State never would have been discovered. The facts supporting Mr. Banks' meritorious Brady claims came to light for the first time in federal court, after the district court ordered discovery. Sec. 2 would have prevented review and eliminated the possibility of relief based on the Farr Brady claim because the State prevented exhaustion of the factual basis for the claim by persistently denying Farr's status as a paid informant and misrepresenting that it had complied with its Brady obligations. Secs. 2 and 4 would have prevented review and eliminated the possibility of relief on the Cook Brady claim because the State prevented exhaustion and caused a procedural default by hiding the evidence that Cook's testimony was coached. Under Sec. 3, Mr. Banks would have been prevented from amending his habeas petition after the transcript showing that Cook had been coached had been turned over in discovery, precluding review of the Cook Brady claim. Sec. 6 would have deprived the federal courts of jurisdiction to consider the Farr Brady claim, because, in post-conviction proceedings, the state court ruled that impeaching Farr would not have made a difference in the sentencing hearing.

Curtis Brinson - Pennsylvania

Curtis Brinson showed that his prosecutor, Jack McMahon -- who had made a training tape for the Philadelphia District Attorney's office advocating the use of peremptory strikes to exclude African-American jurors -- had used 13 of 14 peremptory strikes against African-Americans. This tape became available after Brinson filed a federal habeas petition. The district court mistakenly dismissed Brinson's petition so that he could return to state court with this new evidence of discrimination. Because Brinson's dismissed federal petition did not toll the statute of limitations, and because his state petition was deemed "untimely," Brinson could not get statutory tolling when he returned to federal court. The Third Circuit ruled that the statute should be equitably tolled because of the district court's mistake in dismissing the case. Sec. 5

of H.R. 3035 would not have permitted equitable tolling. See Brinson v. Vaughn, 398 F.3d 225 (3d Cir. 2005).

Marcus Cargle -- Oklahoma

Mr. Cargle was convicted of participating in one murder and committing a second, and sentenced to death. The State had no physical evidence showing that Mr. Cargle shot either victim or that he had aided or abetted either murder. The Tenth Circuit characterized defense counsel's performance as "grossly deficient" and noted the "unusual external pressures" on counsel. Cargle v. Mullin, 317 F.3d 1196, 1209 (10th Cir. 2003). These "unusual external pressures" included ongoing bankruptcy proceedings, a bar grievance investigation, and a criminal tax probe, which led to a conviction and defense counsel's resignation from the bar shortly after Mr. Cargle's trial. Defense counsel spent less than an hour with Mr. Cargle before trial, and never discussed strategy with him or explained the significance of mitigating evidence at sentencing. Counsel failed to appear for a hearing on his motion for continuance and, after the motion was denied, advised Mr. Cargle to feign incompetency as a desperate attempt to delay the trial. The Tenth Circuit stated that "[t]he last-ditch efforts to forestall trial were undoubtedly driven by counsel's woeful state of preparation." Id. at 1210.

The Tenth Circuit held that defense counsel failed to investigate and attack the State's case at the guilt-innocence phase. The State's two primary witnesses were highly vulnerable to impeachment, yet counsel did nothing to prepare an effective cross-examination to test their credibility. In addition, counsel failed to interview and prepare obvious defense witnesses who would have contradicted the testimony of the State's star witnesses. The Court concluded that "no plausible reason other than counsel's self-inflicted ignorance" could explain his failure to challenge the prosecution's theory of the case. Id. at 1214.

According to the Tenth Circuit, the penalty phase defense appeared to be "an after-thought." Id. at 1210. Counsel did not prepare any witnesses. Neither Mr. Cargle nor his parents testified. The testimony of the sole mitigating witness, a pastor, was "more like a first-time interview conducted during discovery than the presentation of a defense at a capital murder trial." Id. The Court found that "counsel's gross mishandling of the penalty-phase defense left his client's fate to jurors who could only wonder why neither the man himself nor any member of his family would step up to explain, in personal human terms, why his life should be spared." Id. at 1211. The Tenth Circuit granted habeas relief on the convictions and the death sentences, and ordered the State to re-try Mr. Cargle.

Under Section 4 of H.R. 3035, the federal courts could not have reviewed the obvious and glaring deficiencies in the representation provided by this since-disbarred attorney. In state post-conviction proceedings, Mr. Cargle's ineffective assistance claim was denied because it was not raised on direct appeal. The claim could not have been raised on direct appeal, however, because it required consideration of matters outside the trial record. H.R. 3035 would allow this kind of state court Catch-22 (you can't raise it on direct appeal; if you don't raise it on direct appeal it's procedurally barred) to cut off all federal review.

Maxwell Hoffman – Idaho

Mr. Hoffman was convicted and sentenced to death in Idaho. The trial lawyers failed to: obtain any records about their client; request a psychiatric evaluation; or follow up on a court expert finding of brain damage. The Idaho courts refused to hear Mr. Hoffman's ineffectiveness claims, because he failed to file them within 42 days of the entry of judgment -- before the transcripts of the trial had been prepared, and before any lawyer could reasonably have looked into and raised the issue. The Ninth Circuit found that the state court's rule was not an adequate procedural bar. See Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001). Under Sec. 4, there would be no federal court jurisdiction over Mr. Hoffman's ineffectiveness claims, no matter how unreasonable the requirements imposed by the state rule and no matter how impossible it would have been for Hoffman to meet them.

Arnold Holloway - Pennsylvania

In Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004), a Pennsylvania capital case, the federal court found intentional racial discrimination by the prosecutor during jury selection and granted a new trial to this African-American defendant under Batson v. Kentucky, 476 U.S. 79 (1986).

There was ample evidence to support the federal court's finding that the prosecutor intentionally discriminated. For example, the prosecutor used 92% (11 of 12) of his peremptory strikes against African-Americans, who comprised only 29% of potential jurors; he struck several African-Americans whose backgrounds were very similar to whites he accepted; he made his strikes after minimal questioning, rather than after genuine exploration of possible bias; he kept handwritten notes during jury selection in which he carefully kept track of every potential juror's race; and he worked in an office in which prosecutorial discrimination in jury selection was rampant, as evidenced by the office's creation of a training videotape that urged office prosecutors to racially discriminate, a study of the office's jury selection practices showing a long-standing practice of racial discrimination, and observations by experienced defense attorneys, prosecutors and at least one judge that it was routine office practice to discriminate against African-Americans in jury selection. Moreover, the prosecutor's handwritten notes recorded an explicitly race-based reason for striking one African-American -- he struck her because he assumed that a "young black female" would "relate to" an African-American defendant. When the prosecutor was asked during jury selection to give reasons for his strikes, he declined to do so. When he was again asked during post-conviction proceedings, he said he did not recall any reasons.

After the Third Circuit granted a new trial, the state recognized that Mr. Holloway's first-degree murder conviction and death sentence -- imposed by a jury that was chosen through racial discrimination -- were inappropriate. The state agreed that Mr. Holloway is guilty of no more than third-degree murder, with a sentence of 10-20 years, and entered a plea to that effect. He is now serving that sentence.

Under Sec. 4 of H.R. 3035, Arnold Holloway would have been executed, rather than resentenced to the term of years sentence that the state now agrees is appropriate. The federal courts would have no jurisdiction to review the case, because the state court deemed it "waived."

Mr. Holloway raised the Batson claim *pro se* on direct appeal. The prosecution told the Pennsylvania Supreme Court to not consider the *pro se* claim, saying that the claim should be raised in state post-conviction proceedings. The Pennsylvania Supreme Court affirmed without mentioning the Batson claim.

Mr. Holloway again raised the Batson claim in his state post-conviction petition, as the prosecution had said he should. The post-conviction trial court denied the claim without any explanation. On appeal, the Pennsylvania Supreme Court stated -- erroneously -- that the claim had not been raised in the post-conviction trial court and deemed it "waived" for that plainly erroneous "reason."

Under current law, the Pennsylvania Supreme Court's "waiver" ruling did not prevent federal merits review because it was based on a plainly erroneous premise -- that the claim supposedly had not been raised in the lower court -- and, thus, was grossly unfair. Section 4 of H.R. 3035, however, would make the state court's "waiver" ruling the last word and strip jurisdiction from the federal courts to ever consider a claim that the state courts have deemed waived, no matter how arbitrary or unfair that state court "waiver" ruling is. Thus, Mr. Holloway would never have obtained federal merits review of the claim.

Fred Jermyn - Pennsylvania

Mr. Jermyn's lawyer, who was less than two years out of law school, did no pre-trial investigation for capital sentencing. In particular, he never investigated Fred Jermyn's childhood, even though a psychiatrist told him before trial that such investigation was necessary.

The post-conviction lawyers discovered that Fred Jermyn suffered shocking mistreatment as a child. His father was mentally ill and hated him from the day he was born. Mr. Jermyn's father battered him; hung him by his heels and whipped him; beat him with fists; beat him with a steel crutch; whipped him with a cat-o'-nine-tails; threatened and terrorized him with guns and knives; forced him to watch while the father tortured animals; forced him to look at pornography; forced him to listen to the father's boasting about bizarre sexual practices; and told him he should worship Satan. Young Mr. Jermyn spent much of his childhood banished to a cramped attic room, where he was chained with a dog collar and leash and forced to eat from a dog food bowl. Eventually, he was removed from the home and sent to a residential school that was normally reserved for orphans, because his mother and child welfare officials feared the father would kill him.

In short, Fred Jermyn suffered childhood mistreatment so extreme that it was described by the mental health experts at the post-conviction hearing as "savage abuse, torture, and

neglect," "horrendous," "incredibly traumatic," "absolutely out of control," "beyond the pale of most forms of abuse," an "extreme case of abuse which is notable for its bizarre character; persistence; all encompassing nature; and pervasiveness," and "one of the most severe cases of child abuse," so severe that it is remarkable that "the child survived at all." The jury, however, did not hear any of this evidence because the trial lawyer did not investigate or present it.

Based upon the trial lawyer's complete failure to investigate and the powerful mitigation that was readily available at the time of trial, the federal court found the lawyer ineffective and ordered that Mr. Jermyn receive a new sentencing hearing.[10] Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001). The prosecution then acknowledged the overwhelming mitigation present in this case and did not seek another death sentence. Mr. Jermyn is now serving a life-without-parole sentence.

Under H.R. 3035, Fred Jermyn would have been executed, rather than resentenced to the life sentence that the Commonwealth now agrees is appropriate.

If Sec. 2 had applied, the federal courts would never have reviewed Fred Jermyn's ineffective assistance of counsel claim because he had earlier filed an "unexhausted" petition containing that claim. The unexhausted petition was filed to obtain a stay of Mr. Jermyn's execution. When the state courts acted on the state post-conviction petition, the federal court dismissed the federal petition without prejudice to allow exhaustion. Under H.R. 3035 Sec. 2, however, the unexhausted claims, including the winning ineffective assistance of counsel claim, would have been dismissed with prejudice.

If Sec. 4 had applied, the federal courts would never have reviewed Mr. Jermyn's claim, since the state court deemed it "waived" because it was first raised in Mr. Jermyn's second state post-conviction petition. Under current law, this state court "waiver" ruling did not prevent federal merits review because the state court retroactively applied a new waiver rule that it had never applied before. Sec. 4, however, would make the state court's "waiver" ruling the last word and strip jurisdiction from the federal courts to ever consider a claim that the state courts have deemed waived, no matter how arbitrary or unfair that state court "waiver" ruling is. Thus, Mr. Jermyn would never have obtained federal merits review of the claim.

If Sec. 6 had applied, the federal courts never would have reviewed Mr. Jermyn's claim because the state court said counsel's ineffectiveness was "not prejudicial." The state court based this holding on the fact that counsel's penalty phase closing argument included a comment that Mr. Jermyn had a bad childhood. Counsel, however, had not presented any evidence about

[10]The appointed lawyer who representing Mr. Jermyn in the *first* state post-conviction proceedings was both conflicted and inept. While representing Mr. Jermyn, this lawyer was running for the elected District Attorney position on a pro-death penalty platform, and also representing in a civil matter the District Attorney who was litigating against Mr. Jermyn. This lawyer did not investigate the case at all, and focused his petition on a frivolous claim that the direct appeal lawyer was ineffective for failing to file a petition for writ of certiorari on several claims.

that. The prosecutor seized upon this, pointing out in his argument to the jury that counsel's argument was unsupported by any evidence. The federal court properly found that the state court's "no prejudice" ruling was unreasonable, and granted relief. Under Sec. 6, the federal court would have no jurisdiction to review this claim, no matter how unreasonable the state court's ruling.

Ledell Lee -- Arkansas

Ledell Lee, on death row for a killing in Pulaski County, challenged his conviction in state postconviction proceedings following direct appeal. In a state postconviction hearing in March of 1999, the trial court accused Mr. Lee's counsel of being under the influence of drugs or alcohol. The court characterized Mr. Lee's counsel as "not competent to try a case," citing his mental state, the way he moved around, and his disconnected speech. The court said he would never have appointed him to the case if he'd known that "you'd just gotten out of rehab." Counsel for the state ultimately asked that defense counsel submit to drug testing, noting, "He's just not with us. He's reintroduced the same evidence over and over again. He's asking incoherent questions. His speech is slurred. He stumbled in the Court Room." Lee v. Norris, 354 F.3d 846, 848 (8th Cir. 2004). Despite counsel's performance, the court denied relief, and the decision was ultimately affirmed by the Arkansas Supreme Court. Lee v. State, 343 Ark. 702 (2001).

Mr. Lee then filed a writ of habeas corpus in the United States District Court. The court held the petition in abeyance until an unexhausted claim of ineffective assistance of counsel could be resolved in state court. The District Court noted its concern that Mr. Lee's "counsel may have been impaired to the point of unavailability" during the postconviction process. Lee, 354 F.3d at 847. The Eighth Circuit affirmed the District Court's decision in 2004.

Mr. Lee would have been executed under Sec. 2 of H.R. 3035. The lawyer impaired by drugs and/or alcohol, whose appearance and performance during the state post-conviction proceedings was noted by both the state court and the state prosecutor, was the same lawyer who took Mr. Lee's case into federal court. That lawyer's performance in state court so concerned the federal district judge in habeas proceedings that the judge held the case in abeyance for the claim to be exhausted in state court. If H.R. 3035 were in effect, however, there would have been no mechanism, procedural or otherwise, through which Mr. Lee could have sought relief.

Remon Lee -- Missouri

Remon Lee was charged with having acted as the getaway driver for a murder. His intended defense was an alibi -- that he was with his family in California on the date of the murder. When the time came to put on his alibi witnesses, they were not present in court. Mr. Lee's family had been waiting to testify, but, unknown to defense counsel, had been told by a representative of the state that they would not be needed until the following day. Mr. Lee's lawyer moved for a short continuance to locate the witnesses, which the trial judge denied because he had plans to visit his daughter, and because he believed that Mr. Lee's witnesses had

"abandoned" him. Mr. Lee was convicted of murder and sentenced to life in prison without parole.

On appeal, Mr. Lee argued that the denial of a continuance had unfairly denied him his chance to put on his defense. The state appeals court denied his appeal because he had violated a state rule requiring that continuance motions be in writing and supported by affidavits.

In Lee v. Kemna, 534 U.S. 362 (2002), the Supreme Court held that the federal courts should review the merits of Mr. Lee's claim. The Court pointed out that neither the prosecutor nor the trial judge had mentioned any rules violation as a reason for denying the continuance motion; there was no time to prepare a written motion in the midst of trial, and Mr. Lee substantially complied with the state rules. The procedural bar was arbitrary and served no conceivable state interest, and thus was inadequate to bar review of Mr. Lee's federal constitutional claim. A federal district court later granted Mr. Lee a new trial.

Under Sec. 4 of H.R. 3035, the fact that a defendant did everything he reasonably could to comply with a state court rule would not matter; if the state court said the petitioner violated the rule, the federal court would have to accept it at face value and could not review the claim.

Eddie Lee Miller -- Arkansas

Eddie Lee Miller was charged with the capital felony murder of a white shopkeeper. Aware that the prosecutor had a history of excluding African-Americans from the jury panel, trial counsel filed a motion seeking to prohibit that practice, but it was denied. In response to counsel's objection during jury selection, the prosecutor stated, "I am going to exercise my challenges however I see fit." He than used all ten of his discretionary challenges to remove black prospective jurors.

The Arkansas Supreme Court affirmed Mr. Miller's conviction and sentence on appeal. Miller v. State, 269 Ark. 241 (1980), cert. denied, 450 U.S. 1035 (1981). In May of 1981, Mr. Miller filed an application for a stay of execution and a writ of habeas corpus in the United States District Court in the Eastern District of Arkansas, conceding that he had not exhausted his state remedies. Miller v. Lockhart, 515 F. Supp. 3, 4 (D. Ark. 1981). The court granted the stay. Miller subsequently filed a petition for state habeas relief which was denied by the Arkansas Supreme Court. Miller v. State, 273 Ark. 508 (1981).

Mr. Miller filed an amended petition in federal court. After reviewing the evidence on the history of excluding African-Americans in the county, statistical proof on the pattern of exclusion, and testimony about the regular prosecutorial practice of keeping black citizens out of the jury box, the district court granted relief. Miller v. Lockhart, 861 F. Supp. 1425, 1446 (D. Ark. 1994). Affirming, the Eighth Circuit dismissed the state's argument that Mr. Miller's claim was procedurally barred. Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995).

Had H.R. 3035 been in effect at the time Mr. Miller's case was reviewed in federal habeas corpus proceedings, he would have been executed. Section 2 requires the federal courts to dismiss with prejudice any unexhausted claim presented in a federal petition unless it satisfies the extremely narrow exception found in 28 U.S.C. § 2254 (e)(2). Because the facts adduced at Mr. Miller's evidentiary hearing could have been presented to the state courts before his federal petition was dismissed for lack of exhaustion, he would have been unable to satisfy that exception. He also probably would have lost under Section 4's prohibition on considering procedurally defaulted claims. Had Mr. Miller not been granted an evidentiary hearing in federal court, the evidence of racial bias in choosing juries in Pulaski County might never have been revealed.

Thomas Miller-El – Texas

In Miller-El v. Dretke, 125 S. Ct. 2317 (2005), the petitioner was convicted and sentenced to death in Texas state court for murder in the course of a robbery. During jury selection, the prosecution peremptorily challenged 11 of the 12 (91%) qualified African American venire members, while accepting white jurors who were identical in everything except their race. Id. at 2340. Prosecutors in that office literally kept a manual on how to make sure they struck from jury service as many "Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated," as possible, a practice maintained for many years. Miller-El v. Dretke, 537 U.S. 322, 334-335 (2003). The state courts refused to acknowledge the overwhelming evidence that the prosecutor intentionally discriminated against African American jurors during jury selection. Miller-El, 125 S. Ct. at 2322-23. The Supreme Court found that the high strike rate against African Americans, the pretextual nature of the prosecutor's stated race-neutral reasons, the disparate treatment of African American and white jurors in questioning, and the office manual established intentional discrimination. Id. at 2325-40.

In dissent, Justice Thomas accused the majority of basing its decision on documents "unearthed" during federal habeas proceedings (from the trial record) and using them to support "theories that Miller-El never argued to the state courts." Id. at 2347 (Thomas, J., dissenting). The majority responded that the "dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." Id. at 2325 n. 2. Under Sec. 2, it apparently would not be enough to present evidence to the state courts but not explain it in the exquisite detail that Mr. Miller-El's federal habeas counsel did.

Thus, though Mr. Miller-El raised his claim at every available proceeding in state court, Sec. 2 would likely have precluded federal review because he arguably was not "specific" enough in explaining to the state court how the evidence established intentional discrimination in violation of federal law.

Alan Pursell – Pennsylvania

Mr. Pursell's defense lawyer admitted he did nothing at all to prepare for capital sentencing. The Pennsylvania Supreme Court applied a new state post-conviction rule -- that did not exist when the state court claimed Mr. Pursell should have raised the issue -- to hold that Mr. Pursell's claim of ineffective assistance of counsel was procedurally barred. During an appeal to the Third Circuit, the state itself agreed to a life sentence. See Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. 2002). Under Sec. 4, there would have been no federal review of Mr. Pursell's claims, and he would have been executed, though the local district attorney now agrees that a life sentence is appropriate.

Kenneth Richey – Ohio

Mr. Richey was convicted of aggravated felony murder and sentenced to death. The State's theory was that he set a fire in a house in order to kill his ex-girlfriend and her new boyfriend. A child (who lived in a different apartment) died in the fire. The Fire Chief and others testified that Mr. Richey attempted to rescue the child in complete disregard for his own safety and had to be restrained from re-entering the house. Under Ohio law, the State was required to prove specific intent to kill the person who died, and could not have sought the death penalty without proving that element. Instead, the State relied on the theory of transferred intent. The lawyer at trial and on direct appeal failed to raise the obvious legal argument that the State had presented insufficient evidence, actually no evidence, of specific intent. In state post-conviction proceedings, the state courts said Mr. Richey's claim was procedurally barred because the lawyer failed to raise it. The Sixth Circuit found that there was insufficient evidence of the required element of specific intent, that this lawyer was patently ineffective in failing to raise the issue, which excused the procedural bar. See Richey v. Mitchell, 395 F.3d 660 (6th Cir. 2005). Under Sec. 4, there would be no federal court jurisdiction over Mr. Richey's claim.

Ronald Rompilla – Pennsylvania

The Supreme Court of the United States would not have had jurisdiction to correct the unconstitutional death sentence in Rompilla v. Beard, 125 S. Ct. 2456 (2005), where the defense lawyers failed to examine a court file regarding Mr. Rompilla's prior convictions which the prosecutor twice told them the State intended to rely on as evidence of aggravation in support of the death penalty. The Supreme Court found that no reasonable lawyer would forgo examination of the file thinking that interviewing the defendant and his family was a sufficient substitute. The Court found prejudice in that the file contained mitigation leads that counsel's talks with the defendant and a few family members had not revealed. Had counsel followed those leads, they would have discovered that Mr. Rompilla's parents were both severe alcoholics who drank constantly, and that his mother drank during her pregnancy with Rompilla. Mr. Rompilla's father, who had a vicious temper, frequently beat his mother, beat Mr. Rompilla with his hands, fists, leather straps, belts and sticks, and locked Mr. Rompilla and his brother in a small wire mesh dog pen filled with excrement. Mr. Rompilla was kept isolated from other children, the family had no indoor plumbing, he slept in the attic with no heat, and the children were not given

clothes and attended school in rags. When post-conviction counsel discovered this information, they had Mr. Rompilla tested and found that he suffered from organic brain damage, caused by fetal alcohol syndrome, and that his IQ was in the mentally retarded range. The state court denied post-conviction relief in part because the evidence was "not entirely helpful,"[11] a finding that would preclude federal habeas review under Sec. 6.

Sidney Scott -- Oklahoma

Mr. Scott was convicted and sentenced to death for murder, largely on the basis of testimony from one Neal Rinker. Prior to trial, the prosecution deliberately hid evidence that Rinker had written letters and made statements to other people admitting having committed the murder himself.

Mr. Scott raised claims that the prosecution improperly withheld this exculpatory evidence in state post-conviction proceedings. The state courts denied the claims on the ground that they should have been raised on direct appeal. The Tenth Circuit found that the prosecution's failure to provide the evidence at the time of the direct appeal was "cause" for the default, allowing Mr. Scott's claims to be heard on the merits. Scott v. Mullin, 303 F.3d 1222, 1228 (10th Cir. 2002). On the merits, the court found that the prosecution's failure to disclose its key witness's admissions made Mr. Scott's trial unfair, and ordered a new trial. Id. at 1231-32.

Under Section 4 of H.R. 3035, Mr. Scott could never have gotten review of his claims. The state courts ruled that those claims were "procedurally defaulted,' and that ruling would have precluded federal court review, even though it was caused by the fact that the prosecution violated federal law by hiding the evidence.

Ernest Simmons -- Pennsylvania

Mr. Simmons, an African-American man who was living with his white girlfriend was convicted of robbing and murdering an elderly white woman in Johnstown, Pennsylvania, and sentenced to death. The most important evidence against Mr. Simmons was testimony from a witness who claimed that Mr. Simmons sexually assaulted her later that night and threatened to kill her as he had the older woman.

Mr. Simmons' conviction and sentence were affirmed on direct appeal. In state post-conviction proceedings, the state finally revealed numerous items of exculpatory evidence whose existence the police and prosecutors had falsely but steadfastly denied. The key witness had originally failed to identify a picture of Mr. Simmons; was not, according to lab reports, sexually assaulted; and had charges against herself dropped in exchange for implicating the defendant.

[11] Rompilla v. Horn, 2000 WL 964750, *5 (E.D. Pa. July 11, 2000).

On Mr. Simmons' post-conviction appeal, the Pennsylvania Supreme Court procedurally barred Mr. Simmons's state misconduct claims on the basis of a rule it had never before announced. Commonwealth v. Simmons, 804 A.2d 625 (Pa.2002). The federal district court ruled that this newly created procedural rule was not "adequate" to prevent habeas corpus review. It then found that the prosecutors had violated the law by failing to disclose evidence that would have helped the defense, and that Mr. Simmons might have been acquitted if his lawyers had had the evidence. Simmons v. Beard, 356 F.Supp.2d 548 (W.D. Pa. 2005). It ordered a new trial.

Under Section 4 of H.R. 3035, the federal courts could not have reviewed Mr. Simmons' claim, because the "procedural default" rule applied by the Pennsylvania Supreme Court -- a rule the Court created in response to Mr. Simmons' appeal and applied for the first time to his case -- would have precluded federal review. Mr. Simmons would not have been able to meet the burden to "prove" he was innocent in order to overcome the court-manufactured "procedural default," even though he likely would be acquitted at a new trial.

Steven Slutzker – Pennsylvania

Mr. Slutzker was convicted of murder and sentenced to life in prison, largely on the basis of memories that the decedent's son claimed to have recovered fifteen years after the crime. The prosecution did not disclose reports of witness statements, including one by a witness who stated that she saw someone other than Slutzker talking to the victim's wife outside her house shortly after the murder. By the time petitioner learned this information, it was too late to go back to state court, making his Brady claim procedurally barred. The Third Circuit found that the state's failure to disclose the information excused that default. See Slutzker v. Johnson, 393 F.3d 373 (3d Cir. 2004). The writ was granted. Under Section 4 of H.R. 3035, the state would have been permitted to hide evidence and thereby prevent federal habeas review, and all court review.

Max Alexander Soffar -- Texas

H.R. 3035 would deprive federal courts of the ability to review federal claims where the petitioner may well be innocent.

Mr. Soffar was convicted and sentenced to death for the robbery and murder of three people at a bowling alley. His conviction was based solely on his confession, obtained after three days of interrogation without the presence of a lawyer. At trial, elements of Mr. Soffar's confession were purportedly corroborated by the State's ballistics examiner.

Mr. Soffar had the misfortune of being represented at trial by Joseph Cannon, an attorney best known for sleeping through large portions of the capital trial of another Texas death-row inmate, Calvin Burdine. Mr. Cannon and his co-counsel failed to interview the sole surviving eyewitness, Gregory Garner, or secure an independent firearms examination. Investigation during habeas revealed that Garner's account of the crime conflicted with Mr. Soffar's confessions and that Garner was able to describe the gunman but did not recognize Mr. Soffar.

An independent ballistics examination showed that the State's trial case rested upon an erroneous determination of the number of bullets fired during the crime, and thus Mr. Soffar's confession could not, in fact, be accurate.

Mr. Soffar's convictions were affirmed on direct appeal, and his state post-conviction petition was denied. The state court allowed Mr. Soffar a hearing on his claim that his lawyers were ineffective for failing to present evidence that would have undermined the reliability of his statements to the police, but refused to admit the most important evidence Mr. Soffar offered, including Mr. Garner's statements to the police, ruling it "not relevant."

One Fifth Circuit judge was so troubled by the circumstances surrounding the interrogation and confession that he "had laid awake nights agonizing over the enigmas, contradictions, and ambiguities which are inherent in this record," Soffar v. Cockrell, 300 F.3d 588, 613 (5th Cir. 2002) (en banc) (DeMoss, J., dissenting), but the Fifth Circuit eventually granted relief on other grounds. It held that Mr. Soffar's lawyers were ineffective for failing to investigate the discrepancies between his confession and Mr. Garner's statements, and for failing to consult a ballistics expert to show that the ballistics evidence was inconsistent with Mr. Garner's statements to police, and ordered a new trial for Mr. Soffar. Soffar v. Dretke, 368 F.3d 441, 478-79 (5th Cir. 2004).

Under Sec. 2, Soffar's claim could not have been reviewed because his state court petition did not describe the ineffectiveness claim in the required elaborate detail, and because the state court prevented exhaustion by refusing to consider critical evidence in support of the claim. Id. at 465-67. Mr. Soffar could not have established actual innocence because he confessed --even though the circumstances of the confession and other evidence makes it very likely that the confession was false and coerced by the police.

Henry Vernon Wallace - Nevada

Henry Vernon Wallace was a brain-damaged, homeless 18-year-old at the time of the offense. His lawyer advised him to plead guilty to second degree murder, without investigating the case and even though it was Wallace's stepfather who shot the victim, and he was sentenced to life in prison with the possibility of parole. Mr. Wallace told his trial counsel that he wished to appeal, but she did not file a notice of appeal, nor did she advise him of the deadlines and process for filing an appeal. Due to his impaired mental functioning, Mr. Wallace was incapable of preparing and filing a post-conviction petition, or of recalling, understanding or relating the relevant information to others. Mr. Wallace's trial counsel failed to respond to a request on his behalf by inmate law clerks for a copy of his file and transcripts; he moved *pro se* for an order to produce those materials; the order was granted; but trial counsel failed to provide the file, explaining later that she did not provide the file because Mr. Wallace was intellectually impaired and illiterate, and that there was no record in her files of ever having received or responded to the court order. Though the state court itself eventually provided the plea and sentencing transcripts, it was too late. Mr. Wallace's state post-conviction application was untimely, as a result of which his federal habeas petition was untimely as well. The federal district court granted

equitable tolling based on Mr. Wallace's illiteracy, mental incapacity, and lack of access to his files, all of which were out of his control. Under Sec. 5 of H.R. 3035, federal review would have been barred.[12]

Terry Williams – Virginia

The Supreme Court of the United States would not have had jurisdiction to correct the unconstitutional death sentence in Williams v. Taylor, 529 U.S. 362 (2000). In that case, defense counsel failed to begin to prepare for the capital sentencing until a week beforehand, and thus failed to uncover extensive records graphically describing Williams' "nightmarish childhood" of abuse and privation, to introduce available evidence that Williams was "borderline mentally retarded," had suffered repeated head injuries at the hands of his father, and did not advance beyond sixth grade, to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, to discover the testimony of prison officials who described Williams as among the inmates least likely to act violently, dangerously, or provocatively, of a prison minister that Williams seemed to thrive in a more regimented environment, and of the same experts who testified on behalf of the State at trial that if kept in a structured environment, Williams would not pose a future danger to society. The same judge who presided at trial found ineffective performance and prejudice in the penalty phase. The Virginia Supreme Court found no prejudice by applying an erroneous legal standard of prejudice under federal law, and by failing to consider the effect of the evidence that was not presented. Under Sec. 6, this finding -- which was both contrary to and an unreasonable application of Supreme Court law -- would bar review.

Zachary Wilson - Pennsylvania

In Wilson v. Beard, 314 F.Supp.2d 434 (E.D. Pa. 2004), the federal district court granted habeas relief and ordered a new trial for a man serving a sentence of life without parole as a result of a Batson violation. This finding was based in part on a jury selection training tape made for the D.A.'s office by Jack McMahon, Wilson's trial prosecutor. In that training session, the prosecutor outlined his own practices in jury selection that included routinely striking minority venire persons.

For example, McMahon told the trainees:

> [I]n my experience, black women, young black women, are very bad. There's an antagonism. I guess maybe because they're downtrodden on two respects, they got two minorities, they're women and they're and blacks, so they're downtrodden in two areas. And they somehow want to take it out on somebody, and you don't want it to be you. And so younger black women are difficult, I've found.

. . .

[12] See Wallace v. Ignacio, 79 Fed.Appx. 292 (9th Cir. 2003); Wallace v. Ignacio, No. CV-N-99-0351-DWH, Memorandum, Decision and Order (D. Nev. July 8, 2004),

> In other words, the 40 come in--you'll never get it just right. You don't want to look there or go, "Is there a black back there? Wait a minute. Are you a black guy?" No, you don't want to do that. You just look and get an estimate. Like I said, 40 come in, you get 25, you say it's 25/15. I mark it down on my sheet, 25/15, and then I know, and then I know how many are left and I know where I am at all times in the jury selection process.

Commonwealth v. Basemore, 744 A.2d 717, 730-731 (Pa. 2000).

The existence of the tape was never revealed to Wilson prior to its public release by District Attorney Lynne Abraham during her election campaign against Jack McMahon. Thereafter, Wilson found out about it and filed a second post-conviction petition based upon the new evidence. The state courts held the claim was procedurally defaulted because it was not raised at trial or on appeal, even though the tape was kept secret for years by the prosecutor's office. The federal district court granted a new trial based upon the trial prosecutor's express statements about his practices of discrimination in jury selection in the tape.

Under H.R. 3035, Mr. Wilson would never have had federal review of his claim and the prosecutor's blatant discrimination would have been allowed to stand. Under Section 4, the federal courts could not have reviewed Mr. Wilson's claim, since the state court ruled that it was "procedurally defaulted," even though the tape was never released by the prosecutor until long after Mr. Wilson's first petition was completely litigated.

LIST OF ORGANIZATIONS AND INDIVIDUALS OPPOSING THE STREAMLINED PROCEDURES ACT

Organizations and Individuals Opposing the Streamlined Procedures Act

Organizations and Individuals

National Conference of Chief Justices
Conference of State Court Administrators
Judicial Conference of the United States
American Bar Association
NAACP Legal Defense Fund
Federal Public and Community Defenders
New York State Bar Association
American Association of Jewish Lawyers and Jurists
American Judicature Society
The Honorable Bob Barr, Former Member of Congress
Bishop Nicholas DiMarzio, Diocese of Brooklyn, Chairman, Domestic Policy Committee, United States Conference of Catholic Bishops
Bishop Arthur N. Tafoya, Diocese of Pueblo
The Honorable Mickey Edwards, Former Member of the House Republican Leadership
David A. Keene, Chairman, American Conservative Union
Chuck Muth, President, Citizen Outreach
John M. Snyder, Public Affairs Director, Citizens Committee for the Right to Keep and Bear Arms
John Whitehead, President, The Rutherford Institute
Helene Lentz, President, Catholic Sisters of St. Joseph, Kansas

Former Federal and State Prosecutors

Elizabeth K. Ainslie, Assistant U.S. Attorney, Eastern District of Pennsylvania (1979-1984)
T. J. Baynham Jr., Assistant U.S. Attorney, Eastern District of Texas (1976-1980)
Harold J. Bender, U.S. Attorney, Western District of North Carolina (1979-1982)
Rebecca A. Betts, U.S. Attorney, Southern District of West Virginia (1994-2001), Assistant U.S. Attorney, Southern District of West Virginia (1977-1981).
James S. Brady, U.S. Attorney, Western District of Michigan (1977-1981)
William G. Broaddus, Attorney General, Virginia (1985-1986)
Ferris Bond, Trial Attorney, U.S. Department of Justice Criminal Division Special Assistant U.S. Attorney (1978-1984)
G. Brian Brophy, Former District Attorney, Dane County, WI
James J. Brosnahan, Former Assistant U.S. Attorney, Arizona and California
Robert C. Bundy, U.S. Attorney, District of Alaska (1994-2001)
A. Bates Butler III, U.S. Attorney, District of Arizona (1980-81), First Assistant U.S. Attorney (1977-80), Deputy Pima County (Arizona) Attorney (1970-77)
J.A. "Tony" Canales, U.S. Attorney, Southern District of Texas (1977-1980)
Zachary W. Carter, U.S. Attorney, Eastern District of New York (1993-1999)
W.J. Michael Cody, Attorney General, Tennessee (1982-1988), U.S. Attorney, Western District of Tennessee (1977-1981), Chair of the Southern Conference of Attorneys General (1987-1988)
Patrick J. Cotter, Special Attorney, Strike Force on Organized Crime, E.D.N.Y. (1987-1990), Assistant U.S. Attorney, Eastern District of New York (1992-1998)

Robert J. DelTufo, Attorney General, New Jersey (2001-2003), U.S. Attorney New Jersey (1977-1980)
W. Thomas Dillard, U.S. Attorney, Eastern District of Tennessee (1981), U.S. Attorney, Northern District of Florida (1983-1986)
Demetrio Duarte, Jr. Assistant District Attorney, San Antonio, Texas (1984-1986)
Thomas Anthony Durkin, Assistant U.S. Attorney, Northern District of Illinois (1978-1984)
Thomas J. Farrell, Assistant U.S. Attorney, Western District of Pennsylvania (1995-2000)
John P. Flannery II, Assistant District Attorney, Bronx County, NY (1985-1986), Assistant U.S. Attorney, Southern District of New York (1974-1979)
Stephen G. Frye, Assistant U.S. Attorney, Western District of Kentucky (1990-1997)
Gil Garcetti, District Attorney, Los Angeles County, CA (1992-2000)
Mark Godsey, Assistant U.S. Attorney, Southern District of New York (1996-2001)
Lawrence S. Goldman, Assistant District Attorney, New York County, NY (1966-1971)
Raymond R. Granger, Assistant U.S. Attorney, Eastern District of New York (1992-1998)
Saul A. Green, U.S. Attorney, Eastern District of Michigan (1994-2001)
John E. Hall, Assistant U.S. Attorney, Eastern District of Missouri (1989-1993)
Hal Hardin, U.S. Attorney, Middle District of Tennessee (1977-1981)
Donald Heller, Assistant District Attorney, New York County (1969-1973), Assistant U.S. Attorney, Eastern District of California (1973-1977), Former Special Prosecutor, Eastern District of California
Philip Heymann, Former Deputy Attorney General, Assistant Attorney General (1978-198)
Richard Hirsch, Deputy District Attorney, Los Angeles County (1967-1971)
Bruce C. Houdek, Assistant U.S. Attorney, Western District of Missouri (1963-1968)
Michael J. Hrozencik, Deputy District Attorney, San Mateo County, CA (1996-2003)
Patrick M. Kiernan, Assistant Circuit Attorney & Section Chief, White Collar Crimes Unit, City of St. Louis (1994-1999 & 2001-2004)
Karyl Krug, Assistant Attorney General and Deputy Chief, Habeas Corpus Division, Office of the Attorney General of Texas (1999-2003)
Fern Laethem, Deputy District Attorney, Sacramento, CA (1976-1979), Assistant U.S. Attorney, Eastern District of California (1979-1980)
Kerry A. Lawrence, Assistant U.S. Attorney, Southern District of New York (1988-1999)
Laurie Levenson, Former Assistant U.S. Attorney, Central District of California
Raymond Levites, Assistant District Attorney, New York County (1971-1976), Assistant U.S. Attorney, Southern District of New York (1976-1987)
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David Zlotnick, Assistant U.S. Attorney, Washington, DC (1989-1993)

Current and Former Federal and State Judges

Hon. Timothy K. Lewis, Former Judge, United States Court of Appeals for the 3rd Circuit, Former Judge, United States District Court for the Western District of Pennsylvania, Former Federal Prosecutor
Hon. William H. Webster, Former Director, Federal Bureau of Investigation, Former Director, Central Intelligence Agency, Former Judge, United States Court of Appeals for the 8th Circuit, Former Judge, United District Court for the Eastern District of Missouri, Former United States Attorney for the Eastern District of Missouri
Hon. William H. Sessions, Former Director, Federal Bureau of Investigation, Former Chief United States District Judge for the Western District of Texas (1987-1987, Chief from 1980-1987)
Hon. Patricia Wald, Judge, United States Court of Appeals for D.C. Circuit (1977-1999), Chief Judge (1986-1991), Former Judge, International Criminal Tribunal for the Former Yugoslavia (1999-2001)
Hon. Robert J. Cindrich, Former United States Attorney for the Western District of Pennsylvania, Former United States District Court Judge Western District of Pennsylvania
Hon. Stephen M. Orlofsky, Former United States Magistrate for the District of New Jersey (1976-1980), Former United States District Judge for the District of New Jersey (1996-2003)
Hon. Bret H. Huggins, Former Judge, Arizona Superior Court (Navajo County, Arizona, October 1992 to January 1997)
Hon. Charles Baird, Retired Justice, 5th District Court of Appeals, Dallas, Texas
Hon. Ron Chapman, Retired Justice, 5th District Court of Appeals, Dallas, Texas

Hon. Harry Low, Retired Presiding Justice, California Court of Appeals (1983-1992), Judge, San Francisco County Superior Court (1974-1983), Judge, San Francisco Municipal Court (1967-1974), Commissioner, Worker's Compensation Appeal's Board (1966), Deputy Attorney General for California in the Civil and Tax Division (1956-1966)
Hon. Michael B. Bolan, Retired Judge of the Circuit Court of Cook County, Illinois, Former Assistant States Attorney Cook County Illinois, Former Assistant Attorney General, Illinois
Hon. Stanley G. Feldman, Retired Justice of the Arizona Supreme Court (1982-2002), Retired Chief Justice of the Arizona Supreme Court (1992-1996)
Hon. Sheila Murphy, Retired Presiding Judge of the 6th District Court, Cook County, Illinois
Hon. Joseph R. Grodin, Former Associate Justice, California Supreme Court
Hon. Charles B. Blackmar, Retired Judge and former Chief Justice, Supreme Court of Missouri, Active Senior Judge
Hon. Jim Exum, Jr., Former Chief Justice of the North Carolina Supreme Court
Hon. Sheila Murphy, Retired Presiding Judge of the 6th District Court, Cook County, Illinois
Hon. Rudolf J. Gerber, Former Judge, Superior Court for the State of Arizona (1979-1988) Former Judge, Court of Appeals of Arizona (1988-2001)
Hon. H. Lee Sarokin, Retired Judge, United States Court of Appeals for the 3rd Circuit
Hon. Daniel H. Weinstein, Retired Judge, California Superior Court.
Hon. Edward Stern, Retired Presiding Judge, San Francisco Superior Court, State of California
Hon Reta A. Strubhar, Retired Judge, Oklahoma Court of Criminal Appeals (1993-2001), Presiding Judge, Oklahoma Court of Criminal Appeals (1999-2000)
Hon. Stewart F. Hancock Jr., Former Associate Judge, New York State Court of Appeals (1986-1993)
Hon. Howard A. Levine, Former Associate Judge, New York State Court of Appeals
Jay Burnett, Retired Presiding Judge, Criminal District Court of Harris County, Texas
Shirley M. Hufstedler, Former Judge of the United States Court of Appeals for the 9th Circuit Former Justice of California Court of Appeal
Thomas Zlaket, Justice, Arizona Supreme Court, 1992-2002, Chief Justice 1997-2002
Myra Selby, Justice, Indiana Supreme Court, 1995-1999
Douglas Inge Johnstone, Former Justice, Alabama Supreme Court
Nathaniel R. Jones, Former Judge of the United States Court of Appeals for the 6th Circuit
Tom Ross, Former Judge of the North Carolina Superior Court, Former Director of the North Carolina Administrative Office of the Courts
Alan B. Handler, Former Justice of the New Jersey Supreme Court
Cecil B. Patterson, Jr., Former Judge of the Arizona Court of Appeals
John J. Gibbons, Former Chief Judge of the Third Circuit Court of Appeals

As of November 14, 2005

LETTER SUBMITTED BY FORMER FEDERAL AND STATE PROSECUTORS AND LAW ENFORCEMENT OFFICERS TO THE HONORABLE ALREN SPECTER, CHAIRMAN, SENATE JUDICIARY COMMITTEE

September 6, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Minority Member
House Judiciary Committee
B-351C Rayburn House Office Building
Washington, D.C. 20515

Re: The Streamlined Procedures Act (S. 1088 & H.R. 3035)

Dear Senators and Representatives:

In an earlier letter, the undersigned -- former prosecutors, law enforcement officers, and Justice Department officials who have served at the state and federal levels -- explained our opposition to S. 1088 and H.R. 3035. Since then, the Senate Judiciary Committee has adopted a substitute to S. 1088 that drops some objectionable provisions but retains others. So far as we are aware, H.R. 3035 has not been amended. This letter, endorsed by still more of our colleagues, reaffirms our reservations about these bills. Make no mistake, S. 1088 as it now stands is an improvement on the original Senate bill, but both this bill and H.R. 3035 remain deeply flawed and should not receive favorable action.

Some of us support capital punishment and some of us oppose it. While we applaud efforts to improve the functioning of our courts and to assist crime victims and their families, we strongly oppose these bills. We believe the bills would eviscerate federal habeas corpus review of state convictions, lead to protracted litigation and delays, and prevent the federal courts from correcting wrongful convictions in cases of actual innocence.

These bills would be counterproductive to our goals of ensuring public safety and fairness, achieved when the guilty are convicted and the innocent acquitted. The jurisdiction-stripping provisions turn a blind eye to the recurrent problems – such as incompetent or nonexistent counsel – that often thwart full consideration and correct determination of claims in state post-conviction proceedings. The purported exceptions for prisoners who are actually innocent – which require clear and convincing evidence of innocence and facts that could not have been discovered previously through the exercise of due diligence – create hurdles that few innocent prisoners will be able to overcome. Accordingly, enactment of these measures would result in the wrongful incarceration or execution of innocent persons.

Expediting the federal post-conviction process at any cost – especially at the cost of wrongfully convicting or executing innocent people while the guilty parties remain free to commit more crimes – is, we believe, something that the American people will not countenance. Nor should they.

But these bills would not expedite the process. In reality, they would engender years of litigation to resolve inconsistencies with the Anti-Terrorism and Effective Death Penalty Act (AEDPA), enacted fewer than ten years ago in response to the same concerns expressed by the sponsors of these current bills. The AEDPA includes strict, detailed procedures for screening federal habeas corpus petitions, including a one-year statute of limitations. After years of litigation, the federal courts have resolved most major

interpretive issues raised by the law. The proposed legislation is also inconsistent with the Justice For All Act, which became law less than a year ago.

The AEDPA took care of whatever problems there were with systemic delays. Statistics maintained by the Administrative Office of the United States Courts indicate that the number of federal habeas petitions has declined significantly over the past five years and habeas cases are resolved more quickly than other civil proceedings (most often on procedural grounds pursuant to the AEDPA). There is no reason to throw the system into disarray with another dramatic and potentially unconstitutional reworking of federal law.

We have spent part of our careers seeking justice for crime victims, and we know from firsthand experience the issues that victims face in the judicial system and the impact that their experience has on their lives. However, we do not think the anecdotal evidence about delay cited by the proponents of these bills justifies these extreme measures, and we fear that the bills will have exactly the opposite effect of what the proponents intend. They will cause significant delays in the processing of these cases, to the detriment of the legitimate concerns of crime victims.

It is important to consider the interests of victims and their families in the judicial process, but we believe these bills would do a disservice to those persons and would eviscerate the means by which federal courts ensure that innocent persons are not mistakenly convicted of crimes they did not commit. Certainly, Congress should not rush to judgment, and any changes to current procedures should be undertaken only after significant study, deliberation, and input from experts and interested persons and groups. Thank you for considering our views on this extremely important matter.

Sincerely,

Elizabeth K. Ainslie
Assistant U.S. Attorney, Eastern District of Pennsylvania
(1979-1984)

G. Brian Brophy
Former District Attorney, Dane County, WI

Robert C. Bundy
U.S. Attorney, District of Alaska (1994-2001)

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Attorney General, Tennessee (1984-1988)
U.S. Attorney, Western District of Tennessee (1977-1981)
Chair of the Southern Conference of Attorneys General
(1987-1988)

Robert J. Del'Tufo
Attorney General, New Jersey (2001-2003)
U.S. Attorney New Jersey (1977-1980)

Demetrio Duarte, Jr.
Assistant District Attorney, San Antonio, Texas
(1984-1986)

John P. Flannery II
Assistant District Attorney, Bronx County, NY
(1985-1986)
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Assistant District Attorney, Harris County, Texas (1969-1976)
Special Agent and Legal Advisor, FBI (1965-1968)

SIGNATURES IN PROGRESS

cc: Members of the House and Senate Judiciary Committees

Attachment to Letter to Specter, Leahy, Sensenbrenner and Conyers
Original July Letter to the Judiciary Committee

July 27, 2005

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable James Sensenbrenner, Jr.
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
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Re: The Streamlined Procedures Act (S. 1088 & H.R. 3035)

Dear Senators and Representatives:

The undersigned individuals are former prosecutors, law enforcement officers, and Justice Department officials who have served at the state and federal levels. Some of us support capital punishment and some of us oppose it. While we applaud efforts to improve the functioning of our courts and to assist crime victims and their families, we strongly oppose the proposed Streamlined Procedures Act. We believe the bill would eviscerate federal habeas corpus review of state convictions, lead to protracted litigation and delays, and prevent the federal courts from correcting wrongful convictions in cases of actual innocence.

The Streamlined Procedures Act is counterproductive to our goals of ensuring public safety and fairness, achieved when the guilty are convicted and the innocent acquitted. The bill's jurisdiction-stripping provisions turn a blind eye to the recurrent problems – such as incompetent or nonexistent counsel – that often thwart full consideration and correct determination of claims in state post-conviction proceedings. The bill's purported exception for prisoners who are actually innocent – which requires clear and convincing evidence of innocence and facts that could not have been discovered previously through the exercise of due diligence – creates a hurdle that few innocent prisoners will be able to overcome. As such, the bill will result in the wrongful incarceration or execution of innocent persons.

Expediting the federal post-conviction process at any cost – especially at the cost of wrongfully convicting or executing innocent people while the guilty parties remain free to commit more crimes – is, we believe, something that the American people will not countenance. Nor should they.

But the Streamlined Procedures Act does not expedite the process. In reality, it will engender years of litigation to resolve its inconsistencies with the Anti-Terrorism and Effective Death Penalty Act (AEDPA), enacted fewer than ten years ago in response to the same concerns expressed by the sponsors of this bill. The AEDPA includes strict, detailed procedures for screening federal habeas corpus petitions, including a one-year statute of limitations. After years of litigation, the federal courts have resolved most major interpretive issues raised by the law. The proposed legislation is also inconsistent with the Justice For All Act, which became law less than a year ago.

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We have spent part of our careers seeking justice for crime victims, and we know from firsthand experience the issues that victims face in the judicial system and the impact that their experience has on their lives. However, we do not think the anecdotal evidence about delay cited by the bill's proponents justifies these extreme measures, and we fear that the bill will have exactly the opposite effect of what the proponents intend. It will cause significant delays in the processing of these cases, to the detriment of the legitimate concerns of crime victims.

It is important to consider the interests of victims and their families in the judicial process, but we believe the Streamlined Procedures Act would do a disservice to those persons and would eviscerate the means by which federal courts ensure that innocent persons are not mistakenly convicted of crimes they did not commit. Certainly, Congress should not rush to judgment on this bill, and any changes to current procedures should be undertaken only after significant study, deliberation, and input from experts and interested persons and groups. Thank you for considering our views on this extremely important matter.

Sincerely,

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Attorney General, Virginia (1985-1986)

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Special Assistant U.S. Attorney (1978-1984)

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James J. Brosnahan
Former Assistant U.S. Attorney, Arizona and California

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Patrick J. Cotter
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Office of the Attorney General of Texas (1999-2003)

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Special Agent and Legal Advisor, FBI (1965-1968)

David Zlotnick
Assistant U.S. Attorney, Washington, DC (1989-1993)

cc: Members of the House and Senate Judiciary Committees

LETTER FROM THE HONORABLE TIMOTHY K. LEWIS, FORMER JUDGE, U.S. COURT OF APPEALS FOR THE 3RD CIRCUIT TO THE HONORABLE ARLEN SPECTER, CHAIRMAN, SENATE JUDICIARY COMMITTEE AND THE HONORABLE PATRICK J. LEAHY, RANKING MINORITY MEMBER, SENATE JUDICIARY COMMITTEE

Hon. Timothy K. Lewis
2001 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006-1825
Phone 202-419-4216
Fax 202-419-3454
tlewis@schnader.com

March 15, 2006

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senators Specter and Leahy:

A number of current and former state and federal judges (including some of the undersigned) wrote to you on July 12 to convey grave concerns about S. 1088, then pending before the Committee. We understand that the Committee has now adopted a substitute, offered by Senator Specter, which deviates from the original bill. Unfortunately, the substitute perpetuates important and troubling aspects of the original, and raises the same fundamental concerns identified in the July 12 previous letter. Moreover, the companion bill in the House, H.R. 3035, has not been amended and thus still contains all the troubling provisions originally identified in the prior letter (a copy of which is attached). In this letter, we want to make clear that the substitute, too, is deeply troubling and should not be enacted. Therefore, we continue to object to H.R. 3035 and S. 1088 in its present form.

Both S. 1088 (as amended by the substitute) and H.R. 3035 purport to "streamline" the federal habeas corpus system. In reality, however, the bills would both significantly delay the resolution of cases and dramatically diminish, if not entirely eliminate, the federal courts' ability to consider habeas corpus petitions. These bills would prevent the federal courts from granting many petitions, even in cases of actual innocence. They would also create significant inconsistencies with current statutes and longstanding judicial decisions, thus slowing the litigation process to the detriment of crime victims and others who legitimately wish the process to proceed expeditiously.

Ordinarily, we are reluctant to take a public position on pending bills. However, judges have a duty to speak out about legislation that affects the administration of justice.

S. 1088 and H.R. 3035 would largely eliminate federal courts' power to adjudicate critical federal issues in many habeas corpus cases involving state prisoners. It appears that the sponsors are

chiefly concerned that habeas corpus petitions filed by prisoners under sentence of death may move too slowly through the system. In our experience, delay is not a serious problem in death penalty cases. If it ever was, the Anti-Terrorism and Effective Death Penalty Act, a comprehensive reform of habeas corpus enacted fewer than ten years ago, eliminated the problem. Most circuit courts routinely place capital cases on an expedited schedule. If there are instances in which death penalty cases have required years to resolve, they are exceptions to the rule and there are legitimate and important reasons for that delay.

Importantly, whatever the concerns of the sponsors of the bills about capital cases, the proposals' impact is far more sweeping. The bills cover not only capital cases, but every state criminal conviction, capital and non-capital. Thus, they cover cases involving business, firearms, environmental, narcotics, and a vast array of other state offenses.

The bills profess to include exceptions so that innocent people may still obtain relief. As we read it, however, the language of the exception is so narrow that it will cover virtually no one. There are now too many instances to ignore in which innocent people were sentenced to prison or even to death, and it took years for the evidence of their innocence to come to light. The limits on federal court review that S. 1088 and H.R. 3035 propose dramatically increase the risk that innocent people will languish in prison or even on death row, and that the true perpetrators of these crimes will remain free, perhaps to commit more crimes.

As we noted, the effect would not be to streamline the process. Rather, the provisions in these bills would increase delays as courts will be forced to resolve inconsistencies between new language and the language in AEDPA and the Innocence Protection Act, the latter of which was enacted less than a year ago. It took almost 10 years for the courts to resolve questions about and challenges to AEDPA, and the constitutional questions and legal inconsistencies raised by S. 1088 (even as amended) and H.R. 3035 are, in our view, much more serious and complicated. In addition, as we read the bills, they would overturn several recent Supreme Court decisions interpreting AEDPA as well as several other decisions of the Rehnquist Court, many of which have helped to further streamline the system and eliminate delays. It serves no one's interest to engender the kind of delays that these bills would create.

Moreover, these bills present an extraordinary risk to the independence of the federal courts, and to the separation of powers that underlies our democracy. Several provisions would flatly repeal federal court jurisdiction to entertain federal questions that are pertinent to the proper disposition of cases. These provisions are not modest adjustments to habeas procedure; they would foreclose federal judicial power to adjudicate federal question cases in the ordinary course. This would be a radical action, inconsistent with the long history of our American legal system.

Finally, we are constrained to say that these bills reflect distrust and, we think, disrespect for the federal judiciary. Federal courts faithfully fulfill their responsibilities to the law and, as an independent branch of government, must be free to continue to do so.

It is difficult to see how legislation of this kind could improve the process and much easier to anticipate that it would complicate matters all the more. We agree with our colleagues who are chief justices of the highest courts of each state. At their recent national conference, they adopted a resolution opposing the kinds of habeas proposals contained in these bills, urging that Congress not rush to judgment, and recommending that there be "additional study and analysis . . . to evaluate the impact of AEDPA to date and the causes of unwarranted delay, if any, including the availability and allocation of resources, and to consider appropriate targeted

measures that will ameliorate the documented problems and avoid depriving the federal courts of their traditional jurisdiction without more supporting evidence."

At the very least, Congress should not rush to judgment. There have been no studies on the impact of AEDPA on delays, and so the need for new legislation to decrease delays is significantly in doubt. We strongly support a study by the Judicial Conference of the United States or other independent body to determine whether there is any need for legislation to achieve the professed goals of S. 1088 and H.R. 3035.

All of us have devoted our careers to ensuring that our country's laws are upheld. We strongly believe that these bills are misguided and dangerous and that they should not receive favorable action. We would be happy to convey our views in person to you and your colleagues.

Very truly yours,

Hon. Timothy K. Lewis	Former Judge, United States Court of Appeals for the 3rd Circuit Former Judge, United States District Court for the Western District of Pennsylvania Former Federal Prosecutor
Hon. William H. Webster	Former Director, Federal Bureau of Investigation Former Director, Central Intelligence Agency Former Judge, United States Court of Appeals for the 8th Circuit Former Judge, United District Court for the Eastern District of Missouri, Former United States Attorney for the Eastern District of Missouri
Hon. William S. Sessions	Former Director, Federal Bureau of Investigation Former Chief United States District Judge for the Western District of Texas (1974-1987, Chief from 1980–1987)
Hon. Patricia Wald J	Judge, United States Court of Appeals for D.C. Circuit (1977-1999) Chief Judge (1986–1991), Former Judge, International Criminal Tribunal for the Former Yugoslavia (1999-2001
Hon. Robert J. Cindrich	Former United States Attorney for the Western District of Pennsylvania, Former United States District Court Judge Western District of Pennsylvania
Hon. Stephen M. Orlofsky	Former United States Magistrate Judge for the District of New Jersey (1976-1980) Former United States District Judge for the District of New Jersey (1996-2003)
Hon. Charles Baird	Retired Justice, 5th District Court of Appeals, Dallas, Texas
Hon. Ron Chapman	Retired Justice, 5th District Court of Appeals, Dallas, Texas

Hon. Charles B. Blackmar	Retired Judge and former Chief Justice, Supreme Court of Missouri, Active Senior Judge
Hon. Jim Exum, Jr.	Former Chief Justice of the North Carolina Supreme Court
Hon. Sheila Murphy	Retired Presiding Judge of the 6th District Court, Cook County
Hon. Rudolf J. Gerber	Former Judge, Superior Court for the State of Arizona (1979-1988), Former Judge, Court of Appeals of Arizona (1988-2001)
Hon. H. Lee Sarokin	Retired Judge, United States Court of Appeals for the 3rd Circuit
Hon. Edward Stern	Retired Presiding Judge, San Francisco Superior Court, State of California
Hon Reta A. Strubhar	Retired Judge, Oklahoma Court of Criminal Appeals (1993-2004) Presiding Judge, Oklahoma Ct of Criminal Appeals (1999-2000)
Hon. Stewart F. Hancock Jr.	Former Associate Judge, New York State Court of Appeals (1986-1993)
Hon. Howard A. Levine	Former Associate Judge, New York State Court of Appeals
Jay Burnett	Retired Presiding Judge, Criminal District Court of Harris County, Texas
Shirley M. Hufstedler	Former Judge of the United States Court of Appeals for the 9th Circuit Former Justice of California Court of Appeal
Thomas Zlaket	Justice, Arizona Supreme Court, 1992-2002, Chief Justice 1997 -2002
Myra Selby Justice,	Indiana Supreme Court , 1995 -1999
Douglas Inge Johnstone	Former Justice, Alabama Supreme Court
Nathaniel R. Jones	Former Judge of the United States Court of Appeals for the 6th Circuit
Tom Ross	Former Judge of the North Carolina Superior Court, Former Director of the North Carolina Administrative Office of the Courts.
Alan B. Handler	Former Justice of the New Jersey Supreme Court
Cecil B. Patterson, Jr.	Former Judge of the Arizona Court of Appeals
John J. Gibbons	Former Chief Judge of the Third Circuit Court of Appeals

Attachment to Letter to Specter and Leahy
Original July letter to the Judiciary Committee
(Includes several signatures added after original delivery)

Hon. Timothy K. Lewis
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Washington, D.C. 20006-1825
Phone 202-419-4216
Fax 202-419-3454
tlewis@schnader.com

July 27, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senators Specter and Leahy:

We are former judges who write to convey our grave concerns about S. 1088, which purports to "streamline" the federal habeas corpus system, but which would in reality dramatically diminish, if not entirely eliminate, the federal courts' ability to consider habeas corpus petitions. Our concerns arise because this bill would prevent the federal courts from granting many petitions, even in cases of actual innocence. It would also create significant inconsistencies with current statutes and longstanding judicial decisions, thus slowing the litigation process to the detriment of crime victims and others who legitimately wish the process to proceed expeditiously.

Ordinarily, we are reluctant to take a public position on pending bills. However, judges have a duty to speak out about legislation that affects the administration of justice. Active judges may hesitate to respond, so we feel a responsibility to take the unusual step of making our position known.

S. 1088, and its companion House bill, H.R. 3035, would largely eliminate federal courts' power to adjudicate critical federal issues in many habeas corpus cases involving state prisoners. It appears that the sponsors are chiefly concerned that habeas corpus petitions filed by prisoners under sentence of death may move too slowly through the system. In our experience, delay is not a serious problem in death penalty cases. If it ever was, the Anti-Terrorism and Effective Death Penalty Act, a comprehensive reform of habeas corpus enacted fewer than ten years ago, eliminated the problem. Most circuit courts routinely place capital cases on an expedited schedule. If there are instances in which death penalty cases have required years to resolve, they are exceptions to the rule and there are legitimate and important reasons for that delay.

Importantly, whatever the concerns of the sponsors of the bill about capital cases, its impact is far more sweeping. The bill covers not only capital cases, but every state criminal conviction, capital and non-capital. Thus, it covers cases involving business, firearms, environmental, narcotics, and a vast array of other state offenses.

The bill professes to include an exception so that innocent people may still obtain relief. As we read it, however, the language of the exception is so narrow that it will cover virtually no one. There are now too many instances to ignore in which innocent people were sentenced to prison or even to death, and it took years for the evidence of their innocence to come to light. The limits on federal court review that S. 1088 proposes dramatically increase the risk that innocent people will languish in prison or even on death row, and that the true perpetrators of these crimes will remain free, perhaps to commit more crimes.

As we noted, the bill's effect would not be to streamline the process. Rather, it would delay it as courts will be forced to resolve inconsistencies between its language and the language in AEDPA and the Innocence Protection Act, the latter of which was enacted less than a year ago. It took almost 10 years for the courts to resolve questions about and challenges to AEDPA, and the constitutional questions and legal inconsistencies raised by S. 1088 are, in our view, much more serious and complicated. In addition, as we read the bill, it would overturn several recent Supreme Court decisions interpreting AEDPA as well as several other decisions of the Rehnquist Court, many of which have helped to further streamline the system and eliminate delays. It serves no one's interest to engender the kind of delays that this bill will create.

Moreover, this bill presents an extraordinary risk to the independence of the federal courts and to the separation of powers that underlies our democracy. Several provisions would flatly repeal federal court jurisdiction to entertain federal questions that are pertinent to the proper disposition of cases. These provisions are not modest adjustments to habeas procedure; they would foreclose federal judicial power to adjudicate federal question cases in the ordinary course. This would be a radical action, inconsistent with the long history of our American legal system.

Finally, we are constrained to say that this bill reflects distrust and, we think, disrespect for the federal judiciary. We frankly resent the implication that federal judges are not performing their constitutional functions in a proper and efficient manner. The truth is otherwise. Federal courts faithfully fulfill their responsibilities to the law and, as an independent branch of government, must be free to continue to do so.

It is difficult to see how legislation of this kind could improve the process and much easier to anticipate that it would complicate matters all the more. At the very least, Congress should not rush to judgment on this bill. There have been no studies on the impact of AEDPA on delays, and so the need for new legislation to decrease delays is significantly in doubt. We strongly support a study by the Judicial Conference of the United States or other independent body to determine whether there is any need for legislation to achieve the professed goals of S. 1088.

All of us have devoted our careers to ensuring that our country's laws are upheld. We strongly believe that this bill is misguided and dangerous and that it should not receive favorable action. We would be happy to convey our views in person to you and your colleagues.

Very truly yours,

Hon. Timothy K. Lewis Former Judge, United States Court of Appeals for the 3rd Circuit

	Former Judge, United States District Court for the Western District of Pennsylvania Former Federal Prosecutor
Hon. William H. Webster	Former Director, Federal Bureau of Investigation Former Director, Central Intelligence Agency Former Judge, United States Court of Appeals for the 8th Circuit Former Judge, United District Court for the Eastern District of Missouri, Former United States Attorney for the Eastern District of Missouri
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Hon. Stephen M. Orlofsky	Former United States Magistrate Judge for the District of New Jersey (1976-1980) Former United States District Judge for the District of New Jersey (1996-2003)
Hon. Bret H. Huggins	Former Judge, Arizona Superior Court (Navajo County, Arizona) (October 1992 to January 1997)
Hon. Charles Baird	Retired Justice, 5th District Court of Appeals, Dallas, Texas
Hon. Ron Chapman	Retired Justice, 5th District Court of Appeals, Dallas, Texas
Hon. Harry Low (Retired)	Presiding Justice, California Court of Appeals (1983-1992) Judge, San Francisco County Superior Court (1974-1983) Judge, San Francisco Municipal Court (1967-1974) Commissioner, Worker's Compensation Appeals Board (1966) Deputy Attorney General for California in the Civil and Tax Division (1956-1966)
Hon. Michael B. Bolan	Retired Judge of the Circuit Court of Cook County, Illinois Former Assistant States Attorney, Cook County, Illinois Former Assistant Attorney General, Illinois

Hon. Stanley G. Feldman	Retired Justice of the Arizona Supreme Court (1982-2002) Retired Chief Justice of the Arizona Supreme Court (1992-1996)
Hon. Joseph R. Grodin	Former Associate Justice, California Supreme Court
Hon. Charles B. Blackmar	Retired Judge and former Chief Justice, Supreme Court of Missouri Active Senior Judge
Hon. Jim Exum, Jr.	Former Chief Justice of the North Carolina Supreme Court
Hon. Sheila Murphy	Retired Presiding Judge of the 6th District Court, Cook County, Illinois
Hon. Rudolf J. Gerber	Former Judge, Superior Court for the State of Arizona (1979-1988) Former Judge, Court of Appeals of Arizona (1988-2001)
Hon. H. Lee Sarokin	Retired Judge, United States Court of Appeals for the 3rd Circuit
Hon. Daniel H. Weinstein	Retired Judge, California Superior Court
Hon. Edward Stern	Retired Presiding Judge, San Francisco Superior Court, State of California
Hon Reta A. Strubhar	Retired Judge, Oklahoma Court of Criminal Appeals (1993-2004) Presiding Judge, Oklahoma Ct of Criminal Appeals (1999-2000)
Hon. Stewart F. Hancock Jr.	Former Associate Judge, New York State Court of Appeals (1986-1993)
Hon. Howard A. Levine	Former Associate Judge, New York State Court of Appeals

(List as of August 8, 2005)

LETTER SUBMITTED BY BOB BARR, FORMER MEMBER OF CONGRESS, THE AMERICAN CONSERVATIVE UNION

July 28, 2005

Dear Senator:

We understand that the Senate Judiciary Committee is scheduled to mark up S. 1088, the Streamlined Procedures Act, this morning.

We are conservatives who write to convey our serious concerns about S. 1088 and to any other legislation that rewrites the habeas corpus laws.

Legislation of this kind should not be acted upon in haste or without real consideration of the unintended consequences of acting without knowledge of what those consequences might include.

At the very least, we urge the Committee to delay any action on such proposals until there has been adequate time to study their impact, and whether any legislation in this area is needed.

As conservatives, we believe in a limited government. We share a profound distrust of the government's ability to "get it right."

This distrust is especially applicable in the criminal justice arena. In recent years a re-examination of evidence in numerous cases has led to the exoneration and release of men and women held for and convicted of crimes they never committed. We believe the guilty should be held accountable, but that we must make certain that those we punish are, in fact, guilty and the sad fact is that this has not always and probably never will always be the case. When we don't "get it right," the innocent suffer by being wrongly incarcerated or even executed and of course the real perpetrators remain free to commit new crimes.

Given this reality, we are extremely concerned about any laws that would decrease the ability of reviewing courts to identify and remedy error in criminal cases and, frankly, we fear that S. 1088 would do just that.

A number of us support the death penalty and swift and certain justice for perpetrators of crime. We believe that the rights of victims of crime should be protected. We are not at

all sure, however, that the enactment of S. 1088 will further any of these laudable objectives.

Any rewrite of the extremely complicated body of law that is habeas corpus will result in countless new issues that will have to be resolved by the courts and this will inevitably result in delay and confusion for prosecutors, victims, courts, and criminal defendants.

We wonder if there is any real need for legislation in this area. At the very least, there should be a careful study of the impact of the 1996 Anti-Terrorism and Effective Death Penalty Act, and whether it has already accomplished the objectives the sponsors seek.

We believe the Committee should spend far more time than it has thus far examining the very real concerns inherent in such proposals. It would be a fundamental mistake to strip the federal courts of their jurisdiction to consider habeas corpus petitions from state prisoners without a real understanding of the possible consequences of doing so. Because the criminal justice system can, as we have seen, convict innocent people and sentence them to prison or even to death, we should be *expanding* the courts' ability to consider petitions raising egregious constitutional violations and evidence of actual innocence.

We urge the Committee to postpone any action on S. 1088, and any other legislation that rewrites the habeas corpus laws, until it has more carefully examined these proposals.

Sincerely,

Bob Barr, former Member of Congress
Mickey Edwards, former Member of the House Republican Leadership
David A. Keene, American Conservative Union
Chuck Muth, Citizen Outreach
John M. Snyder, Citizens Committee for the Right to Keep and Bear Arms

1007 Cameron Street, Alexandria, VA 22314 Phone: (703) 836-8602 Fax: (703) 836-8606

VARIOUS EDITORIALS SUBMITTED IN OPPOSITION TO H.R. 3035, THE "STREAMLINED PROCEDURES ACT"

Excerpts from Editorials Opposing the Streamlined Procedures Act

Hands Off Habeas
"Proponents of the so-called Streamlined Procedures Act justify this radical piece of legislation by citing the supposedly intrusive scrutiny of federal courts of state capital convictions and the delays that ensue. So it is particularly instructive that chief justices of the nation's state court systems have voted overwhelmingly to urge Congress to slow down."

-- The Washington Post
08/19/05

Court Gutting in Congress
"It is appalling that lawmakers would visit such destruction on a basic human right that's been painfully secured across three centuries of jurisprudence. Repeatedly, federal court scrutiny has laid bare the shoddy state of capital justice in the states. DNA science has drawn attention to the frequency of false convictions...Yet the proposal would allow state courts greater cover in pronouncing their own flawed convictions as too 'harmless and nonprejudicial' to merit further review."

-- The New York Times
07/16/05

Streamline or Steamroll?
"Exonerations of people wrongly convicted of a crime typically start with a finding that there was a procedural flaw in the case, and only subsequent fair hearings establish the truth. That's one reason Congress ought to stand up for the due process rights of all Americans."

-- Los Angeles Times
07/13/05

Unfair trial? Too bad
"The two bills - the House version is only slightly more draconian than Senate's - would create virtually insurmountable procedural hurdles to all federal habeas review...While there is an innocence exception, it is so narrowly drawn that many of the innocent people who have recently left death row would not have been able to meet the proposed standard."

-- St. Petersburg Times
08/26/05

Don't Rush to Judgment
"The innocently titled Streamlined Procedures Act amounts to an unconscionable assault on federal court oversight of the fairness of criminal trials in the state courts...[the] measure would deny or sharply restrict the reach of federal judges in hearing habeas-corpus claims from convicts...In death-row cases, the stakes are as high as they come. In other criminal matters, the federal judiciary's policing of such cases assures that our criminal justice system is truly just."

-- Knight-Ridder News Wire
07/23/05

Death Penalty: Dead Man Talking
"...[C]ases of innocence seldom emerge full-blown. Prisoners get new trials built not upon oak-solid evidence of innocence, but upon the thin reeds of technicalities artfully woven together: A defense lawyer made an ineffective argument; a prosecutor failed to turn over key evidence. The Kyl bill would cut off *habeas corpus* for those intermediate appeals, making it nearly impossible to construct a case of innocence."

-- St. Louis Post-Dispatch (MO)
07/13/05

Trial and Error: Death Penalty
Proof that Innocent People Have Been Executed Could Save Other From the Same Fate
"It is a frightening proposal. DNA testing has proven, without a doubt, that innocent people are sentenced to death. Closing a window of appeal increases the likelihood that they will be executed."

-- Kansas City Star (MO)
07/15/05

Rush to Execution Leaves Justice in the Dust
"What's notable about the bill is who opposes it. It's not just the usual opponents of the death penalty in general. Two weeks ago, the national Conference of Chief Justices passed a resolution against the bill, with only the chief justice of Texas not joining the opinion. Although the bill's sponsors contend it will not prevent genuine claims of innocence from being heard, a dozen former federal judges wrote to the Senate Judiciary Committee to say that 'the language of the exception is so narrow that it will cover virtually no one.' "

-- San Jose Mercury News
08/19/05

Executing Bad Judgment
"Last Thursday, Senate Republicans delayed acting on a bill that would grease the route for faster executions. What they should have done was shred this legislation as if it were an old check, bury it deep and then urge their House colleagues to do the same. Pass either bill to restrict a defendant's access to federal review, and due process will no longer be a hallmark of American justice."

-- *The Journal Gazette* (IN)
08/02/05

Justice Right to Worry About Death Penalty
"Congress passed a measure in 1996 to streamline death penalty procedures, but Kyl and Lungren want an even faster rush to judgment. Yet, according to the Death Penalty Information Center, more than three dozen death-row inmates have been exonerated since 2000. Surely, even advocates of capital punishment should be concerned that they not execute the innocent."

-- *Denver Post*
08/09/05

Stop This Bill
"Congress has a novel response to the rash of prisoners over the past few years who have been exonerated of capital crimes after being tried and convicted: Keep similar cases our of court. Both chambers of the national legislature are quietly moving a particularly ugly piece of legislation designed to gut the legal means by which prisoners prove their innocence...It is no exaggeration to say that if this bill becomes law, it will consign innocent people to long-term incarceration or death."

-- *The Washington Post*
07/10/05

Limits on Appeals
"DNA and other post-conviction exonerations have exposed ugly cracks in the criminal justice system. When mounting evidence shows a disquieting number of innocent people are in prison or on death row, Congress ought not make it harder for the wrongfully convicted to get justice."

-- *The Detroit Free Press*
07/19/05

At a Time When the American Public is Growing More Queasy About the Death Penalty, Arizona Sen. Jon Kyl Wants to Limit the Appeals Process
"The legislation that Kyl and Lungren have introduced would serve to degrade an already imperfect method for putting people to death. They would deny appeals because the process takes too long. But time is exactly what is needed to make sure that if people are sent to their deaths, we are sure they are guilty."

-- *Arizona Daily Star*
07/09/05

Justice Delayed and Denied
"[Kyl and Lundgren's] legislation would prevent federal review of cases from states that the U.S. Department of Justice has certified as having competent defense counsel. Inmates in those states would have to show evidence of their innocence -- not just flaws in the fairness or thoroughness of the proceedings against them -- to get a federal hearing. One of the problems with this... is that many of the recent exonerations resulted from evidence that came to light as a result of appeals based on trial errors -- such as incompetent lawyering, jury bias, destruction of evidence or prosecutorial misconduct."

-- *San Francisco Chronicle*
07/14/05

Death Tales
"The 'Streamlined Procedures Act of 2005' -- spiffy title -- is designed to make sure people convicted of murder are quickly punished without federal courts meddling into the sorts of abuses we have been hearing so much about in recent years: sleeping and drunken death-case attorneys, prosecution witnesses bribed with reduced sentences, the man convicted even though he was at a busy picnic miles away at the time of the crime, the string of Death Row inmates proven innocent by their DNA."

-- *Keene Sentinel* (NH)
07/23/05

Editorial Coverage Index

The Washington Post. "Kill Bill," September 29, 2005.

The Washington Post. "Hands Off Habeas," August 19, 2005.

The Washington Post. "Stop This Bill," July 10, 2005.

The New York Times. "Court Gutting in Congress," July 16, 2005.

Los Angeles Times. "Streamline or Steamroll?," July 13, 2005.

Arizona Daily Star. "At a Time When the American Public is Growing More Queasy About the Death Penalty, Arizona Sen. Jon Kyl Wants to Limit the Appeals Process," July 9, 2005.

Concord Monitor. (NH) *Los Angeles Times Reprint.* "Steamrolled Rights; Don't Erode Ability to Appeal Death Sentences," July 17, 2005.

Denver Post. "Justice right to worry about death penalty," August 9, 2005.

Detroit Free Press. "Limits on Appeals," July 19, 2005.

The Hartford Courant. "Don't Limit Habeas Appeals," October 25, 2005.

The Journal Gazette. (IN) "Executing bad judgment," August 2, 2005.

Kansas City Star. (MO) "Inmates' Rights: Brownback Should Vote 'No,'" October 6, 2005.

Kansas City Star. (MO) "Trial and Error: Death Penalty: Proof That Innocent People Have Been Executed Could Save Others From the Same Fate," July 15, 2005.

Keene Sentinel. (NH) "Death tales," July 23, 2005.

Knight Ridder News Wire. "Don't Rush to Judgment," July 23, 2005. (Philadelphia Inquirer)

The Philadelphia Inquirer. "The Miers Impact Put the Brakes on a Bill that Speeds Up Executions," October 28, 2005.

St. Louis Post-Dispatch. "Death Penalty: Dead man talking," July 13, 2005.

St. Petersburg Times. "A threat to due process," October 31, 2005.

St. Petersburg Times. "Unfair trial? Too Bad," August 26, 2005.

San Francisco Chronicle. "Justice Delayed and Denied," July 14, 2005.

San Jose Mercury News. "Rush to Execution Leaves Justice in the Dust," August 19, 2005.

The Tennessean. "Bill derails system of justice," July 22, 2005.

The Washington Post
EDITORIAL
September 29, 2005

Kill Bill

TODAY, THE SENATE Judiciary Committee takes up the so-called Streamlined Procedures Act, a bill that radically scales back federal review of state convictions and death sentences. Calling what this bill does "streamlining" is a little like calling a scalping a haircut. A better name would have been the Eliminating Essential Legal Protections Act. What it does, in effect, is curtail the federal role in policing constitutional violations in state criminal justice systems using the venerable mechanism of habeas corpus. Judiciary Committee Chairman Arlen Specter (R-Pa.) has moderated some of the worst provisions, but this bill is beyond rehabilitation. If it passes, the chances that innocent people will be executed will go way up.

Even after Mr. Specter's efforts, the bill creates onerous procedural hurdles for convicts. It tries to speed up habeas corpus proceedings by making it easier for convicts to lose their right to appeal to federal courts. For example, if a convict fails to raise an argument in state court, federal courts will have no jurisdiction over the claim even if there was a good reason for the failure. If he filed a claim in federal court before going to state court, that claim would be thrown out and lost forever. Supposed exceptions for cases of actual innocence are so narrow as to be useless. And the bill would allow states to race petitions through the courts if they can convince the attorney general that they have an adequate system for providing lawyers in post-conviction proceedings.

Why the radical change? We see no reason. Nor does the Judicial Conference, the administrative arm of the federal judiciary. Like a national organization of state-court chief justices, which came out against the bill this summer, the Judicial Conference made clear that it "does not believe" in "the need for a comprehensive overhaul of federal habeas jurisprudence." Indeed, if anything, federal rules are too strict. Around the country, concerns about potentially irreversible miscarriages of justice have led state legislatures to take a hard look at their death penalty systems. Congress itself passed important legislation not too long ago to encourage states to improve the quality of lawyers they provide capital defendants. This bill would more than undo that progress.

Washington Post
EDITORIAL
August 19, 2005

Hands Off Habeas

PROPONENTS OF the so-called Streamlined Procedures Act justify this radical piece of legislation by citing the supposedly intrusive scrutiny of federal courts of state capital convictions and the delays that ensue. So it is particularly instructive that chief justices of the nation's state court systems have voted overwhelmingly to urge Congress to slow down. The chief justices would be, after all, the apparent beneficiaries of the bill, which would gut federal review of the convictions they oversee. Yet in a strongly worded resolution by the Conference of Chief Justices -- with only the chief justice of death-happy Texas voting no -- the heads of state judicial systems said in essence, "Thanks, but no thanks." Cooler heads in Congress ought to listen.

The bill, pushed in the Senate by Jon Kyl (R-Ariz.) and in the House by Daniel E. Lungren (R-Calif.), would be an unmitigated disaster. Habeas corpus is the centuries-old device by which inmates challenge the legality of their detentions. In modern times it has become the essential vehicle by which convicts on death row or serving lengthy prison terms attack their state-court convictions. Many innocent people owe their freedom to their ability to file habeas petitions.

Yet in many death cases, the most drastic versions of the bill would eliminate federal review entirely. Even where they didn't do that, they would create onerous procedural roadblocks and prevent federal courts from considering key issues. They would bar federal courts from reviewing most capital sentencing and create arbitrary timetables for federal appeals courts to handle these cases. All of which, you might think, would be music to the ears of state court justices, for whom it is a big blank check.

Unless, of course, those chief justices are interested in, well, justice. The resolution, adopted jointly with the Conference of State Court Administrators, notes that "the changes contemplated in these measures may preclude state defendants in both capital and non-capital matters from seeking habeas corpus relief" with "unknown consequences for the state courts and for the administration of justice." It recommends "delaying further action" pending additional study to evaluate whether change in current law is even necessary. If it is, the justices urge Congress "to consider appropriate targeted measures that will ameliorate the documented problems and avoid depriving the federal courts of their traditional jurisdiction without more supporting evidence."

The Senate Judiciary Committee is poised to take up a somewhat less dire version of the bill when Congress returns. This rebuke ought to give senators pause about even that. At a minimum, any senator contemplating voting for it needs to ask why the Senate should be insulating state courts from review against their apparent will.

Washington Post
EDITORIAL
July 10, 2005

Stop This Bill

CONGRESS HAS a novel response to the rash of prisoners over the past few years who have been exonerated of capital crimes after being tried and convicted: Keep similar cases out of court. Both chambers of the national legislature are quietly moving a particularly ugly piece of legislation designed to gut the legal means by which prisoners prove their innocence.

Habeas corpus is the age-old legal process by which federal courts review the legality of detentions. In the modern era, it has been the pivotal vehicle through which those on death row or serving long sentences in prison can challenge their state-court convictions. Congress in 1996 rolled back habeas review considerably; federal courts have similarly shown greater deference -- often too much deference -- to flawed state proceedings. But the so-called Streamlined Procedures Act of 2005 takes the evisceration of habeas review, particularly in capital cases, to a whole new level. It should not become law. For a great many capital cases, the bill would eliminate federal review entirely. Federal courts would be unable to review almost all capital convictions from states certified by the Justice Department as providing competent counsel to convicts to challenge their convictions under state procedures. Although the bill, versions of which differ slightly between the chambers, provides a purported exception for cases in which new evidence completely undermines a conviction, this is drawn so narrowly that it is likely to be useless -- even in identifying cases of actual innocence.

It gets worse. The bill, pushed by Rep. Daniel E. Lungren (R-Calif.) in the House and Jon Kyl (R-Ariz.) in the Senate, would impose onerous new procedural hurdles on inmates seeking federal review -- those, that is, whom it doesn't bar from court altogether. It would bar the courts from considering key issues raised by those cases and insulate most capital sentencing from federal scrutiny. It also would dictate arbitrary timetables for federal appeals courts to resolve habeas cases. This would be a dramatic change in federal law -- and entirely for the worse.

The legislation would be simply laughable, except that it has alarming momentum. A House subcommittee held a hearing recently, and the Senate Judiciary Committee is scheduled to hold one and then mark up the bill this week. Both Judiciary Committee chairmen surely know better. House Judiciary Chairman F. James Sensenbrenner Jr. (R-Wis.), after all, has fought for better funding and training for capital defense lawyers. And Senate Judiciary Chairman Arlen Specter (R-Pa.) has long opposed efforts to strip federal courts of jurisdiction over critical subjects. Neither has yet taken a public position on the bill. Each needs to take a careful look. It is no exaggeration to say that if this bill becomes law, it will consign innocent people to long-term incarceration or death.

New York Times
EDITORIAL
July 16, 2005

Court Gutting in Congress

Congress is quietly considering whether to destroy one of the pillars of constitutional law: the habeas corpus power of the federal courts to determine whether an indigent defendant has been unjustly sentenced to death in state courts.

A bill making alarming progress in committee would effectively strip federal courts of most review power and shift it to the attorney general. That's right: the chief prosecutor of the United States would become the judge of whether state courts behave fairly enough toward defendants appealing capital convictions. If a state system was certified as up to snuff, then the federal courts would lose their jurisdiction and condemned defendants their last hope.

It is appalling that lawmakers would visit such destruction on a basic human right that's been painfully secured across three centuries of jurisprudence. Repeatedly, federal court scrutiny has laid bare the shoddy state of capital justice in the states. DNA science has drawn attention to the frequency of false convictions.

The injustices of the criminal court process flow considerably from the widespread lack of competent defense counsel in the first place. Yet the proposal would allow state courts greater cover in pronouncing their own flawed convictions as too "harmless and nonprejudicial" to merit further review.

Proponents insist that truly meritorious complaints would somehow survive under this oppressive bill. In fact, it would make the execution of the innocent even more likely than it already is.

Los Angeles Times
EDITORIAL
July 13, 2005

Streamline or steamroll?

THERE IS A GROWING awareness in this country, given a growing number of exonerations based on DNA and other evidence, that it's too easy for innocent people to land on death row. These cases help explain why public support for the death penalty has been eroding.

The U.S. Supreme Court is increasingly alarmed by the quality of legal representation afforded defendants in capital cases, and some states are hesitant to apply the death penalty given mounting doubts about the level of error built into their judicial systems. So it's the opposite of logic to see some in Congress moving the other way, seeking to curtail the ability of federal courts to hear claims of an improper trial from defendants convicted in state court.

The Senate today holds a hearing on the ill-advised and Orwellian-sounding Streamlined Procedures Act. What this legislation and its House companion threaten to streamline is the execution or lifetime incarceration of the innocent. The federal judiciary is the ultimate guarantor of Americans' constitutional rights, including the right to due process, and it's sad to see members of Congress (including California's former attorney general, GOP Rep. Dan Lungren) eager to further limit federal oversight over flawed state proceedings.

The centerpiece of the legislation would eliminate the review of most claims for cases coming out of states that the U.S. Department of Justice has certified as providing defendants with competent counsel. Should we leave it up to Atty. Gen. Alberto R. Gonzales, he of the torture memos, to pass judgment on the quality of representation given convicts in Texas? Sounds like a great idea if you are a state prosecutor annoyed at those pesky federal judges.

The measure may even be unconstitutional — it's for a federal court, not a federal prosecutor, to determine whether states are violating the U.S. Constitution.

To sell their "streamlining" law, its proponents are offering to leave the door to the federal courthouse ajar for defendants who can point to evidence of their actual innocence. This is a cynical ploy. It's pretty hard to produce such evidence if your right to a competent lawyer has been denied, or if a prosecutor got someone to lie on the witness stand.

Exonerations of people wrongly convicted of a crime typically start with a finding that there was a procedural flaw in the case, and only subsequent fair hearings establish the

truth. That's one reason Congress ought to stand up for the due process rights of all Americans.

Arizona Daily Star

EDITORIAL
July 9, 2005

The Star's view: At a time when the American public is growing more queasy about the death penalty, Arizona Sen. Jon Kyl wants to limit the appeals process.

Given recent revelations of an imperfect justice system that wrongfully sends people to death row, we find it incredible that Arizona Sen. Jon Kyl wants to put people to death faster.

Kyl, a Republican, has introduced the euphemistically named Streamlined Procedures Act of 2005 in the Senate. The bill would limit the number of times a defendant could have the case reviewed before execution. The legislation has been introduced in the House by Rep. Dan Lungren, R-Calif.

It is expected to win wide approval in the House, where supporters see the checks and balances in the process as a manipulation of the system. This legislation would speed up the execution process and allow Congress to tell constituents it is tough on crime.

Capital punishment is one of those cultural wedge issues on which opposing sides may never agree. Some see it as punishment for the ultimate crime. Others see no justice when punishment is as barbaric as the crime.

Yet we have to ask why, while at war fighting terrorism at home and abroad, our elected officials are reaching for the political margins to find issues that will divide the country.

In fact, there are plenty of reasons why this "get tough with the death penalty" proposal should be turned down. The most compelling is recent evidence that prosecutors have put innocent people on death row.

What's more, public opinion, slowly, is turning away from capital punishment. We have no doubt that the death penalty will become a thing of the past, along with such other historical artifacts as lynchings, slavery and witch hunts.

Even the U.S. Supreme Court has been chipping away at capital punishment. It once was acceptable to put to death retarded defendants. And until recently, it was acceptable for states to impose the death penalty on teenagers. Both are now widely accepted as wrong.

Advocates of the death penalty should ask themselves why the American people would want to restrict judicial oversight for only those on death row. At what point will lawmakers like Kyl and Lungren decide to write legislation to shortchange people convicted of other crimes?

We have learned over the past couple of years of waning death-penalty enthusiasm that prosecutorial zeal and resources are no match for overworked, inexperienced and often incompetent defense attorneys. Cases have been sent back to the trial courts, for example, where attorneys slept during the trials.

And prosecutors have gone to appeals courts asking to put to death a man whose sanity was determined by his medication. When off his medication, the man was insane. But when on, he was considered sane. The prosecutors wanted the judge to order the defendant forcibly medicated so he could be executed.

The legislation that Kyl and Lungren have introduced would serve to degrade an already imperfect method for putting people to death. They would deny appeals because the process takes too long. But time is exactly what is needed to make sure that if people are sent to their deaths, we are sure they are guilty. According to the Death Penalty Information Center, the average time on death row for defendants who were eventually acquitted was 9.3 years.

We wonder whether Americans really want legislation that chips away at a judicial process that is supposed to protect us all. Kyl and Lungren are going against changing public opinion on this issue. This is not a time to make it easier to put people to death. It is a time to end capital punishment altogether.

Concord Monitor
(Concord, NH)
EDITORIAL
July 17, 2005

Steamrolled rights
Don't Erode Ability to Appeal Death Sentences

There is a growing awareness in this country, given a growing number of exonerations based on DNA and other evidence, that it's too easy for innocent people to land on death row. These cases help explain why public support for the death penalty has been eroding.

The U.S. Supreme Court is increasingly alarmed by the quality of legal representation afforded defendants in capital cases, and some states are hesitant to apply the death penalty given mounting doubts about the level of error built into their judicial systems. So it's the opposite of logic to see some in Congress moving the other way, seeking to curtail the ability of federal courts to hear claims of an improper trial from defendants convicted in state court.

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The centerpiece of the legislation would eliminate the review of most claims for cases coming out of states that the U.S. Department of Justice has certified as providing defendants with competent counsel. Should we leave it up to Attorney General Alberto Gonzales, he of the torture memos, to pass judgment on the quality of representation given convicts in Texas? Sounds like a great idea if you are a state prosecutor annoyed at those pesky federal judges.

The measure may even be unconstitutional - it's for a federal court, not a federal prosecutor, to determine whether states are violating the U.S. Constitution.
To sell their "streamlining" law, its proponents are offering to leave the door to the federal courthouse ajar for defendants who can point to evidence of their actual innocence.

This is a cynical ploy. It's pretty hard to produce such evidence if your right to a competent lawyer has been denied, or if a prosecutor got someone to lie on the witness stand.

Exonerations of people wrongly convicted of a crime typically start with a finding that there was a procedural flaw in the case, and only subsequent fair hearings establish the truth. That's one reason Congress ought to stand up for the due process rights of all Americans.

(*Los Angeles Times* Reprint)

The Denver Post
EDITORIAL
August 9, 2005

Justice right to worry about death penalty

John Paul Stevens, addressing the American Bar Association, takes note of improper verdicts and urges caution on use of capital punishment.

U.S. Supreme Court Justice John Paul Stevens lashed out against the death penalty Saturday, on the heels of a vote by the Conference of Chief Justices of state courts to oppose a wrongheaded bill by Sen. Jon Kyl, R-Ariz., and Rep. Dan Lungren, R-Calif., that would put capital punishment into overdrive.

Stevens, addressing an American Bar Association meeting in Chicago, did not call for abolition of the death penalty. But he lamented the impending departure of Sandra Day O'Connor, whose vote helped restrict the death penalty for mentally retarded defendants and those whose crimes were committed before their 18th birthday.

Stevens told ABA delegates that the jury selection process, by screening out potential jurors opposed to capital punishment, could bias the system toward convictions. He also warned jurors might be improperly swayed by victim-impact statements.

Stevens' speech was particularly timely in view of the efforts by Kyl and Lungren to stop what they call "endless delays" between convictions in capital cases and executions. Congress passed a measure in 1996 to streamline death penalty procedures, but Kyl and Lungren want an even faster rush to judgment. Yet, according to the Death Penalty Information Center, more than three dozen death-row inmates have been exonerated since 2000. Surely, even advocates of capital punishment should be concerned that they not execute the innocent.

While not a capital case, the recent freeing of Luis Diaz, who spent 25 years in prison for a series of rapes that DNA evidence now proves he didn't commit, underscores the need to make the most exacting scientific evidence available in all cases involving possible death penalties.

The Post also shares the concern voiced by Justices O'Connor and Ruth Bader Ginsburg about the poor quality of legal representation in many death penalty cases. Some states, including Colorado, field well-qualified public defender teams in capital cases. But too many states, particularly in the Southern "death belt," appoint underpaid, often inexperienced lawyers.

President Bush's nominee to replace O'Connor, John G. Roberts Jr., has a limited record on the death penalty. While serving in the Reagan White House, Roberts suggested that

the high court could cut its caseload by "abdicating the role of fourth or fifth guesser in death penalty cases." Yet, Roberts later did volunteer legal work for a death row inmate.

If he does reach the high tribunal, we hope Roberts takes a responsible view of the death penalty, not the "execute first and ask questions later" tack advocated by Kyl and Lungren.

Detroit Free Press
EDITORIAL
July 19, 2005

Limits on Appeals

DNA and other post-conviction exonerations have exposed ugly cracks in the criminal justice system. Most people now know innocent people wind up in prison and even sentenced to death.

The appeals process serves as a safeguard, but that safety net will be all but shredded if Congress approves bills that would severely limit federal oversight over flawed convictions in state courts.

The Streamlined Procedures Act, sponsored by Sen. John Kyl, R-Ariz., in the Senate, and Rep. Dan Lungren, R-Calif., in the House, would prevent federal review of capital cases from states that the U.S. Department of Justice has certified as providing competent defense counsel. In effect, it would leave it to federal prosecutors, instead of the federal courts, to determine whether states are violating the U.S. Constitution.

The bill would still allow certain appeals if there is evidence of innocence, but that means almost nothing. Exonerations often start by exposing a procedural flaw in the case, such as an incompetent defense lawyer, jury bias or a prosecutor withholding evidence, before establishing the truth with further investigation.

Equally onerous, the bills would prevent inmates from seeking federal review of constitutional issues not brought up on initial appeals because of ineffective counsel. East Lansing Attorney F. Martin Tieber, former deputy director of the State Appellate Defender Office, said the proposal would affect most Michigan inmates with lengthy sentences, especially the poor, who often don't get adequate legal counsel but couldn't appeal serious due process violations later in federal court.

When mounting evidence shows a disquieting number of innocent people are in prison or on death row, Congress ought not make it harder for the wrongfully convicted to get justice.

The Hartford Courant
EDITORIAL
October 25, 2005

Don't Limit Habeas Appeals

Congress ought to kill a reckless proposal that would severely limit the right of appeal in criminal cases.

The Streamlined Procedures Act of 2005 would gut habeas corpus, the hallowed protection that allows prisoners to challenge in federal court the legality of their convictions. Habeas corpus is often the last resort for death row inmates asserting their innocence.

Separate versions of the bill are pending in the House and Senate. Each would impose new procedural hurdles that would effectively block many habeas appeals and thereby speed up executions.

The legislation has met with loud protests from judges, prosecutors, defense lawyers and conservative groups such as The American Conservative Union and The Rutherford Institute, which called the proposals "radical legislation" that "would likely result in the execution of citizens who have been wrongly convicted."

Habeas corpus was considered so important to the nation's founders that they enshrined it in the Constitution. Congress cannot abridge that guarantee, but can skirt it by imposing rules that would essentially thwart prisoner appeals.

There is no hard evidence that habeas appeals have clogged the federal courts or unduly dragged out final resolutions of cases.

The Judicial Conference of the United States, which runs the federal courts, told Congress that before it clamps down on habeas corpus, it ought to first determine whether there are excessive delays and, if so, what causes them. That makes sense.

Sponsored by Republican Sen. Jon Kyl of Arizona and Republican Rep. Daniel E. Lungren of Folsom, Calif., the Streamlined Procedures Act would make it tougher for convicts to assert their innocence - a proposal that ought to chill anyone who has followed the death penalty debate in recent years.

Dozens of convicts have been released from death row after it was determined they did not commit the crimes that led to their convictions. Just last year Congress passed the Innocence Protection Act in an attempt to reduce wrongful convictions.

To now cut off a convict's last appeal by denying habeas corpus would be a travesty.

The Journal Gazette
(Fort Wayne, IN)
EDITORIAL
August 2, 2005

Executing bad judgment

Last Thursday, Senate Republicans delayed acting on a bill that would grease the route for faster executions. What they should have done was shred this legislation as if it were an old check, bury it deep and then urge their House colleagues to do the same. Pass either bill to restrict a defendant's access to federal review, and due process will no longer be a hallmark of American justice.

Since 1973, 119 death-row inmates have been exonerated because of new evidence. Some came within weeks and even days of dying.

Those are 119 reasons for the nation to consider the taking of a life for a life an extreme and unnecessary punishment. Life in jail without parole is a just alternative. Indeed, if that is the most severe punishment a killer can get, the families of victims will have some end to the legal trauma, not the long, drawn-out appeals accompanying any death penalty decision that the legislation purports to stop.

But apparently the fear of killing an innocent person isn't enough to keep politicians from proposing outlandish tough-on-crime legislation. The so-called "Streamlined Procedures Act" sounds like a euphemism from a satirical novel or something covering trade disputes. It is neither. It is, rather, legislation that would allow faster executions in a country that has at least 119 reasons to fear efficiency in matters of death.

Although the Senate and House bills differ slightly, the effect is the same: Clamp down on federal review, and in some cases eliminate it altogether; create new procedural hurdles; and set arbitrary time limits on appeals. And some legal experts have come up with unique and graphic ways to portray the damaging legislation.

"This is radical surgery that is being proposed, the functional equivalent of amputating four limbs to improve the blood flow of a healthy and functioning human body," said Bernard Harcourt, a University of Chicago law professor testifying on June 30 before the House.

He added: "This proposed legislation would not only deprive federal courts of jurisdiction to review highly meritorious claims, but would also spawn a new round of constitutional and statutory litigation that would preoccupy federal courts for the next decade – or at least until the next wave of habeas reform."

But why listen to an expert when you can look tough for constituents?

The death penalty is largely dependent on the race and resources of both the killer and victim, the location of the crime, which judge, jury, prosecutor and defense attorney handles the case. Recent studies have shown it to be ineffective in deterring crime. It's expensive, and society gets nothing from it.

Are we so deep in bloodlust that our sense of justice is collapsing? This bill does nothing to dispel that notion. And 119 people are alive today who might not have been if this bill had been enacted when they went, not guilty, to death row.

Kansas City Star
(Kansas City, MO)
EDITORIAL
October 6, 2005

INMATES' RIGHTS
Brownback should vote 'no'

U.S. Sen. Sam Brownback of Kansas could play a key role today in preserving essential legal protections by voting against a bad bill before the Senate Judiciary Committee. Called the Streamlined Procedures Act, the measure seeks to narrow the circumstances under which federal courts can review the cases of inmates — including those on death row.

The bill is an assault on the right to habeas corpus, a legal privilege explicitly protected by the Constitution. The sponsor is Sen. Jon Kyl, an Arizona Republican.
Besides stopping defendants from appealing in federal courts, the measure would prevent judges from considering key issues in some cases that do reach their courtrooms. And it would give the U.S. attorney general — a prosecutor — the power to prevent federal courts from hearing some cases.

This attempt to dismantle constitutional protections comes as DNA evidence has proved, beyond a doubt, that some innocent people are sentenced to long prison terms and even death. Polls show the public is increasingly uncomfortable about the prospect of fatal errors by the criminal justice system.

Shouldn't the senators be just as concerned?

The Judiciary Committee will vote on the bill today. Brownback's position is considered pivotal.

Brownback, an outspoken opponent of abortion, speaks often of protecting the innocent. That concern should extend to inmates who may have been wrongfully convicted.

Kansas City Star
(Kansas City, MO)
EDITORIAL
July 15, 2005

Trial and Error: Death Penalty

Proof That Innocent People Have Been Executed Could Save Others From the Same Fate

Condemned men usually are resigned, stoic even, as their execution draws near.

Larry Griffin was different as he faced lethal injection in 1995. "Larry went down with an attitude," attorney Sean O'Brien said. "He had bread and water for his last meal."

Most inmates thank their lawyers for trying to save them, said O'Brien, who has been with many in their final hours. Griffin did not.

"We did everything we could," one of his lawyers told him.

"It wasn't enough," the condemned man replied.

O'Brien told that story as he spoke to a group of lawyers Tuesday in Kansas City. He had a reason for discussing an execution that occurred 10 years ago. The day before, St. Louis Circuit Attorney Jennifer Joyce had announced that, because of evidence pointing to Griffin's possible innocence, she was opening a new investigation into the murder for which he was executed.

If Joyce determines Griffin did not kill Quintin Moss in a 1980 drive-by shooting in St. Louis, it would be the first time since the death penalty was reinstated in the United States that a person was cleared of a crime after being put to death.

Griffin always denied killing Moss. No physical evidence connected him to the shooting. The prosecution's key witness was a felon from Boston, a heroin addict in the federal government's witness protection program. He claimed to have been about 20 feet away when shots fired from a moving car killed Moss, 19, and wounded another man.

Samuel Gross, a University of Michigan law professor who opposes the death penalty, adopted Griffin's case as a project. The NAACP Legal Defense and Educational Fund financed a yearlong investigation. Among other things, witnesses said the heroin addict, a white man, wasn't at the scene when the murder occurred in the nearly all-black neighborhood.

Gross has a political motive for clearing Griffin in memoriam. Evidence that an innocent man had been executed would sway a public that is becoming increasingly queasy about

the death penalty.

More than 100 death row prisoners around the nation have been freed after new evidence nullified their convictions. But advocates of capital punishment claim the exonerations prove the system works because no innocent person has been put to death.

That argument leaves O'Brien cold.

"When people ask me, Has Missouri executed an innocent person?' I point them to Larry Griffin," he said.

O'Brien and his law partner, Kent Gipson, took on Griffin's appeals in the early 1990s. Griffin, who grew up in a St. Louis housing project, had been convicted of murdering Moss, a drug dealer, a decade earlier.

The attorneys located Robert Fitzgerald, the heroin addict who had testified for the prosecution.

"He told us a much different story," O'Brien said. "He admitted that he lied when he testified in court, that he didn't see Larry Griffin."

But Fitzgerald's reversal wasn't enough. A federal judge who reviewed the case chose to believe the account given at trial.

The missing link was the man wounded in the drive-by shooting. Neither the prosecution nor the defense had called him to testify. O'Brien and Gipson looked for him but had limited Internet resources at the time.

"We couldn't find him," O'Brien said.

After Griffin's execution, an investigator working for Gross located the man in Los Angeles. He had left Missouri after the shooting. The man told the investigator he'd seen the face of the shooter, and it wasn't Griffin.

"He was shocked to find that Larry Griffin had been executed for the murder of Quintin Moss," O'Brien said.

Joyce is courageous to reopen the investigation. Too many prosecutors refuse to acknowledge the possibility that guilty verdicts can be wrong.

They can, though. The fact that new evidence is coming to light in Griffin's case now should resound in the U.S. Congress. The Senate and House are considering legislation that would prevent many death row inmates from challenging their convictions in the federal courts after other appeals have failed.

The proposed legislation, named the "Streamlined Procedures Act of 2005," would

narrow the circumstances under which an inmate could seek federal review, bar the courts from considering key issues, and set arbitrary timetables for rulings.

It is a frightening proposal. DNA testing has proven, without a doubt, that innocent people are sentenced to death. Closing a window of appeal increases the likelihood that they will be executed.

Sponsors of the Streamlined Procedures Act are catering to critics who claim the appeals process for capital cases is too costly and takes too long.

In Larry Griffin's case, the span between arrest and execution took 15 years. That is looking increasingly like a fatal rush to judgment.

Keene Sentinel
(Keene, NH)
EDITORIAL
July 23, 2005

Death Tales

Two death-penalty stories are making news this month, one from Washington, D.C., and one from St. Louis, Missouri. They are an awkward pair.

In Washington, Congress is considered likely to pass legislation to restrict access to federal courts by defendants who contend they received unfair trials in capital cases. The "Streamlined Procedures Act of 2005" — spiffy title — is designed to make sure people convicted of murder are quickly punished without federal courts meddling into the sorts of abuses we have been hearing so much about in recent years: sleeping and drunken death-case attorneys, prosecution witnesses bribed with reduced sentences, the man convicted even though he was at a busy picnic miles away at the time of the crime, the string of Death Row inmates proven innocent by their DNA.

These revelations are too much for some members of the U.S. House and Senate. By "streamlining" punishments, they hope to eliminate the embarrassments associated with capital punishment. Their bill would prohibit federal review of most cases from states the Justice Department certifies as providing defendants with competent counsel. The likely consequence of this act would be that fewer innocent people would be exonerated.

Meanwhile, in St. Louis, a judge has ordered that Larry Griffin's 1981 murder conviction be reexamined. Griffin was found guilty of the 1980 drive-by killing of a 19-year-old man. But a new investigation of the case, conducted by a Michigan law-school professor, indicates that Griffin didn't do it.

Among other things, the report finds evidence that the only person who identified Griffin as the killer was not present on the street corner when the killing occurred. That man later admitted, "I didn't see nothing." The first police officer who arrived at the crime scene also says the supposed witness was not there.

However, a real witness to the crime — a man who was wounded by the bullets and who knew Griffin —has said that Griffin was not the killer. That man was not called to testify at the trial.

The Streamlined Procedures Act won't have any effect on this case, as it applies only to federal courts. Over the years, as Griffin proclaimed his innocence, his appeals were repeatedly considered, and rejected, by federal courts, including the U.S. Supreme Court. He long ago ran out of options.

But now his case will get a thorough going over at the state level. A Missouri congressman sent a copy of the law professor's report to a St. Louis circuit judge. The judge says she will re-examine the evidence "fully, meticulously and with a completely open mind." So the conviction could conceivably be overturned right in state court. Another reason the Streamlined Procedures Act won't have any effect on this case is that Larry Griffin was executed on June 21, 1995.

Knight-Ridder News Wire

EDITORIAL
July 23, 2005

Don't Rush to Judgment

In a gutsy move in pursuit of justice, the top city prosecutor in St. Louis plans to test the plausible theory that convicted murderer Larry Griffin didn't gun down a drug dealer 25 years ago.

But even if prosecutor Jennifer Joyce's reinvestigation exonerates Griffin, it won't matter to the convicted man.

He was executed a decade ago.

Whether or not Griffin is cleared posthumously, his case should stand as a chilling warning to Congress.

Amid Washington lawmakers' latest drive to further restrict the appeals of defendants, they need to recognize what could be at risk with their tough-on-crime crackdown - innocent lives.

In both Senate and House versions, the innocently titled Streamlined Procedures Act amounts to an unconscionable assault on federal court oversight of the fairness of criminal trials in the state courts.

The Republican-sponsored measure would deny or sharply restrict the reach of federal judges in hearing habeas-corpus claims from convicts. These claims range from whether adequate legal counsel was provided to indigent (and often minority) defendants, on up to whether an innocent person may have been convicted wrongly.

In death-row cases, the stakes are as high as they come. In other criminal matters, the federal judiciary's policing of such cases assures that our criminal justice system is truly just.

Strict limits on such appeals were already imposed in 1996 under a post-Oklahoma City bombing, Clinton-era antiterrorism law - and there's no good reason to tighten them further.

At a recent Senate hearing, proponents argued unimpressively that the appeals delayed "closure" for crime victims, while running up government legal bills.

Isn't the cost of responding to appeals simply the price of successful anticrime efforts that have put 2.1 million people behind bars? Lock up the bad guys, by all means, but don't turn around and scrimp on fairness.

The impact of lengthy appeals on crime victims cannot be ignored. But there is a psychological toll, too, on convicts sitting behind bars who know they are innocent, some of them on death row.

There have been dozens of people exonerated while awaiting execution in recent years, often after years of painstaking appeals and probing of their claims of innocence. What if these inmates had not succeeded in their appeals in time?

Surely advocates of limiting convicts' federal appeals don't mean to respond to the troubling fact of death-row exonerations by strapping the possibly innocent to a gurney sooner.

Isn't it odd how some in Congress - mostly Republicans, but some Democrats, too - regard the federal courts as the best venue for class-action lawsuits involving consumer-product safety, environmental pollution and civil rights. Yet they don't want to bother the same highly regarded federal bench with cases concerning the fundamental rights of life and liberty?

A system of justice streamlined to the degree proposed under this measure would not be justice at all.

Philadelphia Inquirer
EDITORIAL
October 28, 2005

The Miers Impact Put the Brakes on a Bill that Speeds Up Executions

She's not going to the U.S. Supreme Court after all, but Harriet Miers helped further the cause of justice this week - if only indirectly.

Her planned confirmation hearing figured in a welcome decision to postpone Senate action on a bill that launches an unconscionable assault on judicial fairness.

Amid the press of confirmation business, the Senate Judiciary Committee chaired by Sen. Arlen Specter (R., Pa.) scrapped a hearing Wednesday on the innocuously titled Streamlined Procedures Act.

Specter should be in no rush to revisit this misguided bill, even if he has time on his hands now that Miers has pulled out.

The measure would curtail sharply federal courts' ability to review habeas-corpus claims by convicts. In murder cases, that could mean a death-row inmate doesn't get a fair shot at proving innocence - despite the life-and-death stakes and recent examples of wrongful convictions.

Dozens of convicted murderers across the country have been exonerated by new evidence recently. In many cases, their fight to overturn their conviction dragged on for years. After he was jailed in 1981 in the rape-murder of a Delaware County woman, Nicholas Yarris spent 22 years under a death sentence before being exonerated by DNA evidence two years ago.

Americans rightly disturbed by the flaws in the capital punishment system should be outraged at this effort: It would take precious time off the clock for a wrongly convicted person whose life or freedom hangs in the balance.

It's bizarre, too, to recall that Congress only last year passed the Innocence Protection Act. That legislation established a multimillion-dollar fund to improve representation for capital defendants. The "streamlined" measure is treacherous backsliding, disguised by a cynically misleading title.

The bill is opposed by the states' chief justices, as well as the administrators who run state courts. You might expect these folks to welcome less second-guessing by the federal courts. Instead, state court officials say there's no evidence of unusual delays in litigating inmates' claims.

Congress already imposed strict limits on habeas appeals after the Oklahoma City bombing, responding to victims' advocates pleas for quicker "closure" in criminal cases.

Specter's amendments to the habeas bill don't make a bad bill more palatable. There's simply no appeal to the Streamlined Procedures Act.

It should be dropped.

St. Louis Post Dispatch
EDITORIAL
July 13, 2005

DEATH PENALTY: Dead man talking

Larry Griffin went to his execution in 1995 protesting his innocence in the drug-related murder of Quintin Moss in 1980.

Now, new evidence suggests that Griffin was telling the truth and that Missouri executed an innocent man by lethal injection a decade ago. If that is true, Griffin's case could have a profound effect on the state's - and the nation's - legal machinery of death.

Year after year, condemned murderers on death row have been freed after new evidence surfaced that they had been wrongfully convicted. Since 1973, 119 prisoners facing execution have walked out of prisons in 25 states based on new evidence of innocence, according to the Death Penalty Information Center, a group that collects data on capital punishment, which it opposes. In Illinois alone, 18 men were found to be wrongfully convicted.

And yet proponents of the death penalty here and elsewhere, including two past Missouri governors and the current attorney general, continue to argue that no innocent person ever has been executed. It will be hard to make that argument now.

The case against Griffin was flimsy from the start. The state's star witness, Robert Fitzgerald, was a felon from Boston who was in the federal government's witness protection program. In fact, he faced criminal charges in St. Louis County. Fitzgerald was released from jail the same day Griffin was convicted.

Now, as the *Post-Dispatch*'s Terry Ganey disclosed this week, a new investigation by the NAACP Legal Defense Fund has found more reasons to question Fitzgerald's testimony. A police officer, a shooting victim and a relative of the murder victim say they did not see Fitzgerald at the scene.

St. Louis Circuit Attorney Jennifer Joyce, to her credit, has taken the unprecedented step of reopening the case of a dead man. She took that bold step - one that is sure to invite criticism - at the urging of Rep. William Lacy Clay, D-St. Louis, and after seeing the new evidence. Ms. Joyce, supported by Mr. Moss's relatives, wants to make sure that the real killer or killers are identified.

By chance, the evidence of Griffin's possible innocence comes as Congress is considering a bill that would streamline federal appeals, making it harder for death row inmates to prove their innocence.

Today, the Senate Judiciary Committee takes up S 1080, sponsored by Sen. Jon Kyl, R-Ariz., which would greatly restrict the use of the writ of *habeas corpus*. The "Great Writ," with roots as deep as the Magna Carta, is the legal tool prisoners use to challenge their convictions after other appeals have failed. The bill would cut off most of those appeals, except where a prisoner could make a compelling argument for his innocence.

On the surface, that sounds reasonable enough; only innocent people should be cleared. But in reality, cases of innocence seldom emerge full-blown. Prisoners get new trials built not upon oak-solid evidence of innocence, but upon the thin reeds of technicalities artfully woven together: A defense lawyer made an ineffective argument; a prosecutor failed to turn over key evidence. The Kyl bill would cut off *habeas corpus* for those intermediate appeals, making it nearly impossible to construct a case of innocence.

Seven people exonerated after serving years on death row are expected to attend today's hearing to drive home the point that the Kyl bill could have sent them to the death chamber. Larry Griffin cannot attend, but senators should heed his story and kill the bill.

Griffin is not the only person with a strong case of innocence who has been executed. His is just the strongest case among many. The machinery of capital punishment is so fundamentally flawed that it violates our standard of decency.

St. Petersburg Times
(St. Petersburg, FL)
EDITORIAL
October 31, 2005

A threat to due process

Leading judicial groups oppose the Streamlined Procedures Act of 2005 for good reason - it would severely diminish the vital writ of habeas corpus.

The Senate Judiciary Committee is expected to vote this week on legislation that would essentially strip the federal courts of their ability to police the fairness of state trials. This assault on due process should be stopped in its tracks.

Supporters of the Streamlined Procedures Act of 2005 say that changes are needed to move along executions and make the court system more efficient. But the two versions of this bill, one in the House and one in the Senate, reek of hostility toward the federal judiciary. The measures primarily would sharply reduce federal habeas corpus review and close the courthouse door to defendants, whether they are on death row or not, who claim their constitutional rights were violated in the course of a state conviction.

The act would expedite executions, but it also would make it nearly impossible for people whose convictions resulted from incompetent counsel, fabricated evidence or a racially stacked jury from seeking redress in the federal courts. It would make claims of actual innocence extremely hard to bring, increasing the risk of error and speeding along the execution of those who didn't do it.

According to the Death Penalty Information Center, more than 100 death row inmates have been exonerated as innocent of their crimes since the mid 1970s. One thing that many innocent convicts have in common is that their trials were often rife with constitutional errors.

But rather than focusing on fixing the state systems that allow slipshod justice to pass as fair process, these measures would "solve" the problem by forcing the federal courts to turn a blind eye. The writ of habeas corpus, a protection so vital to liberty that the founders put the right in the Constitution, would be diminished to a empty husk.

The Senate version is only slightly less draconian than the one offered in the House. Both versions have been objected to by leading judicial and legal organizations. The American Bar Association said in a recent letter that the bills "inadequately protects the innocent," and the Judicial Conference of the United States, an organization of federal judges, said there was no reason to tinker with existing law.

It is inexplicable why Sen. Arlen Specter, R-Pa., chairman of the Senate Judiciary Committee, would put his imprimatur on the Senate version of the bill. He usually has an accurate compass on civil liberties matters. But in this case he's dead wrong. These measures are highly destructive to this nation's traditional due process guarantees. They would replace accuracy with speed, and justice with notches on a belt. A bad trade all around.

St. Petersburg Times
(St. Petersburg, FL)
EDITORIAL
August 26, 2005

Unfair trial? Too bad

The Streamlined Procedures Act seeks to keep the federal courts from examining the fairness of state trials - a move even state jurists oppose

With more than 40 death row inmates in the last six years having been found innocent and released from prison, you would think Congress would focus any new legislation on strengthening access to the courts so prisoners are not wrongly put to death. But you would be wrong. When Congress returns from its summer recess, it is expected to consider a bill designed to close the federal courthouse doors to prisoner appeals and speed death row inmates to their final end.

The misnamed Streamlined Procedures Act is about gutting procedures, not streamlining them. Two versions of the measure would go a long way toward eliminating federal habeas corpus review of state convictions. Prisoners use habeas corpus to claim that their trial or sentence was constitutionally faulty or that there is new evidence of actual innocence.

Those pushing the changes say the federal courts unduly inject themselves into death penalty cases where the state procedures have been fully and fairly followed. In fact, the federal courts have been a vital check on state trials. When state appeals courts disregard trial errors, such as incompetent defense lawyers, prosecutors who have engaged in misconduct or juries that have been racially rigged, the federal courts have been there to redress the wrong. Allowing an unfair process to stand can have life and death consequences for someone wrongly accused.

The two bills - the House version is only slightly more draconian than Senate's - would create virtually insurmountable procedural hurdles to all federal habeas review, whether the case involves a death row inmate or not. If an inmate has a legitimate claim but his attorney made some procedural error, the federal courts would be essentially barred from hearing it. While there is an innocence exception, it is so narrowly drawn that many of the innocent people who have recently left death row would not have been able to meet the proposed standard.

The bills contain a host of other barriers to keep the federal courts from examining the fairness of state trials. The measures reek of hostility toward the federal judiciary and the constitutional rights they uphold.

Some of the most vocal opposition to the measures is coming from conservative legal circles. The president of the Rutherford Institute, for example, told the Senate Judiciary

Committee that the proposal "would likely result in the execution of citizens who have been wrongly convicted." More than 50 former prosecutors have declared their opposition.

A resolution raising serious objections to the measure and calling for additional study recently passed the Conference of Chief Justices by an overwhelming vote. These are the very state jurists whose relative autonomy and power would be increased by cutting off federal court review. They don't want this congressional favor. Congress should listen.

San Francisco Chronicle
EDITORIAL
July 14, 2005

Justice delayed and denied

THE WELL-DOCUMENTED margin of error in our judicial system -- especially the effects of racial bias and the inadequacy of legal representation for the poor -- is a good reason to rethink the death penalty. The exoneration of several men on Illinois' Death Row led Republican Gov. George Ryan to impose a moratorium on executions in 2000. A group of Assembly Democrats is planning to propose a similar pause on capital punishment in California.

Incredibly, the Senate Judiciary Committee may vote as early as today on a measure that would accelerate the pace of executions in this country by severely restricting the ability of condemned inmates to appeal their sentences.

The Streamlined Procedures Act of 2005, sponsored by Sen. John Kyl, R-Ariz., and Rep. Dan Lungren, R-Gold River (Sacramento County), is designed to curtail what they allege is an abuse of habeas-corpus appeals that allows capital cases to drag on for too many years. Their legislation would prevent federal review of cases from states that the U.S. Department of Justice has certified as having competent defense counsel. Inmates in those states would have to show evidence of their innocence -- not just flaws in the fairness or thoroughness of the proceedings against them -- to get a federal hearing.

One of the problems with this attempt to fast-track justice is that many of the recent exonerations resulted from evidence that came to light as a result of appeals based on trial errors -- such as incompetent lawyering, jury bias, destruction of evidence or prosecutorial misconduct.

Various concerns with Kyl's S1088 emerged at a Senate Judiciary Committee hearing Wednesday. One of the senators asking sharp questions was Dianne Feinstein of California, potentially a key vote.

If anything, the nation should be working to expose and reduce the margin of error in our judicial system -- especially in cases of life and death.

The Judiciary Committee should reject S1088. It's not the American way.

San Jose Mercury News
(San Jose, CA)
EDITORIAL
August 19, 2005

Rush to Execution Leaves Justice in the Dust
Congress Should Drop Proposal to Limit Appeals in Federal Courts

In the last six years, 44 inmates on death row have been freed because new evidence or further review of their cases showed them to be innocent.

Those cases provide proof, beyond a reasonable doubt, of the need to keep courthouses open to appeals from prisoners facing execution.

Except in Congress -- where reason seems not to reach. When the House and Senate return from their summer recess, they will have before them a bill that addresses the problem this way: Let's get the execution over with quicker.

The Streamlined Procedures Act, introduced in both houses, would sharply limit the ability of inmates to get federal courts to review death sentences handed down in state courts, where most criminal trials are held.

What's notable about the bill is who opposes it. It's not just the usual opponents of the death penalty in general.

• Two weeks ago, the national Conference of Chief Justices passed a resolution against the bill, with only the chief justice of Texas not joining the opinion.

• Although the bill's sponsors contend it will not prevent genuine claims of innocence from being heard, a dozen former federal judges wrote to the Senate Judiciary Committee to say that ``the language of the exception is so narrow that it will cover virtually no one."

• Fifty former prosecutors have written to oppose the law. One of them is Bob Barr, a former member of Congress who drafted a law in 1996 that limited death row appeals. He wrote to the Judiciary Committee that the 1996 law is ``working well." He calls the new bill ``legislation that is being pressed without sufficient deliberation, and without any real evidence that it is needed."

California Chief Justice Ronald George believes the bill would overturn recent U.S. Supreme Court decisions that granted new hearings to inmates on death row.
In recent cases, the Supreme Court -- not exactly known for mollycoddling criminals -- has agreed with inmates' appeals that prosecutors had hid information from the defense and that blacks had been improperly excluded from the jury. Those appeals would have been blocked by the new law.

There's no denying that a long time -- often a decade or more -- can pass from the time a criminal is sentenced to when the death sentence is carried out. The cases in which prisoners are wrongly convicted prove that such delay is not a problem to be streamlined away, but a protection to be valued.

The Tennessean
(Nashville, TN)
EDITORIAL
July 22, 2005

Bill derails system of justice

A bill inching forward in Congress amounts to an assault on this nation's commitment to justice.

The purported reasoning behind the "Streamlined Procedures Act on 2005" is to reduce the backlog of criminal cases in the federal courts. Sen. Jon Kyl, R-Ariz. the primary sponsor of the measure, explains that increase in habeas corpus reviews have strained federal court resources and denied victims of crime the closure they need. Habeas corpus review is the primary way that inmates sentenced to death or to long terms can get their cases before a federal judge. It is often used to challenge the competency of the legal representation given to a defendant who cannot afford to hire a private attorney.

But Kyl's bill would "streamline" the process by taking the decision-making power away from judges and giving it to the U.S. attorney general. The legislation would prohibit federal courts from reviewing state cases if the state had been certified by the Justice Department as having competent defense counsel. The only way an inmate in those states could get his case before a federal court is to show evidence of actual innocence -- not just flaws in the legal process.

The bill makes no sense. The quality of defense attorneys appointed to represent poor defendants often varies greatly across a state. Just because a state gets the Justice Department's seal of approval for having competent defense counsel doesn't assure that every defendant will be represented well. And how can an inmate who was wrongly convicted because he had a disinterested attorney find new evidence after the fact of the conviction?

The best way for Congress to assure that cases move quickly and carefully through the judicial system is to provide resources for competent counsel. This bill insults the separation of powers. It turns this nation's adversarial judicial process on its ear by giving the nation's chief prosecutor the final say on who gets judicial review. And it would mean a sure and certain death for innocent people, leaving the guilty free. Members of Congress should demonstrate their commitment to justice by killing this bill.

LETTER SUBMITTED BY THE MOST REVEREND NICHOLAS DIMARZIO, CHAIRMAN, DOMESTIC POLICY COMMITTEE, U.S. CONFERENCE OF CATHOLIC BISHOPS (USCCB)

July 13, 2005

Dear Senator:

As Chairman of the Domestic Policy Committee of the United States Conference of Catholic Bishops, I am writing to convey our grave concerns regarding S. 1088, *The Streamlined Procedures Act of 2005*, when it is considered by the Judiciary Committee. The Committee is concerned because the proposed bill would dramatically diminish the federal courts' ability to consider habeas corpus petitions in death penalty cases, even in cases of actual innocence.

As you know, the bishops of the United States oppose the use of the death penalty in our country. Catholic teaching on capital punishment is clear: If non-lethal means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity with the dignity of the human person (*Catechism of the Catholic Church*).

Nothing illustrates the need for non-lethal punishment more than the disturbingly large number of death row inmates across our country who have been exonerated (119 since 1973), some within days or hours of being put to death. At a time when there should be more safeguards put in place to protect the innocent from wrongful conviction and to prevent lethal mistakes in death penalty cases, S. 1088 attempts to take away some of the safeguards already in place.

S. 1088 would severely limit the circumstances under which a death row inmate can obtain federal habeas corpus review of his or her conviction or sentence. For example, Section 9 of the bill would strip federal courts of jurisdiction to consider most claims challenging either a conviction or sentence of death in states that provide competent counsel to indigent prisoners in state post-conviction proceedings. The only exceptions would be for prisoners who advance claims based on new rules of constitutional law that the Supreme Court has made retroactive, and those who offer newly discovered evidence on the basis of which no reasonable fact finder could have convicted. Section 6 of the bill would deprive federal courts of jurisdiction to review most sentencing claims if a state court previously concluded the error was "harmless" or "not prejudicial."

Our Church fully believes that those who commit terrible violent crimes must be incarcerated, both as just punishment and in order to protect society. We stand in solidarity with victims and their loved ones. However, when it comes to matters of life and death, morality and common sense call for careful safeguards. Therefore, we urge you to oppose efforts to eliminate these safeguards. Thank you for your careful consideration of this important matter. Asking the Lord to bless you and always be with you, I am

Faithfully yours,

+ Nicholas DiMarzio

Most Reverend Nicholas DiMarzio
Diocese of Brooklyn
Chairman, Domestic Policy Committee
United States Conference of Catholic Bishops

STATEMENT OF SETH P. WAXMAN, "HEARING ON S. 1088 BEFORE THE COMMITTEE ON JUDICIARY," UNITED STATES SENATE, JULY 13, 2005

Statement of Seth P. Waxman

Hearing on S. 1088 before the Committee on the Judiciary

United States Senate

July 13, 2005

Statement of Seth P. Waxman

I want to thank the Committee for inviting me to discuss S. 1088, which would amend various provisions of the statutes governing the federal courts' jurisdiction to entertain habeas corpus petitions filed by state prisoners. Since 1979, I have been involved in federal and state litigation, in private practice and for the United States Department of Justice. I have litigated habeas corpus cases since 1980, most recently *Miller-El* v. *Dretke*, which was decided last month by the Supreme Court of the United States.

I want to address my remarks to the profound—and in my view profoundly unfortunate—impact this bill would have on the justice system. S. 1088 would largely eliminate the federal courts' jurisdiction to adjudicate serious, consequential, federal constitutional claims raised by state prisoners. As such, it would constitute a fundamental break with our longstanding statutory and constitutional tradition. What is more, it would generate an entirely new wave of litigation of just the type that the federal courts are only now largely completing following the wholesale 1996 revision of federal habeas procedures in the Anti-Terrorism and Effective Death Penalty Reform Act (AEDPA). I am aware of no data demonstrating that the streamlining provisions of AEDPA have failed to accomplish their purpose. And if inefficiencies were shown to persist in the way habeas corpus petitions are processed in federal courts, there are forthright ways to address them. This bill goes far beyond any ameliorative correction, to curb the federal courts' authority to vindicate meritorious constitutional claims—in non-capital as well as capital cases.

I. The Substance of S. 1088

The title of this bill suggests that it would streamline the processing of habeas corpus cases. When I first picked it up, I expected to find procedural adjustments meant to eliminate inefficiency. I found something else entirely. Section after section of the bill would eliminate federal-court jurisdiction to decide federal questions in habeas corpus cases. The bill is not limited to new procedural rules for litigants or courts to follow *when* federal courts exercise their habeas corpus jurisdiction to decide questions necessary to a proper result. It contains jurisdictional prohibitions that would prevent federal courts from addressing crucial federal issues *at all*.

Section 2, for example, would direct a federal court to dismiss a federal constitutional claim "with prejudice" when, under current law, the court would postpone consideration of the claim until the state courts have had an opportunity to address it first. The import is clear: Section 2 would turn what is now a rule governing the *timing* of federal jurisdiction into a rule *eliminating* federal jurisdiction itself.

There are numerous other examples; I will briefly address three. Section 4 would expressly withdraw federal jurisdiction to examine claims state courts resolved on state procedural grounds. Casting aside the "cause and prejudice" standard crafted in 1977 by Chief Justice Rehnquist—a standard that has proven remarkably effective as a gatekeeper against constitutional claims that were resolved by a state court on adequate and independent procedural grounds—the bill would require federal courts to accept at face value a state court's decision that some procedural rule established an immutable requirement, that the prisoner failed to comply

with that requirement, and that in consequence, the state court declined to consider the claim. Indeed, the bill would eliminate jurisdiction even to consider a claim that the state court *did* proceed to consider on the merits, and claims that any "default" was due to legal representation that fell below the Sixth Amendment floor.

Section 6 would eliminate federal jurisdiction to examine almost all claims addressed to the constitutionality of a sentence. Any recitation by the state court that constitutional sentencing error appeared "harmless" or "not prejudicial" would entirely divest federal courts of jurisdiction—even to examine whether or not such a conclusion was manifestly incorrect. Since any state court that identifies a *non*harmless constitutional violation is required to provide relief, the effect of Section 6 is essentially to strip federal courts of jurisdiction to consider claims of constitutional error in sentencing—even in the case of death sentences challenged on the ground that the sentence imposed does not comport with the Eighth Amendment or was the direct consequence of constitutionally ineffective counsel, in violation of the Sixth Amendment.

Section 9, the most sweeping provision of all, would completely withdraw federal jurisdiction to consider virtually *all* claims in capital cases (whether addressed to conviction or sentence, and regardless even of whether the state court actually addressed the claims), provided the case arises from a state that the Attorney General of the United States certifies as providing legal counsel in postconviction proceedings.

S, 1088 recites exceptions to these wholesale jurisdictional prohibitions, and I will come to them in a moment. But the first order of business is to understand that these provisions would undercut the federal courts' ability to enforce fundamental federal constitutional rights. Only Section 9 would flatly *repeal* basic habeas jurisdiction (in death penalty cases). But the other sections would accomplish much the same purpose by withdrawing jurisdictional power to decide crucial issues *in* habeas corpus cases.

Stripping federal courts of jurisdiction in this way would come at an extremely high cost. We expect state courts to be sensitive to federal constitutional rights, and in the vast majority of cases of course they are. But under our constitutional tradition criminal cases—and especially those imposing capital punishment—require special care and review procedures that minimize the incidence of constitutional error. That is why we have a long tradition of ensuring that prisoners with federal claims have an opportunity to present those claims to federal courts as a necessary safeguard in those rare cases in which constitutional violations that are not corrected in state court. I urge this Committee to think long and hard before it approves legislation that would dilute that tradition of fairness and rationality in our constitutional system.

Now to the exceptions. The principal safety valve relates to so-call "actual innocence," and on first blush, you might think that S. 1088 relaxes jurisdictional prohibitions in circumstances in which a prisoner's factual guilt may be in doubt.[1] But on closer examination,

[1] The other exception frequently referenced in the bill is for "a new rule of law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (*e.g.*, Section 2 (incorporating 28 U.S.C. § 2254(e)(2)). But since 1989, when the Supreme Court first gave effect to that standard, the Court has never given a "new" procedural rule retrospective effect.

the "innocence" exception is far more circumscribed, because, with inconsequential exceptions, the bill would require that any prisoner who asserts that he or she is innocent demonstrate: (1) that the claim rests on a factual predicate that "could not have been previously discovered through the exercise of due diligence"; (2) that the underlying facts "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty"; *and* (3) that a denial of relief on the basis of the claim would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." It's hard to think that any prisoner would be able to make all those showings. The new evidence establishing innocence might have been discoverable earlier; or that evidence might not clearly and convincingly persuade every reasonable judge or jury; or it might not be unreasonable to reject the constitutional claim itself (apart from any evidence of actual innocence). A genuinely innocent prisoner, then, may well be denied even review by a federal court.

As I mentioned earlier, Congress enacted comprehensive reform legislation in this field about ten years ago. At the time, I was responsible for coordinating much of the Department of Justice's views and comments on AEDPA, which we supported and which established extremely high thresholds for obtaining federal habeas corpus relief. Even AEDPA, however, did not withdraw federal-court *jurisdiction* to act in circumstances that warrant habeas corpus relief. It would be a serious mistake to do so now—particularly since, to my knowledge, no one has persuasively established that AEDPA has failed in any systemic way to resolve the inefficiencies in federal-court review that prompted its enactment.

II. Illustrations of Affected Cases

My concern about the profound effects S. 1088 would have stems not just from tradition or constitutional theory. It is not based solely on concerns about the wisdom of wholesale jurisdictional revision in the absence of data identifying any continuing systematic problem. Rather, I am concerned principally about real-world consequences, and my concern is based on real-world experience. We do not have to imagine instances in which federal habeas corpus jurisdiction is essential to the preservation of fundamental rights. Even under AEDPA's restrictive regime, we have real illustrations—habeas corpus cases in which serious constitutional violations went uncorrected until federal habeas corpus review. Consider four recent cases in which substantial majorities of the Supreme Court found egregious constitutional violations that had been overlooked by state courts. Were S. 1088 the law, the federal courts would not even have had *jurisdiction* to review the meritorious constitutional claims.

***Miller-El* v. *Dretke*, 73 U.S.L.W. 4479 (2005)**

Only a few weeks ago, in *Miller-El*, a six-member majority of the Supreme Court concluded that the Equal Protection Clause mandated habeas corpus relief because the prosecutors at petitioner's state murder trial had deliberately skewed the jury-selection process in a racially discriminatory manner—conducting *voir dire* with the purpose and effect of systematically eliminating African Americans. The petitioner had pressed that same claim

previously in state court, but the state courts had denied the claim because the prosecutors offered race-neutral explanations for their actions.

The Supreme Court recognized that AEDPA requires any federal court entertaining a habeas corpus petition (including the Supreme Court itself) to presume the accuracy of state-court findings of fact. To overcome that presumption, the petitioner must prove by "clear and convincing evidence" that the state-court findings were wrong, and indeed that the state courts' decision was based on an "unreasonable" determination of the facts. The threshold for obtaining relief in *Miller-El* was therefore extraordinarily high in light of existing federal statutes (which, of course, remain in place today). Yet six Supreme Court Justices concluded that the evidence of deliberate, unconstitutional race discrimination was so overwhelming that the Constitution simply would not permit the conviction to stand.

That evidence showed that prosecutors had struck ten of the eleven African Americans who were qualified to sit on the jury, even as they failed to strike whites who could be distinguished from African Americans only on the basis of race. The evidence also showed that the prosecutors questioned African Americans, but not whites, using techniques designed to trick them into statements that might be the basis for exclusions for cause. They described executions in lurid detail to African Americans, but not whites, again hoping that blacks would be troubled and reveal some basis for being excused. They insisted on shuffling the seating of veniremen when it appeared that African Americans were next in line to be considered. And they took their cues from a manual (no longer formally a matter of policy) explaining that African Americans should be kept off juries whenever possible. All this evidence established a case of race discrimination that prosecutors were completely unable to explain away.

The Committee should understand that habeas corpus exists for cases like *Miller-El*, in which serious, consequential violations of federal constitutional rights corrupt a criminal trial but are not corrected in state court. AEDPA has already set the bar very high, allowing only egregious cases like *Miller-El* to succeed. This new bill, S. 1088, would set the stage for frustrating justice in those very cases. Several of the provisions in this bill might foreclose federal court action in a given case, depending upon the circumstances. But certainly Section 9 would have a devastating effect. Under that section, a federal court would have no jurisdiction even to address the kind of claim that the petitioner in *Miller-El* advanced (if the case arose from a state certified by the Attorney General to supply counsel in state postconviction proceedings).

Banks v. _Dretke_, 124 S. Ct. 1256 (2004)

Last year in *Banks* the Supreme Court voted 7-2 to upset a death sentence and directed the lower courts to review an equally troubling constitutional question regarding the underlying conviction. The record before the Court showed plainly that: (1) the state's two essential witnesses lied repeatedly to the jury—one at the guilt phase of the trial and the other at the sentencing hearing; (2) state prosecutors assured the jury and the court that those witnesses were telling the truth; (3) those prosecutors also assured defense counsel that all relevant materials had been disclosed; and (4) the prosecutors persisted in those representations throughout the process in state court. In state court the petitioner was unable to prove that the prosecutors had in fact

suppressed a wealth of information that would have demonstrated that the state's witnesses were lying. The truth came out only in federal habeas corpus proceedings.

Had S. 1088 been in place, none of this disturbing, prejudicial prosecution misconduct would have come to light—for the simple reason that the prosecutors kept the critical information away from the state courts and this bill would have eliminated federal habeas corpus review. Neither claim in *Banks* had been fully presented fully to the state courts, and Section 2 would have required a federal court to dismiss them with prejudice. Neither claim would have fit within the extremely narrow exception that Section 2 would allow. Independently, Section 3 of the bill would have barred the claim going to the conviction in *Banks*. The petitioner did not secure evidence to support that claim until the federal petition had been pending for more than a year. It was only at that point that a federal magistrate ordered the state to make crucial evidence available and thus put the petitioner in a position to amend his petition. Finally, Section 9 certainly would have foreclosed federal habeas corpus in *Banks*—if the state had supplied counsel in state postconviction proceedings under a system satisfactory to the Attorney General.

The *Banks* case illustrates the way in which prosecutorial misconduct can undercut the integrity of state-court processes without the knowledge of state courts. The only safeguard to address that kind of behavior is federal habeas corpus.

Wiggins v. _Smith_, 123 S. Ct. 2527 (2003)

In *Wiggins*, a seven-member majority of the Supreme Court held that the petitioner's lawyers rendered ineffective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth Amendment. There too the state's highest court had rejected that very claim on the merits. Accordingly, when the case reached the Supreme Court by way of a habeas corpus petition, AEDPA barred relief absent an extraordinary showing: the petitioner had to satisfy the Supreme Court that "clear and convincing evidence" established that the findings of fact in state court were erroneous; that the state-court decision against the petitioner was based on an "unreasonable" determination of the facts; *and* that the ultimate state-court decision rejecting the Sixth Amendment claim was not only wrong, but "objectively unreasonable."

Writing for the Court, Justice O'Connor explained that in this exceptional case all three of those tests were met. The petitioner was facing a death sentence. The jury was entitled to hear evidence regarding his childhood that might warrant mercy. Yet his attorneys presented no evidence regarding his life history at all. That history reflected numerous facts mitigating the petitioner's responsibility—facts the Court described the story as "excruciating." The petitioner's mother was an alcoholic who regularly beat him, left him alone for days without food, and on one occasion pressed his hand against a hot stove burner. Shuttled among various foster homes, he was repeatedly sexually molested and raped.

The defense attorneys could not explain their failure to investigate these matters and present them to the jury. They contended that they had made a tactical judgment *not* to ask the jury for mercy but, instead, to convince the jury that the petitioner had not actually killed the victim—notwithstanding that he had just been convicted of that offense (in a trial to the judge).

The Supreme Court found it plain that the lawyers had looked no further than a few court records, failed to commission a social worker to fill out the record, and also failed themselves to investigate and evaluate the mitigating evidence available. They simply had failed to take the minimal steps necessary to identify evidence that would have been crucial to any genuinely informed choice whether or not to use the sentencing proceeding as an opportunity essentially to re-try the question of guilt.

If S. 1088 is enacted, Section 9 would completely deprive federal courts of jurisdiction in cases like *Wiggins*—if the relevant state satisfies the Attorney General that it supplies effective lawyers in state postconviction proceedings. At best, the idea seems to be that if lawyers are provided to handle cases at the postconviction stage in state court, federal habeas corpus is unnecessary. That is not at all necessarily the case. Cases like *Wiggins* show that quality representation is needed primarily at the original trial and sentencing stages of the state process. Unfortunately, many states do not provide effective attorneys when they are most needed. And even if better representation is provided later in postconviction proceedings, the damage has already been done.

Cases like *Wiggins* demonstrate, moreover, that even excellent representation in state postconviction proceedings does not ensure that state courts will always reach even reasonable decisions on the merits of federal constitutional claims. The evidence regarding the petitioner's life history was developed by new lawyers who represented him at the state postconviction stage. Those lawyers did the job that the attorneys at the sentencing stage had not. Still, the state courts failed to recognize a violation of the petitioner's Sixth Amendment rights—an oversight that fully seven members of the Supreme Court determined to be not just error, but an "unreasonable application of clearly established law."

***Lee* v. *Kemna*, 534 U.S. 362 (2002)**

In *Lee*, another six-member majority of the Court held that state courts had unjustifiably declined to consider a claim that a petitioner had been denied due process of law when the trial judge refused to give him time to find alibi witnesses who had disappeared from the courthouse. Local rules of procedure required that a request for a continuance must be in writing and, since the petitioner's lawyer presented his request orally (without objection on this ground by the prosecution or comment by the trial judge), the state appellate court held that he had committed "procedural default" making it unnecessary to address his federal constitutional claim.

Defense counsel in *Lee* had arranged for members of the petitioner's family to appear and explain under oath that he had been with them in California at the time the offense in question had been committed in Missouri. Those witnesses were in court when the trial began, sequestered and under subpoena, but they left after being told (apparently by a representative of the state) that they would not be needed until the following day. That afternoon, when defense counsel called them to the stand, he was surprised by their absence and immediately requested a brief continuance so that he could locate them. The trial judge did not rely on the rule requiring requests to be in writing, but said that it would be inconvenient to postpone matters until the

following day because he meant to visit his daughter in the hospital. The trial continued without the alibi witnesses, and the petitioner was convicted.

The Supreme Court recognized that, under its precedents, a federal court entertaining a habeas corpus petition usually cannot consider a claim that was not presented to the state courts in accordance with state procedural rules. But in this case, it was clear that the state courts had no *adequate* basis for refusing to address the prisoner's claim. It was arbitrary, the Supreme Court held, to deny even a short continuance to find alibi witnesses who had mistakenly left the room—witnesses who might well establish that the defendant was not guilty. In *Lee*, moreover, the prosecution relied on eyewitnesses who did not know the defendant well—the kind of testimony that juries tend to believe but that professionals know is notoriously unreliable. The Court thus understood that the state courts had denied a continuance that might have allowed an innocent man to avoid conviction and had given a weak procedural reason for refusing to consider his claim that he had been denied a fair trial.

Cases like *Lee* illustrate how federal habeas corpus is essential in some cases to identify circumstances in which arbitrary state-court behavior can *both* violate due process *and* potentially insulate unfair or erroneous convictions from review in federal court. The prisoner in *Lee* had to clear a high hurdle; he had to establish that the state's reason for declining to treat his due process claim was inadequate. But he met that high burden.

Had S. 1088 been enacted, the result in *Lee* would have been completely different. Section 4 would strip federal courts of jurisdiction to consider a claim that a state court declined to entertain on the basis of some procedural error committed by the prisoner or his lawyer in state court—even if, as was the case in *Lee* and *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the asserted procedural rule was nothing more than a "formal 'ritual'" that "'further[s] no perceivable state interest." Under Section 4 a federal court would have to accept at face value a state court's decision that a state rule established a procedural requirement, that the prisoner or his attorney failed to comply with that requirement, and that, in consequence, the state court declined to consider the prisoner's federal claim. The only exceptions would be for prisoners whose claims rest on "new rules" of law that have retroactive effect or on an overwhelming demonstration of actual innocence based on facts that could not have been discovered previously. Under Section 4, federal constitutional claims like the claim in *Lee* would go without consideration in either state or federal court, irrespective of their merit and irrespective of their bearing on prisoners' guilt.

III. A Better Way

Over the last ten years, the Supreme Court and the lower federal courts have struggled with the provisions of AEDPA, attempting to smooth out the wrinkles so that habeas corpus cases are handled efficiently. Perhaps it is time to stand back, take stock of how AEDPA has fared, and respond to any deficiencies the courts have been unable to address. To my knowledge, that has not been done—certainly not in any objective, systematic way. Instead, S. 1088 adopts a blunderbuss approach to problems that may not even persist—eliminating rather then streamlining the exercise of federal habeas corpus jurisdiction.

There is a far better way to proceed. The Judicial Conference of the United States, the Administrative Office of United States Courts, the Federal Judicial Center, and other institutions *exist* for the purpose of solving problems arising in the judicial branch. I urge the Committee to take advantage of those good offices rather than enacting jurisdiction-stripping legislation on an inadequate record.

Specifically, the Committee should begin by getting the facts straight. We know that some death penalty cases have taken years to resolve, but we do not know why or, more importantly, whether delays in some cases represent a pattern in the system. Good data should be developed to identify any systemic inefficiencies that actually persist. Once that data is assembled, the Committee should work with the Judicial Conference and other institutions and organizations to evaluate it, identify genuine problems, and prepare targeted measures that address the identified problem while minimizing unintended consequences. If the data reveal systemic delays in the federal courts' adjudication of habeas cases, forthright steps can be taken to accelerate the process. Legislation of that kind might produce greater efficiency, something that everyone should want. By contrast, S. 1088 would compromise the federal courts' jurisdiction to perform their vital function in our constitutional system—the enforcement of fundamental constitutional rights in cases like *Miller-El*, *Banks*, *Wiggins*, and *Lee*.

LETTER SUBMITTED BY ROBERT D. EVANS, GOVERNMENTAL AFFAIRS OFFICE, THE AMERICAN BAR ASSOCIATION (ABA) TO THE SENATE JUDICIARY COMMITTEE

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September 27, 2005

Honorable Arlen Specter
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Specter and Senator Leahy:

I write on behalf of the American Bar Association to express our strong opposition to S.1088, the Judiciary Committee-adopted substitute to the proposed "Streamlined Procedures Act of 2005" (SPA) expected to be considered this week by the Committee. S.1088 as amended retains a number of proposed sweeping changes to important habeas corpus protections that we objected to in our previous letter of June 28 and statement submitted at the July 13th Committee hearing. We believe that the Committee should heed the concerns expressed by a broad range of judges, prosecutors, defense counsel and organizations representing them that this proposed legislation is too broad and that further changes to recently-enacted reforms in federal habeas corpus law must be preceded by careful fact-finding and study.

Contrary to the claimed goals of SPA, this measure would create a host of new problems. The bill would overturn several Supreme Court decisions interpreting the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a comprehensive reform of habeas corpus enacted fewer than ten years ago. It has taken almost ten years for the courts to resolve challenges and questions arising under AEDPA. We believe the constitutional questions and legal inconsistencies raised by S.1088 are more complicated and much more troubling than those posed by AEDPA when enacted:

- Although prisoners are already required to exhaust their state court remedies before pursuing a claim in a federal court, the bill would dismiss all claims which lack exhaustion "with prejudice," regardless of the circumstances, ending any possibility of federal court review. This would include claims

involving government misconduct and have the effect of rewarding such behavior by eliminating the possibility of additional review and correction.

- The bill inadequately protects the innocent by proposing virtually unattainable procedural and other requirements to establish innocence. These requirements will prevent many innocent prisoners from reaching federal court, where the majority of innocent and exonerated prisoners have found relief in past years.

- The bill would prevent federal courts from reviewing any claims which state courts refuse to consider on state procedural grounds. While current law already limits such claims to a meritorious few, this bill would strip jurisdiction from the federal courts altogether, leaving state courts at liberty to make erroneous or arbitrary decisions without oversight or possibility of correction.

- Poorly drafted provisions will invite years of litigation and create chaos while the meaning of such terms is resolved. Instead of "streamlining" the appellate process, the bill will create additional delay and uncertainty for families of crime victims.

Similar concerns about the provisions proposed in S.1088 recently led to the adoption of a joint resolution from the Conference of Chief Justices and the Conference of State Court Administrators opposing the legislation. They recommended that Congress authorize additional study and analysis of AEDPA to date before considering … "appropriate targeted measures that will ameliorate the documented problems and avoid depriving the federal courts of their additional jurisdiction without more supporting evidence."

We think this approach is prudent and appropriate. There is no demonstrated need for this bill. In the total absence of any studies on AEDPA or the cause of delays in the courts, the need for new legislation is premature at best. In the case of S.1088, a hastily drafted proposal for change should not be considered before a careful study which can identify discrete problems and alternatives is undertaken. We strongly support such a study by the Judicial Conference of the United States or other independent body and a report of its finding to Congress. This is a necessary step that must preclude any action on this legislation.

For all of the above reasons, we urge the members of the Judiciary Committee to set aside consideration of S.1088 or similar legislation.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: Members of the Committee

LETTER SUBMITTED BY PAUL A. RENNE, FORMER ASSISTANT U.S. ATTORNEY TO THE SUBCOMMITTEE (OCTOBER 31, 2005)

October 31, 2005

Via Facsimile

Honorable F. James Sensenbrenner, Jr.
2449 Rayburn House Office Building
Washington, D.C. 20515

Honorable John Conyers, Jr.
2426 Rayburn House Office Building
Washington, D.C. 20515

Honorable Howard Coble
2468 Rayburn House Office Building
Washington, D.C. 20515

Honorable Robert C. Scott
1201 Longworth House Office Building
Washington, D.C. 20515

Re: HR 3035

Dear Representatives Sensenbrenner, Conyers, Coble & Scott:

I write this letter as a former Assistant U.S. Attorney in the District of Columbia as well as a private attorney with experience representing a defendant in a death penalty appeal, to express my strenuous opposition to HR 3035, the "Streamlined Procedures Act of 2005." I believe this Act, which is totally unnecessary in light of the lack of any significant delay in federal habeas corpus proceedings in capital cases, would constitute a retreat from the safeguards necessary to assure that individuals who are factually innocent or whose trials were constitutionally unfair are not put to death.

The proponents of HR 3035 insist that the number of years between conviction and final resolution of death penalty cases would be reduced significantly by enactment of this legislation. Certainly, with regard to California, this is plainly untrue. (In this regard, I ask that the attached memorandum which provides detailed information about the capital punishment system in California, as well as a copy of a letter from Chief Justice George of the California Supreme Court which discusses the Court's workload in relation to state habeas petitions, be placed into the record.) The memorandum demonstrates that in California the source of the lapse of time between the offense and conclusion of a death penalty case is a result of state court processes that are specific to our state, and are not attributable to the federal habeas process.

I speak about this matter from personal experience, having represented a California death row inmate for well over a decade in the state system. I assumed his representation shortly after his conviction in 1988; his conviction was affirmed on appeal by the California Supreme Court and, in 2004 a

unanimous California Supreme Court, following reference to a Special Master as a result of a grant of the state habeas petition, vacated the death penalty sentence. In sum, not only will HR 3035 all but eliminate federal habeas review, in so far as California is concerned, it will not make a significant change in the time these cases require for appropriate judicial review.

It would be a grave mistake for Congress to pass legislation that sanctions the execution of wrongfully convicted or wrongfully sentenced defendants without the opportunity to prove these fundamental constitutional violations in federal court; it is particularly repugnant to do so on the basis of a false argument that such legislation is necessary because of the delays imposed by federal habeas corpus proceedings. To the extent that federal habeas proceedings are not as swift as some would wish, federal judicial review of state convictions – now greatly restricted by the provisions of the Antiterrorism and Effective Death Penalty Act – is nonetheless imperative.

There is no evidence that undue delay in the current federal habeas system warrants the sweeping changes proposed in HR 3035. However, there is ample evidence that individuals who were wrongfully convicted or sentenced will lose any opportunity for federal judicial review – and for justice to be done – if this bill becomes law. In this regard, I call your attention to the October 19, 2005 analysis of HR 3035, which was submitted by Thomas W. Hillier II, the Federal Defender of Western Washington, and is a part of the record before this Committee.

To cut back on any of these safeguards would contradict the actions taken by this Committee and the Congress in enacting the Innocence Protection Act just a year ago. That Act recognized, of course, that the capital punishment process is flawed and that more safeguards are warranted to protect against wrongful convictions and sentences.

I remain hopeful that this bill will be rejected.

Sincerely yours,

Paul A. Renne

cc: Hon. Roy Blunt
Hon. Nancy Pelosi

957799 v1/SF

LETTER SUBMITTED BY PAUL A. RENNE, FORMER ASSISTANT U.S. ATTORNEY TO THE SUBCOMMITTEE (JULY 20, 2005)

PAUL A. RENNE
ONE MARITIME PLAZA
20TH FLOOR
SAN FRANCISCO 94111-3580
(415) 693-2073

July 20, 2005

Via Facsimile

Senator Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510
Attention: Julie Katzman

Senator Arlen Specter
711 Hart Senate Office Building
Washington, D.C. 20510
Attention: Brett Tollman

Senator Diane Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510
Attention: Brett Speigel

Dear Senators Specter, Leahy and Feinstein:

I write this letter as a former Assistant U.S. Attorney in the District of Columbia as well as a private attorney with experience representing a defendant in a death penalty appeal, to express my strenuous opposition to S.1088, the "Streamlined Procedures Act." I believe this Act would constitute a retreat from the safeguards necessary to assure that innocent individuals are not put to death.

In addition, I ask that the attached memorandum, which provides detailed information about the capital punishment system in California, be placed into the records. The memorandum demonstrates that, in California, the source of the lapse of time between the offense and conclusion of a death penalty case is a result of state court processes that are particular to California. I speak about this matter from personal experience, having represented a California death row inmate for well over a decade in the state system before his death sentence, which initially was affirmed on appeal, was finally overturned by the California Supreme Court following reference to a Special Master as a result of a grant of the state habeas petition. In sum, not only will S. 1088 all-but eliminate federal habeas review, certainly, in so far as California is concerned, it will not make a significant change in the time these cases require for appropriate judicial review.

Sincerely yours,

Paul A. Renne

957799 v1/SF

INTRODUCTION

Several factors contribute to the unique situation that exists in California with regard to capital appeal and post-conviction (i.e., state habeas corpus) proceedings. One factor, according to California Supreme Court Chief Justice Ronald M. George, is the degree of scrutiny that death penalty cases receive before the Court. The Chief Justice recently said, "We don't turn them out like Texas, and I'm glad that we don't."1 Others, set forth below, are idiosyncratic circumstances that contribute to the length of time between commission of the crime, judgment, and final resolution of the case. These circumstances are not the product of federal review or the statutes governing section 2254 cases; consequently, amending the federal habeas statutes would do little, if anything, to reduce this time period in California. In short, the factors are state-created, unique, and not only produce a lengthy state court review process, but require the federal courts to devote significantly more resources to the cases.

I. **What accounts for the lapse of time between commission of the crime and finality in state court in California?**

1. The Lack of Qualified Counsel Willing to Undertake Representation on Automatic Appeal and in Habeas Corpus.

There a chronic and widely reported shortage of willing and qualified counsel to represent individuals in capital cases before the California Supreme Court. As a result, death -sentenced individuals wait years for appointment of counsel before the appellate process can begin. Presently, there are 105 death row inmates without counsel for either the automatic appeal or the state habeas

1 *See* Egelko, *State Chief Justice Praises Long Appeals Process*, San Francisco Chronicle, December 15, 2004, at A21.

proceeding and an additional 166 individuals with counsel for the appeal but without counsel for state habeas proceedings.2 Figures for the period from January 2000 to July 2005 reveal that, on average, individuals waited 55 months – more than four and a half years – from the date of the trial judgment until a lawyer was appointed for the automatic appeal. Currently, in mid-2005, counsel are appointed for the automatic appeal in cases where judgment was rendered by the trial court in 1999 or 2000. In addition, in several cases, the California Supreme Court has been required to remove or allow counsel to withdraw, creating an additional time lapse while the replacement counsel becomes familiar with the case.

2. The State Constitutional Requirement that Death Judgments Be Appealed Directly to the California Supreme Court, which has a Unitary System of Review.

California's process for appellate and habeas corpus review creates a "bottleneck" in the California Supreme Court. Under the state Constitution, every capital judgment is automatically appealed directly to the California Supreme Court. In addition to the automatic appeal, under procedures adopted by the California Supreme Court, the state habeas proceeding -- known in other states as post-conviction review -- also is handled by the California Supreme Court as part of its unitary review procedure. There are currently 646 men and women on California's Death Row. As a result, the resources of the seven-justice court, which also oversees the entire California court system, and decides other important cases in all areas of law, are severely strained. Although death sentences have decreased in recent years, the sheer number of death judgments over the past twenty-five years (well over 600, with an average record length of almost 15,000 pages) has made the

2 Unless otherwise specified, data presented in this memorandum was obtained through on-line research utilizing resources such as Westlaw and LEXIS, the website of the California Supreme Court at http://www.courtinfo.ca.gov/courts/supreme/ and the website of the California Department of Corrections at http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/default.asp.

process of recruiting counsel, presenting the appeal and state habeas, and reviewing the case, time-consuming for the court. One commentator has dubbed the Court's effort to combine the automatic appeals and state habeas "a disastrous failure."3

Currently available statistics illustrate the problem. For example, in the five-year period between 1996-2000, 183 death judgments were entered in the California trial courts, an average of 36.6 a year, including 42 in 1999. During those same five years, the California Supreme Court decided 68 capital appeals, an average of 13.6 per year. In short, the Court, despite all its efforts, fell further and further behind and the length of time between judgment and the decision on the appeal steadily increased.4 As another example, in 2005, the California Supreme Court has thus far issued twelve automatic appeal opinions. The judgments in these cases were rendered in the trial courts between December of 1990 and March of 1995. The average time from judgment to California Supreme Court decision was approximately 12 years and four months. The average time from the date of offense to California Supreme Court decision was approximately 15 years and nine months.

3. Appointment of Habeas Counsel & the Separate Habeas Process.

In California, lawyers appointed for the automatic appeal are not required to accept an appointment for the state habeas proceedings. Consequently, there is a lengthy period between the conclusion of the trial and the appointment of habeas counsel. There are currently 166 death-sentenced individuals who have appellate counsel, but no lawyers to litigate the state habeas proceeding. Approximately thirty of these cases involve death judgments entered in the trial court

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3 *See* Uelman, *Supremely Futile: The George Court's Sisyphean Struggle,* California Lawyer (July 2005), at 28.

4 *See* http://itrs.scu.edu/instructors/uelmen.

between 1989 and 1995. The list of appointments made during the period January 2000 to present reveals that the average wait from the trial judgment until appointment of state habeas counsel was 84.9 months, just over seven years. Looking at the last six state habeas appointments made in 2005, the time from trial judgment to appointment of habeas counsel was 98.5 months, more than eight years.

In addition, in some cases, the state habeas proceedings continue long after the automatic appeal is concluded. For example, the recent decision in *In re Sakarias*, 35 Cal.4th 140, 25 Cal.Rptr.2d 65 (2005) was issued on March 5, 2005, five years after the automatic appeal was decided, *see People v. Sakarias*, 22 Cal.4th 596, 94 Cal.Rptr.2d 17 (2000), and over 14 years after the judgment in the trial court. In fact, 14.27 years represents the average time between trial court judgment and the decision on state habeas in the cases resolved by the California Supreme Court between 2000 and present. In sum, in the vast majority of cases, an affirmance in the automatic appeal does not open the portal into the federal courts because often convictions are affirmed on direct appeal years before the California Supreme Court's decision in the state habeas proceeding.

II. Why do California cases require more federal resources or oversight, particularly in the district courts?

1. The California Supreme Court's Affirmance Rate.

For nearly two decades, the state high court's affirmance rate has been among the highest in the country. Combined with the raw number of capital cases, this results in an extraordinarily high number of cases proceeding into federal district court. From 1979 through 1986, the California Supreme Court affirmed only 7.8 percent of the 64 judgments that it reviewed. Between 1987

through March of 1989, following the change in personnel on the Court, it affirmed 71.8 percent of the 71 judgments that it reviewed. During a two year period, the court went from the third lowest affirmance rate to the eighth highest in the nation.5

Between 1990 and1992, the California affirmance rate reached 94.2 percent, which placed first in the United States, ahead of Georgia ((70.3 percent), Florida (62.6 percent) and Texas (76.9 percent). This high affirmance rate continues to the present. For example, between 1996 and 2003, the California Supreme Court issued 98 death penalty decisions. It reversed a total of 10 cases for an affirmance rate of 89.8 percent.6 The California Supreme Court's tolerance for constitutional error, frequently expressed through a finding that a gross constitutional violation was "harmless" to the death judgment, has been extremely high. As a result, the federal courts in California receive cases that, in other states, would never progress into federal court.

2. Lack of Discovery in Connection with Post-Conviction Proceedings.

Discovery is a critical route by which petitioners in states other than California investigate constitutional violations and develop facts in support of claims of error. Until 2003, no post-conviction litigant in California obtained discovery except in connection with the rare reference (i.e., evidentiary) hearing.7 Effective January 1, 2003, the legislature abrogated the state courts' decisional law, and authorized discovery.8 However virtually no condemned prisoners obtained discovery until several months *after* a March 2004 decision of the California Supreme Court.9 Fact-

5 *See* Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 Loyola L.A. L.Rev. 237, 237-238 (1989).)

6 *See* http://itrs.scu.edu/instructors/uelmen.

7 *See People v. Gonzalez*, 51 Cal.3d 1179 (1990).

8 *See* California Penal Code section 1054.9.
9 *See In re Steele*, 32 Cal.4th 682 (2004).

finding mechanisms in state court, such as discovery, lead to more streamlined, efficient processes in federal district court. The federal courts in California in section 2254 proceedings have yet to reap the benefits of California's new law. Because, in most instances, the discovery procedures in federal court offer the first opportunity to a California capital inmate for discovery, the time and resources expended on the cases by the federal district courts are increased.

3. The Court's Self-Acknowledged Inability to Provide the Federal District Courts with Its Reasoning Process in Ruling on Habeas Corpus Petitions.

The California Supreme Court has created a labyrinthine set of procedural rules combined with what are typically one-page orders. These orders are bereft of any legal or substantive reasoning for denials of claims on the merits in capital state habeas cases. The procedural rulings and the lack of explanation for merits denials complicate the federal courts' ability to review California cases. In 2003, in response to a request from the Chief Judge of the Ninth Circuit to the California Supreme Court to issue more explanatory orders in capital state habeas cases in order to aid the federal courts in their review of the cases, Chief Justice George advised the federal court that such expanded, explanatory orders "would substantially outweigh any benefits."10 No less an authority than former Justice Janice Rodgers Brown, who served on the California Supreme Court for nine years, decried the rules applied by that Court in state habeas cases, explaining that the state Supreme Court has unwisely created a "Byzantine system of procedural hurdles" that undermine the goals of integrity, finality and comity, and create unnecessary and time-consuming layers of review. "[W]e better serve the purpose of the 'Great Writ' . . . and the concern for promptly resolving these claims by abandoning the effort to erect meaningless procedural impediments in favor of the one

certainty for ensuring expeditious review of capital habeas petitions: full merit review without regard to procedural bars."11

4. The Lack of Reference Hearings in State Court.

The California Supreme Court very rarely grants a habeas evidentiary hearing, a proceeding where disputed facts are resolved through the presentation of evidence by both parties. Between April of 1979 and April of this year, the California Supreme Court issued orders for evidentiary hearings – known as reference hearings – in 37 capital habeas writ proceedings. This significantly distinguishes California from most other jurisdictions. What is typical, sometimes even mandatory, in other states -- an evidentiary hearing in state post-conviction -- is a novelty in California. As a result, federal court hearings and fact-finding proceedings for common post-conviction claims, such as violations of prosecutorial disclosure obligations, ineffective assistance of counsel, or conflict of interest situations, are necessary in many, many cases and increase considerably both the time and resources expended on the cases by the federal district courts.

CONCLUSION

In short, the California situation is unique. The state system has huge problems and these problems complicate the post-conviction process in state court and in the federal district court, result in delay within the state system, and cause the cases to move more slowly once they move into the federal habeas process. None of these problems will be ameliorated by the proposed legislation.

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10 *See* Letter, Chief Justice George to Chief Judge Mary M. Schroeder, October 29, 2003.

11 *See In re Seaton*, 34 Cal.4th 192, 209 (2004)(dissenting opinion of Brown, J.)(internal brackets and quotations deleted for readability); *see In re Gallego*, 18 Cal.4th 832, 842 (1998) (opinion of Brown, J.).

"JUDICIAL CONFERENCE ACTION REGARDING THE 'STREAMLINED PROCEDURES ACT OF 2005'" SUBMITTED BY KAREN KREMER, OFFICE OF LEGISLATIVE AFFAIRS, ADMINISTRATIVE OFFICE OF THE U.S. COURTS TO THE SUBCOMMITTEE

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To: Bobby Vassar
Democratic Counsel
Subcommittee on Crime, Terrorism,
and Homeland Security
Voice: (202) 225-2022
Fax: (202) 225-1845

From: Karen Kremer

Date: 9/21/05

Pages: 3 (including cover)

Comment: I wanted to make you aware that, on September 20, 2005, the Judicial Conference of the United States took action regarding the Streamlined Procedures Act, as set forth in the attachment. A letter explaining the action of the Conference will be provided to all members of the House Judiciary Committee early next week.

Please give me a call if you have any questions.

(The information contained in this facsimile message is intended only for the use of the specified recipients and may be confidential. If this communication is misdirected, please destroy all papers and notify sender. Thank you.)

Judicial Conference Action Regarding the "Streamlined Procedures Act of 2005"

With regard to habeas corpus legislation, the Judicial Conference agreed to —

1. Express support for the elimination of any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts;

2. Urge that, before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners and, if so, the causes for such delay;

3. Express opposition to legislation regarding federal habeas corpus petitions filed by state prisoners that has the potential to (1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation, including the following sections of the proposed "Streamlined Procedures Act of 2005" in the 109th Congress (H.R. 3035 as introduced and S. 1088 as amended in July 2005):

   Section 2 of H.R. 3035 and S. 1088 (mixed petitions);
   Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims);
   Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period);
   Section 6 of H.R. 3035 (harmless errors in sentencing); and
   Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code);

4. Express opposition to section 3 (amendments to petitions) of H.R. 3035 and S. 1088 that would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law;

5. Express opposition to section 7 of H.R. 3035 and section 6 of S. 1088 that would make the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applicable to cases pending prior to its enactment, and section 14 of H.R. 3035 and S. 1088 that would make the proposed Streamlined Procedures Act applicable to pending cases; and

6. Express opposition to the provision in section 11 of H.R. 3035 and section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding.

"REBUTTAL TO CLAIMS FROM THE OFFICE OF THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, PENNSYLVANIA"

REBUTTAL TO CLAIMS FROM THE OFFICE OF THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, PENNSYLVANIA

Philadelphia Deputy District Attorney Ronald Eisenberg recently presented testimony in the House and gave press interviews in support of the "Streamlined Procedures Act of 2005," H.R. 1035/S.1088 ("SPA"). Other members of the Philadelphia District Attorney also have lobbied for similar draconian preclusions of judicial review in cases involving unconstitutional convictions and death sentences. This outline directly addresses Mr. Eisenberg's comments, but its analysis also applies to similar assertions by colleagues from his office. These Philadelphia prosecutors take pride in appearing reasonable and soft spoken. However, they have an agenda, which they implemented in the Pennsylvania state courts and now seek to implement federally through the SPA – namely, to curtail or eliminate post-conviction judicial review of unconstitutional convictions and death sentences.

The presentation from the Philadelphia District Attorney purports to be supported by examples from Pennsylvania, and has three main themes: federal courts overturn death sentences for frivolous reasons; federal court litigation causes interminable delay; and SPA is a balanced approach that will "limit overreaching by federal courts, while still providing an appropriate forum for criminal defendants raising legitimate constitutional challenges to their convictions." Eisenberg testimony, p.5.[1] What follows demonstrates that both the broad themes and the examples to support those themes are misleading – the crisis alleged by the Philadelphia District Attorney is non-existent, while the proposed solution (SPA) is designed not to "streamline" habeas procedure, but rather to eliminate federal habeas review of the vast majority of

[1] Available at http://judiciary.house.gov/HearingTestimony.aspx?ID=303.

unconstitutional convictions and death sentences.

When considering the comments emanating from Philadelphia District Attorney's Office, it is important to understand that this office has pushed a radical, anti-constitution agenda, which already has been largely implemented in Pennsylvania's state courts and which Mr. Eisenberg and his colleagues now wish to spread to the federal courts. That office worked on drafting, then lobbied for and obtained jurisdiction stripping amendments to Pennsylvania's *state court* mechanism for post-conviction relief, the Post-Conviction Relief Act ("PCRA"). Those amendments so limited the PCRA's scope that courts and commentators have called the post-amendment PCRA "one of the most restrictive and narrow of all the modern state postconviction remedies." Donald E. Wilkes, Jr., State Postconviction Remedies and Relief, p. 760 (1996 ed.), quoted in Lambert v. Blackwell, 134 F.3d 506, 519 n.25 (3d Cir. 1998) and Commonwealth v. Thomas, 718 A.2d 326, 329 n.8 (Pa.Super. 1998). These amendments to the PCRA even eliminated the provision under which Pennsylvania courts traditionally granted post-conviction relief for "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner." 42 Pa.C.S. 9543(a)(2)(v) (deleted by 1995 amendment). Having convinced the Pennsylvania legislature to strip the state courts of jurisdiction to hear federal habeas claims of constitutional error that would require relief in a federal habeas court, the Philadelphia District Attorney now asks the United States Congress to strip the federal courts of jurisdiction to correct these same types of constitutional error.

The Philadelphia District Attorney's office also lobbied the Pennsylvania legislature for, and obtained, elimination of all "proportionality review" in Pennsylvania death penalty cases.

Proportionality review was a traditional safety valve for grossly inappropriate death sentences. Traditionally, the Pennsylvania Supreme Court reviewed Pennsylvania capital cases to determine if "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." 42 Pa.C.S. § 9711(h)(3)(iii) (deleted by Act 1997, No. 28). Now, however, Pennsylvania is free to impose and carry out "excessive or disproportionate" death sentences without judicial review of proportionality in the Pennsylvania Supreme Court.

The Philadelphia District Attorney has also convinced the Pennsylvania Supreme Court to impose "waiver" or "procedural default" rules in capital cases in an extremely draconian way. When capital punishment was reintroduced in Pennsylvania in 1978, the Pennsylvania Supreme Court announced that it would not let procedural technicalities prevent it from reviewing and remedying constitutional errors in capital cases. See Commonwealth v. McKenna, 383 A.2d 174, 180-81 (Pa. 1978). The Pennsylvania courts applied this capital case "relaxed waiver" rule for 20 years, reviewing constitutional claims that would otherwise have been deemed waived because of a procedural miscue by counsel. The Philadelphia District Attorney, however, repeatedly urged the Pennsylvania Supreme Court to abandon the relaxed waiver approach, and to impose rigid technical bar rules even when they would result in unconstitutional executions.

As a consequence, the Pennsylvania Supreme Court abolished the relaxed waiver approach, and then began applying procedural bar ("waiver") rules to capital cases in the rigid, draconian way that the Philadelphia District Attorney desired. Moreover, the Pennsylvania Supreme Court made this rule change *retroactive*, pulling the rug out from under petitioners who had relied on the traditional approach. As Pennsylvania Supreme Court Justice Thomas Saylor

has explained, the retroactive rule change that the Philadelphia District Attorney pushed for and got has been grossly unfair to Pennsylvania prisoners, barring review of claims that were reviewable under the traditional approach. See Commonwealth v. Ford, 809 A.2d 325, 337-38 (Pa. 2002) (Saylor, J., concurring). The Pennsylvania Supreme Court itself has acknowledged that the harsh new approach the Philadelphia District Attorney pushed for and got is "murky," has created much "confusion" and has "cause[d] uncertainty among the bench and bar" about what is needed to "preserve" a claim for state post-conviction review. Commonwealth v. McGill, 832 A.2d 1014, 1020-22 (Pa. 2003).

Current federal habeas law, as described in numerous United States Supreme Court decisions regarding the adequate and independent state ground doctrine, protects federal constitutional rights against arbitrary, unfair treatment by the state courts. Pennsylvania Supreme Court Justice Saylor has explained that *fairness requires the federal habeas courts to review* the merits of Pennsylvania prisoners' claims because those prisoners were caught in the trap caused by the state court's retroactive rule change, see Ford, 809 A.2d at 337-38 (Saylor, J., concurring), and federal habeas courts in Pennsylvania have recognized the unfairness of this situation and provided merits review, see, e.g., Pursell v. Horn, 187 F.Supp.2d 260, 290-97 (W.D. Pa. 2002) (Chief Judge D. Brooks Smith).[2] The Philadelphia District Attorney, however, now asks Congress, through SPA, to deny the federal courts any jurisdiction to hear constitutional claims that were barred in a "murky," "confused," unpredictable and unfair way by

[2]Judge Brooks Smith was appointed to the District Court by President Reagan, and was recently appointed to the Third Circuit by President Bush.

the state courts.

Through these and other actions, the Philadelphia District Attorney was instrumental in convincing Pennsylvania's legislature and courts to gut review by Pennsylvania courts of federal constitutional error and to allow unconstitutional executions. Through SPA, they now seek to eliminate meaningful federal review, which is already "severely circumscribed" by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[3] As a result, *no court* ever will be able to fairly review unconstitutional convictions and especially, unconstitutional death sentences. This agenda is not just radically anti-federal court; it is radically anti-constitutional.

In reality, the Philadelphia District Attorney's office fears *any* fair judicial review of constitutional claims. They particularly fear federal court review because it is more likely to be fair than is state court review. While their representative cites the number of federal court grants of habeas relief as evidence of a federal judiciary out of control, see Eisenberg testimony, the truth is that these decisions resulted from constitutional violations that had been left uncorrected by the state courts. It is troubling that the state courts did not act in these cases, even worse because the state court inaction often resulted from the agenda lobbied for in Pennsylvania by the Philadelphia District Attorney's office.

While SPA will gut enforcement of all federal constitutional rights, there are two particular areas regarding which Philadelphia prosecutors have particular reason to fear fair disposition in a federal forum: racial discrimination by prosecutors and ineffective lawyering by

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[3]See Johnson v. Carroll, 369 F.3d 253, 257 (3d Cir. 2004) ("AEDPA severely circumscribes a federal habeas court's review of a state court decision.").

defense counsel. It is therefore worth discussing these two areas, and the shameful role played by the Philadelphia District Attorney's office.

In 1997, it was revealed that the Philadelphia District Attorney's Office had conducted videotaped office-run training in which trial prosecutors were taught how to conduct discriminatory jury selection. The Pennsylvania Supreme Court has observed that "the practices described in the [training videotape] ... *flout constitutional principles in a highly flagrant manner*." Commonwealth v. Basemore, 744 A.2d 717, 731 n.12 (Pa. 2000). For example:

> [T]he purpose of voir dire, namely, to select a fair and impartial jury, is denigrated as "ridiculous," in favor of the selection of jurors who will be biased in favor of conviction; various racial and gender stereotypes are described and offered as reasons to discriminate in the selection of jurors; techniques for accomplishing such discrimination are described in detail, including the maintenance of a running tally of the race of the venire panel and the invention of pretextual reasons for exercising peremptory challenges; and a willingness to deceive trial courts to manipulate jury panels to these ends is also expressed.

Id., 744 A.2d at 729; see also id. at 727-32 (quoting training videotape).[4]

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[4]The training vidotape was made under the aegis of then-District Attorney Ronald Castille, who is now a Justice on the Pennsylvania Supreme Court, and who routinely refuses to recuse himself from cases involving the training tape and from cases that he was otherwise responsible for prosecuting as Philadelphia's elected District Attorney.

The training session's "teacher" was Jack McMahon, a long-time Philadelphia Assistant

In 2003, a Committee appointed by the Pennsylvania Supreme Court and charged with investigating racial and gender bias in Pennsylvania's justice system found "strong indications that Pennsylvania's capital justice system does not operate in an evenhanded manner" when it comes to race. Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, p.201 ("Bias Report").[5] The Committee found particularly "alarming results" in Philadelphia, where several studies show that "*race plays a major, if not overwhelming, role in the imposition of the death penalty*"; that "African American defendants were sentenced to death at a significantly higher rate than similarly situated non-African Americans"; and that this racially-biased sentencing results in part from *Philadelphia prosecutors' racially-biased jury selection*, with Philadelphia prosecutors "striking African Americans from the jury twice as often as non-African Americans." Bias Report at 201, 218, 223 n.5; see also id. at 205-09.

Given this evidence of routine racial discrimination by Philadelphia prosecutors, the Philadelphia District Attorney's efforts to curtail fair judicial review in federal court can be

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District Attorney, who gave the training at the request of one of then-District Attorney Castille's top aides.

The Philadelphia District Attorney's office hid this videotape for ten years, and only disclosed it because the current District Attorney, Lynne Abraham, was in an election battle against the former Philadelphia prosecutor, Jack McMahon, who presented the videotaped training session.

[5]Available at www.courts.state.pa.us/Index/Supreme/biasreport.htm.

understood in proper context. The Philadelphia District Attorney's office obviously is annoyed that the federal habeas courts have begun to redress racial discrimination by Philadelphia prosecutors, and Philadelphia prosecutors want SPA to stop it. A few examples are illustrative:

In Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004), a Philadelphia capital case, the Third Circuit found intentional racial discrimination by the Philadelphia prosecutor and ordered a new trial. Under SPA, the federal courts would not have jurisdiction to consider this racial discrimination because the state court deemed the issue " waived."[6] Mr. Holloway would have been executed.

In Wilson v. Beard, 2003 U.S. Dist. Lexis 9737 (E.D. Pa. May 8, 2003); subsequent history, Wilson v. Beard, 314 F.Supp.2d 434 (E.D. Pa. 2004), a Philadelphia case in which the jury was selected by Jack McMahon, the teacher of race discrimination in the Philadelphia District Attorney's training videotape, the District Court found that Mr. McMahon intentionally discriminated, and granted habeas relief. Under SPA, the federal courts would not have jurisdiction to consider this racial discrimination because the state court deemed the issue

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[6]Mr. Holloway's direct appeal lawyer did not raise the issue because he thought it was enough that Mr. Holloway wrote to the Pennsylvania Supreme Court complaining about the discrimination. Mr. Eisenberg himself wrote to the Pennsylvania Supreme Court urging it to *not consider* Mr. Holloway's *pro se* claims of racial discrimination, and the state court complied. Mr. Holloway again raised the issue in his state post-conviction petition, but the Pennsylvania Supreme Court said it was "waived," which is what the Philadelphia District Attorney's office asked the Court to say.

"waived."[7]

In Brinson v. Vaughn, 398 F.3d 225 (3d Cir. 2005), another Philadelphia case in which the jury was selected by Jack McMahon, the Third Circuit remanded for an evidentiary hearing regarding Mr. McMahon's racially discriminatory jury selection. Under SPA, which eliminates "equitable tolling" of AEDPA's statute of limitations, the federal habeas courts would not have jurisdiction to consider this racial discrimination.[8]

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[7]The District Court found that the state court's waiver ruling was not an adequate state ground because it was utterly inconsistent with the treatment of similar claims in other cases.

[8]The Third Circuit found that fairness required equitable tolling because Mr. Brinson's filing "delay" was *engineered by the Philadelphia District Attorney's Office*. Mr. Brinson presented the racial discrimination claim to every level of the state courts, but the Philadelphia District Attorney's office successfully prevented the state courts from even holding a hearing. Having exhausted state remedies, Mr. Brinson then timely filed his federal habeas petition, but the Philadelphia Attorney's Office office convinced the federal district judge to send Mr. Brinson back to state court, against Mr. Brinson's wishes. The Philadelphia District Attorney's office then convinced the state court to deem Mr. Brinson's filing "procedurally barred." Mr. Brinson then returned to federal court, and the Philadelphia District Attorney's office argued that his federal habeas petition was "untimely" because his federal filing time lapsed while he was pursuing the futile state court litigation that The Philadelphia District Attorney's office had convinced the District Court Judge to require. The Third Circuit rejected this grossly unfair argument and allowed equitable tolling. Under SPA, the Third Circuit would not even have had

Intentional racial discrimination by Philadelphia prosecutors is not the only skeleton that the Philadelphia District Attorney's wants to keep in the closet. The Pennsylvania Supreme Court's Committee on Racial Bias also "concluded that delivery of *capital counsel services* for the indigent in Pennsylvania is *inadequate*"; that "[n]o county is providing representation that meets minimal ABA standards"; and that this "*significant failure in the delivery of capital counsel services* to indigent capital defendants in Pennsylvania ... disproportionately impacts minority communities." Bias Report at 213, 218.[9] The Philadelphia District Attorney's office knows that inadequate defense lawyering in Pennsylvania has resulted in unconstitutional convictions and death sentences, resulting from ineffective defense lawyering, and they fear any fair judicial review of Sixth Amendment claims of ineffective assistance of counsel. Again, a

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jurisdiction to deal with this unfairness.

[9]This finding of deficiencies in Pennsylvania capital counsel is nothing new. In 1990, a task force appointed jointly by the Pennsylvania Supreme Court and the Third Circuit found severe systemic deficiencies in the provision, training and support of capital counsel at all levels of state and federal review in Pennsylvania. See Report of the Joint Task Force on Death Penalty Litigation in Pennsylvania (1990). Similarly, in 1994-95, a federal district judge in Pennsylvania noted the lack of attorneys qualified to handle capital cases. See Carpenter v. Vaughn, 888 F.Supp. 658, 659 n.1 (M.D. Pa. 1995) (describing difficulty in finding counsel to appoint because of "the lack of attorneys experienced in the law of federal death penalty habeas corpus proceedings"); Carpenter v. Vaughn, 888 F.Supp. 635, 641 (M.D. Pa. 1994) (describing "dearth of attorneys experienced in the handling of this type of case").

few examples are illustrative:

In Rompilla v. Beard, 125 S.Ct. 2456 (2005), a Pennsylvania capital case, the United States Supreme Court found counsel ineffective at capital sentencing where counsel did not even bother to look at a court file about the defendant's history that the prosecutor told them about, and, as a result, did not discover that their client is mentally ill, brain damaged, mentally retarded and the victim of a horribly traumatic childhood. In fact, they did not look at a single piece of paper about their client's life history. Under SPA, the federal courts would lack jurisdiction to remedy this unconstitutional death sentence resulting from ineffective defense lawyering because the Pennsylvania Supreme Court unreasonably believed the defendant's post-conviction evidence was "not entirely helpful."

In Peterkin v. Horn, 176 F.Supp.2d 342 (E.D. Pa. 2001), a Philadelphia capital case, the federal district court granted a new trial on numerous grounds, including ineffective assistance by a counsel who was unprepared to try the case, prosecutorial misconduct and insufficient evidence. Under SPA, the federal court would have been without jurisdiction to review these constitutional errors because the federal constitutional had earlier dismissed the claims without prejudice to allow Mr. Peterkin to exhaust state remedies. SPA would also strip federal jurisdiction because Mr. Peterkin's claims were barred in state court under the unfair, retroactive application of Pennsylvania's new waiver rules that the Philadelphia District Attorney pushed for. Mr. Peterkin would be executed.

In Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. 2002), a Pennsylvania capital case, the federal court (Judge Brooks Smith, see note 2, supra) found counsel ineffective at capital sentencing where the lawyer *admitted* he did *absolutely nothing* to investigate or prepare critical

evidence. Under SPA, the federal court would be stripped of jurisdiction to review this constitutional error because the Pennsylvania Supreme Court retroactively applied its new rules to hold that the claim of ineffective assistance of counsel was "procedurally barred." Mr. Pursell would be executed.

In Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001), a Pennsylvania capital case, the federal court found counsel ineffective at capital sentencing where counsel, who was less than *two years* out of law school, never investigated Mr. Jermyn's shockingly traumatic childhood, which included beatings with a cat-o'-nine tails and a steel crutch, being chained in an attic room and being forced to eat from a dog food bowl, even thorough a psychiatrist told counsel he needed to investigate this evidence. SPA would eliminate federal jurisdiction over this claim, because the state courts retroactively applied a new procedural bar to the claim – i.e., the type of "procedural bar" that the Philadelphia District Attorney has lobbied for – even through the first post-conviction lawyer, who did not raise the issue was campaigning for the elected District Attorney position on a pro-death penalty platform. SPA also would eliminate federal jurisdiction because the state courts unreasonably held that there was no "prejudice" from sentencing counsel's incompetence. Mr. Jermyn would be executed.

In Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. 2002), a Pennsylvania capital case, the federal court found counsel ineffective for failing to object when the trial judge erroneously told the jury that state law allows parole from a life sentence. SPA would preclude federal jurisdiction over this claim because the Pennsylvania Supreme Court did not think the judge's misstatement affected the death sentence. Mr. Carpenter would be executed.

In Jacobs v. Horn, 129 F.Supp.2d 390 (M.D. Pa. 2001), a Pennsylvania capital case, the

federal court found counsel ineffective where he conducted no mental health investigation and, therefore, did not discover that Mr. Jacobs suffers from organic brain damage, a schizoid personality disorder, and emotional impairments resulting from an extremely traumatic childhood. Under SPA, the federal court would have no jurisdiction because the state courts retroactively applied new waiver rules. Mr. Jacobs would be executed

The Philadelphia District Attorney, for obvious reasons, will not describe these types of cases, where Pennsylvania prosecutors convinced the state courts to ignore real constitutional violations, and where the federal courts provided the only fair review for these unconstitutionally condemned petitioners. Moreover, Mr. Eisenberg's "descriptions" of the few cases that he discussed in his testimony in the House, see Eisenberg testimony, are riddled with misstatements and important omissions. For example:

Mumia Abu-Jamal (see Eisenberg testimony, pp. 1-2): Mr. Eisenberg starts with a Philadelphia case that is a hotbed of political controversy for reasons entirely unrelated to the availability of federal habeas review.[10] What Mr. Eisenberg neglects to mention is that the

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[10]If anything, Mr. Abu-Jamal's case is a type of case for which federal habeas review is particularly important. See Ronald J. Tabak & J. Mark Lane, Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: a Critical Analysis of Recent Developments and Current Proposals, 55 Alb. L. Rev. 1, 8 (1991) ("At least since Reconstruction, when Congress specifically made the federal writ applicable to state prisoners, habeas corpus has provided a check on the tendencies of the state courts to reflect the temporary passions and prejudices of the local populace." (citations omitted)).

District Court found that Mr. Abu-Jamal's death sentence is *unconstitutional*; moreover, the District Court also found that Mr. Abu-Jamal should be allowed to appeal because he made a "substantial showing of the denial of a constitutional right" based upon evidence that the trial prosecutor (from the Philadelphia District Attorney's office) engaged in *intentional racial discrimination* during jury selection. See Abu-Jamal v. Horn, 2001 WL 1609690 (E.D.Pa. Dec. 18, 2001).[11]

William Holland: Mr. Eisenberg does not mention that the District Court found Mr. Holland's death sentence *unconstitutional* because the Pennsylvania state courts improperly denied him a mental health expert who could have presented mitigating evidence at capital sentencing, and because his trial and direct appeal lawyers were unconstitutionally ineffective. See Holland v. Horn, 150 F.Supp.2d 706, 794 (E.D. Pa. 2001).[12] Nor does Mr. Eisenberg mention that the Third Circuit, which he claims to be "dallying about what issues it will allow the defendant to raise," Eisenberg testimony, p.2, has already found that Mr. Holland has made a "substantial showing of the denial of a constitutional right" with respect to numerous claims that affect both his conviction and death sentence, including denial of a mental health expert at the guilt-phase, several unconstitutional jury instructions, unconstitutional arguments by the trial prosecutor, and ineffective assistance of counsel at both phase of trial. See Third Circuit order

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[11]The Abu-Jamal District Judge, Judge Yohn, was appointed by the first President Bush.

[12]The Holland District Judge, Judge Van Antwerpen, was appointed to the District Court by President Reagan, and recently appointed to the Third Circuit by President Bush.

of April 14, 2004.[13]

Donald Hardcastle: Mr. Eisenberg does not mention that the Third Circuit found a *prima facie* case of *intentional racial discrimination by the Philadelphia prosecutor* in this case, and remanded to let the District Court see if the prosecutor could come up with any race-neutral reasons for his peremptory strikes against African Americans. See Hardcastle v. Horn, 368 F.3d 246 (3d Cir. 2004).[14] Nor does Mr. Eisenberg acknowledge that *every second of "delay" in this case is attributable to the Philadelphia District Attorney's office*. Mr. Hardcastle first raised the race discrimination claim at his trial, but the Philadelphia District Attorney's office spent the next twenty-two years fighting against even a hearing being held to resolve the claim.

Brian Thomas: Mr. Eisenberg does not mention that this is a case where the petitioner filed his federal habeas petition within the one year allowed by AEDPA and *the Philadelphia District Attorney's office* then asked the District Court for, and received, lengthy extensions of time to file responses; and it is a case where the trial lawyer did not bother to look at any mental health information about his client despite the fact that Mr. Thomas had been in mental hospitals

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[13]The Third Circuit panel that made these findings, and that Mr. Eisenberg accuses of "dallying," is comprised of Judge Roth, who was appointed by the first President Bush, and Judges Greenberg and Cowen, both appointed by President Reagan.

[14]The panel consisted of Judge Roth, appointed by the first President Bush, and Judges Nygaard and Judge Scirica, both appointed by President Reagan. Judge Nygaard would have granted a new trial without remanding, based on the Philadelphia prosecutor's repeated failure to give reasons for her strikes when given the opportunities to do so.

for *years* and the lawyer was told by the prosecutor that Mr. Thomas *attempted suicide* while held pending trial.

Michael Pierce: Mr. Eisenberg neglects to mention that Mr. Pierce is floridly psychotic (and has been found so by prison doctors), and is unable to even discuss the facts of his case with his counsel. Mr. Eisenberg also neglected to discuss that in state court, Mr. Pierce was permitted to "waive" post-conviction review even though under questioning Mr. Pierce told the state court that his decision to "waive" was motivated by fears that guards would break into his cell and rape and drug him. The Philadelphia District Attorney now opposes federal review and a federal hearing, even though the Commonwealth's own doctors' findings demonstrate that this petitioner is delusional and addled by mental illness.

Hubert Michael: Mr. Eisenberg did not describe the gross constitutional violations that resulted in Mr. Michael's death sentence, including a trial defense lawyer who did *no investigation* for capital sentencing and who made a *false stipulation* that there were no mitigating circumstances when *he knew that substantial mitigation actually existed*. Mr. Eisenberg also did not mention the serious questions about Mr. Michael's competency (including a recent finding by the District Court's own neutral expert that Mr. Michael may be incompetent), which required careful judicial review.

Lisa Lambert: Mr. Eisenberg's description of this case is filled with factual distortions, but they pale in comparison to the main point – this is a case in which *the Third Circuit ruled for the Commonwealth of Pennsylvania* – and thus this case provides no reason to gut important constitutional protections.