THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: HABEAS CORPUS REFORM?

INTRODUCTION

On April 24, 1996 President Clinton signed into law the Antiterrorism and Effective Death Penalty Act (Act),[1] significantly changing both statutory and judge-made habeas corpus law. Despite the potentially misleading title of the Act, most of its provisions apply to habeas corpus petitions in both capital and non-capital cases.[2]

Although the Act makes significant procedural changes,[3] it fails to address the problems present in pre-Act habeas corpus jurisprudence. In fact, the poor drafting of the Act exacerbates existing problems and creates a host of new issues to be considered. Moreover, while the Act does not eliminate a prisoner's right to habeas corpus, it does severely restrict its availability by limiting both successive habeas petitions and federal judicial review of evidence.[4]

Part I of this Recent Development examines the origins of modern

1. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant portions codified as amended at 28 U.S.C.A. §§ 2241-2266 (1996)). The Act actually covers a number of subjects, but media attention has focused primarily upon the domestic antiterrorism provisions of the Act, passed by Congress in the wake of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. This Recent Development focuses on the habeas corpus provisions found in Title I of the Act. *See* 110 Stat. 1214-26.

2. *See* 28 U.S.C.A. §§ 2261-2266.

3. *See infra* Part II.B.

4. *See infra* Part II.C.

day habeas corpus rights. Part II examines the provisions of the Act and notes the potential problems in the application of the Act to future habeas claims. Part II also discusses successive habeas claims. This specific area of habeas jurisprudence is rich in case law, which forms and shapes the substantive habeas corpus right, and illustrates the labyrinth of procedural requirements of the former habeas law.

I. HISTORICAL BACKGROUND OF FEDERAL HABEAS CORPUS LAW

A. Original Function of the "Great Writ" Limited

The primary function of the "Great Writ of Liberty"[5] is to release a person from unlawful imprisonment.[6] The purpose of the writ is not to determine a prisoner's guilt or innocence, but rather to determine whether the prisoner has been denied his liberty in violation of federal law.[7] Originally, prisoners used the writ of habeas corpus to challenge the jurisdiction of the sentencing court or the legality of an Executive detention.[8] In addition, the writ was initially available only to those prisoners held pursuant to federal law.[9]

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5. Officially titled the writ of "habeas corpus ad subjiciendum," at common law, the English courts of Chancery, King's Bench, Common Pleas, and Exchequer all issued the writ. *See* BLACK'S LAW DICTIONARY 709-10 (6th ed. 1990).

The Constitution provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. Art. I, § 9, cl. 2. But nowhere in the Constitution is the privilege of the writ mentioned. Thus, the right of habeas corpus is not an affirmative privilege. The explicit provision of the writ is in the Judiciary Act of 1789, which created the federal court system and empowered federal judges to "grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 82.

6. The writ originally commanded the person detaining another to produce the body of the person detained. *See* BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

7. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 401-02 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1973).

8. *See* McCleskey v. Zant, 499 U.S. 467, 478 (1991).

9. *See* 1 Stat. at 82. The statute provides:

> [W]rits of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Id.

More than twenty-five years after the enactment of the Judiciary Act of 1789, the Supreme Court reaffirmed the limited role of federal habeas corpus. In *Ex parte Bollman*,[10] the Court held that the power of the federal courts to grant habeas relief stemmed from, and therefore was limited by, the Judiciary Act of 1789.[11] Courts possessed no common law authority to issue the writ.[12]

B. Liberalization of Available Relief to State Prisoners

In 1833 and 1842 Congress expanded the availability of the writ, making its relief available to state prisoners[13] and to state prisoners who were also foreign nationals and claimed Act of State immunity.[14] In 1867, the privilege of the writ expanded further to all state and federal cases where the prisoner's liberty was restrained in contradiction to any United States law, treaty, or the federal Constitution.[15]

The Supreme Court originally permitted collateral attack of a state court conviction only if the state court lacked subject matter jurisdiction.[16] After 1867, however, the Court also began to allow collateral attacks upon state court convictions by voiding the state court's jurisdiction because of a constitutional violation.[17] It was not until the mid-twentieth century, however, that the Court no longer required voiding the trial court's jurisdiction before a federal court

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Much of the early history of habeas corpus jurisprudence described in this Recent Development is adapted from CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, FEDERAL HABEAS CORPUS: BACKGROUND & ISSUES (1991).

10. 8 U.S. (4 Cranch) 75 (1807).

11. *See id.*

12. *See id.* at 94.

13. *See* Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634-35.

14. *See* Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539-40. For a discussion of the factors motivating the 1833 and 1842 expansions of authority, see DOYLE, *supra* note 9, at 4.

15. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 385-87.

16. *See Ex Parte* Watkins, 28 U.S. (3 Pet.) 193, 202-203 (1830).

17. *See, e.g., Ex parte* Wilson, 114 U.S. 417 (1885) (holding that a Fifth Amendment procedural violation negated the sentencing court's jurisdiction and, thus, the prisoner possessed the right to petition for habeas relief); *Ex parte* Siebold, 100 U.S. 371 (1879) (holding that if a prisoner is convicted under a law that is later declared unconstitutional, the prisoner may be discharged under a writ of habeas corpus).

could review a writ of habeas corpus.[18]

C. Modern Jurisprudence Affecting Substantive Rights[19]

In 1963, the Warren Court established the groundwork for the modern interpretation of federal habeas corpus review. In *Fay v. Noia*,[20] the Court held that a federal court may deny habeas relief to a petitioner who deliberately bypassed state procedures in order to apply for a federal writ of habeas corpus.[21] However, a federal constitutional claim not raised in a state court proceeding could be raised before a federal court.[22]

In 1977, however, the Burger Court reformulated the standard by

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18. *See* Waley v. Johnson, 316 U.S. 101 (1942).

19. Even after the changes imposed by the Act, this case law is relevant for two reasons. First, states must opt in to the new death penalty habeas provisions. *See infra* Part II.B.2 (describing the new contingent death penalty habeas requirements). Second, the courts will have to look to decisional law to fill gaps created by the Act.

20. 372 U.S. 391 (1963).

21. The Court, early in its habeas corpus jurisprudence, decided that federal courts have the discretion whether or not to require a prisoner to exhaust all avenues of state post-conviction relief before hearing a habeas corpus petition. *See, e.g.*, *Ex parte* Royall, 117 U.S. 241 (1886).

22. *See Fay*, 372 U.S. at 438. The Court stated:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief....

Id. at 439. The same year, in *Townsend v. Sain*, 372 U.S. 293 (1963), the Court, after stating that federal courts should defer to a state court's finding of fact, nevertheless broadened federal habeas courts' powers even further when it specifically authorized independent fact-finding by federal courts. *See id.* The Court held that a federal court must grant an evidentiary hearing in specific sets of circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

which a petitioner could bring an imperfect claim[23] before a federal habeas court, thereby restricting the standard set forth in *Fay*.[24] The Court held that a petitioner who did not present a constitutional claim in state court could only have such a claim reviewed by a federal habeas court if the petitioner showed "cause and prejudice."[25] The purposes of the demanding cause and prejudice standard were to promote the finality of state court adjudications,[26] and to

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23. Habeas claims are considered imperfect, or faulted, for three distinct reasons, if the petition is: (1) "procedurally" imperfect; (2) "successive"; or (3) "abusive." A habeas corpus petition is considered "procedurally" imperfect when a state criminal defendant fails to comply with state procedural rules. *See* Hall v. Delo, 41 F.3d 1248, 1249 (8th Cir. 1994) ("Federal habeas corpus review is barred when a federal clam has not been 'fairly presented' to the state court for a determination on the merits.") (quoting Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994)). Even if a federal claim has been "fairly presented" to the state court, a federal court generally will decline to consider the claim if the state court denied it on "independent and adequate state procedural grounds." Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).

"A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986). An "abusive" petition occurs "where a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that 'disentitle[s] him to the relief he seeks.'" *Id.* (quoting Sanders v. United States, 373 U.S. 1, 17-18 (1963)).

24. *See* Wainwright v. Sykes, 433 U.S. 72 (1977). The Court feared *Fay*'s broad language, acknowledging that the less-restrictive standard might encourage "sandbagging" by defense lawyers. *See id.* at 89. The Court attempted to stop those lawyers "who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court, if their initial gamble does not pay off." *Id.*

25. *See id.* The "cause and prejudice" standard originated in *Davis v. United States*, 411 U.S. 233 (1973) and appeared again in *Francis v. Henderson*, 425 U.S. 536 (1976). In *Wainwright*, the Court noted that the power of the federal courts to entertain faulted habeas corpus petitions rested on "considerations of comity and concerns for the orderly administration of criminal justice." 433 U.S. at 84 (quoting *Francis*, 425 U.S. at 538-39).

26. The concern for finality of court adjudications is present throughout habeas corpus jurisprudence. "Collateral review of a conviction extends the ordeal of trial for both society and the accused." Engle v. Isaac, 456 U.S. 107, 126-27 (1982).

> [B]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

Id. at 127 (quoting Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). The *Engle* Court further noted that a

> [l]iberal allowance of the writ . . . degrades the prominence of the trial itself. . . . Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus

acknowledge the costs of federal collateral review of state convictions.[27]

Application of the cause and prejudice standard requires that a petitioner show cause for not having proceeded with the claim in a state court, and prejudice by not being allowed a federal court hearing.[28] To show cause, a petitioner must give a satisfactory reason for not raising the same issue in state court proceedings.[29] Factors that may establish cause include ineffective assistance of counsel,[30]

> may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.

Engle, 456 U.S. at 127.

27. The Court believed that the adoption of the cause and prejudice standard would have the effect of "making the state trial on the merits the 'main event,' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright*, 433 U.S. at 90.

Previously, the Court noted that the writ of habeas corpus imposes special costs on the federal system. The states are responsible for the primary enforcement of criminal law. Therefore, at least initially, the states have responsibility for upholding constitutional rights. *See Engle*, 456 U.S. at 128. "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (internal citations omitted).

Even with all of its concerns regarding the alleged broad sweep of the *Fay* standard, the Court left it to future circumstances to precisely define the cause and prejudice standard, and noted only that it was narrower than the standard set forth in *Fay*. *See Wainwright*, 433 U.S. at 88.

28. *See* Murray v. Carrier, 477 U.S. 478 (1986).

29. "Cause" suggests that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 488.

30. The Constitution guarantees a fair trial through the Sixth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

The Court recognizes that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Court formally acknowledged that ineffective assistance of counsel at trial is an error of constitutional proportions, and set forth the following standard:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing

interference by state officials that makes compliance with state rule impracticable, or a showing that the factual or legal basis for the claim was not reasonably available to counsel.[31] To show prejudice, a petitioner must demonstrate that the alleged trial errors corrupted the entire proceeding, resulting in an unconstitutional judgment.[32]

On its face, the cause and prejudice standard appears as an absolute bar to a petitioner who failed to raise claims in state court proceedings. For many years, however, the Supreme Court has recognized an important exception to the general cause and prejudice standard—the "fundamental miscarriage of justice" exception.[33] In 1982, the Court held that in certain circumstances the general cause and prejudice standard should yield to promote fundamental fairness.[34] At this point, the Court did not specify when the interest in fairness would warrant an exception to the "cause and prejudice" requirements.

In 1986, the Court clarified the contours of the miscarriage of justice exception. In *Kuhlmann v. Wilson*,[35] a plurality of the Court

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> that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

31. *See Murray*, 477 U.S. at 486-88.

32. Specifically, the Court has held that in order for a petitioner to establish "prejudice" a petitioner must prove "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to [a petitioner's] *actual* and substantial disadvantage, infecting [petitioner's] entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982) (emphases in original).

33. *See* Engle v. Isaac, 456 U.S. 107 (1982) (recognizing formally the miscarriage of justice exception).

34. *See id.* at 135. The Court stated that "[i]n appropriate cases those principles [of 'cause' and 'actual prejudice'] must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* The Court further stated, however, that it was "confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." *Id.* (citations omitted). Subsequent jurisprudence suggests that the cause-and-prejudice standard does not protect those who are victims of a fundamental miscarriage of justice. *See infra* note 48.

35. 477 U.S. 436 (1986).

stated that the cause and prejudice requirement of petitions for writs of habeas corpus must yield when the prisoner supplements his constitutional claim with a "colorable showing of factual innocence."[36] The petitioner can make a colorable showing of factual innocence by demonstrating a fair probability that, in light of all the evidence, the trier of fact would have entertained a reasonable doubt as to the prisoner's guilt.[37] The Court noted that the new standard for the miscarriage of justice exception served as a means of ensuring that federal courts grant habeas review only in those rare cases where the "ends of justice so require."[38]

In the same term, the Court in *Murray v. Carrier*[39] extended the miscarriage of justice exception of the cause and prejudice standard to procedurally defaulted claims.[40] Writing for the Court, Justice O'Connor stated that in the extraordinary cases where a constitutional violation has "probably resulted in the conviction of one who is actually innocent,"[41] federal courts may grant the writ, even in the

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36. *Id.* at 454. Justice Powell wrote:

> In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.

Id. at 454. The Court further explained its choice of the standard in terms of policy reason: "[A] requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration." *Id.*

37. A prisoner cannot make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." *Kuhlmann*, 477 U.S. at 454-55 n.17 (quoting Henry J. Friendly, *Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970)). The prisoner must show a fair probability that in light of all the evidence, including that to have been illegally admitted and evidence claimed to have been wrongly excluded or to have become available after the trial, the trier of fact would have entertained a reasonable doubt of his guilt. *See id.*

38. *Kuhlmann*, 477 U.S. at 454. The Court reasoned that Congress continues to afford federal habeas relief in "appropriate cases." *Id.* at 454 n.16.

39. 477 U.S. 478 (1986).

40. *See id.* at 496. For a discussion of the various types of imperfect habeas claims, see *supra* note 23.

41. *Carrier*, 477 U.S. at 496.

absence of a showing of cause for the procedural default.[42] The Court later extended the miscarriage of justice exception in abuse of the writ and new claim successive petitions.[43] In each case, the Court reasoned that principles of comity and finality must yield to the imperative of correcting a fundamentally unjust incarceration.[44]

Each of the preceding cases considered the application of the actual innocence doctrine to the guilt phase of the trial. In contrast, the Court in *Sawyer v. Whitley*[45] considered a claim of "actual innocence"[46] of the penalty of death. Writing for the plurality, Chief Justice Rehnquist held that a habeas petitioner can show actual innocence of the death penalty only by the presentation of "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law."[47]

The narrow holding of *Sawyer* addressed only innocence of the death penalty. The Court in *Sawyer* did not address whether the "clear and convincing" standard also applied to claims of innocence of the death penalty. The Court remained silent regarding the possibility of the standard applying more broadly, that is, applying to

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42. The Court noted that "for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' But we do not pretend that this will always be true." *Id.* at 495-96 (quoting *Engle*, 456 U.S. at 135).

43. *See* McCleskey v. Zant, 499 U.S. 467, 493 (1991). In *McCleskey*, the Court stated:

> We conclude from the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts. We have held that a procedural default will be excused upon a showing of cause and prejudice. We now hold that the same standard applies to determine if there has been an abuse of the writ through inexcusable neglect.

Id. (internal citation omitted).

44. *See id.*

45. 505 U.S. 333 (1992).

46. The Court's varied terminology is confusing. In a general sense, the Court recognizes a "fundamental miscarriage of justice" exception to the cause and prejudice rule. *See supra* notes 33-44 and accompanying text. A specific form of this exception has been dubbed the "actual innocence" exception. That is, because the petitioner is either actually innocent of the crime or the penalty of death, his incarceration or death would be a fundamental miscarriage of justice and thus fall within the broader exemption to the standard rule.

47. *Id.* at 336.

claims of actual innocence of the commission of the crime. Thus, lower courts were left to decide whether the *Kuhlmann/Carrier* fair probability standard retained any vitality, or if the *Sawyer* "clear and convincing" standard applied to both types of actual innocence claims.[48]

In 1995, the Supreme Court clarified the proper standard for courts to use in actual innocence of the crime claims. In *Schlup v. Delo*,[49] the Court held that where a petitioner who has been sentenced to death claims that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent,'"[50] the proper standard is the less stringent *Carrier* standard.[51]

II. MODERN HABEAS PROCEDURE AND CHANGES ENACTED BY THE ACT

A. Overview

In April, 1996, amid the ambiguity of habeas caselaw, President Clinton approved numerous changes in federal habeas procedural and substantive law. Leaders in Congress attached the habeas measures to a bill touted to respond to domestic terrorism in the wake of the Oklahoma City bombing. Whether or not the antiterrorism measures serve the purpose of reducing domestic terrorism, it is evident that

48. *See, e.g.*, Ortiz v. Dubois, 19 F.3d 708 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 739 (1995). The First Circuit applied the *Sawyer* "clear and convincing" standard to an actual innocence claim based not on the penalty, but rather on the conviction of the crime itself. The court explained, "[g]iven the evidence presented at trial, we believe that a reasonable jury *could* have found that appellant engaged in a joint [unlawful] venture .... Therefore, there has been no fundamental miscarriage of justice." *Id.* at 714.

Similarly, the Second Circuit applied *Sawyer* to a non-death penalty conviction appeal based on a claim of actual innocence. *See* Washington v. James, 996 F.2d 1442 (2d Cir. 1993). The Second Circuit dropped the death penalty language from *Sawyer*'s "clear and convincing" standard, substituted the word "guilty," and held that the standard applied to both kinds of claims of actual innocence. *See id.* at 1447.

49. 115 S. Ct. 851 (1995).

50. *Id.* at 867 (1995) (quoting *Carrier*, 477 U.S. at 496).

51. *Id.* at 866. The Court reasoned that "[t]he paramount importance of avoiding the injustice of executing one who is actually innocent requires application of the *Carrier* standard." *Id.*

prisoners' habeas rights are now bound by a myriad of stringent restrictions.

First, several procedural provisions apply to both capital and noncapital cases. These changes include stringent filing deadlines,[52] limits upon evidentiary hearings held by federal habeas courts,[53] and state law remedy exhaustion requirements.[54]

Second, the Act, as its name suggests, also provides new procedures for capital cases.[55] However, the capital procedures only apply if a state "opts in" to the program established by Congress in the new Act.[56] Furthermore, the "opt in" provision itself leaves open questions about enforcement of state requirements. Nevertheless, if a state chooses to adopt the new framework, the Act provides stay of execution guidelines,[57] additional specific time limits for filings,[58] and a judicial timetable intended to ensure that courts hear these claims without undue delay.[59]

B. Procedural Requirements

1. Provisions Applicable to both Capital and Noncapital Cases

a. Filing Deadlines

Pre-Act procedures did not require a prisoner to file a habeas petition within any specified period of time.[60] Congress imposed a significant change in this procedure by mandating a one year period of limitation for application for writs of habeas corpus.[61] The

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52. *See* 28 U.S.C.A. §§ 2255, 2263 (1996).

53. *See* §§ 2254(d), (e).

54. *See* § 2254(b).

55. *See* §§ 2261-66.

56. *See infra* Part II.B.2 (describing the "opt-in" procedures).

57. *See* 28 U.S.C.A. § 2262. *See infra* Part II.B.2.a (describing the stay of execution guidelines).

58. *See* 28 U.S.C.A. § 2263. *See infra* Part II.B.2.b (describing the statute of limitations for death penalty habeas claims).

59. See 28 U.S.C.A. § 2266. *See infra* Part II.B.2.c (describing the judicial time limits imposed by the Act).

60. *See* 28 U.S.C. § 2254 (1994).

61. *See* 28 U.S.C.A. §§ 2244(d)(1)-(2) (1996).

limitation runs from the date of "direct review"[62] of the state court final judgment.[63] The one year period is tolled, however, until the latest of any of the following dates: (1) the date upon which the State removes an unconstitutional or federally illegal impediment to filing an application;[64] (2) the date on which the Supreme Court recognizes a new constitutional right asserted by the petitioner;[65] or (3) the date on which the factual predicate of the claim could have been exercised through the exercise of due diligence.[66] Thus, although initially it appears that the one year requirement places a harsh restriction on filing, the relatively broad tolling provisions protect those claims that should have the opportunity for an application for review.

b. Appellate Review

Prior to the Act, a prisoner could appeal a state court conviction in federal court if a district court issued a "certificate of probable cause."[67] If challenging a federal conviction, however, the prisoner could make a direct appeal to the appropriate court of appeals.[68] The Act now requires that federal prisoners challenging their conviction must also obtain a certificate of appealability from a circuit justice or judge.[69]

c. Exhaustion of State Remedies

Long before the Act became effective, courts generally followed the rule that a prisoner must fully exhaust state law remedies before

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62. "Direct review" is not defined in the new legislation. One commentator suggests that "direct review" should be given the meaning the Supreme Court gives to "final" judgments, including certiorari proceedings. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 387 n.18 (1996). His suggestion is that "direct review" should not be limited to review by the state courts. *See id.*

63. *See* 28 U.S.C.A. § 2244(d)(1)(A) (1996).

64. *See* § 2244(d)(1)(B).

65. *See* § 2244(d)(1)(C).

66. *See* § 2244(d)(1)(D).

67. *See* 28 U.S.C. § 2253 (1994).

68. *See id.*

69. *See* 28 U.S.C.A. § 2253(c) (1996).

proceeding to the federal courts for habeas review.[70] The Act now requires that if a federal court believes a claim is meritorious, it must refrain from reviewing the application until the prisoner seeks and is denied all state court remedies available to him.[71] In a new provision of this section, the Act allows a federal court to deny an application on the merits.[72] Finally, the Act provides that a state must explicitly waive the exhaustion requirement.[73]

2. Capital Case Procedures for "Opt-In" States

An essential requirement of the habeas corpus reform provisions is that states must choose to abide by the more stringent federal habeas provisions.[74] If a state does not opt in, the Act's provisions do not apply to habeas appeals from prisoners in that state.[75] To opt in to these reforms, states must establish a mechanism for the appointment and compensation of counsel in post-conviction proceedings brought by indigent prisoners convicted of capital crimes.[76] Notably, once a

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70. *See, e.g.*, Pepke v. Cronan, 155 U.S. 100 (1894); *Ex parte* Fonda, 117 U.S. 516 (1886); *Ex parte* Royall, 117 U.S. 241 (1886). The new provision does not substantially amend the prior requirements of state remedy exhaustion found in 28 U.S.C. § 2254 (1994).

71. *See* 28 U.S.C.A. § 2254(b)(1)(A) (1996).

72. *See* § 2254(b)(2).

73. *See* § 2254(b)(3). Professor Yackle argues that this provision probably overrules at least a portion of *Granberry v. Greer*, 481 U.S. 129 (1987), which held that a federal habeas court may overlook a prisoner's failure to exhaust if a state does not claim estoppel. *See* Yackle, *supra* note 62, at 386.

74. *See* 28 U.S.C.A. § 2261(b). The death penalty litigation procedures outlined in the Act only apply if

> a State establishes by statute, 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 brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes.

Id.

75. *See id.* This contingent procedure fosters the possibility of divergent applications of federal habeas law between states that choose the more stringent rules applied by the Act, and states bound by the less formidable prior interpretations of habeas law formulated by the Supreme Court during the last several decades.

76. *See* 28 U.S.C.A. § 2261(b) (1996). This provision now requires states to fund death penalty post-conviction proceedings, a task that, until recently, fell to Congress. Congress

state opts in, prisoners may no longer present claims of ineffective or incompetent counsel during state or federal post-conviction proceedings as grounds for relief under section 2254.[77] However, the Act fails to indicate what standards or mechanisms a state must use to guarantee its abidance with the "competent counsel" opt in requirement.[78]

a. Mandatory Stay of Execution

The Act attempts to limit last-minute applications for stays of execution, by providing for an "automatic" stay of execution to trigger upon a petitioner's motion after all State post-conviction proceedings take place.[79] The automatic stay expires if the prisoner fails to file a habeas claim before the statute of limitations,[80] if the prisoner waives the right to pursue habeas review,[81] or if the prisoner's habeas application fails to substantially show the denial of

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established funding for Post-conviction Defender Organizations ("PCDOs") in 1988 in response to the federal judiciary's concerns about the high population of death row inmates in some jurisdictions, and the apparently inadequate reserve of qualified counsel to handle post-conviction appeals. *See* Marcia Coyle, *Death Resource Centers Reborn as Private Groups*, NAT'L L.J., Jan. 15, 1996, at A9. Federal funding for all PCDOs ended April 1, 1996. *See GOP Eliminates Death Penalty Help Centers*, ROCKY MOUNTAIN NEWS, Jan. 25, 1996, at 42A. The 1995 fiscal budget provided over $19 million to operate these centers. *See id.*

Supporters of the PCDOs argue that the use of court-appointed lawyers will double the cost to taxpayers. *See* Joe Lambe, *Office Aiding Inmates on Death Row to Close*, KANSAS CITY STAR, Sept. 1, 1995, at C1. The General Accounting Office calculated the cost per inmate for appeals by resource centers at $17,200. *See id.* Private lawyers who bill the government would raise the cost to about $37,000 per inmate. *See id.* Without PCDOs Chief Judge Richard A. Arnold of the 8th Circuit Court of Appeals claims that the cost of representation would increase from $21.2 million to between $37.2 million and $51.1 million in the new fiscal year. *See* Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, NAT'L L.J., Sept. 18, 1995, at A25.

77. *See* 28 U.S.C.A. § 2261(e) (1996). The question whether a non-indigent prisoner who did not use the services of appointed counsel may maintain such a claim remains open.

78. The statute vaguely requires that "[t]he rule of court or statute must provide standards of competency for the appointment of such counsel." § 2261(b).

79. *See* § 2262(a).

80. *See* § 2262(b)(1).

81. The Act does not allow waiver to affect the stay unless the prisoner either is represented by counsel and is advised of the consequences of such waiver or competently and knowingly waives the right to counsel. *See* 28 U.S.C.A. § 2262(b)(2) (1996).

a federal right.[82] If one of these expiration events occurs, a court does not possess the authority to enter a stay of execution unless the court of appeals approves the filing of a second or successive petition.[83]

b. Statute of Limitations

Typically, a state prisoner will have only 180 days in which to file an application for a writ of habeas corpus with a federal court.[84] However, a court may toll the 180 day period in limited situations. Specifically, a court may toll the statute of limitations from the date that a petitioner files a petition for certiorari in the Supreme Court, until the final disposition of that petition.[85] Also, upon motion and a showing of good cause, the district court may extend the period for filing for an additional thirty days.[86]

c. Judicial Time Limits

The Act not only imposes time limits on petitioners, it also sets strict time frames within which the judiciary must review and decide habeas claims.[87] Generally, a district court must render a final determination within 180 days of the filing of the prisoner's petition.[88] Two-thirds of this time period must be afforded to the parties to complete all actions related to the application.[89] However, a

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82. *See* § 2262(b)(3).

83. *See* § 2262(c). *See also infra* Part II.C.2 (describing the role of the courts of appeal in considering second or successive habeas petitions under section 2244(b)).

84. *See* 28 U.S.C.A. § 2263(a) (1996).

85. *See* § 2263(b)(1). The Act also provides that the filing deadline tolls during state post-conviction proceedings. *See* § 2263(b)(2).

86. *See* §§ 2263(b)(3)(A)-(B). The Act does not specify the requirements of a showing of good cause. Nor does it guide the courts as to what standard a petitioner must overcome to show good cause. Initially, it seems that because the limitations period is so short, a motion for extension of time will evolve quickly into a more procedural, rather than substantive matter.

87. *See generally* § 2266. Although this language appears under the subheading of "Death Penalty Litigation Procedures" in the text of the Public Law, Pub. L. No. 104-132, § 107, the provision sets forth the same time limits for both capital and non-capital cases. The unclear drafting of this provision leaves open the question whether a state must "opt in" to the judicial time limits in non-capital cases.

88. *See* 28 U.S.C.A. § 2266(b)(1)(A) (1996).

89. *See* § 2266(b)(1)(B).

district court may extend the 180 day period for an additional thirty days.[90] If a court elects to grant the extension, it must issue a written order declaring that the ends of justice that would be served by allowing the extension outweigh the public's and the applicant's interest in a speedy disposition of the application.[91] The Act sets forth a number of factors that the court may consider in determining the necessity of a thirty day extension.[92] The Act provides limited enforcement procedures for ensuring that the judiciary adheres to these limits. The only mechanism by which a state may force compliance is by seeking a writ of mandamus from the federal court of appeals, which has thirty days to act on the state's petition.[93]

In capital cases, a court of appeals must render a final determination of any appeal from an order of a district court granting or denying habeas relief within 120 days of the date on which the reply brief is submitted.[94] The Act also imposes a time limit on decisions regarding petitions for rehearing.[95] Yet, the Court's failure to comply with these limitations is not a ground upon which to grant relief from the judgment of conviction or sentence.[96]

C. Substantive Rights Affected

1. Scope of Federal Review

Through its decisions in *Townsend v. Sain*[97] and subsequent cases,

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90. *See* § 2266(b)(1)(C)(i).

91. *See id.*

92. *See* §§ 2266(b)(1)(C)(ii)(I)-(III). Significantly, the court may not delay the disposition of the petitioner's application merely because of general congestion on the court calendar. *See* § 2266(b)(1)(C)(iii).

93. *See* § 2266(b)(4)(B).

94. *See* § 2266(c)(1)(A).

95. *See* § 2266(c)(1)(B)(i). The decision of a court of appeals to grant a petition for rehearing or rehearing en banc must come within 30 days after the date on which the petition for rehearing is filed. *See id.*

If the court of appeals grants the petition for rehearing or rehearing en banc, it must make a final determination of the appeal within 120 days after the date of the order granting the rehearing. *See* 28 U.S.C.A. § 2266(c)(1)(B)(ii).

96. *See* § 2266(c)(4)(A).

97. 372 U.S. 293 (1963).

the Supreme Court broadened its view of habeas applications and recognized its jurisdiction to review state court determinations where the prisoner shows that the state court proceedings were questionable.[98] The Act places more stringent limits on federal courts' rights to examine state court decisions on the merits.[99] A federal court must now presume the correctness of the state court's judgment.[100] The Act also mandates that an applicant may rebut this presumption only by a presentation of clear and convincing evidence.[101]

2. Successive and Abusive Petitions

The Act requires that the prisoner filing successive petitions make a motion to the court of appeals for an order authorizing the district court to review the application.[102] The grant or denial by the court of

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98. *See id.* In *Townsend*, the Court recognized circumstances where a federal evidentiary hearing would be mandatory, despite exhaustion of state remedies. *See id.*; *see also* Sanders v. United States, 373 U.S. 1 (1963) (articulating specifically the circumstances mandating federal evidentiary review).

99. 28 U.S.C.A. § 2254(e) (1996). This section has drawn much attention, and raises the question of whether this provision effectively codifies, or instead overrules the *Teague* Doctrine. *See Teague v. Lane*, 489 U.S. 288 (1989) (holding that in habeas corpus cases, courts generally should decline to announce or enforce new rules of law retroactively to cases on collateral review, unless there are exceptional circumstances); *see also* Yackle, *supra* note 62 (arguing that the Act's provisions supersede the *Teague* Doctrine).

100. *See* 28 U.S.C.A. § 2254(e)(1).

101. *See* § 2254(e)(1). In a more specific provision, the law provides that if an applicant fails to develop the factual basis of a habeas claim in state court, the court may grant a hearing only upon the demonstration of very specific circumstances. The court may grant an evidentiary hearing only if the applicant shows that:

> (A) the claim relies on—
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

§ 2254(e)(2).

102. *See* 28 U.S.C.A. § 2244(b)(3)(A) (1996). A three-judge panel reviews this initial motion. *See* § 2244(b)(3)(B). It then must render its decision to authorize the petitioner's right

appeals of the applicant's right to petition for habeas corpus is not appealable.[103] However, the petitioner may still directly petition the Supreme Court for a writ of habeas corpus.[104]

In order to satisfy the court of appeals, the petitioner must make a prima facie showing of one of two circumstances.[105] The petitioner must show that the successive application relies on a new rule of constitutional law and is made retroactive to cases on collateral review by the Supreme Court.[106] Alternatively, the petitioner must show that the factual basis for the successive claim could not have previously been discovered through the exercise of due diligence[107] and that the facts underlying the successive claim would be sufficient to prove by clear and convincing evidence that no reasonable juror would find the petitioner guilty of the underlying offense.[108]

The Act's new standards impose more rigid requirements than under previous Supreme Court jurisprudence. In contrast to the Court's previous standard of allowing a petitioner to show either "cause and prejudice" *or* "actual innocence," the Act requires the petitioner to show "cause" *and* at least prima facie evidence of actual innocence. Moreover, the present statutory language overturns the recent *Schlup* decision, where the Court required only a probable

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to petition for habeas relief within 30 days after the filing of the motion. *See* § 2244(b)(3)(D).

103. *See* § 2244(b)(3)(E). Furthermore, the grant or denial of authorization to petition the district court may not be the subject of a petition for rehearing or for a writ of certiorari from the Supreme Court. *See id.*

104. *See* Felker v. Turpin, 116 S. Ct. 2333 (1996). *Felker* represents the Supreme Court's first opportunity to interpret the new habeas provisions. The Court ordered a special hearing on this case, despite the fact that it had completed its regular oral arguments for the 1995-1996 term. *See* Felker v. Turpin, 83 F.3d 1303 (11th Cir. 1996), *cert. granted*, 116 S. Ct. 1588 (1996).

In *Felker*, the Court unanimously held that the gatekeeping mechanism of § 2244(b)(3) applies only to second or successive applications in district court. *See Felker*, 116 S. Ct. at 2340. Thus, read narrowly, the Act does not deprive the Court of jurisdiction to entertain original habeas petitions; rather, the Act simply imposes constitutional conditions on the authority of the Court to grant relief. *See id.*

105. *See* § 2244(b)(3)(C). Similarly, once the court of appeals authorizes a petition, the district court makes its own determination as to whether the petitioner satisfies the statutory requirements. *See* § 2244(b)(4).

106. *See* 28 U.S.C.A. § 2244(b)(2)(A).

107. *See* § 2244(b)(2)(B)(i).

108. *See* § 2244(b)(2)(B)(ii).

showing of actual innocence to obtain a writ of habeas corpus based on a successive petition.[109]

The provisions directed at successive claims present perhaps the most troubling aspect of the Act. The Supreme Court realized this when it liberalized the "cause and prejudice" exception to allow claims of actual innocence to serve as exceptions to the general prohibition against successive claims.[110] The new rules could force the dismissal of a large number of successive applications for federal habeas relief. Frantic prisoners on death row may respond by directly petitioning the Supreme Court for habeas review.[111] Prisoners may also attempt to file successive petitions with the federal courts of appeals. Neither scenario will reduce the drain on the private and public resources directed at habeas litigation.

CONCLUSION

The changes implemented by the Antiterrorism and Effective Death Penalty Act of 1996 reshape habeas corpus jurisprudence. While this Recent Development merely provides an overview the new provisions of the Act, the difficult task of interpretation falls on the shoulders of the courts. Prior case law may guide the process, but the newly imposed limitations will present new challenges to the courts, prisoners, and attorneys.

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109. *See* Schlup v. Delo, 115 S. Ct. 851, 867 (1995).
110. *See* McCleskey v. Zant, 499 U.S. 467 (1991).
111. *See supra* note 104 (describing *Felker's* reaffirmation of this right).

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