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*Federal Habeas Corpus Relief: Background, Legislation, and
Issues*

Lisa M. Seghetti and Nathan James, Domestic Social Policy Division

January 12, 2007

Abstract. The 109th Congress considered legislation that would have further restricted a state prisoner's access to federal habeas relief, and would have provided for expeditious habeas review of cases where a child, public safety officer, or state judge was killed. The 110th Congress may consider similar issues. At issue for Congress is whether it should further restrict state prisoners' access to federal habeas relief by limiting the federal role in policing constitutional violations in the states' criminal justice systems. Two issues have emerged as Congress considers such legislation - trial finality and adequate representation. Proponents contend that restricting state prisoners' access to federal habeas relief is necessary due to many prisoners filing excessive and frivolous claims that result in a backlog in the system and substantial delays in the processing of these cases. Critics contend, however, that many states' criminal justice systems are flawed, with many indigent defendants lacking proper representation throughout all stages of the criminal justice system. They argue that for many defendants, the writ of habeas corpus plays a key role in restoring justice when the system fails.

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Federal Habeas Corpus Relief: Background, Legislation, and Issues

Updated January 12, 2007

Lisa M. Seghetti
Specialist in Social Legislation
Domestic Social Policy Division

Nathan James
Analyst in Social Legislation
Domestic Social Policy Division

<http://wikileaks.org/wiki/CRS-RL33259>



Prepared for Members and
Committees of Congress

Federal Habeas Corpus Relief: Background, Legislation, and Issues

Summary

Federal habeas corpus is the statutory procedure under which state and federal prisoners may petition the federal courts to review their convictions and sentences to determine whether they are being held contrary to the laws or the Constitution of the United States. In 1996, Congress passed legislation that restricted a prisoner's ability to seek relief through the writ of habeas corpus.

The 109th Congress considered legislation that would have further restricted a *state* prisoner's access to federal habeas relief, and would have provided for expeditious habeas review of cases where a child, public safety officer, or state judge was killed. The 110th Congress may consider similar issues. At issue for Congress is whether it should further restrict state prisoners' access to federal habeas relief by limiting the federal role in policing constitutional violations in the states' criminal justice systems. Two issues have emerged as Congress considers such legislation — *trial finality* and *adequate representation*. Proponents contend that restricting state prisoners' access to federal habeas relief is necessary due to many prisoners filing excessive and frivolous claims that result in a backlog in the system and substantial delays in the processing of these cases. Critics contend, however, that many states' criminal justice systems are flawed, with many indigent defendants lacking proper representation throughout all stages of the criminal justice system. They argue that for many defendants, the writ of habeas corpus plays a key role in restoring justice when the system fails.

The current debate over whether to reform the federal habeas corpus law is centered around *state capital* cases. These cases experience some of the lengthier delays that have been highlighted in congressional testimony. The issue of *trial finality* becomes apparent in these cases because the mandated outcome — execution — is suspended pending the outcome of the habeas proceeding. An analysis of the Administrative Office of the U.S. Courts' (AOUSC) data, however, does not fully support the claim that state capital habeas cases take excessively long to process. The data reveals that although the median time for state capital cases to make their way through a federal habeas proceeding is twice as long as state non-capital cases, the *rate* of filing for habeas relief for both types of cases has remained constant.

Since 1988, prisoners serving a *federal capital* sentence are entitled to counsel during *all* post-conviction proceedings. Unlike the federal criminal justice system, most states do not afford prisoners the same right. Critics contend that by not having a mandatory system of post-conviction representation, many states ignore the reality that indigent death row prisoners are not able to competently engage in post-conviction litigation. A study that was conducted over a 23-year period raised the question of whether the delays commonly associated with federal habeas corpus review are necessary to make sure that justice is administered fairly. The research also raised the possibility that the errors found in capital cases may be the result of poor representation. Until the issue of adequate representation is fully addressed in the states' criminal justice systems, habeas corpus reform efforts will continue to be debated. This report will be updated as warranted.

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Federal Habeas Corpus Relief: Background, Legislation, and Issues

Introduction

*“Habeas corpus is a legal procedure that allows prisoners to assert constitutional rights, the procedure itself is not required or controlled by the Constitution.”*¹

- U.S. Supreme Court Justice Lewis F. Powell, Jr. (1972-1987)

Federal habeas corpus is the statutory procedure under which state and federal prisoners may petition federal courts to review their convictions and sentences to determine whether they are being held contrary to the laws or the Constitution of the United States.² The authority of a federal court to issue a writ of habeas corpus has been a part of legal procedure since 1789.³ In 1867, the writ was extended by Congress to prisoners in state custody.⁴ However, although the federal writ of habeas corpus was extended to prisoners in state custody in 1867, it did not become fully available as a means to challenge an unlawful conviction or sentence until the 1940s.⁵

In 1996, Congress passed legislation that restricted a prisoner’s ability to seek relief through the writ of habeas corpus. Since its passage, the courts have been interpreting the meaning of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).⁶ At issue for Congress is whether it should further restrict state prisoners’ access to federal habeas corpus relief by limiting the federal role in policing constitutional violations in the states’ criminal justice systems. Two issues have

¹ Statement of Lewis F. Powell, Jr., Associate Justice, U.S. Supreme Court (retired), in U.S. Congress, Senate Committee on the Judiciary, *Reform of Capital Habeas Corpus Procedures*, 101st Cong., 1st sess., Nov. 8, 1989 (Washington: GPO 1989), hereafter cited as statement of Lewis F. Powell, Jr.

² 28 U.S.C. §2241 et seq. Although the writ of *federal* habeas corpus is the subject of this report, it is important to note that state courts also consider federal constitutional claims during direct review and in post-conviction proceedings.

³ According to retired U.S. Supreme Court Justice Powell, the Constitution mentions habeas corpus, however, it “... is a reference to the ancient writ of habeas corpus available to challenge executive detention without trial.” See statement of Lewis F. Powell, Jr.

⁴ See 28 U.S.C. §2254.

⁵ See *Waley v. Johnson*, 316 U.S. 101, 102 (1942) (stating that the use of the writ of habeas corpus in federal courts extends to cases where the conviction has been in disregard of the accused’s constitutional rights and “where writ is the only means of preserving those rights.”).

⁶ See Title I of P.L. 104-32.

emerged as the Congress considers legislation that would further alter the writ of habeas corpus — *trial finality and adequate representation*. Proponents of habeas corpus reform contend that restricting state prisoners' access to federal habeas corpus relief is necessary due to many prisoners filing excessive and frivolous claims that result in a backlog in the system and substantial delays in the processing of cases.⁷ Critics contend, however, that many states' criminal justice systems are flawed, with many indigent defendants lacking proper representation throughout all stages of the criminal justice system. They contend that for many defendants, the writ of habeas corpus plays a key role in restoring justice when the system fails.⁸

This report examines the issues surrounding the debate on whether to further restrict state prisoners' access to federal habeas corpus filings. This report does not discuss issues related to federalism and the proper role of the federal court system in overseeing the actions of state courts pertaining to prisoners' constitutional rights. The report opens with a discussion of a commission that was established in 1988 to study and make recommendations of the then-current federal habeas corpus system and the 1996 law that restricted prisoners' access to federal habeas corpus relief. It then provides an analysis of federal habeas corpus petition data since 1990. The report examines whether the *number* of federal habeas corpus petitions and the *time* it takes for the federal court system to process these claims have increased since the enactment of the AEDPA. It then discusses legislation introduced in the 109th Congress that would further restrict state prisoners' access to federal habeas corpus relief. The report concludes with an analysis of two dominant issues that are at the center of this debate: *delays caused by habeas corpus petitions* and *post-conviction representation*.

⁷ See for example, testimony of John Pressley Todd, Assistant Attorney General Arizona Attorney General's Office, in U.S. Congress, Senate Committee on the Judiciary, *Habeas Corpus Proceedings and Issues of Actual Innocence*, 109th Cong., 1st sess., July 23, 2005 (Washington: GPO, 2005), hereafter cited as testimony of John Pressley Todd; testimony of Thomas Dolgenos, Chief, Federal Litigation Unity, Philadelphia District Attorney's Office, in U.S. Congress, Senate Committee on the Judiciary, *Habeas Corpus Proceedings and Issues of Actual Innocence*, 109th Cong., 1st sess., July 13, 2005 (Washington: GPO, 2005), hereafter cited as testimony of Thomas Dolgenos; and testimony of Kent Cattani, Esq., Chief Counsel, Office of the Arizona Attorney General, in U.S. Congress, Senate Committee on the Judiciary, *Habeas Corpus Proceedings and Issues of Actual Innocence*, 109th Cong., 1st sess., July 23, 2005 (Washington: GPO, 2005), hereafter cited as testimony of Kent Cattani.

⁸ See for example, testimony of testimony of Ruth E. Friedman, Solo Practitioner, in U.S. Congress, House Subcommittee on Crime, Terrorism and Homeland Security, *Legislative Hearing on H.R. 3035, "The Streamlined Procedures Act of 2005,"* 109th Cong., 1st sess., Nov. 10, 2005, hereafter cited as testimony of Ruth E. Friedman; testimony of Bernard E. Harcourt, Professor of Law, University of Chicago, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, *Terrorist Death Penalty and Streamlined Procedures Bills*, 109th Cong., 1st sess., June 30, 2005 (Washington: GPO, 2005), hereafter cited as testimony of Bernard E. Harcourt; testimony of Byran A. Stevenson, Esq., Executive Director of Equal Justice Initiative of Alabama, Professor of Clinical Law at New York University School of Law, in U.S. Congress, Senate Committee on the Judiciary, *Habeas Corpus Proceedings and Issues of Actual Innocence*, 109th Cong., 1st sess., July 23, 2005 (Washington: GPO, 2005), hereafter cited as testimony of Byran A. Stevenson.

Background⁹

Beginning in the 1970s, the U.S. Supreme Court issued a set of rulings that gradually restricted prisoners' access to *federal* habeas corpus relief; and in the late 1980s a commission was formed that would set the stage for congressional action. Following is a discussion of early efforts to reform the writ of habeas corpus.

The Powell Committee

In 1988, Chief Justice Rehnquist formed an ad hoc committee on federal habeas corpus in capital cases (aka the Powell Committee).¹⁰ The Powell Committee analyzed “the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases.” The committee found that the current system (at that time) of *collateral review*:¹¹

- Is fraught with “unnecessary delay and repetition.” The inadequacies of the system are due to the following: (1) a lack of coordination between federal and state legal systems, resulting in prisoners moving back and forth between the two systems before exhausting state remedies; (2) prisoners filing excessive, last minute motions for stays of execution; and (3) the absence of a statute of limitation allows for prisoners to file multiple petitions at any point during their incarceration.
- Lacks competent and adequately compensated representation.
- Permits last-minute litigation where claims are meritless and are conducted amidst a pending execution, which leads to the abuse of judicial resources and justices.¹²

As a result of its findings, the Powell Committee made several recommendations, some of which were adopted in AEDPA including

- establishing a separate statutory procedure for federal habeas corpus proceedings in capital cases for states to opt-in if they meet certain requirements that pertain to the appointment of competent counsel and compensation of reasonable litigation expenses for indigent prisoners. The opt-in system would provide a shorter statute of

⁹ For additional information on the writ of federal habeas corpus, see CRS Report 96-499A, *Antiterrorism and Effective Death Penalty Act of 1996: A Summary* and CRS Report 96-423A, *Habeas Corpus & the Antiterrorism and Effective Death Penalty Act of 1996: An Overview*, both reports written by Charles Doyle. Contact the author for a copy of the reports.

¹⁰ *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report*, reprinted in 135 Cong.Rec. 24694 (1989), hereafter cited as the Powell Committee Report.

¹¹ A *collateral review* is a non-direct review of a state court decision by a federal court. Such a petition constitutes a separate civil suit. Black’s Law Dictionary, Second Pocket Ed., Bryan A. Garner, Editor in Chief.

¹² See the Powell Commission report.

limitation (six months as opposed to one year) for the filing of habeas corpus petition.¹³ The federal judiciary would have the final judgment about the adequacy of a state's counsel appointment system.¹⁴

- requiring a mandatory stay of execution until the federal habeas corpus proceeding is completed for a prisoner's first request for post-conviction relief.
- requiring prisoners to file their federal habeas corpus petitions no later than 180 days after an order is entered appointing counsel.
- limiting federal courts to considering claims that were raised and litigated in state courts and have adequate evidentiary records and findings of facts.

In addition to the Powell Committee findings, in a series of rulings that began in the 1970s, the U.S. Supreme Court restricted prisoners' access to federal habeas corpus relief. The reason for this is, in part, due to the number of reported cases of abuse by inmates (i.e., repeat and frivolous filing of petitions). Although the issue was most often associated with death penalty cases (e.g., inmates using the writ of habeas corpus as a means to delay their executions), prisoners sentenced in non-capital cases were reportedly also availing themselves of such petitions.¹⁵ The U.S. Supreme Court developed restrictive procedural doctrines to govern federal habeas corpus proceedings;¹⁶ and in 1996, Congress passed legislation that limited federal court adjudication of prisoners' habeas corpus claims, particularly in capital cases, as discussed below.

¹³ Although the Powell Committee recommended "a six-month period within which the federal habeas corpus petition must be filed, the filing period begins to run only on the appointment of counsel ... the filing period is tolled during the pendency of all state court proceedings." See the *Powell Committee* report, p. 51.

¹⁴ Codified at Chapter 154 in 18 U.S.C.. Current legislation would move this authority from the federal courts to the Attorney General.

¹⁵ Habeas corpus may also be used by a person challenging civil confinement in an institution (*Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966)), an immigration deportation order (*Rowoldt v. Perfetto*, 355 U.S. 115 (1957)), an extradition order (*Fernandez v. Phillips*, 268 U.S. 311 (1925)), a conviction by a military court (*Strait v. Laird*, 406 U.S. 341 (1972)), or the denial of parole (*Morrissey v. Brewer*, 408 U.S. 471 (1972)).

¹⁶ See *Stone v. Powell*, 428 U.S. 465 (1976) (ruling that Fourth Amendment exclusionary rule claims cannot be raised on habeas corpus if the state court provided a full and fair hearing); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (finding that claims not presented in state court may be raised on habeas corpus only if there is cause and prejudice); *Engle v. Issac*, 456 U.S. 107 (1982) (finding that a petitioner's failure to object at trial cannot be excused as futile, simply because the objection was unacceptable to that court at the time); and *Marshall v. Longberger*, 259 U.S. 422 (1983) (explaining that federal habeas corpus courts should not subject state court findings of fact to less deference than they accord to federal district court findings).

Antiterrorism and Effective Death Penalty Act of 1996¹⁷

As discussed above, several of the Powell Committee's recommendations were adopted by Congress. Title II of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA; P.L. 104-32) codified some of the recommended restrictions on prisoners' access to federal habeas corpus relief, including

- barring federal habeas corpus reconsideration of legal and factual issues ruled upon by state courts in most instances;
- creating a general one-year statute of limitation (and a six-month statute of limitation in death penalty cases for states that successfully meet certain requirements related to the appointment of representation and compensation for related litigation in post-conviction proceedings);
- prohibiting federal evidentiary hearing of claims in most cases; and
- requiring appellate court approval for repetitious habeas corpus petitions.

Federal Habeas Corpus and Capital Cases

As discussed below, one of the issues that is at the center of reforming the writ of habeas corpus is the perceived delay in processing these petitions. Many proponents of amending the current federal habeas corpus law point to the amount of time it takes from the initial filing of a habeas corpus petition to disposition. They assert that the current system is abused by inmates who use the writ to delay the final outcome of their sentences. They further contend that such delay only benefits one category of habeas corpus petitioners. According to congressional testimony, "unlike the non-capital defendant who is serving his sentence during the habeas corpus process and has every incentive to proceed as quickly as possible to have a federal court vindicate a constitutional claim that the state courts wrongly decided, the capital defendant is not serving his sentence — he is avoiding it."¹⁸ Although it may be true that some death row prisoners use the writ to avoid death, it is also important to note that the overall number of habeas corpus petitions filed by death row inmates pales in comparison to the number of petitions filed by non-death row inmates, at less than 1% in one study done in 1995.¹⁹

¹⁷ Archived CRS Report 96-423, *Habeas Corpus & the Antiterrorism and Effective Death Penalty Act of 1996: An Overview*, by Charles Doyle. Contact the author for a copy of the report.

¹⁸ See for example, the testimony of John Pressley Todd.

¹⁹ According to a 1995 Department of Justice (DOJ) Bureau of Justice Statistics (BJS) report that examined the length of the federal habeas corpus appeal process, "less than 1% of the sentences are death penalty sentences. Most sanctions are custodial sentences." See U.S. DOJ BJS *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, Discussion Paper by Roger A. Hanson and Henry W.K. Daley, Sept. 1995, NCJ-155504, hereafter cited as Federal Habeas Corpus Review study.

The current debate over whether to reform the federal habeas corpus law is centered around state *capital* cases. As of December 31, 2004, there were 3,282 prisoners on death row in state prisons.²⁰ These cases experience some of the lengthier delays that have been highlighted in Congressional testimony, and for many this is where the concern rests. The issue of *trial finality* becomes apparent in these cases due to the mandated outcome — execution — being suspended pending the outcome of the habeas corpus proceeding.

Federal Habeas Corpus Petition Data

A 1995 Department of Justice Bureau of Justice (BJS) study examined the time it takes for a state capital case to make its way through the federal habeas corpus appeal process.²¹ The study looked at federal habeas corpus petitions in 18 federal district courts located in nine different states.²² BJS found that federal habeas corpus cases require a range of time for disposition. For example, 25% of federal habeas corpus cases were processed in 83 days or less, whereas 50% of the cases reached disposition in 175 days or less. However, BJS also found that 10% of the cases took 761 days or more to reach disposition. BJS found that the amount of time it took for a federal habeas corpus petition to reach disposition was based on the complexity of the case. Cases that failed to meet basic procedural requirements were dismissed quickly. However, the time for a federal habeas corpus case to reach disposition increased as the number and seriousness of issues raised in the petition increased.²³

The following section analyzes data from various federal sources and is meant to provide a context in which to discuss the effect of AEDPA on the filing of federal habeas corpus petitions by state prisoners. The discussion of the data, however, is limited to the number of federal habeas corpus petitions filed by state prisoners and the median time it took the cases to reach disposition. The data presented in this report do not take into consideration whether there were any *unwarranted* delays in the current system. In a letter to Congress, the Judicial Conference of the United States urged “that ... analysis be undertaken to evaluate whether there is 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.”²⁴

²⁰ U.S. DOJ BJS Bulletin, *Capital Punishment, 2004*, Nov. 2005, NCJ 211349. According to a more recent publication, currently, there are 3,371 inmates on death row in state prisons. See the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund, Inc. *Death Row U.S.A Summer 2005*, summer 2005.

²¹ See Federal Habeas Corpus Review study.

²² The nine states are Alabama, California, Florida, Indiana, Louisiana, Missouri, New York, Pennsylvania, and Texas.

²³ See Federal Habeas Corpus Review study.

²⁴ The Judicial Conference wrote Congress in response to the Streamlined Procedures Act of 2005 (S. 1088/H.R. 3035). See the Judicial Conference of the United States letter to the Honorable Arlen Specter, Chairman of the Senate Judiciary Committee, Sept. 26, 2005, found online at [<http://ccjr.policy.net/relatives/17324.pdf>], accessed on Dec. 29, 2005.

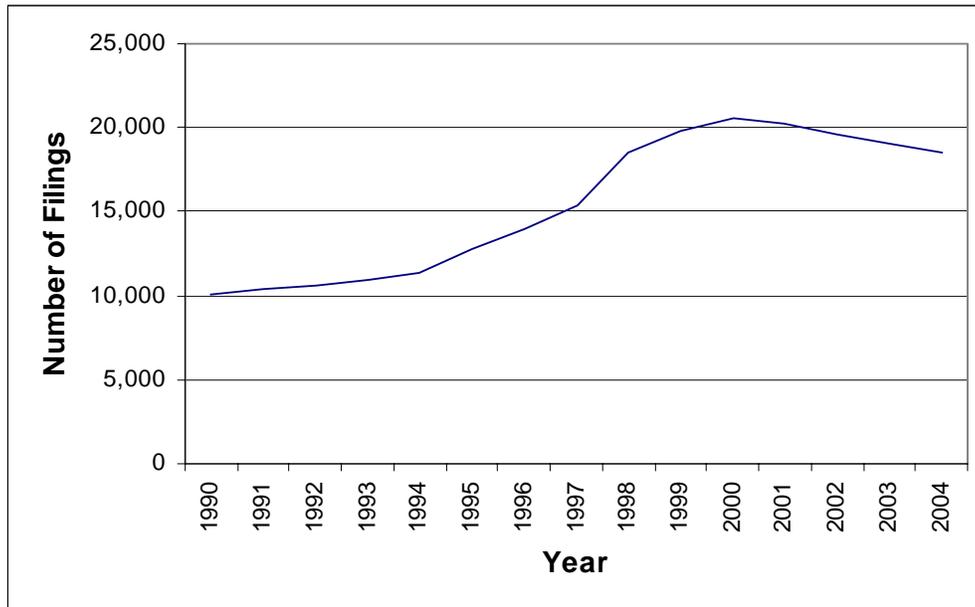
Administrative Office of the U.S. Courts Data. The Administrative Office of the U.S. Courts (AOUC) collects data on federal habeas corpus cases by federal and state prisoners. Prior to 1989, the AOUC did not distinguish between capital and non-capital cases, thus, our analysis does not include data prior to 1989. Moreover, the AOUC data are not coded to capture case-specific information (i.e., reason for filing, age of case, number of extensions granted, etc.), which prevents the analysis from going beyond the assessment of the number of cases filed and the median time it takes a case to reach disposition.

During the period prior to the enactment of AEDPA (1990-1996), on average 12,656 state *non-capital* federal habeas corpus petitions were filed per year, with a *median*²⁵ disposition time that ranged from a low of 5.6 months in 1995 to a high of 6.6 months in 1992 (see **Figures 1** and **3**). During the same period, on average 141 state *capital* federal habeas corpus petitions were filed per year, with a median disposition time that ranged from a low of three months in 1990 to a high of 12.8 months in 1993 (see **Figures 2** and **3**). Since the enactment of AEDPA (1997),²⁶ on average, 18,758 state *non-capital* cases have been filed. The median disposition time for this period (1997-2004) ranged from a low of 5.2 months in 2000 to a high of 6.9 months in 2002 (see **Figures 1** and **3**). Like the period before the enactment of AEDPA, the median disposition time remained fairly steady. Since 1997, an average of 198 state capital federal habeas corpus cases have been filed by prisoners in state custody. The median disposition time during this period ranged from a low of 13.2 months in 1998 to a high of 25.3 months in 2004 (see **Figures 2** and **3**). Following is a more detailed discussion of the data.

²⁵ The data provided by the AOUC only shows the *median* time it take for a case to reach disposition after it is filed, and not the *mean* or average. The median time is not as likely to be effected by cases that take an extraordinary long time to resolve (outliers).

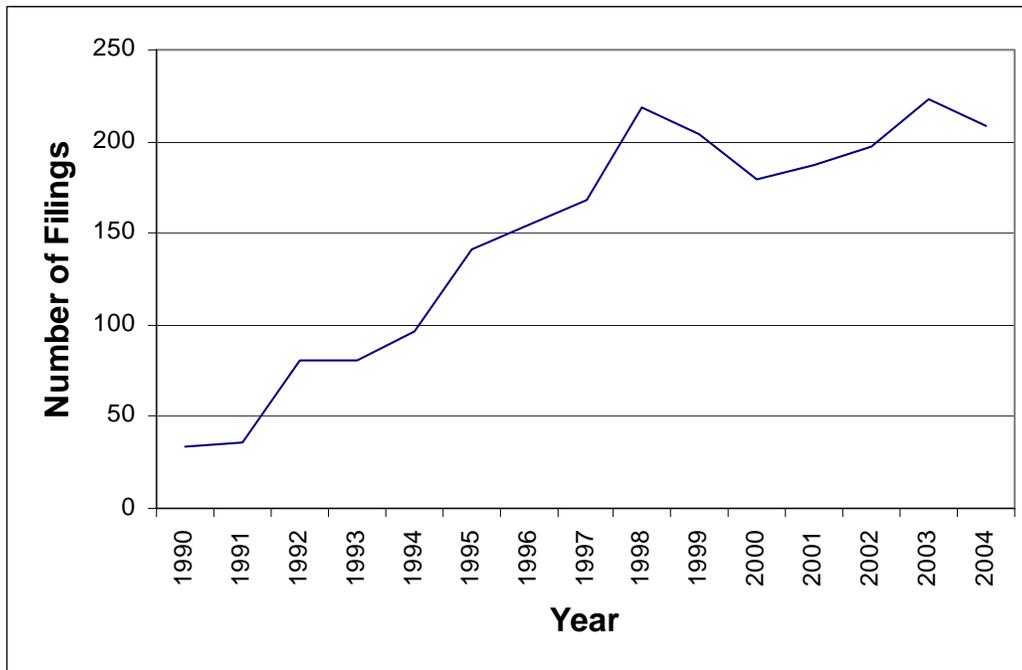
²⁶ AEDPA was enacted on Apr. 24, 1996, however, for the purposes of CRS analysis of habeas corpus petition data pre- and post-AEDPA, 1996 has been excluded in making such comparisons (up until Apr. 24, 1996, habeas corpus petitions filings would have fallen under the old system).

Figure 1. Number of State Non-Capital Federal Habeas Cases, 1990-2004



Source: CRS analysis of the Administrative Office of U.S. Courts data.

Figure 2. Number of State Capital Federal Habeas Cases, 1990-2004



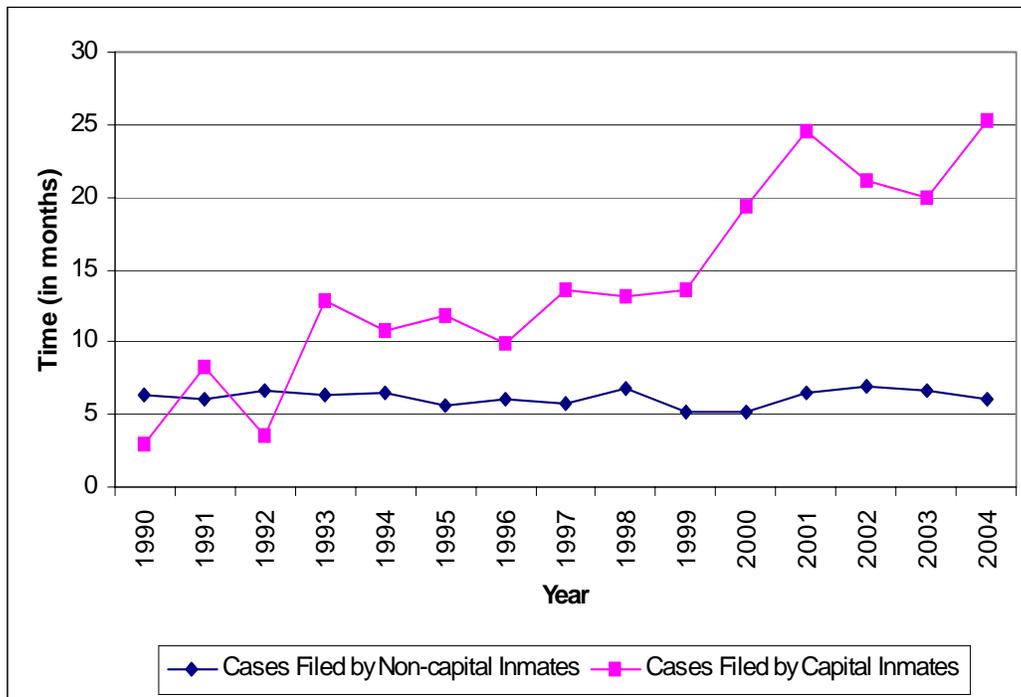
Source: CRS analysis of the Administrative Office of U.S. Courts data.

In 1997 (eight months after AEDPA was enacted), 15,199 state non-capital federal habeas corpus petitions were filed (see **Figure 1**). In 1998, 18,309 state non-

capital federal habeas corpus petitions were filed, an increase of 20% over 1997 numbers (see **Figure 1**). The number of state non-capital federal habeas corpus petitions filed peaked in 2000 at 20,354, an increase of 34% over 1997 numbers (see **Figure 1**). Since 2000, the number has declined slightly.

In 1990, the median time for a state non-capital federal habeas corpus case to reach disposition after it was filed was 6.4 months (see **Figure 3**). By 1997, the median time slightly decreased by almost a month. The median time for a state non-capital federal habeas corpus case to reach disposition peaked in 1998 to 6.8 months (an increase of 1.1 months from 1997). In 2000 and 2001, when the number of state non-capital federal habeas corpus cases filed was about double than what it was in 1990, the median time for a case to reach disposition after it was filed was 5.1 months and 6.5 months, respectively (see **Figure 3**). During the past four years, the median time for these cases to reach disposition has been over six months for each year. It is not all together clear why there has been a recent peak in the median time it takes for state non-capital cases to reach disposition.

Figure 3. Median Time from Filing to Disposition for State Capital and Non-Capital Federal Habeas Cases, 1990-2004



Source: CRS analysis of the Administrative Office of U.S. Courts data.

State capital federal habeas corpus cases accounted for approximately 1% of all federal habeas corpus cases during the period that was examined. Although the filing of state capital habeas corpus claims increased after the enactment of AEDPA, there were periods of relatively small increases and decreases (see **Figure 2**). For example, in 1997, the first full year after the enactment of AEDPA, 168 state federal habeas corpus capital cases were filed (see **Figure 2**). By 2003, there was an increase of 30% in the number of cases filed (see **Figure 2**).

Figure 3 demonstrates that many state capital federal habeas corpus cases are not resolved as quickly as state non-capital federal habeas corpus cases. The median time it took a state capital federal habeas corpus case to reach disposition in 1990 was three months. Generally speaking, since the enactment of AEDPA, there has been an increase in the time for a state capital federal habeas corpus case to reach disposition. In 2004, the median time peaked to 25.3 months, but there were six times as many federal habeas corpus cases filed during this period.

In summary, state capital federal habeas corpus generally cases take longer to reach disposition. Pre-AEDPA, state capital federal habeas corpus cases on average took three additional months to reach disposition when compared to state non-capital federal habeas corpus cases. Since the enactment of AEDPA, on average it has taken an additional nine months for state capital federal habeas corpus cases to reach disposition when compared to state non-capital federal habeas corpus cases. Moreover, during the last four years that were analyzed, it has taken longer to dispose of both types of cases.

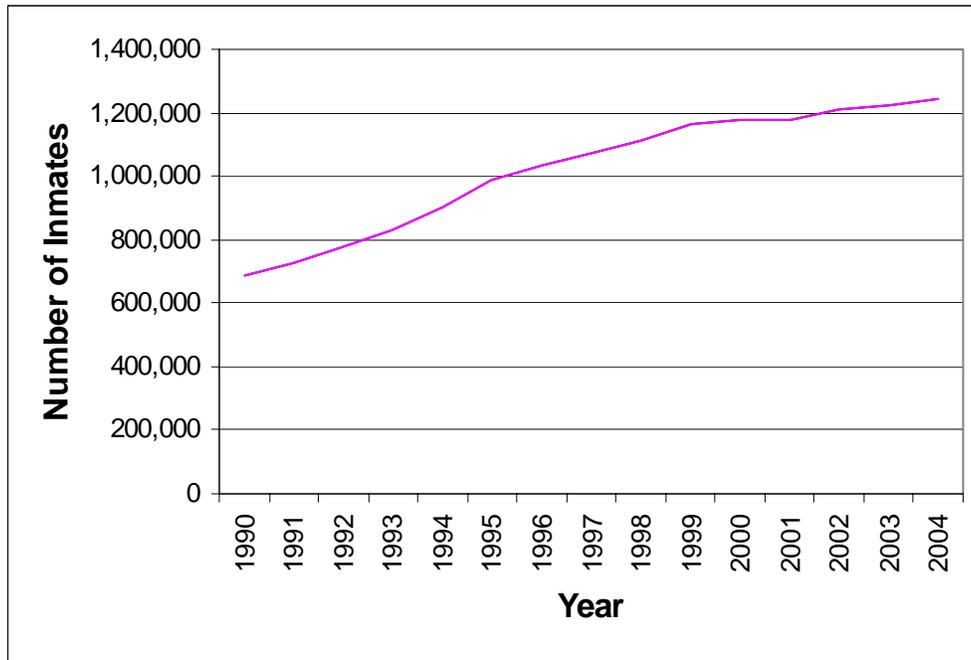
Federal Habeas Corpus Filings and Prison Population. To what extent does the increased prison population have an effect on the number of habeas corpus petition filings? As shown in **Figure 4**, in 1995 the total *state* prison population in the United States was 989,004. By 2000, the state prison population had increased by 19%, to 1,176,269. By 2004, the state prison population had increased by another 6% since 2000, to 1,244,311. **Figures 1** and **2** show that the total number of habeas corpus petitions filed by state prisoners increased from 1990 to 2000. With more people in prison, it follows that more habeas corpus petitions would be filed, simply because there are more sentences to be challenged. However, while there has been a significant increase in the state prison population over the years, the *rate* of state non-capital habeas corpus filings has remained somewhat constant (see **Figure 5**).

The rate of state non-capital habeas corpus filings began to increase in 1996, the year AEDPA was enacted (see **Figure 5**). In 2000, however, there was a noticeable decline in the rate of state non-capital habeas corpus filing, which continues to the present day (see **Figure 5**). According to BJS, AEDPA had a delayed effect on the filing of habeas corpus petitions by state prisoners.²⁷ BJS stated that AEDPA resulted in approximately one additional habeas corpus petition being filed each month for every 3,400 state prisoners.²⁸

²⁷ U.S. DOJ BJS, *Prisoner Petitions Filed in U.S. District Courts, 2002, with Trends 1980-2000*, by John Scalia (Washington, DC: Bureau of Justice Statistics, 2002), p. 5, online at [<http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>].

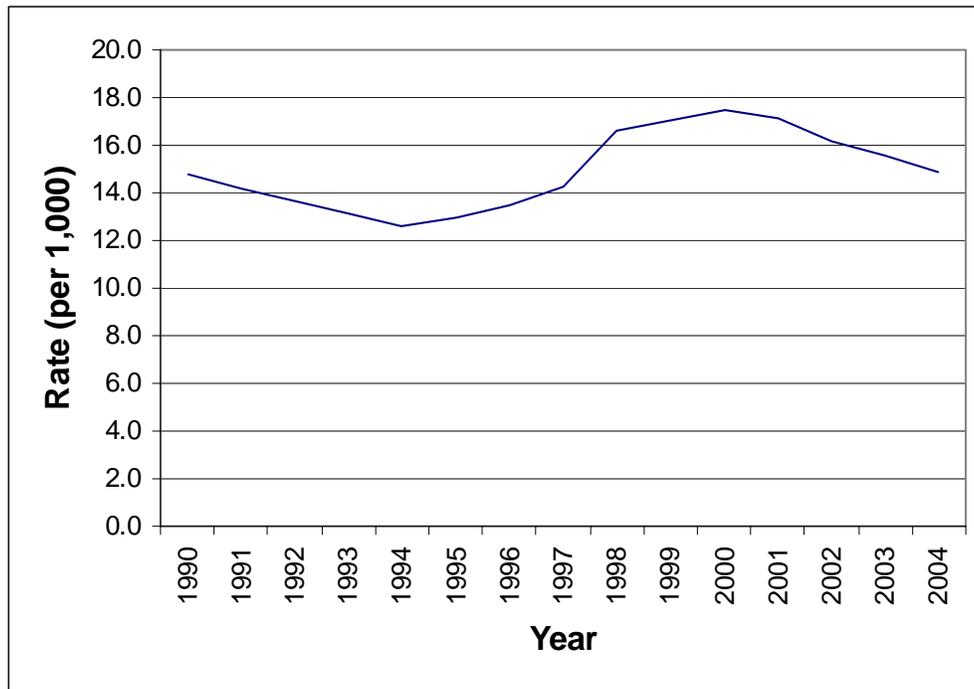
²⁸ *Ibid*, p. 7.

Figure 4. Number of Inmates in State Prisons, 1990-2004



Source: CRS presentation of BJS Sourcebook of Criminal Justice Statistics.

Figure 5. Rate of Federal Habeas Corpus Petitions Filed by State Non-Capital Prisoners, 1990-2004



Source: CRS analysis of the Administrative Office of U.S. Courts BJS data

Legislation in the 109th Congress

Two pieces of legislation were introduced in the 109th Congress that would have reformed the current federal habeas corpus system for state inmates — the Streamlined Procedures Act of 2005 (SPA; S. 1088 and H.R. 3035). The Senate Judiciary Committee attempted to mark up S. 1088 on several occasions. In addition to the SPA, the House passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) on December 16, 2005. Section 302 of H.R. 4472 would have barred federal judicial review of a state prisoner’s habeas corpus application in cases where the state court has found harmless errors in sentencing, see discussion below. Three additional bills (H.R. 3132/S. 956 and S. 1605) were also introduced in the 109th Congress. The bills would have provided for an expeditious habeas review of convictions that involved a killing of a child (§303 of H.R. 3132, §303 of H.R. 3860, and §4 of S. 956) and a public safety officer or state judge (§6 of S. 1605). The House passed H.R. 3132 on September 14, 2005.

The SPA would have amended AEDPA and further restricted state inmates’ access to federal habeas corpus relief. Generally, SPA would have imposed additional requirements on habeas corpus applicants in state custody.²⁹ SPA would have also imposed time limits on federal courts of appeal review of habeas corpus decisions. In addition, it would have barred federal courts from tolling³⁰ the current one-year deadline for filing habeas corpus claims for reasons other than those authorized by the state, as well as clarify when a state appeal is pending for purposes of tolling the deadline. Following is a discussion of the SPA’s major provisions.

The Streamlined Procedures Act of 2005 (S. 1088/H.R. 3035)

Mixed Petitions.³¹ Both bills would have prohibited an applicant from filing a federal habeas corpus petition that included claims that were not properly exhausted in state court. For a claim to be considered by a federal court, the bills would have required the applicant to describe in his petition how he exhausted each claim. The bills would have only allowed unexhausted claims to be considered by the federal courts if the claims for relief rest on *a new rule of law* or *on newly discovered evidence that demonstrates the claimant was factually innocent*,³² and if the denial of relief would be contrary to, or would entail an unreasonable application of, clearly established federal law. The bills would have required all unexhausted claims that do not qualify for consideration be dismissed with prejudice. Unlike S. 1088, H.R. 3035 would have made the provision retroactive.

²⁹ Defendants being held under a state criminal conviction may file a federal petition for a writ of habeas corpus under 28 U.S.C. §2254 to challenge the validity of their conviction or sentence.

³⁰ To *toll* the deadline means “to stop the running of” the statute of limitation. Black’s Law Dictionary, Second Pocket Edition, Bryan A. Garner, Editor in Chief.

³¹ 28 U.S.C. §2254(b)

³² 28 U.S.C. § 2254(e)(2)

Amendments to Petitions.³³ Both bills would have permitted a petitioner to amend his petition only once before the one-year federal application deadline or before the state files an answer to the petition, whichever occurs first. The bills would not have allowed an application to be amended to modify existing claims or to present additional claims, unless such claims would qualify for consideration on the grounds described in current law.³⁴ Unlike S. 1088, H.R. 3035 would have made the provision retroactive.

Procedurally Defaulted Claims.³⁵ Both bills would have barred federal judicial review of any claim found by a state court to be procedurally barred. The bills would have barred federal judicial review of any claim of ineffective assistance of counsel related to such claim *unless* (1) the claim would qualify for consideration if the claim for relief rests on a new rule of law or on newly discovered evidence that demonstrates the claimant was factually innocent,³⁶ or (2) the state’s counsel expressly waives the prohibition on hearing the claim. Both bills would have also barred federal judicial review of any claim that a state court denies on the merits and on the ground that the claim was improperly raised under state procedural law unless the claim would qualify for consideration if it rests on a new rule of law or on newly discovered evidence that demonstrates the claimant was factually innocent.³⁷ Additionally, both bills would have prohibited the writ of habeas corpus to be granted “unless the denial of such relief is contrary to, or would entail an unreasonable application of, clearly established federal law.”

Tolling of the Limitation Period.³⁸ Both bills would have clarified when a state appeal is pending for purposes of tolling the one-year deadline for filing habeas corpus claims. The bills would have established that an application is pending from the date on which the application is filed with a state court until the date on which the same state court rules on that application.³⁹ Unlike S. 1088, H.R. 3035 would have made the provision retroactive.

³³ 28 U.S.C. §2244

³⁴ 28 U.S.C. §2244(b)(2) allows second or successive habeas corpus application when: (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B) the factual predicate for the claim could not have been previously discovered through the exercise of due diligence; and (ii) 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, no reasonable factfinder would have found the petitioner guilty of the underlying offense.

³⁵ 28 U.S.C. §2254

³⁶ 28 U.S.C. §2254(e)(2)

³⁷ 28 U.S.C. §2254(e)(2)

³⁸ 28 U.S.C. §2244(d)

³⁹ The definition of a “pending application” is important because the one-year limitation for filing a federal habeas petition is tolled while an application for collateral review is pending with a state court.

Harmless Errors in Sentencing.⁴⁰ Unlike S. 1088, H.R. 3035 would have barred federal judicial review of a habeas corpus application with respect to a sentencing error that a state court has found harmless or not prejudicial unless a determination is made that the error is contrary to clearly established federal law.⁴¹

Time Limitations for Appeals.⁴² Both bills would have established appellate time limits as follows:

- A court of appeals would be required to decide a habeas corpus appeal within 300 days of the completion of briefing, or if no brief is filed, the date on which it is due.
- If a cross-appeal is filed, the court of appeals has 300 days after the date on which the appellant files a brief in response to the issues presented in the cross-appeal, or if no brief is filed, the date on which it is due.
- An appellate court would be required to rule on a petition for rehearing within 90 days.
- If a panel rehearing is granted, the panel has 120 days after the petition is granted to make a determination.
- If a rehearing en banc is granted, the court of appeals has 180 days after the petition is granted to make a final determination.

If a court of appeals fails to comply with these deadlines, the bills would have allowed the state to petition the U.S. Supreme Court, or a Justice thereof, to force the court to comply with the deadline.⁴³

Capital Cases.⁴⁴ Both bills would have changed the scope of federal review in capital cases. Under current law, a district court can only consider claims that have been raised and decided on the merits in state courts, unless the failure to raise the claim properly is (1) the result of state action in violation of the Constitution or U.S. laws; (2) the result of the Supreme Court's recognition of a new federal right made retroactively applicable; or (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for state or federal post conviction relief.

Both bills would have barred judicial review of capital claims unless (1) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court that was

⁴⁰ 28U.S.C. §2254

⁴¹ S. 1088 *as introduced* had a similar provision, and §302 of H.R. 4472 has a similar provision.

⁴² 28 U.S.C. §2254

⁴³ Both bills also include language stating that the failure of the court of appeals to abide by the time limits is not grounds for granting relief from a judgement of conviction or sentence, nor are the time limits to be construed to entitle a capital defendant to a stay of execution to which he or she would not be otherwise entitled.

⁴⁴ 28 U.S.C. § 2264

previously unavailable; 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 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.

Both bills would have amended current law⁴⁵ by extending the time limit during which the federal district court must render a final determination and enter a final judgment on any application for a writ of habeas corpus in a capital case. Currently, the federal district court must enter a final judgment not later than 180 days after the date on which the application is filed. The bills would have increased the time from 180 days to 15 months.

Review of Chapter 154 Opt-in Requirements.⁴⁶ Under current law, Chapter 154 authorizes special expedited habeas corpus procedures for state capital cases. The procedures are currently available to states that establish a system for providing competent legal representation to capital defendants. Under current law, *federal courts* review whether the state has met the necessary requirements. Both bills would have placed the determination with the *Attorney General* (and not with the federal courts as in current law), with review of such decision in the D.C. Circuit Court of Appeals. The bills would have required the Attorney General's determination to be conclusive unless it is manifestly contrary to the law and is an abuse of discretion.⁴⁷

Clemency and Pardon Decisions.⁴⁸ Both bills would have limited federal judicial review of state clemency and pardon decisions to Supreme Court reviews. The bills would have required such reviews to be conducted only of decisions made by the highest court of a state that involve a claim arising from the exercise of a state's executive clemency or pardon power, or the process or procedures used under such power.

Ex Parte Funding Requests.⁴⁹ Both bills would have required an application for services⁵⁰ for applicants in both federal⁵¹ and state custody to be decided by a judge other than the judge presiding over the post-conviction proceedings in capital cases seeking to vacate or set aside a death sentence. The bills would have required that any authorized amount for these services must be disclosed

⁴⁵ 28 U.S.C. §2266(b)(1)(A)

⁴⁶ Chapter 154 sits in Title 28 of the United States Code.

⁴⁷ §507 of H.R. 3199 has a similar provision.

⁴⁸ Chapter 85 of Title 28 of the U. S.C.

⁴⁹ 21 U.S.C. §848(q)(9)

⁵⁰ Under 21 U.S.C. §848(q)(9), services include investigative, expert or other services reasonably necessary for the defendant's representation, "whether in connection with issues relating to guilt or the sentence."

⁵¹ This section is applicable to a post-conviction proceeding under 18 U.S.C. §2255 which covers federal prisoners.

to the public immediately. Additionally, the bills would have prohibited courts from granting an application for an *ex parte* proceeding,⁵² communication, or request unless the application has been served upon the respondent. The bills would have required all such proceedings, communication, or requests to be transcribed and made a part of the record available for appellate review.

Crime Victims' Rights.⁵³ Both bills would have extended crime victims' specified rights to federal habeas corpus proceedings arising out of a state conviction. These rights are enumerated in current law⁵⁴ and include the right

- to be reasonably protected from the accused;
- to be given reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding involving the crime or of any release of escape or the accused;
- not to be excluded from any such proceeding;
- to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or parole;
- to confer with the government's attorney in the case;
- to receive full and timely restitution as provided by law;
- to a proceeding free from unreasonable delay; and
- to be treated with fairness and with respect for the victim's dignity and privacy.

DNA Testing.⁵⁵ Unlike H.R. 3035, S. 1088 would have permitted DNA evidence to be introduced to establish facts related to a claim. The bill would have permitted the court to order DNA testing if (1) the evidence is in the possession of the state and has been subject to a chain of custody; (2) the proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices; (3) the court, after reviewing the record of the applicant's trial and any other relevant proceedings, determines that there is a reasonable possibility that the DNA testing will produce exculpatory evidence; (4) the DNA testing will be conducted by a lab agreed upon by the state and the applicant, or if the state and the applicant cannot agree, one chosen by the court that is qualified to prepare DNA analysis for entry into the National DNA Index System; and (5) the results of the analysis are promptly disclosed to the court, the state and the applicant.⁵⁶

⁵² An *ex parte* proceeding is a proceeding in which not all parties are present or given the opportunity to be heard. Black's Law Dictionary, Second Pocket Edition, Bryan A. Garner, Editor in Chief.

⁵³ 18 U.S.C. §3771(b)

⁵⁴ 18 U.S.C. §3771(a)

⁵⁵ 28 U.S.C. §2254(e)

⁵⁶ For additional information on DNA testing for law enforcement purposes, see CRS Report RL32247, *DNA Testing for Law Enforcement: Legislative Issues for Congress*, by Lisa M. Seghetti and Nathan James.

Selected Issues

As the debate over whether to reform federal habeas corpus law escalates, two major themes have emerged: *trial finality* and *adequate representation*. Both of these issues are relevant when discussing state capital and non-capital post-conviction proceedings. Following is a discussion of these two issues.

Trial Finality

Critics on both sides of the debate often point to the length of time it takes for a federal habeas corpus case to make its way through the system. On the one hand, those who are in favor of further reforming the body of law that governs federal habeas corpus appeals contend that prisoners abuse the current system as a means to keep their cases in litigation, which delays closure for many victims.⁵⁷ They argue that the increased delays in resolving habeas corpus cases have decreased the public's confidence in the criminal justice system.⁵⁸ Moreover, such delays associated with lengthy habeas corpus appeals cause many problems including victims paying a heavy emotional price; states having to pay the cost of the litigation; the dilution of the effectiveness of the criminal justice system; and some cases that have been overturned due to the tampering of witnesses, reluctance of victims to testify or evidence being lost.⁵⁹

Proponents of further reforming the federal habeas corpus system also contend that the only way to reduce existing delays in the system is to streamline federal habeas corpus proceedings by limiting the ability of state prisoners to petition federal courts for habeas corpus relief *and* by limiting claims federal courts can consider in habeas corpus petitions.⁶⁰ By streamlining the process, they argue, delays in processing these cases would be diminished.⁶¹

Opponents argue, however, that limiting the claims federal courts can consider in habeas corpus petitions would effectively prevent the federal courts from exercising judicial review.⁶² They note that under current law, prisoners are already required to exhaust state court remedies before advancing a claim in federal court. They contend that federal courts use the discretion to hear unexhausted claims sparingly. They also note that many petitioners do not have post-conviction

⁵⁷ See for example, the Powell Committee Report and Testimony of Thomas Dolgenos.

⁵⁸ See for example, The Testimony of John Pressley Todd and Thomas Dolgenos.

⁵⁹ Ibid.

⁶⁰ See S. 1088 and H.R. 3035.

⁶¹ See for example, The Testimonies of John Pressley Todd, Thomas Dolgenos and Kent Cattani.

⁶² See for example, The Testimony of Seth Waxman, Esq., Former Solicitor General of the United States, in U.S. Congress, Senate Committee on the Judiciary, *Habeas Reform: The Streamlined Procedures Act*, 109th Cong., 1st sess., Nov. 16, 2005, 2005 (Washington: GPO, 2005), hereafter cited as testimony of Seth Waxman, and the testimony of Bernard E. Harcourt.

representation, which makes it likely that many petitioners will have unexhausted claims dismissed because they did not have the help of an attorney to accurately present each claim in state court.⁶³

Moreover, opponents contend that the “limiting federal habeas corpus appeals” argument is based on a faulty premise: that petitioners actually want to delay federal adjudication of their claims. According to one such opponent, “99% of state prisoners are serving prison sentences they hope to cut short by winning federal habeas corpus relief. For the 1% under a sentence of death,” the U.S. Supreme Court⁶⁴ has already addressed concerns about unwarranted delay.⁶⁵

Post-Conviction Representation

The Sixth Amendment of the Bill of Rights of the U.S. Constitution provides that any individual accused of a crime is entitled to counsel. The Constitution, however, does not require the appointment of counsel in post-conviction proceedings. Although most experts agree that counsel in post-conviction proceedings is important, especially in capital cases, many states lack an effective system of appointment of counsel for indigent prisoners.⁶⁶

⁶³ Ibid.

⁶⁴ The Supreme Court held in *Rhines v. Weber* (125 S.Ct. 1528 (2005)) 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 all claims in the application, the claim is potentially meritorious, there is no indication that the petitioner intentionally engaged in tactics to delay proceedings, and the court places a reasonable time limit on the petitioner’s return to federal court for adjudication.

⁶⁵ Testimony of Ruth E. Friedman. The 1% figure was first mentioned in a DOJ BJS 1995 discussion paper titled *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* by Roger A. Hanson and Henry W.K. Daley, NCJ-155504.

⁶⁶ In 1989, the American Bar Association (ABA) established standards for the appointment and compensation of counsel in death penalty cases, pre- and post-conviction. The ABA approved a revised edition of the standards in 2003. The ABA urged death penalty states to establish organizations to “recruit, select, train, monitor, support, and assist” attorneys representing capital defendants and prisoners. Moreover, the ABA called for the following:

- The appointment of two experienced attorneys at each stage of a capital case.
- The appointment of the attorneys must be made by a special appointing authority or committee that is charged with identifying and recruiting lawyers with the relevant professional credentials, experience and skills.
- Attorneys should receive a reasonable rate of hourly compensation that reflect the “extraordinary responsibilities” inherent in death penalty litigation.
- Attorneys should also be provided with the time and funding necessary for proper investigations, expert witnesses, and other support services.

(continued...)

In 1988, Congress passed legislation that required the appointment of counsel in *federal* capital habeas corpus proceedings, that is, since 1988, prisoners serving a federal capital sentence are entitled to counsel during *all* post-conviction proceedings.⁶⁷ Unlike the federal criminal justice system, most states do not afford its prisoners with the same right. Critics contend that by having a non-mandatory system of post-conviction representation, many states ignore the reality that indigent death row prisoners are simply not able to competently engage in post-conviction litigation.

Access to Representation. In 1996, Congress eliminated funding for Post-Conviction Defender Organizations (PCDO).⁶⁸ PCDOs were created in the 1980s in response to the federal judiciary's concern about the growth of the death row population in some federal circuits and the lack of qualified counsel to handle post-conviction appeals.⁶⁹ PCDOs were non-profit organizations that recruited and trained private attorneys to represent death row prisoners. Attorneys recruited by PCDOs were well versed in death penalty litigation. PCDOs served as consultants to the attorneys they recruited and provided expertise in the litigation of these cases. At its peak, PCDOs employed full-time, salaried attorneys in 20 of the 38 death penalty states. Before funding for PCDOs was eliminated, PCDOs received grants from the Judicial Conference that were contingent upon the PCDO receiving state funding to support the work it did in state courts.⁷⁰

Since the elimination of PCDOs, many states lack a system for the appointment of counsel for indigent prisoners in post-conviction proceedings. In states that do provide an attorney for post-conviction appeals, the system to appoint such representation varies from state to state.⁷¹ Some states have a public defender's office that handles post-conviction representation, however, these offices are often understaffed and underfunded.⁷² In some states that do not have public defender's offices to handle appeals, counties in the state will handle the responsibility of providing post-conviction representation. Some counties do this by awarding a

⁶⁶ (...continued)

According to the ABA, no state has *fully* adopted its standards. See American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Revised Edition Feb. 2003, online at [<http://www.abanet.org/deathpenalty/DPGuidelines42003.pdf>], accessed on Dec. 30, 2005 and, American Bar Association, *Report to the House of Delegates (Section of Individual Right and responsibilities Section of Litigation)*, 1997, online at [<http://www.abanet.org/irr/rec107.html>].

⁶⁷ See the Anti-Drug Abuse Act of 1988 (§7001 of P.L. 100-690).

⁶⁸ See Title III of P.L. 104-134.

⁶⁹ P.L. 91-447, 18 U.S.C. §3006A (g)(2)(B). PCDOs were previously known as Death Penalty Resource Centers. PCDOs were encouraged to seek state funding so they would be able to provide representation for death row inmates at the state level.

⁷⁰ Roscoe C. Howard, Jr., "The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel," 98 W. Va. L. Rev. 863 (1995-1996).

⁷¹ Testimony of Byran A. Stevenson.

⁷² *Ibid.*

contract to a law firm to handle all post-conviction cases (usually to the lowest bidder), other counties use a list of attorneys that can be appointed to take the case. If an attorney is appointed to the case, a cap is usually placed on the amount of money the state will reimburse the attorney to cover the cost of investigation and legal fees. Also, standards used by the state to determine which attorneys are eligible to handle post-conviction representation vary from state to state.⁷³ If the state chooses not to provide post-conviction representation, then the petitioner must file the petition himself or hope to find an attorney that will take the case pro bono.

Effectiveness of Representation. The effectiveness of defense counsel can have an effect on the length of post-conviction proceedings. Some have attributed the excessive length of post-conviction review to the lack of adequate representation for indigent defendants.⁷⁴ In a report published in 1990, the American Bar Association (ABA) concluded that inadequate counsel greatly increases the risk of convictions that are flawed by fundamental, factual, legal or constitutional error.⁷⁵ Hence, a great deal of time during state and federal post-conviction review, especially in a capital case, is used to determine whether or not a defendant received adequate representation.

The importance of effective representation is further buttressed by research conducted by Liebman, Fagan, West and Lloyd.⁷⁶ The authors conducted a study of death sentences over a 23-year period (from 1973 to 1995). According to the authors, there were approximately 5,760 death sentences handed down in the United States during the 23-year period that was studied. Of these sentences, 79% were reviewed on direct appeal and 41% were reversed due to “serious error.”⁷⁷ With respect to the death sentences that were not overturned after direct review, 40% were overturned on post-conviction review due to serious error. According to the authors, the overall error rate in capital cases for the period 1973-1995 was 68%.⁷⁸ The study showed

⁷³ Ibid.

⁷⁴ American Bar Association, “Towards a More Just and Effective System of Review in State Death Penalty Cases,” 40 Am. U. L. Rev. 53 (1990-91).

⁷⁵ Ibid.

⁷⁶ James S. Liebman, Jeffery Fagan, Valerie West and Jonathan Lloyd, “Capital Attrition: Error Rates in Capital Cases, 1973-1995,” 78 Tex. L. Rev. 1839 (2000), hereafter cited as Liebman, Fagan, West and Lloyd study.

⁷⁷ Ibid. The authors defined “serious error” as error that substantially undermines the reliability of the outcome. According to the authors, the error must be “serious” in three respects: (1) the error must be prejudicial, either because the defendant shows it potentially affected the outcome of the case or because it is the kind of error that almost always has such an effect; (2) the error generally must have been properly reserved by way of a timely objection at trial, reiteration in a timely new trial motion at the end of the trial, and timely and proper assertion on appeal; and (3) the error results in reversal if it is discovered.

⁷⁸ Ibid. The authors define the “error rate” as the frequency with which capital cases that underwent full review were overturned during one of the three stages (state direct appeal, state post-conviction appeal, federal habeas corpus appeal) of review due to serious error.

that among the most common errors that were cited during state post-conviction review, egregiously incompetent defense lawyers accounted for 37% of reversals.⁷⁹

The research concluded that during the period examined, a majority of the death sentences with reversible error were overturned by state courts. In 40% of the cases where reversible error was found, it took an average of 7.6 years after the defendant was sentenced to death for the case to complete all stages of review. It took an average of nine years for cases in which no reversible error was found to complete all stages of review. However, the authors' results led them to conclude that, "indeed, it may be that capital sentences spend so much time under judicial review precisely because they are persistently and systematically fraught with alarming amounts of error, and that the expanding production of death sentences may compound the production of error."⁸⁰

Not all states, however, have a public defense system with similar records. For example, Arizona appoints post-conviction representation to all indigent defendants and requires the appointed attorney to be different from the one that represented the defendant at trial.⁸¹ Arizona has also established mandatory competency standards for any attorney that wishes to be placed on the list of eligible attorneys for appointment in capital post-conviction cases. The standards evaluate the attorney's bar status, continuing legal education, and years of experience in the practice of criminal law or post-conviction proceedings. According to congressional testimony, since 2002, Arizona has spent more than \$1 million for post-conviction representation in 21 cases.⁸²

Attorney General Determination of AEDPA "Opt-in" for States

The issue of post-conviction representation is highlighted in the debate of further limiting state prisoners' access to appeal to the federal courts for habeas relief. Under current law, states have the opportunity to "opt-in" to an expedited review process for federal habeas corpus proceedings in capital cases if they meet certain conditions.⁸³ The "opt-in" provision only applies to capital cases and for qualifying states. For states that successfully "opt-in," a six-month statute of limitation for filing habeas corpus petitions is imposed on state prisoners, and the district court is required to render a final determination and judgment on a petition brought forth under the new chapter no later than 180 days after the date on which

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Testimony of Chief Counsel Kent Cattani, in the U.S. Congress, Senate Committee on the Judiciary, *The Streamlined Procedures Act*, hearing on S. 1088, 109th Cong., July 13, 2005, at [http://judiciary.senate.gov/testimony.cfm?id=1569&wit_id=4459], accessed Oct. 12, 2005, hereafter cited as testimony of Kent Cattani.

⁸² Ibid.

⁸³ AEDPA added a new Chapter 154 (*Special Habeas Corpus Procedures in Capital Cases*) to Title 28 of the United States Code (Judiciary and Judicial Procedure).

the petition is filed.⁸⁴ The Streamlined Procedures Act (S. 1088/H.R. 3035) would allow the Attorney General to decide if states have met the requirements set forth by AEDPA to “opt-in” for the special set of rules governing federal review of state court decisions. In deciding whether a state can “opt-in,” the Attorney General must determine whether the state has developed a sufficient system for appointing and funding qualified counsels during the state post-conviction process.

Under the current system, federal courts must rule on whether a state has met the requirements to “opt-in.” If a state has successfully met such requirements, then the federal district court would be subjected to the limitations set forth by AEDPA, as discussed above. Proponents contend that such a system produces a reluctance on the court’s part to determine whether states have met the criteria.⁸⁵ This is evident in the fact that out of the 38 states that have the death penalty, only thirteen have petitioned the courts to “opt-in” to the expedited review process since its enactment — and only one of those states was successful (Arizona).

Opponents contend, however, that it would eliminate the chance for federal courts to ensure reliable convictions in state capital cases (the only exception would be for claims of actual innocence).⁸⁶ Moreover, opponents contend that by placing this authority with the Attorney General, who is a law enforcement official, it will disturb the existing allocation of the separation of powers.⁸⁷

Conclusion

The issue of what is the proper scope of federal habeas corpus relief resurfaced in the 109th Congress. Although trial finality is often cited by proponents who favor further restricting federal habeas corpus relief to state prisoners as a desirable goal when discussing the scope of such relief, the question of a prisoner’s constitutional rights is often cited by those holding an opposing viewpoint as equally paramount to the discussion of the proper scope of habeas corpus relief. The question of what is the purpose of constitutional rights in the criminal justice system, however, can be supported by both views. For example, do such rights exist primarily to protect the innocent and ensure that only those who actually committed a crime will be convicted or does the litigation of rights serve other purposes such as controlling police and prosecutorial behavior and protecting individual privacy and dignity? Regardless of the question, there appears to be a consensus among legislatures that adequate representation, arguably at *all* stages of the criminal justice system, is critical to ensure that an individual’s constitutional rights are not violated.

⁸⁴ See 28 U.S.C. 2266. No such deadline exists for the courts under Chapter 153.

⁸⁵ See testimony of Kent Cattani.

⁸⁶ See for example, testimony of Seth Waxman and the Rutherford Institute letter to the Honorable Arlen Specter, Chairman of the Senate Judiciary Committee, July 26, 2005, found online at [http://rutherford.org/articles_db/press_release.asp?article_id=573], accessed on Dec. 30, 2005.

⁸⁷ See testimony of Seth Waxman.

As early as 1989, the Powell Committee studied the federal habeas corpus system. Although the committee found that prisoners' abuses of the system were rampant, it also found that many states lacked representation for indigent prisoners in post-conviction proceedings. As a result of the committee's study, as well as several U.S. Supreme Court rulings that addressed some of the issues with the system, Congress passed AEDPA. Among other provisions, AEDPA created a two-tier system for states with respect to federal habeas corpus proceedings. Although there was already an existing system for the processing of federal habeas corpus cases, AEDPA created a second, expedited system for capital cases for states that met certain requirements. As was the case with the committee, Congress, in passing AEDPA, recognized the need to provide an incentive to states to have a system in place that would call for the appointment of adequate counsel as well as provide compensation for the litigation of post-conviction cases. The need for such a system was more apparent in capital cases where prisoners were facing a death sentence. Although Arizona is the only state that has successfully opted-in to the expedited system,⁸⁸ 12 additional states have attempted to do the same to no avail.

Once again Congress recognized the need for effective representation in post-conviction proceedings, especially in capital cases, when it passed the Justice for All Act (P.L. 108-405). Title IV of the act (*the Innocence Protection Act of 2004*) permits the Attorney General to make grants to states so they can improve the quality of legal representation provided to indigent defendants in state capital cases. The research of Liebman, Fagan, West and Lloyd discussed previously raised the question of whether the delays commonly associated with federal habeas corpus review are necessary to make sure that justice is administered fairly. Moreover, the research raised the possibility that the errors found in capital cases may be the result of poor representation. Until the issue of adequate representation is fully addressed in the nation's criminal justice system, reform efforts will continue to be debated.

⁸⁸ Arizona successfully met the criteria set forth in AEDPA after several failed attempts.