Notes

ANOTHER HURDLE TO HABEAS: THE STREAMLINED PROCEDURES ACT

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INTRODUCTION

Shortly before midnight on December 12, 2005, California Governor Arnold Schwarzenegger denied clemency to Crips gang founder and convicted quadruple murderer Stanley "Tookie" Williams on the eve of his execution.[1] Schwarzenegger delivered his decision amidst an explosive public dispute over capital punishment. Yet underneath this visible controversy lurked a constitutional issue that failed to draw the same degree of popular concern but has been stirring the judicial system for decades: the filing of successive petitions for habeas corpus.

In Williams's case, Pasadena lawyer Verna Wefald issued an eleventh-hour emergency plea to the U.S. Supreme Court, accompanied by a 150-page habeas petition.[2] Wefald's petition—alleging "an 'error of constitutional magnitude [that] led to a trial that was so fundamentally unfair absent the error [that] no reasonable judge or jury would have convicted' [Williams]"[3]—followed five similar requests to state and federal courts. The first habeas petition, filed with the California Supreme Court in 1984,[4] alleged various Fifth

1. *See* Williams v. Calderon, 48 F. Supp. 2d 979, 988, 994 (C.D. Cal. 1998) (addressing Williams's conviction). Williams died by lethal injection at 12:35 a.m. on Dec. 13, 2005, hours after Schwarzenegger denied clemency. *See, e.g.*, Jenifer Warren & Maura Dolan, *Tookie Williams Is Executed*, L.A. TIMES, Dec. 13, 2005, at A1.

2. Henry Weinstein, *Williams' Lawyer Appeals to Supreme Court: Constitutional Issues Challenging the Validity of His Convictions and Death Sentence Are Raised in Request for a Stay of Execution*, L.A. TIMES, Dec. 11, 2005, at B8.

3. *Id.*

4. *Calderon*, 48 F. Supp. 2d at 988 (listing Williams's successive attempts at habeas relief).

and Sixth Amendment violations during Williams's trial.[5] This petition was denied in 1988.[6] A second state habeas petition, filed January 9, 1989, was also denied.[7] Williams filed his third state petition on September 1, 1989, and his fourth on April 14, 1994; both were denied.[8] Subsequently, Williams filed a federal habeas petition, amended on November 13, 1995, arguing that he had been incompetent during his trial.[9] Thus, courts repeatedly considered one defendant's conviction for eleven years.

Critics are sharply divided over the appropriate amount of time and resources that courts should devote to habeas review. Scholars who oppose extensive habeas protections argue that lengthier procedures congest courts, divert resources from other claims, and stall victims' ability to heal and move on.[10] Habeas supporters respond by emphasizing the need for judicial process and fairness, especially when a human life is at stake.[11] The U.S. Supreme Court has attempted to define the boundaries of what is required to ensure full and fair process. Congress also interjected its own legislation, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[12] which was, until 2005, the legislature's latest effort toward foreclosing habeas relief.

In 2005, Arizona Republican Senator Jon L. Kyl introduced new legislation that would have further blocked what is already an obstructed path toward habeas relief.[13] The Streamlined Procedures

5. *See* People v. Williams, 751 P.2d 901, 908–11 (Cal. 1988) (rejecting defendant's arguments that (1) police attained unsolicited incriminating statements from the defendant, (2) police violated the defendant's Miranda rights, and (3) the defendant was denied effective assistance of counsel).

6. *Id.* at 921.

7. *Calderon*, 48 F. Supp. 2d at 988.

8. *See Calderon*, 48 F. Supp. 2d at 988 (noting denial of the fourth state petition); *In re* Williams (*Williams II*), 870 P.2d 1072, 1095 (Cal. 1994) (denying the third state petition).

9. *Calderon*, 48 F. Supp. 2d at 988.

10. *See* Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 367 (1983) (listing various motives for limiting habeas review).

11. *See id.* (including factors favoring broad habeas availability).

12. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

13. 151 CONG. REC. S5540–44 (daily ed. May 19, 2005) (statement of Sen. Kyl introducing the Streamlined Procedures Act).

Act (SPA)[14] garnered support from politicians who believed that AEDPA failed to simplify habeas doctrine, yet it faced fiery opposition from its critics.[15] Predictably, an individual's stance on the proposal embodied in this Act reflects personal views of what is important in the judicial process: precise finality or ultimate protection.

Although it is necessary to strike a balance between these two competing interests, the SPA's clear preference for finality was unwarranted and even unconstitutional. Congress was wise not to adopt this legislation, which would have curtailed protections to an undesirable minimum and impeded well-established avenues of relief approved by the Supreme Court. This Note focuses on the changes in the specific habeas doctrine of procedural default. Part I provides the judicial and statutory development of habeas law. Part II outlines the goals of the Streamlined Procedures Act as proposed in 2005. Finally, Part III discusses how the plan proposed in the Act would effectively eradicate habeas relief and leave certain constitutional violations unremedied.

I. DEFINING HABEAS AND THE DOCTRINE OF PROCEDURAL DEFAULT

When a prisoner is held in violation of the Constitution, treaties, or laws of the United States, that individual may petition for federal habeas relief.[16] Upon receiving the habeas petition, a federal court may examine the trial court's criminal conviction.[17] If the conviction is held unconstitutional, the federal habeas court may discharge the

14. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005). Representative Daniel E. Lungren (R-CA) sponsored analogous legislation in the House of Representatives. Streamlined Procedures Act of 2005, H.R. 3035, 109th Cong. (2005).

15. The last congressional action on the Streamlined Procedures Act was a Senate Judiciary Committee hearing on Nov. 16, 2005. Bill Summary and Status for the 109th Congress-S. 1088 (Streamlined Procedures Act of 2005), http://thomas.loc.gov/cgi-bin/bdquery/z?d 109:s.01088: (last visited Mar. 29, 2007). Although the SPA failed in the 109th Congress, if its steadfast supporters propose similar legislation in the future, this may implicate many of the same issues raised in this Note.

16. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 862 (4th ed. 2003). Habeas relief applies to individuals in custody following both state trials, pursuant to 28 U.S.C. § 2254 (2000), and federal trials, pursuant to § 2255.

17. Federal habeas review is a form of collateral relief, which differs from direct review of state court decisions. *See* CHEMERINSKY, *supra* note 16, at 862 (explaining that a habeas "petition constitutes a separate civil suit filed in federal court").

prisoner from custody.[18] By releasing a prisoner held on a state court judgment, the federal habeas court "renders ineffective" the state law ground pursuant to which the judgment rested.[19]

To promote the goals of federalism and comity, the Supreme Court held that, "in a federal system, the [s]tates should have the first opportunity to address and correct alleged violations of state prisoner[s'] federal rights."[20] Specifically, habeas petitioners must first exhaust their claims in state court before submitting them for federal review. A petitioner who fails to raise a particular issue before the lower courts "has deprived the state courts of an opportunity to address [that claim] in the first instance,"[21] a principle known as "procedural default." These claims are generally barred from habeas review.[22]

A. Origins of Habeas and Subsequent Developments

Habeas doctrine is expressly grounded in the U.S. Constitution. Article I, Section 9 affirms, "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."[23] Under the Judiciary Act of 1789, Congress granted federal courts authority to permit habeas for federal prisoners only.[24] Later, following the Civil War, Congress extended to state prisoners the ability to seek habeas corpus relief if they were held "in violation of the constitution, or of any law or treaty of the United States."[25] Despite these early statutory

18. *Id.*

19. Coleman v. Thompson, 501 U.S. 722, 730 (1991).

20. *Id.* at 731.

21. *Id.* at 732.

22. *Id.* at 731. Procedurally defaulted claims are barred from subsequent habeas review unless they fall within one of two articulated exceptions. First, petitioner may succeed by demonstrating "cause" and "prejudice" for the procedural default. Second, a federal court may review such procedurally defaulted claims if petitioner has been subjected to a "fundamental miscarriage of justice." *See infra* Part I.A.

23. U.S. CONST. art. I, § 9, cl. 2.

24. CHEMERINSKY, *supra* note 16, at 868.

25. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2254(a) (2000)); *see also* CHEMERINSKY, *supra* note 16, at 862 (stating that this extension of habeas rights stemmed from Congress's distrust of state courts' "ability and willingness . . . to protect federal rights").

expansions, habeas law evolved primarily through judicial decisionmaking.[26]

The Supreme Court has viewed habeas corpus as a tool for combating wrongful imprisonments and "convictions that violate 'fundamental fairness.'"[27] In 1963, the Court advocated this protectionist stance in *Fay v. Noia*.[28] By allowing "individual[s] convicted in state court [to] raise on habeas issues that were not presented at trial, unless it [could] be demonstrated that he or she deliberately chose to bypass the state procedures,"[29] the *Fay* Court solidified its position that "a[n] [unintentional] forfeiture of remedies does not legitimize the unconstitutional conduct by which . . . [a] conviction was procured."[30]

This lenient gateway toward habeas relief was ultimately replaced by a more rigorous standard. In 1977, in *Wainwright v. Sykes*,[31] the Court retracted its earlier focus on fundamental fairness and emphasized the need for efficiency and respect for state procedural rules.[32] Implicitly overruling *Fay*, the Court held that claims not raised in state court can be presented for habeas review in federal courts only if there is good "cause" for the omission, and even then, only if the omission resulted in "prejudice." By adopting the "cause and prejudice" doctrine, the Court aimed to "mak[e] 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."[33]

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26. McCleskey v. Zant, 499 U.S. 467, 478 (1991), *superseded by statute*, AEDPA of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

27. *See* Engle v. Isaac, 456 U.S. 107, 126 (1982) ("Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'" (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977))).

28. Fay v. Noia, 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991).

29. CHEMERINSKY, *supra* note 16, at 906.

30. *Id.* at 907.

31. Wainwright v. Sykes, 433 U.S. 72 (1977).

32. *See id.* at 81 ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts.").

33. *Id.* at 90. The Court explained that this standard "will afford an adequate guarantee . . . that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *Id.* at 90–91.

Although subsequent Supreme Court decisions followed this reasoning,[34] it was not until *Coleman v. Thompson*[35] in 1991 that the Court expressly overruled *Fay* and held that issues of procedural default *must* be decided under the "cause and prejudice" standard.[36] In *Coleman*, the Court espoused the goal of finality and sought to preserve the integrity and legitimacy of the state court system by allowing only two exceptions for petitioners who defaulted in state court. The first exception allows review of defaulted claims if the petitioner "can demonstrate [1] cause for the default and [2] actual prejudice as a result of the alleged violation of federal law."[37] Second, petitioners may overcome the bar against such claims if they can "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."[38]

Despite the availability of these exceptions, the presumption against procedurally defaulted claims still bars most petitions for habeas relief. The Supreme Court has narrowly construed the "cause and prejudice" and "fundamental miscarriage of justice" standards, and these exceptions remain vague and difficult to prove.[39] Although the *Wainwright* Court failed to define these terms,[40] subsequent decisions provide insight into what is "sufficient 'cause' to excuse a state court procedural default and permit a habeas corpus petitioner to raise matters not presented in the state courts."[41]

In *Engle v. Isaac*,[42] for example, the Court attempted to delineate what constitutes cause for a procedural default. In *Engle*, a petitioner sought habeas review of the constitutionality of jury instructions

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34. *E.g.*, McCleskey v. Zant, 99 U.S. 467, 493–94 (1991), *superseded by statute*, AEDPA of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.); Murray v. Carrier, 477 U.S. 478, 485 (1986); Engle v. Isaac, 456 U.S. 107, 128–29 (1982).

35. Coleman v. Thompson, 501 U.S. 722 (1991).

36. *Id.* at 750.

37. *Id.*

38. *Id.*

39. *See Murray*, 477 U.S. at 488 ("Without attempting an exhaustive catalog of such objective impediments [constituting 'cause'], we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel or that 'some interference by officials' made compliance impracticable, would constitute cause under this standard." (citations omitted)).

40. *See* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977) ("Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here.").

41. CHEMERINSKY, *supra* note 16, at 911.

42. Engle v. Isaac, 456 U.S. 107 (1982).

delivered at his Ohio state trial.[43] At the conclusion of petitioner's initial trial, the judge instructed the jury that petitioner bore the burden of proving self defense by a preponderance of the evidence.[44] At that time, Ohio state courts typically required such a burden of proof for affirmative defenses.[45] The Sixth Circuit Court of Appeals subsequently held that, due to this mistaken but established state practice, any objection to the burden of proof would have been futile.[46] This futility constituted cause for petitioner's waiver at trial, and petitioner had been prejudiced by the judge's incorrect assertion of the burden of proof.[47]

The U.S. Supreme Court, however, reversed and held that because the defense counsel failed to object at trial, in violation of a separate Ohio contemporaneous objection rule, the issue could not be presented for habeas review.[48] The Court emphasized its belief that the costs of foregoing finality outweighed the benefits of providing habeas relief to individuals imprisoned due to jury instructions that violated their constitutional rights.[49] The Court further noted that

> the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.[50]

Therefore, although the precise term "cause" still remained undefined, the *Engle* Court established that failure to raise an objection at trial does not sufficiently satisfy the standard.

There has been even less judicial elaboration on the definition of prejudice. The Court held in *United States v. Frady*[51] that a petitioner must show that the trial outcome likely would have been different

43. *Id.* at 117.
44. *Id.* at 114.
45. *Id.* at 118.
46. *Id.*
47. *Id.*
48. *Id.* at 126–29.
49. *Id.* at 126–28.
50. *Id.* at 130.
51. United States v. Frady, 456 U.S. 152 (1982).

absent the alleged violation of the Constitution or federal law.[52] This, too, is a tough standard to meet. The petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions."[53]

Likewise, the Court has attempted to elaborate what constitutes a "fundamental miscarriage of justice."[54] This exception has been interpreted narrowly to include instances "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[55] Petitioners must present "new reliable evidence" that was absent at trial, such as DNA evidence or trustworthy eyewitness accounts.[56] Unfortunately, because such evidence is not often present, claims of actual innocence are rarely successful.

B. The First Legislative Hurdle: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

In 1996, Congress took action in the habeas arena. Addressing a growing desire for finality in the judicial process, Congress passed a bill that drastically restricted the availability of habeas relief: The Antiterrorism and Effective Death Penalty Act (AEDPA).[57] The AEDPA imposed a statute of limitations on habeas petitions: prisoners have one year to apply for habeas relief.[58] In addition, successive habeas petitions are barred unless approved by a U.S. Court of Appeals.[59] The court of appeals may allow a successive petition only if the petitioner demonstrates either

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52. *Id.* at 170.

53. *Id.* The burden required to demonstrate that prejudice occurred is greater than the standard necessary to show "plain error" for direct appeals. *Id.* at 166.

54. *See* Schlup v. Delo, 513 U.S. 298, 313–15 (1995) (stating that the petitioner "may obtain review of his constitutional claims only if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice'" (citing McCleskey v. Zant, 499 U.S. 467, 494 (1991))).

55. Murray v. Carrier, 477 U.S. 478, 496 (1986). The Court has clarified that "'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993).

56. *Schlup*, 513 U.S. at 324.

57. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

58. 28 U.S.C. § 2244(d)(1) (2000).

59. *Id.* § 2244(b)(3)(A).

> that the claim relies on a new rule of constitutional law that applies retroactively; or if the factual predicate for the claim could not have been discovered previously and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the applicant guilty of the underlying offense.[60]

Finally, courts have described the "key element"[61] of the AEDPA as the provision that limits the scope of habeas review of constitutional claims previously "adjudicated on the merits."[62] Habeas relief is not available if a state court simply misapplied constitutional principles to the particular facts of a case. Rather, relief may be granted only if the state court ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[63] or if the state court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented."[64] In this way, Congress has tried to limit the involvement of federal courts in deciding whether to grant habeas review.

AEDPA supporters applaud the Act for creating a deferential standard to state court decisions—a standard stemming from concerns for finality and federalism articulated by the Supreme Court in developing habeas doctrine.[65] Moreover, the restricted scope of review ultimately decreases the number of habeas petitions saturating federal courts, conserving judicial time and resources.[66] The AEDPA, however, has exacted severe criticism from those who favor closer protection of individual rights. AEDPA opponents generally agree that efficiency is important, but in balancing interests, habeas

60. CHEMERINSKY, *supra* note 16, at 873.

61. Margery Miller, *A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus is Understood as an Appellate Function of the Federal Courts*, 72 FORDHAM L. REV. 2593, 2611 (2004).

62. 28 U.S.C. § 2254(d). "[I]f the claim was not 'adjudicated on the merits,' the circuits agree that a federal court should apply the pre-AEDPA standard of review to the claim." Miller, *supra* note 61, at 2612–13.

63. 28 U.S.C. § 2254(d)(1).

64. *Id.* § 2254(d)(2).

65. *See, e.g.*, Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731, 746–47 (2002) (describing various interpretations of the deferential standard of review).

66. Miller, *supra* note 61, at 2611.

legislation should promote constitutional protections[67] and thus ensure fundamental fairness.

As a result of the AEDPA, many assertions of wrongful or unconstitutional trial court convictions are never reviewed on the merits.[68] Concededly, a strong counterargument exists that a functioning court system requires finality to allow courts to adjudicate the entirety of their caseloads. Proponents of this viewpoint might argue that, unless defendants can prove they are actually innocent of crimes, there is little to gain by disrupting the finality of the state trial court's decision.

Yet a system which relies solely on actual innocence essentially ignores an entire population of prisoners who were convicted and imprisoned in violation of the Constitution.[69] This Note asserts that procedural fairness is important for its own sake, even if some of the individuals afforded constitutional protection are actually guilty of the underlying crimes. Legislation—such as the AEDPA—that erodes such protection risks undermining public faith and confidence in the legal system.

II. A POSSIBLE BLOW TO HABEAS: THE STREAMLINED PROCEDURES ACT

Senator Kyl proposed legislation in the 109th Congress to narrow the already constrained scope of federal habeas review.[70] The stated purpose of this legislation, the Streamlined Procedures Act (SPA), was to implement *streamlined* procedures for federal courts to follow on collateral review of habeas petitions, and the Act specifically addressed procedurally defaulted claims.[71] The SPA would have effectively denied or restricted the jurisdiction of federal courts to hear habeas corpus petitions that (1) have been procedurally barred in a state court,[72] (2) are based upon errors in sentences or sentencing

67. *See, e.g.*, Saltzburg, *supra* note 10, at 367 ("These advocates regard habeas corpus as symbolic of a commitment to constitutional values and to the ideal that no person shall be convicted in violation of the fundamental law of the land.").

68. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 350 (2006).

69. *Id.* at 346; *see also infra* Part III.B.

70. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005).

71. S. 1088 pmbl.

72. *Id.* § 4.

ruled harmless error by a state court,[73] (3) pertain to capital cases,[74] or (4) challenge the exercise of a "[s]tate's executive clemency or pardon power."[75]

Essentially, the SPA would have confiscated from federal courts the jurisdiction over habeas review of both procedurally defaulted and ineffective assistance of counsel claims.[76] In relevant portion, the SPA mandated that

> [a] court, justice, or judge shall not have jurisdiction to consider an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court with respect to any claim that was found by the State court to be procedurally barred, or any claim of ineffective assistance of counsel related to such claim, unless . . . the claim would qualify for consideration on the grounds described in [28 U.S.C. § 2254(e)(2)].[77]

To fulfill the criteria of § 2254(e)(2) under the SPA, federal habeas petitioners would have been required to demonstrate that the procedurally defaulted claim either (1) relies on a new and retroactively applicable rule of constitutional law that was unavailable during petitioner's initial trial, or (2) rests on factual grounds which could not have been discovered earlier with due diligence.[78] In addition, habeas petitioners would have borne the burden of showing that "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 [petitioner] guilty of the underlying offense."[79] By incorporating this strict standard, the SPA would have changed the law of procedural default by barring all defaulted claims unless the petitioner could show actual innocence of the underlying crime.[80]

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73. *Id.* § 6.

74. *Id.* § 9.

75. *Id.* § 10(a).

76. *See id.* § 4(a)(2) ("A court, justice, or judge shall not have jurisdiction to consider an application for a writ of habeas corpus . . . [for] any claim that was found by the State court to be procedurally barred, or any claim of ineffective assistance of counsel . . . .").

77. *Id.*

78. 28 U.S.C. § 2254(e)(2)(A) (2000).

79. 28 U.S.C. § 2254(e)(2)(B) (2000).

80. *See* 151 CONG. REC. S5540 (daily ed. May 19, 2005) (statement of Sen. Kyl) (describing how the SPA will permit "procedurally improper claims to go forward only if they present meaningful evidence that the defendant did not commit the crime").

Stressing the need for finality, SPA supporters emphasized that such legislation was necessary to reduce delays in resolving criminal convictions.[81] Given that many habeas cases take ten or twenty years to resolve, the sponsors argued that such a bill was necessary to ease the flood of habeas petitions.[82] Moreover, the delays are "deeply unfair" to victims of serious crimes because they postpone the ability to gain closure.[83] In urging support for the SPA, Senator Kyl stated, "A parent whose child has been murdered, or someone who has been the victim of a violent assault, cannot be expected to 'move on' without knowing how the case against the attacker has been resolved."[84]

The Act also attempted to combat claimed defects in habeas review, including the ability of federal habeas courts to "reweigh[] evidence or entertain[] claims that have not been decided by state courts."[85] This reflected earlier concerns about defense attorneys strategically "sandbagging" their claims to preserve arguments for habeas review.[86] Supporters additionally argued that permitting federal courts to review claims that had procedurally defaulted in

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81. *Id.* Such views have also been expressed in earlier judicial attempts to narrow the scope of habeas review. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 492 (1991) ("'A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice . . . .'" (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963))), *superseded by statute*, AEDPA of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.); Engle v. Isaac, 456 U.S. 107, 127 (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 . . . .'" (quoting Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting))).

82. *See* 151 CONG. REC. S5540 (statement of Sen. Kyl) ("Currently, many Federal habeas corpus cases require 10, 15, or even 20 years to complete."); *see also McCleskey*, 499 U.S. at 491 ("Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes.").

83. 151 CONG. REC. S5540 (statement of Sen. Kyl); *see also* Marcia Coyle, *Congress Looks at More Limits on Habeas*, NAT'L L.J., July 25, 2005, at 1 (noting that Senator Kyl has argued that there is a "need for closure for victims and their families, which can only be accomplished by reducing the backlog of habeas petitions").

84. 151 CONG. REC. S5540 (statement of Sen. Kyl).

85. *See* Coyle, *supra* note 83.

86. *See, e.g.*, *McCleskey*, 499 U.S. at 491–92 ("[H]abeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh."); Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (criticizing that habeas "may encourage 'sandbagging' on the part of defense 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").

state courts "deprives the trial court of an opportunity to correct any error without retrial, . . . gives state appellate courts no chance to review trial errors, and . . . undercut[s] the [s]tate's ability to enforce its procedural rules."[87] This view has been continually articulated by courts seeking to restore independent state powers.[88] The Supreme Court stated that "[r]eexamination of state convictions on federal habeas frustrates . . . both the [s]tates' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[89] Furthermore, supporters of such habeas restriction argued that the ability to seek repeated habeas review detracts from the respect for the trial as the main event. Such liberal availability of habeas "degrades the prominence of the trial itself."[90]

In addition, sponsors promoted the SPA's ultimate effect: establishing a uniform standard of reviewing procedurally defaulted claims.[91] All federal courts would be barred from reviewing habeas petitions unless the petitioner presents meaningful evidence of actual innocence.[92] This would eliminate much of the guesswork undertaken by states to determine what constitutes good cause and prejudice for a procedurally defaulted claim.

III. THE INTOLERABLE CONSEQUENCES OF THE STREAMLINED PROCEDURES ACT

In its attempt to streamline judicial procedures in pursuit of finality, proposals like the SPA would effectively "strip the federal courts of what limited jurisdiction they now have over constitutional habeas claims of state prisoners."[93] Section A discusses how the SPA nearly eradicated the availability of habeas relief to petitioners. Section B then addresses the Act's troubling potential outcome of leaving victims of constitutional violations without remedies.

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87. Murray v. Carrier, 477 U.S. 478, 487 (1986).

88. *E.g.*, *McCleskey*, 499 U.S. at 491 ("Our federal system recognizes the independent power of a [s]tate to articulate societal norms through criminal law; but the power of a [s]tate to pass laws means little if the [s]tate cannot enforce them.").

89. *Id.*

90. Engle v. Isaac, 456 U.S. 107, 127 (1982).

91. 151 CONG. REC. S5540 (daily ed. May 19, 2005) (statement of Sen. Kyl) ("[T]he SPA creates uniform, clear procedures for review of procedurally improper claims.").

92. *See supra* note 80 and accompanying text.

93. Barbara Bergman, *Great Writ Endangered*, 29 CHAMPION, Oct. 29, 2005, at 4, 4.

A. The Streamlined Procedures Act Would Effectively Obliterate Habeas Relief

The most troubling prospect of the SPA was the Act's elimination of the cause and prejudice standard. To attain habeas review of a procedurally defaulted claim under the SPA requirements, a petitioner must prove that "no reasonable factfinder" would have found petitioner guilty had the new "factual grounds" been available during the initial trial. The SPA standard for habeas review was thus tantamount to a showing of actual innocence via new reliable evidence. Yet because petitioners rarely possess such evidence, the Act would have effectively removed habeas as an option for prisoners held in violation of their constitutional rights.

The Supreme Court has frequently articulated that the "actual innocence" standard comprises a narrow exception.[94] In *Murray v. Carrier*,[95] the Court asserted, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[96] In the 1994 case *Schlup v. Delo*,[97] the Court elaborated: a petitioner must demonstrate that a constitutional violation occurred "probably result[ing] in the conviction of one who is actually innocent."[98] This requires a petitioner to bring forth "new reliable evidence" that is virtually dispositive in proving innocence and that was absent at trial.[99] Sufficient new reliable evidence may include DNA, trustworthy eyewitness accounts, or other forms of physical evidence.[100] The Court acknowledged, however, that because such

94. *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333, 340 (1992) ("[W]e have emphasized the narrow scope of the fundamental miscarriage of justice exception.").

95. Murray v. Carrier, 477 U.S. 478 (1986).

96. *Id.* at 496; *see also* CHEMERINSKY, *supra* note 16, at 918 ("At most, *Herrera v. Collins* stands for the proposition that a habeas petitioner seeking relief by claiming that newly discovered evidence demonstrates actual innocence has a very heavy burden to meet.").

97. Schlup v. Delo, 513 U.S. 298 (1995).

98. *Id.* at 327. In *Schlup*, the Court rejected an earlier approach taken in *Sawyer*, which required a petitioner to "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under [the applicable state] law." *Sawyer*, 505 U.S. at 350; *see also* House v. Bell, 126 S. Ct. 2064, 2077 (2006) (affirming that "the *Schlup* standard is demanding and permits review only in the 'extraordinary' case").

99. *Schlup*, 513 U.S. at 324.

100. *Id.*

exculpatory evidence is absent in most instances, "claims of actual innocence are rarely successful."[101]

For example, the 2006 case of *House v. Bell*[102] demonstrates the extensive showing of exculpatory evidence that may be required. In this case, petitioner was convicted of murder and sentenced to death based on circumstantial evidence.[103] Petitioner sought habeas relief and presented an extensive amount of new evidence to support his actual innocence claim.[104] Specifically, petitioner offered DNA test results showing the semen on the victim's nightgown and panties matched her husband's DNA rather than the petitioner's.[105] In addition, new expert testimony indicated that the blood on petitioner's pants was "chemically too degraded" to have come from the victim on the night of the murder.[106] Instead, the expert concluded that the blood had spilled from the vials of autopsy samples onto petitioner's jeans.[107] Furthermore, the expert confirmed that the blood vials had not been properly sealed, had been transported in the same cardboard box as petitioner's pants, and a vial and a half had emptied throughout the ten-hour journey to the FBI laboratory.[108]

The Supreme Court recognized the main forensic evidence that linked petitioner to the murder—the semen and blood samples—was highly dubious. As a result, the Court concluded that *House* was the rare case in which the new evidence would likely cause "any reasonable juror [to] have reasonable doubt."[109] Thus, petitioner's compelling claim of actual innocence allowed him to bypass the procedural bar to habeas relief.

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101. *Id.*; *see also* Dretke v. Haley, 541 U.S. 386, 393 (2004) (maintaining that "actual innocence" is intended to be a narrow standard); Bousley v. United States, 523 U.S. 614, 623 (1998) (noting that "actual innocence" is more than "mere legal insufficiency"); Arrington v. Williams, 195 F. App'x 761, 762 (10th Cir. 2006) ("[F]undamental miscarriages of justice are 'extremely rare.'" (quoting *Schlup*, 513 U.S. at 324)).

102. House v. Bell, 126 S. Ct. 2064 (2006).

103. *See id.* at 2071–75 (discussing petitioner's bruised arms and hands, blood-stained pants, and semen sample as factors leading to petitioner's capital murder conviction).

104. *See id.* at 2078–80 (presenting DNA evidence as well as new expert testimony in support of his "actual innocence" claim).

105. *Id.* at 2078–79.

106. *See id.* at 2080 (describing the Assistant Chief Medical Examiner's testimony regarding the decay and enzyme degradation within blood samples).

107. *Id.*

108. *Id.*

109. *Id.* at 2077, 2086.

Yet such extensive exculpatory evidence is seldom available. The Supreme Court repeatedly expressed the extraordinary nature of House's circumstances throughout the opinion.[110] Moreover, a multitude of other federal habeas cases have denied actual innocence claims when new reliable evidence was not quite so overwhelming. For example, in *Arrington v. Williams*,[111] the petitioner presented evidence that a government witness had committed perjury at petitioner's trial.[112] Petitioner presented new excerpts from an earlier hearing indicating that the witness had reached a deal with prosecutors to testify against petitioner in exchange for a reduction of his own pending sentence.[113] Furthermore, the content of the excerpts suggested that the witness had mischaracterized the negotiations during petitioner's trial.[114] The Tenth Circuit Court of Appeals held that this new evidence would have solely been useful to impeach the witness.[115] Because impeachment evidence is "a step removed from evidence pertaining to the crime itself," such evidence can rarely support a finding of "actual innocence."[116]

In *Wadlington v. United States*,[117] petitioner supplemented his habeas petition with affidavits from four individuals who attested to petitioner's lack of involvement with a drug conspiracy.[118] The affidavits attacked earlier trial testimony regarding petitioner's drug activities.[119] The Eighth Circuit Court of Appeals nevertheless rejected petitioner's new evidence because "recantations of testimony generally are viewed with suspicion."[120] Furthermore, there remained other evidence connecting petitioner to the conspiracy.[121]

Similarly, the results of new psychological evaluations may not suffice. In *Griffin v. Johnson*,[122] petitioner presented hospital records

110. *E.g.*, *id.* at 2068, 2086.

111. Arrington v. Williams, 195 F. App'x 761 (10th Cir. 2006).

112. *Id.* at 762.

113. *Id.*

114. *Id.*

115. *Id.* at 766.

116. *Id.* at 764 (quoting Calderon v. Thompson, 523 U.S. 538, 563 (1998)).

117. Wadlington v. United States, 428 F.3d 779 (8th Cir. 2005).

118. *Id.* at 782.

119. *Id.*

120. *Id.* at 784; *see also* Arthur v. Allen, 452 F.3d 1234, 1246 (11th Cir. 2006) (rejecting new affidavits which corroborated that petitioner was not at the victim's residence at the time of the murder because subsequent exculpatory affidavits are "suspect").

121. *Wadlington*, 428 F.3d at 784.

122. Griffin v. Johnson, 350 F.3d 956 (9th Cir. 2003).

to invoke an insanity defense in order to satisfy the "actual innocence" standard for intentional murder.[123] The new records diagnosed petitioner with "Chronic Brain Syndrome Associated with Convulsive Disorder with Behavioral Reaction."[124] Other new evidence included a psychologist's evaluation concluding that petitioner suffered from an "Organic Brain Syndrome" and "Post Traumatic Stress Disorder due to past physical and sexual abuse."[125] Petitioner argued that the above evidence demonstrated his inability to "form[] the requisite mental intent to be guilty of murder."[126] The Third Circuit Court of Appeals rejected this claim, however, explaining that "the mere presentation of new psychological evaluations . . . does not constitute a colorable showing of actual innocence."[127] The court reasoned that psychologists may disagree on what constitutes a mental illness, and defendants would likely seek out psychologists who would render a favorable examination.[128]

Evidently, most petitioners cannot obtain the same degree of compelling new evidence that the Supreme Court was willing to accept as demonstrating "actual innocence" in *House*. This is a disconcerting consequence of efforts like the SPA. Most prisoners held in violation of the Constitution will lack overwhelming evidence of actual innocence and therefore will be unable to meet such an onerous standard.[129]

B. The Streamlined Procedures Act Would Leave Victims of Constitutional Violations Without Remedies

Even if the SPA would have effectively streamlined the interpretation of habeas doctrine, it still would have yielded the undesirable effect of streamlining processes designed to preserve constitutional protections. The most troubling aspect of the SPA was the Act's potential substantive effect of allowing constitutional

123. *Id.* at 963–64.

124. *Id.*

125. *Id.* at 964–65.

126. *Id.* at 965.

127. *Id.* (quoting Harris v. Vasquez, 949 F.2d 1497, 1516 (9th Cir. 1990)).

128. *Id.*

129. *See* Vivian Berger, *Streamlining Injustice*, NAT'L L.J., Aug. 8, 2005, at 23 ("The proverbial camel could have navigated the needle's eye more easily than a prisoner will be able to satisfy this provision."); Coyle, *supra* note 83 (quoting Bryan Stevenson of the Equal Justice Initiative in Montgomery, AL, contending that "[e]ssentially [the SPA] would end federal habeas corpus for almost everyone in prison with the exception of a very, very small number").

violations to go unremedied. By requiring petitioners to effectively prove their actual innocence, the Act foreclosed the ability to attain habeas relief by demonstrating cause and prejudice. Thus, in addition to overturning decades of Supreme Court precedent, the SPA would have had the procedural effect of denying review in various circumstances when it had been previously, and rightfully, granted.

1. *The Right to Effective Counsel.* Specifically, the cause and prejudice exception has been used repeatedly as an avenue for exercising basic constitutional rights, such as the Sixth Amendment right to counsel.[130] The Sixth Amendment, defining the basic components of a fair trial, expressly includes this right in the Counsel Clause.[131] The Supreme Court has recognized that this vital safeguard exists "in order to protect the fundamental right to a fair trial."[132] Such a fair trial can only be rendered truly fair if constitutional rights are honored, whether the petitioner is guilty or innocent. Furthermore, in *Strickland v. Washington*,[133] the Supreme Court cautioned that the mere presence of a trial attorney beside the accused does not satisfy the Sixth Amendment.[134] Precisely, "the right to counsel is the right to the *effective assistance* of counsel."[135] This right is denied when

130. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 691–92 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

131. The Counsel Clause provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the [s]tate 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 defen[s]e*

U.S. CONST. amend. VI (emphasis added).

132. *Strickland*, 466 U.S. at 684; *see also* Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (applying *Strickland*); Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (holding that the appointment of counsel for indigent criminal defendants is a fundamental right); Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (holding that a criminal defendant's right to assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty"), *overruled on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981).

133. Strickland v. Washington, 466 U.S. 668 (1984).

134. *Id.* at 685.

135. *Id.* at 686 (emphasis added) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

defense counsel fails to provide "adequate legal assistance."[136] The *Strickland* Court articulated a two-pronged test to determine when defense counsel's performance was so inadequate that it warrants reversal of the conviction,[137] requiring the petitioner to demonstrate (1) that counsel's assistance was deficient,[138] and (2) that counsel's assistance prejudiced the defense.[139] Strickland's "ineffective assistance" test has been applied in countless court decisions that subsequently reaffirmed the right to effective assistance of counsel.[140]

Notably, the SPA sought to repeal this sequence of judicial affirmations. The Act expressly amended habeas doctrine by stating that "[a] court . . . shall not have jurisdiction to consider . . . any claim of ineffective assistance of counsel related to such [procedurally barred state] claim[s]."[141] Even absent this explicit restriction, the SPA would likely have eliminated these claims through its requirement that a petitioner demonstrate actual innocence in order to attain habeas relief. Yet if petitioners cannot initially argue a claim of ineffective assistance of counsel, they may be unaware of what other legal errors have emerged during trial. Subsequently, it may be impossible, in some cases, for a petitioner to prove actual innocence without first demonstrating prejudice caused by counsel's defective performance. This fatal flaw was addressed before the Senate Judiciary Committee during hearings on the Act.[142] Barry Scheck, cofounder of the Innocence Project, asserted that this is "exactly why so many innocence cases do not start out presenting innocence claims at all, but rather procedural due process violations, and proof of innocence only emerges once the rubble of other legal errors has

136. *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)); *id.* ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.")

137. *Id.* at 687.

138. *See id.* ("This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").

139. *See id.* ("This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

140. *E.g.*, Wiggins v. Smith, 539 U.S. 510 (2003); Massaro v. United States, 538 U.S. 500 (2003); Edwards v. Carpenter, 529 U.S. 446 (2000); Lockhart v. Fretwell, 506 U.S. 364 (1993).

141. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. § 4(h)(1) (2005).

142. *See* Bergman, *supra* note 93, at 4 ("[T]he wrongly convicted ordinarily cannot prove their innocence until they have competent counsel . . . and perhaps most important of all, a full and fair hearing on the merits of their procedural due process claims . . . .").

been swept aside."[143] By destroying the means to "sweep aside" the procedural legal errors, the SPA effectively would have denied prisoners the means to prove their actual innocence.[144]

This would have devastating implications for underprivileged petitioners. Prisoners held in violation of their constitutional rights, and without the means to secure quality defense, would be held accountable for the defective performance of their attorneys. Concededly, attorneys generally serve as agents of the accused. It is not always appropriate, however, to bind defendants by their attorneys' poor strategic choices, particularly when such choices are "so serious as to deprive the defendant of a fair [and reliable] trial."[145] Left without a remedy, defendants face imprisonment in violation of their constitutional rights.[146] The SPA left no avenue for relief in these instances. Instead, in its pursuit for finality, Congress would have bound petitioners to state court convictions from trials which were neither full nor fair.[147]

As a practical matter, the Act would have required federal courts to tolerate deprivations of this right in the most extraordinary of instances in which it was once afforded.[148] For example, in *Williams v. Taylor*,[149] defense counsel failed to investigate and present substantial mitigating evidence to the sentencing jury about defendant's "mistreatment, abuse, and neglect during his early childhood" and testimony that defendant was "borderline mentally retarded."[150] Similarly, in *Wiggins v. Smith*,[151] counsel failed to thoroughly investigate defendant's sordid background, and thus did not present

143. *Id.*

144. *See Lockhart*, 506 U.S. at 369 ("'[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" (quoting United States v. Cronic, 466 U.S. 648, 658 (1984))).

145. Strickland v. Washington, 466 U.S. 668, 687 (1984).

146. *See* CHEMERINSKY, *supra* note 16, at 909 (explaining that the bypass test "refuses to credit what is essentially a lawyer's mistake as a forfeiture of constitutional rights").

147. *See* Bergman, *supra* note 93, at 4 ("What this bill would do is speed up the execution of men and women who did not have the resources or competent counsel to prove that they were . . . innocent.").

148. *See* Coyle, *supra* note 83 ("According to the ABA, a federal court would have to accept at face value a state court's decision . . . that the prisoner or his attorney failed to comply with [a procedural] requirement, and that, in consequence, the state court declined to consider the prisoner's federal claim.").

149. Williams v. Taylor, 529 U.S. 362 (2000).

150. *Id.* at 370.

151. Wiggins v. Smith, 539 U.S. 510 (2003).

available mitigating evidence at his client's sentencing.[152] The Supreme Court stated that such representation "fell below an objective standard of reasonableness."[153] Regardless of whether petitioners are actually innocent, "all persons, even those who have been convicted, are entitled to claim the benefits of constitutional rules."[154] Under the SPA, however, the Court would have been required to tolerate such unreasonableness and deny relief to "victims" of such deficient representation. Thus, proposals like the SPA would strip the Court of its power to safeguard the Sixth Amendment right to effective assistance of counsel.[155]

2. *The SPA Endangered Other Constitutional Rights*. The SPA jeopardized other constitutional rights as well. For example, the Act provided no relief to petitioners whose jury selection was tainted by racial bias,[156] compromising constitutional protections. The Supreme Court has held that, when a state court tries a defendant before a jury from which members of defendant's race have been purposefully excluded, the trial may violate the Fourteenth Amendment's Equal Protection Clause.[157] Under established habeas doctrine, a petitioner may demonstrate that the trial prosecutor "perverted" use of the peremptory challenge system during the trial by intentionally objecting to the seating of jurors of the same race as the petitioner.[158] Although peremptory challenges remain a viable jury selection tool for other purposes, "[s]election procedures that purposefully exclude

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152. *Id.* at 522.

153. *Id.* at 521.

154. Saltzburg, *supra* note 10, at 368; *see also id.* (noting that habeas review is necessary to "correct constitutional mistakes").

155. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993) ("[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."); *see also id.* ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.").

156. *See* Ira Reiner, *Legal Railroading Disguised as Efficiency*, L.A. TIMES, Sept. 26, 2005, at B11 ("The Streamlined Procedures Act of 2005 . . . would not . . . allow for review . . . when a conviction was tainted by racial bias in jury selection.").

157. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

158. *See* Swain v. Alabama, 380 U.S. 202, 223 (1965) (describing how a petitioner may raise an inference of "purposeful discrimination" by showing that the prosecutor has been repeatedly "responsible for the removal of [qualified blacks] who have survived challenges for cause, with the result that no [blacks] ever served on petit juries"), *overruled on other grounds by* Batson v. Kentucky, 476 U.S. 79 (1986); *see also* Batson v. Kentucky, 476 U.S. 79, 93–94 (1986) (describing how a defendant may establish a prima facie case of this violation).

black persons from juries undermine public confidence in the fairness of our system of justice."[159]

Even though the SPA did not explicitly strip federal courts of the power to review jury bias claims—unlike its treatment of ineffective assistance claims[160]—this would be a likely result of such legislation. By removing the availability of the cause and prejudice exception, federal courts would have no authority to remedy violations of the Fourteenth Amendment right to equal protection unless petitioners can prove they are actually innocent. Thus, again the SPA sought expedience at the expense of important constitutional safeguards.

The SPA would have similarly limited Sixth Amendment protections contained in the Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[161] The Supreme Court has continuously affirmed the significance of the ability to confront and cross-examine opposing witnesses[162] to ensure "the accuracy of the truth-determining process."[163] Although the Court has noted that this protection is not absolute and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process,"[164] the SPA would have forced the Confrontation Clause to bow permanently to the Act's goal of finality.

By limiting protection of the right to confront witnesses, the SPA would have opened the door for harrowing consequences that undermine the very purpose of the Confrontation Clause. The drafters of the Constitution included the right to confront witnesses in the Sixth Amendment to protect against controversial examination procedures, the most notable being those used in political trials in

159. *Batson*, 476 U.S. at 99.

160. *See* Streamlined Procedures Act of 2005, S. 1088 § 4(h)(1) (2005) (removing federal jurisdiction to review claims of ineffective assistance of counsel unless the state expressly waives the restriction); *see also supra* Part III.B.1.

161. U.S. CONST. amend. VI.

162. Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that when the defendant lacked the opportunity to cross-examine an adverse witness, the exclusion of such critical evidence, added to the state's refusal to permit questioning, denied the defendant "a trial in accord with traditional and fundamental standards of due process").

163. *Id.* at 295; *see also* Crawford v. Washington, 541 U.S. 36, 42 (2004) (discussing this "bedrock procedural guarantee").

164. *Chambers*, 410 U.S. at 295.

16th and 17th century England.[165] In *Crawford v. Washington*,[166] Justice Scalia, writing for the Court, recounted the controversial 1603 trial of Sir Walter Raleigh, and concluded that the framers sought to prevent such abuses when drafting the Confrontation Clause.[167] In that case, Raleigh's accomplice in his alleged treason implicated him in both a letter and an examination before the Privy Council.[168] These accusations were read at Raleigh's trial, and the court rejected Raleigh's demands to have his accomplice testify, and hopefully recant his accusations, in the courtroom.[169] The jury convicted Raleigh and sentenced him to death, despite Raleigh's protests that he was being tried "by the Spanish Inquisition."[170] To stem such abuses, the Court held that the Sixth Amendment must be interpreted to prevent the use of *ex parte* examinations against the defendant.[171]

Disturbingly, the SPA would have reduced federal courts' ability to protect against these evils. When a petitioner alleges violation of this "bedrock"[172] right in the event of a procedurally defaulted claim, violation of this Sixth Amendment right may go unremedied under such a proposal unless the petitioner can prove actual innocence. Years of judicial development of Confrontation Clause doctrine would be squandered as the rights ensured thereby would become effectively "rights without remedies." The confrontation right would still exist, but there would be no teeth for enforcing this protection in instances of procedural default. Further, when coupled with the lack of availability of ineffectual assistance claims, many petitioners might be unaware that such a right exists.

3. *The SPA Would Provide No Remedies for Exceptional State Law Abuses*. In certain instances, courts grant habeas relief even when the specific procedural default does not rise to the level of constitutional violation, using the cause and prejudice standard. For example, in *Murray v. Carrier*, the Supreme Court refused to create an "exhaustive catalog" of adequate "objective impediments," yet

165. *Crawford*, 541 U.S. at 44 ("The most notorious of civil-law examinations occurred in the great political trials of the 16th and 17th centuries.")

166. Crawford v. Washington, 541 U.S. 36 (2004).

167. *Id.* at 44.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 50.

172. *Id.* at 42.

noted that "a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard."[173] The reasonable unavailability of a claim defeats the concern of "sandbagging" that the Court earlier expressed in *Wainwright v. Sykes*.[174]

This exception should also be made available because legal concepts tend to mature slowly, "finding partial acceptance in some courts while meeting rejection in others."[175] Therefore, it is not logical to assume, or require, that attorneys are aware of all constitutional questions that have yet to fully develop. Moreover, if courts were to hold otherwise and make attorneys accountable for novel issues, this may "actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could someday gain recognition."[176] This could undermine the SPA's very purpose of accelerating judicial process.

Furthermore, to deny habeas relief when government agents interfered with procedural efforts would unequivocally violate the habeas doctrine's goal of fundamental fairness. For example, in *Dowd v. United States ex rel. Cook*,[177] the Supreme Court held that when prison officials had prevented a prisoner from sending out his appeal documents, the prisoner was not barred from seeking habeas relief.[178] Even when the restrictions were revoked by a new prison warden, the prisoner's claims were not procedurally barred.[179] The Supreme Court reiterated that interference by law enforcement officials is sufficient to constitute cause.[180] The alternative would lead to absurdly unjust and troubling consequences. Proposals like the SPA may essentially produce this horrific result, by removing cause and prejudice as an avenue for relief.

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173. Murray v. Carrier, 477 U.S. 478, 488 (1986).

174. *See supra* note 86; *see also* Reed v. Ross, 468 U.S. 1, 14–15 (1984) (noting that if a constitutional claim is unavailable, "it is safe to assume that . . . we cannot attribute to [counsel] strategic motives of any sort").

175. *Reed*, 468 U.S. at 15.

176. *Id.* at 16–17.

177. Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951).

178. *Id.* at 208–09.

179. *Id.*

180. *E.g.*, McCleskey v. Zant, 499 U.S. 467, 494 (1991), *superseded by statute*, AEDPA of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

Finally, successors to the SPA might require federal courts to ignore individual cases in which a state trial court "exorbitantly" applied the law. For instance, in *Lee v. Kemna*,[181] a Missouri trial court heard a murder case in which the defendant had planned an alibi defense that he was in California with his family at the time of the murder.[182] Yet the alibi witnesses had left the courthouse, a development unanticipated by the defense.[183] Defense counsel moved for a continuance until the following morning to locate the alibi witnesses and enforce the subpoena.[184] The trial judge denied the request, however, explaining that he would not be in court the next day because "my daughter is going to be in the hospital all day . . . [s]o I've got to stay with her."[185] The judge also denied defense counsel's request for a postponement until the following business day, stating that he had another trial set for that day.[186] The defendant was convicted.[187] On appeal, the Missouri Court of Appeals affirmed the conviction, ruling that the defendant failed to comply with a state law that required continuance requests to be made in writing and accompanied by affidavits.[188]

The U.S. Supreme Court noted, on habeas review, that "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim."[189] The petitioner's case nevertheless fit within a "limited category" of exceptional cases in which "exorbitant application" of a state rule renders the state ground inadequate to bar habeas review.[190] Compliance with the Missouri state rule requiring written continuance requests would not have changed the outcome because the judge denied the request for a "reason that could not have been countered by a perfect motion for continuance."[191] Furthermore, the

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

182. *Id.* at 367.

183. *Id.* at 369.

184. *Id.*

185. *Id.*

186. *Id.* at 370.

187. *Id.* at 365.

188. *Id.* at 372.

189. *Id.* at 376.

190. *Id.*

191. *Id.* at 381 (noting that the judge's stated reasons of his daughter's hospitalization and another scheduled trial would not have been affected by a continuance request precisely in compliance with Missouri law).

Missouri law did not mandate "flawless compliance" with the state rule in the unique circumstances of the case.[192] Finally, given "the realities of the trial," the defendant substantially complied with the state rule by explaining the reasons for his continuance request.[193]

Although any other outcome of *Lee* would seem to deny the petitioner a fair trial, the SPA left no room for such "exorbitant" exceptions to apply. Thus, petitioners will be unarmed against abuse by state courts unless they can somehow show actual innocence. For example, in *Lee*, the petitioner would have likely failed because he had no means to secure the critical alibi witnesses. Likewise, similarly situated petitioners may be unable to demonstrate their innocence if impeded by unlawful state court procedures.[194]

CONCLUSION

The compromise of constitutional rights contemplated by the SPA and its potential progeny may provide courts with gains in speed and finality. In balancing fairness against efficiency, however, Congress should generally favor the scrupulous protection of constitutional rights over expediting the resolution of cases. Otherwise, basic constitutional rights could be systematically denied to a large segment of the population who may lack the knowledge or resources to attain adequate representation.

Thus, Congress should allow federal courts to retain jurisdiction over enforcing fundamental constitutional rights. As the Supreme Court has held, "[t]here can be no doubt that in enacting § 2254, Congress [expressly intended] to 'interpose the federal courts between the [s]tates and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'"[195] To strip federal courts of this power leaves the Constitution without teeth against state court abuse. Congress should reject any future ideological successors to the Streamlined Procedures Act to avoid "streamlining" procedures needed to preserve fundamental constitutional protections.

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192. *Id.* at 382.

193. *Id.*

194. *See* Saltzburg, *supra* note 10, at 367 (noting the importance of protecting constitutional rights due to suspicion of the manner in which state courts consider federal constitutional issues).

195. Reed v. Ross, 468 U.S. 1, 10 (1984).