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ARTICLES

HABEAS CORPUS AND THE NEW FEDERALISM AFTER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

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INTRODUCTION

On February 3, 1997, the House of Delegates of the American Bar Association passed a resolution urging states not to carry out the death penalty in their jurisdictions until the imposition of the death penalty is carried out in a manner which would “ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and minimize the risk that innocent persons may be executed.” The authors of the report accompanying this resolution pointed to the passage of the new Antiterrorism-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) which “significantly curtail[s] the availability of federal habeas corpus to death row inmates” as one of the most recent and dramatic moves by

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1. AMERICAN BAR ASSOCIATION REPORT WITH RECOMMENDATIONS ON DEATH PENALTY IMPLEMENTATION, app. I (1997).
Congress. Therefore, the passage of the AEDPA requires the ABA to take action at this time.

That the ABA would be so concerned about the passage of the AEDPA as to propose a moratorium on the death penalty was certainly not anticipated by President Clinton when he signed this bill. In his statement dated April 24, 1997, accompanying the bill, the President stated:

Some have expressed the concern that two provisions of this important bill could be interpreted in a manner that would undercut meaningful Federal habeas corpus review. I have signed this because I am confident that Federal Courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.

This Article explores some of the questions raised by the dichotomy of views expressed by President Clinton and the American Bar Association. Specifically, Part I provides an overview of the history and development of habeas corpus in this country. Part II examines the implications of habeas corpus on our federalist system and discusses the changes in the scope of the "Great Writ" over time. Finally, Part III investigates the provisions of new AEDPA. In discussing the AEDPA, this Article reviews its most salient provisions and analyzes their interpretations by the Circuit Courts of Appeal, particularly the Seventh Circuit Court of Appeals.

I. BACKGROUND OF THE "GREAT WRIT"

On April 24, 1996, the 104th United States Congress officially launched the new era of federal habeas corpus when it passed the AEDPA. The "Old Habeas," as many now affectionately view it, had already undergone numerous changes since its inception in English common law and its incarnation in Article I, § 9 of the United States Constitution.

In order to understand the implications of the AEDPA, or the "new habeas" bill, one must understand the unique context in which habeas relief was viewed in our American political scene. Under English common law, the writ of habeas corpus allowed anyone imprisoned by a court, a governmental body, or the King himself, to be brought upon demand to the judges of the King's Bench without delay. However, its American counterpart was much more involved.

2. Id. at 1.
3. Id.
The American habeas was an essential element of the political compromise engendered by the "Anti-Federalist State's Rights vs. Federalist Strong Central Government" conflict and tensions which began at the founding of our nation and continues throughout our nation's history.

In the early days of the Republic, the colonists viewed the writ of habeas corpus, like the Bill of Rights, as a protection for citizens only against the new federal government. The fear of the populace was that the new "King George" Washington would not respect the colonists' rights any differently than the old "King George" of England. Conversely, the colonists had no fear that their states might abuse their power. Accordingly, the Judiciary Act of 1789 made the writ available only to federal prisoners and prohibited any inquiry by the federal courts into the propriety of state custody.7

By 1867, concern arose for the protection of American citizens from their state governments in the aftermath of the Civil War when some Southern legislatures were restricting the rights of black people. As a result, the reach of the writ was extended to state prisoners as well.8 The fear of many in Congress and many northerners, that southern legislatures and courts would not treat their former slaves fairly, was also expressed in the passage and adoption of the Thirteenth, Fourteenth, and Fifteenth, "anti-slavery" Amendments. Included in the Fourteenth Amendment was the provision that "no state" could deprive its citizens of due process or equal protection of the laws.9 The Framers designed this passage to insure that all states complied with the Constitution and the Bill of Rights, so that black as well as white citizens were afforded the same protection under the law.10 The extension of habeas corpus jurisdiction to state prisoners was part and parcel of that concern and of the perceived need that the federal courts should be able to protect Americans sentenced by state courts as well.

However, until the Warren Court of the 1960s, the U.S. Supreme Court refused to extend habeas corpus to the states. Prior to the Warren Court decisions, it was axiomatic that every state was supreme in the exercise of its police power, and that there were "fifty criminal justice laboratories" in these United States to administer the criminal laws. During the 1960s, in a series of criminal decisions, the Warren Court incorporated most of the provisions of the Bill of Rights, previously only held applicable in federal courts, and applied them to the states via the Fourteenth Amendment.11 These

9. U.S. CONST. amend. XIV.
10. SHELVIN SINGER & MARSHALL J. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK § 1.2 (1986); Hartman & Singer, supra note 6, at 12.
11. Hartman & Singer, supra note 6, at 13; see, e.g., U.S. CONST. amend. VI (providing the Rights of Confrontation, Jury Trial, Counsel, Speedy Trial, and
"Bill of Rights" decisions arose from the concern that the Warren Court had for the rights of indigent defendants, minors, and the disadvantaged. In addition, these decisions began to construct a uniform code of criminal procedure applicable to all Americans, whether they were in state or federal court.

II. THE EVOLUTION OF THE WRIT OF HABEAS CORPUS JURISPRUDENCE

This Part tracks the development of habeas corpus jurisprudence through three eras of the United States Supreme Court. First, this Part examines the Warren Court decisions, which dramatically shifted the balance of power with respect to habeas corpus law from the states to the federal government. Next, this Part reviews the Burger Court decisions and focuses on the retreat from a strong federal presence in habeas corpus law. Finally, this Part discusses the Rehnquist Court decisions and explores the Court's reduction in the reach of the "Great Writ."

A. The Warren Court Decisions

In addition to the "Bill of Rights" cases decided by the Warren Court, the United States Supreme Court in 1963, handed down three landmark decisions dealing with the "Great Writ" of federal habeas corpus: Fay v. Noia,\textsuperscript{12} Townsend v. Sain,\textsuperscript{13} and Sanders v. United States.\textsuperscript{14} In the aggregate, these cases cut through the procedural thicket of state comity and state concerns about finality, and mandated federal relief from state court decisions which were in violation of the Federal Constitution or the Bill of Rights. Furthermore, these habeas corpus decisions were consistent with the main thrust of the Warren Court in the 1960s to insure that the protections of the Bill of Rights were extended to defendants in state courts as well as to those in federal proceedings.

However, these decisions also affected the balance of power between state and federal governments in the enforcement of the criminal laws. As a result of these Warren Court decisions, the notion that there were "fifty laboratories" to experiment with the rights of defendants died, and the balance of power with respect to the method of enforcement of these laws shifted dramatically to the federal government. In discussing the Warren Court decisions, this

\begin{itemize}
\item \textsuperscript{12} 372 U.S. 391 (1963), overruled by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).
\item \textsuperscript{13} 372 U.S. 293 (1963).
\item \textsuperscript{14} 373 U.S. 1 (1963).
\end{itemize}
Section focuses on three major principles of federal habeas jurisprudence: 1) the standard for determining state procedural default; 2) the criteria for filing successor or "second" petitions; and 3) the circumstances in which federal evidentiary proceedings may be held.

In *Fay*, the defendant, charged with felony murder, objected to the admission of his confession at trial on grounds that it had been coerced. When the court denied the motion, he failed to perfect a timely appeal of his conviction. The defendant then filed a federal habeas petition. However, the federal district court denied relief on the grounds that the failure to file a timely appeal in the state reviewing court precluded the federal court from reviewing the petition. The district court reached this decision even though the State conceded that the confession had been coerced and the cases of two co-defendants had been overturned on the same ground. The United States Supreme Court reversed the lower court's decision. Justice Brennan, speaking for a majority of the Court, stated that the procedural failure of the petitioner to file his appeal could not deny him federal habeas relief unless he deliberately bypassed state procedures and intentionally gave up an opportunity for state review. Holding that the defendant's actions did not constitute such a "deliberate bypass," Justice Brennan reasoned that "the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings."

In *Townsend*, the Supreme Court applied the reasoning of *Fay v. Noia* to the question of when habeas petitioners were entitled to evidentiary hearings in federal court. The Court held that habeas petitioners were entitled to a complete evidentiary hearing on their constitutional claims in federal court, unless they had "deliberately bypassed" the orderly procedure of the state courts.

Similarly, in *Sanders*, the Warren Court remained consistent with its holding in *Fay v. Noia*. However, the Court went further in *Sanders* and applied the "deliberate bypass" test to a case where counsel lacked factual or legal knowledge of a specific constitutional claim when the petitioner's first habeas corpus petition was filed. The Court held that relief would be granted to a defendant who files a successor petition raising a new claim, unless counsel possessed

15. 372 U.S. at 394.
16. Id.
17. Id. at 396.
18. Id.
19. Id. at 398.
20. Id. at 439.
21. Id. at 438-39.
22. Id. at 438.
24. Id. at 317.
knowledge of the claim at the time he filed the first petition and de-
liberately failed to raise the claim.\footnote{Id.}

In any event, the message was clear after these three historic
decisions. The federal government would extend constitutional pro-
tections to all citizens in state courts as well as in federal courts, and
its preferred mode of execution was through the writ of habeas cor-
pus. Although the Burger Court and the Rehnquist Court later
modified the holdings of these three cases, the essential thrust of
these cases, that the federal courts would monitor violations of fed-
eral constitutional rights in state courts, remained unaltered.

\section*{B. Retreat Under the Burger Court}

In 1977, the Burger Court somewhat altered the clear message
sent to the states during the Warren Court era. In \textit{Wainwright v. Sykes},\footnote{433 U.S. 72 (1977).} rather than applying the "deliberate bypass" test of \textit{Fay v. Noia} and its progeny, the Burger Court "substituted the 'cause and prejudice' test to resolve questions of state procedural default."\footnote{Hartman & Singer, supra note 6, at 11 (citing \textit{Sykes}, 433 U.S. at 90-91).} In order to obtain habeas relief, the "cause and prejudice" test requires
the petitioner to show "cause" as to why he did not raise a constitu-
tional claim properly in the state court, as well as the "prejudice" re-
sulting to him from the alleged constitutional violation.\footnote{\textit{Sykes}, 433 U.S. at 90-91.} In \textit{Sykes}, the defendant failed to object to the introduction of his confession at
trial, in which he stated that he shot the deceased.\footnote{Id. at 75.} The state sup-
reme court held that the issue was waived for review since state
law required a contemporaneous objection as a prerequisite for ap-
pearance.\footnote{Id. at 87-88.} Viewing the defendant's failure to object as an independent
state ground for denying relief, the United States Supreme Court
overruled the \textit{Fay v. Noia} test.\footnote{Id. at 87-88.} Although this decision changed the
test to obtain federal relief, the Burger Court did not alter the
authority of the federal courts to monitor state proceedings.

Thereafter, in a series of cases decided from 1991 to 1993, the
Rehnquist Court further reduced the reach of the "Great Writ" by
modifying the 1963 trilogy. Nonetheless, it did not abolish the
power of the federal court to monitor state criminal decisions via the
"Great Writ."
C. Retrenchment Under The Rehnquist Court

1. State Procedural Default and the Doctrine of Independent State Ground

In Coleman v. Thompson, the Rehnquist Court reexamined the doctrine of Fay v. Noia. In Coleman, defense counsel filed his appeal from the denial of petitioner's post conviction petition three days late. The Virginia Supreme Court dismissed the petition, and the United States Supreme Court affirmed. Justice O'Connor, writing for the majority, stated that it was clear from the record that the dismissal by the Virginia Supreme Court was based on state procedural grounds, and therefore the issue was foreclosed from federal habeas corpus review. Distinguishing the ruling in Fay v. Noia, handed down thirty years earlier, the Court made it clear that "this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Thereafter, the defendant was executed.

2. Evidentiary Hearings in Federal Court

In Keeney v. Tamayo-Reyes, the Court considered the validity of the test enunciated in Townsend v. Sain, which established the standard for holding evidentiary hearings in federal court. Tamayo-Reyes, a Cuban immigrant, was charged with murder after he stabbed a man in a bar. He was provided with defense counsel who suggested that he plead guilty to manslaughter. Since the defendant spoke little english, an interpreter explained his rights and the consequences of his plea to him. The court accepted his plea to manslaughter.

After he found himself in prison, Tamayo-Reyes filed a collateral attack in state court on the grounds that he did not understand the mens rea element of manslaughter. A hearing was held, but the petitioner's counsel did not ask him whether his interpreter had
translated “manslaughter” for him. Nor did his counsel employ a language expert to assess the interpreter’s performance, or whether Tamayo-Reyes could understand the translation. The only evidence the counsel introduced, other than the petitioner’s testimony, was an affidavit by the interpreter stating that he had translated manslaughter as “less than murder.” The state court dismissed the petition. The state court of appeals affirmed, and the state supreme court denied review.

Tamayo-Reyes then filed a petition for a writ of habeas corpus in federal district court. He contended that the material facts concerning the translation were not adequately developed at the state court hearing and sought a federal evidentiary hearing, citing Townsend v. Sain. The district court denied relief; however, the Ninth Circuit Court of Appeals reversed, holding that the failure to develop the critical facts was due to the negligence of defense counsel. The Ninth circuit then went on to hold that the counsel’s negligence did not constitute a “deliberate bypass” by the petitioner. Therefore, under the Townsend test, Tamayo-Reyes was entitled to an evidentiary hearing in federal court.

The United States Supreme Court reversed the Ninth Circuit, holding that the “deliberate bypass” standard of Fay v. Noia and Townsend v. Sain was no longer the correct standard for determining whether a petitioner who fails to develop a material fact in state court is entitled to an evidentiary hearing in federal court. Instead, the Court stated that the proper test was the “cause and prejudice” test articulated in Wainwright v. Sykes, and held that counsel’s negligence did not satisfy the “cause and prejudice” test.

In overruling that portion of Townsend v. Sain, the Court held that federal courts should apply the same standard that courts used to determine the claims of a petitioner who has procedurally defaulted in state court. By utilizing the “cause and prejudice” test in Wainwright v. Sykes, there would be uniformity in both situations. However, it is important to note that this case only affected hearings that were required under Townsend v. Sain and did not limit the power of a federal court to hold a evidentiary hearing at its discre-

45. Id. at 13.
46. Id.
47. Id.
48. Id. at 4.
49. Id.
50. Id.
51. Id.
52. Id. at 4.
53. Id.
54. Id. at 5.
55. Id. at 8.
56. Id.
57. Id. at 19.
tion.

3. Successor Petitions

In McClesky v. Zant, the Court held that the standard for determining whether a defendant could file a "second" or "successor" federal habeas corpus petition should also be consistent with the Sykes test. The police charged McClesky, along with other individuals, in the armed robbery of a Georgia furniture store man in 1978, and the murder of an off duty police officer who entered the store as McClesky was making his escape. At first, McClesky confessed to the robbery, but later repudiated his confession at trial and denied all involvement. While being held in the county jail, an inmate named Evans was placed in the cell next to McClesky, and began asking McClesky questions about the crime. At trial, Evans testified that McClesky confided in him and confessed to the shooting. The court convicted McClesky and sentenced him to death.

In January of 1981, after his direct review was exhausted, McClesky filed a state habeas corpus petition. In his petition, McClesky alleged, *inter alia*, that the police placed the inmate next to him for the sole purpose of extracting a confession from him in the absence of counsel, and subverted his Sixth Amendment rights in violation of *Massiah v. United States*. The court denied his petition, as he had no proof of his allegations. Thereafter, in December of 1981, McClesky filed a federal habeas corpus petition alleging other grounds for barring the testimony of Evans, but omitted the specific *Massiah* claim. The federal court denied the petition.

Six years later, in 1987, McClesky's counsel received a copy of a twenty-one page statement by Evans, given to the Atlanta police prior to trial. This statement arguably demonstrated that Evans was working in concert with the police to eavesdrop on McClesky and obtain admissions from him. One month later, McClesky filed a second federal habeas corpus petition, alleging the *Massiah* claim and attaching Evan's statement as proof. The district court

59. *Id.* at 479.
60. *Id.* at 470.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 471.
65. *Id.* at 472.
66. *Id.* (citing *Massiah v. United States*, 377 U.S. 201 (1964)).
67. *Id.*
68. *Id.* at 472-73.
69. *Id.* at 473.
70. *Id.* at 474.
71. *Id.* at 473-74.
72. *Id.* at 474.
granted relief; however, the Eleventh Circuit reversed on the grounds that the filing of the second federal habeas petition constituted an "abuse of the Writ" because McClesky failed to allege that constitutional claim in his first habeas petition.73

Until McClesky, the test for determining whether a second petition constituted an abuse of the writ depended on whether a claim was "deliberately abandoned."74 However, the majority of the Court overruled Sanders on that issue and substituted the "cause and prejudice" test in order to be consistent with Sykes.75 Nevertheless, the Court did not prohibit the filing of "successor petitions" in the district court, but rather, it merely changed the test for determining when a constitutional claim is considered waived.76

Justices Marshall, Stevens, and Blackmun dissented. In Justice Marshall's view, this case was decided wrongly, since McClesky's counsel satisfied the Sanders "good faith" doctrine and did not deliberately hold back the claim.77 The district court found that McClesky was not aware of the evidence that supported his Massiah claim when he filed his first petition.78 Under the old "good faith" standard, a petitioner could have waited to allege the constitutional violation until after he found evidence to support it.79 However, by applying the new "cause and prejudice" standard, the majority denied relief.80

The dissent also argued, however, that even under the newly applied "cause and prejudice" test, the case should have been remanded.81 Where, as here, the State's "veil of deception" and refusal to turn over Evans' statement to counsel interfered with the petitioner's ability to substantiate his Massiah claim, a successive habeas petition should not be barred.82 The district court found that the state covertly planted Evans in the adjoining cell.83 Thereafter, all the government officials counsel interviewed prior to the filing of the first habeas petition denied any knowledge of the agreement between Evans and the state, including the jailer, the assistant district attorney, and others.84 As a result, the dissent contended that it was

73. Id. at 475-76.
74. Id. at 489.
75. Id. at 502.
76. Id. at 496.
77. Id. at 506 (Marshall, J., dissenting).
78. Id. at 476.
80. McClesky, 499 U.S. at 503.
81. Id. at 524 (Marshall, J., dissenting).
82. Id. at 527-28.
83. Id. at 525.
84. Id. at 526.
impossible for the petitioner to verify his claim until he received Evans' statement from the state, six years later. Thus, although the Burger and Rehnquist Courts retreated somewhat from the grand principles of the 1963 trilogy of the Warren Court, they did not retreat from the theory that the federal court would continue to monitor state criminal decisions to determine whether or not federal constitutional rights had been violated.

4. Retroactivity

Another hurdle erected to habeas relief by the Rehnquist Court is the jurisprudence of the "new rule." Although at English common law, all court decisions were retroactive, that has not been the case in America. The United States Supreme Court has applied various formulas to determine which decisions should be retroactive. The latest formula promulgated by the Rehnquist Court is the "new rule" doctrine. Under the Supreme Court's decision in Teague v. Lane, although all decisions of the United States Supreme Court are retroactively applied to cases on direct review, they are not applied to habeas corpus cases on collateral review, unless the Supreme Court decision does not constitute a "new rule."85

The question of when a Supreme Court decision announces a "new rule" of constitutional law appeared simple enough when first announced, but confounds jurists to this day. In theory, a "new rule" of constitutional law is announced if the decision was not dictated by prior precedent existing at the time the defendant's conviction became final, or if the decision broke new ground or imposed a new obligation on the states or federal government. However, state and federal courts continue to disagree over the application of this seemingly clear definition.

For example, in Simmons v. South Carolina,87 the Supreme Court held that it was a denial of due process not to inform a sentencing jury in a death penalty case that the defendant would never be released from prison if they did not impose the death penalty, where a prosecutor had argued the defendant's "future dangerousness."86 Thereafter, as late as September, 1996, in O'Dell v. Netherland,88 the Fourth Circuit Court of Appeals split seven to six on the question of whether Simmons had announced a "new rule," or was dictated by prior precedent.89 The majority held that it did announce a "new rule," and therefore was not retroactive to the habeas petitioner.90 However, six judges on the Fourth Circuit contended that

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86. Id. at 316.
88. Id. at 2198.
89. 95 F.3d 1214 (4th Cir. 1996).
90. Id. at 1218.
91. Id. at 1224, 1235-36.
the prior precedents of Gardner v. Florida and Skipper v. South Carolina dictated the decision in Simmons.92

As conflicting interpretations of what constituted a "new rule" continued, the doctrine was devastating to prisoners on death row who used to look forward to the possibility of a new trial when the Supreme Court would declare a practice of the prosecution or the police to be unconstitutional.93 However, after the doctrine of the "new rule," an inmate seeking collateral review could no longer reasonably expect relief in his case.94

The Seventh Circuit case of Stewart v. Lane95 provides a good example. After the Fourth Circuit handed down the O'Dell decision, an original petition for habeas corpus relief was filed directly in the United States Supreme Court on behalf of Illinois death row inmate, Ray Stewart, the day before his execution.96 The petition noted a similar fact pattern to that of Simmons and O'Dell, and requested a stay of Stewart's execution until the Supreme Court decided the issue of whether Simmons promulgated a "new rule" or was retroactive.97 The petition garnered the votes of only two Justices for a stay of execution, and Stewart was executed at midnight.98 On December 19, 1996, the United States Supreme Court granted a writ of certio-

92. O'Dell, 95 F.3d at 1257 (Ervin, J., concurring in part, dissenting in part) (citing Skipper v. South Carolina, 476 U.S. 1 (1986)).
95. 60 F.3d 296 (7th Cir. 1995).
96. Id. at 298.
97. See Stewart v. Lane, 60 F.3d 296 (7th Cir. 1995). Stewart was convicted of murder and sentenced to death for three murders in Illinois. Id. at 298. His case was litigated at all levels for 13 years. Id. Stewart petitioned for habeas corpus relief alleging that the trial judge erred when he failed to instruct the jury that the only alternative to the sentence of death for Stewart was life imprisonment without the possibility of parole. Id. The district court denied the writ and Stewart appealed.

In addressing Stewart's claim, the Seventh Circuit first looked to Teague v. Lane, because Stewart relied on Simmons v. South Carolina. Id. (citing Teague, 489 U.S. at 316 (1989)). Looking at the law that existed at the time of Stewart's trial, the Seventh Circuit found that no such rule of criminal procedure existed. Id. at 300. The court then looked at the two narrow exceptions outlined in Teague in which a defendant may benefit from a retroactively applied new rule. Id. at 302. The second exception "encompasses 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" Id. The court with little discussion dismissed the notion that Simmons was such a watershed case. Id. at 303. The Court reasoned that Simmons was not the kind of decision that enforced core rules of criminal procedure implicit in ordered liberty. Id.

98. In Re Stewart, 117 S. Ct. 31 (1996). Justices Stevens and Breyer would have granted the stay of execution.
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rari to O'Dell to resolve the question of whether the Simmons doctrine constituted a "new rule" of constitutional law.99 Unfortunately, that grant of certiorari was too late to save Stewart from execution.

The case of Gary Graham, a Texas death row inmate, similarly illustrates the impact of the "new rule" doctrine. In his petition for certiorari to the Supreme Court, Graham attempted to rely on the Supreme Court's decision in Penry v. Lynaugh.100 In Penry the Supreme Court held that, under the framework of existing Texas law, the jury was unable to adequately consider evidence of a defendant's mental retardation and abused childhood.101 In Graham's case, he alleged similarly that under Texas law, the jury was unable to adequately consider the evidence he introduced at sentencing, relating to his youth, unfortunate background, and traits of good character.102

The Penry holding was based primarily upon two cases: Lockett v. Ohio103 and Eddings v. Oklahoma.104 Those cases held that the sentencing jury was entitled to consider all possible mitigating evidence before making a decision as to life or death.105 In fact, the Penry Court stated, "it was clear from Lockett and Eddings that a State could not... prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty."106

Since the Court held in Penry that its decision was dictated by the prior precedents of Lockett and Eddings, Graham argued that Penry had not enunciated a "new rule," and was therefore applicable to him.107 However, in ruling on Graham's petition for certiorari, Justice White, speaking for the majority, denied relief.108 The question for the majority was whether "reasonable jurists reading the case law that existed in 1984 could have concluded that Graham's sentencing was not constitutionally infirm."109 The Court held that reasonable jurists could come to such a conclusion; therefore, the Court determined that Penry announced a "new rule," and consequently, was not applicable to Graham.110 In sum, the non-retroactivity doctrine of the Rehnquist Court turned out to be yet another obstacle to prisoners seeking federal relief from their state

102. Graham, 506 U.S. at 443.
104. 455 U.S. 104 (1982).
105. Lockett, 438 U.S. at 608; Eddings, 455 U.S. at 117.
106. Penry, 492 U.S. at 318.
108. Id. at 463.
109. Id. at 477.
110. Id.
convictions and sentences.

5. Harmless Error Standard Lower for Collateral Review in Federal Court

Another retreat from the grand principles of the 1963 “trilogy” was the lowering of the standard of harmless error on federal habeas corpus review in *Brecht v. Abrahamson.* In that case, the defendant, Todd Brecht, was charged with the fatal shooting of his brother-in-law, a local district attorney. Brecht was arrested, given Miranda warnings and remained silent. Thereafter, he took the stand at his trial and stated that the shooting was an accident. The state argued to the jury that Brecht’s version of what happened differed from what he had told the police at the time of his arrest, and that Brecht never advanced that “accident theory” before. Brecht was convicted and sentenced to life imprisonment.

On appeal, the Wisconsin Supreme Court held that the references to Brecht’s failure to tell the police his “accident theory,” after he was advised of his Fifth Amendment right not to speak, violated his due process rights. However, the Wisconsin court affirmed, holding that this constitutional violation was “harmless beyond a reasonable doubt.”

Brecht then filed a petition for a writ of habeas corpus in the federal district court. The district court granted the petition, holding that the error was not “harmless beyond a reasonable doubt.” The United States Court of Appeals for the Seventh Circuit reversed the district court and reinstated the conviction. However, the Seventh Circuit held that although the proper standard for assessing constitutional errors on direct review was whether the error was “harmless beyond a reasonable doubt,” that should not be the test for habeas corpus review. According to the Seventh Circuit, the proper test for habeas review is the federal harmless error rule for a non-constitutional error. Under this framework, the test is whether the violation “had a substantial and injurious effect or influence in determining the jury’s verdict.”

112. Id. at 623-24.
113. Id. at 624-25.
114. Id. at 624.
115. Id. at 624-25.
116. Id. at 625.
117. Id. at 626 (citing Doyle v. Ohio, 426 U.S. 610 (1976)).
118. Id.
119. Id.
120. Id.
121. Id.
122. Id. at 627.
123. See id at 626-27 (citing Chapman v. California, 386 U.S. 18, 22 (1967)).
124. Id. at 627.
Here, the Seventh Circuit found that the constitutional violation to Brecht's due process rights did not have such an effect or influence on the jury's verdict.125

Brecht then filed a petition for a writ of certiorari in the United States Supreme Court.126 The Supreme Court affirmed the Seventh Circuit's holding.127 Writing for the Court, Chief Justice Rehnquist made a clear distinction between the standard for harmless error on habeas corpus review and the standard on direct review, based upon the function of each.128 He stated that direct review was the principal avenue for challenging a conviction, while habeas review was a secondary avenue and was designed to guard against extreme malfunction of the system.129 Therefore, Rehnquist insisted that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."130

Rehnquist concluded that state courts had the qualifications to decide whether an error in a criminal case had a harmful effect upon the petitioner's right to due process.131 Therefore, Rehnquist stated that it made no sense to have the federal courts review the process with the same harmless error standard.132 Undermining the States' ability to decide upon the prejudicial effects of trial errors could also lead to "the frustration of society's interest in the prompt administration of justice," and its interest in finality.133 Rehnquist reasoned further that there was a cost to society when cases are reversed on collateral review.134 Usually in a habeas proceeding, it is much later than the initial proceeding, it is harder to find witnesses, their memories are foggy, and it is more difficult for the state to prove its case. Therefore, according to Rehnquist, it was legitimate to make the harmless error standard more onerous on collateral review given the social costs involved. Since the Supreme Court did not conclude that the error "had a substantial and injurious effect or influence in determining the jury's verdict," it affirmed the Seventh Circuit's decision.135

These pronouncements of Chief Justice Rehnquist foreshadowed the arguments of the 104th Congress when it passed the new habeas legislation on April 24, 1996. Concerns about finality of judgment, delay, proper use of judicial resources, states' rights and societal cost underlay the passage of AEDPA.

125. Id. at 626.
126. Id. at 627.
127. Id.
128. Id. at 622-23.
129. Id. at 633.
130. Id. at 634 (citing United States v. Frady, 456 U.S. 152, 165 (1982)).
131. Id. at 636.
132. Id.
133. Id. at 637 (citing United States v. Mechanik, 475 U.S. 66, 72 (1986)).
134. Id.
135. Id. at 639.
III. CHANGES UNDER THE ANTITERRORISM-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

This Part first analyzes the changes to habeas corpus relief made by key provisions of the new AEDPA, as recently interpreted by the United States Supreme Court and the Seventh Circuit Court of Appeals. In addition, this Part looks at the landscape of habeas corpus and discusses some of the questions that courts must resolve in the near future.

In analyzing the AEDPA, it is important to note that the essential element of federal court oversight of state court proceedings through habeas corpus jurisprudence has not been abolished with the advent of the new Act. Under the AEDPA, the federal court retains its fundamental right to oversee state criminal proceedings via the writ of habeas corpus. However, under this new Act, the balance of power between state and federal government in the enforcement of the criminal laws of this nation has dramatically shifted back to the states. This becomes clear as one looks at the “deference” the Act mandates to state court conclusions of fact and law.

The fundamental changes under the AEDPA warrant a thorough examination. These changes fall into nine major categories, in addition to the question of the retroactivity of the Act itself, or the waiver of retroactivity by the state. These categories include: (1) Limitations on filing the “Great Writ”; (2) Standard of Review - deference to state court decisions; (3) Evidentiary hearings in Federal Court; (4) Exhaustion of State Remedies; (5) Successor Petitions; (6) Appellate Procedures; (7) “Opt-In” Provisions for Qualifying States; (8) Retroactivity of the Statute; (9) Waiver of retroactivity of the Statute.

This Part discusses these issues seriatim, with reference to the statutory changes and key decisions interpreting the statute, where they exist. In addition, this Part examines some of the public policies which underlie the new Act and their implications for the criminal justice system.

A. Limitations on Filing the “Great Writ”

Section 2244 provides, in part:

(d)(1)- A one year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court. The limitation period shall run from the latest of (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking

137. Id. at 1219.
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such review . . . . 138

(d)(2)- The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.139

Prior to the enactment of AEDPA, there was no limitation on when a prisoner could file an original action for habeas corpus relief in federal court. Under the new Act there is a one-year limitation from the “conclusion of direct review” to file such a pleading.140 Yet, the question arises immediately as to what constitutes the “conclusion of direct review” under subsection (d)(1). Is it, for example, after the state supreme court renders its decision affirming the conviction? Is it after petition for rehearing in the State Supreme Court has been denied? Is it after a petition for certiorari in the United States Supreme Court has been denied? Is it after petition for rehearing after denial of certiorari has been ruled upon by the United States Supreme Court? What if the Supreme Court grants certiorari?

The probable answer to these questions is that direct review is completed after the denial of a petition for certiorari by the United States Supreme Court; the denial of relief by the Supreme Court if certiorari was granted; or the time to file the petition for certiorari has run out, if the petition was never filed. Thereafter, the petitioner must file the petition for habeas corpus relief within one year of that date, unless a petition for state collateral review has been filed. The authority for that answer lies in the definition of direct review provided by the United States Supreme Court in Teague v. Lane.141 In determining the scope of direct review for the purpose of assessing the retroactivity of a Supreme Court decision, Justice O'Connor noted that direct review ends “where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . .”142

In addition, another reason for assuming that the statutory language, “the end of direct review,” includes the time until the denial of a petition for certiorari or the time has run for it to be filed, is by comparing section 2244(d) with section 2263(a) of the same Act.143 Section 2263(a), which deals with the accelerated procedures available to states that qualify, called “opt-in” states, requires that a habeas corpus petition must be filed within 180 days of the “final state

138. Id. at 1217.
139. Id.
140. Id.
142. Id. at 295; see also James Liebman, The New Habeas and the New Section 2255 (Sept. 1996) (Capital Habeas Training Seminar).
143. § 107, 110 Stat. at 1223.
The argument based on statutory construction, namely reading these provisions in pari materia, is that if Congress wanted to limit the filing of the petition to one year after affirmance by the highest court in the state in section 2244(d), it could have used those exact words, as they did in section 2263(a). Instead, in section 2244(d), Congress used the language: "the end of direct review," which by implication means something other than "final state court affirmance."

The second question to resolve in this section of the Act is to determine the meaning of section 2244(d)(2). This subsection provides that the statute of limitations tolls during the pendency of a proper state post-conviction petition. However, what does that mean? At what point does the petition cease to be pending? For example, would the petition still be pending after state supreme court affirmance of the denial of the post-conviction petition? Would the petition still be pending until rehearing by the state supreme court is denied? Would the petition still be pending until the United States Supreme Court denied certiorari? What about rehearing to the United States Supreme Court after denial of certiorari? Again, what if the Supreme Court granted certiorari on review of the post-conviction petition? What if a second post-conviction were filed, does that toll the statute?

One could argue, again, by comparison with section 2263(b), which details the accelerated provisions available to states which qualify for “opt-in” status, that the answer to this question is that the post-conviction petition is pending until denial by the United States Supreme Court. According to the language in section 2263(b), a statute tolls only up until the "final State court disposition ...." Presumably, since the authors of the legislation did not use that language in section 2244(d)(2), they meant something other than disposition by state court affirmance.

However, some courts have held that the proper statutory construction of the Act is to read the Act as a whole. Based on that reasoning, the language tolling the statute only until final state court disposition from section 2263(b) would be read into section 2244(d)(2). Some practitioners are more cautious and assume that the statute is tolled only until the state supreme court renders its

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144. Id.
145. Id. at 1217.
146. Id.
147. Id. at 1223.
149. See Memorandum from John Blume on New Habeas Developments to Habeas Colleagues 2 (Dec. 10, 1996) (on file with the authors).
opinion denying post-conviction relief.\footnote{150} Under that construction, a post-conviction petition for rehearing to a state supreme court would not toll the statute. Erring on the side of caution in these circumstances and assuming that the statute is tolled only until the state supreme court denies post conviction relief is clearly the safer course of action.

B. Standard of Review - Deference to State Court Decisions

Section 2254(d) provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.\footnote{151}

Prior to the AEDPA, although factual determinations by state court judges were presumed correct, determinations of federal law or mixed questions of fact and law were reviewed de novo by the federal court.\footnote{152} Conversely, under the AEDPA, while the presumption of correctness for state court determinations of historical fact has been retained in section 2254(e)(1),\footnote{153} the de novo review for questions of federal constitutional law has been altered.\footnote{154} Essentially, the AEDPA has abolished de novo review for mixed questions of law and fact. This constitutes a major change in the federal-state power balance. Under § 2254(a) of the old Act, "[f]ederal courts...disregarded the state courts' legal conclusions and reached independent judgments on issues presented to them."\footnote{155}

Now, instead of being able to ignore the state court judgment completely, the new statute requires that a federal court allow the decision of the state court to stand unless the adjudication of the

\footnotesize{150. Id.  
152. Thompson v. Keohane, 116 S. Ct. 457, 459-60 (1995). In Thompson, the United States Supreme Court held that the question of whether a suspect was "in custody" for Miranda purposes was a mixed question of fact and law, and thus, was entitled to de novo review by the federal court. Id. The Court vacated the Ninth Circuit's decision, which held that the question of custody was a factual determination by the state court, and as such, was entitled to deference and a presumption of correctness under the old 28 U.S.C. § 2254(d). Id. at 462.  
153. § 104, 110 Stat. at 1219.  
154. Id.  
claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

This language limits the former power of the federal court in two ways. First, with respect to pure questions of federal law, legal decisions of a state court which are only inconsistent with decisions of the federal courts, must be allowed to stand. Only if the federal court can point to a decision of the United States Supreme Court that is "contrary to" the state court decision, may it grant relief. Secondly, with respect to mixed questions of fact and law, the federal court may no longer grant relief unless the state court's application of federal law to the facts of the case was "unreasonable." In order to understand what this means to habeas petitioners, it is necessary to examine some of the decisions of the Seventh Circuit and other Courts of Appeal.

In Lindh v. Murphy, the Seventh Circuit interpreted the meaning of section 2254(d)(1) of the AEDPA. In 1988, Lindh was convicted of murdering two people and attempting to murder a third. Relying on Wisconsin's bifurcated procedure, Lindh argued first that he was not guilty. Alternatively, Lindh argued that even if the jury found him guilty, he was insane at the time of the crime. The jury found Lindh guilty, but not insane. Thereafter, the court sentenced Lindh to life imprisonment plus thirty-five years. On appeal, Lindh's principal contention was that at the time of his trial, the state's psychiatrist was under investigation for engaging in improper sexual conduct with several of his female patients. Therefore, Lindh argued that the psychiatrist might have slanted his testimony during the second phase of the bifurcated procedure, relating to Lindh's mental state, in order to obtain leniency from the prosecution. However, the trial court did not permit defense counsel to cross examine the psychiatrist regarding the charges of sexual impropriety pending against him, and the jury was unaware of the potential bias.

After losing on this issue in the Wisconsin Supreme Court and

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156. Id.
157. 96 F.3d 856 (7th Cir. 1996), cert. granted, 117 S. Ct. 726 (1997).
158. Id. at 860.
159. Id.
160. Id.
161. Id.
162. Id.
163. Lindh, 96 F.3d at 860.
164. Id.
165. Id.
in the federal district court, the matter was argued before the Sev-
enth Circuit Court of Appeals on April 9, 1996.\textsuperscript{166} Fifteen days later,
on April 24, 1996, President Clinton signed the AEDPA into law.\textsuperscript{167} The
Seventh Circuit then set the case for re-argument to determine
whether the new provisions of the Act applied to Lindh's case, and if
so, what impact the new provisions of section 2254(d)(1) had on his
claims.\textsuperscript{168}

Having determined that the provisions of the new Act applied
to Lindh,\textsuperscript{169} Judge Easterbrook, writing for the majority, pointed out
that section 2254(d)(1) of the AEDPA marked a retreat from the
former law.\textsuperscript{170} Prior to \textit{Brown v. Allen},\textsuperscript{171} a writ of habeas corpus
could not issue for state criminal procedures violative of the Con-
stitution.\textsuperscript{172} The writ was restricted to the review of federal criminal
proceedings. Judge Easterbrook quoted Judge Learned Hand who
pronounced that "upon habeas corpus a federal court does not in any
sense review the decision in the state courts."\textsuperscript{173} Although that
practice changed with the decisions of the Warren Court beginning
in 1953 with \textit{Brown v. Allen}, Judge Easterbrook construed congres-
sional intent in passing the AEDPA as a desire to "move back in that
direction" to the era prior to \textit{Brown v. Allen}.\textsuperscript{174}

1. \textit{Some Suggestions as to the Meaning of "Contrary to Clearly
Established Federal Law as Determined by the United States
Supreme Court"}

The first provision of section 2254(d)(1) of the AEDPA provides,
in pertinent part, that "a writ of habeas corpus shall not issue unless
the adjudication of the claim by the State court (1) resulted in a de-
cision that was contrary to, or involved an unreasonable application
of, clearly established Federal Law as determined by the Supreme
Court of the United States . . . ."\textsuperscript{175} With respect to the first clause of
that provision, which requires that a state court decision be contrary
to "clearly established federal law as determined by the Supreme
Court" before a writ can issue, Judge Easterbrook stated that "this is
a retrenchment from former practice which allows the United States
courts of appeals to rely on their own jurisprudence in addition to

\textsuperscript{166} Id. at 856-61.
\textsuperscript{167} AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (to be codified in
\textsuperscript{168} Lindh, 96 F.3d at 861.
\textsuperscript{169} Id. at 867.
\textsuperscript{170} Id. at 869.
\textsuperscript{171} 344 U.S. 443 (1953).
\textsuperscript{172} Lindh, 96 F.3d at 873 (quoting Schechtman v. Foster, 172 F.2d 339, 341
(2d Cir. 1949)).
\textsuperscript{173} Id. (quoting Schechtman, 172 F.2d at 341).
\textsuperscript{174} Id. at 873.
\textsuperscript{175} § 104, 110 Stat. at 1218-19 (to be codified as 28 U.S.C. § 2254(d)).
Thus, according to Judge Easterbrook, under section 2254(d)(1), a conflict between the decisions of the Seventh Circuit and those of a state supreme court does not authorize a federal court to issue a writ of habeas corpus. Rather, in order for a writ to issue, the petitioner must show a conflict between a decision of the United States Supreme Court and the decision of the state supreme court.

Judge Wood, concurring and dissenting in part, strongly opposed this view. Judge Wood stated:

I begin to part company with the majority where it . . . suggests that we “need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the ‘real’ source of law.” For better or for worse, that task will be ours in virtually every case that comes before us under the amended law, because it is rare indeed that we will see something identical in all particulars to a case already decided by the Supreme Court. However minor the factual variations, we both can and must look for guidance in our own decisions, decisions from other appellate courts (federal and state), and persuasive secondary sources.

Easterbrook and the majority did not deal directly with the problems of whether federal appellate court opinions may be viewed as “compelled” or “dictated” by United States Supreme Court decisions, or if they can, whether they could be used by federal courts to help decide questions of federal constitutional law. However, Easterbrook did note the similarity of reasoning required under the new habeas statute and the analysis required by Teague v. Lane.

Teague involved the problem of determining whether a Supreme Court decision announced a “new rule” of constitutional law, or was “compelled by prior precedent.” In Lindh, Judge Easterbrook compared the “compelled by existing precedent” language of Teague to the “clearly established” language of the AEDPA, and stated that “these are the sorts of questions presented by the Teague standard which are unlikely . . . to pose a different kind of interpretive challenge.”

Although Easterbrook never explicitly decided this issue in Lindh, it is possible that a prisoner can still argue that federal courts could use favorable opinions from the Seventh Circuit in reaching their judgments based on the Teague line of reasoning. This is possible where these decisions were “compelled” by an

176. Lindh, 96 F.3d at 869.
177. Id.
178. Id. at 878 (Wood, J., concurring in part, dissenting in part).
179. Id. at 869.
180. Id. (citing Teague v. Lane, 489 U.S. 288 (1989)).
181. Id.
182. Id.
authoritative United States Supreme Court opinion. For example, suppose a prisoner raised an "ineffectiveness of counsel" claim and cited Strickland v. Washington as the "clearly established" federal law in the area, as determined by the Supreme Court. Suppose further that the prisoner then wanted to cite favorable Seventh Circuit decisions interpreting Strickland, such as Kubat v. Thieret or Emerson v. Gramley. The prisoner should be able to do so by arguing that these cases were merely "appellate glosses" on a decision by the Supreme Court, notwithstanding the seemingly restrictive words of the AEDPA to the contrary.

However, in the recent Seventh Circuit opinion of Bocain v. Godinez, the court stated that Lindh clearly held that "[f]ederal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court caselaw in order to reverse state court decisions." In Bocain, the court convicted petitioner of several residential burglaries and sentenced him to an extended term of fifty-five years, pursuant to a sentencing statute that was amended after he committed the crimes in question. The petitioner argued on appeal, inter alia, that this conviction violated his rights under the Ex Post Facto Clause of the Constitution. However, the Illinois reviewing courts construed the amendment as a mere clarification of the pre-existing statute, and not as a change in the statute. Therefore, the Illinois reviewing courts denied relief.

In affirming the district court's denial, the Seventh Circuit pointed out that this case would be decided under the new Act. Therefore, in order to get habeas corpus relief under section 2254(d), the petitioner would have to rely upon a decision of the United States Supreme Court. The petitioner cited Collins v. Youngblood for the proposition that the Ex Post Facto Clause prohibited legislatures from retroactively increasing the punishment for criminal acts. However, Judge Bauer refused to accept the broad holding of that case as binding on the Seventh Circuit in light of the

184. 867 F.2d 351 (7th Cir. 1989).
185. 91 F.3d 898 (7th Cir. 1996).
186. Lindh, 96 F.3d at 878 (Wood, J. concurring).
187. 101 F.3d 465 (7th Cir. 1996).
188. Id. at 471.
189. Id. at 467.
190. Id. at 468.
191. Id. (citing People v. Gramo, 633 N.E.2d 9 (Ill. 1994)).
192. Id.
193. Id. at 471.
194. Id.
196. Bocain, 101 F.3d at 470.
provisions of section 2254(d). He stated that in order to obtain relief, the petitioner must point to a decision which holds that a state court's construction of an amended statute was unconstitutional. In other words, "a Supreme Court case must compel an interpretation of the 1991 amendment as a change in, rather than a clarification of, the . . . sentencing statute that was in effect when Bocain committed the relevant crimes."

The test which Judge Bauer promulgated in Bocain is a very difficult burden for a petitioner to overcome. For example, in the 1995-96 term of the United States Supreme Court, the Court only rendered decisions in approximately ninety cases. With that small a number, the chances of finding a Supreme Court case with the level of specificity demanded by Judge Bauer is remote. Thus, the AEDPA, as interpreted by the court in Bocain, considerably weakens the ability of the federal court to perform any oversight function vis-à-vis state court criminal decisions.

In Fern v. Gramley, the Seventh Circuit also addressed the meaning of section 2254(d)(1) of the AEDPA. In that case, the court focused on the meaning of "federal law, as determined by the Supreme Court of the United States." In determining that the holding of the state court in that case was "contrary to clearly established Federal law as determined by the Supreme Court," Judge Flaum relied upon the Seventh Circuit opinion in Castellanos v. United States.

In Fern, the petitioner pled guilty to a narcotics charge, and received sentences of twenty-five years and ten years concurrently, as well as a $75,000 fine. The trial court advised Fern that if he was unhappy with this sentence and wanted to appeal, he would first have to file a motion to withdraw his guilty plea. Thereafter, counsel appealed directly to the Illinois Appellate Court without first filing the motion to withdraw Fern's guilty plea.

The Illinois Appellate Court held that Fern had waived any issues concerning his sentence by failing to file the appropriate motion. Subsequently, petitioner filed a petition for post-conviction relief, alleging that he had waived all of his sentencing issues on direct appeal due to the ineffectiveness of his counsel. The court

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197. Id. at 472.
198. Id.
199. Id.
200. 99 F.3d 255 (7th Cir. 1996).
201. Id. at 260.
202. Id. (citing Castellanos v. United States, 26 F.3d. 717 (7th Cir. 1994)).
203. Id. at 255-56.
204. Id. at 256.
205. Id.
206. Id. (citing People v. Fern, 557 N.E.2d 1010 (Ill. App. Ct. 1990)).
207. Id. (citing People v. Fern, 607 N.E.2d 951 (Ill. 1993)).
denied Fern's petition.\textsuperscript{208}

The United States District Court of the Northern District of Illinois denied Fern's subsequent petition for habeas relief.\textsuperscript{209} Specifically, the district court found that Fern did not show that he suffered prejudice as a result of trial counsel's failure to file the appropriate motion, as required by the second prong of \textit{Strickland}.\textsuperscript{210}

On appeal, the Seventh Circuit reversed the district court's denial of Fern's petition.\textsuperscript{211} The court relied on \textit{Castellanos v. United States},\textsuperscript{212} which held that the failure of counsel to file an appeal, contrary to the defendant's wishes, constituted not only ineffective assistance of counsel on appeal, but of any assistance on appeal, and was a "per se violation of the Sixth Amendment."\textsuperscript{213} Accordingly, there was no necessity for Fern to show prejudice.

The court also found that the decision in \textit{Castellanos}, which was decided after Fern had lost on direct appeal, did not announce a "new rule" of constitutional law.\textsuperscript{214} Rather, \textit{Castellanos} rested firmly on established U.S. Supreme Court precedent existing prior to the direct review in \textit{Fern}.\textsuperscript{215} The Seventh Circuit therefore vacated the district court's judgment, because the decision of the state court in \textit{Fern} was "contrary to established federal law as established by the United States Supreme Court."\textsuperscript{216}

It is interesting to note that, in attempting to stay within the framework of section 2254(d)(1) of the AEDPA, Judge Flaum pointed to the fact that \textit{Castellanos} survived a \textit{Teague} analysis.\textsuperscript{217} That is, \textit{Castellanos} was firmly rooted on the foundation of clearly established U.S. Supreme Court precedent, and for Judge Flaum, that qualified the \textit{Castellanos} opinion to be used as precedent even under section 2254(d)(1).\textsuperscript{218} However, absent a \textit{Teague} analysis, Judge Flaum clearly holds that only the U.S. Supreme Court decisions must be followed and not lower federal court decisions.\textsuperscript{219} Rejecting more recent federal court decisions, Judge Flaum stated that under the AEDPA, "we begin and end our analysis of petitioner's claim with the Supreme Court's decision in \textit{Snyder v. Massachusetts} \textsuperscript{208}Id.\textsuperscript{209}Id.\textsuperscript{210}Id. (citing \textit{Strickland v. Washington}, 466 U.S. 668 (1984)).\textsuperscript{211}Id. at 260.\textsuperscript{212}26 F.3d 717 (7th Cir. 1994).\textsuperscript{213}\textit{Fern}, 99 F.3d at 257 (citing \textit{Castellanos}, 26 F.3d at 718).\textsuperscript{214}Id.\textsuperscript{215}Id. (citing \textit{Penson v. Ohio}, 488 U.S. 75 (1988)).\textsuperscript{216}Id. at 260-61.\textsuperscript{217}Id. at 259.\textsuperscript{218}Id. at 260.\textsuperscript{219}See Devin v. Detella, 101 F.3d 1206, 1208 (7th Cir. 1996) (holding that petitioner did not have the constitutional right to be present during a jury view of the crime scene).
2. Some Suggestions as to the Meaning of "Unreasonable Application of Federal Law" Standard

The second and more difficult question which section 2254(d)(1) of the AEDPA raises is, what does "unreasonable application of federal law" mean and how is "unreasonable" determined? In an attempt to answer this question, this Section discusses the following 1996 Circuit Court decisions: Lindh v. Murphy, Drinkard v. Johnson, Abrams v. Barnett, Neal v. Gramley, as well as brief references to other recent Seventh Circuit opinions.

In the Lindh decision, the court treated the "contrary to established federal law" provision as applying to "pure" questions of federal law, while he interpreted the "unreasonable application of federal law" as relating to "mixed questions of law and fact." The court reasoned that it is up to Congress to regulate the appropriate habeas corpus relief for violations of Constitutional law determined by federal courts. Under the AEDPA, Congress decreed that unless a decision by a state court is an "unreasonable" application of clearly established federal law, no relief will be granted to the petitioner.

In support of this proposition that Congress has regulated the type of relief required for violations of federal rights in the past, the Lindh court analogizes the retrenchment by Congress in the new habeas statute to the court's previous action in cases such as United States v. Leon, Nix v. Williams, and Stone v. Powell. In all of

220. Id. (citation omitted).
221. 96 F.3d 856 (7th Cir. 1996), cert. granted, 117 S. Ct. 720 (1997).
222. 97 F.3d 751 (5th Cir. 1996), cert. denied, 1997 WL 10415 (U.S. Mar. 3, 1997).
223. 100 F.3d 485 (7th Cir. 1996).
224. 99 F.3d 841 (7th Cir. 1996).
225. Lindh, 96 F.3d at 870.
226. Id. at 872.
227. Id. at 871.
228. 468 U.S. 897 (1984). In Leon, a judge issued a defective warrant, which a police officer then served in "good faith." Id. at 904. The Supreme Court held that in order for the criminal justice system to operate it was important that police follow the commands of judges. Id. at 904. Therefore, there would be no deterrent value in punishing the police for serving a defective warrant where it has been authorized by a court.
229. 467 U.S. 431 (1984). In Nix, evidence of a child's body was found as a result of illegal conduct on the part of the police, but the United States Supreme Court did not suppress the evidence because of the doctrine of inevitable discovery. Id. at 447. Scores of searchers were looking in the very area where the body was found, and doubtless would have found the body without the illegal conduct of the police. Id. at 448.
230. Lindh, 96 F.3d at 871-72 (citing Stone v. Powell, 428 U.S. 465 (1976). In Stone, the Court held that Fourth Amendment violations that have been reviewed on the merits in state courts were no longer cognizable on federal
these cases the “wrong” was clearly discernible, but for policy reasons no remedy was offered to the defendant. For Judge Easterbrook, these cases simply illustrated the traditional legal difference between “constitutional rights” and “remedies.”

Other examples of the gap between the recognition of violations of constitutional rights by federal courts, and their granting relief, are found in the teachings of Teague and its progeny. In Teague, the Supreme Court held that a “new rule” of constitutional law announced in one of its decisions would apply prospectively, or to litigants still on direct review, but would not apply to petitioners seeking habeas corpus relief.\(^{231}\)

The Lindh court determined from all of these examples of court-approved gaps between recognition of “wrongs” and granting relief, that Congress could enact a statute restricting the federal court from granting relief for every constitutional violation. According to the court, “the principal change effected by Section 2254(d)(1)” is that a federal court must now respect a state court decision that is within the limits of what is “reasonable,” as determined by the U.S. Supreme Court, even though the federal court recognizes that a constitutional violation has occurred.\(^{232}\) Thus, under the AEDPA, with respect to the application of federal law to facts, even if the federal court finds a constitutional violation, it may not issue a writ of habeas corpus, unless “the state’s decision reflects an unreasonable application of the law.”\(^{233}\)

Having established that in mixed questions of fact and law, the federal court cannot grant relief unless the state court’s application of the law to the facts is “unreasonable,” Judge Easterbrook and the majority proceeded to ascertain the meaning of “unreasonable.” In determining whether a state court’s treatment of an issue was reasonable, the court first noted that the federal court should take into account “the care with which the state court considered the subject.”\(^{234}\) For example, “a responsible, thoughtful answer reached after a full opportunity to litigate” may adequately support the judgment of a state court.\(^{235}\)

The court then interpreted the AEDPA to mean that “when the constitutional question is a matter of degree rather than of concrete entitlements, a reasonable decision by the state court must be honored.”\(^{236}\) The court used the Sixth Amendment right to a speedy trial to illustrate this interpretation by citing Barker v. Wingo,\(^{237}\) where

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232. Lindh, 96 F.3d at 871.
233. Id.
234. Id.
235. Id.
236. Id.
the U.S. Supreme Court listed a series of factors to determine when a defendants' speedy trial rights were violated. The Court, however, did not specify, "how long was too long." Suppose that a state court allowed a prosecution to commence after six years; however, a federal judge hearing a collateral attack to the conviction believed that any prosecution commenced after five years was a violation of defendant's Sixth Amendment rights. Could the federal judge issue a writ? Presumably, the answer is no under this interpretation of section 2254(d)(1). Six years might not be "unreasonable" in that context, and therefore the writ should not issue. That is the fundamental change which Congress enacted in that portion of section 2254(d)(1).

Thereafter, the majority of the Seventh Circuit found that Lindh did not point to a "clearly established rule of federal law as determined by the United States Supreme Court" that would require confrontation of the psychiatrist who testified at the second stage of the bifurcated trial in Wisconsin. As a result, Lindh was required to prove that, under the second clause of section 2254(d)(1), the state court's decision to disallow cross-examination of the state's psychiatrist on the issue of the sex charges constituted an "unreasonable application of the federal law" and required habeas corpus relief.

The majority of the Seventh Circuit held that the scope of cross-examination was a "matter of degree." Therefore, the state supreme court's ruling was not "unreasonable" within the meaning of section 2254(d)(1), and the writ could not issue. It is interesting to note that in determining whether the decision of a state court concerning mixed questions of law and fact was "unreasonable," the federal court may take into account the process by which the state court reached the decision. By suggesting that a decision reached by the state court after full litigation of an issue may stand, perhaps Judge Easterbrook is also suggesting the inverse of that proposition, that is a state court decision reached without a full and fair hearing would not be entitled to the same "deference."

In contrast, dissenting Judges Rovner and Ripple found a constitutional infirmity in the AEDPA. They contended that Congress trampled on the judicial power of Article III courts in two respects. First, according to Rovner and Ripple, the AEDPA requires federal courts to make decisions based exclusively on U.S. Supreme Court law, instead of their own jurisprudence. Second, the AEDPA limits relief to cases where the "state court's departure from the federal

238. Id. at 530.
239. Lindh, 96 F.3d at 871 (citing Barker, 407 U.S. at 514). In Barker, however, the Court held that a five year delay was not too long.
240. Id. at 876.
241. Id.
242. Id. at 877.
243. Id. at 888.
norm is 'unreasonable.' The majority of the Lindh court attempted to sidestep this issue by setting up a dichotomy which allows total freedom to federal judges to review state court decisions dealing with federal constitutional issues de novo, but restricts these same federal courts from granting relief unless the "unreasonableness" in the application of federal law test was satisfied.

As Professor Liebman points out in his thoughtful petition for certiorari in the Lindh case, the distinction between deciding cases based upon federal law and applying federal law to fact situations may be artificial. In support of this position, Liebman quoted Justice Oliver Wendell Holmes who observed that "law" is not a "brooding omnipresence," but it is what the courts do in fact.

Therefore, it may be that section 2254(d)(1) of the AEDPA is unconstitutional because it allows Congress to impermissibly restrict the operation of a constitutionally mandated judiciary, or it may be that Judge Easterbrook's reading of the section is constitutionally incorrect. Since the Supreme Court has granted Professor Liebman and his colleagues certiorari, perhaps the Court will write the final chapter on the constitutionality or the proper interpretation of section 2254(d)(1).

In Drinkard v. Johnson, the Fifth Circuit discussed another view of what constituted an "unreasonable application of law to facts." In Drinkard, the court convicted the defendant of murdering three people during a drunken spree. At the sentencing phase, the trial court instructed the jury that if it found that the defendant's drunken state at the time of the murders amounted to temporary insanity, that would constitute mitigation. The defendant contended that this instruction prevented the jury from considering his general state of drunkenness as mitigation in itself, even if it did not rise to the level of insanity. In denying defendant's claim under the AEDPA, the Fifth Circuit enunciated its test for interpreting the meaning of section 2254(d)(1). It stated that "an application of

244. Id.
245. Id.
246. Amicus Curiae brief of Professor James S. Liebman for the petitioner, Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996).
247. Id. at 40 (quoting Oliver Wendell Holmes Jr., The Path of the Law, 10 HARV. L. REV. 457, 461 (1897)); see also Miller v. Fenton, 474 U.S. 104, 114 (1985) (noting that "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case.").
248. Amicus Curiae brief of the American Bar Association for the petitioner, Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996).
249. 97 F.3d 751 (5th Cir. 1996), cert. denied, 1997 WL 10415 (U.S. Mar. 3, 1997).
250. Id. at 754.
251. Id. at 755.
252. Id. at 766.
law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect."2 In other words, the court held that habeas relief will only be granted "if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists."2

In Abrams v. Barnett, another Seventh Circuit case following the line of reasoning enunciated in Lindh, the court held that the Appellate Court of Illinois was not "unreasonable" in its approval of a trial court's determination that the defendant was not denied access to counsel over a two hour lunch break.2 The defendant's counsel requested a private interviewing room during the lunch break so that he could prepare the defendant for his forthcoming testimony.2 The sheriff refused due to security problems, but he offered to let counsel speak to the defendant through a grate in the bullpen.2 The defendant's counsel declined the offer, and renewed his request to the court after the break.2 Counsel stated that he simply could not communicate privileged information through a hole in a crowded bullpen.2 The trial court refused to give counsel and the defendant a private room at that point, but the court offered to let counsel speak to his client in the courtroom prior to the defendant's taking the stand.2 Counsel refused the offer, and argued on appeal that the defendant was denied access to counsel under the Sixth Amendment, citing Geders v. United States.2

The Illinois Appellate Court affirmed the conviction and denied relief.2 The Illinois Supreme Court denied leave to appeal.2 Thereafter, the United States District Court for the Northern District of Illinois denied petitioner's writ of habeas corpus, and the Seventh Circuit Court of Appeals case decided the case on November 8, 1996, under the provisions of the AEDPA.2

Judge Flaum, writing for the majority, framed the issue for the Seventh Circuit as whether the decision of the state court was "an unreasonable application of federal law."2 The court then noted

253. Id. at 769.
254. Id.
255. 100 F.3d 485 (7th Cir. 1996).
256. Id. at 491-92.
257. Id. at 490-91.
258. Id. at 488.
259. Id.
260. Id.
261. Id.
262. Id. at 489 (citing Geders v. United States, 425 U.S. 80 (1976)).
263. Id. at 487 (citing People v. Abrams, 631 N.E.2d 1312, 1318 (Ill. App. Ct. 1994)).
264. Id. (citing People v. Abrams, 642 N.E.2d 1286 (Ill. 1994)).
266. Id.
that in *Geders*, the defendant was denied access to his counsel overnight for a period of seventeen hours, while in this case counsel was denied effective access to his client for a period of only two hours. Moreover, the court noted that in *Perry v. Leeke* a denial of access to counsel during a fifteen minute break did not amount to a constitutional violation. Based on the framework of those two cases, the Seventh Circuit held that decision of the state court was not an "unreasonable" application of federal law under section 2254(d)(1) of the AEDPA. Accordingly, the court affirmed the denial of the defendant's petition for a writ of federal habeas corpus.

Another example of a federal court finding that the rulings of a state court were not "unreasonable" is found in the Seventh Circuit's decision in *Neal v. Gramley*. In 1982, Neal entered the home of a neighbor, robbed the sixty-three year old widow, bashed her head in with a lead pipe filled with concrete and stabbed her to death. Thereafter, a jury sentenced Neal to death. Neal then filed a post-conviction petition claiming that his trial lawyer failed to fully investigate factors in mitigation. After the court denied that petition, Neal filed a second post-conviction petition alleging that, in addition to ineffective assistance of trial counsel, his attorney in the first post-conviction hearing was also incompetent.

His first attorney only put Neal's current wife on the stand during the sentencing hearing, who testified that Neal treated her well. On appeal Neal alleged that if his trial counsel fully investigated his past, he would have learned that Neal's mother severely beat him as a child; that a jailer would have testified to Neal's good conduct while awaiting trial; that a psychologist would have submitted an affidavit to the effect that Neal was suffering from a delusion when he killed the victim; and that Neal's delusionary thought was that the elderly neighbor was his mother.

Writing for the majority, Judge Posner first stated that under *Lindh*, "when the issue tendered to the federal court is ... not the meaning of the Constitution but the application of a settled principle to the facts of the case, the petitioner must show that the state courts' determination was not merely incorrect, but
'unreasonable.' The court then held that the determination by the state court that Neal's counsel was not ineffective was not "unreasonable" within the meaning of the AEDPA. In addition, the court noted that the restriction on the federal court's decision was based on the proviso that "the determination was made after...a full and fair opportunity to litigate the issue" in state court.

In addition, the Seventh Circuit ruled that there was no constitutional right to counsel at post-conviction proceedings, and that the alleged error by the first post-conviction counsel was insufficient grounds for the federal court to issue a writ. Specifically, the court noted that under the AEDPA, Congress expressly stated that incompetence of counsel in post-conviction proceedings is not a ground for relief in federal habeas corpus. Moreover, the state court found that trial counsel was not ineffective in failing to present the additional evidence found by the second post-conviction counsel, and hence, the first post-conviction counsel was also not ineffective for failing to find this information. Therefore, under Illinois law, since the first post-conviction counsel was not ineffective, the issues raised by the second post-conviction counsel were procedurally defaulted, and consequentially, should not even be considered on federal habeas review.

In addition, even if the federal court would disagree with the state court and find the trial counsel and the first post-conviction counsel ineffective, the petitioner must not only prove incompetence, but also resulting prejudice. Judge Posner refused to find these two requirements and concluded that Neal offered no real proof of prejudice, since "no jury would buy the psychologist's fantastic speculation that when Neal advanced with pipe and knife against Mrs. Waid, he saw his mother and was frightened, or the conclusion that he should be punished more lightly because he thought he was 'only' killing his mother, who had mistreated him as a child."

279. *Id.*
280. *Id.* at 844.
281. *Id.* at 843.
282. *Id.*
283. *Id.* (citing § 104(i), 110 Stat. at 1219).
284. *Id.*
285. *See generally id.*
286. *Id.* at 845. In holding that Neal could not demonstrate prejudice, Judge Posner compared Neal's case to *Stewart v. Gramley*. *Id.* at 845 (citing *Stewart v. Gramley*, 74 F.3d 132 (7th Cir. 1996)). In that case, Stewart shot two men dead and wounded one woman during a jewelry store robbery. *Stewart*, 74 F.3d at 133. Stewart pled guilty and the court sentenced him to death. *Id.*

After exhausting all of his direct appeals and his requests for post conviction relief, Stewart filed a petition for habeas corpus in the U.S. District Court for the Northern District of Illinois. *Id.* The district court found that the defendant had pled guilty involuntarily. *Id.* The Seventh Circuit reversed and remanded the case to district court to adjudicate the remaining claims. *Id.*
Not all circuit courts interpreting the AEDPA, however, have affirmed state court decisions as "reasonable" applications of federal law. One example is the Seventh Circuit reversal of the state court decision in \textit{Hall v. Washington}. \footnote{Id. at *1.} In \textit{Hall}, the defendant was convicted of the murder of a supervisor in the kitchen at Pontiac prison and sentenced to death. \footnote{Id. at 133-34.} After the Illinois Supreme Court affirmed his conviction and sentence on direct appeal, the defendant filed a post-conviction petition, alleging ineffectiveness of counsel at trial and sentencing. \footnote{Id. at 135.} The post-conviction court dismissed this petition, and the Illinois Supreme Court affirmed the dismissal. \footnote{Id.}

Thereafter, petitioner filed a petition for habeas corpus review in the United States District Court, which granted him an evidentiary hearing, but denied relief. \footnote{Id.} On appeal to the Court of Appeals for the Seventh Circuit, Judge Wood, speaking for a unanimous panel, evaluated the state court decision pursuant to section 287. No. 95-1125, 1997 WL 42967 (7th Cir. Feb. 4, 1997).

Stewart claimed that the trial judge should have appointed a psychiatrist to examine him for the purpose of mitigation. \footnote{Id.} At 133-34. The Seventh Circuit held that \textit{Ake v. Oklahoma}, 470 U.S. 68 (1985), did not apply to his federal habeas corpus case. \footnote{Id.} \textit{Stewart}, 74 F.3d at 135 (citing \textit{Teague v. Lane}, 489 U.S. 288 (1988)). The court further held that if Stewart had the right to a psychiatric examination, the trial court's failure to appoint a psychiatrist would not prejudicial error. \footnote{Id.} At 134. In reaching this decision, the court looked at several psychiatric evaluations Stewart underwent after his sentencing, and concluded that there was no "reliable indication of any psychiatric disorder graver than 'mild situational anxiety.'" \footnote{Id.} Furthermore, the court found that, absent evidence of a psychiatric condition before sentencing, Stewart's chances of receiving a lesser sentence were not realistic. \footnote{Id. at 136.}
The court found that Hall's counsel totally failed to interview his client prior to sentencing, failed to present even a single mitigation witness, and failed to provide the court with a single valid argument for sparing petitioner's life. The court noted that:

Congress would not have used the word 'unreasonable' if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing United States Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue.

The court then found that the state court's decision that Hall's counsel provided effective assistance at sentencing was "unreasonable" in light of the United States Supreme Court's ruling in \textit{Strickland v. Washington}.

\textbf{292.} \textit{Id.} at *6-12.
\textbf{293.} \textit{Id.} at *7.
\textbf{294.} \textit{Id.} at *6.
\textbf{295.} \textit{Id. Strickland} established a two-prong test for ineffective assistance of counsel: performance of counsel must be objectively unreasonable; and, there is a reasonable possibility that, but for counsel's errors, the result of the trial would be different. \textit{Strickland v. Washington}, 466 U.S. 668, 687 (1984). \textit{Accord Emerson v. Gramley}, 91 F.3d 898 (7th Cir. 1996) (holding that the failure to present any mitigating witnesses at the sentencing phase of a capital case was ineffective assistance of counsel, even though the defendant told counsel not to present such evidence) \textit{see also United States ex rel. Holman v. Gimore}, No. 95-C5035, 1997 U.S. Dist. LEXIS 2309 (N.D. Ill. Feb. 26, 1997) (holding that under the AEDPA, the Illinois Supreme Court's decision was unreasonable under \textit{Strickland v. Washington}); \textit{Compare with Eddmonds v. Peters} 93 F. 3d 1307 (7th Cir. 1996).

In \textit{Eddmonds}, the Seventh Circuit maintained its long standing reluctance to issue writs for trial counsel incompetence. Stating that it was harmless error, the Seventh Circuit affirmed the district court's refusal to grant a petition for a writ of habeas corpus for a petitioner who had a long well documented psychiatric history and for whom no fitness hearing was conducted before trial. \textit{Id.} at 1323. Eddmonds lured a nine year old boy to his apartment just minutes after the boy was sodomized by two other men and then sodomized the boy himself. \textit{Id.} at 1322. When the boy began to cry, Eddmonds pushed his head into the bed suffocating the boy. \textit{Id.} Eddmonds was sentenced to death for deviant sexual assault and murder of the nine year old boy. \textit{Id.} at 1310. The Illinois Supreme Court affirmed the conviction and the sentence. \textit{Id.} 1311. After his requests for post-conviction relief were unsuccessful, Eddmonds filed a writ of habeas corpus alleging ineffective assistance of counsel because his attorney failed to request a fitness hearing before trial. \textit{Id.} The district court denied the petition and Eddmonds appealed to the Seventh Circuit. \textit{Id.}

On appeal, the Seventh Circuit held that, assuming \textit{arguendo} that counsel's failure to request a hearing was a constitutional violation, Eddmonds did not suffer any prejudice, and therefore, the second prong of \textit{Strickland} was not satisfied. \textit{Id.} at 1316. The court theorized that if a fitness hearing was held, Eddmonds would have been found fit because Eddmonds was found fit two and one half years before trial. \textit{Id.} at 1317. Furthermore, the court relied on Eddmonds' detailed statement and testimony during the suppression hearing as evidence of Eddmonds' competence to aid in his defense. \textit{Id.} at 1316-17. As a re-
C. Evidentiary Hearings in Federal Court

Section 2254(e) of the AEDPA provides that:

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State Court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that:

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.296

This section constitutes a major change in the law. Under the old Act, factual determinations by a state court were presumed to be correct; however, this assumed that there was a hearing in state court on the merits of the factual issue followed by a written finding or opinion resolving the matter. Moreover, the presumption of correctness did not apply if: the merits of the factual dispute were not resolved in a state court hearing; the fact-finding procedure was not adequate to provide a full and fair hearing; the material facts were not fully developed at a state court hearing; or the indigent applicant was not represented by counsel at the hearing in state court.297

In contrast, the AEDPA abolishes all of these exceptions to the pre-

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Moreover, under the prior Act, a federal court always had discretion to conduct an evidentiary hearing even if it was not required. Under the AEDPA, however, no evidentiary hearings may be conducted unless the applicant relies on a “new rule” of constitutional law made retroactive to collateral proceedings by the Supreme Court, or the defendant relies on a new claim that could not have been discovered earlier.296

Professor Yackle suggests that if there was no evidentiary hearing in state court, because of opposition by the prosecutor or the failure of the trial court judge to grant such a hearing, a petitioner should still request an evidentiary hearing in federal court.297 After all, the AEDPA prohibits federal evidentiary hearings only when it is the applicant’s fault.300 Therefore, Professor Yackle argues that if it is not the applicant’s fault, then section 2254(e)(2) does not apply.301

In Pitsonbarger v. Gramley,302 the Seventh Circuit interpreted section 2254(e)(2) of the AEDPA. In that case, the court convicted Pitsonbarger of two murders in Illinois, and he received the death penalty.303 Prior to this sentence, he had pled guilty in Nevada to attempted murder and other charges, and he received life imprisonment.304 Subsequently, Pitsonbarger plead guilty in Missouri, and received another sentence of life imprisonment.305 After losing his direct appeal in the Illinois Supreme Court, Pitsonbarger filed a post-conviction petition in the Circuit Court of Peoria County.306 The Circuit Court dismissed this petition as frivolous without holding a hearing on the merits of Pitsonbarger’s claims.307 Thereafter, Pitsonbarger’s post-conviction appeal to the Illinois Supreme Court was dismissed due to the failure of his counsel to file his appellate brief on time. He then filed a petition for a writ of habeas corpus in the district court, requesting an evidentiary hearing on his claims.308

The Federal District Court for the Central District of Illinois denied Pitsonbarger an evidentiary hearing and dismissed his

296. § 104, 110 Stat. at 1219.
300. § 104, 110 Stat. at 1219.
301. Yackle Memorandum, supra note 299.
302. 103 F.3d 1293 (7th Cir. 1996).
303. Id. at 1297.
304. Id.
305. Id.
306. Id.
307. Id.
308. Id.
The district court noted that Pitsonbarger failed to raise many of the claims included in his writ of habeas when he appealed to the Illinois Supreme Court on direct review. In addition, the district court found that the Illinois Supreme Court did not address these claims on the appeal of the denial of his post-conviction hearing, since his post-conviction counsel was not allowed to file his brief late.

Judge Wood, writing for the majority, affirmed the district court's denial of an evidentiary hearing stating "the rules of procedural default prevent us from reaching these claims, troubling though they are." Although the district court premised its denial of an evidentiary hearing on the prior Act, the Seventh Circuit affirmed under section 2254(e)(2) of the AEDPA. The court held that none of Pitsonbarger's claims satisfied the criteria enunciated by Congress in the AEDPA. In particular, the court noted that the petitioner was not relying on a new rule of constitutional law made retroactive to cases on collateral review. The petitioner failed to present facts that would not be discoverable through due diligence. The proffered facts underlying the claim did not establish by clear and convincing evidence that, but for a constitutional error, no reasonable fact finder would have found petitioner guilty.

Thus, the Seventh Circuit affirmed the denial of the Pitsonbarger's request for an evidentiary hearing.

As a result of this decision by the Seventh Circuit, most of Pitsonbarger's constitutional claims went unheard by the state post-conviction court or in federal habeas corpus proceedings. It is interesting to note, however, that in his signing statement President Clinton remarked, "if [section 2254(e)] [were] read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate federal rights, it would raise serious constitutional questions."

Section 2254(e) of the AEDPA presents a very restrictive test. The requirement that the applicant rely on a "new rule made retroactive to collateral proceedings by the Supreme Court" is a Herculean obstacle. The very definition of retroactivity in Teague v. Lane is that no "new rule" will be made retroactive to collateral
proceedings by the Supreme Court. Teague holds that new rules will be made retroactive to cases on direct review only, except for two narrow exceptions. One exception is where a crime has been decriminalized. Another exception is where a decision is recognized as a “bedrock” or a “watershed” decision, such as the holding by the Supreme Court that indigents have a right to counsel under the Sixth Amendment. Except for those two narrow exceptions, decisions announcing “new rules” are simply not retroactive to cases on collateral attack.

Section 2254(e)(2)(B) of the AEDPA does not permit an evidentiary hearing in federal court unless the defendant can advance a newly discovered claim that will demonstrate “by clear and convincing evidence that, but for a constitutional error, no reasonable fact-finder juror would have found the applicant guilty of the underlying offense.” This is similar to the test adopted by the Supreme Court in Sawyer v. Whitley and Schlup v. Delo. In both those cases the Supreme Court granted relief using this test as opposed to the more stringent test of Jackson v. Virginia. To this extent, section 2254(e)(2)(B) is better for the petitioner than it could have been, but the entire section militates against hearings in federal court on habeas petitioners’ claims, and weakens the power of the federal court and the federal government vis-à-vis the state courts and state government in the administration of the criminal law. However, the question in Sawyer was whether “but for a constitutional error, no reasonable juror would find a petitioner eligible for the death penalty under the applicable state law.” In requesting an evidentiary hearing in the federal court, Pitsonbarger argued that the requirement in the AEDPA that “no reasonable fact-finder would have found the petitioner guilty of the underlying offense,” included the situation where the petitioner is not eligible for death. The Seventh Circuit rejected this argument. The court held that innocence of the death penalty was not encompassed by the AEDPA, which contemplated relief only when, but for the constitutional error, the petitioner was innocent of the underlying offense.

321. Id. at 310.
322. Id. at 311.
323. Id.
324. Id.
328. 443 U.S. 307, 319 (1979) (holding that the proper standard for granting relief in a federal habeas corpus proceeding is whether the petitioner can show that no rational trier of fact could find proof of guilt beyond a reasonable doubt).
329. Sawyer, 505 U.S. at 336.
D. Exhaustion of State Remedies

Section 2254(b) reads in pertinent part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available state corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An applicant for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

Congress clearly stated its policy objectives in this section. In the interests of comity, the defendant must first present all federal constitutional claims to the state court, and await their review by the highest court in the state. This gives the state an important role in the administration of the criminal law of our nation. If the defendant fails to exhaust his or her claim in the state court system, and raises both exhausted and unexhausted claims in his federal habeas corpus petition, section 2254(b) changes the way a federal court will treat such “mixed” petitions. Under the prior Act, if a petitioner filed a petition with both exhausted and unexhausted claims, a federal court could hold the case on call, or dismiss the petition with leave to reinstate, while the petitioner went back to state court to exhaust his claims.

Conversely, under section 2254(b)(2) of the AEDPA, if the petitioner presents a “mixed” petition to a federal court, the federal court may dismiss the entire petition. There is no provision under the AEDPA for the federal court to grant a “mixed” petition, unless the state waives “exhaustion.” To insure the infrequency of these waivers, exhaustion is never presumed under section 2254(b)(3). Section 2254(b)(3) mandates that states make express waivers of the exhaustion requirement. The purpose of the exhaustion doctrine
is to protect the role of the state courts in the enforcement of federal constitutional law.\footnote{Rose, 455 U.S. at 518.} Again, this tightening of the "exhaustion" doctrine again tilts the balance of power further in favor of state courts in the administration of our criminal justice system.

E. Successor Petitions

Section 2244 provides in pertinent part:

(2) A claim presented in a second or successive habeas corpus application . . . shall be dismissed unless-

(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, . . . or

(B)(i) the factual predicate for the claim could not have been discovered previously 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 fact-finder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the Court of Appeals.

(C) The Court of Appeals may authorize the filing of a second or successive application only if it determines that the application makes a \textit{prima facie} showing that the application satisfies the requirements of this subsection.

(D) The Court of Appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.\footnote{AEDPA, Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (1996) (to be codified at 28 U.S.C. § 2554).}

Under the former habeas corpus statute, the applicant must file a successor petition in federal district court. If denied relief, the
applicant could file an appeal in the U.S. Court of Appeals. If denied the petition, the applicant could appeal to the Supreme Court.

Under the AEDPA, however, this procedure is completely different. The successor petition must meet new standards. First, section 2244(2)(A) requires the new claim be based upon a "new rule" of constitutional law made retroactive to cases on collateral review by the Supreme Court. As suggested previously, this is virtually an impossible burden because the Supreme Court has held that a "new rule" of constitutional law will almost never be applied to cases on collateral review.

In addition, the requirement that "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 fact-finder would have found the applicant guilty of the underlying offense," is also a departure from the prior Act. The former Act required only that a successor petition allege factual grounds not adjudicated in the earlier petition, and that the petitioner did not deliberately withhold the claim in the first writ or otherwise "abuse the writ."

These new restrictions make it exceedingly difficult to file "successor" petitions under the AEDPA. For example, in Roldan v. United States, the Seventh Circuit upheld the denial of a petitioner's successor petition, since the petitioner alleged neither that the claim relied on a new rule of constitutional law made retroactive, nor that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.

In addition, unlike the former Act which simply requires a petitioner to file a successor petition in the district court, section 2244(3)(A) of the AEDPA requires the petitioner to first present a motion for leave to file a successor petition to the U.S. Court of Appeals. Thereafter, under subsection 3(E), if the court denies the motion for leave to file the successor petition, there is no further appeal to the U.S. Supreme Court on this petition.

Challenges to the provision forbidding further review by the

338. Id.
340. See Teague v. Lane, 489 U.S. 288, 311 (1989). There are two rare exceptions to the ban on retroactivity of "new rules" for cases on collateral review. They are either a) for crimes which have been decriminalized, or b) for watershed decisions such as a right to counsel case or other "bedrock procedural rules." Id.
342. 96 F.3d. 1013 (1996).
343. Id. at 1014. See, e.g., Coleman v. United States, No. 96-745, 1997 WL 53488 (10th Cir. Feb. 11, 1997).
344. § 101, 110 Stat. at 1217.
345. See id.
U.S. Supreme Court were brought immediately upon passage of the AEDPA. In *Felker v. Turpin*, 346 Felker, who was under a sentence of death, filed a successor petition on May 2, 1996, in the Court of Appeals for the Eleventh Circuit. 347 The Eleventh Circuit denied Felker's motion for leave to file the successor petition. 348 Notwithstanding the clear language of the AEDPA prohibiting further appeal, Felker filed a petition for writ of certiorari in the Supreme Court. 349 He alleged that the legislation amounted to "a suspension of the writ," and that subsection (E) constituted an unconstitutional restriction on the jurisdiction of the Supreme Court. 350

Speaking for a unanimous Court in denying the writ, Chief Justice Rehnquist first found that the Court retained its power to review original writs of habeas corpus conferred upon it by the Judiciary Act of 1789; consequently, "there can be no plausible argument that the Act has deprived the Court of appellate jurisdiction in violation of Article III, Section 2." 351 The Court then held there was no suspension of the writ in violation of Article I, Section 9, Clause 2 of the Constitution, which provides that "the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it." 352 The Court stated that the "new restrictions on successive petitions" are well within the complex and "evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." 353 Thus, a unanimous Supreme Court rejected the first challenge to the AEDPA, and held that section 2244 of the AEDPA passed constitutional muster.

F. Appellate Procedures

Section 2253 reads in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability . . . if the applicant has made a substantial showing of the denial of a constitutional right.

347. *Id.* at 2337.
348. *Id.*
349. *Id.*
350. *Id.* at 2340.
351. *Id.* at 2339.
352. *Id.* at 2339-40.
353. *Id.* at 2340.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2). 354

Under the former Act a district court issued a "certificate of probable cause." 355 Once this certificate was obtained, any issue could be raised on appeal. Under the AEDPA, the petitioner must file a motion in the circuit court of appeals requesting the issuance of a "certificate of appealability." 356 In this motion, the petitioner must identify each issue that he or she wishes to raise on appeal. The court of appeals may then select which of these issues it agrees to hear, or it may decline to hear an appeal on any of these issues. 357

For example, in Herrera v. United States 358 the Seventh Circuit noted that the criteria for issuing the certificate of probable cause and the criteria for issuing a certificate of appealability are similar. 359 According to the court, a petitioner had to make "a substantial showing of the denial of a federal right" in order to obtain a certificate of probable cause. 359 Under section 2253(c)(2) of the AEDPA, "a certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 359 Consequently, the court concluded that "the two certificates differ only in scope: a certificate of probable cause places the case before the Court of Appeals, but a certificate of appealability must identify each issue meeting the 'substantial showing' standard." 359

G. "Opt-In" Provisions for Qualifying States

The 104th Congress passed "Special Habeas Corpus Procedures in Capital Cases" as part of the AEDPA. This provides an accelerated timetable for habeas litigation for those states which qualify for what has been termed "Opt-In" status.

Section 2261 provides in pertinent part:

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and

357. Id. But see 7TH CIR. R. 22.1. Rule 22.1 provides that in the Seventh Circuit, the Certificate of Appealability (COA) should first be filed with the district court. Id. Then, if the district court denies the COA, counsel must include the district court's denial of the COA with the petitioner's reasons for the granting of the certificate by the court of appeals. Id.
358. 96 F.3d 1010 (7th Cir. 1996).
359. Id. at 1012.
360. Id. (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).
361. Id.
362. Id. (emphasis added).
(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer . . . .

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254.\textsuperscript{383}

Under this section, there are four basic criteria in order for a state to qualify for “opt-in” status. First, the state must provide a mechanism for the appointment of counsel in death penalty post-conviction cases.\textsuperscript{384} Second, there must be standards for the appointment of such counsel mandated by the state court or the state legislature.\textsuperscript{385} Third, these lawyers must receive payment for reasonable litigation expense.\textsuperscript{386} Finally, post-conviction counsel must not have represented the prisoner either at trial or direct appeal, absent an express request by the prisoner.\textsuperscript{387} Once these conditions are satisfied, the time within which to file a habeas corpus petition is no longer one year after the end of direct review. Instead, section

\begin{footnotes}
364. Id.
365. Id.
366. Id.
367. Id.
\end{footnotes}
2263(a) of the AEDPA only allows a petitioner to file a habeas corpus petition up to "180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." Section 2263(a) also expedites the schedule in federal court. The parties have a minimum of 120 days to file all pleadings and briefs, and to conduct a hearing if one is warranted. All of this, however, must take place within a maximum of 180 days after the filing of the habeas corpus petition, because the district court judgment is due within 180 days after the date the application for habeas corpus was filed. The district court is allowed an additional thirty days to file its opinion, but only under extraordinary circumstances.

In addition, section 2263(a) even affects the circuit court of appeals. Under this section, the decision of the federal reviewing court must be rendered no later than 120 days after petitioner's reply brief is filed. Moreover, if the defendant files a petition for rehearing after his or her case is affirmed on appeal, the court of appeals must grant or deny the rehearing petition within thirty days of its filing, or within thirty days of the State's response.

Of course, it is unclear what punishment, if any, can be meted out to the circuit and district court judges if they fail to meet these time deadlines, since they have lifetime appointments. The AEDPA requires the Administrative Office of United States Courts to submit an annual report to Congress reflecting the compliance with these time limitations by both the district courts and courts of appeal.

In addition to the matters discussed above, there are other differences between the normal habeas corpus procedures under AEDPA and the special provisions for the qualifying or "opt-in" states. One difference is that under the special habeas corpus procedures, no amendment to an application for a writ of habeas corpus shall be permitted after the filing of the state's answer, except in extraordinary circumstances. To date, the U.S. courts of appeals have not found any state to qualify for the special habeas corpus procedures in capital cases as an "opt-in" state.

H. Retroactivity of the Statute

Sections 2261-2266 of the AEDPA establish that the effective date in which the "special habeas corpus procedures in capital cases"
would apply to pending cases in states that qualified for "Opt-In" status is on or after the date of enactment of the Act. With respect to the remainder of the AEDPA, sections 2244-2255, there is no effective date specified. Therefore, the question arises as to when these provisions take effect and to what class of cases they apply. This question is of extreme importance because of the radical changes enacted in the new legislation. As discussed previously, questions relating to when the federal court is limited in its review of state court decisions involving issues of federal law or mixed questions of fact and law; what conditions are required for evidentiary hearings in federal court; and what time limitations are placed on the filing of federal habeas corpus petitions, are all dependent upon which federal habeas act applies.

On September 12, 1996, in Lindh v. Murphy, the Seventh Circuit resolved this issue. Specifically, the Seventh Circuit addressed whether the AEDPA applied to Lindh's petition for habeas corpus relief, even though it had been filed prior to April 24, 1996.

Fifteen days after Lindh lost his appeal in the Supreme Court of Wisconsin, President Clinton signed the AEDPA into law. The Seventh Circuit set the case for re-argument to determine whether the new provisions of the AEDPA applied to Lindh's case, and if so, what impact the new provisions of section 2254(d)(1) had on Lindh's case. The court then held that the AEDPA applied to Lindh's case.

Judge Easterbrook, speaking for the majority of the court, noted that Landgraf v. USI Film Products was the leading U.S. Supreme Court decision in this area. According to the court, Landgraf prescribed a sequence of determinative issues regarding retroactivity. The first step was to decide whether Congress specified to which cases the AEDPA applies. If it did, then the court can simply follow the statute with respect to its applicability. If Congress did not specify to which cases the AEDPA applies, then a court must apply the law in force at the time the case is decided, unless the Act attached new legal consequences to events completed before its enactment. Under the latter situation, the Act is considered retroactive.

376. Id. at 1225-26.
377. Id. at 1217-19.
379. Id. at 860.
380. Lindh, 96 F.3d at 861.
381. Id. at 862.
383. Lindh, 96 F.3d at 861 (citing Landgraf, 114 S. Ct. 1483 (1994)).
384. Id.
385. Id.
386. Id.
The court found that Congress did not specify which cases the AEDPA applies to, because chapter 153 lacked an effective date provision.\textsuperscript{387} However, the petitioner in \textit{Lindh} argued that Congress specified by negative implication that chapter 153, which encompasses sections 2244 to 2255, should not apply retroactively.\textsuperscript{388} Sections 2244 to 2255 of the Act were silent as to the effective date of application, in contrast to the clear statement of congressional intent reflected in sections 2261-2266, encompassed in chapter 154. In chapter 154, Congress stated that it applied to all pending cases on or after the date the President signed the Act.\textsuperscript{389} By reading the two chapters of the AEDPA in \textit{pari materia}, Lindh contended that if Congress intended chapter 153 to apply to pending cases, it would have included this language in the Act.\textsuperscript{390}

Moreover, Lindh argued that under \textit{Landgraf} there was a presumption against retroactivity.\textsuperscript{391} In \textit{Landgraf}, the Court held that the 1991 Civil Rights Act was not retroactive, because Congress was silent on the issue.\textsuperscript{392} Justice Stevens noted that the "presumption against statutory retroactivity" was founded upon "sound considerations of general policy and practice, and according with long held and widely shared expectations about the usual operation of legislation."\textsuperscript{393}

Judge Easterbrook disagreed with the analysis of \textit{Landgraf}.\textsuperscript{394} In his view, chapters 153 and 154 were drafted by different houses of Congress and at different times; therefore, no negative implication could be drawn from the failure of Congress to specify when one chapter would be effective, even though it stated that the other chapter would be applicable to all pending cases upon enactment.\textsuperscript{395} Easterbrook reasoned that in situations where a statute is silent on the issue of retroactivity, it is just as likely that Congress intended the courts to resolve the issue, since Congress did not agree on the effective date of application.\textsuperscript{396} In any event, the court's view was that if Congress did not specify an effective date, the courts must apply the law in force at the time the case was to be decided; thus, the Seventh Circuit held that the AEDPA applied to Lindh's case.\textsuperscript{397}

Justice Easterbrook admitted, however, that if a statute attached new legal consequences to events completed before its en-
actment, then it could not be retroactive. 398 Under Landgraf, not every change in outcome constitutes a new legal consequence. 399 It matters "whether the party adversely affected by the change has legitimate reliance interests in the operation of the former law." 400 The court stated that the AEDPA may be applied to a case where the crime occurred before 1996. 401 In addition, the court noted that the AEDPA does not "change any of the rules defining or penalizing crime" therefore, he concluded that the Act does not attach a new legal consequence to Lindh's actions in 1988. 402

Moreover, a prisoner can have no legitimate expectation about the scope of collateral review. 403 Citing Lockhart v. Fretwell, 404 the court noted that the petitioner there called his lawyer ineffective for failing to take advantage of an appellate opinion that was overruled after the prisoner commenced his collateral attack. 405 Although his lawyer failed to cite the opinion at a time when it would have helped the petitioner, the court affirmed the denial of habeas relief. 406 Based on that holding, the court concluded that there were no new legal consequences to events completed before the AEDPA's enactment in Lindh's case, since Lindh unjustifiably relied on the former habeas statute. 407

The court conceded that a petitioner may rely on the former statute with respect to the time in which to file a habeas corpus petition, since prior to the AEDPA there was no time limit. 408 The court stated that "a prisoner's decision to defer filing—perhaps while doing legal research . . . is the sort of event to which the amended statute would attach new legal consequences." 409 In order to overcome that problem, the Seventh Circuit held that "no collateral attack filed by April 23, 1997, may be dismissed" under the AEDPA. 410 The court concluded, however, that in Lindh the Act attached no new legal consequences to events completed before its enactment, and therefore, applied the AEDPA in deciding Lindh's case. 411

In an unpublished 1996 memo regarding the Seventh Circuit's decision in Lindh, numerous scholars, including Blume, Kendall, Olive and Yackle, suggested that its holding regarding the retroac-

398. Id. at 863.
399. Id. at 861.
400. Id.
401. Id. at 863.
402. Id. at 864.
403. Id. at 864-65.
405. Lindh, 96 F.3d at 864 (citing Lockhart, 506 U.S. at 367).
406. Id.
407. Id. at 866.
408. Id. at 866-67.
409. Id. at 866.
410. Id.
411. Id.
tivity of chapter 153 was at odds with the decisions of other federal circuits, and pointed out that a writ of certiorari had been filed on this issue. Thereafter, on December 20, 1996, in Jeffries v. Wood, the Ninth Circuit ruled that the AEDPA did not apply retroactively to cases filed prior to April 24, 1996. Then, on January 10, 1997, the Supreme Court granted certiorari to Lindh on the question of retroactivity. Nevertheless, until the United States Supreme Court rules to the contrary, the law in the Seventh Circuit is clear: the AEDPA is applicable today to every pending case in the federal courts. It should also be noted that although the Seventh Circuit held that the AEDPA is applicable to pending cases, this holding does not alter the effect of the procedural steps taken before its enactment.

1. **Waiver of Retroactivity of Statute**

The Seventh Circuit heard the appeal in Emerson v. Gramley one day before President Clinton signed the AEDPA into law. Three months elapsed before the Seventh Circuit issued its opinion. During that period, the State failed to request re-argument under the AEDPA, or brief the court with respect to any changes arising under the AEDPA that would impact the issues or decision in Emerson. The Seventh Circuit stated that the AEDPA “affects the scope of federal judicial review of state court determinations, rather than the power of review.” Therefore, the court held that the issue of retroactivity waived.

In that case, Emerson and his brother stabbed and robbed Robert Ray and his girlfriend Delinda Byrd. Ray survived and testified against the Emerson brothers. The court convicted Emerson and sentenced him to death. The Illinois Supreme Court granted a new trial, and Emerson was again convicted and sentenced to

412. Memorandum from John Blume et al., En Banc Seventh Circuit Decision in Lindh v. Murphy to Habeas Colleagues 2 (Sept. 20, 1996) (on file with authors).
413. 103 F.3d 827 (9th Cir. 1996).
415. See, e.g., United States ex rel. Coulter v. Gramley, 945 F. Supp. 1138, 1141 n.1 (N.D. Ill. 1996) (stating that the provisions of the AEDPA “apply even though Coulter was convicted and filed his habeas petition before the provision’s enactment”); accord Bocain v. Godinez, 101 F.3d 465, 471 (7th Cir. 1996) (unequivocally stating that “the 1996 Act may be applied when the crime or state court decision preceded April 24, 1996”).
416. See Lindh, 96 F.3d at 863; Green v. Scott, 96 F.3d 1010 (7th Cir. 1996).
418. Id. at 900.
419. Id.
420. Id.
421. Id.
422. Id.
Thereafter, Emerson appealed his second conviction and sentence, but was unsuccessful. His request for post-conviction relief was equally unsuccessful. Subsequently, Emerson filed a petition for habeas corpus relief alleging that his trial lawyer at the second trial was incompetent during both the trial and the sentencing phases. The district court agreed that Emerson was afforded ineffective assistance of counsel at the sentencing, and both sides appealed.

On appeal, Emerson argued that his trial counsel did nothing to investigate possible mitigating circumstances and presented absolutely no mitigating evidence. The Seventh Circuit first noted that although Emerson had asked his counsel not to pursue mitigation, Illinois law mandated that if no mitigating circumstances were introduced to rebut the prosecution's aggravating evidence, the jury must impose a sentence of death. Judge Posner, writing the opinion for the court, then found no evidence that trial counsel properly advised Emerson of the consequences of presenting no mitigation under Illinois law, or that it was a strategic decision. Thus, the court determined that the level of representation provided at sentencing fell "below the minimum level of competent representation." Moreover, the court found that if the trial counsel presented some evidence in mitigation, Emerson may well have been spared the death penalty. For those reasons, the court concluded that Emerson did not receive effective assistance of counsel at sentencing. Therefore, the court vacated the death sentence and ordered a new sentencing hearing.

CONCLUSION

The advent of the Antiterrorism-Terrorism and Effective Death Penalty Act of 1996 has shifted the balance of power between the federal government and the states with respect to the administra-

423. Id.
424. Id.
425. Id.
426. Id.
427. Id.
428. Id. at 906.
429. Id. at 905-06.
430. Id. at 906.
431. Id.
432. Id.
433. Id. at 907.
434. The State has since filed a petition for certiorari in the United State Supreme Court, arguing that the question of whether Emerson's habeas petition should be reviewed under the prior Habeas Corpus Act or under the new AEDPA, was not waivable by the State. Emerson v. Gramley, 91 F.3d 898 (7th Cir.), petition for cert. filed, 65 U.S.L.W. 3489 (U.S. Dec. 18, 1996) (No-96-1043).
tion of our criminal justice system dramatically in favor of the states. The AEDPA sounds a retreat from the grand principles of the Warren Court that so effectively used the writ of habeas corpus as its enforcement arm for the provisions of the Bill of Rights, which it incorporated through the Fourteenth Amendment. During the Warren Court era, the federal government guaranteed the rights of minors, sex offenders, indigent felons without counsel, and protected the rights of prisoners in state as well as federal prisons.

In all these endeavors, the power of the federal court to insure that the states, police, courts, and prisons all complied with the federal constitution was strengthened through the mechanism of the “Great Writ.” The Burger and Rehnquist Courts retreated somewhat from this strong federal presence in the administration and enforcement of our criminal laws and procedures; however, the AEDPA goes far beyond the decisions of the Burger and Rehnquist Courts in shifting the balance of power to the states in the administration of their criminal justice systems. Implicated by the passage of the AEDPA are notions of comity, finality, and economy of judicial resources as opposed to notions of justice, due process, and equal protection of the laws for all.

Hardest hit by this Act will be the prisoners under sentence of death in our state and federal prisons. For them, accelerated filing procedures, restrictions on filing more than one writ, even if new evidence is discovered, and deference to state court findings of fact and law even without full and fair evidentiary proceedings present obstacles to obtaining justice in their cases. In a report prepared by the Death Penalty Information Center, it was estimated that over sixty-six persons who were sentenced to death have been released from death row because significant evidence of their innocence was discovered. The habeas corpus procedures mandated by the AEDPA may not effectively prevent future miscarriages of justice, which is why the American Bar Association has recently proposed a moratorium on the imposition of the death penalty in America.

The tension between a strong central government and states' rights began with our founding fathers in the constitutional convention of 1787. It found expression in the papers and pamphlets of the Federalists and the Anti-Federalists. That same battle is raging today with the AEDPA, which restricts the power of the central government and its federal courts in its habeas jurisdiction, tilting the scale back to the states. The AEDPA presents both a challenge and an opportunity to the several states of our land. Hopefully, they will use this new found power wisely and fairly to protect the rights of all Americans.
